

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Jon Wellingshoff.

New England Independent Transmission Company, Docket No. EL07-21-000
L.L.C.

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued February 20, 2007)

1. On December 4, 2006, New England Independent Transmission Company, L.L.C. (New England ITC), submitted a petition for declaratory order (Petition) seeking a finding that it meets the independence and capability requirements of the ISO New England Inc. (ISO-NE) open access transmission tariff (OATT) pursuant to Commission requirements. In this order, we grant the Petition.

I. Petition

2. New England ITC is developing the “Green Line” project, a 660 MW high voltage direct current (HVDC) underwater transmission line that will stretch approximately 140 miles to connect the coast of Maine with the city of Boston.¹ The Green Line project is expected to begin commercial operations in 2013. As part of the development of the Green Line, New England ITC requests a Commission finding that it meets the independence and capability requirements of Attachment M of the ISO-NE OATT.

3. New England ITC filed the Petition so that it can participate in the ISO-NE Regional System Planning (RSP) process. Such a finding is required by Attachment M of ISO-NE’s Transmission, Markets and Services Tariff, which is the ISO-NE OATT. The purpose of the RSP process is to identify system reliability and market efficiency needs that may not be met by Market Participants through market solutions.² New England ITC seeks a Commission determination by March 1, 2007.

¹ New England ITC is not seeking a definitive Commission order on the benefits of the Green Line project. *See* Petition at 9.

² *See* section II.48 and Attachment N of ISO-NE’s OATT.

4. Upon a Commission finding that it qualifies as an independent transmission company (ITC), New England ITC plans to enter into an ITC Agreement with ISO-NE consistent with Attachment M of the ISO-NE OATT. New England ITC then plans to develop, construct, maintain and operate (subject to ISO-NE's direction) new regional transmission facilities in ISO-NE that will be part of the Pool Transmission Facilities. Upon completion of construction, testing, and commercial operation of the Green Line, New England ITC plans to transfer the operation and control of the Green Line to ISO-NE, thus making the Green Line project available for service under the ISO-NE OATT. New England ITC adds that it will not construct the Green Line unless it is approved by the ISO-NE as part of the RSP.

5. Finally, New England ITC states that upon a Commission finding of independence and capability it will have the responsibilities and rights of an ITC pursuant to Attachment M. Among the rights and responsibilities, New England ITC will: (1) possess section 205 rights involving the recovery of revenue requirements; (2) develop protocols for transmission service curtailments; (3) establish ratings for its facilities; (4) develop transmission maintenance and outage schedules; and (5) plan its system in coordination with ISO-NE.

A. Independence Criteria

6. New England ITC asserts that it currently operates independently of market participants. It plans to institute procedures to prohibit current or future employees and officers from having any direct financial interests in market participants that could raise a conflict of interest. Furthermore, New England ITC also states that it will defer to the independent control and decision-making of the ISO-NE and notes that it will relinquish operational control of the Green Line transmission facilities to ISO-NE.

7. As a Connecticut limited liability company, New England ITC explains it will be governed by a Managing Member and will not issue stock or have shareholders.³ New England ITC will be owned by: (1) Green Power Ventures; (2) Anbaric Power Ventures, L.L.C. (Anbaric); (3) Catamount Management Corporation (Catamount); (4) Starwood Energy Investors IV, L.L.C. (Starwood); and (5) EIF Green Line, L.L.C. (EIF). According to New England ITC, the investors will possess certain non-operational rights in order to protect their financial investments, but will have no involvement in determining who will be granted access to New England ITC's transmission facilities.

³ Green Power Ventures, L.L.C. (Green Power Ventures) will serve as New England ITC's Managing Member.

8. New England ITC states that principals of Green Power Ventures and Anbaric will serve as New England ITC's executives and will have day-to-day control over the operation of the ITC. Green Power Ventures' owner is also the CEO and operator of the Neptune Regional Transmission System, L.L.C. (Neptune).⁴ Both Green Power Ventures and Anbaric have an indirect part ownership interest in Neptune.

9. New England ITC states that Catamount, Starwood and EIF will serve as non-managing investors in New England ITC and none of the three will hold more than 49 percent of the membership interests. Starwood's investment affiliate owns an 80 percent interest in five natural gas-fired generating facilities in southern California.⁵

10. New England ITC states that two of EIF's affiliates own 66 percent of the interests in Berkshire Power Company, L.L.C., which owns and operates a single 245 MW generating facility in the ISO-NE region. All of the output of the Berkshire facility is committed under a reliability must-run contract with ISO-NE. New England ITC asserts that because Berkshire Power's output is controlled by ISO-NE, and because access to the New England transmission system is available under the ISO-NE OATT, EIF has no economic or commercial interests that would be significantly affected by New England ITC's actions or decisions.

