

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

ISO New England Inc.

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Docket Nos. ER13-193-000
ER13-196-000
(not consolidated)

**REQUEST FOR CLARIFICATION AND REHEARING OF
THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY AND
THE FIVE NEW ENGLAND STATES**

June 17, 2013

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Pursuant to Section 313 of the Federal Power Act (“FPA”), 16 U.S.C. § 825*l* (2006), and Rules 212 and 713 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.713 (2012), the New England States Committee on Electricity (“NESCOE”),¹ the Department of Public Utilities of the Commonwealth of Massachusetts (“Mass DPU”), the Rhode Island Public Utilities Commission (“Rhode Island PUC”), the Connecticut Public Utilities Regulatory Authority (“CT PURA”),² the Commissioner of the Connecticut Department of Energy and Environmental Protection (“CTDEEP”),³ the State of New Hampshire Public Utilities Commission (“NHPUC”),⁴ the

¹ On December 10, 2012, NESCOE filed a Motion to Intervene and Protest in this proceeding (“NESCOE Protest”).

² The Mass DPU, Rhode Island PUC and CT PURA filed the “Notice of Intervention and Protest of the Southern New England States” in these dockets on December 10, 2012 (“Southern New England States Protest”).

³ CTDEEP filed the “Motion To Intervene and Comments of the Commissioner of the Connecticut Department of Energy and Environmental Protection in Support of the Protest of the Massachusetts Department of Public Utilities” in these dockets on December 10, 2012. CTDEEP is the designated NESCOE manager for the state of Connecticut.

⁴ The NHPUC filed the “Motion for Out-Of-Time Intervention of The New Hampshire Public Utilities Commission” in these dockets on December 13, 2012.

Vermont Public Service Board (“VT PSB”),⁵ and the Vermont Public Service Department (“VPSD”)⁶ (collectively, the “Five New England States”)⁷ respectfully request clarification and rehearing of the Commission’s May 17, 2013 Order on Compliance Filings issued in the above-captioned proceedings (“May 17 Order”).⁸ For the reasons detailed below, the Commission should grant rehearing and take appropriate action to ensure that its findings and directives (i) are consistent with the requirements set forth in Order No. 1000,⁹ (ii) do not exceed the bounds of the Commission’s statutory authority, (iii) answer legitimate concerns regarding the effect of its directives on the execution of state policies, and (iv) articulate a satisfactory explanation for the Commission’s determinations.

I. INTRODUCTION

In the May 17 Order, the Commission found that the compliance filing made by ISO New England Inc. (“ISO-NE”) and the PTO Administrative Committee (“PTOs”) (together, the “Filing Parties”) partially complied with the requirements set forth in Order No. 1000.¹⁰ Among other findings, the Commission rejected two major components of the Filing Parties’ proposal: (1) the process for evaluating transmission solutions to identified transmission needs driven by

⁵ The VT PSB filed the “Out-of-Time Motion to Intervene of Vermont Public Service Board” in these dockets on January 7, 2013.

⁶ The VPSD is the designated NESCOE manager for the state of Vermont. The VPSD has to date not intervened in the above-captioned dockets. The VPSD represents the interests of the public in utility matters and is responsible for utility planning to meet the public’s need for least cost, sustainable energy.

⁷ On January 8, 2013, NESCOE and the Five New England States jointly filed the Motion for Leave To Respond and Response (“NESCOE/Five New England States Answer”) in this proceeding. The Commission recognized NESCOE and each of the Five New England States as parties to this case and accepted the NESCOE/Five New England States Answer. May 17 Order at P 8.

⁸ *ISO New England Inc.*, 143 FERC ¶ 61,150 (2013).

⁹ *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), *petition for review pending*, No. 12-1232 (D.C. Cir.).

¹⁰ *Id.* at PP 1, 11.

Public Policy Requirements, and (2) the cost allocation method associated with public policy-driven projects.¹¹ The Filing Parties are required to make a further compliance filing within 120 days of the issuance of the May 17 Order to correct these and other areas of the proposal that the Commission found inconsistent with Order No. 1000.

NESCOE and the Five New England States have been active participants in the Order No. 1000 proceeding since the proposed rulemaking phase and have worked closely with ISO-NE and market participants in the ongoing regional stakeholder process addressing compliance with Order No. 1000. NESCOE and the Five New England States have been highly engaged in the development of the process for incorporating public policy requirements into the transmission planning process.

During the rulemaking process, NESCOE expressed support for the Commission's proposal to establish procedures to consider transmission needs driven by public policies as part of the planning process, noting that NESCOE shared "the Commission's interest in helping to bring to fruition projects and associated transmission that meet state and federal policy objectives" and that "[i]f properly structured and implemented, inserting policy considerations in the planning analysis could help the states identify the most cost-effective means to achieve the policy objectives."¹² Similarly, the Mass DPU filed comments supporting "the concept of requiring transmission planning processes to consider public policy requirements, provided that any final rule is carefully crafted and implemented to take into account"¹³ concerns including

¹¹ See, e.g., *id.* at PP 11, 64, 67, 116-119, 172, 313-315.

¹² NESCOE Comments, Docket No. RM10-23-000 (Sept. 29, 2010), at 1, 17.

¹³ Comments of the Massachusetts Department of Public Utilities and the Massachusetts Department of Energy Resources, Docket No. RM10-23-000 (Sept. 29, 2010), at 10.

that “[s]tates must be afforded substantial deference in the identification and consideration of their own policy goals in the planning process.”¹⁴

The same views hold true today. A properly structured and implemented Order No. 1000 process can complement and augment states’ efforts to advance their policy objectives. Driven by these considerations—and relying on repeated assurances in Order No. 1000 that regions would be accorded flexibility in tailoring procedures and that the Commission would not encroach into state authority—NESCOE and the states developed the core framework for evaluating and paying for public policy projects that became the basis for the Filing Parties’ proposal. This process, in which NESCOE and the states play a central role in the evaluation and selection of public policy projects, achieved broad regional consensus and was supported by ISO-NE, the states,¹⁵ PTOs, and, except where there was an abstention, every voting member of the New England Power Pool Participants Committee (“NEPOOL”).¹⁶

However, the May 17 Order retreats from the flexibility and respect of jurisdictional boundaries that the Commission pledged in Order No. 1000. In rejecting the New England states’ key role in the process of evaluating public policy projects and associated cost allocation, the Commission applied a rigid and overreaching application of Order No. 1000 that is both inconsistent with its own Final Rule and an unlawful intrusion into state authority, exceeding its

¹⁴ *Id.* at 13. Similarly, the Southern New England States advocated that “[s]tates are and should remain the ultimate decision-makers on questions of whether a transmission project best achieves state public policy goals. The Commission should defer to state regulators and allow them to identify their own policy goals, and the planning process should never consider transmission projects proposed to achieve a state’s public policy goals unless that state – whose policy is at issue – approves.” Reply Comments of the Southern New England States, Docket No. RM10-23-000 (Nov. 12, 2010), at 20.

¹⁵ While the Maine Public Utilities Commission later took a contrary position to NESCOE and the other five New England states regarding the public policy process, the six New England states’ presented a collective view through the Order No. 1000 stakeholder process, including at the New England Power Pool Participants Committee (“NEPOOL”) final vote on compliance filings.

¹⁶ NESCOE/Five New England States Answer at 7 (detailing how irrespective of whether NEPOOL members voted in favor of the Filing Parties’ compliance package or the NEPOOL alternative, both packages included the same essential states’ role in the process).

own authority in so doing. The Commission cannot use an order on a compliance filing to modify the requirements and scope of Order No. 1000. Nor can it sidestep legitimate concerns that the states raised during the compliance proceeding regarding cost allocation, cost containment, and other areas of the Filing Parties' compliance package. NESCOE and the Five New England States urge the Commission to grant rehearing and correct the errors in its May 17 Order.

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

NESCOE and the Five New England States provide the following statement of issues in accordance with Rule 713(c)(2), 18 C.F.R. § 385.713(c)(2) (2012), discussed further below in Section III. This statement of issues also serves as the concise specification of errors required under Rule 713(c)(1), 18 C.F.R. § 385.713(c)(1) (2012). NESCOE and the Five New England States request clarification in the first instance regarding the selection of a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation, which is also the subject of a request for rehearing.

1. The Commission erred in rejecting the Filing Parties' proposed process for evaluating potential solutions to identified transmission needs driven by Public Policy Requirements, and in so doing, the May 17 Order alters the requirements of Order No. 1000 by mandating procedures to evaluate potential transmission projects driven by Public Policy Requirements that are inconsistent with the directives in Order No. 1000. *See, e.g.*, Order No. 1000 at PP 148, 208-212; Order No. 1000-A at P 338. By expanding the scope of the Final Rule in this manner without an opportunity for notice and comment, the Commission acted in an arbitrary and capricious manner. *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222, 227 (D.C. Cir. 2011). The Commission failed to provide an adequate explanation for rejecting a process that is compliant with the Order No. 1000 requirements. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010); *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006).
2. The Commission erred in rejecting the Filing Parties' proposed process for evaluating whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation. NESCOE and the

Five New England States seek clarification that the Commission did not intend for the May 17 Order to depart materially from the requirements set forth in Order No. 1000 regarding the selection of transmission projects driven by state-level Public Policy Requirements for inclusion in the regional system plan for purposes of cost allocation. *See, e.g.*, Order No. 1000 at PP 148, 211, 331; Order No. 1000-A at PP 205, 329, 455. If the requested clarification is not provided, NESCOE and the Five New England States seek rehearing; the Commission does not provide a reasoned explanation for such a material departure from the requirements set forth in the Final Rule. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010).

