

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

Industrial Energy Consumers of America, )  
American Forest & Paper Association, R )  
Street, Institute, Glass Packaging Institute, )  
Public Citizen, PJM Industrial Customer )  
Coalition, Coalition of MISO Transmission )  
Customers, Association of Businesses )  
Advocating for Tariff Equity, Carolina Utility )  
Customers Association, Inc., Pennsylvania )  
Energy Consumer Alliance, Resale Power )  
Group of Iowa, Wisconsin Industrial Energy )  
Group, Multiple Intervenors (NY), Arkansas )  
Electric Energy Consumers, Inc., Public )  
Power Association of New Jersey, Oklahoma )  
Industrial Energy Consumers, Large Energy )  
Group of Iowa, Industrial Energy Consumers )  
Of Pennsylvania, Maryland Office of People's )  
Counsel, Pennsylvania Office of Consumer )  
Advocate, Consumer Advocate Division of )  
Of the Public Service Commission of West )  
Virginia, and Missouri Industrial Energy )  
Consumers, )

Complainants )

v. )

Avista Corporation; Idaho Power Company )  
MATL LLP; North Western Corporation; )  
PacifiCorp; Portland General Electric )  
Company; Puget Sound Energy, Inc.; )  
Duke Energy Florida LLC; Florida Power & )  
Light Company; Tampa Electric Company; )  
Dominion Energy South Carolina, Inc.; )  
Duke Energy Carolinas, LLC and Duke )  
Energy Progress, Inc.; Louisville Gas and )  
Electric Company and Kentucky Utilities )  
Company; Southern Company Services, Inc., )  
As agent for Alabama Power Company, )  
Georgia Power Company, Georgia Power )  
Company and Mississippi Power Company; )  
Arizona Public Service Company; Black )  
Hills Power, Inc.; Black Hills Colorado )  
Electric Utility Company, LP; Cheyenne )

Docket No. EL25-44-000

Light, Fuel & Power Company; El Paso )  
 Electric Company, NV Energy, Inc.; )  
 Public Service Company of Colorado; Public )  
 Service Company of New Mexico; Tucson )  
 Electric Power Company; UNS Electric, Inc. )  
 California Independent System Operator, )  
 Inc.; Southwest Power Pool, Inc.; PJM )  
 Interconnection, L.L.C., Midcontinent )  
 Independent System Operator, Inc.; New )  
 York Independent System Operator, Inc.; )  
 and Independent System Operator of New )  
 England, Inc., )  
 Respondents )

**THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY’S  
 RESPONSE TO THE MOTION TO DISMISS AND ANSWER OF ISO-NE**

Pursuant to the Notice of Extension of Time issued by the Federal Energy Regulatory Commission (“Commission”) on April 1, 2025, the New England States Committee on Electricity (“NESCOE”) files its response to the Motion to Dismiss and Answer (the “Motion to Dismiss”) filed by ISO New England, Inc. (“ISO-NE”)<sup>1</sup> in the above-captioned matter.

NESCOE does not take a position regarding whether the Commission should grant or deny ISO-NE’s Motion to Dismiss. Instead, NESCOE provides a response to clarify the standard of review that may apply to potential reforms to regional planning for asset condition projects in New England. As described below, the Commission can implement significant reforms to the current asset condition regional planning process that do not require any revisions to the Transmission Operating Agreement (“TOA”) and therefore the *Mobile-Sierra* presumption would not apply to those reforms. In addition, even if revisions to the TOA would be required for certain reforms, those reforms may not need to overcome the *Mobile-Sierra* presumption

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<sup>1</sup> See Motion to Dismiss Complaint as to ISO New England, Inc., or in the Alternative, to Hold Complaint in Abeyance, and Answer of ISO New England, Inc., EL25-44-000 (March 20, 2025).

because the most relevant provision of the TOA regarding asset condition projects does not receive *Mobile-Sierra* protection.

ISO-NE’s Motion to Dismiss appears to overstate the restrictions of the TOA as they apply to asset condition projects. ISO-NE states that to change the “current arrangements between ISO-NE and the [Participating Transmission Owners (“PTOs”)] related to a PTO’s local planning actions” a proponent would have to overcome the *Mobile-Sierra* presumption.<sup>2</sup> This language seems to suggest that any party seeking *any* changes to regional planning for asset condition projects in New England would have to overcome the *Mobile-Sierra* presumption. Under the *Mobile-Sierra* presumption, a proponent must show “unequivocal public necessity” or “extraordinary circumstances” that would necessitate a change—rather than showing that rates are not just and reasonable under Section 206 of the Federal Power Act.<sup>3</sup>

In support of the conclusion that the *Mobile-Sierra* presumption would apply to *all* asset condition regional planning reforms, ISO-NE relies on a single provision of the TOA that makes clear that the New England Transmission Owners (“NETOs”) retain “physical control” over their Transmission Facilities.<sup>4</sup> Specifically, TOA § 3.01(c) provides that:

