

106 FERC ¶ 61,280
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc., et al.

Docket Nos. RT04-2-000
and ER04-116-000

Bangor Hydro-Electric Company, et al.

Docket Nos. ER04-157-000
and ER04-157-001

The Consumers of New England v. New
England Power Pool

Docket No. EL01-39-000

ORDER GRANTING RTO STATUS SUBJECT TO
FULFILLMENT OF REQUIREMENTS AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 24, 2004)

1. On October 31, 2003, ISO New England Inc. (ISO-NE) and the New England transmission owners¹ (Transmission Owners) (collectively, the Filing Parties) submitted for approval, pursuant to Section 205 of the Federal Power Act (FPA),² a proposal to establish a regional transmission organization (RTO) for New England (RTO-NE). The Filing Parties also seek a declaration that the existing contractual arrangements governing the operation of the New England wholesale electricity market, as currently overseen by ISO-NE and the New England Power Pool (NEPOOL), will terminate as of the operations date of RTO-NE.

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

² 16 U.S.C. § 824d (2000).

2. In addition, on November 4, 2003, the Transmission Owners, joined by Green Mountain Power Corporation and Central Vermont Public Service Corporation (ROE Filers), submitted a related Section 205 filing, as amended, seeking approval for the return on equity (ROE) component recoverable under the regional and local transmission rates charged by RTO-NE. Specifically, the ROE Filers propose a single ROE applicable to all regional and local transmission rates, which would consist of a base ROE (12.8 percent), as well as incentive adders of 50 basis points to reward RTO participation and 100 basis points to reward future transmission expansions. The ROE Filers state that the combined ROE would be 13.3 percent for existing transmission facilities and 14.3 percent for new transmission facilities.

3. As discussed below, we find that the Filing Parties' proposal to establish RTO-NE will comply with the minimum characteristics and functions applicable to RTO operations as set forth by the Commission in Order No. 2000,³ subject to the following conditions: (i) submittal of a seams resolution agreement with the New York Independent System Operator (New York ISO); (ii) an agreement with NEPOOL concerning the procedures pursuant to which RTO-NE will be permitted to acquire NEPOOL's reversionary interests in ISO-NE; and (iii) revision of the agreements giving rise to RTO-NE, as directed herein. In addition, we will accept the ROE Filers' proposed 50 basis point adder for Regional Network Service but reject this proposed adder as it relates to Local Service. We will also reject the ROE Filers' 100 basis point adder as it would relate to Local Service, but will set for hearing, subject to suspension and refund, the ROE Filers' proposed 100 basis point adder as it relates to Regional Network Service. Finally, we will set for hearing, subject to suspension and refund, the ROE Filers' proposed base level ROE.

4. At the outset of this order, we wish to commend the Filing Parties, market participants, and each of the state and regional entities who participated in the extensive stakeholder process that preceded the Filing Parties submission of their RTO proposal. Several of the issues that divided the parties were contentious and could not be resolved by the parties alone, including most significantly the issue of whether the Transmission Owners and ISO-NE were permitted to make their RTO proposal in the absence of NEPOOL approval. Nonetheless, a broad consensus was reached by the parties regarding their fundamental commitment to a single RTO for New England, building on the platform set in place by NEPOOL and ISO-NE. In addition, the parties largely agreed regarding both the scope and regional configuration of RTO-NE and on its governance

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

structure. Thus, in approving the general framework for RTO-NE, today, we give shape and form to an RTO well positioned to serve the needs and interests of all market participants.

Background

A. Current Structure and Operation of the New England Electricity Markets

5. There is a long history of voluntary, joint operation of the bulk power system in New England. Specifically, NEPOOL, since 1971, has served as a voluntary organization of transmission and generation owners, suppliers, publicly-owned entities, and end-users. Initially, NEPOOL operated as a tight power pool, a single, unified regional network with coordinated operations covering the bulk power facilities subject to its control (both generation and transmission), including a centralized Control Center to provide central dispatch services.⁴

6. Following the issuance of our open-access mandate in Order No. 888,⁵ NEPOOL was required to revise its operational and organizational structure to satisfy the requirements for an Independent System Operator (ISO). To meet these requirements (and rather than revising NEPOOL's governance structure), NEPOOL, chose, instead, to contract with an independent entity, ISO-NE, to perform these functions. Thus, ISO-NE, with the Commission's approval, was authorized to fulfill the obligations of an ISO beginning in July of 1997.⁶

⁴ The NEPOOL Control Area is comprised of the States of Connecticut, Massachusetts, New Hampshire, Rhode Island, Vermont, and portions of Maine. Northern Maine is not a part of NEPOOL since its facilities are not electrically connected with the other facilities in the region.

⁵ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in part and rev'd in part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom., New York v. FERC, 70 U.S.L.W. 4166 (U.S. March 4, 2002).

⁶ See New England Power Pool, 79 FERC ¶ 61,374 (1997), order on reh'g, 85 FERC ¶ 61,242 (1998).

7. Under the arrangements giving rise to ISO-NE, the ISO operates and functions independent of any financial interest in the wholesale electricity market, with a division of responsibilities as between ISO-NE and NEPOOL. At the same time, NEPOOL retained many of its historical functions and duties, including the right to sponsor Section 205 proposals. The relationship among NEPOOL members is currently governed by an operating agreement called the Restated NEPOOL Agreement. The NEPOOL Open Access Transmission Tariff (OATT) is an attachment to that agreement. The Restated NEPOOL Agreement includes provisions specifying the governance procedures for NEPOOL including the procedures for changing the OATT as well as the fundamental principles governing the operation of the wholesale power exchange.

8. Currently, NEPOOL maintains the primary responsibility for amending the NEPOOL OATT and for changing the market rules that apply to the operation of the wholesale power exchange. ISO-NE, meanwhile, is responsible for the administration of the NEPOOL OATT, operation of the transmission system, dispatch of generation, and operation of the day-ahead and real-time electricity markets. ISO-NE performs these duties and functions under an agreement with NEPOOL known as the Interim ISO Agreement (ISO Agreement).

9. The instant filing is not the region's first attempt to comply with the Commission's RTO objectives. An earlier proposal was submitted on January 16, 2001 in Docket No. RT01-86-000.⁷ A second proposal was filed on August 23, 2002, in Docket No. RT02-3-000.⁸ The Filing Parties note, that their instant proposal builds on these earlier efforts.

⁷ See Bangor Hydro-Electric Company, et al., 96 FERC ¶ 61,063 at 61,275 (2001) (RTO 2001 Order). In the RTO 2001 Order, the Commission rejected a proposed RTO scope limited to the New England region for the reasons discussed in Section D of this order.

⁸ This RTO proposal was submitted jointly by ISO-NE and New York ISO, subject to the negotiation of key elements of the proposal with stakeholders. Ultimately, these negotiations failed. In a notice of withdrawal filed on November 22, 2002, however, ISO-NE and the New York ISO signaled their commitment to continue to work collaboratively with their respective stakeholders on the goals and objectives related to RTO formation, including the development of more efficient wholesale electricity markets and the elimination of market seams. These issues are addressed in Section D of this order.

B. Filing Parties' Proposal

10. The Filing Parties state that under their RTO proposal, RTO-NE would become the provider of regional transmission service in the six-state New England region currently served by ISO-NE, covering the States of Connecticut, New Hampshire, Massachusetts, Rhode Island, Vermont, and the southern portion of Maine. Like ISO-NE today, RTO-NE would also become the administrator of the New England wholesale energy market. The Filing Parties state that, as such, RTO-NE would become the successor entity of ISO-NE, with a governing structure and delegated duties and functions designed to satisfy the minimum characteristics and functions set forth by the Commission in Order No. 2000.

11. The Filing Parties state that the core documents included in their filing would carry out this transition by defining the relationship between both RTO-NE and the New England Transmission Owners, on the one hand, and the relationship between RTO-NE and market participants, on the other. The respective rights and responsibilities of RTO-NE and the Transmission Owners would be principally addressed in the Transmission Operating Agreement (TOA)⁹ and in the pro forma Merchant Transmission Owners Agreement. Under the TOA, the Transmission Owners would agree to transfer the operational authority over their transmission facilities to RTO-NE, subject to certain reserved rights. The TOA would address, among other things, (i) the terms and conditions under which RTO-NE would manage the Transmission Owners' transmission facilities; (ii) Section 205 filing rights; and (iii) the establishment of independent transmission companies (ITCs).¹⁰

12. The Filing Parties state that under the pro forma Merchant Transmission Owners Agreement, RTO-NE would be required to perform certain duties and functions regarding the Transmission Owners' non-pool transmission facilities (non-PTF), including central dispatch functions, real-time balancing, setting operation limits, and maintaining reliability and system security.¹¹

⁹ The TOA is an agreement solely between RTO-NE and the participating transmission owners.

¹⁰ There currently are no ITCs operating within NEPOOL. However, as discussed in Section E(3), below, it is envisioned that the TOA would serve as a framework for negotiations for a specific agreement with a single ITC or multiple ITCs.

¹¹ Transmission facilities under the proposal would be designated as either Pool Transmission Facilities (PTF) or non-Pool Transmission Facilities (non-PTF). This designation is a continuation of the existing practice within NEPOOL. PTF facilities are higher voltage lines that are used to provide service throughout the region. In contrast, (continued ...)

13. The Filing Parties state that the rights and responsibilities of the RTO and market participants would be addressed in the RTO-NE Tariff, including in large part provisions previously accepted by the Commission for NEPOOL and ISO-NE. The RTO Tariff would consist of four parts, including: (i) general terms and conditions; (ii) an OATT; (iii) Market Rule 1;¹² and (iv) the RTO-NE Self-Funding and Capital Funding Tariff. In addition to these agreements, the Filing Parties state that they are submitting a pro forma Market Participant Service Agreement, which would address the terms and conditions applicable to an entity's status as a market participant. Finally, the Filing Parties state that they are submitting the RTO Participants Agreement (Participant Agreement) to address governance matters currently addressed in the Restated NEPOOL Agreement.

14. The Filing Parties request that the Commission approve the documents included in their filing to go into effect on the "RTO-NE Operation Date," as defined in the TOA, i.e., the date on which the signatories to the TOA unanimously agree to permit RTO-NE to commence operation. The Filing Parties state that this proposed effective date reflects the need for an appropriate lead-time and the need for certainty in the form of a Commission order in advance of the initiation of RTO-NE operations. In connection with their request, the Filing Parties seek waiver of the Commission's prior notice requirements to permit their filing to be considered more than 120 days in advance of the requested effective date.¹³

15. The ROE Filers state that their ROE proposals are intended to be considered in connection with the Filing Parties' proposed formation of RTO-NE. The ROE Filers request approval for a single, region-wide ROE, consisting of a 12.8 percent base ROE component. In addition, the ROE Filers request approval for a 50 basis point adder

non-PTF facilities are lower voltage lines or radials lines that primarily perform a local service. Service on PTF facilities is currently provided under NEPOOL's OATT. Service on non-PTF facilities is provided under the OATT of the individual Transmission Owner.

¹² Market Rule 1 contains the rules for the operation of the energy and capacity markets, as currently operated by ISO-NE. See New England Power Pool and ISO New England Inc., 100 FERC ¶ 61,287 (NE-SMD Order), order on reh'g, 101 FERC ¶ 61,344 (2002).

¹³ 18 C.F.R. § 35.3 (2003). The Filing Parties state that the signatories to the TOA would jointly issue a written notice at least 30 days in advance of the RTO-NE Operations Date, which would be posted on the RTO-NE website and filed with the Commission for informational purposes.

attributable to their formation of RTO-NE and a 100 basis point adder applicable to new construction.

Notices and Responsive Pleadings

16. Notices of the Filing Parties' RTO proposal in Docket Nos. RT04-2-000 and ER04-116-000 were published in the Federal Register. Notices of intervention and motions to intervene were submitted by the entities listed in Appendix A to this order. In addition, motions to intervene out-of-time were filed, on January 9, 2003, by the Union of Concerned Scientists and the Interconnection Rights Holders Management Committee (IRH Management Committee), and, on December 23, 2003, by National Grid USA (National Grid). Answers to protests and answers to answers were filed by the IRH Management Committee, USGen, ISO-NE, and NEPOOL (on December 23, 2003), by H.Q. Energy, New England Consumer Owned Entities, Florida Power & Light Co. (FPL), and NEPOOL (on January 7, 2004), and by Duke Energy North America, LLC (Duke) (on January 8, 2004).

17. Notices of the ROE Filers' submittal in Docket Nos. ER04-157-000 and ER04-157-001 were published in the Federal Register. Notices of intervention and motions to intervene were submitted by the entities listed in Appendix B to this order.

18. NEPOOL and Western Massachusetts Industrial Customers Group (WMICG) filed motions to consolidate the Filing Parties' RTO formation proposal and the ROE Filers' ROE proposals. In support of their motions, NEPOOL and WMICG assert that there is a commonality of issues and interests involved in these proceedings which should be resolved on a consolidated basis.

Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁴ the notices of intervention and the timely, unopposed motions to intervene submitted by the entities noted in the Appendices to this order serve to make these entities parties to the proceedings in which these interventions were filed. In addition, we will accept the unopposed late-filed interventions and protests submitted by the IRH Management Committee and National Grid. Rule 213(a) of the Commission's Rules of Practice and Procedure¹⁵ prohibits an answer to a protest and an answer to an answer, unless otherwise

¹⁴ 18 C.F.R. § 385.214 (2003).

¹⁵ Id. at § 385.213(a)(2).

permitted by the decisional authority. We will accept the answers to protests and answers to answers noted above, given the complex nature of this proceeding and because these answers aided in clarifying certain issues, as discussed below.

20. We will deny NEPOOL's and WMICG's motions to consolidate proceedings. While we are setting certain issues for an evidentiary hearing relating to the ROE Filers ROE proposals, we are not establishing an evidentiary hearing, at this time, regarding the Filing Parties' proposal to establish RTO-NE. As such, there would be no benefit to be gained by consolidating these proceedings.

21. Finally, we will grant the Filing Parties' requested waiver of our prior notice filing requirement to permit the instant filing to be considered more than 120 days in advance of the requested effective date applicable to the start-up of RTO-NE.

B. RTO Implementation Rights

1. Filing Parties' Position

22. The Filing Parties claim that they are entitled under Section 205 of the FPA to file the replacement agreements necessary to establish RTO-NE without seeking the consent or prior approval of NEPOOL. Specifically, the Filing Parties claim that they are entitled to terminate their existing contractual relationships with NEPOOL under the Restated NEPOOL Agreement and with ISO-NE under the ISO Agreement. The Filing Parties also seek a declaration that these existing agreements will terminate as of the Operations Date of RTO-NE because, they assert, these agreements will be superseded by the RTO-NE replacement agreements.

23. The Filing Parties state that their entitlement to establish an RTO and to terminate the existing NEPOOL arrangements was previously confirmed by the Commission in the RTO 2001 Order and cannot be relitigated here.¹⁶ In addition, the Filing Parties state that they were not required to give six months notice of withdrawal to NEPOOL under Section 21.2(a) of the Restated NEPOOL Agreement, given their rights under Restated NEPOOL Agreement Section 17A.3.¹⁷ The Filing Parties assert that regardless, they provided such notice on the date that they made their RTO filing in this

¹⁶ The Filing Parties cite to RTO 2001 Order, 96 FERC at 61,275.

¹⁷ Section 17A.3 of the Restated NEPOOL Agreement gives each Transmission Owner the right to terminate or amend its relationship with ISO-NE in connection with the creation of an alternative arrangement for the ownership and/or operation of its transmission facilities on an unbundled basis.

proceeding. Finally, the Filing Parties claim that the ISO Agreement does not bar their entitlement to establish RTO-NE because the Commission granted the request to extend the term of the ISO Agreement for an interim basis only (through the end of 2004), in Docket No. ER03-1181-000, noting the comment of the Transmission Owners that acceptance of the extension “will not preclude the implementation of an Order 2000-compliant RTO for New England before the end of 2004.”

2. Responsive Pleadings

24. Intervenors challenge the legal right of the Filing Parties to submit their RTO proposal under Section 205 of the FPA in the absence of NEPOOL’s consent and prior approval. NEPOOL urges the Commission to rule on this threshold legal issue, defer consideration of the remaining aspects of the filing, and grant the parties 90 days to determine whether they can resolve their differences and present a voluntary, mutually agreeable RTO proposal for New England.

25. Intervenors argue that an RTO for New England can only be implemented by terminating both the Restated NEPOOL Agreement and the ISO Agreement. In particular, NEPOOL claims that Section 17A of the Restated NEPOOL Agreement cannot be read to give the Filing Parties the right to terminate their relationship with NEPOOL unilaterally because Section 17A.3 gives each Transmission Owner only the right to terminate or amend its relationship with ISO-NE (not NEPOOL). NEPOOL also argues that Section 21.2(e) of the Restated NEPOOL Agreement prohibits the Filing Parties from seeking the Section 205 changes included in their RTO filing because this provision contains obligations that would apply to the Transmission Owners beyond the effective date of the termination of their NEPOOL membership. NEPOOL states (quoting the language of Section 21.2(e) itself) that “to the extent that the transmission facilities of the Transmission Owners as former Participants are required to permit transactions among any of the remaining Participants pursuant to the [Restated NEPOOL Agreement] or [NEPOOL] Tariff, Section 21.2(e) ... provides that ‘all existing service over the [former] Participant’s facilities shall continue to be provided under the [NEPOOL] Tariff for a period of three years.’”¹⁸

26. Finally, intervenors argue that the Commission should reject the Filing Parties’ attempts to dissolve NEPOOL on policy grounds because NEPOOL, even after the establishment of RTO-NE, has a useful stakeholder function to play.

¹⁸ See New England Power Pool, Docket No. ER03-1181-000, Delegated Letter Order (September 29, 2003).

3. Answers

27. In their answer, the Filing Parties assert that the RTO 2001 Order addressed many of the same arguments raised now by NEPOOL and other intervenors, including the argument that in making their RTO filing, the Filing Parties were attempting to abrogate the Restated NEPOOL Agreement and the ISO Agreement. The Filing Parties reiterate that their filing herein is not prohibited by these agreements. In addition, the Filing Parties urge the Commission to deny the various requests for additional stakeholder discussion, mediation, settlement proceedings and hearing.

4. Commission Finding

28. We will reject intervenors' arguments regarding the RTO implementation rights of the Filing Parties. For the reasons discussed below, we find that the Transmission Owners are permitted under their existing arrangements with NEPOOL to withdraw from the Restated NEPOOL Agreement and are entitled, along with ISO-NE, to file the necessary agreements under Section 205 to establish RTO-NE.¹⁹ However, we will deny the Filing Parties' request that the Restated NEPOOL Agreement and ISO Agreement be deemed to be terminated as of the Operations Date of RTO-NE. Instead, we will require the Filing Parties to make a compliance filing addressing, among other things, NEPOOL's reversionary interests in the New England wholesale electricity market and the terms pursuant to which these interests can be transferred to RTO-NE.

29. We begin with the issue of whether the Transmission Owners can terminate their existing relationship with NEPOOL under the Restated NEPOOL Agreement. Section 17A of the Restated NEPOOL Agreement addresses both the right of a TO to terminate its participation in NEPOOL (Section 17A.2) and the right of a Transmission Owner to terminate its relationship with ISO-NE (Section 17A.3). Section 17A.2 provides that [n]othing in this Agreement shall restrict any rights . . . of any Transmission Owner to terminate its participation in NEPOOL pursuant to 21.2 of this Agreement [discussed below]." Section 17A.3 provides a parallel right as it relates to the Transmission Owner's relationship with ISO-NE:

Each Transmission Owner retains all rights that it otherwise has incident to its ownership of its assets, including without limitation . . . the right, individually or

¹⁹ We also note that to the extent the Transmission Owners were required to provide six months notice prior to their withdrawal from the Restated NEPOOL Agreement (a requirement which the Filing Parties dispute), this notice was given by the Filing Parties on October 31, 2003. As such, this requirement will be satisfied as of May 1, 2004.

collectively, to amend or terminate the Transmission Owner's relationship with the ISO in connection with the creation of an alternative arrangement for the ownership and/or operation of its transmission facilities on an unbundled basis (e.g., a transmission company), subject to necessary regulatory approvals and to any approvals required under applicable provisions of this Agreement.

30. Section 21.2 of the Restated NEPOOL Agreement addresses the right of a NEPOOL participant to withdraw from NEPOOL. Section 21.2(a) sets forth the basic right, stating, with only a single qualification relating to a notice requirement, that a Participant "shall have the right to terminate its status as a Participant upon no less than six months' prior written notice given to the Secretary of the Participants Committee." This right to withdraw, moreover, is not defeated in this case by operation of Section 21.2(e) of the Restated NEPOOL Agreement, as intervenors contend. Section 21.1(e) provides:

If the status of a Participant as a Participant is terminated pursuant to Section 21.2 or any other provision of this Agreement, such former Participant's generation and transmission facilities shall continue to be subject to such NEPOOL or other requirements relating to reliability as the Commission may approve in acting on the termination, for so long as the Commission may direct. Further, if any of such former Participant's transmission facilities are required in order to permit transactions among any of the remaining Participants pursuant to this Agreement or the Tariff, all pending requests for transmission service under the Tariff relating to such Participant's facilities shall be followed to completion under the Participant's own tariff and all existing service over the Participant's facilities shall continue to be provided under the Tariff for a period of three years.

