

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

**Building for the Future Through Electric)
Regional Transmission Planning and)
Cost Allocation and Generator)
Interconnection)**

Docket No. RM21-17-000

**MOTION TO REJECT
UNTIMELY SUPPLEMENTAL COMMENTS, OR IN THE ALTERNATIVE, TO
ACCEPT SUPPLEMENTAL COMMENTS OF THE NEW ENGLAND STATES
COMMITTEE ON ELECTRICITY**

Pursuant to Rule 212 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. § 385.212, the New England States Committee on Electricity (“NESCOE”)¹ respectfully requests that the Commission reject the untimely² supplemental comments³ filed in the above-referenced docket. If the Commission accepts the various untimely supplemental comments, in the alternative, NESCOE respectfully requests that the Commission accept its own supplemental comments.

¹ NESCOE is the Regional State Committee for New England, representing the collective positions of the six New England states in regional electricity matters.

² The reply comment deadline in this docket was September 19, 2022 - nearly 18 months ago.

³ While NESCOE acknowledges that not every late-filed comment filed in this docket is unduly prejudicial (and a few commenters have included explanations as to why their late-filed comments should be accepted), there have been more than a dozen sets of comments filed since October 1, 2023. These comments are styled in various ways (*e.g.*, comments, supplemental comments, letters to the Commission), but for ease of reference, NESCOE will refer to these more recent late-filed submissions as “late-filed supplemental comments.”

I. DUE PROCESS WARRANTS REJECTION OF LATE-FILED SUPPLEMENTAL COMMENTS

Over a dozen parties have filed untimely substantive supplemental comments in this docket over the past six months. NESCOE recognizes that the Commission has previously accepted late-filed comments where they did not result in undue prejudice or delay or where they assisted in the Commission's decision-making process.⁴ However, the Commission has also rejected unsolicited reply comments, reasoning that it would be unfair to others to accept such comments.⁵ In this case, the deadline for reply comments to the Notice of Proposed Rulemaking ("NOPR") in above-referenced docket was September 19, 2022.⁶ The Commission has not solicited additional comments to date. To the contrary, on two separate occasions, the Commission denied requested extensions of time sought by various States.⁷

⁴ *Revision to Electric Reliability Org. Definition of Bulk Elec. Sys. & Rules of Proc.*, 141 FERC ¶ 61,236, n.27 (2012) ("Further, NERC, MISO, Consumers, MISO Transmission Owners, Barrick, ITC Companies, and AMP filed reply comments. Although the NOPR did not allow for reply comments, we will accept these pleadings because they have assisted our understanding of NERC's proposal in this Final Rule."), *order on reh'g*, Order No. 773-A, 143 FERC ¶ 61,053 (2013), *rev'd sub nom. People of the State of N.Y. v. FERC*, 783 F.3d 946 (2d Cir. 2015).

⁵ *See, e.g., Rules Concerning Certification of the Elec. Reliability Org.; & Procs. for the Establishment, Approval, & Enf't of Elec. Reliability Standards*, Order No. 672, 114 FERC ¶ 61,104, P 17 (2006) (stating that the Commission did not solicit reply comments and, therefore, accepting such comments from those who chose to submit them would be unfair to others), *order on reh'g*, Order No. 672-A, 114 FERC ¶ 61,328 (2006); *Refinements to Policies & Procedures for Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. By Pub. Utils.*, Order No. 816, 153 FERC ¶ 61,065, n.26 (2015) (rejecting reply comments where such comments were unsolicited), *order on reh'g and clarification*, Order No. 816-A, 155 FERC ¶ 61,188 (2016).

⁶ *See* Notice on Requests for Extension of Time, Docket No. RM21-17-000 (May 25, 2022) (establishing an initial comment deadline for the NOPR of August 17, 2022 and a reply comment deadline of September 19, 2022).

⁷ Notice Denying Extension of Time, Docket No. RM21-17-000 (Aug. 9, 2022) (rejecting request of Georgia Public Service Commission for 30-day extension of time); Notice Denying Extension of Time, Docket No. RM21-17-000 (Sept. 2, 2022) (denying request for extension of time until March 19, 2023, to submit reply comments filed by the States of Utah, Alaska, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, West Virginia, and Wyoming).