11. New England ITC states that one of EIF's affiliates is a passive investor in Neptune. Furthermore, New England ITC states that EIF has extended a development credit to developers of the 70 MW Loring Cogeneration facility in Northern Maine, but has not made any equity investment in that facility, and does not exercise any management or control rights over it. In addition, New England ITC states that EIF holds a passive, non-voting, non-managing interest in the 70 MW Waterside generating facility in southwestern Connecticut, all of the output of which is committed under a long-term load response program with ISO-NE.

12. New England ITC states that, consistent with Order No. 2000, it will promptly inform the Commission of any changes to its corporate structure or governance that could

⁴ Neptune, which is a merchant transmission project, is a 660 MW underwater HVDC transmission line that links the control area of PJM Interconnection, L.L.C. with that of New York Independent System Operator, Inc.

⁵ The Commission has previously disclaimed jurisdiction over Starwood's affiliate as a "passive investor" with regard to Neptune. Petition at 24 n.48 (*citing Neptune Regional Transmission System, L.L.C.*, 111 FERC ¶ 61,306, at P 23-25 (2005)).

affect its future independence.⁶ New England ITC also states that it satisfies the Commission's independence requirements as set forth in Order No. 679, *Promoting Transmission Investment through Pricing Reform*.⁷ Furthermore, according to New England ITC, its structure makes it independent and is therefore consistent with the Commission's *Policy Statement Regarding Evaluation of Independent Ownership and Operation of Transmission*.⁸ For these reasons, New England ITC states that its proposal complies with the Commission's independence requirements.

B. Capability Criteria

13. New England ITC explains that it will draw on the resources, experience and capabilities of the developers of Neptune project, and that its involvement in the development, construction and operation of other transmission facilities provides the necessary proof of its capability to qualify as an ITC.⁹ It will share the same principals, investors, equipment suppliers, and operations and construction management personnel that were involved in the Neptune project's underwater HVDC transmission line, and therefore, it claims, any (1) planning, development and management; (2) financing; (3) construction; and (4) operation and maintenance capability requirements are satisfied. New England ITC contends that EIF, Starwood, and Catamount will provide the necessary development capital for New England ITC, including options for permanent equity capital.

⁶ In Order No. 2000, independence was identified as one of the minimum characteristics and functions that an entity must satisfy in order to be approved as a Regional Transmission Operator (RTO). *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089, at 31,046 (1999) (Order No. 2000), *order on reh'g*, Order No 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001). The Commission has applied the RTO independence criteria to ITCs. *See* Order No. 2000, at 31,061; *see also ITC Holdings Corp.*, 102 FERC 61,182 at P 27 (2003).

⁷ 116 FERC ¶ 61,057 (2006) (Order No. 679).

⁸ 111 FERC ¶ 61,473 (2005) (*Independent Transmission Policy Statement*).

⁹ Petition at 32-36.

II. Notice, Interventions, Comments and Answer

14. Notice of New England ITC's filing was published in the *Federal Register*, 71 Fed. Reg. 76,312 (2006), with interventions, protests and comments due on December 28, 2006. New England Power Pool Participants (NEPOOL) Committee filed an emergency motion to intervene and request for extension of time to file comments to January 10, 2007. New England ITC did not oppose the motion and the extension was subsequently granted.

15. Motions to intervene were filed by the United Illuminating Company, Industrial Energy Consumer Group, NRG Companies,¹⁰ Connecticut Department of Public Utility Control, Bridgeport Energy, L.L.C., Long Island Power Authority and LIPA, Department of Telecommunications and Energy of the Commonwealth of Massachusetts, Casco Bay Energy Company L.L.C., and the Vermont Department of Public Service. Florida Power & Light Company – New England Division (FP&L) filed an untimely motion to intervene.

16. American Wind Energy Association (American Wind Energy), Independent Energy Producers of Maine (IEPM), NSTAR Electric & Gas Corporation (NSTAR), Northern Utilities Service Company (NUSCO), Central Maine Power Company (CMP), National Grid USA, NEPOOL, Maine Public Utilities Commission, New England Conference of Public Utilities Commissioners, Inc. (New England Commissioners), and ISO-NE intervened with comments.