3. The May 17 Order exceeds the bounds of the Commission's statutory authority by abrogating the central role of the New England states over the execution of their own state policies and intruding into state authority over the development of transmission facilities. The Commission erred in rejecting the Filing Parties' proposed processes for evaluation and selection of transmission projects driven by Public Policy Requirements, which accorded appropriate deference to New England states over matters within their jurisdiction. The May 17 Order is contrary to Order No. 1000, which assured both regional flexibility and a significant role for the states. *See, e.g.*, Order No. 1000 at PP 107, 208, 212; Order No. 1000-A at PP 330, 337-338. The Commission failed to engage in reasoned decision-making by not answering concerns regarding the transfer of state policy implementation to entities other than state officials and the limitations of effectuating state policy solely through transmission development. 16 U.S.C. §§ 824, 824e, 824p, 824q; *Altamont Gas Trans. Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209-210 (D.C. Cir. 2011); *Conn. Light & Power v. FPC*, 324 U.S. 515, 527 (1945); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1288 (D.C. Cir. 2007); *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002).
4. The Commission erred in finding that inclusion of the "opt-in" provision in the Filing Parties' proposed cost allocation method for public policy projects is not compliant with Order No. 1000. The opt-in provision is consistent with the requirements in Order No. 1000 that costs must be allocated at least roughly commensurate with benefits while not involuntarily allocating costs to those that receive no benefits from transmission facilities. *See, e.g.*, Order No. 1000 at P 219; *see also Illinois Commerce Comm'n et al., v. FERC*, 576 F. 3d 470 (7th Cir. 2009). The Commission's rejection of this proposed method without responding to concerns about the potential for an involuntary allocation of costs to states that do not benefit from a public policy project is arbitrary and capricious and does not constitute reasoned decision-making. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Florida Gas Transmission Co. v.*

FERC, 604 F.3d 636, 639 (D.C. Cir. 2010); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209-210 (D.C. Cir. 2011); *Public Service Commission of the Commonwealth of Kentucky v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1991).

5. The Commission erred in failing to require cost containment provisions for public policy projects, which were widely supported by stakeholders in the region and the states and are necessary to make the public policy process just and reasonable. Despite concerns raised regarding the effect of the absence of such provisions, the May 17 Order provided no explanation of how public policy projects would be protected against escalating costs that would erode the cost-benefit assessment justifying a project in the first place; thus, the May 17 Order falls short of the reasoned decision-making required by law, and the Commission acted in an arbitrary and capricious manner. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209-210 (D.C. Cir. 2011); *Public Service Commission of the Commonwealth of Kentucky v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1991); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001).

III. ARGUMENT

A. The Commission Erred by Finding that the Core Participation of New England States in the Filing Parties' Proposed Process for Evaluating and Selecting Transmission Solutions to Identified Transmission Needs Driven by Public Policy Requirements Is Not Consistent with Order No. 1000.

The May 17 Order creates new standards for evaluating public policy projects that are divorced from the requirements set forth in Order No. 1000. Not only are such modifications to Order No. 1000 unlawful absent a notice-and-comment rulemaking process, but the May 17 Order also relegates states to a subordinate role in the implementation of their own policies. NESCOE and the Five New England States request rehearing of these findings, as discussed below.

NESCOE and the Five New England States note that the May 17 Order appears to conflate the process of evaluating potential solutions to identified transmission needs driven by Public Policy Requirements with the process of selecting transmission projects for regional cost allocation. For example, while purporting to discuss the lack of an evaluation process that

satisfies the requirements of Order No. 1000 (May 17 Order at P 116), the Commission refers in a footnote to the Order No. 1000 requirement that “each public utility transmission provider...amend its OATT to describe a transparent and not unduly discriminatory process for evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation.” May 17 Order at n. 216 (emphasis supplied). And the May 17 Order later finds that “the Filing Parties’ proposed evaluation process for Public Policy Transmission Upgrades does not comply with the requirements of Order No. 1000” (*id.* at P 313), concluding in the next paragraph that “[g]iven NESCOE’s role in the proposed evaluation process, the Filing Parties do not explain how this process will provide transparency for stakeholders seeking to understand and provide input in the evaluation of whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation....” *Id.* at P 314 (emphasis supplied). The flip-flopping between these two concepts creates confusion.

Notwithstanding this conflation of the two concepts, NESCOE and the Five New England States discuss below separately the errors in the May 17 Order related to the evaluation of potential solutions to identified transmission needs driven by public policy requirements (section A.1), and selection in the regional transmission plan for purposes of cost allocation of transmission projects to meet such needs driven by public policy requirements (section A.2).

1. The Commission Erred in Rejecting the Filing Parties’ Proposed Process for Evaluating Identified Transmission Needs Driven by Public Policy Requirements, and, Correspondingly, in Unlawfully Expanding the Scope of the Order No. 1000 Requirements.

The Commission erred in finding that the Filing Parties’ proposed public policy process did “not comply with Order No. 1000’s requirement that each public utility transmission provider establish procedures in its OATT to evaluate at the regional level potential transmission

solutions to identified transmission needs driven by public policy requirements” (May 17 Order at P 116) and that “the Filing Parties must develop procedures to evaluate at the regional level all identified potential transmission solutions to transmission needs driven by public policy requirements, not only those that NESCOE indicates that it would like ISO-NE to study further, as the Filing Parties propose” (*id.*; emphasis supplied). In making these findings, the Commission mischaracterizes its rulings in Order No. 1000 and appears to misunderstand the Filing Parties’ proposal in this regard. As a result, the Commission’s ruling unlawfully expands the scope of what Order No. 1000 held.

a. The May 17 Order Is Inconsistent with Order No. 1000’s Requirements for Establishing Procedures To Evaluate Transmission Solutions To Meet Needs Driven by Public Policy Requirements.

In Order No. 1000, the Commission required public utility transmission providers through the regional transmission planning process “to evaluate, in consultation with stakeholders, alternative transmission solutions that might meet the needs of the transmission planning region more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning process.”¹⁷ Such alternative transmission solutions include, among other things, “transmission facilities needed to . . . meet transmission needs driven by Public Policy Requirements.”¹⁸ The Final Rule “require[d] that the regional transmission planning process . . . provide an opportunity to consider transmission needs driven by Public Policy Requirements.”¹⁹

The Commission explained that “by considering transmission needs driven by Public Policy Requirements, we mean: (1) the identification of transmission needs driven by Public

¹⁷ Order No. 1000 at P 148.

¹⁸ *Id.*

¹⁹ *Id.* at P 6.

Policy Requirements; and (2) the evaluation of potential solutions to meet those needs.”²⁰ The Commission clarified in Order No. 1000-A that it was “not requiring anything more than what we directed in Order No. 1000, namely, the two-part identification and evaluation process.”²¹

In the May 17 Order, although finding that the Filing Parties’ proposal meets Order No. 1000’s requirement to establish a just and reasonable and not unduly discriminatory process for identifying transmission needs driven by public policy requirements (May 17 Order at P 111), the Commission found that the Filing Parties’ proposal does “not comply with Order No. 1000’s requirement that each public utility transmission provider establish procedures in its OATT to evaluate at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements” that satisfies the requirements of Order No. 1000 (*id.* at P 116). Accordingly, the Commission’s objection to the Filing Parties’ proposal was directed at the second stage of “consideration,” *i.e.*, evaluation of potential solutions to meet transmission needs driven by Public Policy Requirements.

Regarding the evaluation phase, the Commission stated in Order No. 1000 that it would “leave to public utility transmission providers to determine, in consultation with stakeholders, the procedures for how such evaluations will be undertaken, subject to the Commission’s review on compliance and with the objective of meeting the identified transmission needs more efficiently and cost-effectively.”²² The Commission noted that “this process must include the evaluation of proposals by stakeholders for transmission facilities proposed to satisfy an identified

²⁰ *Id.* at P 205.

²¹ Order No. 1000-A at P 321. The Commission further explained: “Compliance filers must explain how their process gives all stakeholders a meaningful opportunity to submit what they believe are transmission needs driven by Public Policy Requirements, and allow an open and transparent transmission planning process to determine whether to move forward regarding those needs.” *Id.* at P 335.

²² Order No. 1000 at P 211.

transmission need driven by Public Policy Requirements.”²³ Order No. 1000 required a process for evaluation, not specific results regarding which proposed solutions addressing various identified needs would be evaluated for further study.²⁴ The Commission explained that the public utility transmission provider’s procedures must “establish a just and reasonable and not unduly discriminatory process through which public utility transmission providers will identify, out of this larger set of needs, those needs for which transmission solutions will be evaluated.”²⁵ In Order No. 1000-A, the Commission “reiterate[d] that not every proposal by stakeholders during the identification stage will necessarily be identified for further evaluation.”²⁶

The Filing Parties’ public policy proposal did indeed set forth a process for considering transmission needs driven by Public Policy Requirements that is consistent with the express requirements of Order No. 1000, and the Commission erred in finding otherwise. The Filing Parties’ proposed compliance package included the addition of a new section 4A of Attachment K to the ISO-NE Transmission, Markets and Services Tariff (“ISO-NE Tariff”), which, in relevant part, describes the procedures ISO-NE would implement to consider—*i.e.*, identify and evaluate—transmission needs driven by Public Policy Requirements.²⁷

The identification phase occurs first: ISO-NE posts a notice indicating that members of the Planning Advisory Committee may provide NESCOE with input regarding transmission

²³ *Id.*

²⁴ *Id.*; *see also id.* at P 80 (imposing an “affirmative obligation in . . . transmission planning regions to evaluate alternatives that may meet the needs of the region more efficiently or cost-effectively.”).

²⁵ *Id.* at P 209.

²⁶ Order No. 1000-A at P 321.

²⁷ *See* Filing Parties Transmittal Letter at 49-57.

needs driven by Public Policy Requirements.²⁸ Membership in the Planning Advisory Committee is open to any interested stakeholder in New England.²⁹

To the extent needs are identified, ISO-NE will initiate a “Public Policy Transmission Study” to begin the process of evaluating potential solutions. For NESCOE-initiated studies, ISO-NE will first “prepare and post on its website a proposed scope for the Public Policy Transmission Study, and associated parameters and assumptions.”³⁰ ISO-NE will then solicit stakeholder input on the scope, parameters, and assumptions through the Planning Advisory Committee.³¹ Pursuant to the Filing Parties’ public policy proposal, NESCOE determines the final scope, parameters, and assumptions before ISO-NE proceeds to conduct the study.³²

The Public Policy Transmission Study identifies “high level solutions, along with the costs and benefits of various scenarios.”³³ ISO-NE posts the study results on its website and holds a Planning Advisory Committee meeting to solicit input on the scope, parameters and assumptions for a second phase—or “follow-on”—of the initial study.³⁴ As the Filing Parties described in their Transmittal Letter, “[t]he follow-on phase is intended to help narrow the areas of interest from the states so that scope of possible transmission solutions is better defined and so that the possible solutions can be used as the basis for” initiating a competitive solicitation of

²⁸ Filing Parties proposed Attachment K, Section 4A.1.

