



To: ISO New England
From: NESCOE
Cc: Planning Advisory Committee
Date: June 1, 2017
Subject: Response to CLF's May 16, 2017 Request

On May 16, 2017, the Conservation Law Foundation (CLF) requested that ISO New England Inc. (ISO-NE) determine “the existence of Public Policy Requirements . . . that are driving, or may, drive transmission needs relating to the New England Transmission System.” CLF’s request is inconsistent with the Open Access Transmission Tariff (OATT). ISO-NE should reject the request.

In addition, NESCOE takes this opportunity to discuss the recent D.C. Circuit Court of Appeals opinion on Order 1000¹ compliance in New England because CLF inaccurately conflates the process for evaluating policy-driven projects with the process for identifying policy-driven transmission needs.²

Finally, NESCOE offers an observation on the connection between CLF’s Order 1000 request and the serious concern states have expressed in the Integrating Markets and Public Policies (IMAPP) process regarding the use of FERC-jurisdictional tariffs to achieve state-driven clean energy requirements.

I. CLF’s Challenge is Inconsistent with the Public Policy Planning Process under the OATT

CLF misunderstands the Order 1000 process. Although the plain language of the relevant OATT provision is clear, NESCOE sets it forward here to help resolve confusion.

Section 4A of the OATT governs the planning process for public policy projects. Consistent with Order 1000, Section 4A includes the initial process for *identifying* policies that drive transmission needs and the subsequent process, if any, for *evaluating* potential solutions to those needs. *See* Order 1000 at P 205 (“by considering transmission needs driven by Public Policy Requirements, we mean: (1) the identification of transmission needs driven by Public Policy Requirements; and (2) the evaluation of potential solutions to meet those needs.”); Order 1000-A

¹ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011) (Order No. 1000), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132 (Order No. 1000-A), *order on reh’g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

² *Emera Maine v. FERC*, Nos. 15-1139 and 15-1141 (D.C. Cir.) (Apr. 18, 2017) (*Emera*).

at P 321 (clarifying that FERC was “not requiring anything more than what we directed in Order No. 1000, namely, the two-part identification and evaluation process.”).

Sections 4A.1 and 4A.1.1 are the provisions related to the first part of the process (policy identification) and the remainder of Section 4A concerns the second part of the process (solution evaluation).

In pertinent part, Section 4A.1 provides that:

By no later than May 1 . . . NESCOE may submit to the ISO in writing a request for a new Public Policy Transmission Study, or an update of a previously conducted study. The request will identify the Public Policy Requirements identified as driving transmission needs relating to the New England Transmission System, and may identify particular NESCOE-identified public policy-related transmission needs as well. Along with any such request, NESCOE will provide the ISO with a written explanation of which transmission needs driven by state or federal Public Policy Requirements the ISO will evaluate for potential solutions in the regional planning process, including why other suggested transmission needs will not be evaluated. The ISO will post the NESCOE request and explanation on the ISO’s website. *If NESCOE does not provide that listing of identified transmission needs (which may consist of a NESCOE statement of its determination that no transmission needs are driven by state or federal Public Policy Requirements identified during the stakeholder process) and that explanation (which may consist of a NESCOE explanation of why no transmission needs are driven by state or federal Public Policy Requirements identified during the stakeholder process), the ISO will note on its website that a NESCOE listing and explanation have not been provided. In that circumstance, the ISO will determine subsequently (after opportunity for Planning Advisory Committee input), and post on its website an explanation of, which transmission needs driven by state or federal Public Policy Requirements the ISO will evaluate in the regional planning process, including why other suggested transmission needs will not be evaluated. (Emphasis added)*

The plain language of Section 4A.1 designates NESCOE as the entity that identifies whether there are state or federal public policies driving transmission needs and, in turn, whether a Public Policy Transmission Study should be commenced to evaluate potential solutions.