Section 21.2(e) suggests that a Participant's terminated status, at least in certain cases, may not relieve the Participant of all obligations under the Restated NEPOOL Agreement, *i.e.*, where the withdrawing Participant's facilities might be "required in order to permit transactions among any of the remaining Participants." In this case, however, it has not been demonstrated that any such transactions among NEPOOL's "remaining Participants" could be undertaken where, as here, all of the Transmission Owners are seeking to terminate their relationship with NEPOOL. Moreover, the concluding language of Section 21.2(e) confirms the inapplicability of this prohibition in the instant case by narrowing the intended reach of this provision:

It is the intent of this subsection that no such termination should be allowed to jeopardize the reliability of the bulk power facilities of any remaining Participant or should be allowed to impose any unreasonable financial burden on any remaining Participant.

31. Because the Filing Parties do not intend to withdraw from the Restated NEPOOL Agreement until the Operations Date of RTO-NE, their withdrawal would not jeopardize reliability or impose any unreasonable burden on the remaining NEPOOL Participants. To the contrary, the establishment of RTO-NE, for the reasons discussed below, will enhance reliability and otherwise benefit market participants. For all these reasons, we find that the Restated NEPOOL Agreement does not prohibit the Transmission Owners from withdrawing from NEPOOL and does not prohibit the Filing Parties from establishing RTO-NE.

32. Nor does the ISO Agreement prohibit the Filing Parties from seeking to establish RTO-NE. The ISO Agreement was entered into by ISO-NE and NEPOOL – not by the Transmission Owners, individually. Thus, while the ISO Agreement may bind NEPOOL, as it may be constituted from time to time, it does not directly bind any of the Transmission Owners directly for the reasons previously enunciated by the Commission in the RTO 2001 Order.²⁰

33. While neither the Restated NEPOOL Agreement nor the ISO Agreement can be read to prohibit the Transmission Owners from withdrawing from NEPOOL or to prohibit the Filing Parties from establishing RTO-NE, we cannot agree that, ipso facto, NEPOOL ceases to exist. The Filing Parties cite to no provision in the existing arrangements supporting such a conclusion. In addition, the ISO Agreement suggests that when the functions and duties of ISO-NE are transferred to another entity or are otherwise terminated, NEPOOL may have certain reversionary interests in ISO-NE's assets. The ISO Agreement, for example, addresses ISO-NE's interest in certain facilities and equipment (including assets which may be owned by ISO-NE) and gives NEPOOL a reversionary interest in these assets.²¹ NEPOOL's reversionary interests, which would

²⁰ See RTO 2001 Order, 96 FERC at 61,275.

²¹ See ISO Agreement at Section 6.5. Specifically, Section 6.5 of the ISO Agreement states that ISO-NE, in the performance of its duties and functions, may acquire or develop certain assets (including but not limited to land, structures, fixtures, equipment, facilities, other capital assets, and software or other intellectual property or rights to intellectual property) and that all such assets shall be regarded as either: (i) NEPOOL assets (if the funding paying for these assets was provided for by the NEPOOL Participants pursuant to the Restated NEPOOL Agreement) (see Section 6.5(b)); or (ii) ISO-NE assets (if the funding paying for these assets was provided under the ISO's operating tariffs) (see Section 6.5(c)). Upon the termination of the ISO Agreement, Section 6.5(c) requires ISO-NE to transfer these assets to NEPOOL and requires NEPOOL to purchase these assets to the extent that funding for these assets has not already been provided.

appear to include the software ISO-NE uses to operate the New England energy market, are not owned or controlled by the Filing Parties.

34. Accordingly, while the Filing Parties are permitted to establish an RTO under Section 205 of the FPA, NEPOOL's reversionary interests could serve to impede the RTO's efficient start-up, even though NEPOOL, on its own, without the transmission grid owned by the Transmission Owners, could make little practical use of these interests. Under these circumstances, we will require the Filing Parties to identify the nature and extent of these reversionary interests and to propose options for acquiring these interests in a compliance filing to be made within 90 days of the date of this order. NEPOOL and other parties, if necessary, may file a position statement 20 days thereafter. We note, however, that barring a voluntary agreement by NEPOOL and the Filing Parties regarding these issues, the Commission may be authorized to impose a reasonable settlement on the parties under Section 13.9 of the ISO Agreement, including fair compensation to NEPOOL for any non-recovered costs related to its assets.²²

C. RTO Independence

*In Order No. 2000, we held that an RTO must be independent of any market participant.*²³

35. The Filing Parties state that RTO-NE will be fully independent of any market participant, given RTO-NE's proposed governance structure, as set forth in the Participants Agreement. In addition, the Filing Parties state that their proposed allocation of Section 205 filing rights, as between RTO-NE and its constituent Transmission Owners (see TOA at Section 3.04), will not impede the independent operation of RTO-NE.²⁴

²² Section 13.9 gives either party to the ISO Agreement the right to unilaterally terminate the ISO Agreement upon such terms as the Commission may specify where "future changes in the electric industry [have] impact[ed] the operation of the NEPOOL Market in a fundamental manner not contemplated by [the ISO] Agreement." If necessary, the Filing Parties should address in their compliance filing the operation and effect of this provision as it relates to their rights to acquire NEPOOL's reversionary interests.

²³ Order No. 2000 at 31,046; 18 C.F.R. § 35.34(j)(1) (2003).

²⁴ Additional issues regarding the Filing Parties' proposed delegation of operational authority to RTO-NE could also be characterized, in part, as RTO independence issues. These issues, which principally relate to the TOA, are discussed in Section E, below.

1. Governance Structure

a. Filing Parties' Proposal

36. The Filing Parties state that the governance structure for RTO-NE would be modeled on a consensus agreement reached by the NEPOOL Participants Committee (Governance Term Sheet), with only one exception (discussed below) relating to the nomination of board members. The Filing Parties state that under this consensus proposal, RTO-NE would become the successor to ISO-NE and would retain ISO-NE's status as a not-for-profit entity. The Filing Parties state that RTO-NE, like ISO-NE, would be a non-stock corporation governed by an independent, non-stakeholder board of directors. The Filing Parties add that the RTO-NE board, as well as its officers and employees, would be subject to a Code of Conduct, which would prohibit all directors from being affiliated with any market participant.

37. The Filing Parties state that consistent with the Governance Term Sheet, RTO-NE's board would be comprised of ten non-stakeholder directors, who would be authorized to serve three-year staggered terms.²⁵ These directors would be responsible for selecting their own chief executive officer (a non-voting member of the board) and other officers responsible for the day-to-day operations of RTO-NE. The Filing Parties note that the board would have exclusive decision-making authority for RTO-NE, including authority over the RTO-NE Tariff, the RTO-NE market rules and RTO-NE's operating and capital budgets.

38. The Filing Parties state that under the Participants Agreement, a stakeholder advisory process would be established that would replicate the participants' sector and committee structures that currently exist within NEPOOL.²⁶ Under the Participants Agreement, for example, a Participants Committee would be established to oversee the activities of three standing technical committees – the Markets Committee, the Reliability

²⁵ Currently, ISO-NE has a 10 member non-stakeholder Board of Directors, one of whom is the President and CEO of ISO-NE.

²⁶ Under the current NEPOOL structure, stakeholder participation is facilitated through NEPOOL's Committee structure. The Participants Committee is the principal stakeholder body. It is comprised of five sectors representing generators, transmission owners, suppliers, publicly-owned entities, and end-users. Modifications to the Restated NEPOOL Agreement or NEPOOL OATT must receive a two-thirds vote of the aggregate NEPOOL voting shares (with each sector given a 20 percent share).

Committee, and the Transmission Committee.²⁷ The Filing Parties state that these committees would be authorized to provide input and advice to RTO-NE on issues affecting system reliability, markets, and transmission. The Filing Parties state that these stakeholder provisions would ensure the existence of a collaborative process for receiving input from and responding to the concerns of market participants and government officials.

39. The Filing Parties state that the Participants Agreement would also address the nomination and election of RTO-NE's board of directors. The Filing Parties state that under Section 13.1 of the Participants Agreement, a Nominating Committee would be established, which would consist of up to six incumbent members of the RTO-NE board; up to five market participant representatives (not including more than one representative from any sector); and one representative from the New England Conference of Public Utility Commissioners (NECPUC).

40. The Filing Parties state the RTO-NE board would be responsible for proposing one or more incumbent directors for re-election, while an independent search firm would be responsible for identifying candidates required to fill any vacancies. The Filing Parties state that, acting by consensus, the Nominating Committee would then propose to the Participants Committee a first slate of candidates that would include incumbent directors proposed by the board, if any, and any new candidates identified through the search process.

41. The Filing Parties state that if the first slate of proposed directors is approved by a 70 percent vote of the Participants Committee it would then be presented to the board for their approval. If not approved by either, the Nominating Committee would be responsible for proposing a substitute slate. The Filing Parties state that in submitting a substitute slate, the Nominating Committee would not be required to include or exclude any nominee from the previous slate. If the substitute slate is not approved by the Participants Committee, the Nominating Committee, by default, would be authorized to present either the first slate or the substitute slate directly to the board.²⁸

²⁷ This committee structure is similar to the existing structure of committees within NEPOOL. However, the existing committees in NEPOOL have decisional authority. The committees under the proposal would serve only an advisory function.

²⁸ The Filing Parties note that it was only with respect to this single provision, i.e., the nomination guidelines for approving the board when the Participants Committee is unable to approve a given slate, that the Filing Parties' governance proposal varies from that approved by the NEPOOL Participants Committee. The Filing Parties explain that that the Governance Term Sheet, as approved by the NEPOOL Participants Committee would have provided for up to six rounds of selection by the Nominating Committee of a (continued ...)

42. The Filing Parties state that the Participants Agreement also addresses the information received, created, and distributed by market participants and RTO-NE in connection with the settlement, operation and planning of the RTO-NE system. The Filing Parties state that this policy (Information Policy) would be substantially identical to the NEPOOL Information Policy currently in effect.²⁹ In addition, the Filing Parties state that RTO-NE would be responsible for filing the Information Policy with the Commission and for seeking any changes to the Information Policy under Section 205 of the FPA.

43. Finally, the Filing Parties state that certain governance matters affecting the independence of RTO-NE would be addressed by the TOA, namely, the allocation of Section 205 filing rights as between RTO-NE and the Transmission Owners (discussed below, at Section C(2)), and the rights of a Transmission Owner to withdraw from RTO-NE. The Filings Parties state that under Section 10.01(b) of the TOA, a TO would be permitted to unilaterally withdraw from RTO-NE upon the occurrence of certain stated conditions, including (i) a default by RTO-NE; (ii) a change in Federal policy concerning RTO formation; (iii) a Commission order revising the Filing Parties' division of their respective rights and duties; (iv) membership in an ITC; and (v) membership in another RTO following a merger or acquisition.

b. Responsive Pleadings

44. The Connecticut Attorney General argues that RTO-NE, as proposed, would be largely controlled by an incumbent board, but without the governance protections embodied in the NEPOOL arrangements, including meaningful input from market participants. Public Interest Organizations³⁰ argue that in addition to NEPOOL's existing five sectors, RTO-NE should also seek effective stakeholder input from a sixth sector comprised of renewable generation, distributed generation and load response entities.

slate of candidates and consideration by the Participants Committee if the Participants Committee could not meet the 70 percent voting requirement for recommendation of a slate before a default slate would be presented to the RTO-NE board.

²⁹ The Information Policy governs the collection of confidential information from market participants and its dissemination to the Commission, state commissions, and others.

³⁰ The Union of Concerned Scientists; Conservation Law Foundation; Clean Water Action; Environment Northeast; Massachusetts Consumers Alliance; Massachusetts Public Interest Research Group; and Pace Energy Project.

45. The NE Market Participants³¹ assert that the Filing Parties' proposed board election process and the Nominating Committee structure should be revised, consistent with the agreement reflected in the Governance Term Sheet. In particular, the NE Market Participants object to the Filing Parties' proposal limiting the election process to two slates of candidates to be presented by the Nominating Committee to the Participants Committee, before defaulting to a decision by the Nominating Committee.³² The NE Market Participants assert that, as agreed to in the Governance Term Sheet, up to six slates of candidates should be considered and that to avoid resubmission of the same slate twice, the revised slate should include at least one different candidate than the initial slate.

46. The New England Consumer-Owned Entities object to the composition of the Nominating Committee, asserting that the Nominating Committee, as proposed, would be dominated by RTO board members. The NE Market Participants also object to the proposal requiring that the chair of the Nominating Committee be one of the incumbent board members. The NE Market Participants contend that allowing incumbent board members to hold five of the Nominating Committee seats and mandating that an incumbent board member also chair the committee could lead to a self-perpetuating board.

47. Intervenors also challenge the termination provisions set forth in the TOA at Section 10.01, to the extent that these Transmission Owner allowances could undermine the independence of RTO-NE. NECPUC asserts that giving the Transmission Owners the unilateral right to withdraw from RTO-NE, absent only a public interest determination by the Commission, gives the Transmission Owners too much leverage over the day-to-day operations of RTO-NE.

c. Answers

48. The Filing Parties take issue with intervenors' arguments that RTO-NE would operate without the governance protections embodied in the NEPOOL arrangements. The Filing Parties state that RTO-NE would be independent of market participants and, as a jurisdictional public utility, would be accountable to the Commission. In addition, the Filing Parties point out that RTO-NE's duties and responsibilities would be fully

³¹ AES Londonderry, LLC; Calpine Eastern Corporation; FPL Energy, LLC; Mirant Americas Energy Marketing, LP; Mirant New England, Inc; Mirant Canal, LLC; Mirant Kendall, LLC; NRG Companies; and USGen New England, Inc.

³² See also Duke protest at 17-20; PSEG protest at 12.

spelled out in the Participants Agreement and would also be included in its Code of Conduct.

49. The Filing Parties further state that RTO-NE's board selection process would include stakeholder participation on the Nominating Committee and stakeholder votes on director nominee slates. In addition, the Filing Parties states that in comparison to ISO-NE's existing procedures, RTO-NE's board procedures would promote greater transparency by requiring board agendas to be posted, the opportunity for stakeholders to provide written input on agenda items, and for reports on board meeting actions, and proposed revisions to market rules or other tariff provisions.

50. The Filing Parties also respond to NECPUC's concerns regarding a Transmission Owner's termination rights under Section 10.01 of the TOA. The Filing Parties assert that, in fact, these rights are generally consistent with the requirements for Section 205 approval as recently established by the Commission in Pennsylvania-New Jersey-Maryland Interconnection.³³

d. Commission Ruling

51. For the reasons discussed below, we find that the Filing Parties' proposed governance structure for RTO-NE, as set forth in the Participants Agreement, generally satisfies the independence requirement of Order No. 2000, subject to conditions.³⁴ We note, first, that the Filing Parties' proposed governing model and organizational structure for RTO-NE builds on many of the existing successful features embodied by ISO-NE. Thus, RTO-NE, like ISO-NE, will be established as a not-for-profit entity governed by an independent, non-stakeholder board. In addition, the directors, officers and employees of RTO-NE will be subject to a Code of Conduct, which will prohibit RTO-NE directors and staff from holding any financial interests in a market participant, except for only a limited transition period after they join RTO-NE.

52. Currently, however, ISO-NE's full independence is limited by its contractual arrangement with NEPOOL. Under NEPOOL's existing arrangements, NEPOOL's market participants, not ISO-NE, have the primary authority to

³³ 105 FERC ¶ 61,294 at PP 35-36 (2003) (PJM Filing Rights Order).

³⁴ Based on these findings, we will also dismiss as moot a related complaint filed in Docket No. EL01-39-000 by the Consumers of New England (Consumers). In their complaint, Consumers seek various changes to the existing ISO-NE/NEPOOL governance structure.

establish and revise the rates, terms and conditions governing the operation of the New England wholesale electricity market.

53. In the RTO 2001 Order, we found that this governance model could not meet the Commission's independence requirement unless and until the various market participant committees within NEPOOL were relegated to a purely advisory role in the administration of the RTO.³⁵ The Filing Parties' proposed governance structure, here, accomplishes this objective. As NECPUC notes in its comments, this organizational change as proposed by the Filing Parties will provide stability and a clear designation of authority over the operation of the New England markets by placing market issues squarely in the hands of a financially disinterested entity rather than with market participants.³⁶

54. At the same time, the Filing Parties' proposed governance structure will also utilize a meaningful stakeholder process to solicit, receive, consider and respond to advisory input from stakeholders. We agree with the Filing Parties that these stakeholder processes will facilitate the formation of consensus positions among stakeholders and between RTO-NE and stakeholders. It will do so, in part, by utilizing NEPOOL's existing sector voting blocks, including a generator sector, a transmission sector, a supplier sector, a publicly-owned entity sector, and an end-use sector.³⁷ However, we agree with Public Interest Organizations that alternative energy providers (e.g., renewable generation, distributed generation, and load response entities) represent an important, emerging presence in the New England electricity market which should be adequately represented within RTO-NE's stakeholder advisory process.³⁸ Accordingly, we will require the Filing Parties in a compliance filing to reflect the participation of these interests as a sixth voting sector.

55. We will also require the Filing Parties to change one additional feature of their proposed stakeholder procedures relating to the submission of alternative proposals in Section 205 filings made by RTO-NE. We agree with interveners that the proposed 70 percent Participants Committee vote needed to require RTO-NE to include in its Section 205 filing an alternative stakeholder proposal sets too high a bar triggering this

³⁵ RTO 2001 Order, 96 FERC at 61,259.

³⁶ See NECPUC comments at 7.

³⁷ See Participants Agreement at Section 7.

³⁸ We made a similar finding with respect to WestConnect RTO. See Arizona Public Service Company, et al., 101 FERC ¶ 61,033 at P 58 (2002).

stakeholder allowance.³⁹ Accordingly, in order to facilitate fuller stakeholder input, we will require the Filing Parties to revise this aspect of its proposed stakeholder procedures to allow for the submission of alternative proposals based on a Participants Committee vote of 60 percent or higher.

56. We will accept the Filing Parties proposed procedures relating to the nomination and election of the RTO-NE board, subject to conditions. We note that these procedures, with only one exception discussed below, were approved by the NEPOOL Participants Committee and thus enjoy broad stakeholder support. We also agree that these procedures are workable and fair and will allow for adequate input on the part of stakeholders. While intervenors' take issue with these procedures because they would allow up to six incumbent members to sit on the Nominating Committee, we disagree that this level of representation by the incumbent board will diminish RTO-NE's independence. In fact, there will be adequate checks and balances in place to ensure that each member of the RTO-NE board, whether carrying out a board duty or a duty assigned to the Nominating Committee, will act with sufficient independence of any market participant.⁴⁰

57. We will also reject intervenors' arguments regarding the number of rounds that a proposed slate of board candidates will be required to be considered in those instances in which the Participants Committee is unable to approve a given slate. We agree with the Filing Parties that allowing up to six slates of candidates, as proposed by intervenors, would be inefficient and unwieldy. We also agree that this allowance could discourage qualified candidates from being considered. Accordingly, we will accept the Filing Parties proposal to consider no more than two slates of candidates.

58. However, we agree with the NE Market Participants that a first slate of candidates should not be permitted to be re-nominated as a second slate, without variation. The ability to submit the same slate twice would not be productive or otherwise warranted in those cases where the initial slate is rejected. Therefore, while we will accept the requirement that up to two slates of candidates be considered, we will

³⁹ Under the Filing Parties' proposal, each sector would have 20 percent of the total vote.

⁴⁰ For this same reason, we will reject intervenors' protests regarding: (i) the requirement that the initial RTO-NE board consist of ISO-NE's directors (see Participants Agreement at Section 9.2.2); and (ii) the requirement that the Nominating Committee be chaired by a sitting member of the RTO-NE board (see Participants Agreement at Section 13.1.2).

require that at least one new nominee be named under those circumstances in which a second slate of nominees is presented to the board for its consideration.

59. Finally, we agree with intervenors that the Filing Parties' proposed termination and withdrawal rights set forth at Section 10.01 of the TOA must be modified. As proposed, the TOA would prohibit any meaningful review by the Commission under Section 205 relating to a Transmission Owner election to exercise its rights under Section 10.01, even in those instances where revisions to RTO-NE's operating agreements may be necessary or appropriate as a result. This proposal, however, is inconsistent with the RTO/ISO Access and Withdrawal Rights Policy Statement, where the Commission held that "arrangements to join or exit an RTO or ISO will be reviewed [by the Commission] in the context of filings made under Section 205."⁴¹ This review is necessary in order to determine whether all of the elements contained in the filed arrangements meet the principles of Order No. 2000 and are just and reasonable under Section 205 of the FPA. Accordingly, we will require the Filing Parties to make a compliance filing within 30 days of the date of this order to revise this aspect of the TOA.

2. Allocation of Section 205 Filing Rights Authority

a. Filing Parties' Proposal

60. The Filing Parties state that Section 3.04 of the TOA would establish an allocation of Section 205 filing rights as between the Transmission Owners (acting either individually or jointly) and RTO-NE. Specifically, the Filing Parties state that the Transmission Owners, acting individually, would have the authority to submit filings under Section 205 to establish and revise their own revenue requirements; the rates, terms and conditions for transmission service under the Transmission Owner's Local Service Schedule; the rates or charges for the recovery of a TO's investment in new transmission facilities; and the terms and conditions applicable to interconnection agreements.⁴² The Filing Parties state that the Transmission Owners, acting jointly, would have the authority to submit Section 205 filings to establish and revise the rates and charges for transmission

⁴¹ See Guidance on Regional Transmission Organization and Independent System Operator Filing Requirements under the Federal Power Act, 104 FERC ¶ 61,248 (2003); see also Pennsylvania-New Jersey-Maryland Interconnection, et al., 105 FERC ¶ 61,294 at P 36 (2003). For this same reason, the Filing Parties' proposal is also inconsistent with the PJM Filing Rights Order.