17. IEPM and American Wind Energy urge the Commission to grant a finding that the proposal meets the independence and capability requirements. American Wind Energy supports the Petition insofar as it allows for investment in transmission by new entities, and new investment by existing transmission entities operating in new geographic areas.

18. The New England Commissioners state that it is not necessary for an entity to have an ITC determination before participating in the RSP process. The New England Commissioners request that the Commission limit any decision to the narrow issues of New England ITC's independence and capabilities.

¹⁰ The NRG Companies are composed of: NRG Power Marketing, Inc.; Connecticut Jet Power L.L.C., Devon Power LLC, Middletown Power L.L.C.; and Montville Power L.L.C.; Norwalk Power L.L.C.; Somerset Power L.L.C.

19. NSTAR, NUSCO, CMP, and National Grid USA reserve judgment on whether the Green Line project qualifies for inclusion in ISO-NE's regional planning process, and request that the Commission not prejudge this outcome in its consideration of New England ITC's Petition.

20. NEPOOL states that New England ITC's request for a declaratory order is premature and was filed without any evidence of an understanding between New England ITC and ISO-NE as to their respective responsibilities and obligations. NEPOOL requests that the Commission dismiss the Petition without prejudice, thereby allowing New England ITC to refile once such an understanding with ISO-NE is reached with NEPOOL. Alternatively, NEPOOL requests that the Commission hold this proceeding in abeyance. If the Commission decides to grant the Petition before there is an understanding of respective responsibilities and obligations, NEPOOL urges that any order be limited to the New England ITC's independence and capabilities. Finally, NEPOOL submits that the findings are not necessary for either the New England ITC to propose its Green Line project or the RSP process. Maine Public Utilities Commission concurs with NEPOOL.

21. ISO-NE asserts that it supports transmission development that meets regional needs, whether for reliability or region-wide market efficiency, and supports elective and merchant projects. ISO-NE states that New England ITC's approach to Green Line cost recovery may not conform to the OATT provisions that allow only the costs of Regional Benefit Upgrades to be rolled into regional transmission rates. ISO-NE states that in order to be a Regional Benefit Upgrade, an upgrade must be a Reliability Transmission Upgrade or a Market Efficiency Transmission Upgrade.¹¹

22. Additionally, ISO-NE states that New England ITC need not be an ITC to participate in the RSP process. According to ISO-NE, the RSP process "envisions" identification of regional system needs prior to consideration of particular regulated transmission projects and market-based solutions. Furthermore, ISO-NE explains that Attachment M "contemplates" the negotiation of an ITC Agreement as a predicate to a Commission determination of independence and capability. Therefore, ISO-NE contends a ruling on the Petition is premature until the ITC Agreement, which sets forth the respective responsibilities of the ISO and the ITC, is negotiated. ISO-NE requests that the Commission defer ruling on the Petition until after the parties negotiate and file an ITC Agreement. ISO-NE also requests that any Commission determination should avoid reference to the Green Line's suitability for inclusion in the RSP and its ultimate rate treatment.

¹¹ See also section II of ISO-NE's OATT.

23. New England ITC filed an answer to the comments.

III. Discussion

A. Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make those parties who filed them parties to this proceeding.

25. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2006), the Commission will grant FP&L's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

26. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept New England ITC's answer filed herein because it has provided information that assisted us in our decision-making process.

B. Commission Determination

27. As an initial matter, the Commission welcomes innovative projects pursuant to the *Independent Transmission Policy Statement*.¹² New England ITC explains that it intends to work closely with ISO-NE to ensure the development of an appropriate *pro forma* ITC Agreement in accordance with Attachment M. Likewise, ISO-NE states that it has agreed to begin these negotiations in the near future.¹³ Additionally, New England ITC has begun to work with NEPOOL to discuss and facilitate an understanding of the ITC proposal and the proposed Green Line project.¹⁴

28. Many parties request that the Commission's determination in this proceeding be limited to the two narrow issues of independence and capability. We agree. Indeed, New England ITC itself states that its Petition is not intended to address the merits of the Green Line project, as to either its inclusion in ISO-NE's RSP process as a Reliability

¹² 111 FERC ¶ 61,473, at P 1-2, 5.

¹³ ISO-NE Comments at 11.

¹⁴ NEPOOL Comments at 5.