ISO-NE only has a role in this process under two scenarios:

- (1) if NESCOE entirely fails to provide a submission to ISO-NE by May 1 of the relevant year, or

(2) if NESCOE's submission fails to meet the requirements in the OATT.³

In the latter scenario, NESCOE meets the requirements so long as it includes a statement of determination that no transmission needs are driven by the stakeholder-identified Public Policy Requirements and an "explanation of why no transmission needs are driven by state or federal Public Policy Requirements identified during the stakeholder process."

As long as NESCOE provides its statement and explanation, the OATT provides only *one* avenue to challenge NESCOE's determination and that challenge must relate solely to federal policies. Under Section 4A.1.1, if a stakeholder asserts "that a *federal* Public Policy Requirement that may drive transmission needs relating to the New England Transmission System has not been appropriately addressed by NESCOE, it may file with the ISO, no later than 15 days after the posting of NESCOE's explanation as described in Section 4A.1 . . . a written request that explains the stakeholder's reasoning and that seeks reconsideration by the ISO of NESCOE's position regarding that requirement." (Emphasis added). There is no comparable provision in the OATT allowing a stakeholder to challenge NESCOE's determination regarding the identification of *state* Public Policy Requirements driving transmission needs. The tariff structure as it relates to state laws is clear and it is deliberate.

To NESCOE's knowledge, as part of the lengthy stakeholder process on Order 1000 compliance in New England, no party ever proposed tariff language to do what CLF asks ISO-NE to do now: allow for challenges to NESCOE's determination on state policies. Furthermore, ISO-NE never included such a provision in its compliance filings. CLF proposed tariff amendments on two separate occasions in September 2012 for ISO-NE's inclusion in OATT revisions to comply with Order 1000. It never included proposed changes to the process set forth in Sections 4A.1 or 4A.1.1 or any changes regarding NESCOE's role in identifying Public Policy Requirements that drive transmission needs. Indeed, in a later filing with FERC on Order 1000 compliance, CLF endorsed the approach reflected in the current tariff whereby NESCOE makes the determination on policy requirements that drive transmission needs. CLF asked FERC to accept ISO-NE's second compliance filing, stating that "[t]he revised approach to the project selection, development and cost allocation has the states determining the policies that may drive transmission, but leaves with ISO-NE the authority to select the most cost-effective project and to allocate the costs to all states according to the 70/30 method described above." Comments of the Conservation Law Foundation and the Sustainable FERC Project, Docket Nos. ER13-193-000 and ER13-196-000 (Dec. 16, 2013), at 12.

In its brief to the D.C. Circuit in *Emera*, FERC unequivocally explained to the Court how the OATT operates regarding the identification of Public Policy Requirements driving transmission needs: "[NESCOE] chooses the public policy-driven transmission needs for which the regional operator must evaluate potential solutions." Brief of Respondent FERC, Case Nos. 15-1139 and 15-1141(D.C. Cir.) (filed May 20, 2016) at 61. FERC further clarified that "ISO New England would not make judgments about state policies or the means by which States would satisfy their policy objectives" and that ISO-NE's role in selecting projects as the RTO/ISO would be based

³ ISO-NE has a role in Section 4A regarding the identification of local (municipal and county) Public Policy Requirements, which is not relevant to the CLF request.

on “specific transmission needs (*identified by the States Committee* [i.e., NESCOE]) driven by Public Policy Requirements (established by federal or state officials).” *Id.* at 61-62 (emphasis added).

