

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Wholesale Competition in Regions with
Organized Electric Markets

Docket Nos. RM07-19-000 and
AD07-7-000

**COMMENTS OF
CONNECTICUT MUNICIPAL ELECTRIC ENERGY
COOPERATIVE AND MASSACHUSETTS
MUNICIPAL WHOLESALE ELECTRIC COMPANY**

Connecticut Municipal Electric Energy Cooperative (“CMEEC”) and Massachusetts Municipal Wholesale Electric Company (“MMWEC”) provide comments in response to the February 22, 2008, Notice of Proposed Rulemaking (“NOPR”)¹ regarding wholesale competition in regions with organized electric markets. CMEEC and MMWEC are joint action agencies that participate, directly and on behalf of their members, in the wholesale electric markets operated by ISO New England Inc. (“ISO-NE”). CMEEC and MMWEC commend the Commission for pursuing, through both the instant NOPR and the previously issued “Advance Notice of Proposed Rulemaking”² ways in which to improve the operation of organized wholesale electric markets.

MMWEC and CMEEC stated in our comments to the Commission on the ANOPR, and continue to urge here, that the Commission should make needed course corrections to ensure that wholesale electric markets and market administrators better serve consumers’ needs. We focus here on ISO and RTO accountability issues, which

¹ Notice of Proposed Rulemaking, *Wholesale Competition in Regions with Organized Electric Markets*, 122 F.E.R.C. ¶ 61,167 (February 22, 2008).

² Advanced Notice of Proposed Rulemaking, *Wholesale Competition in Regions with Organized Electric Markets*, Docket Nos. RM07-19-000 and AD07-7-000 (June 22, 2007), *published in* 72 Fed. Reg. 36,275 (July 2, 2007), *codified at* FERC Stats. & Regs. ¶ 32,617 (2007) (“ANOPR”).

must be addressed if the Commission is to ensure that both the markets -- and the market administrators -- serve the ends for which they were created: facilitating the provision of reliable electric service to consumers at the lowest reasonable cost.

SUMMARY

With respect to RTO/ISO accountability, the centerpiece of the NOPR is the Commission's identification (at P 275) of four "criteria" to be used to "assess the mechanism or process by which an RTO or ISO achieves board responsiveness to its members and customers," (*id* at P 274), coupled with a directive that each RTO and ISO make a compliance filing demonstrating that "it is achieving ... responsiveness[.]" either through existing stakeholder processes or newly implemented practices. *Id.* at P 276. In general, the criteria appear to be aimed at ensuring that each RTO/ISO has access to all viewpoints, and fairly "balances" the "diverse interests" before it.

While improved stakeholder processes may result in more "responsive" institutions in some regions of the country, their implementation is hardly an antidote for the accountability concerns correctly highlighted in the NOPR, the ANOPR, the comments filed in response to the ANOPR, and earlier Commission rulemakings and other proceedings concerning the same issues. Indeed, in light of legislation recently-introduced in both the House and Senate, it is clear that RTO accountability is a National concern, and that addressing the issues underlying these concerns will require more than structured stakeholder dialogue.

As the Commission well knows, New England has a "stakeholder process" that is inclusive, and that facilitates communication between and among stakeholders and between stakeholders and ISO management (and, less so, the ISO Board). Nonetheless,

in New England we have seen no evidence that the presence of a functioning stakeholder process guarantees that an ISO or RTO will be properly focused on the need to minimize the cost impact of their operations on consumers. Indeed, a burgeoning “stakeholder process” can be a double-edged sword, acting as a black hole for market participant resources, giving the appearance of a more even-handed and effective process than actually exists, and delaying the resolution of important matters. Ensuring that wholesale markets and market administrators serve the ends for which they were created -- providing or facilitating the provision of reliable electric service to consumers at the lowest reasonable cost -- will require additional structural changes, which were reviewed in our ANOPR comments and are reviewed anew *infra*.