⁴² The proposed TOA provides, however, that RTO-NE would have Section 205 filing authority over large generation interconnection agreement terms and conditions that affect system operation.

service under the RTO-NE OATT and the rates, terms and conditions relating to incentive or performance-based rates.

61. The Filing Parties state that RTO-NE would have the authority to submit filings to establish and revise the terms and conditions of the RTO-NE OATT, any separate tariffs relating to regional transmission service, all market rules, and its own administrative tariff. However, the Filing Parties state that RTO-NE would not have the authority to eliminate Local Network Service or Local Point-to-Point Service, nor would it be permitted to make any filings concerning the terms or conditions relating to retail access plans or the recovery of wholesale or retail stranded costs in effect as of the Operations Date of RTO-NE.

62. The Filing Parties also propose a number of stakeholder procedures relating to this proposed allocation of filing rights. The Filing Parties state, for example, that the Transmission Owners, whether acting jointly or individually, as well as RTO-NE, would be required to provide prior written notification to stakeholders and a Regional State Committee of any filing they seek to submit to the Commission. In addition, where RTO-NE concludes that a Transmission Owner filing would be inconsistent with the design of the RTO-NE markets, or would otherwise be harmful to the market, the Transmission Owner filing would be required to include a written statement provided by RTO-NE and, in addition, any such filing would not be permitted to become effective until such time as the Commission approves the filing.

63. In turn, RTO-NE would also be required to consult with the Transmission Owners to determine whether any filing it proposed to make would have any adverse impact on a Transmission Owner's revenue requirements, or on the ability of any Transmission Owner to implement an incentive rate plan then in effect. The Filing Parties state that where a Transmission Owner concludes that an RTO-NE filing would be harmful, in this regard, the RTO-NE filing would be required to include a written statement provided by the Transmission Owner and any such filing would not be permitted to become effective until such time as the Commission approves the filing.

64. The Filing Parties state that their respective Section 205 filing rights would also be subject to certain emergency filing procedures, as set forth in Section 3.04(e) of the TOA. The Filing Parties state that pursuant to these procedures, RTO-NE would be permitted to make certain Section 205 filings not otherwise authorized under the TOA in order to address such issues as efficiency, competitiveness, and reliability of the New England market.

65. Finally, the Filing Parties propose a five-year moratorium on FPA Section 205 filings related to: (i) the RTO-NE OATT provisions governing the split between PTF and non-PTF transmission facilities; (ii) the RTO-NE OATT provisions relating to the methodology by which the costs of transmission upgrades related to generation

interconnections are regionally allocated; and (iii) the RTO-NE OATT provisions relating to the methodology by which the costs of existing and new transmission are allocated.⁴³ At the end of the five-year moratorium, RTO-NE would be given Section 205 filing rights in the event that it determines that a change in the rate design is inconsistent with existing design of any rates or charges for transmission service. The Transmission Owners would have Section 205 filing rights to modify cost allocations.

b. Responsive Pleadings

66. Intervenor argue that giving Transmission Owners unilateral Section 205 filing rights over RTO rates and RTO rate design is inconsistent with the independence requirement of Order No. 2000.⁴⁴ American National Power, Inc. (ANP) asserts that while a Transmission Owner does have Section 205 rights regarding the transmission facilities it owns, a Transmission Owner choosing to participate in an RTO should be required to utilize a stakeholder process before it submits any Section 205 filing to the Commission to change RTO-NE's rates or rate design. In addition, ANP argues that Transmission Owners should be required to give at least 60 days notice of a proposed change in the level of rates or rate design under the RTO-NE OATT. The NEPOOL Industrial Customer Coalition urges a continued role for stakeholders regarding Section 205 revisions to market rules.

67. NECPUC proposes that the Regional State Committee, as referenced in the TOA, as well as RTO-NE should be given concurrent authority along with the Transmission Owners, over rate design changes. NECPUC argues that this division of filing rights authority is mandated by independence concerns and is warranted as an appropriate condition to voluntary RTO formation. NECPUC concludes that when the Transmission Owners seek to form an RTO, they are voluntarily waiving their statutory rights under the FPA.

⁴³ See Proposed TOA at 26-29. Currently, New England has a transmission rate design for existing transmission facilities comprised of a postage stamp rate applicable to the PTF, while the Transmission Owners have license plate rates for service provided over non-PTF transmission facilities. Recently, New England implemented revisions in its transmission cost allocation methodology pursuant to which transmission upgrade costs are allocated based on whether the upgrade provides regional or local benefits. See New England Power Pool and ISO New England, Inc., 105 FERC ¶ 61,300 (2003).

⁴⁴ See New England Consumer-Owned Entities at 46; NEPOOL Industrial Customer Coalition protest at 10; Connecticut Attorney General protest at 4; Exelon protest at 7; New England Advocates protest at 11; WMICG protest at 4; NECPUC protest at 9; EPSA protest at 7; NE Market Participants at 12.

68. The NE Market Participants assert that even in the circumstances where RTO-NE determines that an existing OATT provision that falls within the Transmission Owners' Section 205 authority must be changed to avoid substantially and adversely affecting the efficiency or competitiveness of the RTO-NE markets, RTO-NE would be required to wait for at least 30 days before it could unilaterally make a Section 205 filing. The NE Market Participants submit that this requirement will undermine the independence of RTO-NE.

69. Exelon Corporation (Exelon) takes issue with the Filing Parties' proposal to give the Transmission Owners exclusive Section 205 authority over interconnection agreements and interconnection costs, including agreements involving network upgrades. Exelon asserts that authority over these matters should be given to RTO-NE. Similarly, WMICG argues that the Filing Parties' proposed division of authority over interconnection agreements is inconsistent with the Commission requirement that RTOs have sole authority for the evaluation and approval of all requests for transmission service, including requests for new interconnections.⁴⁵ Exelon also objects to the Filing Parties' proposal to give the Transmission Owners unilateral Section 205 filing authority over cost allocation issues relating to regional transmission expansion.

c. Answers

70. The Filing Parties assert that intervenors' arguments fail to acknowledge that under the Filing Parties' proposal, RTO-NE's independence will be fully safeguarded. In addition, the Filing Parties point out that their proposed allocation of filing rights authority to the Transmission Owners is consistent with the allocation of filing rights recently approved by the Commission with respect to PJM.

d. Commission Finding

71. We will accept the Filing Parties proposed allocation of their respective Section 205 filing rights. On balance, the Filing Parties' proposal provides for a reasonable allocation of their respective Section 205 filing rights, consistent with our recognition in the PJM Filing Rights Order that both an RTO and its TO members are public utilities under the FPA.⁴⁶ In the PJM Filing Rights Order, we noted that

⁴⁵ See WMICG protest at 3, citing Standardization of Generator Interconnection Agreements and Procedures, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003) (Order No. 2003), order on reh'g, 106 FERC ¶ 61,220 (2004) (Order No. 2003-A).

⁴⁶ 103 FERC ¶ 61,170 at P 17.

Section 201(e) of the FPA defines a “public utility” subject to our regulation as “any person who owns or operates” jurisdictional facilities.⁴⁷ We also noted that applying this standard in the ISO/RTO formation context presented by PJM’s filing, PJM is a public utility under the FPA because it operates jurisdictional facilities. We also acknowledged that PJM’s Transmission Owners, even after the establishment of PJM as an ISO (now an RTO), continue to be public utilities as well because of the Transmission Owners’ ownership interests in jurisdictional facilities.⁴⁸

72. Like the arrangements giving rise to PJM, the Filing Parties’ RTO formation proposal, here, includes an allocation of Section 205 filing rights among and between a public utility RTO and its public utility Transmission Owners. Moreover, this proposed allocation of filing rights is a voluntary proposal of the sort found to be permissible under the FPA in Atlantic City Electric Company, et al. v. FERC.⁴⁹ While the court’s ruling in Atlantic City does not require us, as a matter of law, to limit an RTO’s filing rights to the extent proposed by the Filing Parties, voluntary proposals to allocate these rights may be acceptable under our policies and, in particular, under Order No. 2000 where the interests of the region as a whole are properly safeguarded.

73. The Filing Parties’ proposal satisfies this standard. In fact, the interests of the New England region as a whole will be safeguarded as a result of the balanced allocation of Section 205 rights proposed by the Filing Parties. As noted above, RTO-NE will exercise day-to-day operational authority over all of the bulk power transmission facilities that are currently controlled by ISO-NE and will have the exclusive Section 205 filing authority concerning the terms and condition of the RTO-NE OATT, any separate tariffs relating to regional transmission service, all market rules, and its own administrative tariff.

74. Nor will the Transmission Owners be permitted to exercise any undue discrimination over the matters for which they will have Section 205 filing authority. First, the Filing Parties have proposed (and we are accepting) a detailed stakeholder input process that will allow the views of both stakeholders and RTO-NE to be presented to and considered by the Transmission Owners in advance of any TO filing. Second, no TO filing can or will become effective and thus become binding on any entity, absent Commission review and approval.

⁴⁷ Id., citing 16 U.S.C. § 824(e) (2000).

⁴⁸ Id.

⁴⁹ 295 F.3d 1 (D.C. Cir. 2002) (Atlantic City).

75. In this regard, we note that while in the past, NEPOOL filings garnering widespread stakeholder support and no opposition could be regarded by the Commission, in some cases, with a degree of validity, no such presumptions could or will apply to a TO filing. As such, we will be rigorous in our review of all Section 205 filings made by the Transmission Owners, whether jointly or individually, and of any comments or protests submitted by market participants or other interested parties relating to these filings. In addition, we note that no right accorded to any Transmission Owner under the Filing Parties' proposal will prohibit the Commission from exercising its full authority under Section 206 of the FPA, as may be necessary, or prohibit any market participant from seeking relief under this statutory safety net. We will continue to monitor the workability and fairness of this allocation of filing responsibilities after RTO-NE commences operations.

76. With respect to intervenors' argument that the Filing Parties' allocation of their filing rights would be inconsistent with Order No. 2003, we note that in the Filing Parties' answer, the Filing Parties confirm their commitment to comply with these requirements. We also note that these issues are currently pending in the Order No. 2003 compliance filings recently made by the Transmission Owners and NEPOOL.⁵⁰ To ensure compliance with Order No. 2003, RTO-NE will be required to make a compliance filing that will conform to our rulings in these Order No. 2003 compliance filing proceedings.

77. Regarding the issue of three-party agreements, Section 2.05 of the TOA contemplates the filing of three-party agreements among the RTO, the Transmission Owner, and the interconnection customer. If these parties agree to the terms and conditions of the agreement, RTO-NE and the Transmission Owner would jointly file the executed agreement. If the parties cannot agree, RTO-NE and the Transmission Owner would file the unexecuted agreement. These provisions are consistent with the requirements set forth in Order No. 2003. However, we find that the language of the TOA is unclear as to whether these provisions would apply to generator interconnections with both the PTF facilities and the non-PTF facilities. We clarify that they must apply to both.

78. Regarding the Transmission Owners' reservation of filing rights for transmission upgrades related to generator interconnections, we find that this provision is unclear and will require the Filing Parties to clarify this provision in their compliance filing, consistent with the requirements of Order No. 2003. Order No. 2003 provides that independent entities will be given flexibility regarding the pricing policy that each

⁵⁰ See Section E(1) of this order, supra.

independent entity chooses to adopt, subject to Commission approval.⁵¹ RTO-NE would be such an independent entity. The Transmission Owners would not be independent entities. To the extent the Transmission Owners are seeking to reserve filing rights for the pricing policy that would apply to generator interconnections, this reservation of rights would be inconsistent with Order No. 2003.

79. Finally, for the reasons noted above, we will reject NECPUC's request that the Regional State Committee be given concurrent filing rights along with the Transmission Owners over rate design changes. The FPA grants Section 205 filing rights to public utilities only, and the Regional State Committee will not be a public utility.

D. RTO Scope and Regional Configuration

In Order No. 2000, we held that an RTO must serve a region of sufficient scope and configuration to permit the RTO to effectively perform its required functions and to support efficient and non-discriminatory power markets.⁵²

1. Filing Parties' Proposal

80. The Filing Parties state that RTO-NE's geographic scope and configuration complies with the requirements of Order No. 2000 because the six-state New England area comprises a large enough region in and of itself to maintain system reliability and to effectively support efficient and non-discriminatory power markets. In addition, the Filing Parties note that various initiatives and agreements currently in place in the region will eliminate inter-regional seams in the markets bordering RTO-NE and will provide a solid platform for even broader regional improvements in the future.

81. In particular, the Filing Parties note that ISO-NE has executed an Interregional Coordination Agreement with the New York ISO, which expands the physical scope of the region by establishing objectives to coordinate planning, address seams issues, eliminate real time price differentials resulting from trade barriers and eliminate export fees between New York and New England. In addition, the Filing Parties note that under another established process known as Virtual Regional Dispatch initiative, the Filing

⁵¹ Order No. 2003 and Order No. 2003-A set forth the pricing policy for generator interconnections that applies to transmission providers that are not independent entities.

⁵² Order No. 2000 at 31,079.

Parties are committed to eliminating any residual real-time price differences not achieved through bilateral trading between the New England and New York ISO regions.⁵³

82. The Filing Parties state that the Interregional Coordination Agreement will address, among other things, export fees, i.e., the transmission service charges that New York and New England currently impose on exports from their respective regions (also known as Through and Out Service charges). The Filing Parties state that these charges, which can discourage economically efficient trading between New York and New England, need to be eliminated as expeditiously as possible. The Filing Parties state that to accomplish this objective, the RTO-NE OATT would provide for a five-year phase out of these charges with New York on a reciprocal basis.⁵⁴ The Filing Parties state that they have been engaged in discussions with the New York ISO and the New York Transmission Owners regarding the level of reciprocity needed to effect a phase-out of these charges.

2. Responsive Pleadings

83. Intervenors assert that RTO-NE, as proposed, fails to satisfy the scope and regional configuration requirements of Order No. 2000. The NE Market Participants argue that these requirements have not been met in this case for the same reason previously cited by the Commission in its 2001 RTO Order, i.e., because the narrow configuration of the existing Northeast ISOs creates artificial constraints within the broader market that spans the Northeast region.⁵⁵ Edison Mission Energy, Inc.⁵⁶ (Edison Mission, et al.) concur, noting that the Commission has never approved an RTO for a region as small as New England or for a region that, like New England, exists within a larger natural market.

⁵³ Under the straw proposal included as Attachment IV to the Filing Parties' RTO proposal, the Virtual Regional Dispatch initiative would be designed to eliminate certain seams issues between New England and New York by enabling RTO-NE and the New York ISO to make joint dispatch decisions. Both RTO-NE and the New York ISO would continue to evaluate the bids and offers in their respective markets separately and would together adjust the energy flow over the interface to cause real-time prices to converge.

⁵⁴ See proposed RTO-NE OATT at Section 25.2.

⁵⁵ See NE Market Participants protest at 34, citing 2001 RTO Order, 96 FERC at 61,260. See also NEPOOL Industrial Customer Coalition protest at 5.

⁵⁶ Joined by Edison Mission Marketing & Trading, Inc., Midwest Generation EME, LLC, and Coral Power LLC.

84. Intervenors also challenge the Filing Parties' assertions regarding their proposed seams resolution initiatives and the extent to which these initiatives would serve as the practical equivalent of a larger RTO. The NE Market Participants assert that the Filing Parties' proposed seams reduction measures will not remedy the existing seams plaguing the Northeast markets because these measures are still in the preliminary stage and, even if successful, would not be the equivalent of the expanded scope required by Order No. 2000.

85. Edison Mission, et al. challenge the usefulness of the Interregional Coordination Agreement to alleviate seams, noting that the dispute resolution procedures included in this agreement provide a recipe for inaction and delay, complicating and undermining any possible productiveness of the Interregional Coordination Agreement.⁵⁷ Edison Mission, et al., further note that the Interregional Coordination Agreement initiative is similar to the failed Memorandum of Understanding (MOU) process, which was previously characterized by the Commission in the RTO 2001 Order as disappointing. Edison Mission, et al., Dominion Resources, Inc.⁵⁸ (Dominion) and Exelon submit that if the seams-reduction goals identified by the Filing Parties are to be achieved, it is imperative that the Commission establish a definitive timetable for achieving these objectives.⁵⁹

86. Constellation Power Source, Inc. and Constellation New Energy, Inc. (Constellation) take issue with the Filing Parties' professed commitment to its Virtual Regional Dispatch initiative as a seams-reduction measure, asserting that there has been no analysis that such processes are necessary or that the purported benefits of the Virtual Regional Dispatch initiative would outweigh the harm to the market or the risks of revenue shortfalls that would have to be compensated by Market Participants. The Constellation Companies argue that there has been no demonstration that the administrative decisions that would be made by RTO-NE and the New York ISO would be more efficient than those of market participants. Edison Mission, et al. and Long Island Power Authority and Long Island Lighting Company (LIPA) agree, noting that the

⁵⁷ Under these procedures, dispute resolution may be triggered if the market operators are unable to complete any of the tasks outlined in the agreement or if the interregional coordination officers determine that they lack sufficient direction to proceed with any task.

⁵⁸ Joined by Dominion Energy Marketing, Inc., Dominion Nuclear Connecticut, Inc. and Dominion Retail, Inc.

⁵⁹ See also LIPA protest at 19 (arguing that the establishment of formal seams resolution procedures are imperative).

Virtual Regional Dispatch initiative is no substitute for the proper scope and configuration of a New England RTO.

87. LIPA urges the Commission to reject the Filing Parties proposed Through and Out Rate conditions. LIPA asserts that these provisions will unreasonably prolong the elimination of Through and Out Service charges. LIPA also asserts that RTO-NE's phase out proposal should not be conditioned upon removal of operating and scheduling requirements already approved by the Commission under a neighboring control area's OATT.

88. Duke argues that the Filing Parties' proposal does nothing to eliminate a significant seam between the New England and New York markets relating to the provision of station power. Duke explains that in both PJM and New York, all generators that are self-supplying station power are permitted to net their station power requirements against gross output on a monthly basis and that these generators are not required to purchase station power under a retail tariff if they are "net positive" for the month. Duke asserts that under the Filing Parties proposal, by contrast, this net out allowance would occur on an hourly basis.

89. Finally, Dominion and HQ Energy Services (US), Inc. (HQUS) raise as seams issues the Filing Parties failure to propose rolled-in rate treatment for certain interties between New England and Canada, for transmission services that, to date, have been provided under separate contracts and thus, to date, have not been included in the NEPOOL OATT.

3. Answers

90. The Filing Parties take issue with intervenors' assertions that the Commission's findings in the RTO 2001 Order regarding scope and regional configuration continue to apply to the facts and circumstances at issue today in the New England markets. The Filing Parties argue that these attacks conveniently ignore the intervening history of failed attempts to create a larger Northeast RTO and, by contrast, the positive, significant, and measurable progress made in creating a more seamless Northeast market since 2001.

4. Commission Finding

91. We find that RTO-NE, as configured geographically by the six New England states and as further defined in its scope by the existing integration and required additional integration of the New England market and its neighboring control areas (as discussed below), will satisfy the scope and regional configuration requirements of Order No. 2000.

92. In the RTO 2001 Order, we found that inter-regional trading in the Northeast markets – by market participants in PJM, the New York ISO and NEPOOL -- was significant and growing and that to a certain extent these Northeast control areas relied on each other to meet their energy needs.⁶⁰ We also noted that a natural market spans the Northeast region, but that the vitality of this market was being hampered by the balkanized set of market rules that had developed in these markets since their inception. We further held that ISO-NE and the Transmission Owners sponsoring the New England region’s initial RTO proposal, in Docket No. RT01-86-000, had failed to demonstrate that their various seams reduction proposals, as of that time, could serve the functional equivalent of a single RTO meeting our RTO scope requirement.

93. In the years that have followed our issuance of the RTO 2001 Order, however, the Northeast market has become significantly more integrated. In the New England markets, ISO-NE has implemented a standard market design (NE-SMD) modeled after the market design utilized by PJM.⁶¹ Moreover, while ISO-NE’s markets have become more integrated with PJM’s markets, PJM markets, in turn, have been expanded both to the west⁶² and to the south.⁶³ In the meantime, the New York ISO’s markets have also become more integrated with the New England markets.⁶⁴

94. In Order No. 2000, we found that an RTO application that proposes to rely on an “effective scope” in lieu of a larger geographical control area to satisfy our scope requirement would be required to show that the integration of the RTO’s markets with those of its neighbors would serve as the functional equivalent of a larger RTO.⁶⁵ We recently found that the Southwest Power Pool would satisfy the scope requirement for an RTO with the development of a seams agreement with Midwest ISO.⁶⁶ Similarly, we

⁶⁰ RTO 2001 Order, 96 FERC at 61,260.

⁶¹ NE-SMD Order, 100 FERC ¶61,287 at P 2.

