

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

ISO New England, Inc. and)	Docket No.	ER13-193-000 and
Participating Transmission Owners)		ER13-196-000
Administrative Committee)		(not yet consolidated)

**MOTION TO INTERVENE AND PROTEST OF
THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

The New England States Committee on Electricity (“NESCOE”), by and through counsel, Lisa S. Gast and Jason T. Gray, Duncan, Weinberg, Genzer & Pembroke, P.C., 1615 M Street, NW, Suite 800, Washington, DC 20036, respectfully tenders for filing this Motion to Intervene and Protest (“Motion”) regarding the October 25, 2012 filing by ISO New England Inc. (“ISO-NE”) and Participating Transmission Owners Administrative Committee (collectively, “Filing Parties”) in purported compliance with the Federal Energy Regulatory Commission's (“FERC” or “Commission”) Orders on Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000 and Order No. 1000-A¹ (“October 25 Filing”). In support thereof, NESCOE states as follows:

I. PRELIMINARY STATEMENT

1. This Motion is tendered pursuant to Sections 205 and 206 of the Federal Power Act (“FPA”), 16 U.S.C. §§ 824d, and 824e (2006), Rules 211, 212 and 214 of the Rules of Practice and Procedure of the Commission, 18 C.F.R. §§ 385.211, 385.212

¹ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011), FERC Stats. and Regs. ¶ 31,323 (2011) (“Order No. 1000”), Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012), 139 FERC ¶ 61,132 (2012) (“Order No. 1000-A”).

and 385.214 (2012), and the Commission's November 1, 2012 Notice of Compliance Filings establishing December 10, 2012, as the date by which motions to intervene and comments are to be filed in this proceeding.

2. NESCOE requests that correspondence, pleadings and other documents with regard to this proceeding be served on the following, whose names are to be placed on the Commission's official service list in accordance with Rule 203, 18 C.F.R. § 385.203(b)(3) (2012):

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II. DESCRIPTION OF THE PARTIES

3. NESCOE is the Regional State Committee on Electricity for the New England region. NESCOE is governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and

Vermont and is funded through a regional tariff administered by the ISO New England.² NESCOE's mission is to represent the interests of the citizens of the New England region by advancing policies that will provide electricity at the lowest reasonable cost over the long term, consistent with maintaining reliable service and environmental quality.³

4. ISO-NE is the private, non-profit entity that serves as the Regional Transmission Organization ("RTO") for New England. ISO-NE administers the New England wholesale power markets and operates the regional bulk power system (*i.e.*, those facilities located in the New England region) pursuant to the ISO-NE Tariff and operating agreements with the New England transmission owners.

5. The Participating Transmission Owners Administrative Committee joined ISO-NE's October 25 Filing on behalf of New England's Participating Transmission Owners ("PTOs"). As explained in footnote 2 of the October 25 Filing, Transmittal Letter in Docket No. ER13-193-000, the PTOs that voted in favor of the Order 1000 compliance filing are: (1) Bangor Hydro-Electric Company; (2) NSTAR Electric & Gas Corporation; (3) Central Maine Power Company; (4) Maine Electric Power Corporation; (5) New England Power Company d/b/a National Grid; (6) Northeast Utilities Service Company on behalf of its affiliates: (i) The Connecticut Light and Power Company, (ii) Western Massachusetts Electric Company, (iii) Public Service Company of New Hampshire, (iv) Holyoke Power and Electric Company; and (v) Holyoke Water Power Company; (7) The United Illuminating Company; (8) Vermont Electric Power Company, Inc.; and (9) Vermont Transco, LLC.

² *ISO New England, Inc.*, 121 FERC ¶ 61,105 (2007).

³ *See* Joint Petition for Declaratory Order to Form a New England Regional State Committee, The Governors of: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont, Docket No. EL04-112-000 (Jun. 25, 2004).

III. RELEVANT BACKGROUND

6. On July 21, 2011, the Commission issued Order 1000. As explained by the Commission, a core reform under Order No. 1000's final rule requires "each public utility transmission provider to participate in a regional transmission planning process that produces a regional transmission plan and complies with existing Order No. 890 transmission planning principles."⁴ In addition, Order No. 1000 adds two significant new requirements relevant to this proceeding: (1) the addition of a means to identify and consider transmission needs that are driven by state or federal public policies, and (2) the removal of rights of first refusal from federal tariffs for projects that receive regional cost allocation.⁵

7. On October 25, 2012, in response to Order 1000, the Filing Parties submitted their October 25 Filing, filed in two parts due to its size. Part I was assigned Docket No. ER13-193-000, and Part II was assigned Docket No. ER13-196-000. On October 26, 2012, ISO-NE and the Participating Transmission Owners Administrative Committee filed a Joint Motion to Consolidate the two Dockets. FERC has not yet ruled on their Motion, and therefore NESCOE's Motion is being filed in both dockets.

8. On November 1, 2012, the Commission issued its Notice of Compliance Filings establishing December 10, 2012, as the date for which motions to intervene and comments are due in these two docketed proceedings. NESCOE's Motion is timely submitted in accordance with the Commission's November 1, 2012 Notice.

9. On November 16, 2012, the New England Power Pool Participants Committee ("NEPOOL") filed Comments on the October 25 Filing ("NEPOOL

⁴ Order No. 1000 at P 68.

⁵ Order No. 1000 at PP 6-7.

Comments”).⁶ NEPOOL’s Comments state that NEPOOL does not support the Filing Parties’ proposal. NEPOOL supports an alternative proposal (“NEPOOL-supported proposal”).⁷ Approximately 83% of the NEPOOL Participants Committee voted in favor of the NEPOOL-supported proposal in an October 3, 2012 vote.⁸ This is in contrast to the 17% NEPOOL support for the October 25 Filing in a vote on the same day, which support came from the NEPOOL’s transmission sector. One component of the NEPOOL-supported proposal pertains to the Order 1000 public policy process. In general, the NEPOOL-supported proposal incorporates in large part the Filing Parties’ public policy process; however, the NEPOOL-supported proposal adds provisions that ISO-NE and/or the TOs chose not to incorporate into the Filing Parties’ proposal. The NEPOOL-supported proposal is a different and, in fact, improved public policy process than that set forth by the Filing Parties. As described below, the New England states consider several of the additional provisions in the NEPOOL-supported proposal to be important and necessary to making the Filing Parties’ as-filed public policy process just and reasonable. Without certain of the modifications proposed in the NEPOOL-supported proposal, the states are not likely to make use of the Filing Parties’ public policy process. Such an outcome would be counter to the intent of Order 1000 to facilitate consideration of state public policies in regional planning, and therefore implementing an approach to consider state public policies in planning that is not supported by the states would be inherently unjust and unreasonable.

⁶ Comments of the New England Power Pool Participants Committee, Docket Nos. ER13-193-000 and ER13-196-000 (Nov. 16, 2012).

⁷ NEPOOL Comments at 2.

⁸ *Id.* at 3.

10. Further, and importantly, the NEPOOL-supported proposal includes provisions that correct the fundamental TO protectionist provisions in the October 25 Filing proposal that NESCOE believes are not compliant with Order 1000 and not in the public interest. In general terms and as described more fully below, the NEPOOL-supported proposal seeks to provide incumbent TOs and other transmission developers comparable development opportunities and comparable cost recovery opportunities. In this respect, the NEPOOL-supported proposal is a more faithful reflection of Order 1000's purpose and is in the public interest.

IV. INTERESTS OF NESCOE AND BASIS FOR MOTION TO INTERVENE

11. As noted above, NESCOE's mission is to represent the interests of the citizens of the New England region by advancing policies that will provide electricity at the lowest reasonable cost over the long term, consistent with maintaining reliable service and environmental quality. Among other things, the October 25 Filing, if accepted, will modify the transmission planning process currently in effect in New England. For this reason, NESCOE has a direct interest in this proceeding and a right to intervene to protect its interests as they may appear. The participation of NESCOE in this case is necessary and appropriate to the administration of the FPA and will be in the public interest. The interests of NESCOE will be affected by this proceeding and will not be adequately represented by any other party. NESCOE, therefore, requests that the Commission grant this Motion and make it a party to this proceeding.

V. INTRODUCTION AND SUMMARY OF NESCOE POSITION

12. NESCOE advances policies that will provide New England ratepayers electricity at the lowest reasonable cost over the long-term, consistent with

maintaining reliable service and environmental quality. NESCOE has also been pursuing, at the direction of the New England Governors, means to enable the New England states to identify and evaluate those renewable resources located in and around New England best able to satisfy state public policy objectives at the lowest all-in delivered cost (*i.e.*, the cost of generation and transmission combined). This effort is referred to here as Coordinated Competitive Renewable Power Procurement.⁹ Although the states will use Coordinated Competitive Renewable Power Procurement and other means to advance their state public policies, Order 1000 could be an additional vehicle available to the states to pursue state policy goals if properly structured and implemented. To that end, NESCOE has been actively working with the ISO-NE and New England stakeholders since August 2011 to develop a comprehensive Order 1000 proposal that would meet New England's needs in this regard. NESCOE appreciates ISO-NE and NEPOOL participants' efforts to understand the states' interests, preferred processes and the reasons for them. Due to a few but meaningful differences between the public policy proposal contained in the October 25 Filing, and the NEPOOL-supported public policy proposal, the New England states do not support the October 25 Filing with respect to its public policy proposal. As noted, however, NESCOE appreciates the Filing Parties' efforts to craft such a proposal. The New England states are hopeful that the ultimate outcome of the Order 1000 process will provide additional value to a transmission planning process that is, at least in part, already working for New England. The October 25 Filing's public policy proposal, with the addition of certain provisions from the NEPOOL-supported public policy proposal, will satisfy the Commission's objective and provide the region and states

⁹ Documents relating to NESCOE's Coordinated Competitive Renewable Power Procurement can be found at www.nescoe.com/Coordinated_Procurement.html.

a vehicle through which to consider state public policies in planning.

13. The states have a particularly strong and continuing interest in identifying process improvements to provide ratepayers reliable service at the lowest cost. For that reason, and in order to ensure that the full value of the Commission’s direction in Order 1000 is realized for New England, NESCOE discusses here several modifications to the planning process that are, in NESCOE’s view, a compliant application of the principles of Order 1000 as compared to the Filing Parties’ proposal. In particular, and as described below, FERC should: direct ISO-NE to adopt several specific sections of tariff language relating to the public policy process that was supported by a strong majority of NEPOOL participants; require competitive processes to identify reliability and public policy projects for inclusion in the Regional System Plan (“RSP”); and withhold approval from elements in the Filing Parties’ submission that would give incumbent transmission owners an unreasonable advantage in project development opportunity and project cost recovery.¹⁰ Absent such changes, the October 25 Filing is unjust and unreasonable and should not be accepted by FERC.

A. The Filing Parties’ Public Policy Process Proposal Should be Viewed in the Context of the States’ Activities, and their Efforts Through ISO-NE and NESCOE, with respect to Public Policy Objectives.

14. As NESCOE stated in the Commission’s Order 1000 Notice of Proposed Rulemaking (“NOPR”) process, NESCOE supports Order 1000’s focus on

¹⁰ The NESCOE manager for Maine has indicated that Maine does not support the portions of this NESCOE filing relating to the structure for the consideration of public policy in planning (set forth in the NESCOE filing principally in section VI.A). The Maine NESCOE Manager represents that the State of Maine will seek to intervene and file separately on this issue. The Maine NESCOE Manager further represents that Maine fully supports the remainder of the NESCOE filing, including in particular sections VI.B and VI.C relating to improving the competitive framework for transmission projects.

regional coordination to advance state public policy objectives.¹¹ NESCOE shares the Commission's interest in identifying means to consider projects and associated transmission that may advance state policy objectives at costs and pursuant to terms states determine to be acceptable in connection with such state policies. In fact, as discussed more fully below, New England, through ISO-NE, NESCOE and others' efforts, has done considerable work related to New England's renewable resource potential to meet state policy objectives and to developing competitive processes to facilitate their development.