From our perspective, the bottom line is that while we are of course in favor of a strong, vibrant, and even-handed stakeholder process, it cannot substitute for effective oversight and regulation of ISOs and RTOs by the Commission. With that objective in mind, the ANOPR comments submitted by MMWEC and CMEEC put before the Commission specific, structural and process changes that we assert will help to ensure that: (1) RTOs and ISOs are properly focused on their statutory obligation to provide or to facilitate provision of reliable electric service at lowest reasonable cost; and (2) the Commission is positioned to provide needed and effective oversight of these institutions. We note that there was nothing startling about these proposals. They are consistent with concerns we have raised in prior rulemaking and other Commission proceedings, and, more important, are fully consistent with FERC and judicial precedent -- both with respect to the obligations of public utilities in general and RTOs and ISOs in particular.

The NOPR does not state why (or even whether) many of our specific suggestions were deemed unnecessary or found wanting, and it does not explain why another of our suggestions -- that FERC obligate ISOs/RTOs to adopt a “mission” statement that includes as core objectives the minimization of costs and maximization of value to RTO customers -- was significantly watered down in the proposed rule. We discuss *infra* the basis for our concern that any final rule should make this obligation mandatory and far more specific than as framed in the NOPR. We also reiterate our earlier suggestions that went unaddressed in the NOPR.

Equally important, MMWEC and CMEEC note that, since the submission of ANOPR comments, the concern that RTOs and ISOs be properly focused on cost considerations has been addressed in recent legislative proposals introduced in both the Senate and the House.³ Over the past two months, legislation has been introduced in both bodies that would require the Commission, in determining whether an ISO or RTO rate or charge (or rule relating to such rates or charges) is just and reasonable, to

consider whether the rate or charge (including each rule or regulation relating to the rate or charge) would enable the Transmission Organization to provide, or facilitate the provision of, reliable service to consumers at the lowest reasonable cost.

S. 2660, 110th Cong., 2d Sess., § 2(b) (introduced Feb. 25, 2008); H.R. 5447, 110th Cong., 2d Sess., § 2(b) (introduced Mar. 6, 2008). In addition, the same two bills state (*id.*) that, in determining whether a proposed charge is consistent with the just and reasonable standard, the Commission must consider whether the proposal:

³ In the Senate, Sen. Bernie Sanders (I-VT) introduced S.2660, the “Consumer Protection and Cost Accountability Act,” co-sponsored by Senators Snowe, Kerry, Collins, Kennedy and Leahy. In the House, Rep. Allen (D-ME) introduced H.5547, also titled, the “Consumer Protection and Cost Accountability

provide[s] consumer benefits that outweigh any anticipated direct or indirect costs to consumers, as demonstrated by a cost-benefit analysis to be submitted by the Transmission Organization to the Commission.

In introducing S.2660, Senator Sanders highlighted concerns with respect to ISO and RTO cost accountability that mirror those expressed in the comments and proposals of MMWEC and CMEEC. Senator Sanders stated that:

Independent System Operator, RTOs or ISOs as they are called—are experiencing ... substantial, across-the-board problems with spiraling costs, unaccountable governance, and a chronic lack of oversight. Increasingly, RTOs/ISOs are adopting questionable, unproven, and expensive market mechanisms, and there seems to be little interest at the Federal Energy Regulatory Commission, FERC, or the RTOs/ISOs to question any of the economic theories behind these mechanisms. I note that on February 21, 2008, FERC finally took a step toward acknowledging that the markets are not working by issuing a proposed rule that would address some concerns. I believe, however, that the legislation I am introducing today will focus FERC on consumer issues, which were not adequately addressed in the proposed rule. The goal of lowering costs to consumers has been lost in the race to create competitive electricity markets. In fact, something as simple as keeping costs to consumers as low as reasonably possible is not even part of the mandate, or mission statement, of any of the Nation's ISOs or RTOs!