⁶² See Alliance Companies, et al., 100 FERC ¶ 61,137 (2002).

⁶³ See American Electric Power Service Corporation, et al., 103 FERC ¶ 61,008 at P 23 (2003).

⁶⁴ See, e.g., New York Independent System Operator, Inc., 106 FERC ¶ 61,111 at P 2 (2004) (approving software and market rule changes designed to approve the efficient and more seamless operation of the New York ISO’s real-time market).

⁶⁵ Order No. 2000 at 31,079.

⁶⁶ See Southwest Power Pool, Inc., 106 FERC ¶ 61,110 (2004).

find that RTO-NE, when it has on file a strengthened seams agreement, will meet this standard. This is so, due to both the existing integration of the markets in which RTO-NE will operate and because of the additional seams-reduction initiatives outlined by the Filing Parties in their RTO proposal. Specifically, we agree with the Filing Parties that the Interregional Coordination Agreement entered into between ISO-NE and the New York ISO, with modifications, can serve as a useful vehicle for eliminating many of the persisting seams that divide these markets. We also agree that the Virtual Regional Dispatch initiative has the potential to promote a more seamless interface between New York and New England.

95. Intervenors question the Filing Parties' commitment to these seams-reduction initiatives by characterizing these efforts as only preliminary in nature or otherwise undeveloped. We agree that these initiatives must be pursued without delay. Further, we agree that the current seams reduction agreement is not structured to ensure that the seams will be eliminated within a reasonable timeframe. For example, in many areas the agreement contains only a best efforts commitment to complete actions by a date certain. However, rather than rejecting the Filing Parties' RTO proposal for its failure to address these scope issues, we will, instead, condition our approval of RTO-NE on its development of a more complete seams agreement with the New York ISO. Accordingly, we will require the Filing Parties to make a compliance filing within 90 days of the date of this order containing a revised seams agreement. The compliance filing must include specific milestones and timelines for resolution of each of the remaining seams issues within one year of the date of the Filing Parties' compliance filing. The compliance filing must also include a proposal for eliminating Through and Out Service Charges between RTO-NE and the New York ISO within six months of the date of the Filing Parties' compliance filing.

96. In addition, since the New York ISO has significant trade with PJM, the Filing Parties should also explain in their compliance filing the role of PJM in the resolution of these Northeast seams issues. The Filing Parties should identify the specific seams issues that require the participation of PJM to resolve and the Filing Parties' plan for PJM participation in resolution of these issues. We will reject Duke's protest regarding ISO-NE's existing station power procedures and netting out allowance, which the Filing Parties propose to adopt, without revision, in the RTO-NE OATT. Duke has not demonstrated that these existing netting out procedures (as provided for on an hourly-basis versus a monthly basis in New York and PJM) constitute a significant seams issue requiring revision at this time as a prerequisite to RTO formation. These procedures, moreover, do not hinder or impede the exchange of power between New England and its neighboring control areas.

97. Finally, we will address the requests of Dominion and HQUS for rolled-in rate treatment concerning certain non-PTF ties between New England and Canada. Since there are a limited number of buyers and sellers in Quebec, roll-in of these facilities

would not provide the benefits associated with the elimination of an inter-regional seam between organized markets. Additionally, unlike other facilities that would be a part of RTO-NE, customer ability to use the HQ Interconnect would be limited due to the terms of existing contracts. For these reasons, we will deny these requests for rolled-in rate treatment concerning non-PTF ties between New England and Canada.

E. Operational Authority

In Order No. 2000, we held that an RTO must have operational authority for all transmission facilities under its control and must also be the security coordinator for its region.⁶⁷

98. The Filing Parties state that RTO-NE will comply with the operational authority requirements of Order No. 2000 given the duties and functions it would be assigned under the TOA (relating to PTF facilities) and under the pro forma Merchant Transmission Owners Agreement (relating to non-PTF facilities). For the reasons discussed below, we find that the TOA generally satisfies the operational authority requirements of Order No. 2000, subject to conditions. However, for the reasons discussed below, we will reject the pro forma Merchant Transmission Owners Agreement.

1. Duties and Functions Assigned to RTO-NE Under the Transmission Operating Agreement

a. Filing Parties' Proposal

99. The Filing Parties state that under the TOA, RTO-NE would be given the day-to-day operational control authority over all of the bulk power transmission facilities currently controlled by ISO-NE. The Filing Parties state that under the TOA, RTO-NE would be authorized, among other things, to: (i) provide transmission service over the facilities it controls; (ii) centrally dispatch generation; (iii) implement real-time balancing; (iv) schedule interchange transactions; (v) determine operating limits (vi) approve transmission outage schedules; (vii) maintain short-term reliability; (viii) exchange security information with Transmission Owners and other entities authorized to review such data; and (ix) serve as the regional security coordinator.

100. The Filing Parties state that in addition to the allocation of Section 205 filing authority (discussed in Section C(2), above) and indemnification (discussed in Section O, below), the TOA would also enumerate a number of additional TO rights and

⁶⁷ Order No. 2000 at 31,090; 18 C.F.R. § 34.35(j)(3) (2003).

responsibilities. The Filing Parties state that under Section 3.06 of the TOA, the Transmission Owners would be required to physically operate their respective transmission facilities through existing Local Control Centers and would be required to perform various functions in accordance with RTO-NE's directions. In addition, Section 3.06 of the TOA would require the Transmission Owners to establish ratings and rating procedures for their transmission facilities and would also require each TO to operate, repair, and maintain these facilities in accordance with applicable law and Good Utility Practice.

101. The Filing Parties state that under Section 3.07 of the TOA, each TO would retain the right to enter into interconnection agreements with other Transmission Owners, generator and other entities connecting the TO's facilities and to file such agreements with the Commission. The Filing Parties state that under Section 3.09 of the TOA, the Transmission Owners would be required to build transmission projects to meet regional needs, as determined by RTO-NE, subject to the receipt of siting and other required regulatory approvals. The Filing Parties state that Section 3.11 of the TOA addresses grandfathered treatment for all pre-existing transmission agreements. The Filing Parties request that the Commission confirm that existing transmission service agreements for Local Service will be grandfathered and that Schedule 21 and the individual Local Service Schedules to the RTO-NE OATT be treated as successor rate schedules to the Transmission Owners existing local tariffs.

102. Finally, the Filing Parties state that certain provisions of the TOA would be subject to protection under the "public interest" standard of review established in United Gas Pipe Line Co. v. Mobile Gas Service Corp.⁶⁸ and Federal Power Commission v. Sierra Pacific Co.⁶⁹ These provisions, which are identified in Section 11.04(c) of the TOA, address, among other things, facilities subject to the TOA, RTO-NE and TO duties and functions, and Section 205 filings rights authority.

b. Responsive Pleadings

103. Intervenors seek revisions to the TOA concerning six broad subject areas discussed below, namely to the TOA provisions addressing: (i) interconnections; (ii) billing arrangements; (iii) outage scheduling; (iv) ratings; (v) grandfathered contracts; and (vi) Mobile-Sierra protection.⁷⁰

⁶⁸ 350 U.S. 332 (1956) (Mobile).

⁶⁹ 350 U.S. 348 (1956) (Sierra).

⁷⁰ Other provisions of the TOA, and intervenor challenges relating to these provisions, are discussed in: (i) Section C(2) (Section 205 filing rights authority); (ii) (continued ...)

104. Dominion objects to the TOA provision which would leave the authority to file generator interconnection agreements with the Transmission Owner, rather than as a function of the RTO. Dominion asserts that it is important that the process for open, competitive interconnection of generation be managed centrally by the RTO, consistent with the requirements of Order No. 2003. The Electric Power Supply Association (EPSA) asserts that the division of authority over interconnection requests and cost allocation is confusing and should be clarified. EPSA also seeks clarification that RTO-NE's interconnection procedures will rely on a standard, three-party interconnection agreement among the Transmission Owner, RTO-NE, and the generator and that this agreement will be filed with the Commission by RTO-NE, not the Transmission Owner.

105. ANP, Dominion, the NEPOOL Industrial Customer Coalition, Public Service Electric and Gas Company⁷¹ (PSEG), and Exelon protest the Filing Parties' proposal under Section 3.10 of the TOA for separate billing arrangements for transmission and market services.⁷² Intervenors argue that this proposed billing arrangement would: (i) grant an undue preference to Transmission Owners, as opposed to other market participants who provide such services as reactive power and black-start service; (ii) do nothing to encourage investment in the transmission grid; (iii) raise overall costs for consumers; and (iv) require market participants to post increased financial assurances.

106. Dominion adds that Transmission Owners would have no responsibility, as they should, for making the RTO whole for defaults in the payment of market and RTO services. Dominion concludes that the Filing Parties' proposal will increase the financial assurance costs of most participants, negatively affect the credit ratings of participants who are net payees in the ISO-NE settlement process, and make it more costly for the RTO to obtain credit. Dominion argues that RTO-NE should maintain a single, one-stop,

Section E(2) (Facilities Subject to the TOA); Section E(3) (Authority to Establish Independent Transmission Companies); Section M (Planning and Expansion); and Section O (Third Party Liabilities).

⁷¹ Joined by PSEG Power LLC and PSEG Energy Resources & Trade LLC.

⁷² Section 3.10 of the TOA would allow the New England Transmission Owners to direct RTO-NE to bill customers separately for transmission services for payment directly to the account of the New England Transmission Owners. The Filing Parties assert that this provision would encourage investment in new transmission by ensuring that there will be a direct mechanism for the recovery of regulated transmission costs which will not be intermingled with market revenue streams.

RTO-managed billing system with a single RTO-developed financial assurance requirement.⁷³

107. Intervenors also challenge the Filing Parties' proposed allocation of operational authority as between the Transmission Owners and RTO-NE over transmission maintenance outage scheduling, arguing that the proposed TOA would improperly limit RTO-NE's authority over these matters.⁷⁴ Specifically, intervenors object to the proposed TO approval process relating to RTO-NE's authority to reschedule or revoke approval of outages under the TOA, arguing that this authority should reside in RTO-NE, subject to Commission approval. NECPUC asserts that the RTO should be given authority over this matter, consistent with Commission policy.⁷⁵

108. ANP argues that RTOs must have authority, without limitation, to schedule all planned transmission and maintenance outages. Duke adds that RTO-NE should be given the authority to require the rescheduling of transmission and generation maintenance outages when the TO or generator refuses to voluntarily reschedule and where such rescheduling will significantly reduce the direct and lost opportunity costs of the affected generator (using a measure similar to one already proposed in the TOA with respect to reduced congestion costs). Duke notes that while it appears that RTO-NE would have authority to approve transmission maintenance outages under the TOA and to approve generation maintenance outages under Market Rule 1, there is, in fact, no provision in the filing for either voluntary coordination or required rescheduling of a transmission outage to avoid curtailment of generator output.

109. The NE Market Participants further submit that in seeking to modify an outage schedule, under Section 3.08(e) of the TOA, RTO-NE should be required to collaborate with all market participants (not just the Transmission Owners) to develop appropriate guidelines. In addition, when analyzing a proposed outage plan submitted by a Transmission Owner, under Section 3.08, the NE Market Participants suggest that

⁷³ NECPUC, which takes no position on this issue pending its further review of the issues presented, recommends that Section 3.10 be eliminated from the TOA as an interim matter, subject to a separate proceeding following the start-up of RTO-NE.

⁷⁴ See EPSA protest at 8; NEPOOL Industrial Customer Coalition protest at 15; New England Advocates at 12; NECPUC protest at 23.

⁷⁵ NECPUC protest at 25-26, citing PJM Interconnection, L.L.C., 97 FERC ¶ 61,319 (2001), 99 FERC ¶ 61,170 (2002); California Independent System Operator, 91 FERC ¶ 61,341 (2000) (approving Section 3.2.3 of the Cal ISO Outage Coordination Protocol).

RTO-NE take into consideration all proposed outages attributable to both generation and transmission. In addition, NECPUC points out that it is unclear under the proposed TOA what happens if there is a disagreement, as between RTO-NE and a Transmission Owner, over what qualifies as an “Emergent or Unanticipated Event” (*i.e.*, the triggering circumstance that would permit RTO-NE to reschedule an outage, under certain specified circumstances, to reduce congestion costs).

110. NE Market Participants also take issue with Section 3.06(v) of the proposed TOA, which would grant the Transmission Owners unilateral authority over transmission rating matters. The NE Market Participants argue that this authority should reside with the market participants, subject to Commission approval, and that RTO-NE should have the right to audit and review the methodologies of each Transmission Owner to ensure that ratings are derived fairly and applied in a non-discriminatory manner.

111. LIPA requests that its service agreement with Cross Sound Cable, LLC (CSC) be recognized as a grandfathered agreement in the merchant transmission owners agreement currently being negotiated between CSC and ISO-NE.

112. Intervenors also object to the Mobile-Sierra public interest protections contained in the proposed TOA. Exelon asserts that these protections should be rejected by the Commission in order to facilitate the anticipated evolution of the TOA in the years ahead. NECPUC argues that the ills NECPUC attributes to the TOA’s proposed division of Section 205 filing rights (Section 3.04) would be compounded by according these provisions Mobile-Sierra public interest protection. In addition, NECPUC asserts that provisions of the TOA relating to the governance of RTO-NE cannot be accorded Mobile-Sierra protection, consistent with Commission precedent.⁷⁶ Finally, NECPUC objects to according Mobile-Sierra protection to TOA provisions addressing application authority (Section 3.04); planning and expansion (Section 3.09), termination and withdrawal rights (Section 10.01), and ITC formation (Section 10.05). NECPUC asserts that Mobile-Sierra protection for these provisions is inappropriate, given the still-evolving nature of the wholesale electricity market.

c. Answers

113. The Filing Parties respond to intervenors’ claims that under the TOA, RTO-NE would lack sufficient authority over the scheduling of transmission maintenance outages. The Filing Parties argue that RTO-NE’s role, in this regard, would be properly limited to the authority it would be given under the TOA to deny or reschedule outages for

⁷⁶ NECPUC protest at 14, citing Avista Corp., et al., 100 FERC ¶ 61,274 (2002) and Cleco Power L.L.C., et al., 101 FERC ¶ 61,008 at 61,026 (2002).

reliability reasons. The Filing Parties state that, by contrast, granting RTO-NE unlimited authority to reschedule outages repeatedly for market efficiency could have a significant impact on a Transmission Owner's ability to manage its assets and could also affect system reliability. The Filing Parties also assert that market monitoring would provide sufficient oversight over any Transmission Owner's scheduling practices.

114. The Filing Parties also defend their proposed separate billing arrangements proposal as reasonable, because RTO-NE's transmission income stream should not be held hostage to market and credit risks that are wholly unrelated to the transmission business. The Filing Parties also note that the Transmission Owners would continue to be responsible for their respective obligations to provide for the capital needs of RTO-NE to the extent not provided by third-party financing.

115. The Filing Parties also respond to NE Market Participants' objections regarding ratings under Section 3.06(v) of the TOA and the extent to which the Transmission Owners would be permitted to exercise authority over these matters. The Filing Parties assert that this provision merely codifies the existing practice today, where the Transmission Owners establish the ratings for the transmission facilities they own and operate. The Filing Parties further assert that this practice is consistent with the delegation of functions addressed by the Commission in Order No. 2000.⁷⁷

116. Finally, the Filing Parties respond to the intervenor challenges concerning the application of the Mobile-Sierra doctrine to the TOA. The Filing Parties argue that the Mobile-Sierra protection they seek is limited and appropriate, because it would not interfere with RTO-NE's independence or impede its ability to evolve.

d. Commission Finding

117. For the reasons discussed below, we will accept, in part, and reject in part, the Filing Parties' proposed delegations of operational authority, as set forth in the TOA. We will also require the Filing Parties to make a compliance filing within 90 days of the date of this order addressing these rulings.

i. Interconnection Authority

118. We will not address at this time the TOA's compliance with the interconnection procedures set forth by the Commission in Order No. 2003, due to the pendency of related issues in the Order No. 2003 compliance filing proceedings submitted by

⁷⁷ Filing Parties answer at 88, citing Order No. 2000 at 31,105.

NEPOOL and the Transmission Owners.⁷⁸ In the NEPOOL submittal, NEPOOL seeks to amend the NEPOOL OATT as it applies to generator interconnections to PTF facilities. In the Transmission Owners' submittal, the Transmission Owners seek to amend their local tariffs as they apply to non-PTF interconnections. Accordingly, while we will not address these issues here, we will require the Filing Parties to conform the TOA to our rulings in these Order No. 2003 proceedings in a compliance filing to be made herein within 30 days of the date of our orders issued in Docket Nos. ER04-432-000 and ER04-433-000.

ii. Billing Arrangements

119. We agree with intervenors that the TOA's allowance for a separate monthly invoice for transmission and market services in order to facilitate the direct payment of transmission bills to the accounts of the Transmission Owners has not been justified by the Filing Parties and could invite an unwarranted "me first" call on RTO-NE's receivables. Under these circumstances, we agree with intervenors that any value to the Transmission Owners in insulating their cash flows from the reach of RTO-NE's lenders, in the event of a default in a non-transmission business, could be outweighed by the potential cost that could be borne by all other market participants in the form of increased financial assurances. As such, we will require the Filing Parties to revise Section 3.10 of the TOA consistent with these findings.

iii. Outage Scheduling

120. We agree with intervenors that RTO-NE should be given the ultimate authority to modify outage schedules based on either reliability or economic considerations. We also agree that the provisions relating to this authority should be included in the RTO-NE OATT, not the TOA. Accordingly, we will reject Section 3.08 of the TOA and require the Filing Parties to include a conforming provision in Market Rule 1. Absent this revision, the Transmission Owners would have an inherent conflict of interest with respect to the scheduling of outages, especially where the Transmission Owner also owns or controls generation resources or has load serving obligations. This conflict of interest would also exist for any affiliate of a Transmission Owner that might purchase Firm Transmission Rights (FTRs) at auction, since any outage could be designed to favor the affiliate.⁷⁹

⁷⁸ See New England Transmission Owners, Docket No. ER04-432-000 and New England Power Pool, Docket No. ER04-433-000 (filed January 20, 2004).

⁷⁹ See, e.g., Exelon Corporation, et al., 97 FERC ¶ 61,009 (2001); PJM Interconnection, L.L.C., et al., 97 FERC ¶ 61,319 (2001).

121. We will also require the Filing Parties to include language in Market Rule 1 making clear that all proposed outages will be considered together by RTO-NE when it decides to accept a proposed TO outage plan. By considering all proposed outages (both transmission and generation), RTO-NE will be able to ensure that the system impact attributable to these outages can be minimized in a way that will reduce congestion and promote market efficiency.

122. Finally, we reject as moot NE Market Participants' request that all stakeholders, not just the Transmission Owners, be consulted in developing appropriate guidelines for modifying an outage schedule. Given our ruling, above, requiring the duties and functions set forth in Section 3.08 of the TOA to be transferred to the appropriate section in Market Rule 1, authority over these matters will, as a result, be vested in RTO-NE and thus made subject to the stakeholder input process discussed above.

iv. Ratings

123. We will grant the protest submitted by the NE Market Participants concerning proposed Section 3.06(v) of the TOA. In Order No. 2000, we found that it would be inappropriate to require RTOs to establish transmission facility ratings without guidance or input from their member Transmission Owners.⁸⁰ Instead, we held that RTOs and Transmission Owners should collaborate in this process.⁸¹ In the TOA, however, the Filing Parties' elevate this Transmission Owner consultation requirement to an unreasonable level by proposing to eliminate RTO-NE's role altogether. Specifically, the Filing Parties propose that the Transmission Owners be given exclusive authority over these matters. We disagree for the reasons previously enunciated in Order No. 2000.

124. In Order No. 2000, we recognized that facility ratings can have at least an indirect effect on the ability of the RTO to perform its RTO duties and functions, including its responsibilities relating to transmission planning and expansion activities and the calculation of Available Transmission Capacity and Total Transmission Capability. Accordingly, we encouraged such ratings to be undertaken by the Transmission Owner and the RTO in a collaborative process. In addition, we recognized that while the RTO may initially need to rely upon existing values for equipment ratings and operating ranges so as not to disrupt the reliable operation of its system, we would expect the RTO's authority over these matters to increase over time, as the RTO gains experience operating or directing the operation of the transmission facilities over which it has authority.

⁸⁰ Order No. 2000 at 31,106.

⁸¹ Id.

Consistent with these guidelines, we will require the Filing Parties to revise this section of the TOA in their compliance filing.

v. **Grandfathered Contracts**

125. We will grant LIPA's request with respect to its existing agreement for transmission service across the Cross Sound Cable merchant transmission facility. We will require RTO-NE to include appropriate grandfathering terms in its merchant transmission operating agreement negotiated with CSC LLC to cover existing transmission service agreements, including LIPA's agreement.

vi. **Mobile-Sierra Provisions**

126. The Filing Parties seek Mobile-Sierra protection covering some but not all provisions of the TOA, including provisions which, as discussed below, may have an effect on RTO-NE's customers, other non-party market participants, or the market as a whole. In support of this Mobile-Sierra request, the Filing Parties argue that their Mobile-Sierra requests represent an "appropriate balance" between providing RTO-NE the authority necessary to meet Commission requirements, and the needs of the Transmission Owners to preserve certain rights they have long held as owners of the region's bulk power transmission system.⁸² However, for the reasons discussed below, we are not persuaded that the Filing Parties have carried their burden in showing that their proposal, in all its parts, strikes the necessary balance of interests.