²⁹ Section 2.3 of Attachment K to the ISO-NE Tariff provides: “Any entity, including State regulators or agencies and, if in existence, a Regional State Committee or similarly situated entity, as specified in Attachment N of the OATT, may designate a member to the Planning Advisory Committee by providing written notice to the Secretary of that Committee....”.

³⁰ Filing Parties proposed Attachment K, Section 4A.2.

³¹ *Id.*

³² *Id.*, Section 4A.3.

³³ Filing Parties Transmittal Letter at 52; *see* Filing Parties proposed Attachment K, Section 4A.3.

³⁴ Filing Parties proposed Attachment K, section 4A.3.

projects to meet the identified need.³⁵ NESCOE makes the determination regarding whether ISO-NE will conduct the follow-on phase of the study, which involves “more detailed analysis and engineering work on the conceptual projects,” as well as whether ISO-NE initiates the competitive project-based solicitation.³⁶

The finding in the May 17 Order that “the Filing Parties must develop procedures to evaluate at the regional level all identified potential solutions to transmission needs driven by public policy requirements, not only those that NESCOE indicates that it would like ISO-NE to study further” (at P 116; emphasis supplied) is inconsistent with the Commission’s statement in Order No. 1000-A that “not every proposal by stakeholders during the identification stage will necessarily be identified for further evaluation”³⁷ (presumably at the evaluation stage). The May 17 Order, thus, appears to be expanding the scope of the Final Rule.

Moreover, there is good reason why Order No. 1000 does not require public utility transmission providers to expend time and resources evaluating each and every potential solution any stakeholder may identify. A simple example illustrates the point. If State A has recently denied siting approval for a project that was to be located within that state, requiring ISO-NE to study a conceptual public policy project mirroring the attributes of the project that was just denied siting approval would not only be an unjust and unreasonable use of consumer dollars, it would also distract from the evaluation of viable solutions to identified needs.

To the extent the Commission’s concern is that stakeholders are not granted an opportunity to provide input on which potential solutions to identified transmission needs driven by Public Policy Requirements will be evaluated, this concern is unwarranted in light of the fully

³⁵ Filing Parties Transmittal Letter at 52.

³⁶ *Id.*; see also Filing Parties proposed Attachment K, Section 4A.3-4A.4.

³⁷ Order No. 1000-A at P 321.

open membership provisions for the Planning Advisory Committee. As discussed above, following the needs identification, ISO-NE initiates and conducts a Public Policy Transmission Study with scope, parameters and assumptions determined following input from the Planning Advisory Committee. This study identifies high-level solutions to the identified needs and costs and benefits of various scenarios. The results of the study are subsequently posted.

This process for evaluation provides an open and transparent process for evaluating potential solutions. It includes an opportunity for stakeholder input into the scenario analysis ISO-NE performs, including proposing changes to study scope, parameters and assumptions. All interested stakeholders have the opportunity to identify solutions for ISO-NE to study, which will be the subject of discussion at the Planning Advisory Committee. This process complies with the plain language of Order No. 1000.

In addition, the Commission's characterization of the Filing Parties' proposed process contains inaccuracies that, absent clarification, impose requirements beyond those in Order No. 1000. The May 17 Order states that "Filing Parties . . . propose that NESCOE, not the public utility transmission providers in the transmission planning region, will (1) determine which, if any, high level solutions to identified transmission needs driven by public policy requirements the states are interested in exploring through the submission of Stage One Proposals, [and] (2) identify which, if any, Stage One Proposal projects that one or more of the states would like to have further developed in a Stage Two study phase." May 17 Order at P 313. However, any further analysis of potential solutions performed at NESCOE's request is just that, an additional study exceeding the requirements of Order No. 1000, conducted at state officials' request to inform whether and how they decide to execute state laws. Order No. 1000 provides flexibility to structure the evaluation process, and nothing therein requires more than scenario analysis.

Indeed, Order No. 1000 itself notes explicitly that scenario analysis could be one way to conduct the evaluation.³⁸ There is no requirement for the incremental analysis that states may request to help inform whether and how states may decide to implement state policies, which is permitted in the Filing Parties' proposal.

b. The May 17 Order's Rejection of the Process for Evaluating Potential Solutions To Needs Driven by Public Policy Requirements Is Inconsistent with Order No. 1000's Assurances of Regional Flexibility.

Order No. 1000 required public utility transmission providers to establish procedures to evaluate among potential solutions to identified transmission needs driven by Public Policy Requirements. It further purported to allow flexibility and noted that "there are many ways potential upgrades to the transmission system can be evaluated, ranging from the use of scenario analyses to production cost or power flow simulations."³⁹ The Filing Parties' proposal meets the requirements set forth in the Final Rule. The Commission's rejection of this aspect of the Filing Parties' public policy proposal is particularly perplexing in light of the Commission's stated desire to provide for regional flexibility, and, moreover, is directly contrary to the Commission's clear statements in Order Nos. 1000 and 1000-A regarding the role of the states.

In Order No. 1000, the Commission held that it would "allow for local and regional flexibility in designing the procedures for identifying the transmission needs driven by Public Policy requirements for which potential solutions will be evaluated in the local or regional transmission planning processes."⁴⁰ Additionally, the Commission stated that it "strongly

³⁸ Order No. 1000 at P 211 ("there are many ways potential upgrades to the transmission system can be evaluated, ranging from the use of scenario analyses to production cost or power flow simulations").

³⁹ *Id.*

⁴⁰ *Id.* at P 208. The Commission makes many references throughout Order No. 1000 to the flexibility it accords regions to demonstrate compliance with its directives. *See, e.g., id.* at PP 61, 149, 157-158, 211, 220, 259, 322, 324, 441, 449, 604.

encourage[s] states to participate actively in both the identification of transmission needs driven by Public Policy Requirements and the evaluation of potential solutions to the identified needs.”⁴¹

The Filing Parties structured a proposal around the guidance that the Commission provided. First, they proposed procedures that rely on a committee of states, NESCOE, to determine which identified needs are appropriate to move forward with an evaluation of potential solutions. Then, along with input from the fully open Planning Advisory Committee, NESCOE provides ISO-NE with the final scope, parameters, and assumptions of the public policy study ISO-NE is to conduct.

The Commission’s rejection of the Filing Parties’ proposal, which was broadly supported in the region, is wholly inconsistent with the numerous assurances the Commission made that regions would have flexibility and the states would be actively involved, particularly with regard to state public policies. Order No. 1000-A clarified these overarching guidelines:

[A]s we also explained in Order No. 1000 and above, our expectation is that state regulators should play a strong role and that public utility transmission providers will consult closely with state regulators to ensure that their respective transmission planning processes are consistent with state requirements. We believe this will be particularly true in the case of state-level Public Policy Requirements, where state regulators are likely to have unique insights as to how transmission needs driven by those state-level Public Policy Requirements should be satisfied. Thus, we leave it to state regulators and public utility transmission providers, in consultation with stakeholders, in each transmission planning region to determine the appropriate role of state regulators in the transmission planning process generally and in the consideration of transmission needs driven by Public Policy Requirements in particular.^[42]

⁴¹ *Id.* at P 212 (emphasis supplied).

⁴² Order No. 1000-A at P 338.

The May 17 Order fails to explain the departure from the Final Rule.

c. By Expanding the Requirements of Order No. 1000, the Commission Unlawfully Changed its Final Rule through the May 17 Order.

With its rulings, the May 17 Order is not only inconsistent with Order No. 1000, it is impermissible as a matter of law. As detailed above, the Filing Parties' proposed procedures for evaluating among potential solutions to address transmission needs driven by public policy requirements are consistent with—and even more detailed than—the requirements set forth in Order No. 1000. The conclusion in the May 17 Order (at P 116) that the Filing Parties' proposed process does not comply with the requirement in Order No. 1000 “that each public utility transmission provider establish procedures in its OATT to evaluate at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements” unlawfully expands the scope of the Order No. 1000 requirements.

The Commission cannot modify its Final Rule through a subsequent compliance order without providing notice and opportunity to comment. By expanding the scope of the Final Rule without an opportunity for notice and comment, the Commission acted in an arbitrary and capricious manner.⁴³ The Commission failed to provide an adequate explanation for rejecting a process that is compliant with the Order No. 1000 requirements.⁴⁴ Therefore, the Commission

⁴³ See *City of Idaho Falls v. FERC*, 629 F.3d 222, 227 (D.C. Cir. 2011) (finding that the Commission's implementation of an order reflected a change in rulemaking requiring notice and opportunity to comment); 5 U.S.C. § 553 (2013).

⁴⁴ See *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006) (“[A]n unexplained departure from prior [agency] policy and practice is not a reasonable one.”) (quoting *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005)).

failed to meet its obligation to “examine the relevant data and articulate a satisfactory explanation for its action.”⁴⁵

2. The Commission Erred in Rejecting the Filing Parties’ Proposed Process for Evaluating Whether To Select a Proposed Public Policy Transmission Upgrade in the Regional Transmission Plan for Purposes of Cost Allocation, and the Commission Should Clarify That It Did Not Intend To Expand the Scope of Order No. 1000, or Grant Rehearing.

