UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Clear River Energy Center LLC	)	
v.	)	Docket No. EL18-31-000
ISO New England Inc. New England Power Company New England Participating Transmission Owners	)	

PROTEST OF THE
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY

Pursuant to Rule 211 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure[1] ("Rules") and the Commission's November 20, 2017 *Notice of Complaint*,[2] the New England States Committee on Electricity ("NESCOE") hereby files this protest in the above-captioned proceeding.[3] On November 17, 2017, Clear River Energy Center LLC ("Clear River") filed a complaint[4] against ISO New England Inc. ("ISO-NE" or "ISO"), New England Power Company ("National Grid"), and the New England Participating Transmission Owners alleging that certain longstanding provisions of the ISO-NE Open Access Transmission Tariff ("OATT") are unlawful.[5]

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1 18 C.F.R. § 385.211 (2016).

2 *Clear River Energy Center LLC v. ISO New England Inc., et al.*, Docket No. EL18-31-000, Notice of Complaint (Nov. 20, 2017).

3 On November 22, 2017, NESCOE filed a timely motion to intervene in this proceeding by doc-less intervention.

4 *Complaint of Clear River Energy Center LLC*, Docket No. EL18-31-000 (Nov. 17, 2017) ("Complaint").

5 Capitalized terms not defined in this filing are intended to have the meaning given to such terms in the ISO-NE Transmission, Markets and Services Tariff ("Tariff"). The OATT is Section II of the Tariff.

Clear River alleges that Schedule 11 of the OATT is unjust and unreasonable because it authorizes the direct assignment to interconnection customers of operation and maintenance expenses, various administrative and general costs, and property taxes associated with network transmission upgrades constructed to facilitate the customer's generator interconnection (collectively, "O&M Costs").[6] Because Clear River has failed to demonstrate that the Commission-approved allocation of costs associated with interconnection facilities in New England is unjust and unreasonable, the Commission should deny the Complaint, as more fully set forth below.

I. PROTEST

A. Clear River Has Failed to Meet Its Burden Under Section 206 of the Federal Power Act to Demonstrate that New England's Longstanding Interconnection Cost Arrangement Has Become Unjust and Unreasonable

The Commission is required under the Federal Power Act ("FPA") to ensure that jurisdictional rates are just and reasonable.[7] Under section 206 of the FPA, FERC may "prescribe a change in contract rates whenever it determines such rates to be unlawful."[8] However, "[t]he condition precedent to the Commission's exercise of its power under § 206(a) is that the existing rate is 'unjust, unreasonable, unduly discriminatory or preferential,'"[9] and the burden of proof for this showing is upon the complainant.[10]

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6 Complaint at 2. The Complaint also challenges Schedule 21-NEP of the OATT, which relates to National Grid's allocation of O&M Costs to interconnection customers. *Id.* While this protest focuses on Schedule 11, it applies to the Complaint in its entirety and the reasons for dismissal with respect to Schedule 11 also apply to Schedule 21-NEP.

7 *See* 16 U.S.C. §§ 824d(a), 824e(a).

8 *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

9 *Id.* (quoting 16 U.S.C. § 824e(a)).

10 16 U.S.C. § 824e(b); *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009); *Union Elec. Co. v. FERC*, 668 F.2d 389, 393 (8th Cir. 1981) (stating that "the challenger has the heavy burden of showing convincingly that the [rate at issue] is outside the zone of reasonableness").

Where a complainant challenges an existing rate—that is, a rate that FERC previously has found to be just and reasonable—the Commission must evaluate whether the rate has become unjust and unreasonable due to "intervening shifts in circumstances."[11] Clear River has failed to show that any such change in circumstances has caused the rate to become unjust and unreasonable. The Commission should dismiss the Complaint.

1. The Commission Has Found Schedule 11's Allocation of Interconnection-Related Costs to Be Just and Reasonable.

Schedule 11 of the OATT authorizes the direct assignment to interconnection customers of all interconnection-related network upgrade costs, including O&M Costs, with certain exceptions not relevant here.[12] As Clear River recognizes, Schedule 11 was initially developed as part of New England's open access restructuring, before the Commission established standardized generator interconnection procedures.[13] In 2000, the Commission approved the Tariff's cost allocation provisions and found the direct assignment to be reasonable, particularly in light of ISO-NE's congestion management program.[14] Although the Commission did not specifically address the direct assignment of O&M Costs to interconnection customers, there was no need to do so, as *all* interconnection-related upgrade costs were assigned to interconnection customers.