154 Cong. Rec. S1126 (February 25, 2008). Senator Sanders went on to note:

The legislation I am introducing today would refocus FERC on the consumer cost impacts of RTO/ISO actions. Consistent with existing law, the bill makes explicit that, when FERC considers the lawfulness of RTO/ISO rates, it must assess whether those rates will ensure that consumer costs are as low as reasonably possible consistent with the provision of reliable service. Also, in recognition of the uniquely important roles played by RTOs and ISOs, this bill requires FERC to make both goals—cost minimization

and reliability—a part of each RTO or ISO’s mission. These changes clarify and amplify existing law as applied to these important organizations, but do not alter, diminish, or imply an absence of similar requirements with respect to other public utilities regulated by FERC.

Id.

We note that these concerns mirror questions raised by other federal legislators. As we stated in our ANOPR comments (at 10-11), in a May 21, 2007, letter to the Government Accountability Office (“GAO”), Senators Joseph I. Lieberman (D-CT) and Susan M. Collins (R-ME), the Chairman and Ranking Minority Member, respectively, of the Senate Committee on Homeland Security and Governmental Affairs, asked the GAO to “begin an investigation into ISO and RTO costs, structure, processes, and operations.” GAO Letter at 2.⁴ Explaining the need for the investigation, Senators Lieberman and Collins pointed out that “RTOs and ISO make many market-development decisions and advance market-design mechanisms that significantly affect consumer costs.” *Id.* The Senators were concerned that RTOs and ISOs “might not be living up to their full potential with respect to improving and reducing costs, and might not have adequate incentives to minimize costs.” *Id.* at 1. While recognizing that RTOs and ISOs must weigh many factors in making these market-design and development decisions, the Senators emphasized that they “believe that seeking the lowest possible prices for consumers should be a high priority.” *Id.* at 2.

The Senators asked that the GAO report on several questions, including those that CMEEC and MMWEC believe to be central to RTO accountability to customers:

⁴ The Senators’ letter to the GAO was Attachment 1 to the ANOPR comments filed by MMWEC and CMEEC.

Does each RTO/ISO have a defined “mission” statement? (a) To the extent this is the case, do these mission statements include an obligation on the part of the RTOs/ISOs to control administrative and operational costs, as well as the cost impacts of its market-design decisions, in order to keep costs low for consumers? (b) What incentives are built into the organization or mission of each RTO/ISO with respect to ensuring that costs to consumers are as low as reasonably possible? (c) Does each RTO/ISO have a mechanism in place to identify, assess, track, and monitor the cost impacts of its decisions at the retail consumer level and, if so, how does that mechanism work?

Id. at 3. The GAO was also asked to address:

With respect to each RTO/ISO: (a) what process is in place to ensure that an evaluation of the costs and benefits of the market design proposals is conducted prior to their submission to the FERC for approval; and (b) what role do market participants and other stakeholders (*e.g.*, state commissions) play in the development, consideration and submission for approval to FERC and approval of (i) new market design proposals; and (ii) the RTO/ISO annual operating budget?

Id. In response, the GAO agreed to conduct the requested study, and we understand that its investigation is now underway.⁵

The concerns expressed by Senator Sanders, and those expressed in the GAO Letter from other federal legislators, have informed the proposals we presented in the ANOPR comments, as well as the additional comments we offer below.

⁵ The GAO’s response to the Senators’ letter was Attachment 2 to the ANOPR comments filed by MMWEC and CMEEC.

COMMENTS

A. The NOPR's Focus On Ensuring RTO And ISO "Responsiveness" Through Stakeholder Processes Is Fine As Far As It Goes, But Does Not Go Far Enough

The ISO-NE stakeholder process features "inclusiveness" and the opportunity to raise concerns directly with ISO personnel. However, and for several reasons, an inclusive stakeholder process is not a panacea. MMWEC and CMEEC urge the Commission not to rely upon such processes as the exclusive (or even, perhaps, the primary) mechanism to ensure that organized wholesale electric markets and market administrators are providing or facilitating the provision of reliable electric service at the lowest reasonable cost.