The Commission similarly erred in finding that the Filing Parties’ proposed process “prevent[s] the public utility transmission provider from meeting its obligation under Order No. 1000 to evaluate and select the transmission solution that more efficiently or cost-effectively meets the needs of the transmission planning region.” May 17 Order at P 67. Specifically, the Commission found:

Filing Parties do not propose for ISO-NE to select the more efficient or cost-effective solutions to the identified transmission needs driven by public policy requirements. As proposed, a Public Policy Transmission Upgrade is selected in the regional transmission plan when NESCOE, or all of the participating states’ utility regulatory authorities jointly, submit a Public Policy Transmittal to ISO-NE. Therefore, ISO-NE would have neither the authority nor responsibility for selecting a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation.

Id. at P 118.

The Commission explained its finding, stating that “Order No. 1000 places an affirmative obligation on public utility transmission providers to select transmission solutions that may meet the region’s transmission needs driven by public policy requirements more efficiently or cost effectively . . . The Filing Parties’ proposal does not provide that a public utility transmission

⁴⁵ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010) (the Commission must make a reasoned decision based on substantial evidence).

provider will select the more efficient or cost-effective solutions in the regional transmission plan for purposes of cost allocation.” *Id.* at P 119.

- a. The Commission Should Clarify, or in the Alternative, Grant Rehearing, That the May 17 Order Does Not Expand Order No. 1000’s Requirements.

NESCOE and the Five New England States request that the Commission clarify that the May 17 Order was not intended to expand the scope of Order No. 1000 by requiring not just the establishment of a process for determining which projects driven by Public Policy Requirements should be selected in the regional transmission plan for purposes of cost allocation, but also the actual selection of the more efficient or cost-effective solutions among those considered. The plain language of Order No. 1000 is clear that there may not be a cost-effective solution and that there is no assurance that a project will be selected at all.⁴⁶ By contrast, the May 17 Order not only suggests that ISO-NE is required to establish criteria for selection in the regional plan for purposes of cost allocation of transmission projects driven by Public Policy Requirements, but goes a step further and appears to require ISO-NE to actually select and put in the regional system plan the more efficient or cost effective solution among the options studied.

If the Commission does not grant clarification, NESCOE and the Five New England States request rehearing. The explanation in the May 17 Order mischaracterizes Order No. 1000 to such a degree that this ruling, if not modified on rehearing, would constitute an unlawful modification of a rule of the Commission. Order No. 1000 held that with respect to transmission upgrades generally:

If the public utility transmission providers in the transmission planning region, in consultation with stakeholders, determine that an alternative transmission solution is more efficient or cost-effective than transmission facilities in one or more local

⁴⁶ Order No. 1000 at P 211.

transmission plans, then the transmission facilities associated with that more efficient or cost-effective transmission solution can be selected in the regional transmission plan for purposes of cost allocation.^[47]

Order No. 1000 did not say that such facilities must be selected in the regional transmission plan for purposes of cost allocation. The Commission's statements in the May 17 Order amount to a holding that public utility transmission providers must not only consider transmission needs driven by Public Policy Requirements, but that they must also select specific transmission projects in the regional transmission plan for purposes of cost allocation if they are found to be more efficient or cost-effective than transmission facilities in one or more local transmission plans.

The Commission's express intent in the Final Rule was that public utility transmission providers "consider transmission needs driven by Public Policy Requirements," period: "We are not requiring that public utility transmission providers do any more than that... the transmission planning process and the resulting transmission plans would be deficient if they do not provide an opportunity to consider transmission needs driven by Public Policy Requirements."⁴⁸ Now, with the May 17 Order, the Commission appears to be expanding the requirement to consider transmission needs driven by Public Policy Requirements into a requirement to select projects evaluated as a result of this consideration in the regional transmission plan for purposes of cost allocation.

To understand the full import of this ruling in context, the planning process in New England must be considered. Selection of a project for inclusion in the ISO-NE Regional System Plan ("RSP") is an initial critical step in moving a project to siting, construction, and cost

⁴⁷ *Id.* at P 148 (emphasis supplied).

⁴⁸ Order No. 1000-A at P 205.

allocation. Once a project is included in the RSP, it proceeds toward siting approval and construction unless there is a change in need or a technical problem is identified. Inclusion of a project in the RSP may also confer certain rights on the transmission developer, such as entitlement to abandoned plant recovery if the project is later removed.

As a result, this finding unlawfully expands the scope of what Order No. 1000 held and goes far beyond the Commission’s assurance in Order No. 1000 that the Final Rule does not mandate any particular method for selecting among potential solutions to meet an identified need driven by Public Policy Requirements. Order No. 1000 clarifies the relationship between evaluating potential solutions and taking the further step of selecting a project for inclusion in the regional system plan for purposes of cost allocation:

By requiring the evaluation of proposed transmission solutions in the regional transmission planning process, the Commission is not dictating that any particular proposals be accepted or that selected transmission facilities be constructed. . . . Whether or not public utility transmission providers within a region select a transmission facility in the regional transmission plan for purposes of cost allocation will depend in part on their combined view of whether the transmission facility is an efficient or cost-effective solution to their needs.^[49]

Stated another way, Order No. 1000 “requires public utility transmission providers in a region to adopt transparent and not unduly discriminatory criteria for selecting a new transmission project in a regional transmission plan for purposes of cost allocation,” but the Commission is “not mandating that any particular transmission facility identified to address identified transmission solutions be built.”⁵⁰

⁴⁹ Order No. 1000 at P 331 (emphasis supplied).

⁵⁰ Order No. 1000-A at PP 455, 329.

b. The Process for Evaluating Whether To Select a Proposed Public Policy Transmission Upgrade in the Regional Transmission Plan for Purposes of Cost Allocation Is Consistent with Order No. 1000.

The impetus behind the Commission's rejection of the Filing Parties' proposal appears to be based on a misunderstanding of NESCOE's role in the proposed process:

Given NESCOE's role in the proposed evaluation process, the Filing Parties do not explain how this process will provide transparency for stakeholders seeking to understand and provide input in the evaluation of whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation that provides for stakeholder coordination or otherwise culminates in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected . . . the Filing Parties do not propose to evaluate transmission solutions to identified transmission needs driven by public policy requirements to determine whether they are the more efficient or cost-effective solutions, as required by Order No. 1000, but instead propose to evaluate only those transmission solutions to identified transmission needs driven by public policy requirements that NESCOE indicates it would like ISO-NE to study further. Finally . . . because the Filing Parties' proposal provides that NESCOE, or all of the participating states' utility regulatory authorities jointly, will select Public Policy Transmission Upgrades in the regional transmission plan for purposes of cost allocation, the Filing Parties' proposed evaluation process fails to comply with Order No. 1000's requirement that public utility transmission providers select more efficient or cost-effective transmission solutions to address transmission needs driven by public policy requirements in the regional transmission plan for purposes of cost allocation.

May 17 Order at P 314.

Order No. 1000 obligated public utility transmission providers to evaluate potential solutions. Nothing in the Final Rule required that a project must always be selected to meet a need.⁵¹ Nor does Order No. 1000 preclude the role played by NESCOE and the states in the

⁵¹ Order No. 1000 at P 211; *see also id.* at P 331; Order 1000-A at PP 329, 455.

selection of projects driven by state public policy requirements in the regional transmission plan for purposes of cost allocation.

In fact, Order No. 1000 appears to encourage such a central role to ensure that ISO-NE's judgments do not substitute for that of the states in the execution of state laws. Among the statements in the rulemaking proceeding that were relied upon in structuring the proposed process, the Commission stated:

- The Commission is “not placing public utility transmission providers in the position of being policymakers or allowing them to substitute their public policy judgments in the place of legislators and regulators.”⁵²
- “It is not the function of the transmission planning process to reconcile state policies.”⁵³

Applying these appropriate limitations to the regional planner's role, the Filing Parties' proposed process calls for NESCOE/the New England states to provide a Public Policy Transmittal⁵⁴ as a pre-condition to ISO-NE placing a project in the regional transmission plan for purposes of cost allocation, which as a practical matter in New England, authorizes it forward for potential siting approval and actual construction. This interplay between the states and ISO-NE ensures that jurisdictional boundaries, espoused in Order No. 1000 and required by law, are appropriately delineated.

It also provides a built-in mechanism for resolving questions about state policy implementation. For example, if State A has a statute requiring reductions in greenhouse gas

⁵² Order No. 1000-A at P 318.

⁵³ *Id.* at P 327.

⁵⁴ The Filing Parties proposal defines a Public Policy Transmittal as “a written document sent by NESCOE or jointly by all of the participating states' utility regulatory authorities to the ISO that indicates which of the New England states support inclusion of a particular Public Policy Transmission Upgrade in the Regional System Plan and provides each state's final decision concerning such proposed Public Policy Transmission Upgrade and associated cost allocation as set forth in such state's regulatory authority decisions that is to be utilized for the project costs.” Filing Parties proposal, Primary Version – Marked, at 70.

emissions and this is a policy identified in the Order No. 1000 process as driving transmission needs, there are a number of options available to the state to meet such a requirement. A transmission project could be one way to meet that state public policy need or it could be part of multi-faceted solution; states could also determine that fuel cells or solar power energy are preferred ways to meet the same state policy objective. The implementation of state policies necessitates the judgment of those charged under state law with meeting the requirements of state laws. Even putting aside constitutional issues around federal-state authority, if ISO-NE selects a transmission solution for inclusion in the regional transmission plan for purposes of cost allocation as a means to achieve State A's policy mandates, and State A chooses a different approach based on state officials' judgment of the preferred means to execute their state law, even if more costly in the short term, by what means is a disagreement between ISO-NE and State A about how to execute state law resolved? Any such disagreement between ISO-NE and a state could not be brought to the Commission for resolution. And in any event, neither ISO-NE nor the Commission has any authority to find that State A's judgment is "wrong" in terms of whether and how the state decides to execute its state laws such that the process the May 17 Order details is simply impractical.

B. The May 17 Order Is Inconsistent with Order Nos. 1000 and 1000-A and Exceeds the Bounds of the Commission's Statutory Authority by Abrogating the Central Role of the New England States over the Implementation of Their Own State Policies and by Infringing upon State Authority over the Development of Transmission Facilities.