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[11] *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 356 (D.C. Cir. 2014) ("*FirstEnergy*"); *La. Pub. Svc. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999) (stating that "the Commission has the duty—not the option—to reform rates that by virtue of changed circumstances are no longer just and reasonable") (citation omitted).

[12] *See ISO New England, Inc., et al.*, 91 FERC ¶ 61,311 at 62,078-62,080 (2000) ("Initial Order"), *order on reh'g*, 95 FERC ¶ 61,384 (2001).

[13] Complaint at 17; *see New England Power Pool*, 85 FERC ¶ 61,141 (1998).

[14] Initial Order at 62,079.

After the acceptance of Schedule 11, the Commission promulgated its standardized generator interconnection procedures in Order No. 2003.[15] In Order No. 2003, the Commission included *pro forma* transmission pricing policies[16] but, as relevant to this proceeding, the Commission explicitly allowed for "independent entity variations" from the proposed procedures.[17] The Commission recognized that an Independent System Operator ("ISO") or Regional Transmission Organization ("RTO") "is less likely to act in an unduly discriminatory manner than a [transmission provider] that is a market participant," and, therefore, accorded ISOs/RTOs "greater flexibility to customize its interconnection procedures and agreements to fit regional needs."[18]

The Complaint relies heavily on the *pro forma* provisions in Order No. 2003. It argues that network upgrades should not be directly assigned to interconnection customers—referring to this as "the Commission's O&M Cost policy."[19] However, as just discussed, the Commission clearly allowed flexibility for ISO/RTO regions to propose alternative interconnection pricing provisions. The Commission also specifically recognized at least two situations where the

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[15] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,146 (2003) (Order No. 2003); *order on reh'g,* Order No. 2003-A, 69 Fed. Reg. 15,932, (Mar. 26, 2004), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,160 (2004) (Order No. 2003-A); *order on reh'g and directing compliance*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,171 (2005) (Order No. 2003-B), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,662 (June 30, 2005), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,190 (2005) (Order No. 2003-C); *aff'd sub nom., National Association of Regulatory Commissioners v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

[16] These policies generally disallowed direct assignment to interconnection customers of network upgrade costs because these customers should not be "charged twice" for the use of the transmission system (i.e., first, by funding network upgrades; second, by paying transmission service charges)—thus, once interconnection customers have initially paid the full cost of network upgrades that would not have been needed but for the interconnection, the interconnection customer receives transmission service credits for the cost of the network upgrades. Order No. 2003 at P 694.

[17] *Id.* at P 827.

[18] *Id.*

[19] Complaint at 15.

general rule would not necessarily apply, both of which are relevant here: (1) in regions where interconnection customers do not pay for transmission service,[20] and (2) where "a well-designed and independently administered participant funding policy" for network upgrades would offer "the potential to provide more efficient price signals and more equitable allocation of costs than the crediting approach."[21]

The Commission squarely considered, and accepted, these exceptions in the context of the New England Power Pool's ("NEPOOL") compliance filing in the Order No. 2003 proceeding. As acknowledged in the Complaint, NEPOOL's compliance filing stated that "[t]he Order No. 2003 Amendments . . . preserve NEPOOL's current practice of allocating all ongoing costs (O&M, G&A, taxes) of Generator Interconnection Related Upgrades to generators."[22] The Commission agreed that this practice was appropriate. The Commission's order on compliance found that NEPOOL's variations from Order No. 2003's *pro forma* Large Generator Interconnection Agreement ("LGIA") were acceptable given ISO-NE's independence.[23] In once again approving Schedule 11, the Commission noted that interconnection customers would

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[20] *See* Order No. 2003-A at PP 423-24. In Order No. 2003-A, the Commission noted Central Maine Power Company's argument that in regions where interconnection customers do not pay for transmission service, not requiring them to pay expenses associated with network upgrades would allow them to use the entire transmission system without making any contribution toward its associated costs. The Commission did not accept the argument as a blanket rule but stated that it would entertain proposals from an RTO or ISO to directly assign such costs to interconnection customers. *Id.* at P 424.

[21] Order No. 2003 at P 695. The Commission noted that providing transmission service credits to an interconnection customer for the costs of network upgrades somewhat mutes the interconnection customer's "incentive to make an efficient siting decision that takes new transmission costs into account[.]" *Id.*

[22] Complaint at 21, n. 57; New England Power Pool, Standardizing Generator Interconnection Agreements and Procedures: Order No. 2003 Compliance, Docket No. ER04-433-000 (filed Jan. 20, 2004), at 25.