Transmission Upgrade¹⁵ or any determination regarding constraints that may exist in Maine, New Hampshire or Massachusetts, cost allocation, regional cost support and/or transmission development. We therefore clarify that any decision on those matters will be reserved for another proceeding. Our determination in this proceeding is limited to New England ITC's independence and capability to operate as an ITC within the meaning of Attachment M of the ISO-NE OATT.

29. As noted, we are providing a limited finding on independence and capability and agree that there is a need for financing and regulatory certainty early in the process. As New England ITC provides in its answer, all of the funds expended to establish New England ITC and for the Green Line are the result of private development capital. New England ITC notes that it has a real and practical need to obtain a determination on the threshold issues of independence and capability at this time.¹⁶ We agree and therefore we will provide the assurances needed to go forward as we have in the past.¹⁷

30. We note that Order No. 2000 provides that entities wishing to form an RTO will be given flexibility regarding the proposed structures or forms of organization. The Commission "will not limit the flexibility of proposed structure or forms of RTOs" and will accept a transco, ISO, hybrid, or other form as long as it meets our minimum characteristics, functions, and other requirements.¹⁸ As noted in the *Independent Transmission Policy Statement*, similar flexibility will be given to ITCs.

¹⁵ While the 2007 RSP has not yet been presented to the ISO Board of Directors, the pleadings in this case indicate that there is a consensual acceptance of New England ITC's participation in the 2007 RSP process. See ISO-NE comments at 10 and NEPOOL Comments at 2.

¹⁶ New England ITC answer to comments at 9.

¹⁷ See e.g. *Neptune Regional Transmission System L.L.C.*, 96 FERC ¶ 61,147, at 61,633 (2001); accord *Removing Obstacles To Increased Electric Generation And Natural Gas Supply*, 95 FERC ¶ 61,225 (2001); *American Electric Power Service Corporation*, 116 FERC ¶ 61,059, at P 26 (2006) ("Our approach ensures that applicants can receive an early determination regarding the appropriate incentives for a particular project, thereby providing the regulatory certainty that is important in supporting large new investments . . .").

¹⁸ Order No. 2000, at 31,036.

1. Timing

31. According to ISO-NE, the OATT sets out a sequence of events different from that proposed by New England ITC. ISO-NE explains that the RSP process “envisions” identification of regional system needs prior to consideration of particular regulated transmission projects and market-based solutions. Furthermore, ISO-NE explains that Attachment M “contemplates” the negotiation of an ITC Agreement as a predicate to a Commission determination of independence and capability.

32. Attachment M of the OATT does not require the delay of an independence and capability determination until after the negotiation of an ITC Agreement has been completed. Attachment M of the ISO-NE OATT states:

In order for an ITC to assume rights, responsibilities and functions specified in this Attachment, the PTO(s) that are proposing to participate in, join, or become an ITC must apply for, and receive a FERC order [of independence and capability]. . . Once FERC issues an order then the ITC may operate within the ISO consistent with the rights, responsibilities, and functions that have been accepted or approved by FERC . . . and the ITC shall enter into an ITC Agreement with the ISO

33. In response to ISO-NE’s and others’ comments about the approval sequence required under the OATT, we find that New England ITC’s Petition regarding independence and capability does not violate ISO-NE’s OATT and is not premature.

2. Independence

34. New England ITC states that it referred to Order No. 2000,¹⁹ Order No. 679,²⁰ and the *Independent Transmission Policy Statement*²¹ to provide its framework for an independence determination. We agree that these sources provide reasonable criteria for an independence determination.

35. New England ITC states that the independence criteria that is evaluated to determine if an applicant can operate free of market influence includes the applicant’s

¹⁹ 89 FERC ¶ 61,285, at 194.

²⁰ 116 FERC ¶ 61,057, at P 201-03.

²¹ 111 FERC ¶ 61,473, at P 1-2, 5.

governance structure and a consideration of any rights that could allow market participant owners to affect, either directly or indirectly, the applicant's operation, planning or investment decisions.²² The *Independent Transmission Policy Statement* encourages development of a more reliable transmission grid by giving appropriate consideration to passive equity ownership of ITCs by market participants.²³ A showing of independence from any market participant (sellers of energy or ancillary services to the RTO) is required, including financial and decision-making independence.²⁴