NESCOE urges the Commission not to consider the late-filed supplemental comments in this docket because they are untimely and highly prejudicial in that other interested participants have not been provided with notice or opportunity to provide their own supplemental comments or to respond to the late-filed supplemental comments. As the Commission’s website plainly explains, reply comments on this NOPR “give commenters a chance to respond to each other, including the opportunity to emphasize, refute, or otherwise address the comments of others.”⁸ Additionally, if the Commission were to consider late-filed supplemental comments in this proceeding, it would only be fair to allow other interested parties to submit their own late-filed comments. However, this would likely result in a delay in the issuance of a Commission decision in the above-referenced docket, an outcome NESCOE hopes the Commission would wish to avoid.

NESCOE echoes the explanation of the Electricity Transmission Competition Coalition that deadlines exist to provide clear opportunities for parties impacted by an agency’s proposed rule to timely submit comments and/or reply comments to protect their interests and provide their perspectives.⁹ NESCOE also agrees that the filing of unauthorized comments prior to the issuance of a final rule makes it more difficult for the Commission to timely issue that final rule while ensuring fairness for all commenters, especially when the comments are filed potentially very close to the issuance of a final rule.¹⁰

⁸ FERC Explainer on the Transmission Notice of Proposed Rulemaking, at <https://www.ferc.gov/explainer-transmission-notice-proposed-rulemaking>.

⁹ Motion for Leave to Answer and Answer of the Electricity Transmission Competition Coalition to the Unauthorized Supplemental Reply Comments of Certain Anti-Competition Incumbent Utilities, Docket Nos. RM21-17-000, AD22-8-000, AD21-15-000 (Feb. 1, 2024), at 7.

¹⁰ *Id.*

Of particular concern, the consideration of late-filed supplemental comments is most likely to be prejudicial to entities that have limited resources to respond to a flood of extremely late-filed comments. Likewise, those that are not familiar with FERC proceedings are highly likely to be prejudiced by the Commission's consideration of late-filed supplemental comments. If the Commission were to allow this, it would undercut its laudable effort to encourage public participation in its proceedings. On the "Public Participation" link on FERC's homepage, members of the public can find guidance on topics such as filing comments.¹¹ The comment filing guidance section of the FERC website states that "[t]he Commission expects parties to file a comment in a timely manner based on the reasonably foreseeable issues arising from the applicant's filing and the Commission's notice of filing."¹² Similarly, another section of the website explaining the public comment process states that "[t]he public notice provides the start and end dates of a comment period."¹³ Nowhere in the public participation and/or comment guidance contained within the Public Participation section of the FERC website is there any suggestion that the Commission may consider late-filed comments or that commenters are even allowed to submit comments beyond the comment deadlines. Accordingly, laypersons relying on this guidance are very likely to be prejudiced if the Commission accepts late-filed supplemental comments.

Most of the late-filed supplemental comments include attempts to influence the Commission on substantive topics, rather than merely pushing for a final rule. The untimely

¹¹ See How to File a Comment, available at <https://www.ferc.gov/how-file-comment>.

¹² *Id.*

¹³ See <https://www.ferc.gov/submitting-effective-comments>.

filing of such substantive supplemental comments effectively eliminates the chance of commenters to respond to one another and prevents the Commission from considering information contained in the record in a fair and nondiscriminatory manner. For example, although purporting merely to “express support for the Commission’s efforts to finalize its rule on regional electric transmission planning and cost allocation[,]”¹⁴ EEI’s Late-Filed Supplemental Comments offer substantive recommendations. Thus, EEI’s Late-Filed Supplemental Comments are intended to influence the Commission at what may be the eleventh hour regarding its members’ preferences on the federal Right of First Refusal (“ROFR”) under the guise of “offering support” for the Commission finalizing its transmission planning rule. Absent a concrete showing of good cause for providing new or novel information not already in the record, the prejudicial nature of accepting such late-filed supplemental comments outweighs any negligible benefit that such supplemental comments may have. The Commission should therefore reject such untimely supplemental comments.