[23] *New England Power Pool, et al.*, 109 FERC ¶ 61,155 at P 22, 25 (2004) ("*NEPOOL Order*"). The Commission acknowledged that the Tariff would retain the existing cost allocation provision under Schedule 11. *Id.* at P 4.

continue to be "required to pay all annual costs including [O&M Costs] allocable to the direct assignment facilities and [network upgrades]."[24]

The Commission's order also related facts demonstrating that the direct assignment to interconnection customers of interconnection-related network upgrade costs, including O&M Costs, continued to be appropriate. The Commission explained that in New England, "generators do not pay for transmission service, so there are no transmission charges against which the credit contemplated by the *pro forma* LGIA could be applied."[25] ISO-NE has explained the region's transmission rate structure in a separate proceeding before the Commission:

> Pursuant to the ISO OATT, the ISO provides regional transmission service –Regional Network Service ("RNS") and Through or Out Service ("TOut") – within the New England Control Area over the Pool Transmission Facilities ("PTF"). The New England OATT for regional transmission service has differed from the Commission's *pro forma* OATT since its inception, in 1997, in that it has not employed a system of physical rights and advance reservations for point-to-point transmission service for the vast majority of transactions over the PTF in New England. [ISO-NE] does not employ a system of physical rights for transmission service over lines that are internal to the New England Control Area.
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> RNS, which is the primary form of transmission service over the PTF, does not use advance reservations, and does not distinguish between "firm" and "non-firm" transmission service. Rather, RNS allows network Transmission Customers to receive energy and capacity from Network Resources at any point on the PTF without a reservation, and treats all transactions cleared in the energy markets or generation scheduled for reliability as firm. Generating resources that participate in the New England Markets are automatically designated as Network Resources and be [*sic*] able to utilize the regional transmission system. . . . Consistent with the

[24] *Id.* at P 7.

[25] *Id.* at P 84.

> foregoing, in New England, *generators do not pay to transmit their output within New England on the regional network system.*"[26]

The NEPOOL counsel memo attached to the Complaint underscores this point: "Generators connected to the grid pay nothing to access all of the New England power markets."[27]

The Commission expressly permitted the continued inclusion in the Tariff of the previously-approved cost allocation provisions regarding the costs of network upgrades related to interconnections:

> In Order No. 2003, we stated that we would permit independent entities to adopt their own pricing approach, where appropriate. This flexibility is warranted here, given the existing Commission-approved provisions NEPOOL proposes to retain, which we find acceptable under Order Nos. 2003 and 2003-A, and the interplay of these provisions with NEPOOL's Commission-approved market design.[28]

The order's approval of the continued use of the existing Tariff provisions was appropriate and consistent with Order No. 2003, and the factors supporting the Commission's decision continue to apply today.

2. Clear River Fails to Satisfy Its Burden Under Section 206

To meet its burden under section 206 of the FPA, Clear River must show that the existing rate—Schedule 11—has become unlawful due to "intervening shifts in circumstances."[29] Contrary to this requirement, Clear River claims that "if Schedule 11 is to remain in effect as is, it must be justified on its standalone merits today,"[30] and that the Commission's "determination

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26 *Motion to Intervene and Comments of ISO New England Inc.*, Docket No. EL11-49-000 (filed Aug. 15, 2011), at 9-10 (footnotes omitted) (emphasis added).

27 Complaint at Exhibit A, June 13, 2002 Letter from David T. Doot to Paul B. Shortley, Chair, NEPOOL Tariff and Reliability, at 9.

28 *NEPOOL Order* at P 85.

29 *FirstEnergy*, 758 F.3d at 356; *La. Pub. Svc. Comm'n,* 184 F.3d at 897.

30 Complaint at 9.

must therefore start with a clean slate."[31] This is not the standard for complaints under section 206. Clear River can point to no changed circumstances in New England that warrant granting its Complaint and changing the provisions of Schedule 11, which the Commission has previously found to be just and reasonable.

Clear River attempts to rely on the fact that the markets administered by ISO-NE have evolved since Schedule 11 was first developed to justify granting the Complaint.[32] It asserts that "the original predicates relied upon in 2000 and 2004 are no longer relevant."[33] However, Clear River ignores that the Commission's previous approval of Schedule 11 recognized, *inter alia*, that (i) interconnection customers in New England do not pay for transmission service, (ii) the cost allocation for interconnection-related network upgrades is intertwined with the ISO-NE market design, and (iii) ISO-NE is an independent transmission provider. Clear River does not establish the requisite changed circumstances for the Commission to grant the Complaint.