Despite assurances in Order Nos. 1000 and 1000-A that the Commission would accord regions flexibility and would not infringe on state authority, the operation of the May 17 Order would do just that by supplanting the judgment of state officials over the implementation of their own state laws and policies with that of the regional transmission planner. NESCOE and the Five New England States urge the Commission to grant rehearing to ensure that its

implementation of Order No. 1000 is consistent both with the assurances made in the rulemaking proceeding and, importantly, with the Commission’s statutory authority.

1. The May 17 Order Is Inconsistent with Order No. 1000’s Clear Declarations That the Reforms Were Not Intended To Usurp State Authority.

The Commission made numerous statements in Order No. 1000 that assured the Final Rule, as a whole, was not infringing on state authority: “In establishing these reforms, the Commission is simply requiring that certain processes be instituted. This in no way involves an exercise of authority over those specific substantive matters traditionally reserved to the states, including . . . authority over . . . transmission facilities.”⁵⁵ The Commission made similar affirmations specifically addressing its proposed reforms implementing the requirement that public utility transmission providers consider transmission needs driven by Public Policy Requirements:

In response to commenters that urge us to recognize the role of the states in transmission planning, especially as it relates to compliance with Public Policy Requirements, we clarify that nothing in this Final Rule is intended to alter the role of states in that regard . . . In Order No. 890, the Commission stated its expectation that “all transmission providers will respect states’ concerns” when engaging in the regional transmission planning process. This is equally true with regard to the consideration of transmission needs driven by Public Policy Requirements.^[56]

The Commission reiterated on rehearing its intent not to interfere with “state-level public policy efforts”⁵⁷ and acknowledged that “state regulators play an important and unique role in the transmission planning process, given their oversight over transmission siting, permitting, and

⁵⁵ Order No. 1000 at P 107.

⁵⁶ *Id.* at P 212.

⁵⁷ Order No. 1000-A at P 330.

construction, as well as integrated resource planning and similar processes.”⁵⁸ Similarly, the Commission stated in Order No. 1000-A:

[State regulators] may be in the best position of determining how state-level public policy requirements are satisfied. . . . [T]he Commission will not require as part of this generic rulemaking proceeding a particular status for state regulators in the transmission planning process. To do so would ignore the wide range of roles that state regulators themselves tell us that they are permitted to take under their various state laws.^[59]

NESCOE and the Five New England States relied on these statements and worked diligently with ISO-NE, the New England transmission owners, and other stakeholders to develop procedures that met the goals of Order No. 1000 and respected the New England states’ role in identifying and evaluating transmission needs driven by state Public Policy Requirements. The result was a process that garnered consensus in the regional stakeholder process on the role that NESCOE and the states should play in the identification of public policies driving transmission needs and the evaluation and selection of public policy projects. These aspects of the Filing Parties’ proposal that the May 17 Order rejected were also included in the NEPOOL alternative proposal, which was developed through the same extensive stakeholder process as the Filing Parties’ proposal and which was supported by 83 percent of the stakeholders, *i.e.*, all but the participating transmission owners. In other words, except where certain entities abstained from the vote, each and every stakeholder that participated in the development of the ISO-NE public policy process, including the participating transmission owners, voted in that stakeholder process to support the core elements of a public policy process that recognizes the primary role

⁵⁸ *Id.* at P 337.

⁵⁹ *Id.*

the New England states should play in facilitating the ISO-NE's consideration of transmission needs driven by Public Policy Requirements.⁶⁰

With the May 17 Order, however, the Commission wholly disregards its commitment in Order No. 1000 to “allow for local and regional flexibility in designing the procedures for identifying the transmission needs driven by Public Policy Requirements for which potential solutions will be evaluated in the local or regional transmission planning processes.”⁶¹ On rehearing, the Commission made clear that this flexibility extended specifically to the role played by state regulators in the process: “Thus, we leave it to state regulators and public utility transmission providers, in consultation with stakeholders, in each transmission planning region to determine the appropriate role of state regulators in the transmission planning process generally and in the consideration of transmission needs driven by Public Policy Requirements in particular.”⁶² The consideration of “transmission needs driven by Public Policy Requirements” specifically includes the evaluation of potential solutions to meet those needs.⁶³ With the Commission's promise of regional flexibility in Order No. 1000, followed by the May 17 Order which wholly disregarded the process developed by the region, the Commission gave with one hand and took away with the other assurances that the Commission was not intruding into matters exclusively reserved to the states. NESCOE and the Five New England States urge the Commission to correct this error on rehearing.

⁶⁰ Although NESCOE and the Southern New England States protested the Filing Parties' compliance filing due, in part, to certain meaningful differences between that proposal and the NEPOOL alternative proposal, NESCOE and the Five New England States emphasize that these differences do not involve the core participation of New England states in the process for evaluating and selecting public policy projects.

⁶¹ Order No. 1000 at P 208.

⁶² Order No. 1000-A at P 338.

⁶³ Order No. 1000 at P 205.

The component of the Filing Parties' proposal that the May 17 Order rejected gave the states an appropriately major role in the regional transmission planning process with respect to public policy projects. The reasons why the states should occupy such a central role is obvious. Public policy projects are not driven solely by engineering or economic analyses, but rather reflect state goals, laws and regulations, which in many cases contemplate that state officials will exercise judgment in their execution. The public policies identified by the states for consideration in the regional planning process trigger the evaluation and selection of projects, and it is essential that the public policy makers – the states – play the prominent decision-making role throughout the entirety of the process.

For example, a state may determine that its citizens' electricity needs are best served with sustainable, renewable, or clean energy technologies, *e.g.*, wind, solar, biomass or hydrokinetic resources. State legislatures and/or regulatory authorities factor in the relative costs and benefits of state policies, along with often hard-to-quantify societal benefits they deem relevant and important. Attainment of a public policy objective may result in construction of certain resources and facilities that are more costly than other types of facilities built to address reliability or economic needs, but the state may determine that the benefits to its citizens from attainment of the public policy goal, such as reductions in greenhouse gases, outweigh those direct and specifically quantifiable costs. In each instance, however, the decision about whether, how and at what price to execute state public policies is uniquely the state's to make.

By contrast, ISO-NE is a transmission planner and wholesale market administrator. It does not, as an institutional or jurisdictional matter, have the authority to make judgments on states' behalf about state policies or to make decisions for a state about the means by which a state will satisfy its state public policy objectives or at what costs. Similarly, the Commission

does not, as an institutional and jurisdictional matter, have authority in connection with decisions about the means of implementing state public policies. Nor do individual stakeholders have any authority in connection with the implementation of state policies.

None of these entities has the authority, expertise, or accountability to substitute its judgment for that of the states in connection with state statutory requirements or policy preferences codified in state law, many of which contemplate that state officials will exercise their judgment in balancing the interests and goals identified by state legislatures, including those related to energy and the states' environmental and economic development goals. Stakeholder and other interests' representatives are always free to try to persuade state legislatures to modify such state statutes to, for example, transfer state policy implementation authority to someone other than state officials. Absent such action from a state legislature, the May 17 Order improperly attempts to reassign responsibility for state law implementation in this context.

As NESCOE and the Five New England States explained in their Answer, states – not planning authorities, stakeholders representing various shareholder or special interests, or the federal government – are the proper jurisdictional entities to identify, evaluate for further consideration, and advise on selection in the regional transmission plan for purposes of cost selection those transmission needs which are driven by state Public Policy Requirements.⁶⁴ The May 17 Order erred in attempting to confer upon ISO-NE the authority to make decisions about the implementation of state policies for states. This would stifle the ability of each state to implement their own public policies, enacted by their state legislatures and/or regulatory authorities, over matters properly within their jurisdiction (*e.g.*, energy and environmental policies). Authority over state policies has been, and remains with, the states.

⁶⁴ NESCOE/Five New England States Answer at 13.

In the regional context, the highly integrated nature of the New England transmission grid means that the attainment of one state's public policy goals may require the cooperation and participation of other states. The buy-in of each affected state is critical to the success of multi-state projects. If one state does not judge that its state policy or statutory interests are advanced by a particular project, it must have the ability not to participate and/or withdraw from the process at critical stages in the developmental process as development costs escalate. (And, as discussed below, the states participating in such a multi-state project must have the ability to decide how the costs of such projects should be allocated, as the allocation of costs is an essential component of compromise on such public policy projects.) Agreement among multiple states in public policy identification, whether to proceed with detailed and expensive project analysis, project selection, and project cost allocation stages of the process, facilitates the construction of projects. Ensuring that the states retain this critical role, with stakeholder input, as proposed by the Filing Parties, provides the best means of obtaining state support for any public policy projects ultimately selected. Providing the states a central role in the local and regional transmission planning and cost allocation process for public policy-driven transmission projects is also likely to reduce the potential for litigation about policy and project selection, as well as allocation of the associated costs.⁶⁵

The May 17 Order is likewise not consistent with the statement in Order No. 1000 that "it is appropriate to require public utility transmission providers, in consultation with their stakeholders, to design the appropriate procedures for identifying and evaluating the transmission needs that are driven by Public Policy Requirements in their area, subject to [FERC's] review on

⁶⁵ See, e.g., *Illinois Commerce Comm'n, et al., v. FERC*, No. 11-3421 (7th Cir. October 27, 2011) (addressing the Midwest Independent System Operator, Inc.'s proposed approach for allocating the costs of Multi-Value Projects, including public policy-driven projects, across MISO's footprint); and *Illinois Commerce Comm'n, et al. v. FERC*, 576 F. 3d 470 (7th Cir. 2009) (appealing PJM's allocation of the costs associated with new transmission facilities rated at 500 kV and above across the entire PJM footprint).

compliance,” so long as “all such procedures allow for input from stakeholders, including but not limited to those responsible for complying with the Public Policy Requirement(s) at issue and developers of potential transmission facilities that are needed to comply with one or more Public Policy Requirements.”⁶⁶

As discussed above, the Filing Parties’ proposed procedures do allow for and encourage input and involvement from stakeholders, while recognizing the important role that the states play in the process. The procedures proposed by the Filing Parties set forth a fully open and transparent process. For example, at the Public Policy Transmission Study stage, the study scope, assumptions and results are presented to the Planning Advisory Committee with the opportunity for stakeholders to comment.⁶⁷ The second phase of the public policy transmission study process, which, as detailed above, goes beyond what was required for compliance, is also designed to be open and transparent and provides opportunities for stakeholder input into the parameters and assumptions to be used in the follow-on study.⁶⁸

To the extent a public policy project is considered for selection in the regional planning process, the public policy project – and its potential costs to consumers – will ultimately be subject to each state’s requirements regarding the process for approval, separate and apart from the open proceeding in which a state regulatory authority(ies) will evaluate whether to grant siting approval. There are thus procedures available for interested stakeholders to intervene and participate, as deemed appropriate by that state’s regulatory authority and consistent with state law. Those ultimately aggrieved with a state’s decision not to approve a project or site a particular line have full recourse through the state courts. The intended state regulatory authority

⁶⁶ Order No. 1000 at P 208.