127. We begin our analysis with the recognition that the TOA sets forth the terms and conditions pursuant to which the Transmission Owners participating in RTO-NE will voluntarily transfer the operational authority over their transmission facilities to RTO-NE. Under these circumstances, we generally think it reasonable, subject to the conditions discussed below, that the Filing Parties be permitted in return for their commitment to rely on the terms of their agreement with the contractual protection afforded by the Mobile-Sierra public interest standard of review.

128. Our review of the TOA, however, should not and cannot be limited to a consideration of the rights and interests of the contracting parties alone where the TOA, by its terms, may also affect the rights and interests of RTO-NE's customers, other non-party market participants, or the performance and operation of the market as a whole. Under these circumstances (and as the Filing Parties themselves acknowledge), we are

⁸² Filing Parties answer at 78.

required to balance the needs of the Transmission Owners for contractual certainty with the interests properly represented by an RTO.⁸³

129. Applying these guidelines here, and for the reasons discussed below, we will accept the Filing Parties' proposed Mobile-Sierra provisions as they relate to the following provisions of the TOA: Section 2.01 (categories of transmission facilities); Section 2.04 (excluded assets); Section 3.02 (RTO-NE operating authority); Section 3.03 (OATT services and administration); Section 3.04 (Section 205 filing authority); Section 3.05 (RTO-NE's rights and responsibilities); Section 3.06 (Participating Transmission Owners' responsibilities); Section 3.07 (reservation of rights); Section 3.14 (legal rights and obligations); Section 6.06 (RTO-NE's treatment of other Participating Transmission Owners); Section 6.08 (RTO-NE status as a non-profit entity); Section 10.02 (RTO-NE's release of operating authority in case of termination); Sections 10.03-04 (default); Section 11.06 (integration charges applicable to new Participating Transmission Owners); Section 11.08 (assignments of interests); Section 11.17 (liabilities as between RTO-NE and the Transmission Owners); and Section 11.19 (conditions precedent with respect to the effectiveness of the TOA).

130. These provisions generally address the division of responsibility as between RTO-NE and the Transmission Owners (the merits of which are addressed elsewhere in this order), or interests that affect, predominantly, the contracting parties alone. We view these provisions as necessary and appropriate to defining the terms of the agreement between RTO-NE and the Transmission Owners.

131. In addition, we have addressed elsewhere in this order provisions of the TOA for which Mobile-Sierra protection has been requested, but upon analysis have required that these provisions be revised, eliminated, or transferred to the RTO-NE OATT.⁸⁴ As the

⁸³ The Filing Parties themselves suggest this analysis in asserting their claim that the selective Mobile-Sierra protection they seek in the TOA strikes the necessary balance. See Filing Parties answer at 77 ("A balancing of the harms of (i) potential RTO inflexibility against (ii) the harm of immediate contractual uncertainty faced by Transmission Owners contemplating participation in the RTO, must be decided in favor of allowing the Transmission Owners some degree of contractual certainty in a few specific areas.").

⁸⁴ Specifically, we have rejected the Filing Parties' proposed provisions addressing billing (TOA Section 3.10) and termination and withdrawal rights (TOA Section 10.01). We have also required that TOA Section 3.10 be transferred to the RTO-NE OATT. Finally, for the reasons discussed below, we will also require that TOA Section 3.09 (planning and expansion) and Schedule 10.05 (Independent Transmission Companies) be transferred to the RTO-NE OATT, and will reject Section 10.05(b).

Filing Parties' Mobile-Sierra requests relate to these provisions, the requests have been rendered moot by our rulings elsewhere in this order and are therefore dismissed. Finally, we find that the Filing Parties have not justified, to date, the remainder of their proposed Mobile-Sierra requests. In fact, the Filing Parties did not even attempt to do so, other than to provide a broad overview supporting these requests. However, because Mobile-Sierra protection may be appropriate with respect to at least some of these provisions, we will permit the Filing Parties to include in their compliance filing a fuller justification supporting their requests.

2. Facilities Subject to the Transmission Operating Agreement

a. Filing Parties Proposal

132. The Filing Parties state that under Article II of the TOA, the facilities that would be made subject of the TOA would include Category A Facilities, Category B Facilities, and Local Facilities. Category A Facilities would consist of all lines 115 kv and above (except for 115 kv radial lines) and related facilities. Category B Facilities would consist of all 115 radial kv lines, all 69 kv lines (except control area interties) and related facilities. Local Facilities would consist of all transmission facilities below 69 kv and all transformers that have no Category A Facilities or Category B Facilities connected to the lower voltage side of the transformer. The Filing Parties' proposal reflects the status quo treatment of these facilities under the existing NEPOOL arrangements.

b. Responsive Pleadings

133. Intervenors object to the Filing Parties' failure to include certain facilities within the operational control authority of RTO-NE. Unitil Companies (Unitil), for example, asserts that the OATTS of Fitchburg Gas and Electric Company and Unitil Energy Systems, Inc., which are currently on file with the Commission, should be incorporated into the RTO-NE OATT.

134. In addition, FPL seeks to recover its support payment costs relating to its ownership interest in the Seabrook Nuclear Power Station through RTO-NE's regional transmission rates. In support of its request, FPL asserts that the Seabrook Transmission Substation acts as a switching point for three integral 345 kV lines within NEPOOL and is an essential element of the North-South transmission interface in New England. FPL argues that given its ownership interest in this facility, FPL should be permitted to become a signatory to the TOA and that conforming changes to the TOA, as necessary, should be required. FPL also requests, however, that it be exempted from the requirements under TOA Section 3.06 applicable to Participating Transmission Owners because not all of the requirements of Section 3.06 are applicable to the transmission facilities owned by FPL.

135. Dominion and HQUS request that the Filing Parties be required to provide milestone dates for addressing the roll-in of Hydro Quebec Interconnection Costs and the treatment of Hydro Quebec Interconnection Capability Credits. HQUS argues that under the Filing Parties' proposal, substantial operational authority over the main transmission tie between Quebec and New England would be ceded to local transmission owners, forcing transmission customers to pay pancaked rates. HQUS requests that the Commission require full integration of these facilities, including rolled-in rate treatment and the allocation of full operational control authority to RTO-NE.⁸⁵

136. Finally, PPL EnergyPlus, LLC (PPL), the holder of a long-term transmission reservation on the MEPCO AC Facility, a non-PTF Tie located between the facilities owned by the Maine Electric Power Company and New Brunswick, urges the Commission to mandate the roll-in of these facilities under the RTO-NE OATT.

c. Answers

137. The Filing Parties assert that none of the requests made by intervenors with respect to facility designations should be entertained by the Commission in this proceeding. First, the Filing Parties characterize FPL's request relating to the Seabrook Nuclear Power Station as non-related to the RTO formation issues presented in this proceeding and otherwise unjustified. The Filing Parties argue that FPL's request, if granted, would increase RTO-NE's transmission rates with no countervailing benefits to RTO-NE's customers. In addition, the Filing Parties claim that FPL's request to become a signatory to the TOA is, in fact, an effort to cherry pick the benefits of only selective portions of that agreement.

138. The Filing Parties also urge the Commission to reject, as premature, the proposed rolled-in rate treatment sought by Dominion and HQUS (*i.e.*, to reject a Commission-imposed solution), pending the Filing Parties' on-going negotiations with the interested parties concerning the many complex issues associated with this matter, including (i) coordination of funding and/or service agreements; (ii) arrangements with entities that currently have use rights over these facilities; and (iii) the appropriate split of Section 205 filing rights in light of the distinct ways in which rates and/or charges for these non-PTF Ties are recovered (or will be recovered in the future). The Filing Parties argue that this process should not be short-circuited by the Commission because, in fact, a negotiated

⁸⁵ But see National Grid protest at 9-10 (arguing, among other things, that the operational authority and rate treatment of the facilities at issue have been in use for over decade, that the revisions sought by HQUS would require the forcible participation of certain hydro entities in the proposed RTO, and that the terms of an appropriate roll-in are currently the subject of negotiations).

settlement is imminent. Specifically, the Filing Parties state that they expect to file in the near future bilateral operating agreements and tariff schedules addressing the treatment of these facilities under the RTO-NE framework, i.e., under a framework that would give RTO-NE operating authority over these facilities.

139. Finally, the Filing Parties respond to the rolled-in rate request made by PPL, asserting that this request is unwarranted and should be rejected. The Filing Parties note that PPL has made this request because it is currently obligated to pay for a long-term reservation over the MEPCO AC Facilities, which it would be allowed to circumvent in the event rolled-in rate treatment is approved. However, the Filing Parties note that ISO-NE has opposed this request, absent agreement by the owners of these facilities.

d. Commission Ruling

140. We will accept the Filing Parties' proposed designation of facilities subject to the TOA as compliant with the operational requirements of Order No. 2000, subject to condition. First, we agree with the Filing Parties that we need not address here, in conjunction with the formation of RTO-NE, the rolled-in rate requests made by FPL, Dominion, HQUS, and PPL.

141. However, we agree with Unitil that service under the OATTs of its affiliates, Fitchburg Gas and Electric Company and Unitil Energy Systems, Inc., which are currently on file with the Commission, should now be provided under the local service provisions of the RTO-NE Tariff.⁸⁶ To the extent that wholesale transmission services may be requested from these companies, it is appropriate that service be provided on a similar basis to other wholesale services in New England. Accordingly, we direct the Filing Parties in their compliance filing to modify the RTO-NE Tariff to the extent required by this ruling.

3. Authority to Establish Independent Transmission Companies

a. Filing Parties' Proposal

142. The Filing Parties state that the TOA addresses the development and implementation of one or more ITCs within RTO-NE, including the procedures for negotiating an agreement between RTO-NE and an ITC and the parameters for proposing

⁸⁶ See Fitchburg Gas and Electric Light Company, Letter Order, Docket No. ER00-2253-000 (June 9, 2000); Concord Electric Company, et al., 101 FERC ¶ 61,324 (2002).

and negotiating any variation from the RTO-NE/ITC split of responsibilities.⁸⁷ Pursuant to these procedures, RTO-NE would assign certain of its responsibilities to one or more ITC, subject to Commission approval. The Filing Parties state that if the parties cannot reach agreement regarding the formation of an ITC, an ITC Agreement would be filed jointly by the parties under Section 205, showing the areas of disagreement and seeking Commission resolution. In addition, RTO-NE would also have the authority to file a pro forma ITC Agreement as part of its Tariff.

b. Responsive Pleadings

143. Intervenors characterize the Filing Parties' proposed ITC framework as undeveloped and thus premature. The NE Market Participants argue, for example, that the Filing Parties have not demonstrated that their proposed ITC template is, in fact, consistent with the Commission's prior approvals for other regions or is otherwise appropriate for New England. The NE Market Participants therefore request that this proposal be considered by the market participants as a whole or simply deferred until an actual ITC is proposed.

144. PSEG argues that the Filing Parties' proposed ITC template, if implemented by an actual ITC, could threaten the efficient operation of the New England markets by allocating to the ITCs, rather than to RTO-NE, many of the duties and functions that require a regional and fully independent perspective. PSEG cites, as one example, the calculation of Total Transmission Capability, which under the Filing Parties' proposal (ITC template at Section 7.4) would be performed by the ITC. In addition, PSEG asserts that an ITC within RTO-NE should play no role in financial negotiations of Reliability Must-Run agreements to assist the regional dispatch or resolve a condition of temporary market power.

145. PSEG further asserts that ITCs should play no role in determining protocols for transmission line-loading relief, as proposed in Section 8.1 of the ITC template. PSEG asserts that these procedures also require a regional perspective and uniform coordination across and among RTO boundaries. PSEG also insists that RTO-NE, not an ITC, should be given the ultimate responsibility over (i) the coordination of transmission and generation outage scheduling; (ii) system planning and expansion; and (iii) awarding transmission service discounts. PSEG also requests revision to Section 12.2 of the ITC template, which allows RTO-NE to monitor the activities of an ITC only with respect to matters that are within the ITC's scope of responsibilities. PSEG asserts that this authorization would prevent RTO-NE monitoring in the case of an ultra vires act engaged in by the ITC. Finally, PSEG requests clarification that the market data made available to

⁸⁷ See Proposed TOA at Section 10.05 and Schedule 10.05.

an ITC would be limited to data necessary for the ITC's performance of its authorized functions and would not include bid data or outage data unless the ITC signs the appropriate confidentiality agreement with the relevant market participant.

146. Dominion supports the formation of ITCs as long as there is a proper assignment of the transmission service responsibilities, consistent with the Commission's ruling in TRANSLink Transmission Company, L.L.C., et al.⁸⁸ Finally, NECPUC argues that ITC provisions included by the Filing Parties in their proposed TOA should be removed in their entirety and, in any event, should not be accorded Mobile-Sierra protection, as proposed. NECPUC argues that it is premature to rule on these provisions in the absence of a concrete ITC proposal submitted for Commission review.⁸⁹

c. Answers

147. The Filing Parties respond to the characterization of their proposed ITC framework as premature. The Filing Parties state that, in fact, the inclusion of their proposed framework in their RTO proposal is required, consistent with the Commission's findings in Alliance Companies, et al.⁹⁰ The Filing Parties state that in that order, the Commission held that "PJM must revise its tariff to permit ITCs to operate under PJM [and] to the extent that PJM's tariff does not permit ITCs it is unjust and unreasonable."⁹¹

148. The Filing Parties also take issue with the assertion that their proposed ITC framework, to the extent it relies on precedents from other regions, may not be applicable to the needs of the New England markets. The Filing Parties respond that the Commission's precedents with respect to ITC delegations were identified by the Commission in Alliance as a suitable generic template.

c. Commission Findings

149. In Order No. 2000, we held that we would not limit the flexibility of proposed RTO structures or forms of organizations within RTOs.⁹² We also stated that we would

⁸⁸ 99 FERC ¶ 61,106 (2002) (TRANSLink).

⁸⁹ See also New England Consumer-Owned Entities protest at 95.

⁹⁰ 100 FERC ¶ 61,137 at P 43 (2002).

⁹¹ Id.

⁹² Order No. 2000 at 31,036-37.

allow Transmission Owners to establish hybrid for-profit transmission companies within the RTO framework, assuming the RTO otherwise meets our minimum characteristics and functions justifying its establishment as an RTO.⁹³ For the reasons discussed below, we find that the Filing Parties proposed ITC framework satisfies these requirements, subject to conditions.

150. As a threshold matter, we agree with NECPUC that the ITC framework should be made a part of RTO-NE's OATT, not the TOA, given its potential affect on non-parties to the TOA and the market as a whole. This treatment, moreover, is consistent with our rulings in other cases.⁹⁴ Accordingly, we will require the Filing Parties in their compliance filing to re-file their ITC framework in the appropriate tariff language to be included in the RTO-NE OATT. As such, because we will require that Schedule 10.05 be moved to the RTO-NE OATT, we will reject Section 10.05(b), since it is based on these provisions being a part of the TOA.

151. Subject to this revision and the additional conditions discussed below, we find that the Filing Parties' proposed ITC framework generally complies with our ITC formation requirements. We note, in particular, that the Filing Parties proposed division of authority as between RTO-NE and an ITC is generally consistent with our policies. Under this framework, RTO-NE will be the regional reliability authority for the entire RTO-NE transmission system, including any ITC transmission systems. In addition, under Section 7 of the ITC framework, RTO-NE will be the designated transmission provider under the RTO-NE OATT for the ITC, thus assuring that the provision of transmission of service over the ITC's facilities will occur on an open access, non-discriminatory basis. Moreover, RTO-NE, not the ITC, will have the authority to execute all agreements with the ITC's customers.

152. We also note that under the proposed ITC framework, an allowance is made for the filing of an unexecuted ITC agreement, where disputes cannot be resolved by RTO-NE and the Transmission Owners and that this allowance is consistent with our policy.⁹⁵ This allowance, moreover, will not undermine the independence of RTO-NE.

153. We also find that that the proposed ITC functions under the ITC framework are generally acceptable. Specifically, we find it acceptable for some functions with

⁹³ Id.

⁹⁴ See, e.g., PJM Interconnection, L.L.C., 102 FERC ¶ 61,296 at P 4 (2003) (PJM March 2003 Order).

⁹⁵ Order No. 2003 at P 240.

predominately local characteristics to be delegated to an ITC, as proposed, so long as the RTO is given proper oversight authority in the event that local actions have a regional impact. We have also found that ITC control of maintenance and outage schedules is appropriate, subject to RTO oversight.⁹⁶ Here, the Filing Parties proposed ITC framework is consistent with this approach.

154. We also find appropriate the division of authority that will allow the ITC to make all decisions on rate discounts. However, consistent with the parallel tariff provision in effect for PJM, we will require the Filing Parties to qualify this right by noting that this authority can only be exercised by the ITC “to the extent rate discounting is authorized as to such transmission services.” Additionally, the Filing Parties propose postage stamp rates unlike PJM. Therefore, we will require the Filing Parties to clarify in their compliance filing the effect of their discounts on other customers in RTO-NE.

155. We will also accept the proposed procedure for calculating Available Transmission Capacity and Total Transmission Capability. The Commission has stated that an ITC being more familiar with the facilities involved is in a better position to determine near-term facility ratings and capabilities.⁹⁷

156. While under the Filing Parties’ proposal, RTO-NE and the representatives of the proposed ITC would be permitted to jointly develop and establish the ITC’s authorized planning procedures, moreover, RTO-NE, not the ITC, would have the final say. Specifically, in the event any dispute arises regarding the terms and conditions of these procedures, RTO-NE would be authorized to submit its proposal directly to the Commission.

157. It is not clear, however, what role ITC’s will play in the development of Reliability Must Run related costs. As such, we will require the Filing Parties to explain the ITC’s role regarding this matter in their compliance filing.

158. We will reject intervenors’ arguments that additional safeguards are required regarding the extent of confidential data made available to an ITC. Section 17 of the ITC framework already provides such safeguards consistent with the Information Sharing provision we accepted in for PJM.⁹⁸ However, after experience is gained under an ITC

⁹⁶ Ameren Services Company, et al., 101 FERC ¶ 61,320 (2002); PJM Interconnection, LLC, 102 FERC ¶ 61,296 at P 35 (2003).

⁹⁷ Alliance, 99 FERC at 61,435.

⁹⁸ See PJM Interconnection, L.L.C., 102 FERC ¶ 61,296 at P 73 (2003)(PJM March 2003 Order). Section 17 of the ITC framework states, in relevant part, that (continued ...)

arrangement, parties may wish to better define the types of information that should be shared.

159. With respect to RTO-NE's transmission planning and expansion responsibilities under an ITC framework, RTO-NE will have the responsibility to ensure that these responsibilities are carried out on a coordinated, region-wide basis. Under Section 10 of the ITC framework, for example, RTO-NE will have the responsibility for the development of a regional needs assessment, while the ITC will have the right to participate in the development of this assessment. Consistent with our ruling in TRANSLink Development Company, LLC,⁹⁹ in the event that RTO-NE determines that any of the projects identified in the ITC plan would cause a material adverse impact on RTO-NE's facilities, the ITC's plan cannot be incorporated into the Regional System Plan. In addition, consistent with the PJM March 2003 Order, we will require RTO-NE to include in its compliance filing a consistent definition and criteria for what would "materially adversely affect" the transmission system outside the ITC's footprint.

160. Finally, we will reject the Filing Parties proposed provisions relating to line loss costs. Under proposed Section 6 of the ITC framework, the ITC would be given the unilateral right to file with the Commission a mechanism for determining loss responsibility, subject to certain stated conditions. However, we agree with PSEG that this provision should not be considered at this time to the extent that its approval would prejudice the appropriate allocation of costs that have yet to be quantified.

5. Facilities Subject to the Merchant Transmission Owners Agreement

161. The Filing Parties propose to establish pro forma terms and conditions for RTO-NE's operation of future merchant transmission facilities. LIPA, however, argues that the parties that would be subject to this pro forma agreement are limited and that the

"RTO-NE shall upon the ITC's request, make available to the ITC any and all information within the RTO-NE's custody or control that is necessary for such ITC to perform its responsibilities and obligations under this Schedule, provided that such information will be made available to such ITC only to the extent permitted under the RTO-NE Information Policy and subject to any restrictions in the RTO-NE Information Policy governing the confidential treatment of non-public information, and provided further that any ITC employee or employee of an ITC's Local Control Center shall comply with such RTO-NE Information Policy and any applicable standards of conduct to prevent the disclosure of such information to any unauthorized Person."

⁹⁹102 FERC ¶ 61,033 at P 87 (TRANSLink Development).

services addressed by the proposed agreement should be the subject of bilateral arrangements freely negotiated by the contracting parties with respect to all issues presented. We agree and therefore will reject the Filing Parties proposed pro forma Merchant Transmission Owners Agreement.

F. Short-Term Reliability

In Order No. 2000, we held that an RTO, in order to discharge its short-term reliability duties, must have exclusive authority for: (i) receiving, confirming and implementing all interchange schedules; (ii) redispatching generators; and (iii) overseeing all requests for scheduled outages of transmission facilities.¹⁰⁰

162. The Filing Parties state that RTO-NE will comply with the short-term reliability requirement set forth in Order No. 2000 because, under the TOA and the RTO-NE OATT, RTO-NE would assume ISO-NE's existing authority relating to short-term reliability matters. We find that RTO-NE satisfies the requirements set forth by the Commission in Order No. 2000 as they relate to short-term reliability matters.