First, the ability of a stakeholder forum to be effective in identifying issues and ensuring that they are properly addressed is largely a function of the capability and resources assigned to the stakeholder process by the participants. In New England, this burden is increasingly becoming prohibitive for many of the smaller Participants, including Public Power systems. Further, given the complexity and burdens imposed by the process,⁶ it is often difficult for individual participants to feel as if they have an ability to impact the final result of the process.⁷ This dynamic can lead to a sense of disenfranchisement and disengagement that undermines the effectiveness of the process.⁸

⁶ For example, we note the disturbing increase in the use of smaller working groups as part of the stakeholder process. This tends to provide greater opportunities for larger, more well funded Participants to influence the process at the early stages, while many of the smaller participants and end users are forced to weigh in on issues after they have progressed fairly well along.

⁷ We often see the "squeaky wheel" syndrome. Those participants that devote the most staff and/or consultant time get listened to while others only get consulted after the process is fairly well along. Similarly, we find that our positions are much more likely to have traction if they are consistent with the ISO's views.

⁸ At times, it can be frustrating in that the goal of stakeholder committee discussions seems to be to get to

In other words, too much stakeholder process can be as bad as not enough stakeholder process.

Second, the effectiveness of the stakeholder process in New England (and elsewhere) depends on the ISO's receptivity to new ideas and its willingness to change course based on feedback that it receives through the stakeholder process. While that may be true at the edges or at times, it has not been demonstrated consistently. Consistent with our ANOPR comments (and the instant filings), MMWEC and CMEEC are of the view that the level of RTO or ISO "receptivity" or "responsiveness" will not change absent mandated modifications to the way in which the ISO must assess the issues before it.

Third, the NOPR includes (at P 279) "Fairness in Balancing Diverse Interests" as among its responsiveness "criteria." We fear that the thinking behind this criteria may be a sense that, so long as a given ISO proposal has both supporters and detractors, it must be in some sense "balanced" in a way that renders it just and reasonable. However, that logic does not hold, as a proposal that is half way between a reasonable position and an unreasonable one is not automatically reasonable simply because there are some stakeholders on each side. Moreover, not all stakeholder views are in fact "equal." The ISO (and this Commission) have statutory obligations to consumers that cannot be met tallying market participant votes on either side of a particular proposition.

For these reasons, while we see value in a stakeholder process, we cannot endorse the notion that the development of stakeholder processes meeting the Commission's four criteria in any way lessens or alleviates the need for the Commission to conduct its own

the lowest common denominator, rather than an answer that works best for the region's consumers.

searching review under the FPA of whether a particular rate, charge, market rule, or design change is just and reasonable. We address immediately below changes that we assert should be made to focus the RTOs and the ISOs on their statutory obligations.

B. The Commission Should Require RTOs and ISOs to Adopt As Their “Mission” the Provision of Reliable Service at the Lowest Reasonable Cost

In our ANOPR comments, MMWEC and CMEEC urged the Commission to require RTOs and ISOs to incorporate express corporate objectives to provide or facilitate the provision of reliable electric service to consumers at the lowest reasonable cost. ANOPR Comments at 3-12. The NOPR addresses this proposal, but falls far short of imposing the requisite requirement. While proposing to require RTOs and ISOs to post a “mission statement or charter” on the organization’s website, the NOPR goes no further in terms express obligations, stating only that the Commission:

encourages each RTO and ISO to set forth in these documents the organization’s purpose, guiding principles, and commitment to responsiveness to customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services.

NOPR at P 280. More than “encourage[ment]” is needed, as is something more binding than a mere expectation of responsiveness to “customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services.”

There is nothing new in the notion that public utilities should provide customers with reliable service at the lowest reasonable cost. Consistent with a long line of Commission and court precedent, the provision of such service is (or should be) the goal of federal regulation of public utilities under the FPA as it stands today. Yet, in our experience, ISOs and RTOs have failed to recognize long-term cost minimization as part

of their mission, and we see no basis for concluding that they will do so in the absence of an express requirement.

1. The imposition of an obligation on RTOs and ISOs to provide or facilitate the provision of reliable service at the lowest reasonable cost is fully consistent with FERC and judicial precedent.