3. The Complaint Constitutes an Impermissible Collateral Attack on the Commission Orders Approving Schedule 11

Despite Clear River's statement that it "is in no way seeking to collaterally attack any of the Commission's prior orders,"[34] the Complaint does in fact constitute an impermissible collateral attack on the Commission orders approving Schedule 11. "A collateral attack is an attack on a judgment in a proceeding other than a direct appeal and is generally prohibited."[35] Even though a complaint may seek only prospective relief, it constitutes a collateral attack when

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31 *Id.* at 27.

32 *See, e.g.*, *id.* at 9, 23, 25.

33 *Id.* at 27.

34 *Id.* at 19.

35 *New England Conference of Public Utilities Commissioners v. Bangor Hydro-Electric Co., et al.*, 135 FERC ¶ 61,140 at P 27 (2011) ("*NECPUC*"). "Collateral attacks on final orders and relitigation of applicable precedent … thwart finality and repose that are essential to administrative efficiency, and are therefore strongly discouraged."; *see NSTAR Elec. Co. v. ISO New England, Inc.*, 120 FERC ¶ 61,261 at P 33 (2007).

its argument is in direct conflict with a prior Commission order in another proceeding.[36] The Complaint attempts to relitigate the Commission's findings that Schedule 11 and the direct assignment of O&M Costs to interconnection customers was just and reasonable. The Commission should reject this attempt.

As discussed above, Clear River has failed to satisfy section 206's requirement to demonstrate that Schedule 11 has become unjust and unreasonable due to changed circumstances. Instead of showing such changed circumstances, Clear River seems to argue that the orders approving Schedule 11 were inadequate. The Complaint alleges that the Commission orders offered no rationale for the direct assignment of O&M Costs to interconnection customers and never addressed the merits, or considered the reasonableness, of the direct assignment.[37] These arguments, which effectively amount to criticism that filings with the Commission were deficient and/or the Commission's reasoning in the earlier orders was inadequate, constitute a collateral attack on those orders.

Moreover, Clear River's assertions are untrue. As explained above, the Commission explained why the direct assignment of these interconnection-related costs in New England was just and reasonable.

Similar to Clear River's assertions that the orders approving Schedule 11 were inadequate, the Complaint attempts to characterize the Commission's approval of Schedule 11 as a temporary or transitional measure.[38] The Commission's orders never stated that Tariff provisions were intended to be temporary, and there is no statement that would indicate or

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[36] *NECPUC* at P 28.

[37] Complaint at 3, 7, 23.

[38] *Id.* at 3, 8.

suggest that the provisions would not continue to be effective going forward. The Commission should reject Clear River's attempt to re-cast these well-settled orders.

B. Clear River's Requested Relief Would Have Wide-Ranging Impacts on the New England Electricity Markets and Would Result in Significant Cost Shifts

The allocation of interconnection-related costs is part of a holistic New England regional rate framework. If granted, the Complaint would undo the longstanding cost structure between interconnection customers and transmission customers, fundamentally altering this transmission rate framework and unjustly and unreasonably shifting costs from merchant generators to consumers. The cost shift to consumers that Clear River seeks to accomplish—potentially hundreds of millions of dollars just related to this Complaint alone and the likelihood of hundreds of millions more from future interconnecting generators[39]—is both sweeping and unfounded.

The Complaint attempts to bolster its argument by characterizing the O&M Costs it seeks to shift as a mere fractional percentage of the overall RNS rate, suggesting that millions of additional dollars that would be imposed on customers in New England is no burden at all.[40] The Complaint further mischaracterizes Schedule 11 as resulting in a "windfall" for ratepayers,[41] but it is Clear River's proposed remedy that would result in a windfall for generators. Under Clear River's proposed structure, a generator would pay *nothing* to support the ongoing expenses of the network upgrades related to its interconnection and would pay *nothing* to use the transmission system. The Commission should reject Clear River's attempt to treat the RNS rate, ultimately paid by New England consumers, as a catch-all for its development costs. Clear River

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[39] *See id.* at 5, 10.

[40] *See id.* at 10, 29-30.

[41] *Id.* at 30.

should have been aware of the cost funding arrangement in New England before it commenced project development. To the extent Clear River did not fully understand the rules governing interconnection costs, it is improper to now ask New England customers, through the RNS rate, to indemnify Clear River.