G. Tariff Administration and Design

In Order No. 2000, the Commission held that an RTO must administer its own tariff and employ a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities.¹⁰¹

1. Filing Parties' Proposal

163. The Filing Parties state that RTO-NE would comply with the tariff administration and design requirements set forth in Order No. 2000. In particular, the Filing Parties state that RTO-NE would serve as the transmission provider under the RTO-NE OATT and that the RTO-NE OATT would retain the same rate design reflected in the NEPOOL OATT. In addition, the Filing Parties state that the RTO-NE Tariff would include, under separate rate schedules, the rates, terms and conditions for Local Network Service and Local Point-to-Point Service and other local services offered by the Transmission Owners.

¹⁰⁰ Order No. 2000 at 31,103-04; 18 C.F.R. § 35.34(j)(4)(i)-(iv) (2003).

¹⁰¹ Order No. 2000 at 31,174; 18 C.F.R. § 35.34(k)(1) (2003).

164. The Filing Parties further submit that RTO-NE's structure and organization would give it the ability to evolve over time. The Filing Parties also state RTO-NE would remain open to the possibility of further expansion within or beyond its proposed current borders. In particular, the Filing Parties note that RTO-NE's system software would have an open architecture modeled after PJM's software and that, as such, RTO-NE would be in a position to modify its market design, as appropriate, and would be able to do so both quickly and efficiently.

2. Responsive Pleadings

165. ANP takes issue with proposed Section II.12.2 of the RTO-NE OATT, which would require that all transmission customers that take regional network service over the PTF also take local network service over non-PTF transmission facilities. ANP argues that load that is directly connected to the PTF does not utilize non-PTF facilities for the delivery of electric energy and, therefore, should not be required to take local network service. PPL argues that service should be provided under a single tariff at a single, system-wide rate.

166. Exelon requests that the Market Participant Service Agreement be revised to read that a market participant's commitment to abide by the RTO-NE OATT, Market Rule 1, RTO-NE's Operating and Planning Procedures and related documents be "consistent with the nature of the services sold." Exelon argues that this revision is necessary because it would, among other things, allow for a lower level of required maintenance and thus lower costs for the generator, where a generator is not obligated to supply Installed Capability (ICAP).

167. Exelon and Duke also object to the Filing Parties' failure to include in their proposed RTO-NE OATT adequate provisions relating to unit retirement and maintenance procedures, including in particular the right to make a Section 205 filing to collect Reliability Must-Run rates. Exelon explains that under the existing requirements set forth in the NEPOOL OATT, suppliers are required to wait for 180-days before Reliability Must-Run rates can go into effect, which Exelon asserts is unnecessary. Duke requests tariff provisions that would ensure that a generator owner is compensated under Commission-approved rates for reliability services provided during a period in which RTO-NE has required the unit to run pending its consideration of retirement or deactivation requests.

168. In addition, Exelon takes issue with the NEPOOL OATT's existing provisions relating to the "deactivated reserve" option and seeks to modify maintenance obligations to be consistent with the nature of the services sold, *i.e.*, to require less maintenance on older units, particularly where the unit owner does not sell ICAP or forward reserves and has not committed its unit to be available at some future date.

169. Edison Mission, et al. argue that the RTO-NE OATT should be required to include dispute resolution provisions currently included in the NEPOOL OATT, at Section 12.1, and the Restated NEPOOL Agreement, at Section 21.1. Edison Mission, et al. note that these provisions mandate arbitration and allow mediation before the filing of complaints at the Commission. Edison Mission, et al. argue that proposed Section I.6 of the RTO-NE Tariff, by contrast, would provide for only a 60-day dispute resolution period which is not adequate and that these procedures would differ from the provisions applicable to the Filing Parties themselves under Section 11.4 of the TOA.

3. Answers

170. The Filing Parties respond to the protests filed by ANP and PPL regarding the Filing Parties' proposed retention of a two-tiered transmission service and rate structure. The Filing Parties argue that their retention of this two-tier service has broad stakeholder support. In addition, the Filing Parties argue that the requirement that Regional Network Service customers take Local Network Service is necessary in order to permit the Transmission Owners to collect certain costs not otherwise collected through the Regional Network Service rate. The Filing Parties further add that these costs are subject to the Commission's Section 205 review.

171. The Filing Parties also respond to the requests made by Exelon and Duke regarding additional unit retirement and maintenance procedures. The Filing Parties assert that while these generator concerns warrant further review, additional stakeholder input would be appropriate. At this time, however, the Filing Parties argue that the procedures at issue need not be addressed as a prerequisite to RTO-NE's formation.

172. Finally, the Filing Parties defend their proposed dispute resolution procedures as reasonable. Specifically, the Filing Parties argue that the 60-day dispute resolution procedure allowed under Section I.6 of the RTO-NE Tariff strikes an appropriate balance between encouragement of serious negotiation and avoiding undue delay in presenting disputes to the Commission for resolution. Nonetheless, the Filing Parties state that they are willing to conform the procedures set forth in Section I.6 of the RTO-NE Tariff with the corollary provisions set forth in the TOA to remove any implication that existing avenues of relief are no longer available.

4. Commission Finding

173. We will approve the Filing Parties' RTO proposal as it relates to our tariff administration and design requirements, subject to conditions. First, we will grant Edison Mission, et al.'s request with regard to ADR procedures. We will require the Filing Parties in their compliance filing to revise Section I.6 of the RTO-NE Tariff and Section 11.14 of the TOA to make these ADR procedures available to all market participants on an equal basis.

174. We will deny Exelon's request that we condition its obligation to abide by the RTO-NE Tariff "consistent with the nature of the services sold." We agree with the Filing Parties that Exelon's proposed revision is vague and overbroad and could be relied upon to permit a generator to avoid compliance with a reliability directive issued by RTO-NE. However, we also agree with Exelon that generators who are not required to meet ICAP obligations should not be required to adhere to the same maintenance rules that apply to generators who are required to meet ICAP obligations. Accordingly, we will require the Filing Parties to propose appropriate tariff language addressing these respective obligations in their compliance filing.

175. We will deny ANP's protest regarding its obligations to pay certain non-PTF charges under Section II.12.2 of the RTO-NE OATT. As the Filing Parties point out in their answer, ANP's obligations to pay Local Network charges are required under NEPOOL's existing Tariff and a prior settlement agreement. Moreover, the costs at issue are not recovered twice under these existing classifications and could not be recovered at all but for charges to which ANP objects. Under these circumstances, we agree with the Filing Parties that revisions to this rate structure are not required in connection with the establishment of RTO-NE. Nonetheless, we will clarify here that while customers must take service under the Local Network Service tariff, their payment obligations are and must be limited to the specific Local Network Services provided.

H. Congestion Management

In Order No. 2000, we held that an RTO must ensure the development and operation of market mechanisms to manage transmission congestion.¹⁰²

176. The Filing Parties state that under their proposal RTO-NE would manage congestion through the locational marginal pricing (LMP) mechanism currently in place in the New England markets under NE-SMD and Market Rule 1.¹⁰³ The Filing Parties state that under Market Rule 1, RTO-NE would rely on LMP pricing and ISO-NE's new multi-settlement and congestion management system to alleviate transmission constraints in the New England market. We find that the Filing Parties' RTO proposal satisfies the congestion management requirements established by the Commission in Order No. 2000.

¹⁰² Order No. 2000 at 31,108; 18 C.F.R. § 35.34(k)(2) (2003).

¹⁰³ See NE-SMD Order, 100 FERC at 62,273.

I. Parallel Path Flow

*In Order No. 2000, we held that an RTO must develop and implement procedures to address parallel path flow issues within its region and with other regions.*¹⁰⁴

177. The Filing Parties state that RTO-NE will address parallel path flows in its own region through its administration of a regional LMP congestion management regime and that the effectiveness of RTO-NE's internal parallel path flow management will be enhanced by close coordination with RTO-NE's neighboring Canadian provinces, the New York ISO and PJM. The Filing Parties state that RTO-NE will not be substantially affected by any parallel path flow external to the New England region. We find that the Filing Parties' RTO proposal is consistent with the parallel path flow requirements of Order No. 2000.

J. Ancillary Services

*In Order No. 2000, we held that an RTO must serve as the provider of last resort for ancillary services and that all market participants must continue to have the option of self-supplying or acquiring ancillary services from third-parties. We also determined that the RTO must have the authority to decide the minimum amounts of each ancillary service and, if necessary, the locations at which these services must be provided.*¹⁰⁵

178. The Filing Parties state that RTO-NE will satisfy the ancillary services requirements set forth by the Commission in Order No. 2000 through its administration of Market Rule 1.¹⁰⁶ The Filing Parties note that RTO-NE, in its administration of Market Rule 1, will assume all of the ancillary services-related functions that ISO-NE currently performs. We find that the Filing Parties' RTO proposal satisfies the ancillary services requirements established by the Commission in Order No. 2000.

¹⁰⁴ Order No. 2000 at 31,130; 18 C.F.R. § 35.34(k)(3) (2003).

¹⁰⁵ Order No. 2000 at 31,140-41; 18 C.F.R. § 35.34(k)(4) (2003).

¹⁰⁶ See NE-SMD Order, 100 FERC ¶ 61,287.

K. OASIS, Total Transmission Capability and Available Transmission Capacity

In Order No. 2000, we held that the RTO must be the single OASIS site administrator for all transmission facilities under its control and independently calculate total transmission capacity and available transmission capacity.¹⁰⁷

179. The Filing Parties state that RTO-NE will satisfy the Commission's transmission request requirements set forth in Order No. 2000 because RTO-NE will administer a single OASIS node for its region and will base its Available Transmission Capacity calculations on data that it develops itself, reflecting ratings supplied by the Transmission Owners. We find that the Filing Parties RTO proposal satisfies the OASIS, Total Transmission Capacity, and Available Transmission Capacity requirements established by the Commission in Order No. 2000.

L. Market Monitoring

In Order No. 2000, we held that RTOs would be required to develop market monitoring procedures to ensure the availability of objective information regarding the operation the RTO's markets and that these marketing monitoring functions should serve as a vehicle for proposing efficiency improvements and remedying market design flaws.¹⁰⁸

1. Filing Parties' Proposal

180. The Filing Parties state that the market monitoring provisions included in the Participants Agreement reflect significant enhancements to the current ISO-NE monitoring practices and are substantially consistent with the Governance Term Sheet approved by the NEPOOL stakeholder process.

181. The Filing Parties state that RTO-NE will both meet and exceed the Commission's requirements for effective market monitoring through the functions that would be performed by an independent External Market Monitoring Unit and an Internal Market Monitoring Unit.¹⁰⁹ The Filing Parties state that the External Market Monitoring

¹⁰⁷ Order No. 2000 at 31,163; 18 C.F.R. § 35.34(k)(5) (2003).

¹⁰⁸ Order No. 2000 at 31,156; 18 C.F.R. § 35.34(k)(6) (2003).

¹⁰⁹ See proposed Participants Agreement at Section 9.4.

Unit would be authorized to review and assess various aspects of the New England market rules and procedures from the perspective of both design and administration, prepare reports, submit recommendations, suggest changes, and comment on proposals with respect to the New England market. The Filing Parties state that these functions would include the development, maintenance and administration of a Market Monitoring and Mitigation Plan which is identical to ISO-NE's current plan, as approved by the Commission.

182. The Filing Parties state that under the Participants Agreement, the Internal Market Monitoring Unit would be authorized to evaluate the relationship of the RTO-NE markets with other markets and note, in particular, that under Section 9.4.3(h) of the Participants Agreement, the Internal Market Monitoring Unit would be authorized to participate in a committee of regional market monitors if and when such a committee is established. The Internal Market Monitor Unit would also be responsible for developing and maintaining the Market Monitoring and Mitigation Plan, reviewing behavior of market participants, referring concerns to the RTO-NE board, making recommendations concerning changes to Market Rules, and providing periodic reports on the New England market.

2. Responsive Pleadings

183. Dominion asserts that the External Market Monitoring Unit should be available and accessible not only to the RTO-NE board, but as well to all stakeholders for conducting analyses and developing recommendations regarding the operation of the New England markets. Edison Mission, et al. adds that the External Market Monitoring Unit, as proposed, is not sufficiently independent to perform the functions envisioned by the Commission because the External Market Monitoring Unit would be selected by and report directly to the RTO-NE board, with no indication of how the selection process will operate, what the standards of selection will be or what "reporting," in this context, may entail. New England Consumer Owned Entities further argues that greater transparency is required in the market monitoring processes that would be overseen by RTO-NE.

184. New England Advocates¹¹⁰ submit that while the dual market monitoring function proposed by the Filing Parties will be helpful, the Commission should also require that an additional market evaluation process be made on a periodic basis (perhaps every two years) by an outside, independent entity, focusing on market rules, pricing, and administrative efficiency issues.¹¹¹ New England Consumer-Owned Entities and the

¹¹⁰ The Attorney General of the Commonwealth of Massachusetts, the Connecticut Office of Consumer Counsel, the Maine Public Advocate and the New Hampshire Office of Consumer Advocate.

¹¹¹ See also Public Interest Organizations protest at 14.

NEPOOL Industrial Customer Coalition add that market monitoring functions need to be put into place to evaluate the performance and behavior of RTO-NE, which will have an inherent bias to portray success in the markets it operates.

185. NECPUC requests revisions to RTO-NE's Information Policy regarding the information received, created and distributed by market participants and RTO-NE in connection with market settlements, system operations, and planning matters. NECPUC argues that this information should be provided to state regulators in order to facilitate their evaluations of market issues. NECPUC also asserts that state regulators should be given access to all such materials, including certain confidential information collected by or developed by RTO-NE.

3. Answers

186. The Filing Parties take issue with the concern expressed by intervenors that in addition to the market monitoring functions that RTO-NE would be permitted to oversee, the Market Monitoring Plan should also be subject to periodic independent external review and other procedures to insure independent monitoring. The Filing Parties claim that these concerns are already adequately addressed by the procedures set forth in the Participants Agreement which would permit the Participants Committee, at its election, to request periodic audits of RTO-NE's performance. In addition, the Filing Parties note that RTO-NE would itself be an independent entity and would remain fully subject to the Commission's oversight.

4. Commission Finding

187. We find that the Filing Parties RTO proposal satisfies the market monitoring requirements established by the Commission in Order No. 2000. RTO-NE will have the ability through the internal and external Market Monitoring Units, to evaluate market rules, market functions, and market procedures and will be authorized to make the appropriate reports and recommendations to the RTO and the Commission. The function of these Market Monitoring Units will also include the responsibility for a Market Monitoring and Mitigation Plan identical to that currently utilized by ISO-NE.

188. We will reject intervenors' argument that the Internal Market Monitoring Unit should be fully independent of RTO-NE, or alternately, that an independent body should be established to conduct a review of RTO-NE and its markets on a regular basis. As we have held in the past and reaffirm here, Order No. 2000 permits, but does not require, the market monitor to be outside of the RTO.¹¹² Nor will we require an independent outside review of the operation of RTO. The Commission will fulfill this role.

¹¹² PJM Interconnection, LLC, 96 FERC ¶ 61,061 (2001).

189. We will also reject the New England Consumer Owned Entities' request regarding the need for greater market information transparency. We are satisfied that RTO-NE's Market Monitoring Units will have access to the data they require to perform their respective duties, and we recognize the need to otherwise limit the level of access to confidential information by and among market participants.

190. NECPUC requests revisions to RTO-NE's Information Policy regarding the information received, created and distributed by market participants and RTO-NE in connection with market settlements, system operations, and planning matters. NECPUC argues that this information should be provided to state regulators in order to facilitate their evaluations of market issues at the state level. NECPUC also asserts that state regulators should be given access to all such materials, including certain confidential information collected by or developed by RTO-NE.

191. NECPUC's concerns are both legitimate and reasonable. However, uniformity in this policy across RTO-NE's neighboring control areas would also serve a useful purpose and should also be considered. Accordingly, because PJM is currently in the process of developing such a policy, we will allow PJM to serve as the lead case in this matter.¹¹³ We will require the Filing Parties to submit a filing within 30 days of the date of our order addressing PJM's policy, including what, if any, variations may be required in that policy as it would apply to RTO-NE.

192. Finally, on November 17, 2003, the Commission issued an order amending all market-based rate tariffs and authorizations to ensure compliance with six Market Behavior Rules concerning: (i) unit operations; (ii) market manipulation; (iii) communications; (iv) reporting; (v) record retention; and (vi) related tariff matters.¹¹⁴ In the MBR Tariff Order, we noted that it is appropriate to authorize Market Monitoring Units to enforce certain ISO/RTO tariff matters concerning market behavior (with appeal rights to the Commission) for matters that are clearly set forth in the tariffs of the ISOs/RTOs in which the behavior is objectively identifiable and in which the violations have clear Commission-approved sanctions set forth in the tariff.¹¹⁵ In the MBR Tariff Order, the Commission also stated that all other aspects of tariff-related enforcement will be the responsibility of the Commission regardless of whether the alleged violation

¹¹³ PJM's Members Committee is expected to consider this issue at its next scheduled meeting on March 25, 2004.

¹¹⁴ Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61, 218 (2003) (MBR Tariff Order), reh'g pending.

¹¹⁵ MBR Tariff Order at P 182.

occurs in an ISO- or RTO-administered market or in the bilateral markets.¹¹⁶ The Commission has more specifically addressed how the MBR Tariff Order affects the types of provisions that may be included in the tariff for an organized market.¹¹⁷

193. The RTO-NE filing was made before the issuance of the MBR Tariff Order and thus could not address how the market rules complied with the requirements of the MBR Tariff Order. However, since the filing is made pursuant to section 205 of the FPA, the Filing Parties are required to do so. Accordingly, we will direct the Filing Parties in their compliance filing to demonstrate that RTO-NE's market rules, including any penalty provisions, comply with the MBR Tariff Order.

M. Planning and Expansion

*In Order No. 2000, we held that the RTO must be responsible for planning and for directing or arranging necessary transmission expansions, additions and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate authorities.*¹¹⁸

1. Filing Parties' Proposal

194. The Filing Parties state that RTO-NE would comply with the RTO planning and expansion requirements set forth in Order No. 2000 by providing an enhanced and broader regionalized system planning process. First, the Filing Parties state that RTO-NE would continue ISO-NE's functions of independently assessing regional system needs, providing information about system needs to market participants, and identifying regulated transmission solutions in the event a market solution is not forthcoming in response to RTO-NE's identified needs. In addition, the Filing Parties propose to expand on this existing process.

195. The Filing Parties state, for example, that pursuant to proposed Section II.48 of the RTO-NE OATT, RTO-NE's system planning and expansion procedures would include a mandatory "must build" requirement applicable to certain transmission facilities deemed necessary to enhance the economic efficiency of New England's transmission system. These procedures would require RTO-NE to initiate system enhancement and

¹¹⁶ Id.

¹¹⁷ California Independent System Operator, 106 FERC ¶ 61,179 (2004).

¹¹⁸ Order No. 2000 at 31,172; 18 C.F.R. § 35.34(k)(7) (2003).

expansion studies at least once every three years and to incorporate the results of these studies into RTO-NE's Regional System Plan.¹¹⁹ The criteria for determining which market efficiency needs would be included in the completed needs assessment would be developed by RTO-NE with input from a Planning Advisory Committee.¹²⁰

196. The Filing Parties state that RTO-NE would be required to publish its needs assessment with the affected transmission owners then responsible for providing a "regulated transmission proposal." That response on the part of the Transmission Owner would then be evaluated by RTO-NE and, if found acceptable, approved. The Filing Parties state that when RTO-NE determines that new facilities are required and designates one or more Transmission Owner to build a transmission upgrade, the designated Transmission Owner would be obligated to build, or cause to be built, the subject facilities. This obligation, however, would be subject to a variety of conditions set forth in the TOA, including the right of the Transmission Owner to recover all prudently-incurred costs and a return on investment. The Filing Parties state that a Transmission Owner would not be obligated to proceed with a new facility if informed on a non-binding basis by the chair of a state regulatory authority having jurisdiction over siting that the necessary approval is unlikely to be obtained.

197. The Filing Parties state that in order to accommodate multi-state review and approval of new transmission facilities that are coordinated with programs of other regional transmission entities, where necessary, RTO-NE would rely on inter-area planning procedures and coordination protocols covering as broad a region as feasible, including adjacent Canadian systems who are members of the Northeast Power Coordinating Council, the Mid-Atlantic Area Council, the East Central Area Reliability Council, and each of the transmission providers in these regions.

2. Responsive Pleadings

198. PSEG characterizes the Filing Parties' planning and expansion proposals as significant and far sweeping in their scope, but notes that the stakeholder process which

¹¹⁹ The Regional System Plan would serve as the successor process to the Regional Transmission Expansion Plan currently overseen by ISO-NE.

¹²⁰ The Planning Advisory Committee would serve as the successor Committee to the Transmission Expansion Advisory Committee, currently in place under the NEPOOL OATT. The Filing Parties state that the Planning Advisory Committee would provide input and feedback to RTO-NE concerning the development of the Regional System Plan including input regarding study assumptions, needs assessments, and project options. See proposed RTO-NE OATT at Section II.48.

preceded the Filing Parties' submission of its RTO proposal accorded little attention to these proposed procedures. Accordingly, PSEG requests that the Commission return these issues for consideration by a stakeholder process or, in the alternative, defer these issues for a subsequent proceeding.