15. As explained in detail in NESCOE's Comments on the Commission's "Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities" NOPR in Docket No. RM10-23-000, dated September 29, 2010, New England's regional system planning process has been in place since 2000, when the Commission accepted the NEPOOL regional transmission planning and expansion proposal.¹² Through this planning process, ISO-NE produces an annual report referred to as the Regional System Plan or RSP. The RSP is a snapshot in time of New England's continuous cycle of needs assessments, reflecting the dynamic nature of the regional power system and corresponding needs. The RSP has resulted in over \$4.7 billion in transmission infrastructure to meet reliability needs since 2002,¹³ including investment in major transmission projects in Connecticut, Maine, Massachusetts and Vermont, as well as an interconnection with Canada. Another \$6 billion in transmission

¹¹ NESCOE Comments, Docket No. RM10-23-000, at 9-12 (September 29, 2010).

¹² *Id.* at 3.

¹³ *See* October 25 Filing, Transmittal Letter at 2.

investment for reliability related projects is currently under review, study or construction.¹⁴

16. From 2009-2011, the New England Governors adopted a series of Resolutions expressing interest in exploring joint, or separate but coordinated, competitive procurement as a means to identify those renewable resources located in or proximate to the region that could help meet the region's clean energy goals at the lowest "all-in" cost (e.g., generation and transmission combined).¹⁵

17. In 2009, the New England Governors adopted *The Renewable Energy Blueprint*, which first identified the concept of Coordinated Competitive Renewable Power Procurement and its potential to enable the New England states to meet their common energy needs and renewable goals.¹⁶ In 2010, in work conducted at the request of the Governors, a *Report to the New England Governors on Coordinated Procurement* (the "2010 Report") reflected the preliminary perspective of the six New England states on the potential to coordinate procurement of renewable resources across New England. The Report concluded that such activity could "... aggregate demand for renewable power and enhance buying power; stimulate the market for renewable resources; and, provide value to renewable project developers by creating larger revenue streams than might otherwise be possible. Using cooperative competitive processes may, therefore, facilitate development of cost-effective, low-carbon renewable electric

¹⁴ See ISO-NE 2012 Regional System Plan at Table 5.1.

¹⁵ See http://www.nescoe.com/uploads/NEGC_Blueprint_Resolution.pdf.

¹⁶ The New England Governors' Renewable Energy Blueprint, 2009, at 7-8, 25 is available at <http://www.nescoe.com/Blueprint.html>.

generation in and around the region.”¹⁷ Further, coordinated competitive procurement fits New England’s preference for competitive processes - rather than central planning - to identify what resources are built where, and by whom.

18. NESCOE has undertaken further work to inform New England policymakers’ consideration of issues associated with developing the region’s renewable resources and associated transmission, as needed. This included: a 2011 *Request for Information*¹⁸ from renewable developers and others including transmission owners and independent transmission developers in relation to resources recognized as renewable across New England States that could be developed by 2016; and a 2012 *Renewable Supply Curve Analysis* that provided information about the relative, directionally indicative costs of various wind resources in New England and New York.¹⁹

19. Most recently, in July 2012, the New England Governors adopted a Resolution directing NESCOE to develop and implement a Work Plan in connection with Coordinated Competitive Renewable Power Procurement with the goal of issuing a solicitation by December 2013. That Resolution is attached to this filing as Exhibit A. NESCOE is implementing this Work Plan and is on track to meet the goal the Governors identified.

¹⁷ See 2010 Report at 5.

¹⁸ Available at http://www.nescoe.com/Coordinated_Procurement.html.

¹⁹ References to wind resources in this draft Work Plan do not indicate a preference for wind relative to other resource types. Rather, references to wind resources reflect that wind has been the subject of several ISO-NE studies, and that wind resources were the predominant resource that responded to NESCOE’s Request for Information, which was open to all resources that satisfy five New England States’ Renewable Portfolio Standard requirements and Vermont’s renewable energy goals.

20. The New England states' work on Coordinated Competitive Renewable Power Procurement and on Economic Studies ISO-NE conducts pursuant to Attachment K, and FERC's intent in Order 1000, have common purposes. They seek to create vehicles through which states may identify and consider state public policies in planning. Further, Coordinated Competitive Renewable Power Procurement and Order 1000 both identify competition as the preferred means to identify projects to advance public policy objectives. Overall, nothing in New England's existing planning processes - even absent any changes in response to Order 1000 - interferes with: (1) the New England Governors' direction as articulated in their Resolutions associated with the Coordinated Competitive Renewable Power Procurement process; (2) the region's preference to identify resources to meet public policy objectives through competitive processes; and (3) the New England states' interest in securing resources that advance state public policy objectives at the lowest all-in cost. Importantly, current New England processes also respect the appropriate decision-making role of states with regard to whether to pursue state public policy projects, and at what cost, in furtherance of state policy objectives. The process to consider state public policies ultimately adopted pursuant to Order 1000 must do the same.

21. NESCOE believes that the tariff changes prompted by Order 1000 will have the potential to advance both the states' interest in minimizing the cost of achieving their public policy goals and FERC's objective of incorporating public policy objectives into regional transmission planning. However, these goals will be met only to the extent that the states determine that the public policy process tariff provisions the

Commission approves satisfies the states' interests and will therefore be a useful tool. The language proposed by the Filing Parties, without the changes requested below, does not. The New England states preference is for the Commission to adopt the public policy process as requested herein. To the extent the Commission does not approve a public policy process that satisfies the states' interests, the New England states intend to continue to work together, as is happening today, through other means to advance state public policy objectives.

B. NESCOE's View on Transmission Competition in New England for Reliability and Market Efficiency Projects.

22. The Filing Parties indicate in the Transmittal Letter which accompanies its October 25 Filing that the existing transmission planning process has been highly successful, and that the existing process ensures that all potential solutions are transparently considered. As stated in the October 25 Filing:

The transmission planning process in New England has been highly successful, resulting in the construction of a large number of new ISO-NE-approved transmission projects that have eliminated many existing and emerging reliability needs on a timely basis. As a result of these projects, New England has a much more robust and flexible transmission system, with an increased level of reliability. These projects approved under the current process have also had the collateral benefit of reducing hundreds of millions of dollars of congestion on the New England transmission system, and eliminating the need for ISO-NE to make daily out-of-merit dispatch payments and contributing to reduced payments for [Reliability Must-Run] generation.

October 25 Filing, Transmittal Letter at 22-23 (internal citations omitted).

23. The Filing Parties conclude by stating, “[g]iven the successful results in New England, the Commission would be imposing a solution when there is no

problem.” October 25 Filing, Transmittal Letter at 23.

24. Notwithstanding that New England has demonstrated its ability to plan, site, cost-allocate and build transmission to meet reliability needs such ability does not mean that New England should not implement improvements to the planning process that will benefit ratepayers. To that end and as described below, NESCOE supports the changes relating to competition for reliability projects identified in the NEPOOL-supported proposal.

25. The Commission has often recognized the value of competition in improving service and lowering costs.²⁰ There is no reason to believe that competitive pressures will be less successful in the transmission arena than it is in other aspects of the electricity market. The Commission should require, to the extent consistent with the requirements of reliability, that regional planning processes incorporate meaningful opportunities for competition in the development and construction of transmission projects. Such competition will benefit customers by encouraging market participation by efficient project developers and facilitate cost discipline for incumbents. In New England, transmission costs have increased from \$15.14/kw-yr (\$0.003 per kwh at 60% capacity factor) in 2002,²¹ to \$75/kw-yr (\$0.014/kwh) in 2012, and is projected to rise to \$115/kw-

²⁰ *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, FERC Stats. & Regs. ¶ 31,036 at p. 31,364 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in 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).

²¹ Available at http://www.iso-ne.com/stlmnts/iso_rto_tariff/rate_dev/2002/Schedule_9_Rate_effective_060102.xls

yr (\$0.022/kwh) in 2016.²² Cost discipline is needed: recent experience in New England, where many transmission projects have moved from the planning to operational phase, shows actual costs well above incumbent transmission owners' project cost-estimates at the time of project selection. These overruns are a particular concern in light of the increases in transmission cost as a proportion of New England customers' bills in recent years. Such cost overruns frustrate, or worse, make impossible a timely comparison of alternative solutions that could satisfy or defer the need proposed to be met by the proposed transmission project. Increased competition among entities to build transmission facilities could help to improve project cost control. It could also act as a counterweight to the existing regulatory structure wherein incumbent transmission owners seek financial incentives (including enhanced rates of return on equity) funded by ratepayers as a matter of course. Indeed, a competitive process may encourage at least some transmission developers to propose projects without insisting that ratepayer-funded financial incentives are necessary, which would benefit ratepayers.

26. Competitive processes are consistent with the New England states' view that reliability is a top priority. It is well within the capability of ISO-NE, and the Commission, to craft qualifications and ongoing monitoring processes that will ensure that non-incumbents meet the same reliability standards as incumbents. But, in NESCOE's view, increasing the competitive dynamic in transmission development in a way that allows experienced transmission developers, including but not limited to incumbent TOs from within New England and elsewhere, an enhanced opportunity to propose and construct solutions throughout New England would benefit ratepayers and be in the public

²² ISO-NE 2012 Regional System Plan at Table 5.2.

interest. As set forth in more detail below, affording *Mobile-Sierra* protection to the TOA would frustrate the important policy goals and benefits that follow from the introduction of increased competition, contrary to the intent of Order 1000.

VI. PROTEST

A. Any Successful Order 1000 Public Policy Process Must Recognize the States' Central Role With Respect to Identifying Public Policies and Selecting Cost-Effective Solutions that Meet Those Policies.

27. With respect to a public policy-related process, 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.²³ In Order 1000, the Commission “encourage[d] 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,”²⁴ and explained its belief “that the requirements imposed [in Order 1000] complement state efforts by helping to ensure that potential solutions to identified transmission needs driven by Public Policy Requirements of the states can be evaluated in local and regional transmission planning processes.”²⁵ The New England states concur with the Commission’s intent, expressed above, to “complement state efforts” and “help to ensure that potential solutions to identified transmission needs driven by Public Policy Requirements of the states can be evaluated.” To that end,

²³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 at P 574 (“Order No. 890”), *order on reh’g*, Order No. 890-A, 73 FR 2984 (January 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

²⁴ Order No. 1000 at P 212.

²⁵ Order No. 1000 at P 213.

NESCOE requests the Commission to approve the NEPOOL-supported modifications described herein, without which the October 25 Filing is unjust and unreasonable. If the details of the process the states consider necessary are not included in the approved tariff language, the states' ability to use the state public policy planning tool FERC sought to create through Order 1000 would be substantially reduced.

28. As explained herein, New England already has useful public policy planning processes in place. Through these processes, in the form of ISO-NE Economic Studies the states have requested from time to time, the six New England states have worked together to identify and consider policy objectives and assumptions. The states then provide these objectives and assumptions to ISO-NE and, after stakeholder input, ISO-NE incorporates them into technical studies. ISO-NE's September 29, 2010 comments in response to the Commission's NOPR in Docket No. RM10-23-000 explains the effectiveness of the existing processes. In those comments, ISO-NE discusses its experience with Economic Studies jointly requested by NESCOE and/or the New England states. ISO-NE noted that, following these studies, "nonincumbents and incumbents alike are prepared to step forward...with projects that may provide support for the enunciated public policy goals."²⁶ In fact, ISO-NE indicated that "a number of projects have been brought forward by non-incumbents and incumbents that could facilitate access to renewable and low carbon sources of energy within New England and in neighboring systems."²⁷

²⁶ Comments of ISO New England Inc., Docket No. RM10-23-000, at 23 (September 29, 2010) (internal footnote omitted).