The commitment we urge that the Commission impose upon RTOs and ISOs is no bolt out of the blue. The Federal Power Act and Natural Gas Act have long been interpreted to provide for reliable service at the lowest reasonable cost.⁹ That goal is equally applicable to ISOs and RTOs. Indeed, Order No. 2000 sought “to promote efficiency in wholesale electricity markets and to ensure that electricity consumers pay the lowest price possible for reliable service....”¹⁰

The Commission has made similar pronouncements in more recent settings. For example, in a recent proceeding involving whether ISO New England was engaged in “lobbying” activities, the Commission rejected claims that it had erred in finding that

⁹ See *Atlantic Refining Co. v. Public Service Comm’n of New York*, 360 U.S. 378, 388 (1959) (noting it was Congress’s intent in drafting the Natural Gas Act that natural gas “shall be sold in interstate commerce at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.”); *id.* at 390 (stating that Congress’s “overriding intent” was “to give full protective coverage to the consumer as to price”); *National Fuel Gas Supply Association v. FERC*, 900 F.2d 340, 346 (DC Cir 1990) (discussing a natural gas pipeline’s duty to “minimize its overall costs to achieve the lowest reasonable rates consistent with the maintenance of adequate long term service.”); *Columbia Gas Transmission Corporation*, 26 F.E.R.C. ¶ 61,034 (1984) (enforcing a pipeline’s “fundamental duty to provide service at the lowest, reasonable rate consistent with maintenance of adequate service”); *Panhandle Eastern Pipeline Co.*, 44 F.E.R.C. ¶ 61,246 (1988) (“The Commission has stated that it will find abuse if a pipeline evidences a reckless disregard of the pipeline’s fundamental duty to provide service at the lowest reasonable cost consistent with the maintenance of adequate service.”); *Louisville Gas & Electric Co.*, 61 F.E.R.C. ¶ 61,016 (1993) (“One of the Commission’s primary regulatory goals is to ensure the lowest, reasonable cost energy to consumers, consistent with reliable service.”). There should be no question that Natural Gas Act precedent is equally applicable in the context of the Federal Power Act. *TAPS v. FERC*, 225 F.3d 667, 686 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002) (noting that the Natural Gas Act and Federal Power Act should be interpreted consistently).

¹⁰ *Promoting Transmission Investment through Pricing Reform*, Order No. 679-A, 72 Fed. Reg. 1,152, 1,166 (Jan. 10, 2007), III F.E.R.C. Stat. & Regs. ¶ 31,236, P 86 n.141, *clarified*, 119 F.E.R.C. ¶ 61,062 (2007), P 86 n.141 (2006) (quoting Order No. 2000, FERC Stats. & Reg. ¶ 31,089 at 31,024).

there were “similar interests between ISO-NE and its ratepayers.” *ISO New England Inc.*, 118 F.E.R.C. ¶ 61,105, P 21 (2007). Instead, and in support of its finding, the Commission stated that “ISO-NE ... seeks only to provide reliable service at the lowest reasonable cost.” The Commission subsequently reached a similar conclusion with respect to PJM, stating:

As an RTO, PJM assumed responsibility to plan the regional transmission grid to meet the needs of the region as a whole, with emphasis on achieving reliable supply at the lowest reasonable cost.

PJM Interconnection LLC, 119 F.E.R.C. ¶ 61,063, P 6 (2007). With respect to the RTO/ISO “mission statement or charter,” the NOPR not only fails to enforce the “responsibility” as set forth in these Commission rulings, but the reference to “responsiveness to customers and other stakeholders” (at P 280) appears to move in the other direction, seemingly putting customer interests on a par with “other stakeholders.” FPA precedent is not in accord with the seeming direction proposed to be taken by the Commission in P 280 of the NOPR.

2. RTOs and ISOs should be required to provide or facilitate the provision of reliable service at the lowest reasonable cost because, absent a requirement, there is reason to believe that they will not do so on their own.