36. Order No. 679 provides for increased flexibility, especially if the project will be placed under the operational control of an RTO, as is the case here, and allows ITCs to have investors that are market participants in certain circumstances. The *Independent Transmission Policy Statement* clarifies that ITC proposals with passive minority equity ownership will be accepted and reiterates the safeguards established in *ITC Holdings Corp.*²⁵ to ensure continued independence, including limits on potential ownership by market participants and corporate governance structures that assure that market participants that do purchase limited stakes would not be able to assert influence over independent operation. A merits evaluation will be undertaken on a case-by-case basis, including a determination of the passive ownership's effect on independent operation, planning and construction of the transmission system.²⁶

37. In Order No. 2000, the Commission clarified that a stand-alone transmission company will not be considered a market participant solely because of its ownership of transmission facilities. With the exception of EIF, the investors in the New England ITC are independent of market participants. The managing members of New England ITC will not have any ownership interest in market participants nor will they have any

²² *Id.* at P 5.

²³ The Commission allowed ITC ownership structures to include passive participation of up to 49 percent ownership by a single market participant. *Independent Transmission Policy Statement* at P 5.

²⁴ Order No. 2000, at 31,046 and 31,061; *see also* 18 C.F.R. § 35.34(j)(1).

²⁵ 111 FERC ¶ 61,149 (2005).

²⁶ 111 FERC ¶ 61,473, at P 1-2, 5.

financial ties to market participants. Therefore, the structure meets the requirements of Order No. 2000.²⁷ In addition, the non-managing members will hold no more than 49 percent of membership interests in New England ITC.²⁸

38. The Commission has reviewed New England ITC's proposal for independence criteria and found it to be consistent with Commission policy. The measure for independence in an ITC application is the ability of the applicant to operate free of market participant control or influence. Factors considered include ownership percentage, composition of board of directors,²⁹ rights, responsibilities and corporate structure.³⁰ Moreover, New England ITC states that if the Green Line is built it will be under operational control of ISO-NE and will be required to abide by ISO-NE's OATT. Finally, as with any market participant in ISO-NE, New England ITC will be subject to market monitoring rules of both the RTO and the Commission.

39. Accordingly, we find that the New England ITC's independence criteria is consistent with Commission policy. Therefore, New England ITC's request for a determination of independence is granted.

3. Determination of Capabilities

40. As an initial matter, ISO-NE comments that a capability determination is not possible until specific responsibilities are allocated between the parties. We disagree. The ISO-NE OATT provides a general guideline of the responsibilities for ITCs.³¹ This

²⁷ Order No. 2000, at 31,066.

²⁸ See note 22 *supra*.

²⁹ New England ITC explains that Green Power Ventures is owned and controlled by Edward M. Stern. We note that pursuant to the Commission's regulations, any person who holds an interlocking position as an officer or director of a public utility is required to apply for Commission authorization to hold such position (or if qualified, comply with the regulation pertaining to automatic authorization). While at this time New England ITC's managers do not fall within these requirements, a future filing may be necessary upon a change in circumstances. See Application for Authority to Hold Interlocking Position, 18 C.F.R. §§ 45.1 *et seq*.

³⁰ 111 FERC ¶ 61,149, at P 25-26.

³¹ See generally ISO-NE OATT Attachment M.

provides us with adequate criteria for a capability determination. In addition, citing to various provisions of Attachment M of the ISO-NE OATT, New England ITC provides specific examples of the responsibilities it would undertake as an ITC.³²

41. New England ITC asserts that it has the necessary capabilities to carry out the responsibilities and functions of an ITC within the framework of ISO-NE. We agree. The Petition provides a detailed offering as to New England ITC's proven capability in the context of Neptune. For example, New England ITC states that it has supported the development of the Green Line for more than six months using its own development capital and EIF, Starwood and Catamount will provide the requisite financial support for the Green Line project and New England ITC, with the option to provide permanent equity capital. The Neptune project, which the New England ITC members planned, developed, permitted, financed, and constructed and which is expected to begin operations, provides additional proof of capability.

42. The Commission will engage in ITC capability determinations on a case-by-case basis. Each determination will require the evaluation of a variety of criteria such as the applicant's construction skills, management skill, expertise and competence, financial abilities, and history within the industry. At this time, we are not establishing a definitive list of required criteria. But, based on the showing in the Petition, we find that at this point in its development, New England ITC has the necessary capabilities to continue its development as an ITC pursuant to Attachment M of the ISO-NE OATT.

The Commission orders:

New England ITC's petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Magalie R. Salas,
Secretary.

³² See Petition at 31-32 (citing rights and responsibilities under Attachment M).