²⁷ *Id.*

29. New England's existing processes for considering public policy objectives in planning have been extremely informative to policymakers. If properly implemented, the NEPOOL-supported public policy process could enhance current practices. NESCOE's general support for the Order 1000 directive that ISO-NE consider public policy requirements in transmission planning, and the states' ability to effectively use any Order 1000 public policy process, assumes that the process will be structured to complement New England's existing planning processes.

30. To maximize the potential use of Order 1000's ability to advance consideration of state public policy in planning, NESCOE participated proactively in the ISO-NE stakeholder process to develop a public policy process. The six New England states worked together to offer ISO-NE and the region's stakeholders a process about which there was state consensus.²⁸ NESCOE emphasizes herein three elements that are central to NESCOE's support for the public policy process it requests the Commission to approve. One, the process must recognize the states' central role with respect to identifying the public policies that ISO-NE would consider in planning. Two, the process must acknowledge that only the states will determine whether and how each state will ultimately satisfy their respective state public policy objectives. Three, each state must decide for itself whether the benefits of a proposed project that prevail in a competitive process outweigh the costs from the perspective of that state's policies and ratepayers pursuant to that state's analysis of its laws and policies. Thus, consistent with Order 1000 principles, there shall be no involuntary cost allocation associated with any project

²⁸ As discussed more fully below with respect to identifying public policies, the states are committed to continuing to work together to reach consensus positions in the Order 1000 process, as well as working with other stakeholders, to the extent that process is acceptable to the states.

designed to advance public policy objectives, particularly when those projects are, fundamentally, voluntary in nature.

31. To the extent details of the process necessary to implement these three fundamental premises are not included in the final ISO-NE tariff, the states' ability to use the tools FERC sought to provide in Order 1000 to advance projects that meet state policy objectives would be substantially reduced. In such a case, the states are likely to pursue processes other than Order 1000 regional planning to consider means to advance state public policies.

1. States Play a Central Role With Respect to Identifying Public Policies.

32. In the October 25 Filing, the Filing Parties propose new Section 4A.1 to Attachment K of its OATT, which sets for the process by which NESCOE will identify public policies that may be served by transmission solutions.²⁹ Both the process described by the Filing Parties, and the process supported by NEPOOL, properly recognize that, as the central component of the Commission's directive that RTOs consider state public policy objectives in transmission planning, states necessarily play a prominent role in the Order 1000 planning process. However, while the process described by the Filing Parties is substantially similar to the process supported by NEPOOL, the NEPOOL-supported proposal implements several provisions the New England states consider important to the states' use of the full process as a planning tool. For this reason, NESCOE submits that the Commission should accept the October 25 Filing related to the

²⁹ OATT, Primary Marked Version at 537; *see also* OATT, Contingent Marked Version at 543-44. It is important to recognize that public policies do not drive transmission needs. Rather, there are a variety of ways to meet public policies, only one of which may be a transmission solution identified in a regional transmission planning process.

public policy process, subject to the inclusion of the specific modifications detailed in Section VI.A.4. below from the NEPOOL-supported process.

33. ISO-NE has consistently recognized the central role that the New England states play in this regard. In its September 29, 2010 comments on the Commission's NOPR in Docket No. RM10-23-000, ISO-NE cited the following advantages to a state-centric approach to public policy planning:

First, states within a region may have differing policy goals or priorities. Second, the development by the Regional State Committee of a consensus on the governing policy criteria, and thereafter, on the policy-driven needs that result from the application of those criteria, should assist in achievement of the "buy-in" necessary for multistate projects to obtain siting approval and to be constructed on a timely basis. Third, the fact that a Regional State Committee's decisional process will have been used to identify the public policy need or priority would simplify cost allocation. That is, the analysis undertaken to reach that decision would presumably be premised on anticipated benefits to the region as a whole or to a sub-region, and therefore the presumptive cost allocation for a resulting project would readily flow from that analysis. Fourth, ISO-NE's experience with the regional response to Economic Studies jointly requested by the New England states (whether through NESCOE or the governors' association) suggests that nonincumbents and incumbents alike are prepared to step forward, in response to a clear and unified signal, with projects that may provide support for the enunciated public policy goals.

Comments of ISO New England, Inc., Docket No. RM10-23-000, at 22-23

(September 29, 2010) (internal footnote omitted). Similarly, in its NOPR comments, NEPOOL identified the important role that states must play with regard to public policy requirements. "In regions with multiple States, such as New England, the States [*sic*] involvement in the process of identifying public policy requirements, and any related transmission upgrades and cost allocation will be especially important." Comments of

the New England Power Pool, Docket No. RM10-23-000, at 13 (September 24, 2010). NEPOOL added that, “[w]here the States have a mechanism for providing their collective input into the impact of State public policy requirements on the regional system planning process, and have formally expressed their collective input through that mechanism, the Commission should give that input considerable deference in any related matters regarding regional planning or cost allocation that come before the Commission.” *Id.* NEPOOL explicitly recognized NESCOE as one such mechanism. *Id.*, n.16. Further, in their October 25 Filing, the Filing Parties agree that “the states should take a leading role in the identification of public policies” that may give rise to the need for transmission projects. October 25 Filing, Transmittal Letter at 50.

34. Given the demonstrated importance of the states’ role, the Commission must defer to the states with regard to what policies ISO-NE considers in studies and how any subsequent competitive process to advance associated proposed projects moves forward. NESCOE respectfully submits that no other entity – not FERC, not ISO-NE nor any other market participant – is properly suited to make decisions concerning state public policies and whether or how to advance them.

35. The states fully respect and value the Commission’s direction in Order 1000 concerning stakeholder input. The New England states are committed to soliciting and considering input from interested stakeholders and facilitating opportunities for dissenting views to be presented to ISO-NE. NESCOE’s work with ISO-NE and stakeholders since August 2011 to develop a comprehensive Order 1000 compliance proposal that is broadly supported evidences this approach. Further, both the Filing Parties’ submittal and the NEPOOL-supported proposal reflect the open, transparent

process that incorporates stakeholder input, as contemplated by FERC in Order 1000.

2. Only the States Can Determine the Means By Which They Will Meet Public Policy Objectives.

36. Similar to the centrality of the states' role in identifying state public policies, only the states are qualified to determine which, if any, projects should be pursued in furtherance of those policies. The types of public policy projects contemplated by Order 1000 are, by definition, voluntary in nature, designed to help facilitate the fulfillment of individual and/or collective state goals. As a result, the role of the states in this process must differ from the role states play in the development of reliability projects. Accordingly, in order for the states to be able to use the tools created pursuant to Order 1000 to further consideration of public policies in regional planning, states must: (1) have the determinative role in any competitive process that identifies potential transmission solutions that would advance state public policies; (2) determine which potential solutions should move forward and under what terms and conditions after final negotiations with a project that prevails in a competitive process; and (3) determine whether such a project should be removed from further consideration.

37. Proposed Section 4A.3 of Attachment K to the ISO-NE OATT in the October 25 Filing sets forth a study process through which NESCOE will submit requests for Public Policy Transmission Studies. As explained by the Filing Parties, the Public Policy Transmission Study is a two-phase process. The first phase identifies high-level solutions and produces a rough estimate of the costs and benefits. October 25 Filing, Transmittal Letter at 52; *see also* OATT, Primary Marked Version at 69-70. The second phase is "designed to produce more detailed analysis and engineering work on transmission concepts identified in the first phase." OATT, Primary Marked Version at

70; *see also* October 25 Filing, Transmittal Letter at 52. The study process will be open and transparent. Both states and stakeholders will have a meaningful opportunity to participate and comment. For example, NESCOE may want to include additional study parameters and assumptions that go into either phase.

38. The second phase of the Public Policy Transmission Study process for state public policy projects is only undertaken after NESCOE provides ISO-NE a written request to proceed.³⁰ The intent of the second phase is to provide more granular information about potential transmission solutions that may meet public policies, which the states will use as they decide whether to move forward with a particular project. Again, as proposed, the process is designed to be open and transparent and to enable the states to provide input regarding the proposed options, or any particular feature of proposed transmission solutions that the states are interested in exploring. *See* October 25 Filing, Transmittal Letter at 52 (discussing input from NESCOE).

3. Only the States are Properly Suited to Decide Whether the Benefits of a Public Policy Transmission Project Offered to Advance State Public Policy Objectives Outweigh its Costs from the Perspective of that State's Policies and Ratepayers.

39. Upon completion of the Public Policy Transmission Study, a decision must be made as to whether to move forward with a particular project. Only the states may properly determine whether a particular project is one or more states' preferred means to satisfy a state's public policy objectives, its terms and conditions, and what, if any, level of costs a state determines to be appropriate for its ratepayers to incur in furtherance of that state's public policies. No other entity is properly suited to make this

³⁰ *See* October 25 Filing, Transmittal Letter at 50. As explained in more detail below, *ex ante* approval by NESCOE is an important element in terms of ensuring that ratepayers are not exposed to development costs that provide little or no benefit.

determination on behalf of a state's ratepayers who would incur the costs. Involuntary assignment of any costs to any state under the pretext of "furthering a state public policy," when a state has concluded it will satisfy its state public policies by other means, would be unjust and unreasonable. Thus, the fundamental structure reflected in Filing Parties' process as modified by elements of the NEPOOL-supported process identified herein enables each state to decide whether to participate in a particular proposed project, and to conduct, as a state wishes, sufficient cost/benefit analysis to confirm whether, and at what cost, that state would support a project is a necessary element of any final tariff language.

40. The New England states cannot obtain a meaningful understanding of costs in the abstract. Within the pool of potential projects that may advance public policy objectives, there will almost certainly be less expensive - or more cost-effective or otherwise preferable - means of achieving comparable benefits. Thus, in deciding whether to incur costs associated with transmission projects in furtherance of state public policies, interested states must be able to compare proposed projects' relative costs and benefits.

41. First, costs associated with public policy-related transmission projects - which can be achieved in a variety of ways - are not essential to reliably operating the system. Thus, in the event a public policy transmission project is no longer cost-effective or desirable, whether resulting from cost overruns, changes in policy, or less expensive technological advancements, the transmission project can be discontinued without negatively impacting the fundamental obligation to provide reliable service.

42. Second, while transmission is one means for relieving congestion constraints, both transmission and non-transmission solutions may be able to advance state public policies. *See* October 25 Filing, Transmittal Letter at 50 (noting that "there is often

a variety of ways to meet public policies”). For example, in order to meet its renewable portfolio standard, a state could promote localized solar generation in lieu of building new transmission to connect to distant wind resources. States could meet carbon-reduction goals by promoting energy efficiency or distributed generation from combined heat and power instead of pursuing transmission-based solutions. In addition, in states with Alternative Compliance Payment compliance mechanisms under their RPS, suppliers could fulfill their RPS obligations by making these payments rather than by purchasing renewable energy resources that cost more than the state has determined is reasonable.

43. Third, states that wish to pursue public policy-related transmission projects require accurate cost information about such projects to allow those states the ability to assess the states’ preferred means to proceed from their ratepayers’ perspective. Following participating states’ cost/benefit analysis and any final price negotiation between states and the project that prevails following a competitive assessment of proposed projects, ISO-NE’s proposed means by which NESCOE or the states will inform ISO-NE of selected public policy transmission upgrade solution is a “Public Policy Transmittal.” ISO-NE 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.³¹

³¹ OATT, Primary Marked Version at 70.

The Public Policy Transmittal “is the trigger needed for the ISO to place the public policy project into the Regional System Plan as a Public Policy Transmission Upgrade.”