Moreover, the remedy proposed by Clear River cannot be implemented as easily as the Complaint suggests. The Complaint tells only half a story. It describes the cost allocation under Schedule 11 in isolation, but, as discussed above, Schedule 11's cost allocation provisions are inseparable from New England's overarching rate structure, where generation resources seeking to interconnect to the regional grid fully fund interconnection and related upgrades costs and, in turn, those resources are permitted to transmit energy over the regional transmission system at *no charge*. Because the cost allocation set forth in Schedule 11 is necessarily interrelated to the allocation of other costs, granting the Complaint would require the region to reconsider, and likely substantially rewrite, the entire Tariff governing cost allocation for the transmission system.

Granting the Complaint would also require the consideration of equities between existing generators and new generators. Existing generators have been subject to the cost allocation arrangement reflected in Schedule 11, with O&M Costs accounted for in the revenues they need to earn in the ISO-NE markets. The Commission would need to consider whether new generators would be placed at a competitive advantage if such costs are now shifted to transmission customers.

C. If the Commission Finds that Schedule 11 Is Unjust and Unreasonable, It Should Not Grant the Requested Relief, But, Instead, Should Direct the Development of a Just and Reasonable Replacement Through the Stakeholder Process

For the reasons set forth above, the Commission should deny the Complaint. However, should the Commission find that Schedule 11 or other Tariff provisions related to this proceeding are unjust and unreasonable, it should not grant Clear River's requested relief. Clear River's request—that the Commission direct ISO-NE and National Grid to modify the allocation of O&M Costs with respect to interconnection-related network upgrades—is overly simplistic and would necessarily have wide-ranging impacts throughout the region. The Commission has considerable leeway in the fixing of a just and reasonable rate, and, if it grants the Complaint, it should use that latitude to direct a stakeholder process to produce a just and reasonable outcome.[42]

In response to Commission Rule 206, Clear River states that "because this [Complaint] involves a proposed change to the ISO-NE Tariff, there is no alternative process by which [Clear River] might pursue the requested relief."[43] Contrary to Clear River's assertion, New England has an established stakeholder process where Tariff changes are—and in this case should have been—initially vetted so that the effects that proposed revisions would have on market participants, stakeholders, and consumers can be explored. The stakeholder process also facilitates the development of improvements to proposals to promote more equitable treatment of impacted parties. The Commission has long recognized the importance of New England's

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[42] *See New York PSC, et al. v. New York Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 at PP 10, 65 (2015) (granting a complaint in part and directing a compliance filing, stating that NYISO should "work with its stakeholders in developing this compliance filing").

[43] Complaint at 39.

stakeholder process and has maintained that proposals to change the Tariff should proceed through that process.[44]

In this case, Clear River disagrees with the longstanding Commission-approved allocation of interconnection-related network upgrade costs. Rather than pursue a solution through the stakeholder process, Clear River has taken the extraordinary first step of filing the Complaint. Unlike a traditional complaint related to a rate charged by a jurisdictional service provider, in which relief would impact only the single rate at issue, granting the relief requested by Clear River would impact every generator and transmission customer, and thereby, every retail electric customer in New England. Because granting the Complaint would implicate the overall rate structure in New England, the Commission would need to direct a comprehensive and holistic process that examines all relevant market rules and Tariff provisions.

Therefore, if the Commission determines that changes to Schedule 11 or other Tariff provisions are required, the Commission should direct the initiation of a stakeholder process to determine appropriate revisions to the Tariff that are equitable to all market participants and consumers, and that would result in just and reasonable rates.

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[44] *See, e.g., ISO New England Inc.*, 138 FERC ¶ 61,042 at P 114 (2012) ("ISO-NE's stakeholder process is the appropriate venue . . . to propose and develop appropriate rules[.]"); *ISO New England Inc.*, 128 FERC ¶61,266 at P 55 (2009) (declining to require ISO-NE to make tariff changes where it would end-run the stakeholder process); *New England Power Pool*, 107 FERC ¶ 61,135 at PP 20, 24 (2004) (rejecting an entity's proposed changes because the "suggested revisions have not been vetted through the stakeholder process and could impact various participants.").

II. CONCLUSION

For the reasons stated herein, NESCOE respectfully requests that the Commission deny the Complaint.

Respectfully submitted,

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Date: December 7, 2017

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Cambridge, Massachusetts this 7th day of December, 2017.

Respectfully submitted,

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