Nothing herein or elsewhere contained shall be construed as requiring or effecting a transfer of any PTO’s responsibility (or the assumption thereof by the ISO) for the physical control of the Transmission Facilities, including the physical operation, repair, maintenance and replacement of such Transmission Facilities, or as conveying to the ISO: (x) any right, ownership, title or interest in or to a PTO’s Transmission Facilities; (y) any right of access to any PTO’s real property, except as specified in Section 3.02(i); or (z) any rights or authority with respect to a PTO’s Excluded Assets, except as specifically provided herein.<sup>5</sup>

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<sup>2</sup> Motion to Dismiss, at 15.

<sup>3</sup> *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 550 (2008), quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) and *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981).

<sup>4</sup> Motion to Dismiss, at 14, citing TOA § 3.01(a).

<sup>5</sup> TOA, § 3.01(c).

Contrary to the suggestion in the Motion to Dismiss, the NETOs' right to "physical control" is not properly read as an unfettered right to unilaterally make each and every decision concerning any in service or prospective Transmission Facility. Rather, it relates only to actual physical control of those facilities. Regional planning in particular does not entail ISO-NE agents and employees actually engaging in any "physical operation, repair, maintenance and replacement" of Transmission Facilities.

Notably, under Section 3.01(c) of the TOA, the NETOs retain physical control over *all* of their Transmission Facilities, which would include those that are currently regionally planned by ISO-NE because they would expand the New England Transmission System. Thus, if Section 3.01(c) banned any regional planning for Transmission Facilities that the NETOs retain physical control of—as ISO-NE appears to contend in its Motion to Dismiss—then regional planning for projects expanding the transmission system would also be barred by the TOA. That result, however, is belied by other provisions of the TOA as well as ISO-NE's status as the regional system planner for New England under ISO-NE's Open Access Transmission Tariff ("OATT").

Rather than proscribing regional planning for asset condition projects, the TOA instead recognizes that the rules and processes that apply to planning transmission generally are included in the OATT and ISO-NE's planning procedures. The TOA states that "Each PTO shall perform all of its responsibilities, and exercise each of its rights, with respect to the planning and expansion of the New England Transmission System in accordance with the ISO OATT and Schedule 3.09(a) hereto."<sup>6</sup> The TOA further states that "The ISO shall develop any modifications to Planning Procedures (including Existing Planning Procedures) and any new Planning Procedures that it may deem

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<sup>6</sup> TOA, § 3.09(a) (underlining in original).

necessary or appropriate in coordination with the PTOs and other stakeholders,” and refers to the TOA’s dispute resolution process in the event that a NETO disagrees with any new planning procedure.<sup>7</sup> ISO-NE states in its Motion to Dismiss that it currently has a limited role in planning asset condition projects.<sup>8</sup> However, that role is dictated not by the TOA, but by the existing OATT and planning procedures. Therefore, changes to ISO-NE’s role in the planning process for asset condition projects could be made through, *inter alia*, changes to the OATT and ISO-NE’s planning procedures and would not necessarily require revisions to the TOA.

Indeed, ISO-NE’s planning procedures already provide for limited regional assessment of asset condition projects for planning purposes. Specifically, ISO-NE Planning Procedure 4 includes a requirement that asset condition projects budgeted at \$5 million or greater are presented to the Planning Advisory Committee as well as an attachment that provides specific guidance to the NETOs for those presentations.<sup>9</sup> The NETOs’ own motion to dismiss and answer similarly recognize that some regional planning already exists for asset condition projects. Specifically, the NETOs state that asset condition projects already “proceed through the regional planning process and are subject to comprehensive review by stakeholders.”<sup>10,11</sup> In addition, the NETOs correctly

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<sup>7</sup> *Id.*, § 3.09(b).

<sup>8</sup> Motion to Dismiss, at 11.

<sup>9</sup> See Planning Procedure 4, § 1.1.1(5), 1.4, 1.5, Attachment G, available at [https://www.iso-ne.com/static-assets/documents/2020/02/pp\\_4\\_rev9.pdf](https://www.iso-ne.com/static-assets/documents/2020/02/pp_4_rev9.pdf).

<sup>10</sup> Motion to Dismiss and Answer of the Indicated New England Transmission Owners to Complaint of Consumers for Independent Regional Transmission Planning for All FERC-Jurisdictional Transmission Facilities at 100 KV and Above (“NETO Motion to Dismiss”), at 5 (March 20, 2025).