October 25 Filing, Transmittal Letter at 56. Once one or more state(s) decides to move forward with a Public Policy Transmission Upgrade, cost controls remain necessary. To avoid exposing ratepayers to unnecessary costs for projects pursued on a voluntary basis, the states which have opted-in to a particular project must have the ability to continue to assess costs and benefits and, if necessary, discontinue a project.

44. Fourth, during New England’s Order 1000 stakeholder conversations, ratepayer exposure to project development costs emerged as a significant issue. Absent strong cost controls, ratepayers could be exposed to the unacceptable risk associated with project proposal development costs. Project proposal development costs have the potential to be high and some may ultimately provide ratepayers little or no value. For example, ratepayers should not be obligated to pay an unlimited number of developers’ project proposal costs. Interested developers’ shareholders, including TOs’ shareholders, should fund their initial proposals if they are interested in the opportunity to compete with other proposals for project development opportunities. If such initial costs are not borne by shareholders, states will likely pursue other, less-risky alternatives to meet public policy goals that do not expose ratepayers to early project proposal costs.

45. Fifth, it is essential that public policy project development costs to be recovered from ratepayers only be incurred if, and to the degree that, states have knowledge of them and consent to developers incurring them. However, even if costs are recoverable based on a NESCOE request that a particular developer proceed through ISO-NE’s proposed Stage One and Stage Two Proposal processes, the need for ongoing

cost control remains. Further, participating states must be able to withdraw their support for a project if the states conclude that circumstances, *e.g.*, cost overruns, adversely affect the prior conclusion that the project had been a cost-effective way to meet state policy objectives. *See* October 25 Filing, Transmittal Letter at 55 (discussing the process whereby NESCOE can reject revised cost estimates). In order for the states to effectively utilize the Order 1000 transmission planning process, these cost controls must be in place.

46. A final cost control mechanism relates to TOs' interest in recovering prudently incurred development costs. Prior to the TO submitting such costs to FERC for recovery, the states who are supporting such a project should be able to verify that the costs were prudently incurred. Thus, the TOs, and any other project sponsor that seeks FERC approval of cost recovery, should be required to first provide documentation to such states to facilitate this verification. This step in the process as set forth in the NEPOOL-supported proposal is not intended to and does not in fact shift any prudency findings from FERC to those states that support a particular public policy project. It simply enables state review of appropriate documentation. This step in the process will streamline any subsequent proceedings before the Commission. In sum, the October 25 Filing does not include the cost control mechanisms that are contained in the NEPOOL-supported proposal, and, therefore the October 25 Filing is unjust and unreasonable without including the changes that are described in Part VI.A.4 herein. If the process does not contain cost control mechanisms that the New England states believe are necessary, the process is less likely to be used.

4. Absent Certain Modifications, New England States Would Not Make Use of the Filing Parties' Public Policy Process To Advance State Public Policy Projects. That Proposed Process Therefore Fails to Comply with Order 1000's Directives and is Per Se Unjust and Unreasonable.

47. In reviewing a compliance filing, the “sole relevant issue” is whether the compliance filing actually complies with the Commission’s directives. *Delmarva Power & Light Co.*, 63 FERC ¶ 61,321 at p. 63,160 (1993). In the instant proceeding, the sole relevant issue with respect to ISO-NE’s public policy proposal is whether it “provide[s] for the consideration of transmission needs driven by Public Policy Requirements in the local and regional transmission planning processes.” Order No. 1000 at P 203. In determining whether the Filing Parties’ public policy compliance proposal satisfies this directive, the Commission should be mindful that there are no degrees of “justness and reasonableness.” Rather, a rate, term, or condition of service is either just and reasonable, or it is not, and “not even ‘a little unlawfulness is permitted.’” *Farmers Union Central Exch., Inc. v. FERC*, 734 F.2d 1486, 1508 (D.C. Cir. 1984), *cert. denied sub nom. Williams Pipe Line Co. v. Farmers Union Central Exch.* (citing *Consumers Federation of America*, 515 F.2d at 358 n. 64 (quoting *FPC v. Texaco Inc.*, 417 U.S. 380, 399, 94 S.Ct. 2315, 2327, 41 L.Ed.2d 141 (1974))).

48. As stated above, the New England states generally support the serious efforts of ISO-NE in its attempt to get myriad interests to coalesce around a single, comprehensive Order 1000 proposal for New England. While the New England states support many aspects of the October 25 Filing’s public policy process proposal, it should not be accepted as filed because it is flawed by what essentially amounts to “a little unlawfulness” and is therefore unjust and unreasonable.

49. In particular, the October 25 Filing’s public policy process omits material provisions that are necessary in order for the states to use the process in furtherance of state public policy objectives. In contrast, the NEPOOL-supported proposal includes certain details the New England states consider necessary in order for the states to be able to use the process to bring a potential project to fruition. Thus, several of the modifications contained in the NEPOOL-supported public policy process would cure the omissions in the October 25 Filing, and result in a process that satisfies the Commission’s compliance directives and is just and reasonable.

50. NESCOE submits that, by definition, any process that the states would not use to further Order 1000’s goal of creating a process in which states may consider state public policy requirements in the local and regional transmission planning processes is *per se* unjust and unreasonable and should be rejected. Thus, NESCOE urges the Commission to acknowledge the foundation the Filing Parties’ public policy proposal provides, and build upon that proposal by accepting the modifications that need to be added from the NEPOOL-supported proposal to render the filing just and reasonable.

51. Consistent with the above, NESCOE submits that if the following modifications to the Filing Parties’ version of Attachment K in the NEPOOL-supported proposal³² were to be ordered by the Commission, the New England states could use the process, the Commission’s intent would be met, and the resulting language would be just and reasonable.

52. First, the New England states request that the Commission order the modification of Attachment K, Section 4A.4, “Response to Follow-On Phase of Public

³² NESCOE also submits that corresponding modifications to the TOA must also, where indicated, be made.

Policy Transmission Studies,” of the October 25 Filing³³ consistent with the NEPOOL-supported proposal. The modification in the NEPOOL-supported proposal provides that when ISO-NE conducts studies at the request of the New England states, the PTOs will provide NESCOE with documentation supporting TO-incurred study costs associated with TO work in support of such studies. The reason this modification is necessary is that the States have a strong interest in ensuring that only prudently incurred costs are passed on to state ratepayers in furtherance of a project intended to meet state public policies.

Additionally, the New England states wish to ensure that state regulators are satisfied regarding the prudence of such costs without having to invest considerable time and costs required to file a prudence complaint with the Commission in connection with the costs to study transmission projects to satisfy state public policies. The modification in the NEPOOL-supported proposal would satisfy those goals, rendering the language just and reasonable. The New England states emphasize that their interest in receiving documents to substantiate the prudence of study costs for projects intended to further state policy objectives is not intended to transfer prudence determinations from the Commission to states. Rather, it is intended to facilitate state review of supportive documents and increase states’ confidence in the prudence of incurred costs.

53. Second, the New England states request that the Commission order the modification of Attachment K, Section 4A.5(e), “List of Qualifying Stage 1 Proposals: NESCOE Response,” of the October 25 Filing³⁴ consistent with the NEPOOL-supported

³³ OATT, Primary Marked Version at 539-40; *see also* OATT, Contingent Marked Version at 545-46.

³⁴ OATT, Primary Marked Version at 541; *see also* OATT, Contingent Marked Version at 548.

proposal. The modification made in Section 4A.5(e) of the NEPOOL-supported proposal adds a description of the information project developers must include in Stage 1 proposals at the request of NESCOE. This modification is necessary since one or more New England states will be the entities considering whether to support projects proposed to advance state public policies. Accordingly, the states should have the opportunity to specify what information they consider important and necessary to make such determinations. With the requested modification, the resulting language would be just and reasonable.

54. Third, the New England states request that the Commission order the modification of Attachment K, Section 4A.5(f), “Stage Two Cost Estimate Requests,” of the October 25 Filing³⁵ consistent with Section 4A.6, “Reimbursement of Stage One Proposal and Stage Two Solution Costs,” of the NEPOOL-supported proposal. The New England states submit that the modification made to Section 4A.6 in the NEPOOL-supported proposal should be adopted in place of Section 4A.5(f) of the October 25 Filing. Such modification is necessary because as-modified, Section 4A.6 of the NEPOOL-supported proposal requires project developers, when actual costs of a study reach ninety percent of the estimated costs, to provide ISO, NESCOE and the supporting states a revised estimate of the cost to complete the work. If any one or more of the supporting states does not accept the revised estimate, NESCOE shall notify ISO-NE either that (1) the states do not accept the revised estimate, and ISO-NE shall promptly advise the developer to stop work or (2) shall notify ISO-NE that the remaining states continue to

³⁵ OATT, Primary Marked Version at 541-42; *see also* OATT, Contingent Marked Version at 548.

support the revised estimate and shall provide a revised cost allocation mechanism. On the other hand, Section 4A.5(f) of the October 25 Filing allows a project developer to exceed its cost estimate by 25% before it must notify the states of the cost over-run or make a request to revise the estimate. As described above, the states' ability to control costs is critical to whether one or more states will use the public policy process to bring projects to fruition. The New England states will use a competitive process to select which projects will be studied based on criteria, which will include costs. Therefore, accurate cost estimates are paramount to the integrity of state decision-making. If one or more New England states are to use the public policy process to select projects based on state cost-benefit analysis, the New England states *must* be able to cancel a project that exceeds its cost estimate. Transmission studies for public policy-related projects differ from transmission studies for reliability projects, in that a public policy project is not needed to maintain the reliability of the grid, and does not necessarily have to be built. Project developers incurrence of additional costs beyond their original estimate could delay the states' decisions about that project and create incremental ratepayer financial obligations in the event the states decide not to pursue the project.

55. Related to the same issue, in Section 1.1(a)(ii) of Schedule 3.09(a) of the TOA,³⁶ the Filing Parties propose revisions in the October 25 Filing that mirror the issue in Attachment K, Section 4A.5(f).³⁷ In particular, the October 25 Filing's proposed revision to Section 1.1(a)(ii) of Schedule 3.09(a) of the TOA proposes a requirement that

³⁶ TOA, Primary Marked Version at 102; *see also* TOA, Contingent Marked Version at 102.

³⁷ OATT, Primary Marked Version at 541-42; *see also* OATT, Contingent Marked Version at 548.

the cost overrun be 25% before there can be a request for a revised estimate. NESCOE opposes the proposed guaranteed cost recovery in accordance with tariff provisions that apply to reliability projects, as public policy projects will proceed only if the benefits exceed the costs, and accordingly, cost control is critical. The Commission should not grant PTOs the right to exceed cost estimates and to recover those costs from ratepayers without review. For these reasons, the October 25 Filing's proposed changes to Section 1.1(a)(ii) of Schedule 3.09(a) of the TOA should be revised in accordance with the revisions proposed in the NEPOOL-supported proposal with respect to Attachment K, Section 4A.5(f). With the requested modifications to both Attachment K and the TOA, the resulting language is just and reasonable.

56. Fourth, the New England states request that the Commission order the modification of Attachment K, Section 4A.8, "Time Period During Which the ISO May Receive a Public Policy Transmittal," of the October 25 Filing³⁸ consistent with the NEPOOL-supported proposal. The modification of Section 4A.8 of the NEPOOL-supported proposal provides that the then-current Public Policy planning cycle will end if NESCOE and/or the states do not submit to ISO-NE a transmittal as defined in the proposal within 12 months of ISO-NE communicating its preferred Stage Two solutions to the states. This modification is necessary to bring clarity to the process, and in particular to the end of a public policy transmission study cycle. This required modification gives assurance to developers that their bids are not firm for longer than one year, consistent with typical commercial bidding procedures. It also imposes a reasonable time for states

³⁸ OATT, Primary Marked Version at 544; *see also* OATT, Contingent Marked Version at 550.

to deliberate proposed projects. However, under the requested modification, states could continue to consider a proposed project through several means. If one or more states are interested in continuing to consider a proposed project beyond the 12-month period, those states could designate it as an elective upgrade, request to study it again in the next public policy planning cycle, or request a departure from the 12-month tariff deadline from FERC and continue deliberations. The requested modification is in accordance with Order 1000's clear directive:

The Commission requires each public utility transmission provider to 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... The evaluation process must culminate in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation.