199. On the merits of these proposed revisions, intervenors raise a number of objections. First, intervenors challenge the terms and conditions of the Filing Parties' proposed "obligation to build" requirement. Duke argues that the TOA, as proposed, fails to include any enforcement provisions relating to this requirement and fails to set out a process sufficient to address a Transmission Owner's potential unwillingness to build.¹²¹ Duke notes that there may be circumstances where, notwithstanding the cost recovery protections afforded under the TOA, the construction of transmission upgrades to relieve a bottleneck will not advantage the customers of the Transmission Owner within whose system the facilities would be built. Duke proposes that RTO-NE be given the authority to substitute another Transmission Owner willing to construct the necessary facilities or, alternatively, that RTO-NE be required to institute a proceeding before the Commission wherein the Commission would determine the appropriate action to be taken against the Transmission Owner.¹²²

200. NECPUC objects to the allowance that would free a Transmission Owner from its obligation to build where the chair of a state siting authority concludes, on a non-binding basis, that a transmission project listed in the Regional System Plan is unlikely to be approved. NECPUC asserts that a Transmission Owner should not be freed of its obligation under these circumstances because any such representation would be made without the benefit of a full public record. NECPUC suggests, as an alternative, that the costs incurred by the Transmission Owner in an unsuccessful attempt to secure siting authority be allocated in the same manner that the costs of the project would have been allocated.

201. Intervenors also raise a number of objections regarding the Regional System Plan process. LIPA argues that if RTO-NE is to be given the authority to direct market efficiency upgrades, the standards and procedures for implementing an assessment must be established up front. LIPA argues that the Filing Parties' proposal to leave these issues for later development by RTO-NE be rejected. In addition, the Maine Public

¹²¹ See also New England Consumer-Owned Entities at 112 ("The obligation to build in the TOA is full of loopholes through which the Transmission Owners can back out of the obligation when it suits their interests.").

¹²² Duke notes that this latter alternative was followed by the Commission in PJM Interconnection, L.L.C., 95 FERC ¶ 61,123 at PP 20-21 (2003).

Utilities Commission (Maine Commission) requests that the proposed RTO-NE OATT be revised to require RTO-NE to file its Regional System Plan, or any amendments to that plan, with the Commission, given the fact that the inclusion of projects in the Regional System Plan can have a direct impact on rates.¹²³ In the alternative, the Maine Commission requests clarification that the inclusion of a project in the Regional System Plan will not preclude Commission review of the project in setting rates.

202. Intervenors also allege that the Regional System Plan, if approved, will continue the current planning bias in favor of regulated transmission projects as the preferred solution to system inadequacies at the expense of traditional generation, distributed generation, and demand resources. TransEnergie U.S. Ltd. And Cross Sound Cable Company, LLC (TransEnergie) assert that this process will virtually ensure that all transmission investment made within the New England control area will be made by incumbent transmission companies at the expense of market solutions.

203. Instead, the NEPOOL Industrial Customer Coalition urges the Commission to adopt a non-discriminatory Request For Proposal process that would seek the optimal solution to a system inadequacy, whether it relies on generation, transmission, demand resource, or any combination of these options. In addition, the New England Advocates argue that the costs relating to any such solution should be eligible for recovery from transmission service customers through an RTO tariff rate, not just on the “special conditions” basis proposed by the Filing Parties.¹²⁴

204. NECPUC objects to the inclusion of certain planning provisions in the TOA, as opposed to the RTO-NE OATT. Specifically, NECPUC argues that provisions addressed at Section 3.09 of the TOA should be included in the RTO-NE OATT to better facilitate revisions under Section 205 or 206 of the FPA and because these provisions affect all market participants, not just the signatories to the TOA.¹²⁵ NECPUC also requests that the Filing Parties’ proposed planning provisions be revised to allow for greater stakeholder involvement in the case of planning disputes, noting that Section 11.14 of the TOA, as proposed, would include only the RTO and the Transmission Owners in this dispute resolution process. In addition, NECPUC requests clarification that the

¹²³ See also Vermont Department of Public Service protest at 3.

¹²⁴ See proposed RTO-NE OATT at Sheets 405-07 (making the costs attributable to a non-regulated transmission solution eligible for recovery from transmission customers where a regulated transmission solution may take several years to implement).

¹²⁵ NECPUC, however, does not challenge the Filing Parties’ proposal to include in the TOA provisions addressing RTO-NE’s responsibility to develop the Regional System Plan and the TO’s obligation to build.

Transmission Owners will have the opportunity to seek recovery of costs prudently incurred or prudently committed to be incurred in planning, siting and construction of facilities included in the Regional System Plan, but will not have a guarantee of recovery.

205. Finally, LIPA requests clarification regarding the criteria that would be applied by RTO-NE in identifying a market efficiency upgrade and the ability of RTO-NE, under these procedures, to identify reliability seams attributable to the differences in reliability criteria utilized by the three regional reliability councils serving the area (i.e., by the Northeast Power Coordinating Council, the Mid-Atlantic Are Council, and the East Central Area Reliability Council).

3. Answers

206. The Filing Parties respond to NECPUC's request that the TOA provisions relating to transmission planning and expansion be addressed not in the TOA but, instead, in the RTO-NE OATT. The Filing Parties assert that the vested interests of the Transmission Owners in planning matters and their obligations to build new facilities warrant the contractual protection they are seeking under the TOA.

207. The Filing Parties also respond to the allegation that their proposed system planning process will favor regulated transmission projects in lieu of more viable market-based alternatives. The Filing Parties submit that the procedural options proposed by intervenors to give due consideration to these alternatives could, instead, create opportunities to impose strategic and procedural delay in the building of necessary transmission and would be otherwise unnecessary given the fact that the Filing Parties' proposed procedures include adequate consideration of market-based solutions, including merchant transmission solutions. The Filing Parties state that regardless, Section II.48.3 of the RTO-NE OATT would authorize RTO-NE to remove or modify a planned transmission upgrade from the Regional System Plan at any time if a market response, or other system condition, otherwise mitigates or eliminates a previously-identified need.

208. The Filing Parties also respond to the Request For Proposal procedures proposed by the NEPOOL Industrial Customer Coalition in those instances where a market response does not emerge in response to a planning need. The Filing Parties argue that reliance on a competitive solicitation process in these circumstances would delay the construction of needed transmission. In addition, the Filing Parties contend that these procedures would lead to under-investment in transmission and prevent opportunities for cost-effective generation to reach load.

209. The Filing Parties also challenge the Maine Commission's request that the Regional System Plan be filed with the Commission. The Filing Parties argue that such a requirement would be inconsistent with the Commission's objective of having an independent entity (i.e., RTO-NE) address regional planning needs without the need for

Commission review and oversight of each transmission project approved by that independent entity.

4. Commission Finding

210. We find that the Filing Parties' proposal meets the requirements set forth by the Commission in Order No. 2000, subject to conditions. In Order No. 2000, we held that an RTO must encourage market-motivated operating and investment actions for preventing and relieving congestion. We also determined that a regional planning and expansion process would be required to: (i) accommodate the efforts of state regulatory bodies to create multi-state agreements; (ii) review and approve new transmission facilities; and (iii) coordinate with other ISOs or RTOs where necessary. Additionally, we required that an RTO file a plan design to meet these objectives and to include in this plan specified milestones.¹²⁶ For the reasons discussed below, we find that the Filing Parties' proposed Regional System Planning process satisfies these requirements, subject to conditions. We will also require that certain provisions that are inappropriately placed in the TOA be transferred to the RTO-NE OATT.

211. The RTO-NE Regional System Planning process, as proposed, will vest authority in RTO-NE to: (i) determine whether a particular transmission project should be built; (ii) assess regional system needs; (iii) identify alternative solutions in the event a market solution is not forthcoming in response to an identified need; and (iv) coordinate planning activities on an inter-regional basis. These procedures, moreover, will generally build on the planning process currently utilized by ISO-NE, while providing assurances that market-based responses to a system need will be given due consideration in the Regional System Plan.

212. However, we will require the Filing Parties to modify their proposed provision relating to the Request for Alternative Proposals (i.e., the procedure available to RTO-NE when no viable solutions have been proposed to meet a near-term reliability need). We have recently addressed the circumstances under which ISO-NE is authorized to issue a "Gap RFP" to meet reliability needs.¹²⁷ In the Gap RFP Order, we stated that we were examining the issue of whether ISOs or RTOs should be responsible for procuring new supplies to meet reliability needs, but that we were unwilling at this time to grant ISO-NE a broad authorization permitting it to engage in these procurement activities. Because the Filing Parties' proposal is similar to the proposal before us in the Gap RFP proceeding,

¹²⁶ See Order No. 2000 at 31,164.

¹²⁷ See ISO New England Inc., 106 FERC ¶ 61,190 (2004) (Gap RFP Order).

we will require the Filing Parties to modify their proposal, consistent with our conditional acceptance of ISO-NE's proposals in the Gap RFP Order.

213. We will also require the Filing Parties to transfer certain of the provisions included in proposed TOA Schedule 3.09(a) to the RTO-NE OATT. Schedule 3.09(a) includes planning guidelines outlining the Transmission Owner's rights and obligations. We find that with the exception of those provisions that affect only (or predominantly) the rights and responsibilities of RTO-NE and the Transmission Owners, i.e., Sections 6 and 7, Schedule 3.09(a) does not belong in the TOA, given the effect that the provisions included in this Schedule may have on market participants as a whole.¹²⁸ By placing these provisions in the RTO NE OATT, stakeholders will have an opportunity to participate more fully in the planning process as changes to the Regional System Plan will be subject to Section 205 and 206 filings. In addition, including these Schedule 3.09(a) provisions in the RTO-NE OATT should address concerns raised by intervenors regarding: (i) potential bias in favor of regulated transmission projects; (ii) the limited involvement of stakeholders in the dispute resolution process; and (iii) the procedures applicable to Requests for Alternative Proposals. Accordingly, we will require the Filing Parties, in their compliance filing to submit revised tariff language reflecting the placement of Schedule 3.09(a) (with the exception of Sections 6 and 7) in the appropriate section of the RTO-NE OATT.

214. We will reject, in part, intervenors requests that we modify or expand upon the Filing Parties' proposal concerning a Transmission Owner's obligation to build. First, we disagree that this obligation can be influenced by (or avoided by) the Transmission Owner's considerations of its own interests in a given project. In addition, we disagree that this obligation lacks flexibility, i.e., that it would preclude a Transmission Owner from working with another Transmission Owner or other entity to fulfill its obligation to build. However, at the end of the RTO-NE process, if there is no agreement to build a given project, we will require RTO-NE to submit a report to the Commission, which will permit us to determine whether to require an enlargement of facilities under the FPA or take other steps.¹²⁹

¹²⁸ Proposed Section 6 addresses the Transmission Owners rights and obligations to build and associated conditions including cost recovery. Proposed Section 7 addresses the Transmission Owner's obligations.

¹²⁹ We have imposed a similar requirement in PJM. See PJM Interconnection, LLC, 104 FERC ¶ 61,124 P 31 (2003). Under the FPA, the Commission has the obligation to prevent unjust and unreasonable rates and it has found that transmission owners cannot be permitted to charge opportunity costs when such costs exceed the costs of expansion in order to ensure that transmission owners have the appropriate incentive to expand their systems when it is economically efficient to do so. See Pennsylvania (continued ...)

215. While we find that the Regional System Plan provides an adequate framework for a Regional Planning Process, we also agree with intervenors that the Filing Parties' proposal requires further clarification.¹³⁰ Specifically, we will require the Filing Parties to identify in their compliance filing the standards and procedures that will be followed by RTO-NE in the Regional System Plan to: (i) identify market efficiency upgrades; (ii) assess cost-effective solutions, and (iii) explain how RTO-NE will allocate any financial transmission rights or ARRs that would result from the construction of new facilities.

216. We will reject intervenors' argument that RTO-NE should be required to file the Regional System Plan pursuant to Section 205 of the FPA. RTO-NE will provide an annual assessment of its system needs, consistent with the standard procedures that we are requiring as part of the Regional System Planning process. We have not required Regional System Plan to be filed pursuant to Section 205 for other RTOs and we will not do so here.

217. NECPUC requests that a Transmission Owner not be freed of its obligation to build based only on a non-binding determination by a chair of a state siting board. We agree with NECPUC that such a determination is not sufficient. Instead, a Transmission Owner obligated to build should have to demonstrate that it has failed after making a good faith effort to obtain the necessary approvals or property rights under applicable law. As stated earlier, once the Transmission Owner makes this demonstration, RTO-NE must submit a report to the Commission that will permit us to determine whether to require an enlargement of facilities under the FPA or take other steps. We direct the Filing Parties to include this revision in their compliance filing.

218. Finally, we will deny PSEG's request that the Filing Parties' planning and expansion proposals be referred back to a stakeholder process for further consideration and development. In fact, the instant proceeding provides an adequate forum for consideration of these issues.

Electric Co., 58 FERC ¶ 61,278 at 61,874 (1992). By the same token, it may not be appropriate to permit a transmission owner or its affiliates to receive congestion-related revenues or other benefits that result from a decision not to construct facilities when such expansion would be a less expensive means of remedying congestion.

¹³⁰ See Section II 48.4 (d) of RTO-NE's OATT which provides for a needs assessment identifying situations that significantly affect the efficient operation of the RTO-NE bulk power system.

N. Inter-Regional Coordination

In Order No. 2000, we held that an RTO should develop mechanisms to coordinate its activities with other regions, whether or not an RTO has been formed in those regions.¹³¹

219. The Filing Parties state that RTO-NE will comply with the inter-regional coordination requirements set forth by the Commission in Order No. 2000 by engaging in extensive efforts to reduce seams issues between RTO-NE and its neighboring control areas (see Section D, above). The Filing Parties state that these efforts will include entering into the Interregional Coordination Agreement with the New York ISO in order to address the elimination of export fees, common resource adequacy measures, coordinated system planning and virtual regional dispatch. For the reasons discussed in Section D above relating to RTO-NE's scope and regional configuration, we find that that RTO-NE satisfies the inter-regional coordination requirements of Order No. 2000.

O. Third-Party Liabilities

The Filing Parties state that they were able to agree to a liability policy addressing their respective liabilities to: (i) RTO-NE's OATT customers (see proposed OATT at Section I.5.2) and (ii) to each other (see ISO-NE proposed TOA at Section 9.02 and the Transmission Owners' proposed TOA at Section 9.06). However, the Filing Parties state that they were unable to agree on the terms and conditions under the TOA pursuant to which the Transmission Owners and RTO-NE would be required to indemnify one another relating to any residual third party liabilities. Accordingly, the Filing Parties state that they have submitted alternative indemnification provisions to be included in the TOA to address these residual third party liabilities.

1. ISO-NE's Proposal

220. ISO-NE seeks approval for an indemnification provision under Article IX of the TOA, pursuant to which RTO-NE would not be liable to any TO for third party claims involving RTO-NE's own performance, except in cases of gross negligence or willful misconduct by RTO-NE.¹³² In addition, ISO-NE proposes that RTO-NE be freed from

¹³¹ Order No. 2000 at 31,167; 18 C.F.R. § 35.34(k)(8) (2003).

¹³² A parallel provision applicable to the Transmission Owner's obligation to indemnify the RTO-NE is proposed at TOA at Section 9.02(b).

any such liability to the TO involving consequential damages (even for acts which may have been committed by RTO-NE with willful intent or gross negligence). Specifically, ISO-NE proposes the following indemnification language:

Except as specifically provided herein, RTO-NE shall not be liable to any [Participating Transmission Owner] for Losses [defined to include, among other things, “liabilities” and “claims”] and arising or resulting from the performance of RTO-NE of its obligations under this Agreement, except in cases of gross negligence or willful misconduct by RTO-NE, provided that in no event shall RTO-NE be liable to any [Participating Transmission Owner] for Consequential and Loss of Load Damages.^{133]}

221. In addition, ISO-NE proposes that the Transmission Owners indemnify RTO-NE with respect to any environmental liabilities to which RTO-NE may become subject as a result of its operational control over the Transmission Owners’ transmission assets, “except to the extent such Environmental Damages result from the gross negligence or willful misconduct of RTO-NE or its directors, officers, members, employees or agents.”¹³⁴

222. ISO-NE argues that these indemnification provisions are consistent with the liability policy set forth by the Commission in its White Paper issued in Docket No. RM01-12-000.¹³⁵ In addition, ISO-NE argues that its proposed indemnification provisions are consistent with the indemnification provision that currently governs ISO-NE’s relationship with NEPOOL under the ISO Agreement.¹³⁶

¹³³ See ISO-NE’s proposed TOA at Section 9.02(c). The term “Consequential and Loss of Load Damages” is defined at proposed Section 9.02(a).

¹³⁴ See ISO-NE’s proposed TOA at Section 9.03(2). The corollary provision applicable to RTO-NE’s obligation to the Transmission Owners is set forth at Section 9.03(1).

¹³⁵ See Remediating Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Docket No. RM01-12-000, White Paper (April 28, 2003) at Appendix A, pp. 19-20.

¹³⁶ ISO-NE acknowledges, however, that the indemnification provision to which it cites shifts the risk for the third party liabilities it addresses from ISO-NE to NEPOOL, i.e., to all NEPOOL market participants, not just the Transmission Owners. See ISO Agreement at Section 10.4 (“NEPOOL shall indemnify, defend and save harmless [ISO-NE] and its directors, officers, members, employees and agents from any all damages, losses, claims and liabilities by or to third parties arising out of or resulting (continued ...)

223. ISO-NE asserts that under the Transmission Owners' proposal (discussed below), RTO-NE would be required to pass its third party liabilities on to market participants as a whole and that such an allocation would not be appropriate. Among other things, ISO-NE cites to the financial burden this allocation would impose on RTO-NE and market participants.

224. Finally, ISO-NE states that should the Commission reject its proposed provision in favor of the indemnification language proposed by the Transmission Owners, then, to be consistent, TOA Section 4.01(d) (relating to Transmission Owner warranties) should also be rejected. ISO-NE points out that under proposed Section 4.01(d), the Transmission Owners disclaim warranties with respect to the maintenance of their transmission facilities. ISO-NE asserts that should its proposed indemnification provision be rejected, the Transmission Owners should also be required to indemnify RTO-NE for any third-party liabilities resulting from the Transmission Owner's failure to properly repair and maintain their transmission facilities.

2. Transmission Owners' Proposal

225. The Transmission Owners state that under their proposed indemnification provision, both the Transmission Owners and RTO-NE would be required to indemnify the other against liability for injuries to third parties caused by their own acts or omissions. Specifically, the New England Transmission Owners propose the following indemnification language:

- (i) Each [Participating Transmission Owner] shall severally release, indemnify, and hold harmless RTO-NE from and against any and all damages, losses, liabilities, obligations, claims, demands, suits, proceedings, recoveries, judgments, settlements, costs and expenses, court costs, attorney fees, and all other obligations (each, an "Indemnifiable Loss") asserted against RTO-NE by a Person that is not a party to this Agreement (a "Third Party") including but not limited to any action by a [Participating Transmission Owner] employee, the extent alleged to result from, arise out of or be related to such [Participating TO's] acts or omissions that give rise to such Indemnifiable Loss; and

from the performance by [ISO-NE] under this Agreement or the actions or omissions of the NEPOOL Participants in connection with this Agreement, except in cases of gross negligence or willful misconduct by the ISO or its directors, officers, members, employees or agents.").

(ii) RTO-NE shall release, indemnify, and hold harmless each [Participating TO] from and against an Indemnifiable Loss asserted against such [Participating TO] by a Third Party, including but not limited to any action be a RTO-NE employee, to the extent alleged to result from, arise out of or be related to RTO-NE's acts or omissions that give rise to such Indemnifiable Loss, including an RTO-NE directive and/or instructions to a Party.

226. The Transmission Owners assert that the reciprocal indemnification rights they propose are almost identical to the indemnification language approved by the Commission in TRANSLink Development.¹³⁷ The Transmission Owners argue that these same rights should be adopted in the TOA because the TOA puts RTO-NE in the “driver’s seat” with respect to a wide spectrum of real-time and other operating decisions that will affect the integrity of the New England bulk power system. The Transmission Owners assert that for this reason it is appropriate that RTO-NE, and not the Transmission Owners, be held liable for any third party claims which may arise relating to RTO-NE’s exercise of this authority. In addition, the Transmission Owners assert that it is the risk posed by this potential liability that will give RTO-NE the incentive it needs to perform its duties and functions consistent with the highest standards required of a system operator.

227. The Transmission Owners dispute ISO-NE’s claim that making RTO-NE liable for its own acts and omissions under Article IX of the TOA will threaten the financial viability of RTO-NE. The Transmission Owners assert that, in fact, RTO-NE will be able to rely on a combination of liability insurance (paid for by market participants) and the ability under its operating tariff to recover any costs associated with such liabilities from all market participants, including the Transmission Owners. The Transmission Owners further assert that this socialized cost responsibility mirrors the indemnification provisions included in the ISO Agreement.

228. Finally, the Transmission Owners note that for legal reasons under applicable state laws the Transmission Owners may not be able to obtain indemnification for acts and omissions attributable to RTO-NE. The Transmission Owners assert that given this potential exposure, the TOA’s indemnification provisions should look to RTO-NE (and thus to all market participants), not the Transmission Owners alone, to manage or otherwise control these risks.