II. SHOULD THE COMMISSION CONSIDER LATE-FILED SUPPLEMENTAL COMMENTS, NESCOE REQUESTS LEAVE TO FILE SUPPLEMENTAL COMMENTS

Should the Commission consider any untimely supplemental comments in rendering a final rule in Docket No. RM21-17, then due process requires an opportunity for others, including NESCOE, to respond. If the Commission considers any of the late-filed supplemental comments, NESCOE respectfully requests that the Commission afford NESCOE the opportunity here to provide the Commission with updated information not available at the time that it filed its

¹⁴ Letter from Edison Electric Institute to Chairman Phillips and Commissioners Christie and Clements, Docket Nos. RM21-17-000, AD22-8-000, AD21-15-000 (Feb. 21, 2024), at 1 (“EEI Late-Filed Supplemental Comments”).

reply comments that will aid the Commission in its decision-making process. Consistent with Commission precedent governing the submittal of answers to pleadings, the supplemental comments set forth below are intended to enhance the Commission’s understanding of the issues and to facilitate the development of a complete and accurate rulemaking record.¹⁵

III. SUPPLEMENTAL COMMENTS

NESCOE requests that the Commission not take any action in a final rule that would disrupt progress made in New England on longer-term transmission planning.

First, the opportunity for competitive transmission solicitations in appropriate circumstances has not interfered with, slowed, or had other claimed adverse effects on significant transmission development in New England. A competitive solicitation has, however, resulted in the one and only cost containment proposal ever advanced by any incumbent New England transmission owner (“NETO”).¹⁶ On behalf of consumers, NESCOE urges the Commission not to impede or disrupt further competitive solicitations and their cost containment mechanisms.

Second, since NESCOE filed its reply comments in this docket, the New England States, ISO New England Inc. (“ISO-NE”), and stakeholders have worked diligently to develop a new mechanism to enable the region to move from studying transmission infrastructure needed for public policy to developing it. The centerpiece of the new process is a competitive solicitation issued by ISO-NE, with advance state agreement on cost allocation for certain projects, and a

¹⁵ See, e.g., *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, P 2 n.6 (2016) (accepting unauthorized pleading because it aided in the Commission’s decision-making process); *Viridon Cal. LLC*, 186 FERC ¶ 61,143, P 9 (2024) (accepting unauthorized answers “because they provided information that assisted us in our decision-making process”).

¹⁶ ISO-NE. *Boston 2028 RFP Review of Phase 1 Proposals Appendix A* at 43 (Eversource and National Grid committed to a reduction in return on equity should actual costs exceed proposed costs). At https://www.iso-ne.com/static-assets/documents/2020/07/final_boston_2028_rfp_review_of_phase_one_proposals_appendix_a.pdf.

vehicle for alternative cost allocation in specific circumstances. The schedule calls for a vote at the New England Power Pool's Participants Committee in early April 2024 with a FERC filing shortly thereafter. The nature of the transmission development vehicle through which States can execute state mandates is significant. New England's Order No. 1000¹⁷ public policy experience, with no resulting transmission, underscores the need for such a vehicle to have state support. The New England States are anxious to execute this new, first-of-its kind, state-supported mechanism that is central to transmission needed for reliable clean power. NESCOE implores the Commission to maintain flexibility that enables ISO-NE to issue competitive solicitations to identify projects in furtherance of state laws.

Finally, EEI promoted rightsizing its members' assets.¹⁸ The NETOs have similarly expressed eagerness for rightsizing investment opportunities. NESCOE agrees with the need to develop sensible approaches to rightsizing. We have, however, communicated repeatedly that a prerequisite to being equipped to discuss rightsizing approaches is a more transparent and predictable asset condition process.¹⁹

¹⁷ *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g & clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

¹⁸ EEI Late-Filed Supplemental Comments at 1.