Order No. 1000 at P 32. With the requested modification, the resulting language is just and reasonable.

57. Fifth, the New England states request that the Commission order the modification of Attachment K, Section 4A.9(a), "Inclusion of Public Policy Transmission Upgrades in the Regional System Plan and RSP Project List," of the October 25 Filing³⁹ consistent with the NEPOOL-supported proposal. The modification in the NEPOOL-supported proposal enables the New England states that elect to support a project in furtherance of their state public policy objectives the opportunity to negotiate final pricing with the project sponsor. This modification is necessary because as previously described,

³⁹ OATT, Primary Marked Version at 544; *see also* OATT, Contingent Marked Version at 550.

states will only proceed with a public policy project to the extent one or more states conclude that a certain project is the most cost-effective way to achieve that state's policy goals. Since the New England states will ultimately decide whether to support a project, at what price, and allocate the costs among participating states, the New England states must have the ability to enter final negotiations with the project proponent that prevails after a competitive evaluation. Without the ability to control the level of final cost recovery, the benefits of competitively procured public policy transmission could be lost through lax cost control and inefficient construction practices. With the requested modification, the resulting language is just and reasonable.

58. Sixth, the New England states request that the Commission order the modification of Attachment K, Section 4A.9(c), "Subsequent State Opt-In," of the October 25 Filing⁴⁰ consistent with the NEPOOL-supported proposal. The modification in the NEPOOL-supported proposal provides that project costs will be allocated according to the method agreed to by the states that conclude a project is the most cost-effective means to further their state public policy objectives. In contrast, the Filing Parties propose to allocate costs to a state that chooses to participate in a public policy project later in the process than other participating states according to the same method that is used to allocate Regional Network Service ("RNS") charges. One or more New England states that conclude a proposed project is the preferred means to advance their state public policies will agree to the terms on the allocation of costs associated with such project, or the project will not move ahead as the means to satisfy the state public policies. The modification in the NEPOOL-supported proposal is necessary because in this construct,

⁴⁰ OATT, Primary Marked Version at 545; *see also* OATT, Contingent Marked Version at 551.

there is no reason to allocate the costs of projects that one or more states support on any basis other than the states' agreement. Moreover, this framework is consistent with the principle that costs must not be involuntarily allocated. With the requested modification, the resulting language is just and reasonable.

59. Finally, the New England states request that the Commission order the modification of Attachment K, Section 4A.9(d), "Removal From RSP Project List," of the October 25 Filing⁴¹ consistent with the NEPOOL-supported proposal. The modification in the NEPOOL-supported proposal removes language contained in the October 25 Filing that would provide for discontinued projects to receive a reasonable return on investment ("ROI") at the Commission-approved return on equity ("ROE"). This modification is necessary because as discussed above, one or more states that elect to pursue a public policy project to advance state policy objectives will ultimately negotiate a final agreement with the selected developer that prevails following a competitive evaluation as described in Section 4A.9(a). The New England states are confident that interested developers will participate in the public policy transmission study process on a voluntary basis according to the terms defined in the tariff and agreed to by the states, and not pursuant to a guaranteed a rate of return. Developers that require a guaranteed rate of return may elect not to participate. With the requested modification, the resulting language is just and reasonable.

⁴¹ OATT, Primary Marked Version at 545; *see also* OATT, Contingent Marked Version at 551.

B. Reliability and Market Efficiency Projects - the October 25 Filing Does Not Go Far Enough to Increase Competition in Transmission Development.

60. Another primary focus of Order 1000 is on increasing competition in transmission development. As FERC notes in Order 1000 (discussing Order No. 890), as a result of existing practices in some areas, a non-incumbent transmission developer may lose the opportunity to construct its proposed transmission project to the incumbent transmission owner if that owner has a federal right of first refusal to construct any transmission facility in its service territory. *See* Order No. 1000 at P 228 (citing Notice for Request for Comments, Transmission Planning Processes under Order No. 890, Docket No. AD09-8-000 (October 8, 2009)). The Commission further found that if a regional transmission planning process does not consider and evaluate transmission projects proposed by non-incumbents that regional transmission planning process cannot meet the Order 890 transmission planning principle of being “open,” and may not result in a cost-effective solution to regional transmission needs. *See id.* at P 229. NESCOE agrees with this sentiment expressed by the Commission in Order 1000, and further agrees that competition, properly implemented, will be advantageous to ratepayers.

61. The Filing Parties, on the other hand, assert that the existing process has been highly successful, and that few, if any, changes are needed to meet the requirements of Order 1000. As the Filing Parties state:

[t]he facts reviewed in this subsection demonstrate that the existing New England reliability and market efficiency planning processes, which include and rely on application of the PTOs’ right to build, are consistent with, or superior to, the processes described by the Commission in Order

No. 1000 (that would exclude this right to build provision).⁴²

62. While the existing transmission planning process has brought proposed reliability projects to fruition, NESCOE believes that aspects of the October 25 Filing in connection with competition are not just and reasonable. Careful modifications to the ISO-NE's processes that would increase competition would benefit New England ratepayers.

1. Transmission Competition would be Improved in New England if it Were Expanded to Include Competition for the Selection of Projects to be Constructed.

63. The Filing Parties assert that sufficient competition already exists in New England. The October 25 Filing states: "A cornerstone of the existing planning process is the open collaboration among the planning experts of the PTOs in the areas affected by a reliability problem to identify solutions to reliability needs, in which the PTOs openly share their planning studies and data with each other and with ISO-NE so that a variety of potential solutions can be evaluated, modified and combined on an interactive basis." October 25 Filing, Transmittal Letter at 23 (citing Joint Testimony of David Boguslawski, Northeast Utilities' Vice President of Transmission Strategy and Operations, and Carol Sedewitz, Director of Electric Transmission Planning at Natural Grid USA at 8-10 ("PTO Testimony")).

64. The Filing Parties further submit that "The current transparent process...is a technically rigorous process in which all reasonable transmission options are explored." October 25 Filing, Transmittal Letter at 23. According to the Filing Parties,

⁴² October 25 Filing, Transmittal Letter at 22.

[t]he benefits of this open collaboration will be lost if the Commission forces ISO-NE to replace the existing process with a process in which parties must submit their own individual proposed solutions and then compete for inclusion in the RSP Project List. This competition will necessarily force the PTOs and other developers to keep their own data and analyses away from competitors, and will undermine the advantageous, open interaction that has produced exemplary results in New England. An alternative process based on dueling project submissions will also lose the benefits of iteration that exist today, in that the work done in suggesting solutions leads to other ideas and a second, third or even fourth round of analyses in order to get to the best result and respond to changing conditions.

Id. at 24.

65. The Filing Parties have a very narrow view of what competition is.

According to the Filing Parties,

[t]he current New England process already incorporates competition where it is most likely to reduce costs and ensure superior results. As described in the PTO Testimony, when one or more PTOs are selected to build a reliability project under the current process, they generally hold a competitive solicitation for the construction and procurement work for the projects. Therefore, those responsible for the actual construction of the project, and for supplying major components thereof, must compete to be selected, and the competition allows the PTOs to consider cost, capability and experience in selecting engineering and construction firms. It is in the construction of transmission projects that superior capability is most important to get projects timely completed. Order No. 1000 would replace this competition with a process in which competing developers must develop more detailed proposals and are likely to team up with their own preferred construction and engineering firms when they prepare their competing solutions. This is a less optimal situation than one in which there is competition among materials and construction services providers after the best project is identified.

Id. at 26 (internal footnote omitted).

66. The Filing Parties emphasize competition among *construction companies* the PTOs select to build their projects and assert that competition “where it is most likely to reduce costs and ensure superior results” is already incorporated in the current planning process. The current planning process does not, however, adequately provide for competition *among transmission developers* and in the *process for the region to select projects*. Increasing competitive opportunity among developers will encourage them to use innovative approaches and incent them to find ways to minimize project costs. The current transmission planning process does not.

67. Despite the Filing Parties’ belief that the transmission planning process changes directed in Order 1000 would be a “less than optimal situation” than that already in place in New England, the New England states submit that the current transmission planning process in New England would be enhanced to the benefit of ratepayers by increased competition. Providing a reasonable opportunity for experienced transmission developers, including but not limited to those with experience building transmission in New England and elsewhere, to advance creative proposals and build projects would not impede the ability for New England to get transmission needed for reliability built on time. Increased competition among developers would, however, benefit ratepayers through competing firms’ efforts to minimize and control their project costs.

2. Improvements to the Transparency of the Transmission Planning Process Would Benefit Ratepayers.

68. As noted above, the Filing Parties repeatedly state that the process is both open and collaborative. NESCOE agrees that in many ways, it is. Stakeholders are

fully aware of all studies, including the results of needs assessments and solutions studies. Stakeholders have the opportunity to comment at various points in the study process, to ask questions and to make suggestions.

69. However, the process is not so open and transparent as to preclude improvements in this regard. Needs assessment study groups, for example, are generally closed to all but impacted TOs (*see* October 25 Filing, Supporting Testimony of ISO-NE Witness Stephen J. Rourke at 10 (“Rourke Testimony”). Over time, various entities have requested that ISO-NE allow them access to needs assessment study groups and ISO-NE has denied those requests.⁴³ According to ISO-NE, such denial of needs assessment study group access is for Critical Energy Infrastructure Information (“CEII”) protection and/or market sensitive information; however, personnel from interested entities that are today excluded either have, or could obtain, CEII or market sensitive information clearance. Alternatively, ISO-NE could exclude such personnel on an as-needed basis when specific sensitive information is discussed. Due to the needs assessment study groups’ limited composition and lack of meeting minutes, it is unknown to all but ISO-NE and TOs whether needs assessment study groups begin to discuss potential solutions. Potential solutions are properly the subject of solution study groups, which are at least, according to the tariff, open to interested persons. However, the Rourke Testimony indicates that needs assessment study groups’ discussion may be broader than a strict needs focus. A footnote to the table in Attachment 1 of the Rourke Testimony states that “Needs start/completion dates approximate based on preliminary studies conducted by Transmission Owners; typically included some preliminary work on solution development.” NESCOE

⁴³ On a limited basis, impacted generators are permitted attend portions of needs assessment study group meetings when their facilities are directly affected.

understands that - and why- ISO-NE is interested in not converting need assessment study group meetings into Planning Advisory Committee meetings, with all potentially interested entities entitled to participate. However, allowing planning engineers from incumbent transmission owners *and* competitive transmission developers access to needs assessment study groups, as provided for in the NEPOOL-supported proposal, would enhance in a limited, constructive way the openness and transparency of the planning process. Allowing transmission developers more broadly into needs assessment study groups would help eliminate any bias in access to information and in the timing of access to information by and between incumbent transmission owners and competitive developers.

70. The Filing Parties also state that “no other superior potential solutions have been identified in retrospect to those developed in the existing planning process.” October 25 Filing, Transmittal Letter at 24. Specifically, the Filing Parties state that “[n]o party has ever come forward with a reliability project that should have been constructed in New England that was superior to one that was selected using the demanding solutions identification process described [in the existing process].” *Id.* at 26. Since needs assessment study groups are, with very limited exception, closed to all but incumbent TOs and ISO-NE, there is a bias in access to information and in the timing of access to such information by and between incumbent transmission owners and competitive developers. It is therefore understandable that entities that ISO-NE does not allow in needs assessment study groups have not historically advanced projects ISO-NE deems to better meet needs than do those entities in the room from the outset. For these reasons, consistent with the NEPOOL-supported proposal, ISO-NE should open the needs

assessment study groups to technical personnel from all pre-qualified transmission developers with CEII clearance.