¹³⁷ 102 FERC ¶ 61,033 at P 39.

3. Commission Finding

229. We will require the Filing Parties, in their compliance filing, to conform Article IX of the TOA to the indemnification requirements advanced by the Transmission Owners, subject to the guidance and rationale set forth herein. As discussed below, we agree with the Transmission Owners that the TOA should include a cross indemnification provision requiring RTO-NE and the Transmission Owners to be responsible for all third party liabilities attributable to their own acts or omissions. Specifically, each party should be responsible for their respective liabilities not otherwise addressed by the limitations on liability provisions set forth in Section I.5.2 of the RTO-NE OATT (as to OATT customers) or the Filing Parties' own agreement concerning their respective second party liability limitations as to each other.

230. The issue, in this regard, is which entity, the RTO-NE or its Transmission Owners, should shoulder the risk of third party claims attributable to the acts or omissions of RTO-NE or its Transmission Owners. Under the existing arrangements governing the rights and obligations of ISO-NE and NEPOOL, ISO-NE's third party liability risks (for ordinary negligence) are allocated to all market participants by way of NEPOOL. Section 10.4 of the ISO Agreement requires NEPOOL, i.e., all market participants, to indemnify ISO-NE for third party liabilities attributable to ISO-NE's acts or omissions, except in cases of gross negligence or willful misconduct. As such, the costs associated with these risks are allocated to all market participants. While ISO-NE now proposes to allocate these same risks to the Transmission Owners alone, ISO presents no valid justification for doing so. Rather, we agree with the Transmission Owners that their proposed cost responsibility should be adopted in this case as it relates to the parties' Article IX indemnification responsibilities, consistent with our finding in TRANSLink Development and ISO-NE's existing arrangement with NEPOOL.

231. Finally, we will not consider here ISO-NE's proposal to revise its own proposed Section 4.01(d) of the TOA, based on its alleged inconsistency with the indemnification provision proposed by the Transmission Owners. Revisions to this provision, if any, may be considered by the Filing Parties in their compliance filing, to extent that any such revision is consistent with the guidance provided here.

P. Base Level Return on Equity and Return on Equity Adders for RTO Participation and Transmission Expansion

1. Proposals

232. The ROE Filers¹³⁸ propose a single ROE applicable to regional and local transmission rates under the RTO-NE OATT.¹³⁹ By way of background, the ROE Filers explain that since 1997, transmission service in New England has been provided under a two-tier structure, with the NEPOOL OATT governing regional service and access to the PTF and individual TO OATTS governing local service and access to non-PTF facilities. The ROE Filers note that each Transmission Owner currently has an individual ROE for its PTF assets under the NEPOOL OATT and an individual ROE for its other assets under its individual OATT.

233. The ROE Filers state that, as proposed in the Filing Parties' RTO filing, there would be a single, region-wide OATT governing access to both PTF and non-PTF facilities, which would include, among other things, regional system planning and "must build" obligations. As such, the ROE Filers assert that it is appropriate to have a single, region-wide ROE, with sufficient equity returns available to elicit necessary investments by Transmission Owners.

234. The ROE Filers propose a base ROE of 12.8 percent, based on a one-stage Discounted Cash Flow (DCF) analysis. The ROE Filers assert that this DCF analysis produced a range of reasonableness of 8.0 percent to 17.7 percent (and a midpoint return of 12.8 percent) for a proxy group comprised of Northeast transmission owners.¹⁴⁰ The ROE Filers assert that this proposed ROE is reasonable when compared to the 12.38

¹³⁸ See supra, P 2. The ROE Filers consist of the Transmission Owners, Green Mountain Power Corporation, and Central Vermont Public Service Corporation.

¹³⁹ On November 18, 2003, the ROE Filers submitted an amended ROE filing to correct typographical errors in their initial filing and supply updated data applicable to two Transmission Owners (Bangor-Hydro Electric Company and NSTAR Electric & Gas Corporation).

¹⁴⁰ The proxy group was composed of publicly-traded New England Transmission Owners, as well as publicly-traded Transmission Owners doing business in the New York ISO control area and the PJM control area. In addition, the ROE Filers rely, for comparative purposes, on three additional proxy groups comprised of: (i) Standards & Poor's Electric Utilities group; (ii) Moody's Electric Utilities group; and (iii) natural gas pipelines.

percent base ROE approved by the Commission for the Midwest ISO¹⁴¹ and International Transmission Company.¹⁴² The ROE Filers argue that in comparison to these recently-approved ROEs, the ROE Filers deserve a higher ROE due to current market conditions, namely increased market uncertainty and reduced investor confidence.

235. The ROE Filers also seek a 50 basis point adder to reward their willingness to transfer the operational control authority over their transmission facilities to RTO-NE. In support of their request, the ROE Filers point out that in the Commission's policy statement on RTO formation incentives, the Commission stated that "any entity that transfers operational control of transmission facilities to a Commission-approved RTO would qualify for an incentive adder of 50 basis points on its ROE for all such facilities transferred."¹⁴³ The ROE Filers propose that this adder would apply both to the PTF facilities included in the single transmission rate for regional service and the non-PTF facilities that are included in the local service schedules.¹⁴⁴

236. The ROE Filers also seek a 100 basis point adder applicable to all future transmission expansions placed in service on or after January 1, 2004. The 100 basis point adder would apply to facilities that are included in either the regional transmission rate or in the local service charges. The ROE Filers state that this allowance is authorized under the Commission proposed Pricing Policy Statement and is justified, in this case, due to the severe liquidity crunch in the New England region in particular and the electric utility industry in general. In addition, the ROE Filers assert that it is appropriate to apply this adder to all transmission expansions, i.e., it should not be limited to innovative

¹⁴¹ ROE filing at 13, citing Midwest Independent System Operator, Inc., 100 FERC ¶ 61,292 at P 31 (2002).

¹⁴² Id., citing ITC Holdings Corporation, 102 FERC ¶ 61,182 at P68 (2003).

¹⁴³ Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid, 102 FERC ¶ 61,032 (2003) (Pricing Policy Statement).

¹⁴⁴ The rate under the Local Service Schedule will include both the cost of the non-PTF facilities and certain costs related to PTF facilities that are not included in the rate for Regional Network Service. This could include the cost of PTF facilities recovered through a Transmission Owner's formula rates before these costs are included in the single region-wide rate. Also, the rates for the Local Network Schedule may include the additional cost to construct PTF facilities due to local environmental requirements, e.g., the cost of burying lines underground. These additional costs would be treated as local in nature and thus would not be recovered through the rate for Regional Network Service.

technologies alone, because the benefits of system expansion will not be contingent on or vary depending on the type of technology used to construct it.

237. The ROE Filers request an effective date for their filing consistent with the Operations Date of RTO-NE. The ROE Filers state that should the Commission establish a hearing to consider the issues presented by its filing, the Commission should nonetheless issue rulings without recourse to an evidentiary hearing regarding the appropriateness of: (i) the requested ROE adders; and (ii) the proposed proxy group for calculating the ROE.

2. **Responsive Pleadings**

238. Intervenors argue that the ROE Filers' 50 basis point adder request should be rejected. The New England Advocates and the New England Consumer-Owned Entities argue that this adder is unwarranted because the Transmission Owners have been fully compensated for having transferred operational control of their facilities to an independent entity, i.e., to ISO-NE, back in 1997. In addition, NECPUC argues that the alleged policy basis supporting the adder lacks substantive support and is still under review by the Commission.¹⁴⁵ NECPUC and the New England Advocates also argue that even assuming that an adder of some kind may be appropriate in this case, the ROE Filers have failed to justify the amount of that adder that could be considered appropriate.

239. Intervenors also object to the ROE Filers' proposed 100 basis point adder for new transmission facilities. The New England Advocates and the New England Consumer-Owned Entities submit that this request should be rejected because the ROE Filers have been fully compensated for their commitment to regional transmission planning and expansion, beginning in 2000, when ISO-NE implemented these procedures on a system-wide basis. These intervenors conclude that ISO-NE already has exclusive authority to develop long term planning.

240. NECPUC argues that while the ROE Filers cite to a "severe regional liquidity crunch in New England" as support for their 100 basis point adder, they fail to tie this alleged condition to the issue presented here, i.e., to transmission financing. In addition,

¹⁴⁵ NECPUC cites Public Service Commission of the Commonwealth of Kentucky v. FERC (D.C. Cir. No. 03-1097), "Motion of Respondent FERC to Hold Proceedings in Abeyance and for Voluntary Remand to Permit Issuance of a Further Order" (filed December 5, 2003). In the underlying case, the Commission granted a 50 basis point adder to the Transmission Owners of the Midwest ISO. See Midwest Independent Transmission System Operator, Inc., 100 FERC ¶ 61,292 at 62,315 (2002), reh'g denied, 102 FERC ¶ 61,143 (2003).

NECPUC asserts that there can be no justification to provide an incentive adder for all projects, including projects already planned and commenced, regardless of whether RTO-NE has even determined that these projects are either useful or needed.

241. Intervenor also take issue with the DCF analysis underlying the New England Transmission Owners requested base ROE. First, intervenors argue that the proxy groups relied upon by the New England Transmission Owners to perform their DCF analyses were unrepresentative. The New England Consumer-Owned Entities, for example, argue that these proxy groups included firms that own no New England transmission, but do own substantial (and far riskier) merchant or nuclear generation. Consequently, it is asserted, including non-New England diversified holding companies in a DCF proxy group for RTO-NE can only yield anomalous results such as those evidenced by the 17.7 percent ROE indicated for PPL Corporation (PPL) (on which the New England Transmission Owners rely).¹⁴⁶

242. The New England Advocates also note that while the ROE Filers have generally stable dividend yields, firms included in the Transmission Owners' proxy group do not. In addition, NECPUC notes that because the ROE Filers operate under formula rates, as opposed to stated rates, they bear less transmission risk than Transmission Owners operating in New York and PJM. The NEPOOL Industrial Customer Coalition adds that the Transmission Owners participation in NEPOOL and ISO-NE distinguishes their risk profile from the Transmission Owners participating in the Midwest ISO.

243. The New England Consumer-Owned Entities argue that while using a proxy group comprised of investor-owned utilities alone may yield a small proxy group including only four companies, the Commission has relied upon proxy groups of this size in other cases.¹⁴⁷

¹⁴⁶ NECPUC points out that PPL is a holding company for subsidiaries involved not only in electricity distribution in the State of Pennsylvania, but also power generation and marketing and foreign electricity distribution in the United Kingdom and South America. NECPUC asserts that these international operations are the source of most of PPL's earnings uncertainty. The Connecticut DPUC argues that eliminating PPL from the New England Transmission Owners proxy group would produce a midpoint return of 11.75 percent, based on a range of returns of 8.0 percent to 15.5 percent.

¹⁴⁷ See New England Consumer-Owned Entities protest at 29, citing Southern California Edison Company, 92 FERC ¶ 61,070 at 61,265 (2000); Consumers Energy Company, 98 FERC ¶ 61,333 at 62,411-12 (2002).

244. Intervenors also object to the Transmission Owners reliance on a midpoint return, versus a median return. Intervenors assert that reliance on a median return is necessary in this case in order to give consideration to more of the companies used by the Transmission Owners in their proxy group, not just those at the top and bottom of the ROE range. These intervenors assert that reliance on a median return is also consistent with Commission policy¹⁴⁸ and would have produced an ROE of 10.2 percent in this case, based on the Transmission Owners' preferred proxy group.

3. Commission Finding

245. We agree with the ROE Filers that their voluntary proposal to establish RTO-NE and their commitment to transfer the day-to-day operational control authority over their transmission facilities to RTO-NE, warrants a 50 basis point incentive adder to the ROE component recovered in RTO-NE's transmission rates for Regional Network service. Accordingly, we will accept this incentive adder with respect to these facilities without suspension or hearing. Approval of this adder is consistent with our rulings in other cases.¹⁴⁹ It is also appropriate, here, because of the region-wide benefits that will be set in place by the establishment of RTO-NE. Accordingly, we disagree with intervenors' argument that the ROE Filers have already been rewarded (and compensated in full) for their participation in the markets currently overseen by NEPOOL and ISO-NE. In fact, these existing arrangements, for the reasons discussed in Section C(1) of this order, above, have not met the independence requirement set forth by the Commission in Order No. 2000.

246. We also reject intervenors' argument that the ROE Filers have failed to support their entitlement to a full 50 basis point adder versus some lesser amount. While the incentive adder we approve here is not derived from any mathematical formula or equation, it can be supported, here, as falling within a zone of reasonableness based on our RTO formation policies and the facts and record before us. For the reasons discussed above, we believe a 50 basis point adder in this case is reasonable.

¹⁴⁸ See NECPUC protest at 19 and Connecticut DPUC protest at 6, citing Transcontinental Gas Pipe Line Corp., Opinion 414-A, 84 FERC ¶ 61,084 at 61,427 (1998); Trunkline Gas Company, Opinion No. 441, 90 FERC ¶ 61,017 at 61,108 (2000).

¹⁴⁹ See PJM Interconnection, L.L.C., 104 FERC ¶ 61,124 at P 74 (2003) (PJM RTO Order); See also Allegheny Power System Operating Companies, et al., 106 FERC ¶ 61,003 (2004); Cleco Power LLC, et al., 101 FERC ¶ 61,008 at P 142 (2002); Midwest Independent Transmission System, 100 FERC ¶ 61,292 at P 31 (2002).

247. However, we will reject the proposed 50 basis point adder as it relates to RTO-NE's Local Service Schedules. The adder was intended as an incentive for transmission owners to turn over the operational control of their transmission facilities to an entity responsible for providing regional transmission service under the terms and conditions of a regional tariff. While the rationale for this incentive applies for the facilities that are part of the Regional Network Service, it does not apply for the facilities that are subject to the Local Service Schedule. The Local Service charges generally recover the costs of facilities that do not provide regional service, e.g., lower voltage lines and radial lines. Additionally, the Local Service Schedule may include the cost of upgrades to PTF facilities that are higher because of local environmental decisions in the siting process. Since the beneficiaries of these costs primarily go to local customers, we do not find that it is reasonable to grant the incentive adder that is designed to apply for facilities that provide regional benefits.

248. Also, RTO-NE has less control over the facilities that are part of the Local Service Schedule. For example, while service on the PTF facilities is subject to one service, Regional Network Service, there are separate tariffs and terms and conditions of service for each Transmission Owner for Local Service. Additionally, the Transmission Owners have reserved the right to file for changes in terms and conditions for Local Service.¹⁵⁰ By contrast, RTO-NE has the exclusive right to file changes to the terms and conditions of Regional Network Service. We recognize that the Commission has not addressed this type of distinction in our prior orders on rate incentives. However, in those cases, the RTOs did not have the same type of rate design that is proposed here. In those cases, the RTOs only charged a single rate for transmission service over the facilities within the RTO.

249. We will also accept, subject to suspension, hearing, and the application of our Pricing Policy Statement (when issued), the ROE Filers' proposed 100 basis point adder attributable to new transmission investment. In the PJM RTO Order, we held that applicants seeking this incentive adder would be required to demonstrate why the adder is needed to incent investment in new transmission facilities and whether the adder should apply to all types of transmission expansion or be more narrowly focused on transmissions expansions that utilize innovative, less expensive technologies.¹⁵¹ Here, we find that intervenors have raised issues of material fact relating to these requirements. Accordingly, we will set these issues for hearing, subject to our Pricing Policy Statement (when issued). In addition, for the same reasons as discussed above, we will also reject

¹⁵⁰ See TOA at Section 3.04 (Application Authority).

¹⁵¹ See PJM RTO Order, 104 FERC ¶ 61,124 at P75.

the ROE Filers' proposed 100 basis point adder as it would apply to the Local Service Schedules.

250. We will also accept, subject to suspension and hearing, the ROE Filers' proposed base ROE. While the ROE Filers assert that a base ROE of 12.8 percent is similar to the ROEs recently approved by the Commission for the Midwest ISO and International Transmission Company, intervenors raise a number of challenges regarding the appropriateness of such an ROE here. We believe these matters would be best addressed in an evidentiary hearing. Accordingly, we will accept and suspend the ROE Filers' proposed 100 basis point adder and proposed base ROE for filing, make them effective upon the RTO-NE Operations Date, subject to refund, and set these issues for hearing. However, in order to provide the parties a opportunity to resolve these matters among themselves, we will hold the hearing in abeyance and institute settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁵²

The Commission orders:

(A) The Filing Parties' proposal to establish RTO-NE as an Order No. 2000-compliant RTO is hereby accepted for filing, subject to conditions, to become effective on the Operations Date of RTO-NE, as discussed in the body of this order.

(B) The Filing Parties' request for a declaratory order that the existing arrangements governing ISO-NE and NEPOOL will terminate as of the Operations Date of RTO-NE is hereby denied, as discussed in the body of this order.

(C) As discussed in the body of this order, the Filing Parties are hereby directed to make a compliance filing within 90 days of the date of this order.

(D) The ROE Filers' proposed rates to implement their joint ROE proposals applicable to RTO-NE's regional and local transmission rates under the RTO-NE OATT are hereby rejected, in part, and accepted, in part, for filing, subject to suspension and the outcome of an evidentiary hearing, to become effective upon the Operations Date of the RTO-NE, as discussed in the body of this order.

(E) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402 (a) of the Department of Energy Organization Act and by the Federal Power Act, particularly Sections 205 and

¹⁵² 18 C.F.R. § 385.603 (2003).

206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), a public hearing shall be held in Docket Nos. ER04-157-000 and ER ER04-157-001 concerning, as discussed in the body of this order: (i) the ROE Filers' proposed Base ROE; and (ii) the appropriateness of a 100 basis point adder as it relates to Regional Network Service. As discussed in the body of this order, the hearing will be held in abeyance to give the parties time to consider settlement options.

(F) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (1998), the Chief Administrative Law Judge is hereby authorized to appoint a settlement judge within 15 days of the date of this order. Such settlement judge will have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they may make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(G) Within ninety (90) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every ninety (90) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(H) If the settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in this proceeding in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(I) The complaint filed by The Consumers of New England against NEPOOL in Docket No. EL01-39-000 is hereby dismissed as moot, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.

Docket Nos. RT04-2-000 and ER04-116-000
Intervenors

AES Londonberry, LLC, Calpine Eastern Corporation,
FPL Energy, LLC, Mirant Americas Energy Marketing, LP,
Mirant New England, Inc., Mirant Canal, LLC, Mirant Kendall, LLC
NRG Companies, and USGen New England, Inc.

American National Power, Inc.
Associated Industries of Massachusetts
BP Energy Company
Central Vermont Public Service Corporation
Connecticut Attorney General
Connecticut Department of Public Utility Control
Conservation Law Foundation
Constellation Power Source, Inc. and Constellation NewEnergy, Inc.
Dominion Resources, Inc., Dominion Energy Marketing, Inc.,
Dominion Nuclear Connecticut, Inc. and Dominion Retail, Inc.
Duke Energy North America, LLC
Edison Mission Energy, Inc.; Edison Mission Marketing &
Trading, Inc.; Midwest Generation EME, LLC and Coral Power
LLC

Electric Power Supply Association
Exelon Corporation
Florida Power & Light Co.
Green Mountain Power Corporation
HQ Energy Services (US), Inc.
Independent Power Producers of New York, Inc.
Industrial Energy Consumer Group and PowerOptions, Inc.
Interconnection Rights Holders Management Committee
Long Island Power Authority and LIPA
Maine Public Utilities Commission
Massachusetts Attorney General; Connecticut Office of Consumer Counsel; Maine
Public Advocate; and New Hampshire Office of Consumer Advocate
Massachusetts Department of Telecommunications and Energy
National Grid USA
NEPOOL Industrial Customer Coalition
New England Conference of Public Utilities
Commissioners
New England Consumer-Owned Entities
New England Power Pool Participants Committee

New York Independent System Operator, Inc.
New York Transmission Owners
Ontario Power Generation, Inc.
PPL EnergyPlus, LLC; PPL Maine, LLC; PPL Great Works, LLC; and PPL Wallingford
Energy LLC
Public Service Electric and Gas Company; PSEG Power LLC and
PSEG Energy Resources & Trade LLC
Reliant Resources, Inc.
Strategic Energy L.L.C.
TransCanada Power Marketing Ltd
TransEnergie U.S. Ltd. and Cross-Sound Cable Company, LLC
Union of Concerned Scientists
Unitil Companies
Vermont Department of Public Service
Vermont Public Service Board
Western Massachusetts Industrial Customers Group

Appendix B

Docket Nos. ER04-157-000 and ER04-157-001
Intervenors

Connecticut Attorney General
Connecticut DPUC
Independent Power Producers of New York, Inc.
Industrial Energy Consumer Group
Interconnection Rights Holders Management Committee
Maine Public Utilities Commission
Massachusetts Attorney General; Connecticut Office of Consumer Counsel; Maine
Public Advocate; and New Hampshire Office of Consumer Advocate
Massachusetts Department of Telecommunications and Energy
NEPOOL Industrial Customer Coalition
New England Conference of Public Utilities
Commissioners
New England Consumer-Owned Entities
New Hampshire Office of Consumer Advocate
Office of Consumer Counsel
Union of Concerned Scientists
Vermont Department of Public Service
Vermont Public Service Board
Western Massachusetts Industrial Customers Group