<sup>11</sup> Although the NETOs are correct that there currently exists a process to provide certain information to stakeholders concerning certain asset condition projects, NESCOE disagrees that the current process is “comprehensive” because in fact it is in need of significant reform and enhancement. As described at greater length in NESCOE’s comments in this docket, the current regional process for asset condition project is insufficient for

note that they recently implemented “transparency reforms and additional opportunities for stakeholder engagement.”<sup>12</sup> These reforms were implemented without a change to the TOA or even a change to the OATT or ISO-NE’s planning procedures. It therefore stands to reason that there are other reforms that could be made without changing the TOA, and therefore, would not need to overcome the *Mobile-Sierra* presumption.

It is true that the TOA does expressly provide that the NETOs have certain rights as to their Transmission Facilities that would need to be fully accounted for in any reforms to New England’s regional planning process. For example, under the TOA, a NETO has the right to “to take any action(s) that it deems necessary to prevent loss of human life, injury to persons and/or damage to property” and the right to “adopt and implement, consistent with Good Utility Practice, procedures and to take such actions it deems necessary to protect its facilities from physical damage or to prevent injury or damage to persons or property.”<sup>13</sup> For these reasons, NESCOE in its own comments made clear that regional planning for asset condition projects “should provide flexibility for ISO-NE and the NETOs to exclude a narrowly tailored category of projects from regional planning procedures, such as emergency repairs, provided that there is regular, timely, and transparent reporting of these projects to ISO-NE, States, and stakeholders.”<sup>14</sup> The NETOs’ rights under the TOA, however, are not so broad that each and every potential reform to the regional planning process for asset condition projects would

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several reasons, including but not limited to information asymmetry between NETOs and stakeholders, stakeholder difficulties in getting complete information about proposed projects, and a lack of means to address inconsistent costs across projects. *See* NESCOE Comments, at 13–18.

<sup>12</sup> *See* NETO Motion to Dismiss, at 18.

<sup>13</sup> TOA, §§ 3.02(c), 3.07(a)(v).

<sup>14</sup> NESCOE Comments, at 3.

require revising a *Mobile-Sierra*-protected section of the TOA. Indeed, the spectrum of potential reforms to regional planning for asset condition projects is wide. However, as discussed at greater length at NESCOE’s comments, ISO-NE, as the regional system planner, currently has too small a role in the regional planning for asset condition projects.<sup>15</sup> That status quo can be changed, for the reasons described above, through amendments to the OATT and ISO-NE’s planning procedures, and petitioners seeking those changes do not need to overcome the *Mobile-Sierra* presumption, provided that the proposed changes are consistent with the TOA.

Finally, even if certain future reforms do require one or more attendant revisions to the TOA, it is not necessarily true that a future Section 206 complaint would need to overcome the *Mobile-Sierra* presumption. In its Motion to Dismiss, ISO-NE states that “The New England TOA is a binding contractual arrangement that spells out the legal rights and responsibilities of ISO-NE and the PTOs relating to planning, maintaining, or upgrading Transmission Facilities. These terms are explicitly made subject to *Mobile-Sierra* under Section 11.04(c) of the TOA.”<sup>16</sup> However, ISO-NE does not mention that the TOA provision that most squarely addresses asset condition projects does not receive *Mobile-Sierra* protection under the TOA. Section 11.04(c) of the TOA includes a list of all provisions that receive *Mobile-Sierra* protection. Noticeably absent is Section 3.08 of the TOA, which is captioned as “Repair and Maintenance of Transmission Facilities.” In particular, Section 3.08(f) expressly concerns asset condition projects, stating in (i) that

If, at any time during the Term, any of a PTO’s Transmission Facilities are damaged or destroyed, then, such PTO shall determine, in its sole discretion, consistent with Good Utility Practice and applicable Law,

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<sup>15</sup> See NESCOE Comments, at 17–18.

<sup>16</sup> Motion to Dismiss, at 14.

whether or not (and if so, in what manner) to restore or cause the restoration of such damaged or destroyed Transmission Facilities to substantially the same condition, character or use as existed before the damage or destruction, if at all, provided that such PTO shall consult with the ISO prior to making such determination and shall comply with the requirements specified in Section 2.06.

It is likely that any potential reforms that require a revision to the TOA would require a revision to this section in particular, as it concerns the replacement of damaged or destroyed Transmission Facilities. However, TOA Section 3.08 does not receive *Mobile-Sierra* protection under Section 11.04(c) of the TOA and, therefore, the Section 206 standard would apply to any changes to Section 3.08.<sup>17</sup> Accordingly, even if an amendment to the TOA is required, proponents of future regional planning reforms for asset condition projects may not need to overcome the *Mobile-Sierra* presumption.

For the reasons stated herein, NESCOE respectfully requests that the Commission afford due consideration to its response to the Answer and Motion to Dismiss of ISO-NE.

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<sup>17</sup> See TOA, § 11.04(c).

Respectfully Submitted,

/s/ Nathan Forster

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Dated: April 24, 2025

## 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 Osterville, Massachusetts this 24th day of April, 2025.

*/s/ Nathan Forster*

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