⁶⁷ See Filing Parties proposed Attachment K, Section 4A.1(a).

⁶⁸ See *id.*, Section 4A.3.

processes are not detailed in compliance filings submitted to the Commission because state regulatory authority processes are not a proper subject matter for federal tariffs.

2. The May 17 Order Exceeds the Commission’s Authority by Demoting the Role of the New England States over the Implementation of Their Own State Policies and by Infringing upon State Authority over the Development of Transmission Facilities.

Instead of complementing the states’ implementation of their policies, by operation of the May 17 Order, the Commission deviates from its core responsibilities and into matters unequivocally reserved to the states. Unlike state officials, ISO-NE has no accountability whatsoever to state lawmakers or state citizens for decisions the May 17 Order would have ISO-NE make about whether and how to implement state public policies. Such a result is untenable, and without doubt was not contemplated by state lawmakers who adopted the state laws the May 17 Order seeks to have ISO-NE implement. By recognizing in the Final Rule the unique position of states in the process of considering public policies in the regional planning process, but then in the May 17 Order effectively relegating the states to being no different than a market participant or stakeholder – and trying to neuter state-decision making over matters of state policy – the Commission contradicts itself.

More gravely, in diminishing the role of the states with the rulings in the May 17 Order, the Commission has exceeded its authority under the FPA. Section 201(a) of the FPA provides that federal regulation under the FPA is “to extend only to those matters which are not subject to regulation by the States.”⁶⁹ Thus, FPA section 201(a) recognizes that the authority granted to the Commission by section 201(b) over the regulation of the transmission of electricity in interstate commerce is limited. Where Congress has not granted the Commission authority, and where states have traditionally asserted authority over a particular matter, the Commission may not act

⁶⁹ 16 U.S.C. § 824(a).

without intruding on the rights of states.⁷⁰ The Supreme Court recognizes that “[w]here a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone.”⁷¹ In areas of traditional state regulation, a federal statute does not supplant state law unless Congress has made such an intention “clear and manifest.”⁷² Furthermore, “[w]hen the Congress explicitly reserves jurisdiction over a matter to the states, as here, the Commission has no business considering how to induce a change of state policy with respect to that matter.”⁷³ The Supreme Court has held that “[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”⁷⁴

Indeed, “[a]s a federal agency, FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.”⁷⁵ Thus, if there is no statute conferring authority, FERC has none.⁷⁶ Without

⁷⁰ See *Conn. Light & Power v. FPC*, 324 U.S. 515, 527 (1945) (“The policy declaration that federal regulation is ‘to extend only to those matters which are not subject to regulation by the States’ is one of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose. But such a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent. It cannot be wholly ignored.”); see also *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (quoting *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 527).

⁷¹ *Id.* at 532 (quoting *Yonkers v. United States*, 320 U.S. 685, 692 (1944)).

⁷² *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁷³ *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996) (internal quotation marks omitted).

⁷⁴ *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotation marks omitted).

⁷⁵ *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (“*Atlantic City*”) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

⁷⁶ See *id.*; *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (recognizing that “an agency literally has no power to act ... unless and until Congress confers power upon it”).

statutory authorization for its acts, an agency’s “action is plainly contrary to law and cannot stand.”⁷⁷

There is no question that states have sovereignty over their own public policies.⁷⁸ The May 17 Order, thus, unlawfully infringes on state authorities by rejecting the Filing Parties’ proposal and directing them to remove from their planning process an appropriate designation of the states’ role in the process of evaluating potential solutions to transmission needs driven by Public Policy Requirements.

NESCOE and the Five New England States raised these concerns extensively in their pleadings, and by not responding to concerns raised regarding transferring state policy implementation authority to any entity other than a state official and the limitations of effectuating state policy solely through transmission development, the Commission failed to engage in reasoned decision-making.⁷⁹ The Commission failed in its obligation to “examine the relevant data and articulate a satisfactory explanation for its action.”⁸⁰ Although the Commission recited these concerns (*e.g.*, May 17 Order at PP 94-96), “to characterize objections is not to answer them.”⁸¹

Finally, as discussed above, in suggesting that not only is ISO-NE required to establish criteria for selection in the regional plan for purposes of cost allocation of a transmission project driven by Public Policy Requirements, but that ISO-NE is required to actually select the more

⁷⁷ *Atlantic City* at 8.

⁷⁸ *See Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 1288 (D.C. Cir. 2007) (“Noticeably absent from these sections of the Code is any provision granting FERC authority to dictate the manner in which state eminent domain power may be used.”).

⁷⁹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (“*Motor Vehicle*”); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209-210 (D.C. Cir. 2011) (“*PSEG*”); *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010) (“*Fla. Gas*”).

⁸⁰ *PSEG* at 208 (quoting *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005)).

⁸¹ *Id.* at 210.

efficient or cost effective solution among the options studied, the Commission clearly exceeds its authority. As explained above, selection of a project in the ISO-NE RSP is the impetus to moving a project forward to siting approval, construction, and cost allocation, and the Commission has no authority to intrude on states' jurisdiction over construction of transmission facilities.⁸² Congress gave the Commission limited siting authority in Federal Power Act section 216, 16 U.S.C. § 824p (setting forth prerequisites for issuance by FERC of a construction siting permit for electric transmission facilities). However, states retain their authority to deny permits necessary for siting and constructing electric transmission facilities.⁸³ In light of its lack of jurisdiction over these matters reserved to the states, FERC cannot now in the May 17 Order do “indirectly what it cannot do directly.”⁸⁴

The transmission planning reforms in Order No. 1000 were explicitly concerned with process: “these reforms are not intended to dictate substantive outcomes, such as what transmission facilities will be built and where.”⁸⁵ FERC explicitly recognized “that such decisions are normally made at the state level.”⁸⁶ The Commission has long recognized the limits of its authority with regard to the authority of states over planning, siting, construction and ownership of transmission facilities: “This Final Rule will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-

⁸² See, e.g., *New York v. FERC*, 535 U.S. 1, 24 (2002) (recognizing FERC jurisdiction over unbundled transmission of electricity but not over traditionally state regulated areas such as the planning, siting and construction of transmission facilities).

⁸³ *Piedmont Evtl. Council v. FERC*, 558 F.3d 304, 310, 313-15 (4th Cir. 2009) (recognizing that “states have traditionally assumed all jurisdiction to approve or deny permits for siting and construction of electric transmission facilities,” and rejecting FERC’s view that it could act when a State authority denied a permit application).

⁸⁴ *Town of Concord v. FERC*, 955 F.2d 67, 71 n. 2 (D.C. Cir. 1992).

⁸⁵ Order No. 1000-A at P 188.

⁸⁶ *Id.*

side decisions . . . [or] authority over utility generation and resource portfolios.”⁸⁷ By rejecting as non-compliant the proposed tariff provisions according the states a central role in the selection of public policy transmission projects in the regional plan for purposes of cost allocation, the May 17 Order is acting contrary to the Final Rule and exceeding its statutory authority.

C. The Commission Erred in Rejecting the Inclusion of an “Opt-In” Provision in the Proposed Cost Allocation Method for Public Policy Transmission Upgrades That Is Consistent With the Order No. 1000 Requirements.

In their respective protests of the Filing Parties’ compliance filing, NESCOE and the Southern New England States advocated for the adoption of the NEPOOL alternative proposal’s opt-in provision in the proposed cost allocation method for Public Policy Transmission Upgrades. The NEPOOL alternative proposal allocates the costs of constructing, operating and maintaining any Public Policy Transmission Upgrades included in the Regional System Plan in the manner voluntarily agreed upon by the states that opt-into the development of such projects.⁸⁸ In the event the states electing to opt-in to the development of a Public Policy Transmission Upgrade do not specify a cost allocation method, costs would be allocated on a network load ratio share basis to the states opting to fund development of the project.⁸⁹

Although different in some respects from the NEPOOL alternative proposal, the Filing Parties’ proposal did provide that if opting-in states do not specify a different cost allocation

⁸⁷ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 31,036, at 31,782, n.544 (Apr. 24, 1996); *order on reh’g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles 1996-2000 ¶ 31,048 (Mar. 4, 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 relevant 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*, 535 U.S. 1 (2002) (“Order No. 888”).

⁸⁸ NEPOOL proposed Attachment K, Section 4A.9(a).

⁸⁹ *Id.*

mechanism, the costs of the public policy upgrades in question will be allocated to network load for all opting-in states based on each states respective load ratio share.⁹⁰

The May 17 Order rejected the Filing Parties’ proposed cost allocation method, finding that it violates several key principles. First, the Commission states that the cost allocation method for Public Policy Transmission Upgrades violates Order No. 1000’s prohibition against participant funding “as each state can unilaterally decide that it in fact does not benefit from a proposed transmission project and ‘opt-out’ of cost allocation for that project. Once one state decides to opt-out, the remaining states must then agree to reallocate the costs that would have been allocated to beneficiaries in the state that opted out.” May 17 Order at P 391. Second, the Commission finds that the Filing Parties’ cost allocation proposal for Public Policy Transmission Upgrades violates the requirement of Regional Cost Allocation Principle 1 (*i.e.*, that costs be allocated in a manner that is at least roughly commensurate with estimated benefits) “because states that may potentially receive benefits from a particular Public Policy Transmission Upgrade can nonetheless opt-out of cost allocation for that project, [and therefore] certain beneficiaries of a transmission project may not be allocated a portion of the costs of that project.” *Id.* Third, the May 17 Order finds that the Filing Parties’ proposal “lacks a clearly defined *ex ante* cost allocation approach for Public Policy Transmission Upgrades . . . because it permits states to opt-out of cost allocation for a particular transmission project.” *Id.* at P 392.