As system operators, RTOs and ISOs have substantial incentives to make planning and operations decisions that facilitate reliable operation of the system, which is an appropriate goal. However, because they do not pay the costs resulting from their decisions, they have no incentive (either express or implicit) to minimize those costs or their impacts on consumers. Nor is there meaningful competitive pressure among ISOs or RTOs (which are natural regional monopolies) to provide system-operation or

market-administration services at least cost. As a result, and as we stated in our ANOPR comments (*e.g.*, at 6-9), ISOs and RTOs are not naturally inclined to consider either the direct or indirect costs of their actions.¹¹ Instead, from our vantage point as consumers, it appears that ISOs and RTOs are inclined to opt for the easiest or theoretically “pure” approaches to system administration or market design without adequately considering likely consumer impacts.

This observation has been especially apparent with respect to system-operation and market-administration decisions pertaining to reliability. As load-serving entities or their representatives, CMEEC and MMWEC strongly support a commitment to reliable electric system planning and operation. However, there are points of diminishing returns and there are more- and less-expensive ways to achieve the same reliability results. ISOs and RTOs have little inherent incentive to consider the costs associated with different approaches to maintaining reliability. Indeed, ISO-NE has at times disavowed responsibility to consider the costs of reliability-related actions or to assess whether there are alternative methods to preserve system reliability at lower cost.¹²

At other times, ISO-NE has paid lip service to reducing consumer costs but has failed to follow through. For example, although ISO-NE’s tariff contemplates the

¹¹ In our experience, the indirect costs associated with ISO or RTO services -- *i.e.*, the cost impacts of ISO or RTO system-operation and market-administration decisions and market rules -- swamp the direct costs of running the ISO or RTO, even though such direct administrative costs are substantial and increasing.

¹² For example, when a New England generator seeks an out-of-market Reliability Must-Run (“RMR”) agreement, ISO-NE takes no position as to the rate to be paid under the agreement, and has at times stated expressly that it is not responsible for examining whether there are less expensive means of maintaining reliability. *See* Motion To Strike, and Motion To Reject the Collateral Attack of MMWEC, Chicopee And South Hadley, and, In the Alternative, Motion for Leave to Answer, *Berkshire Power Company, LLC*, Docket No. ER05-1179-000, at 13 (Nov. 22, 2005) (“When faced with a request from a generator to make a reliability determination, the ISO is not required by Market Rule 1 as part of this process to determine the lowest-cost alternative or to examine all possible short-term engineering alternatives...”).

development of “Market Efficiency Transmission Upgrades” for the purpose of “reduc[ing] bulk power system costs to load systemwide,”¹³ and although New England’s Transmission Owners have agreed to build such upgrades when directed to do so by ISO-NE (subject to certain conditions),¹⁴ ISO-NE has never directed a Transmission Owner to construct such an upgrade, and no such upgrades have been built in New England. Meanwhile, New England congestion costs and the out-of-market costs associated with Reliability Must Run agreements have skyrocketed.¹⁵

This observation is particularly troubling given that a primary benefit that New England’s consumers were said to have obtained under the RTO arrangements (which

¹³ ISO New England Inc. Transmission, Markets and Services Tariff, FERC Elec. Tariff No. 3, Section II.1.67 (defining a “Market Efficiency Transmission Upgrade” as “[t]hose additions and upgrades that are not related to the interconnection of a generator, and, in the ISO’s determination, are designed to reduce bulk power system costs to load systemwide, where the net present value of the reduction in bulk power system costs to load system-wide exceeds the net present value of the cost of the transmission addition or upgrade. For purposes of this definition, the term ‘bulk power system costs to load system-wide’ includes, but is not limited to, the costs of energy, capacity, reserves, losses and impacts on bilateral prices for electricity.”)

¹⁴ See Schedule 3.09 of the “Transmission Operating Agreement” between and among ISO New England and New England’s Transmission Owners, available at http://www.iso-ne.com/regulatory/toa/er06-1181_toa-composite_6-29-06.pdf.