71. The Filing Parties also state that if competition for transmission development is introduced, it will “undermine the advantageous, open interaction that has produced exemplary results in New England.” October 25 Filing, Transmittal Letter at 24. Despite New England’s ability to plan, build and site transmission, not even ISO-NE claims that the current process is without room for improvement, including to its transparency and openness. For example, and to ISO-NE’s credit, ISO-NE has identified the need to better align planning and markets in the context of Strategic Planning Initiative.⁴⁴ ISO-NE has also agreed to conduct Market Resource Alternative Analysis for major transmission projects.⁴⁵ The New England states support ISO-NE’s work in this regard: such analysis is directionally consistent with the New England states’ work to obtain non-transmission alternative analysis earlier in the planning process than occurs today. Both efforts will better illuminate means to satisfy identified needs than occurs today. Further, ISO-NE is developing a Transmission Planning Manual for stakeholders’ consideration that will make more transparent the assumptions and criteria ISO-NE uses in planning. A Planning Manual will increase the overall transparency of the planning process and market participants’ and states’ confidence in its output. In recent years,

⁴⁴ See, e.g., ISO Discussion Paper: Aligning Markets and Planning (June 13, 2012), available at http://www.iso-ne.com/committees/comm_wkgrps/strategic_planning_discussion/materials/mra_discussion_paper_06132012_vtransmit.pdf.

⁴⁵ See e.g., A Roadmap for New England: A Proposal for Meeting the Challenges Identified in the Strategic Planning Initiative (March 2012) (“discussing the development of a Market Resource Alternative structure within the transmission planning process.”), available at www.iso-ne.com/committees/comm_wkgrps/strategic_planning_discussion/materials/strategic_plan_initiative_roadmap_march_2012.pdf.

ISO-NE has also responded to requests to rework ISO-NE transmission project lists so that changes to project costs and changes to projects are more transparent and able to be tracked over time. While some changes have been helpful, this requires further progress. NESCOE strongly supports these ISO-NE efforts, which evidence ISO-NE's recognition that there is indeed room to improve the transmission planning process, its transparency and states' and stakeholders' confidence in its output.

72. Introducing in a measured way a competitive dynamic in the transmission development arena will further improve the transmission planning process to the benefit of ratepayers. It will not, as the Filing Parties argue above, unravel the region's ability to plan, site and build transmission. Indeed, New England's competitive wholesale market has not unraveled the region's ability to secure generation resources when they are needed. There is no basis for, or experience to inform, the Filing Parties' assertion that introducing competition into transmission planning would stall the development of transmission in New England.

73. For these reasons, NESCOE requests that the Commission find that the October 25 Filing did not go far enough to increase competition in transmission development, and order the Filing Parties to submit a compliance filing adopting those provisions in the NEPOOL-supported proposal that provide incumbent and non-incumbent transmission providers comparable development opportunity and cost recovery opportunity as described in the NEPOOL-supported proposal.

3. FERC Should Find that the Public Interest Would be Served by the Removal of *Mobile-Sierra* Protections From the TOA to Enable New England Consumers to Benefit from Increased Competition.

74. Another materially important issue in the Order 1000 process is FERC's interest in removing "*Mobile-Sierra*" protections from federal tariffs. The *Mobile-Sierra* doctrine was originally established in two 1956 Supreme Court cases, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*") and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*"). Under these decisions, FERC reviewed jurisdictional contracts before they became effective and, if a contract as approved by FERC expressed the parties' intent that non-consensual modifications to its terms are to be governed by the *Mobile-Sierra* doctrine, the contract could not be unilaterally amended except by showing that the original terms are contrary to the public interest. Order 1000, among other things, "removes from Commission-approved tariffs and agreements a right of first refusal for certain new transmission facilities." Order No. 1000 at p. 1 (Summary).

75. Many parties, including the New England TOs, raised *Mobile-Sierra* arguments in their comments and responses to Order 1000. FERC deferred consideration of specific *Mobile-Sierra* arguments about the ROFR to its review of individual compliance filings.⁴⁶

76. In their October 25 Filing, the Filing Parties argue that the *Mobile-Sierra* doctrine protects the PTOs' obligation and right to build transmission upgrades and, in the circumstances presented in New England, that the Commission cannot make the

⁴⁶ See Order No. 1000-A at P 343 (addressing assertion that Schedule 3.09 of the Transmission Operating Agreement establishes a ROFR that is protected under *Mobile-Sierra*).

public interest showing required to modify this portion of the TOA. *See* October 25 Filing, Transmittal Letter at 18. The Filing Parties further argue that the relevant facts in New England demonstrate that the existing right to build provision has benefitted the public, that the record does not support overturning the PTOs’ right to build, and the associated reliability and market efficiency planning processes based on the public interest standard. *Id.* at 21.

77. The provisions asserting *Mobile Sierra* protections were incorporated many years ago in the TOA. *See* October 25 Filing, Transmittal Letter at 18 (citing Order No. 1000 at P 292). In Order No. 1000, the Commission adopted a framework which provides considerable flexibility for public utility transmission providers in each region to determine, in the first instance, how best to address the removal of federal rights of first refusal from Commission-jurisdictional tariffs and agreements. *See* Order 1000 at P 322. Unlike many of the contracts discussed in *Mobile-Sierra* precedent,⁴⁷ however, the TOA is *not* a commercial contract. It is an operating agreement that affects (1) how transmission customers may use the regional transmission system, (2) how that system is built and owned, and (3) the reliability provided to, and the costs paid by, ratepayers. The animating purpose of the *Mobile-Sierra* doctrine, which is to promote the stability of commercial supply contracts in the energy industry, is not served by applying the doctrine to the TOA.⁴⁸ It follows that the *Mobile-Sierra* doctrine

⁴⁷ *See, e.g., NRG Power Mktg., LLC v. Maine Pub. Utils. Comm’n*, 130 S. Ct. 693, 701 (2010) (“*NRG*”). *See also Maine Pub. Utils. Comm’n v. FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010); *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County, Washington*, 128 S.Ct. 2733, 2737 (2008).

⁴⁸ As stated by United States Supreme Court, the “animating purpose” of the *Mobile-Sierra* doctrine is the “promotion of the stability of supply arrangements which all

should not be applied to the TOA in a manner that frustrates the achievement of other important policy goals, such as ratepayer benefits that would follow the introduction of more effective competition in the transmission market in New England.

78. NESCOE submits that even if the TOA is entitled to *Mobile-Sierra* protection, which the Commission should not grant, the Filing Parties are mistaken that the Commission cannot make the public interest showing required to modify this portion of the TOA.

79. Presumably because generic *Mobile-Sierra* findings are “appropriate only in rare circumstances,” *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 711 (D.C. Cir. 2000), the Commission did not make such a finding in Order 1000. *See* Order No. 1000 at P 292; Order No. 1000-A at PP 388-89. However, the Commission did address the impact of ROFR provisions on the public interest and the unduly discriminatory nature of such provisions. Specifically, in Order 1000, the Commission found that “the elimination of federal rights of first refusal from Commission-jurisdictional tariffs and agreements is necessary and appropriate to ensure that rates for jurisdictional services are just and reasonable.” Order No. 1000 at P 313. It did so based on its finding that “an incumbent transmission provider’s ability to use a right of first refusal to act in its own economic self-interest may discourage new entrants from proposing new transmission projects in the regional transmission planning process.” *Id.* at P 256. The Commission also found, “on an independent and alternative basis,” that “elimination of any federal rights of first refusal from Commission-jurisdictional tariffs

agree is essential to the health of the [energy] industry.” *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 130 S. Ct. 693, 700-01 (2010).

and agreements is necessary to address opportunities for undue discrimination and preferential treatment against nonincumbent transmission developers within regional transmission planning processes.” Order No. 1000-A at P 361.

80. While the Commission did not “shift the burden to defend [ROFR] provisions to the contracting parties,”⁴⁹ its generic findings in Order 1000 are instructive as to the enforceability of the TOA ROFR. For example, the Commission made clear that “[n]onincumbent transmission developers seeking to invest in transmission can be discouraged from doing so as a result of federal rights of first refusal in tariffs and agreements subject to the Commission’s jurisdiction.” Order No. 1000 at P 3. To comply with the Commission's directive in Order 1000, transmission operators should be directed to remove the ROFR or demonstrate compelling circumstances that warranted maintaining the ROFR. The Filing Parties did neither.

81. While the Filing Parties discuss at length the purported benefits to New England of the “collaborative process” that the ROFR facilitates, arguing that this approach is “superior to the proposed dueling submission process set out in Order No. 1000,” October 25 Filing, Transmittal Letter at 2-3, these claims have already been found by the Commission as an inadequate basis to perpetuate the ROFR. In Order 1000, the Commission rejected the notion that “just because an incumbent public utility transmission provider may have certain strengths, a nonincumbent transmission developer should be categorically excluded from presenting its own strengths in support of its proposals or bids.” Order No. 1000 at P 260. Order 1000 permits parties to demonstrate that their circumstances were distinguishable, not to re-litigate the fundamental findings of

⁴⁹ Order No. 1000-A at P 388.

Order No. 1000. The Commission should find that the Filing Parties are seeking to relitigate these fundamental findings and have otherwise failed to make a compelling showing that there is something so distinctive about the operation of the ROFR in New England that its continuation is not contrary to the public interest. Thus, the ROFR should have been eliminated.

82. In considering whether the right of first refusal is contrary to the public interest, the Commission should also take into account the clear preference for competitive transmission development contained in the NEPOOL-supported proposal and the fact that that proposal received the support of approximately 83% of NEPOOL.⁵⁰ Conversely, the October 25 Filing received only approximately 17% support from NEPOOL, which came only from the PTOs that voted to support the October 25 Filing by ISO-NE and the PTOs.⁵¹

83. While *Mobile-Sierra* should not apply to the TOA, even if the Commission finds that doctrine to be available, the record here supports a finding that the ROFR is not in the public interest, should be removed and no longer stand as a barrier to effective competition in the planning and construction of transmission in New England.

4. The October 25 Filing's Defense of the Current Process Is an Insufficient Justification for Preserving the ROFR.

84. The Filing Parties offer a number of justifications for preserving the status quo as it relates to New England incumbent TOs' exercise of exclusive rights over building transmission projects needed for reliability. None of those justifications

⁵⁰ See NEPOOL Comments, Transmittal Letter at 3.

⁵¹ *Id.*

should be found to be sufficient to bar the modest introduction of competition into the process as preferred by a strong majority of NEPOOL and urged here by NESCOE.

85. At page 25 of the October 25 Filing, Transmittal Letter, the Filing Parties state that “the current process reduces the probability of disputes and resulting delay.” The ISO-NE’s statement is, of course, true. If the process does not provide for competition in the process for selecting projects to be constructed, it follows that there will be fewer disputes as to which project should be constructed. However, such a process necessarily disadvantages non-incumbent transmission developers and precludes consideration of alternative projects in a competitive process that may better meet a need, or meet a need at a lower cost.

86. At page 26 of the October 25 Filing, Transmittal Letter, the Filing Parties state that “[h]owever beneficial the vision of using non-incumbents to compete for new transmission projects may appear in principle, in reality, especially in New England where there is limited available land, this vision is likely to result in additional cost, wasted effort, and lost time.” Indeed, there are areas in New England that are densely populated and have limited open land. However, there are other areas in New England with vastly different profiles. That some portions of New England are densely populated is no reason to preclude ratepayers the benefits that could result from some degree of competition in transmission development. Further, the claim that some competition in transmission development would result in additional cost is highly speculative; having not engaged in a competitive process, neither ISO-NE nor the TOs have any basis for such claims. Without having experienced competition in transmission development, neither ISO-NE nor the TOs could possibly know whether increased administrative costs would

be outweighed by downward cost pressure that would result from competition to the benefit of ratepayers. The claim of “wasted effort” reflects the overall incumbent TO-protectionist posture of the October 25 Filing.