Order No. 1000 required each public utility transmission provider to implement “a method, or set of methods, for allocating the costs of new transmission facilities selected in the regional transmission plan for purposes of cost allocation.”⁹¹ As was the case with the consideration of public policy requirements, Order No. 1000 expressly accorded regions

⁹⁰ Filing Parties proposed Attachment K, Section 4.A.9(a).

⁹¹ Order No. 1000 at P 558.

flexibility to develop cost allocation methods, provided they are consistent with the six principles detailed in the Final Rule.⁹² The Commission explained that the reason it adopted the cost allocation principles was:

because we do not want to prescribe a uniform method of cost allocation for new regional and interregional transmission facilities for every transmission planning region. To the contrary, we recognize that regional differences may warrant distinctions in cost allocation methods among transmission planning regions. Therefore, we retain regional flexibility and allow the public utility transmission providers in each transmission planning region . . . to develop transmission cost allocation methods that best suit the needs of each transmission planning region or pair of transmission planning regions, so long as those approaches comply with the regional and interregional cost allocation principles of this Final Rule.^[93]

As is relevant to the May 17 Order’s errors, Regional Cost Allocation Principle 1 provides that “[t]he cost of transmission facilities must be allocated to those within the transmission planning region that benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits.”⁹⁴ In discussing this principle, the Commission emphasized, again, that “[t]he cost allocation principles are not intended to prescribe a uniform approach, but rather each public utility transmission provider should have the opportunity to first develop its own method or methods. Also, we recognize that regional differences may warrant distinctions in cost allocation methods.”⁹⁵ Regional Cost Allocation Principle 2 provides that “[t]hose that receive no benefit from transmission facilities, either at present or in a likely future scenario, must not be involuntarily allocated any of the costs of those transmission facilities.”⁹⁶ The Commission

⁹² *Id.* at PP 604-606.

⁹³ *Id.* at P 604.

⁹⁴ *Id.* at P 622.

⁹⁵ *Id.* at P 624.

⁹⁶ *Id.* at P 637.

clarified that cost allocation for public policy projects must follow these same cost allocation principles.⁹⁷

1. The Opt-in Provision Is Necessary for Compliance with Cost Allocation Principles 1 and 2 and Does Not Result in Free Ridership.

The Commission fails to address in the May 17 Order the demonstration made by NESCOE and the Five New England States in their Answer that allowing states in New England to opt-in to public policy projects will not result in “free ridership.” As NESCOE and the Five New England States explained, there is a tension between a desire to prevent the “free ridership” concerns identified by the Commission in Order No. 1000⁹⁸ and a need to comply with Regional Cost Allocation Principle 1 and Regional Cost Allocation Principle 2.⁹⁹ The Commission recognized this in Order No. 1000, explaining that “[i]n response to MISO Transmission Owners that Principle 2 might contribute to free rider problems, we agree that it, like all the other principles adopted in this Final Rule, requires careful consideration and application to ensure that they are implemented appropriately in practice.”¹⁰⁰

The Commission’s conclusion that the Filing Parties’ proposal creates “a free rider problem” (May 17 Order at P 392) fails to acknowledge that the ability of New England states not to opt in to certain public policy projects ensures compliance with Regional Cost Allocation Principles 1 and 2. It is illogical to presume that New England states will refuse to participate in a given project irrespective of any benefit they may derive from it. NESCOE and the Five New England States expect these processes to be open and that the costs and benefits of projects

⁹⁷ *Id.* at P 219 (“the costs of new transmission facilities allocated within the planning region must be allocated within the region in a manner that is at least roughly commensurate with estimated benefits. Those that receive no benefit from new transmission facilities, either at present or in a likely future scenario, must not be involuntarily allocated any of the costs of those facilities. ”).

⁹⁸ *See, e.g., id.* at P 534.

⁹⁹ *Id.* at P 586.

¹⁰⁰ *Id.* at P 638.

designed to meet public policy requirements will be openly discussed and debated. But, just because a public policy project may provide a benefit, regardless how slight, to a state, does not mean that this project is the most beneficial means to execute a states' policy objective or that a state should be forced to require any or all of its ratepayers to bear the costs of that project. Whether, and if so, at what point, any or all of a state's consumers should underwrite a public policy project intended to further state policy objectives, are decisions intrinsically for the state to make.

As NESCOE and the Five New England States explained, once a Public Policy Requirement has been identified, there will almost always be a number of alternative ways to meet that need. The Commission's finding that the opt-out provision results in "free ridership" ignores that state officials are the only participants in the regional transmission planning process that can determine how best to meet the public policy requirements of that state, or address conflicting state public policies, and whether the cost-benefit analysis of any particular solution leads to the conclusion that this solution is appropriate for that state.¹⁰¹ If a state is forced to bear the costs of a project it has determined will not meet these needs in a cost effective manner, both Regional Cost Principles 1 and 2 will have been violated.

The Commission appears to want an arithmetical, pre-defined formula without sufficiently accounting for the tension between Regional Cost Allocation Principles 1 and 2. However, the proposed method proactively addresses this tension by setting forth a just and reasonable mechanism to ensure costs are allocated consistent with Order No. 1000. The

¹⁰¹ For example, in 2012 the New Hampshire Senate came within one vote of repealing the Regional Greenhouse Gas Initiative ("RGGI") legislation. Repeal of that legislation would have placed New Hampshire at odds with the other New England states on this regional carbon emissions policy, which some states could potentially identify as driving the need for transmission to achieve the RGGI goals.

Commission’s rejection of this proposed method without responding to these legitimate concerns is arbitrary and capricious and does not constitute reasoned decision-making.¹⁰²

2. The May 17 Order’s Determination That the Opt-in Provision Constitutes Participant Funding is in Error.

The May 17 Order makes conclusory statements that the Filing Parties’ proposed cost allocation method constitutes participant funding without addressing detailed arguments to the contrary made by NESCOE and the Five New England States. The Commission explained in Order No. 1000 that “[u]nder a participant funding approach to cost allocation, the costs of a transmission facility are allocated only to those entities that volunteer to bear those costs.”¹⁰³ The Commission makes clear in its discussion of participant funding in Order No. 1000 that participant funding refers to a cost allocation method under which “a transmission developer, a group of transmission developers, or one or more individual transmission customers”¹⁰⁴ funds a particular project. The Commission goes on to explain that if a transmission developer fails to satisfy a transmission planning region’s criteria for its project to be selected in the regional transmission plan for purposes of cost allocation, “the developer could either withdraw its transmission project or proceed to ‘participant fund’ the transmission project on its own or jointly with others.”¹⁰⁵ The Commission errs in conflating the notion of an individual or group of developers/customers funding a particular transmission project with that of a New England

¹⁰² *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1991) (“*K N Energy*”) (“we cannot ignore the Commission’s unwillingness to address an important challenge [. . .]. It most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it - that it conduct a process of reasoned decisionmaking. The deference we owe FERC’s expert judgment does not strip us of that responsibility.”); *see also Motor Vehicle*, 463 U.S. 29, 43; *PSEG*, 665 F.3d at 209-210; *Fla. Gas*, 604 F.3d at 639.

¹⁰³ Order No. 1000 at P 486, n. 375.

¹⁰⁴ *Id.* at P 724.

¹⁰⁵ *Id.* at P 725.

state opting in to a public policy project upon determining that some or all of the ratepayers in its state will benefit from the project.

There is a significant difference between a cost allocation method where the transmission developer or potential customer must pay for the network upgrades in order for the facilities to be built and what is being proposed by the Filing Parties and in the NEPOOL alternative proposal, in which the Qualified Transmission Project Sponsor will recover its costs from the ratepayers in those states which have opted in to that project. Under the NEPOOL alternative proposal, each of the six New England states has the ability to decline to fund a specified project because it believes, for example, that the costs of such project will outweigh the benefits of the project, or that the state simply will not benefit from the project, or that the public policy requirements the project advances are not relevant to or in furtherance of that state's policies or laws. But the NEPOOL alternative proposal does not provide that costs of public policy projects are to be allocated only to those transmission developers who sponsor the project, or to their customers. To the contrary – these costs will be allocated on either a region-wide basis, across all of New England, or on a sub-regional basis. The existence of an opt-in provision does not transform this cost allocation method into participant funding. Under the NEPOOL alternative proposal, the costs will be allocated throughout the six-state region, unless one or more of the states determines that there will be no benefits to it and therefore does not opt in to that project.

3. The May 17 Order Errs in Finding That the Cost Allocation Method Is Not Transparent.

The May 17 Order finds that the default cost allocation method “is not an *ex ante* method because it permits states to opt-out of cost allocation for a particular transmission project. Thus, the default cost allocation method is not a transparent method with adequate documentation to allow a potential transmission developer to determine how the method was applied to a proposed

transmission facility.” May 17 Order at P 392. This finding ignores and fails to respond to the explanation provided by NESCOE and the Five New England States in their Answer.¹⁰⁶ As explained therein, to the extent a public policy project is considered for selection in the regional planning process, the public policy project – and its potential costs to consumers – will ultimately be subject to each state’s requirements regarding the process for approval, separate and apart from the open proceeding in which a state regulatory authority(ies) will evaluate whether to grant siting approval. Hence, there are procedures available for all interested stakeholders to intervene and fully participate, as deemed appropriate by each state’s regulatory authority and consistent with state law. If aggrieved by a state’s decision not to approve a project or site a particular line, an interested stakeholder will have full recourse through the state courts. Putting aside the fact that no state is entitled to any particular level of explanation about another state’s decision-making process in connection with its state policies, individual state processes are the appropriate mechanism for providing the region with transparency. But the intended state regulatory authority processes should not be detailed in compliance filings submitted to the Commission because state regulatory authority processes are not a proper subject matter for federal tariffs.