¹⁵ See National Rural Electric Cooperative Association, THE REGIONAL TRANSMISSION ORGANIZATION REPORT CARD: WHOLESALE ELECTRICITY MARKETS AND RTO PERFORMANCE EVALUATION SECOND EDITION, at 104 (August 20, 2007) (available at http://www.nreca.coop/Documents/PublicPolicy/RTO_RC_Final_071807_Revised.pdf) (“In New England, congestion costs have risen dramatically over the past three years. In the years 2003 through 2005, energy market congestion costs were \$87 million, \$80 million, and \$266 million, respectively. The majority of the congestion costs were incurred in the day-ahead market; and in 2005, nearly all of the congestion costs were incurred in the NEMA/Boston and Connecticut zones.”); *id.* at 122 (“In New England, uplift costs appear to have risen dramatically from \$320 million in 2004 to \$527 million in 2005. Of this \$207 million cost increase, \$79 million was due to an increase in the costs of reliability agreements for the Connecticut load pocket, and \$76 million was due to an increase in the cost of being prepared for second contingencies in the Boston load pocket.”). According to the most recent data on the ISO-NE website (http://www.iso-ne.com/genrtion_resrcs/reports/rmr/rmr_agreements_summary_with_fixed_costs.xls), the cumulative annual fixed revenue requirement for currently-effective RMR agreements in New England exceeds \$295 million. We note that as of a year or two ago, this figure was considerably higher. Over the past sixteen months, settlements have been approved terminating RMR agreements entered into with respect to Mystic generating facilities (in MA), and Bridgeport and PPL Wallingford generating facilities (in CT). These settlements have saved consumers literally hundreds of millions of dollars in potential RMR agreement payments. However, the achievement of these settlements has had virtually nothing to do with actions

became effective following Commission approval in early 2005) was the assumption by the region's transmission owners of the obligation to construct transmission upgrades planned through the ISO process for either reliability or economic reasons. This obligation was included in an agreement between ISO-NE and the transmission owners. To our knowledge, the ISO has never sought to enforce that commitment against any transmission owner. The consequences of such inaction upon New England consumers have been severe.

For example, in the Springfield, Massachusetts area, the need for substantial transmission upgrades was identified by the ISO in the 2002-2003 time frame, but they have not yet been constructed. In the meantime, Western and Central Massachusetts customers have paid existing generators tens of millions of dollars per year in out-of-market RMR agreement payments. *Berkshire Power Company LLC*, FERC Docket No. ER05-1179-000; *Pittsfield Generating Company*, FERC Docket No. ER06-262-000; *Consolidated Edison Energy Massachusetts Inc.*, FERC Docket No. ER05-903-000 (West Springfield 3); and *Consolidated Edison Energy Massachusetts Inc.*, FERC Docket No. ER06-819-000 (GT-1 and GT-2).¹⁶ According to ISO-produced data, the aggregate Annual Fixed Revenue Requirements for these RMR units (following settlements of each

taken by ISO-NE; they are the result of customer protests and related actions by the Commission.

¹⁶ These RMR agreements are now apparently selling points that assist the generation owners in shifting the assets to new owners. See *Consolidated Edison Development, Inc.*, 123 F.E.R.C. ¶ 61,022 (2008) (approving sale of, *inter alia*, jurisdictional facilities owned by Consolidated Edison Energy Massachusetts, Inc., including RMR agreements for the West Springfield 3 generating unit and for GT-1 and GT-2); see also "Maxim Power to acquire Massachusetts plant contracted to ISO New England," *Power Daily Northeast* (April 18, 2008) (discussing Maxim Power Corp.'s plans to acquire the Pittsfield Generating facility, which is under an RMR agreement pursuant to a settlement in Docket No. ER06-262-000).

of the FERC proceedings initiated in response to these filings) is nearly \$56 million, which translates to \$8.64/kw-month.¹⁷