¹⁹ *See, e.g.*, NESCOE, *Draft 2023 Regional System Plan Feedback* (Aug. 30, 2023), at <https://nescoe.com/wp-content/uploads/2023/08/NESCOE-2023-RSP-Comment-Form-Cover-Memo.pdf>; NESCOE, *Comments on ISO-NE's Draft 2024 Work Plan* (Aug. 11, 2023), at 2, at <https://nescoe.com/wp-content/uploads/2023/08/NESCOE-Comments-on-ISO-NE-2024-Work-Plan.pdf>; NESCOE, *Asset Condition Planning Process Improvements – Next Steps* (July 14, 2023), at 7, at <https://nescoe.com/wp-content/uploads/2023/07/Asset-Cond-NETO-Requests-7.14.23-.pdf>.

Over a year has passed since NESCOE first requested the asset condition process improvements necessary to lay the foundation for any rightsizing discussion.²⁰ While the NETOs have made some progress in response to NESCOE's requests, significant work remains. For example, the region adopted new protocols in requiring more notice of upcoming asset condition projects to allow for meaningful state and stakeholder review and feedback before construction begins.²¹ Yet on February 28, 2024, a NETO presented, for the first time, an asset condition project for which construction begins in March 2024.²²

Further, the most important asset condition process improvement NESCOE sought, and requested completion of by the end of 2023, has not seen the light of day. The Asset Condition Needs and Solution Guidance Document will enable more disciplined, criteria-based consideration of, and decision-making about, needs, solutions, and priorities. It is not possible to commence a rightsizing conversation without it. The NETOs' self-identified draft delivery date of March 2024 has now been moved without notice or explanation to May 2024. The NETOs denied NESCOE's recent request to prioritize that work and stay on their schedule.²³

²⁰ NESCOE. *Asset Condition Projects and Process Improvements* (Feb. 2023), at https://www.iso-ne.com/static-assets/documents/2023/02/2023_02_08_nescoc_asset_conditions_letter.pdf.

²¹ *Guidelines for Creation of Asset Condition Project Presentations* at https://www.iso-ne.com/static-assets/documents/100005/2023_11_13_pac_guidelines_for_creation_of_asset_condition_project_presentations_v1.pdf.

²² National Grid. *M-165 115kV Line Asset Condition Project* (Feb. 28, 2024) at https://www.iso-ne.com/static-assets/documents/100008/a06_2024_02_28_pac_m165_presentation.pdf.

²³ NESCOE. *Request to Prioritize Asset Condition Guidance Document* (Feb. 8, 2024) at <https://nescoc.com/wp-content/uploads/2024/02/Asset-Cond-Guidance-Documents-Feb-2024f-1.pdf>.

New England's current processes leave States and stakeholders watching billions of dollars in asset condition projects sail through a drive thru window.²⁴ This is unconscionable and no foundation upon which to build a rightsizing approach. Accordingly, NESCOE strongly urges the Commission to ensure that appropriate asset condition review processes are in place to enable a considered dialogue about rightsizing. New England is not there. The Commission should not make any decisions about rightsizing until changes have been made that result in underlying asset condition processes that are transparent and result in disciplined, cost-conscious investment.

IV. CONCLUSION

NESCOE respectfully requests that the Commission reject late-filed supplemental comments in issuing a final rule in this proceeding or taking further action on the potential reforms discussed in the NOPR. Should the Commission opt to consider any late-filed supplemental comments in this proceeding, in the interest of due process and to aid in the

²⁴ Since ISO-NE began tracking asset condition projects in 2016, \$3.7 billion of projects have been placed in-service, with \$5.2 billion more proposed, planned, or under construction. Asset Condition List – October 2023, at <https://www.iso-ne.com/system-planning/system-plans-studies/rsp/?file-type=XLS&file-type=XLSX&file-type=CSV&file-type=xls&file-type=xlsx&file-type=csv>.

Commission's decision-making, NESCOE respectfully requests that the Commission likewise accept NESCOE's supplemental comments.

Respectfully Submitted,

/s/ Shannon Beale

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Date: March 20, 2024

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 Natick, Massachusetts this 20th day of March 2024.

/s/ Shannon Beale _____

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