D. The Commission Erred in Accepting the Compliance Filing Without the Cost-Containment Provisions in the NEPOOL Alternative Proposal, Thereby Unnecessarily Exposing Consumers to Cost Overruns.

Both NESCOE’s Protest and the Protest of the Southern New England States underscored the important role that cost estimates play in states deciding to move forward with policy-driven projects. Accurate cost estimates provide states with a level of assurance that a selected project

¹⁰⁶ NESCOE/Five New England States Answer at 21.

achieves a state’s policy goals in a cost-effective way.¹⁰⁷ In short, whether study costs or project costs, “accurate cost estimates are paramount to the integrity of state decision-making.”¹⁰⁸

In the May 17 Order, the Commission arbitrarily rejected comments that the Filing Parties’ proposal lacked two key cost-containment features. Its decision falls short of reasoned decision-making, reflecting both a misunderstanding of such cost containment provisions and a disregard for the reasonable concerns raised by the states about cost overruns in the context of public policy projects. For the reasons detailed below, the Commission should grant rehearing and require the Filing Parties to file a further compliance filing containing NEPOOL’s proposed revisions to Sections 4A.5(f), 4A.6 and 4A.9(a) of Attachment K.

1. The Commission Failed To Answer Legitimate Concerns Regarding the Absence of Language in the Filing Parties’ Proposal Requiring the Developer of a Public Policy Project To Provide Notice to States Before Exceeding Authorized Study Costs.

The Filing Parties proposed Section 4A.5(f) to Attachment K—“Stage Two Cost Estimate Requests.”¹⁰⁹ In pertinent part, Section 4A.5(f): (1) permits NESCOE to request from any qualified project sponsors cost estimates for Stage Two Solution study work; and (2) requires each such sponsor to provide ISO-NE and NESCOE with a revised cost estimate if the sponsor expects the study costs to exceed the estimate by 25%.¹¹⁰

NEPOOL’s alternative proposal recognized the need for stricter parameters around study cost estimates. While the NEPOOL alternative proposal maintained the provision permitting NESCOE to request cost estimates for Stage Two Solution Study work, it proposed to eliminate

¹⁰⁷ See NESCOE Protest at 34-35.

¹⁰⁸ See *id.* at 32.

¹⁰⁹ Primary Tariff Sheets, Marked Version Marked at 541-42.

¹¹⁰ *Id.* at 542; see also May 17 Order at P 367.

the remaining portion of proposed Section 4A.5(f), including the 25% cost overrun proposal.¹¹¹ Instead, if the actual costs of a study reach 90% of the original cost estimate, the NEPOOL alternative proposal would require qualified project sponsors to provide ISO-NE, NESCOE, and states supporting the project with a revised estimate of the costs to complete the work.¹¹²

The Commission rejected this aspect of NEPOOL’s proposal in its May 17 Order, finding that the Filing Parties’ proposal providing NESCOE and the states notice when study costs exceed estimated costs by 25% is just and reasonable. May 17 Order at P 403. The Commission supported its determination by downplaying the nature of cost overruns, stating that estimates “are precisely that—estimates. Unanticipated costs may arise . . . and the Filing Parties’ Proposal provides adequate flexibility and transparency in accounting for costs.” *Id.*

Nowhere does the Commission respond to the concerns that NESCOE or the Five New England States raised in their pleadings about project developers being permitted to exceed cost estimates for public policy project studies and recover those costs from consumers without review.¹¹³ This does not amount to reasoned decision-making.¹¹⁴

The unreasonableness of the limited protection afforded by the Filing Parties’ proposal is illustrated by the following simple example. Assume the initial cost estimate for studying a Stage Two Solution is \$100,000. Under NEPOOL’s alternative proposal, the states would be given the opportunity to receive and review a revised cost estimate once the actual costs incurred in performing the work reach \$90,000. If the project developer’s revised cost estimate indicates that the work can be completed at a cost of \$124,000, rather than \$100,000, the states would be

¹¹¹ NEPOOL proposed Attachment K, Section 4A.6, at 39-40.

¹¹² NEPOOL proposed Attachment K, Section 4A.6, at 40; *see also* May 17 Order at P 370.

¹¹³ NESCOE Protest at 33.

¹¹⁴ *See Motor Vehicle*, 463 U.S. at 43; *PSEG*, 665 F.3d at 209-210; *Fla. Gas*, 604 F.3d at 639.

in a position to determine whether the information that would be gained through completion of the Stage Two Study work justifies a 24% cost overrun that would be passed through to their state's consumers. Such a decision may be informed by other Stage Two Studies being undertaken within the cost estimate range. In stark contrast, the Commission-approved approach would allow project sponsors to incur and recover \$124,000 in total Stage Two Solution costs without ever informing the states of the 24% overrun or permitting the states to revisit their decision to proceed with this additional layer of study.

This basic example demonstrates the need for NEPOOL's proposed provisions as a consumer protection mechanism. Indeed, as NESCOE argued in its Protest, unlike transmission studies for reliability projects needed to maintain system reliability, transmission studies for public policy-related projects are related to projects that do not necessarily have to be built.¹¹⁵

Finally, the Commission's finding at paragraph 403 that estimates "are precisely that— estimates," is an oversimplification of a complex issue that fails to rise to the level required for reasoned decision-making. The Commission's finding is arbitrary, capricious and an abdication of the Commission's responsibilities under the FPA to ensure that rates are just and reasonable.¹¹⁶

2. The Commission's Failure To Require the Filing Parties To Adopt the NEPOOL Alternative Proposal's Mechanism for Negotiating Cost Recovery Removes the Sole Protection Against Escalating Costs That Will Erode the Cost-Effectiveness of Selected Projects.

NEPOOL also proposed a revision to Section 4A.9(a) that would limit cost recovery for approved projects to the cost recovery mechanism negotiated between the opting-in states and

¹¹⁵ NESCOE Protest at 32; Southern New England States Protest at 62, 65.

¹¹⁶ See *Motor Vehicle*, 463 U.S. at 43; *PSEG*, 665 F.3d at 209-210; *Fla. Gas*, 604 F.3d at 639; *K N Energy*, 968 F.2d at 1303.

the project sponsor.¹¹⁷ The basis for the Commission’s rejection of NEPOOL’s proposed revision to Section 4A.9(a) was simply that the Filing Parties’ proposal is just and reasonable and provides for “substantial involvement by the states by allowing them to receive cost estimates, and agree to a cost allocation mechanism prior to bringing a policy-driven project to fruition.” May 17 Order at P 398. The Commission’s acceptance of a public policy process that lacks this cost containment provision is in error and should be overturned on rehearing.

As a threshold matter, the Commission appears to misunderstand the ability of states to receive cost estimates under the Filing Parties’ proposal. In paragraph 398, the Commission appears to be referring to the ability of states in Section 4A.5(f) of the Filing Parties’ proposal to receive estimates for study costs. There is no provision for states to request or receive cost estimates for the actual transmission project. At a minimum, the Commission’s reference to a provision relating to study costs when the cost recovery mechanism relates to project costs reflects a fundamental confusion regarding the language at issue that should be corrected on rehearing.

However, even if cost estimates were received, neither such a provision nor an agreement among states on a cost allocation methodology would provide protections against cost overruns. NESCOE’s Protest noted New England’s recent experience, where many transmission projects that have moved from the planning to the operational phase have well exceeded the project costs that incumbent transmission owners estimated at the time the project was selected.¹¹⁸ NESCOE also explained that cost overruns are a particular concern in light of the increases in transmission costs as a proportion of New England customers’ bills in recent years.¹¹⁹

¹¹⁷ NEPOOL proposed Attachment K, Section 4A.9(a) at 42; *see also* May 17 Order at P 371.

¹¹⁸ NESCOE Protest at 15; *see* Southern New England States Protest at 35-36.

¹¹⁹ NESCOE Protest at 15; *see* Southern New England States Protest at 35-36.

NESCOE's Protest further highlighted that states will only proceed with a public policy project to the extent they conclude that a certain project is a cost-effective way to achieve state policy goals.¹²⁰ However, without the direct ability to enter final negotiations with the project proponent and control conditions on cost recovery, "the benefits of competitively procured public policy transmission could be lost through lax cost control and inefficient construction practices."¹²¹

The Commission's findings at paragraph 398 fail to respond to these facially-legitimate contentions or draw any rational connection between the record and the choice made.¹²² Instead, the Commission approved a process that lacks even the most minimal protections against cost overruns, without any explanation of how public policy projects would be protected against escalating costs that would erode the cost-benefit assessment justifying the project in the first place. Such a result cannot be justified. The Commission's decision is not the result of reasoned decision-making and is otherwise arbitrary and capricious.¹²³

IV. CONCLUSION

For the reasons discussed herein, NESCOE and the Five New England States respectfully request that the Commission (i) grant clarification that with its rulings in the May 17 Order, it did not intend to expand the scope of Order No. 1000's requirements with respect to selection of a public policy transmission upgrade in the regional plan for purposes of cost allocation, or, in the alternative, grant rehearing; (ii) grant rehearing and approve the Filing Parties' proposed procedures that accord NESCOE and the states a central role in the process for evaluating

¹²⁰ NESCOE Protest at 34-35; *see also* Southern New England States Protest at 62.

¹²¹ NESCOE Protest at 35.

¹²² *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (citing *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 648 (D.C. Cir. 1973)); *Motor Vehicle*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

¹²³ *Motor Vehicle*, 463 U.S. at 43.

potential solutions to identified transmission needs driven by public policy requirements and selecting transmission upgrades to meet those needs in the regional plan for purposes of cost allocation; (iii) grant rehearing and approve the “opt-in” mechanism as part of the public policy transmission upgrade cost allocation process; and (iv) grant rehearing and direct the Filing Parties to modify the tariff to include the cost containment measures advocated by states and other stakeholders in the region.

Respectfully submitted,

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Dated: June 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 17th day of June, 2013.

By: /s/ Phyllis G. Kimmel

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