87. The Filing Parties also argue that costs are already minimized in the current process. On page 27 of the October 25 Filing, Transmittal Letter, the Filing Parties’ state that “project development costs are subject to regional cost recovery and these can be in the millions of dollars for projects of significant scope. A submission-based project design would multiply these costs by the number of proposals developed for final comparison.” This argument by the Filing Parties assumes that *all* developers would seek to recover and/or succeed in recovering *all* project development costs. This assumption is without basis and flawed. Some developers may submit shareholder-funded project proposals – an investment in the opportunity to advance significant projects. Moreover, to the extent the process provided that cost recovery would only be recovered through the ISO-NE mechanisms if a project proposal was ultimately selected to be constructed, there would be no additional project development costs to the region. Finally, using a mechanism whereby a very limited number of developers recover development costs, any increase in project development costs may be minimal in comparison to the downward price pressure on projects even limited competition could bring.

88. On page 48 of the October 25 Filing, Transmittal Letter, the Filing Parties state that:

[e]xisting Section 4.2(b) of Attachment K indicates that the chosen solution may differ from the solution proposed by a transmission owner (*i.e.*, PTOs, OTOs, MTOs). In fact, the process invites an open collaboration among planning

experts and ISO-NE to identify the optimal solution, with stakeholder input. Per existing Section 8 of Attachment K, projects are built by PTOs as/if designated by the ISO-NE in accordance with the Transmission Operating Agreement (“TOA”). These provisions, collectively, preserve an avenue for participation by nonincumbents.”

89. While this language indicates non-incumbent transmission developers are permitted to propose alternative solutions, the overall transmission planning process is centered on incumbent transmission owners, the only entities ISO-NE regularly permits to participate in needs assessment study groups. *See, e.g.*, October 25 Filing, Transmittal Letter at 22-27.

90. In sum, NESCOE submits that the October 25 Filing does not fully comply with Order 1000’s directives because it does not go far enough in terms of increasing competition in transmission development. The Commission should find that competition in transmission development would be improved in New England by including competition in the process of selecting the projects to be constructed. Moreover, the Commission should find that increasing the transparency and openness of the transmission planning process will foster competition and benefit ratepayers. Finally, FERC should find, based on the foregoing, that removing *Mobile-Sierra* protection from the TOA will serve the public interest.

5. If FERC Rejects The Primary Filings, FERC Must Determine the Appropriate Period During Which the ROFR Protections for Incumbent TOs Will Persist for Reliability Projects.

91. If the Commission rejects the Filing Parties’ request to perpetuate the ROFR, as the Commission should, it would be appropriate to consider whether, in order to ensure that reliability is not compromised, an incumbent TO should have an

exclusive right to build a project found to be required for reliability within a specified number of years, and if so, how many years is necessary.

92. In its October 25 Filing, the Filing Parties explained that more than halfway through New England’s Order No. 1000 compliance stakeholder process the Commission issued Order No. 1000-A. Among other things, that Order required a “no ROFR” planning process alternative, even for regions like New England where incumbents would assert *Mobile-Sierra* protection of existing federal rights to build transmission projects.⁵² The Filing Parties state that the Commission explained that this was being done so that it would have a compliance plan to consider in the event that the Commission could meet the “public interest” burden required to modify the existing contractual rights governed by the *Mobile-Sierra* doctrine.⁵³ The Filing Parties further explain that they have developed a “contingent” alternative reliability and market efficiency planning process in compliance with the requirements of Order No. 1000-A even though they believe the Commission is required to uphold their *Mobile-Sierra* contract rights:

requiring that reliability projects identified as being needed within five years of the completion of a Needs Assessment be developed in the manner they are today, by the existing PTO in an RTO-led process that can begin identifying the most cost-effective solution for the region as soon as the needs are established. This is critical because, even where the ISO and TOs are able to work quickly, the time needed to engineer and move a project through siting and construction for even relatively simple projects is often around five years. While more complex reliability projects often take more than five years to place in service, the

⁵² October 25 Filing, Transmittal Letter at 6.

⁵³ *See id.*

Filing Parties believe that five years is a reasonable and factually supported dividing line.⁵⁴

93. The Filing Parties submitted a “contingent” filing, consisting of revisions in addition to those in the primary filing, that would preserve an incumbent TO’s ROFR for any project needed for reliability within five years:

[b]ecause reliability is a critical function for the RTO and transmission owners, and can result in large economic losses and an increased threat to public health and safety when transmission upgrades needed to address near-term reliability needs are not placed in service as expeditiously as possible, the Filing Parties believe that it is not acceptable to delay projects by one to two years for additional processes to play out before beginning the siting process. Given the focus on reliability by the Commission, Congress and the states, the Filing Parties believe that this five-year horizon for reliability projects is consistent with the goals of Order No. 1000. If not determined to be within the four corners of Order No. 1000, this five-year horizon for reliability projects should be accepted as superior to the processes set forth in the Order.⁵⁵

94. During the ISO-NE stakeholder process, there was considerable discussion regarding, in the “contingent” filing, the proposal to maintain the ROFR for any reliability project needed within five years. The Filing Parties’ proposal, cited above, would provide the incumbent TOs the exclusive right to build any project identified as needed for reliability within five years. As NESCOE indicated throughout the stakeholder process, the New England states are concerned with the lack of analysis to support the TO’s desired five-year protection period. During the stakeholder process, New Hampshire Transmission produced both a forward-looking and retrospective analysis that demonstrated that allowing the incumbent TO the right to build any project needed within

⁵⁴ October 25 Filing, Transmittal Letter at 6 (citing Attachment 1 to Rourke Testimony; PTO Testimony at 39-43).

⁵⁵ October 25 Filing, Transmittal Letter at 6-7.

five-years would all but eliminate competition in New England.⁵⁶ Based on its analysis, New Hampshire Transmission proposed that the incumbent TO retain the right to build any project needed for reliability within three years.⁵⁷ ISO-NE and the PTOs have not provided any analysis to substantiate a five-year protection period or to refute New Hampshire Transmission’s proposed three-year period. Lacking any further analysis that supports the five-year period or refutes the three-year period analysis, the New Hampshire Transmission proposed three-year period is preferable.⁵⁸

95. The Filing Parties’ proposed revisions to Section 1.1(b) of Schedule 3.09(a) also implements their proposal to continue the ROFR for incumbent PTOs for New Transmission Facilities or Transmission Upgrades to meet reliability requirements. October 25 Filing, Transmittal Letter at 58. The primary filing would continue the ROFR, whereas the contingent filing would protect PTOs for a period of five years—where the reliability need identified in the needs assessment is five years or less from the date the

⁵⁶ New Hampshire Transmission, LLC “A4:NHT Competitive [sic] Analysis (August 27, 2012), available at http://www.iso-ne.com/committees/comm_wkgrps/trans_comm/tariff_comm/mtrls/2012/aug1314152012/index-p2.html.

⁵⁷ Memorandum from Matt Valle, President of New Hampshire Transmission, LLC to Don Gates, Chairman of the NEPOOL Transmission Committee (September 20, 2012), available at www.iso-ne.com/committees/comm_wkgrps/trans_comm/tariff_comm/mtrls/2012/sep252012/a3_nht_memo_re_order_1000_amendment.pdf.

⁵⁸ Although perhaps not directly applicable to New England, PJM Interconnection, LLC’s uses time-based treatment of competitive solicitation and a “project window” instead of Order 1000’s exceptions to competitive solicitation. *See* Compliance Filing of PJM Interconnection Inc., LLC, Docket No. ER13-198-000 (October 25, 2012). In its Compliance Filing, PJM presents its analysis which found that of 50 projects studied, 40 projects (80 percent) were identified as required in year five (of the 15-year planning horizon), seven of the 50 projects (14 percent) were required in year four of the planning horizon, three of the 50 projects (6 percent) were identified as required in year three of the planning horizon. This analysis, if applied to New England, would indicate that in order to enhance competition, less than a five-year ROFR would be appropriate.

need is identified. TOA, Primary Marked Version at 103; *see also* TOA, Contingent Marked Version at 103. To the extent the Commission rejects the primary filing, the proposed revisions to Section 1.1(b) of Schedule 3.09(a) in the Primary Marked Version will be moot. With respect to the contingent filing, however, the protections for incumbent TOs would continue for those projects needed for reliability within a five-year period. As explained above with respect to the OATT revisions pertaining to ROFR, the Filing Parties did not provide any analysis upon which the Commission could base a finding that the five-year period in which incumbents retain exclusive rights is just and reasonable. As noted above, the New Hampshire Transmission analysis showed that looking at historic data or at forward-looking project specific data, a five-year period as proposed by the Filing Parties would effectively eliminate competition in New England. That reliability needs and their timing are identified in needs assessment study groups to which only incumbent TOs are regularly welcome make the five-year reliability-need date more troubling. For the foregoing reasons, NESCOE submits that the Commission should reject the proposed revision to Section 1.1(b) of Schedule 3.09(a) in the October 25 Filing.

96. To properly safeguard reliability and to create appropriate competitive opportunities that could benefit ratepayers, NESCOE urges FERC to assess the analysis offered by New Hampshire Transmission, and identify the appropriate period, if any, in which incumbent TOs should have the exclusive right to build transmission needed for reliability based on analysis and information rather than speculation or preferences. Should FERC decide to accept the Filing Parties' five-year protection period as proposed in the October 25 Filing, FERC should assess the extent to which it would enable effective competition in New England after the five-year period expires.

C. The Commission Should Reject Proposed Revisions that are Inconsistent with the Commission’s Specific Compliance Directives.

97. While there may be many ways to implement the directed revisions, it is well settled that “compliance filings must be limited to the specific directives ordered by the Commission.” *See, e.g., NorthWestern Corp.*, 113 FERC ¶ 61,215 at P 9 (2005); *see also id.* (“The Commission reaffirms that compliance filings must only provide the changes directed by the Commission”). This parameter, which defines the appropriate scope of compliance filings, is important and necessary in light of the role a compliance filing plays in the regulatory process. The sole issue for the Commission in reviewing a compliance filing involves whether the compliance filing complies with the Commission’s directives. *Tampa Elec. Co.*, 113 FERC ¶ 61,159 at P 37 (2005); *see also NorthWestern Corp.*, 113 FERC ¶ 61,215 at P 9 (stating that “the Commission’s focus in reviewing [compliance filings] is whether or not they comply with the Commission’s previously-stated directives”). In sum, while there may be many ways to implement the Commission’s directives, if a compliance filing exceeds the scope of, or is contrary to, the Commission’s previously-stated directives, it should be rejected. *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,179 at PP 13, 53 (2008) (accepting those proposals in a compliance filing that comply with the Commission’s specific directives, but rejecting those proposals that do not).

98. In purported compliance with Order 1000’s directives, the Filing Parties explain that the “Primary Compliance Filing includes proposed modifications to Schedule 3.09(a) of the TOA to accommodate a competitive process for Public Policy Transmission Upgrades.” October 25 Filing, Transmittal Letter at 57. Several of the proposed revisions to Schedule 3.09(a) that are contained in the primary filing are also

contained in the contingent filing. *Compare* TOA, Primary Marked Version at 102, *with* TOA, Contingent Marked Version at 102. Contrary to this stated purpose—accommodating a competitive process for public policy transmission upgrades—several of the proposed modifications or clarifications would afford the TOs more substantive rights than the existing TOA provides. In addition, in Section 4B.2(ix) of Attachment K, the Filing Parties propose to subject entities seeking to become Qualified Transmission Project Sponsors to eminent domain requirements that would serve to eliminate competition. The effect of these proposed revisions is to erect barriers to competition for non-incumbent transmission developers. Therefore, as set forth more fully below, the Commission should reject the October 25 Filing’s proposed revisions to Sections 1.4, and 2.1 of Schedule 3.09(a) of the TOA, and Section 4B.2(ix) of Attachment K, because they are outside of the scope of, or contrary to, Order 1000’s specific directives.