There should not be any confusion regarding the meaning and operation of the OATT in connection with the identification of state and federal policies that drive transmission needs and the commencement of a Public Policy Transmission Study. Through its May 1, 2017 submission, NESCOE provided the statement and explanation that is required under Section 4A.1 and included in that submission state responses that exceed what is required in the OATT. ISO-NE should reject CLF’s attempt to create a new process, after-the-fact, that is divorced from the plain language in the tariff. It would be inappropriate, as FERC has found, for ISO-NE “to reconcile state policies”⁴ and to so casually dismiss, as CLF urges, each state’s analysis of its laws and how they affect transmission needs.⁵

II. CLF Misreads *Emera*

CLF mistakenly claims that *Emera* requires “ISO-NE to make its own determination . . . regarding the existence of [Public Policy Requirements] that are driving, or may, drive transmission needs relating to the New England Transmission System.” CLF states that “[a]s the D.C. Circuit has confirmed, it is fundamentally the responsibility of ISO-NE—not the states—to evaluate transmission needs and potential solutions as part of its Regional System Plan process, regardless of whether those transmission needs arise from state public policy requirements or any other source.” CLF has conflated the process for *evaluating* solutions to policy-driven transmission needs with the process of *identifying* if there are any needs in the first place. *Emera* imposes no requirements on ISO-NE to determine Public Policy Requirements driving transmission needs and directed no changes to the OATT.

As discussed above, Order 1000 required a two-part process for considering policy-driven transmission needs: (1) the identification of transmission needs driven by Public Policy Requirements; and (2) the evaluation of potential solutions to meet those needs. Order 1000-A at P 321. NESCOE’s appeal in *Emera* concerned only the second part of this process and, more specifically, whether ISO-NE was required to select a project as part of its evaluation of solutions. The Court’s opinion served to clarify that no such selection is required. *See Emera*, Slip Op. at 19.

ISO-NE’s rules regarding the identification of policy needs has never been in controversy, was not before the Court, and, as discussed above, FERC itself affirmed to the Court the role that NESCOE plays in that process. There was no remand to FERC to direct any changes to the OATT whatsoever. If anything, by concluding that “[t]he division of roles between ISO-NE and the states poses no jurisdictional problem for FERC,” *Emera* affirms the process reflected in the current OATT whereby NESCOE must first identify a state policy driving a transmission need

⁴ Order 1000-A at P 327.

⁵ The new process CLF seeks to impose on the region would raise new jurisdictional questions and undermine the features of Order 1000 that purported to respect the sovereignty of states.

before ISO-NE begins expending consumer dollars on evaluating a need. As *Emera* plainly states, “ISO-NE has no role in setting public policy for the states.” *Id.* at 21.

NESCOE appreciates the work ISO-NE, the New England Power Pool (NEPOOL), FERC and others have dedicated to the Order 1000 process over the last several years. ISO-NE should reject CLF’s after-the-fact request to modify the process.

III. CLF Order 1000 request and influence on IMAPP approaches

Finally, as an important, related aside, NESCOE, ISO-NE, market participants, and others have engaged over the last year in constructive discussions as part of NEPOOL’s IMAPP initiative. Those discussions have included the potential to develop a wholesale market structure that states can use to “achieve” their clean energy public policy requirements. NESCOE has expressed concern throughout the IMAPP process about using a FERC-jurisdictional tariff to execute the requirements of state laws and has, in particular, highlighted changes to New England’s Order 1000 compliance filing as an example of stakeholders seeking to shift decision-making over the implementation of state laws away from state officials.⁶

NESCOE is disappointed that, in the midst of collaborative efforts to explore market-based proposals through IMAPP, CLF now asks ISO-NE to assume the role that belongs to state officials, namely, determinations in connection with the execution of state laws. The very thing that CLF advocates in the context of Order 1000—a change to NESCOE’s role in the identification of Public Policy Requirements driving transmission needs—is precisely the kind of after-the-fact market participant action that causes the states serious pause in using a FERC-jurisdictional tariff to achieve their clean energy requirements.⁷

⁶ See, e.g., Memo from NESCOE to NEPOOL, *Feedback to NEPOOL on Long-Term “Achieve”-style IMAPP proposals*, April 7, 2017, at 4-5, available at http://nescoe.com/wp-content/uploads/2017/04/NESCOE_Memo_NEPOOL_4-7-17f.pdf.

⁷ See *id.*