99. In its proposed revision to Section 1.4 of Schedule 3.09(a) of the TOA, the Filing Parties attempt to incorporate a non-severability clause whereby the revisions to Schedule 3.09 would only become effective if the Commission accepts all proposed revisions contained in the October 25 Filing without modification. TOA, Primary Marked Version at 105; *see also* TOA, Contingent Marked Version at 105. In the event the Commission accepts the October 25 Filing with modification, the Filing Parties indicate that the compliance proposals would only become effective after the TOs vote in sufficient support of a general amendment to the TOA. TOA, Primary Marked Version at 105; *see also* TOA, Contingent Marked Version at 105. The Commission should reject this proposed revision.

100. As demonstrated above, “the Commission’s focus in reviewing [compliance filings] is whether or not they comply with the Commission’s previously-stated directives.” *NorthWestern Corp.*, 113 FERC ¶ 61,215 at P 9. At a minimum, common sense militates against the rejection of proposals that comply with the Commission’s specific directives. Rejecting compliant proposals merely because the applicant seeks to inextricably link those proposals to non-compliant aspects of the filing is contrary to the interests of administrative efficiency. The Filing Parties’ all-or-nothing proposal should also be rejected because it is contrary to Commission practice and precedent. When reviewing compliance filings, the Commission routinely issues orders accepting the proposals that comply with the directed changes and rejecting proposals contained in the same filing that do not comply. *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,179 (2008). The Filing Parties have provided no justification or rationale that would support diverging from the Commission’s established practice. Accordingly, the Commission should reject the Filing Parties’ proposed revision to Section 1.4 of Schedule 3.09(a) of the TOA.

101. The Filing Parties also propose to revise Section 2.1 of Schedule 3.09(a). TOA, Primary Marked Version at 105; *see also* TOA, Contingent Marked Version at 106. In explaining its proposal, the Filing Parties represent that “Section 2.1 is clarified to indicate that PTOs have no obligation to provide support to any QTPS to facilitate the development of any QTPS project proposal.” October 25 Filing, Transmittal Letter at 58. The Commission should reject this proposed revision. It appears to be facially contrary to the general principle of cooperation underlying Order 1000. *See, e.g.,* Order No. 1000 at P 81 (stating that “proactive cooperation among public utility

transmission providers within a transmission planning region could better identify transmission solutions to more efficiently or cost-effectively meet the reliability needs of public utility transmission providers in the region”); *see also id.* at P 355 (discussing “clear and transparent procedures that result in the sharing of information” in terms of the benefits of inter-regional coordination) and P 438 (discussing the expectation that neighboring utilities will cooperate). Rather than facilitate cooperation and the sharing of information that could benefit the transmission planning process, this provision would memorialize the opposite in the tariff. Moreover, the proposed “clarification” to Section 2.1 of Schedule 3.09(a) is essentially a substantive revision that cannot be reconciled with any compliance directive in Order 1000. For the foregoing reasons, the Commission should reject the Filing Parties’ proposed revision to Section 2.1 of Schedule 3.09(a). The Commission should reject this proposed “clarification” because it is a substantive revision that cannot be reconciled with any compliance directive in Order 1000.

102. By virtue of their role as public utilities, New England’s TOs possess important information that is critical to the development and construction of transmission projects that can be reliably and efficiently integrated into the existing transmission system. Some degree of protection over this information may be warranted. For example, it may be prudent and necessary to require entities obtaining transmission-related data from TOs to execute a non-disclosure agreement before receiving critical energy infrastructure information. Also, protective agreements may be necessary to ensure that the data is used for limited and appropriate purposes. However, a blanket prohibition from providing any support or data is unwarranted and extreme. Regional transmission customers and the TOs’ distribution customers pay for this data. Thus, their

access to such data should not be unreasonably restricted. The planning goals of Order 1000 will be undermined if TOs are not obligated to share critical information with regional transmission customers and/or the TOs' distribution customers. The Commission should reject the October 25 Filing's proposed revision to Section 2.1 of Schedule 3.09(a) of the TOA.

103. In Section 4B.2(ix) of Attachment K, the Filing Parties require entities seeking to become Qualified Transmission Project sponsors to demonstrate their experience "in acquiring rights of way, and the authority to acquire rights of way by eminent domain, if necessary, that would facilitate approval and construction." October 25 Filing, Transmittal Letter at 59. The Commission should reject this proposal because it is inconsistent with Order 1000's stated preference for developing competition. In particular, no entity has eminent domain rights in every state, and further, "Rights of Way" are entirely a state issue. Moreover, all the Commission required in terms of qualification criteria is that the non-incumbent developer be able to "demonstrate that it has the necessary financial resources and the technical expertise to develop, construct, own, operate and maintain transmission facilities." Order No. 1000 at P 323. The October 25 Filing's proposal regarding Section 4B.2(ix) of Attachment K exceeds the Commission's directive, resulting in an unduly discriminatory impact on non-incumbent developers. This overly-restrictive requirement should not be included as a prerequisite for qualifying as a Qualified Transmission Project Sponsor.

104. As explained above, Commission precedent limits the scope and purpose of compliance filing to the Commission's specific directives. To the extent compliance proposals are contrary to, or address anything other than, the changes directed

by the Commission, those particular proposals should be rejected. *NorthWestern Corp.*, 113 FERC ¶ 61,215 at P 9. In this case, the Filing Parties have proposed substantive revisions that either exceed the scope of the Commission's compliance directives or are contrary to the principles underlying Order 1000. Accordingly, the Commission should reject the October 25 Filing's proposed revisions to Sections 1.4, and 2.1 of Schedule 3.09(a) of the TOA, and Section 4B.2(ix) of Attachment K.

VII. RESERVATION OF RIGHTS

105. NESCOE reserves the right to posit and address any issue that it or others may identify or raise herein which are developed before or after discovery or during the course of any hearing or technical conference which may be conducted in this proceeding.

VIII. CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, the New England States Committee on Electricity respectfully requests the Commission grant the following relief:

1. Grant NESCOE's Motion to Intervene and allow it to participate fully in these proceedings for all purposes;
2. With respect to the Public Policy process set forth in the October 25 Filing, accept the October 25 Filing, subject to a compliance filing to be made by the Filing Parties to include the modifications required by the New England states to make the process useable, and therefore just and reasonable, as set forth above;
3. With respect to the issue of transmission competition set forth in the October 25 Filing, find that the Filing Parties' submittal did not go far enough to increase competition in transmission development, and order the Filing Parties to submit a compliance filing adopting those provisions in the NEPOOL-supported proposal that provide incumbent and non-incumbent transmission providers comparable development opportunity and cost recovery opportunity as described therein;
4. With respect to the issue of *Mobile-Sierra* protection set forth in the October 25 Filing, find that the public interest would be served by the removal of *Mobile-Sierra* protections from the Transmission Operations Agreement,
5. With respect to the issue of a Right of First Refusal, reject the October 25 Filing's request to perpetuate the Right of First Refusal, assess the analysis offered by New Hampshire Transmission, and identify the appropriate period, if any, in which incumbent Transmission Operators should have the exclusive right to build transmission needed for reliability;
6. Reject specific OATT and TOA revisions proposed in the October 25 Filing, as noted hereinabove in Section VI.C, that are inconsistent with the Commission's directives in Order 1000; and

7. Grant such other and further relief as the Commission may deem necessary and appropriate.

Dated: December 10, 2012

Respectfully submitted,

/s/ Lisa S. Gast
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EXHIBIT A

NEW ENGLAND GOVERNORS CONFERENCE, INC.

RESOLUTION NO. _____

A Resolution Directing The New England State Committee on Electricity (NESCOE) to Implement a Work Plan for the Competitive Coordinated Procurement of Regional Renewable Power

WHEREAS the New England States have a long and successful history of leadership and cooperation on such issues as energy, environmental protection and climate change; and

WHEREAS the New England region has vast potential for cost-effective renewable resources, particularly wind power, and a proven ability to site and develop transmission projects within the region; and

WHEREAS NESCOE, at the request of the New England Governors, conducted an extensive analysis of state laws and policies through which the states could facilitate the development of renewable resources located in and proximate to the region, as well as associated transmission, and produced the *New England Governors' Renewable Energy Blueprint* (Blueprint); and

WHEREAS the New England Governors' by resolution dated September 15, 2009, adopted the Blueprint and directed their regulatory and policy officials to (1) use the Blueprint as a resource to help support development of New England's renewable resources in their public advocacy, rulemaking, policy development and other initiatives; and (2) to review the availability of renewable resources in the region, including those identified in the Blueprint; and to consider potential mechanisms for joint or separate but coordinated and competitive procurement of renewable resources; and

WHEREAS in July 2010, in response to direction from the New England Governors, NESCOE provided to the New England Governors a *Report to the New England Governors on Coordinated Renewable Procurement* reflecting the New England states' initial assessment of issues associated with joint or separate but coordinated renewable procurement, including identification of some preliminary terms and conditions associated with such procurement as well as some obstacles and potential solutions with regard to coordinating processes and related matters; and

WHEREAS in December 2010, NESCOE issued a Request for Information (RFI) to help identify those Renewable Portfolio Standard or goal-eligible resources within New England or neighboring regions that could be operational by 2016 that have the greatest potential for helping New England meet renewable energy goals at the lowest overall – or “all in” – delivered price of electricity; and

WHEREAS in response to the RFI, NESCOE received promising results including information on more than 50 renewable generation projects totaling more than 4,700 megawatts and seven transmission projects designed to facilitate delivery of renewable energy to New England loads,

which confirmed that sufficient resources exist to enable New England to develop or import renewable energy to meet states' Renewable Portfolio Standards or goals; and

WHEREAS the New England Governors continue to be interested in exploring the potential for joint or separate but coordinated competitive procurement of renewable resources as a means to identify those able to serve customers at the lowest over-all delivered cost; and

WHEREAS NESCOE, at the request of the New England Governors, completed an analysis in 2012 of the availability of, and potential cost for, new wind resources that could be developed in New England or New York to meet New England's renewable energy goals, and demonstrated that the regional potential for additional wind energy greatly exceeds the forecasted regional need through 2020; and

WHEREAS NESCOE reported on this analysis to the New England Governors on February 26, 2012 as per the New England Governors' resolution dated July 11, 2011, directing NESCOE and their regulatory and policy officials to report on the progress of such investigations at or before the next meeting of the New England Governor's conference; and

WHEREAS NESCOE has developed a work plan for moving forward toward a regional procurement, which sets out remaining work that needs to be completed, decisions that need to be made, and issues to be resolved and steps for completing these, and which evidences that these steps could be completed and a solicitation for procurement issued by the end of December 2013.

NOW, THEREFORE, BE IT RESOLVED that the New England Governors direct NESCOE and their regulatory and policy officials to implement the work plan and any regulatory proceedings or procedures as are necessary or appropriate to execute the coordinated competitive regional procurement of renewable power, with the goal of issuing a solicitation for procurement by the end of December 2013; and

THEREFORE, BE IT RESOLVED that the New England Governors direct their energy policy staffs to implement such other policy and procedures in their states as are necessary or appropriate to facilitate a coordinated competitive regional procurement consistent with the NESCOE work plan and timetable; and

ADOPTION CERTIFIED BY THE NEW ENGLAND GOVERNORS CONFERENCE, INC. on July 30, 2012 in Montpelier, Vermont.

Peter Shumlin
Governor of Vermont
Chairman

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, DC, this 10th day of December, 2012.

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