At the same time, MMWEC has been pursuing the construction of a new, 280 MW gas-fired power plant that will be located in same reliability region, at MMWEC's existing Stony Brook Energy Center facility, in Ludlow, Massachusetts. MMWEC sought to have the new unit "qualified" for participation in the first "Forward Capacity Market" auction, which was held in February 2008. The ISO failed to qualify the Unit for the first FCM auction because certain long-planned transmission upgrades necessary to resolve *pre-existing* transmission planning violations in the Springfield, Massachusetts area are not expected to be completed prior to the commencement of the first FCM "Capacity Commitment Period," in mid-2010. In challenging this finding before the Commission, MMWEC noted that, notwithstanding the existence of a "commitment" to construct needed facilities that was subject to enforcement by the ISO, no such enforcement action had been taken. As explained by MMWEC:

The lack of progress is particularly discouraging given the promises that have been made to consumers by the ISO and the region's transmission owners about new construction, and the significant consideration that has been paid for those promises. The RTO-NE arrangements implemented in February 2005 (following FERC approval), include an obligation on the part of the region's transmission owners to construct needed transmission. In return for the assumption of this "obligation to build," New England consumers have been required to pay return on equity ("ROE") incentive increases both to reward RTO participation (50 additional basis points) and, separately, to reward new transmission construction (100 additional basis points).

¹⁷ These data are posted on the ISO website: http://www.iso-ne.com/genrtion_resrcs/reports/rmr/rmr_agreements_summary_with_fixed_costs.xls.

“Motion of Massachusetts Municipal Wholesale Electric Company to Intervene, Protest, Challenge To, Comments Upon, and Request For Issuance of an Order With Respect to “Informational Filing” of ISO New England Inc.,” filed in *ISO New England Inc.*, Docket No. ER08-190-000, at 17-18 (November 21, 2008) (footnote citations omitted).

While expressing some sympathy for MMWEC’s concerns, the Commission rebuffed them:

[W]hile we are sympathetic to the issues created by the lack of timely completion of transmission upgrades in this area, we will not grant MMWEC's request that ISO-NE investigate and prepare periodic reports on the status of transmission upgrades. Similarly, addressing MMWEC’s answer, we find that the record in this proceeding has not provided adequate support for the Commission to initiate *sua sponte* a section 206 proceeding to investigate the reasons for delay in the transmission upgrades in this area. We encourage the parties to use the stakeholder process to address delays in these transmission upgrades.

ISO New England Inc., 122 F.E.R.C. ¶ 61,018, P 86 (2008).

Similarly, in the Southeast Massachusetts (“SEMA”) reliability region, ISO-NE appears to have stood by as consumers were forced to pay more than a hundred million dollars *per year* in above-market daily reliability payments to a generator, while the local transmission owner -- which had externalized much of the cost to other customers -- took its time in planning and implementing transmission improvements. The out-of-market generation costs skyrocketed in early 2006, but transmission upgrades expected to improve the situation (though not fix the problem) are unlikely to be in service before mid-2010. In the meantime, several SEMA municipal systems have initiated litigation against the ISO contending that they have been overcharged by approximately \$24 million in 2006 and 2007 (and are on pace to be overcharged by more than \$13.5 million

in 2008) as a result of the ISO's system-operation decisions and misapplication of its tariff. *Braintree Electric Light Department, et al. v. ISO New England Inc.*, Docket No. EL08-48-000 (complaint filed March 28, 2008).

Nor are MMWEC and CMEEC alone in concluding that ISO-NE has no inherent incentive to minimize consumer costs. The D.C. Circuit has reached the same conclusion. In *NSTAR Electric & Gas Corp. v. FERC*, 481 F.3d 794 (2007), the Court of Appeals considered the propriety of certain "bid mitigation agreements" (the predecessor of today's RMR agreements) that ISO-NE negotiated and the Commission approved under a prior Market Rule. NSTAR challenged a set of Commission orders approving the agreements negotiated under former Market Rule 17,¹⁸ claiming that the Commission failed to determine independently whether the rates were "just and reasonable." On appeal the Commission argued that because the ISO was authorized only to negotiate "reasonable payment terms," the agreements had to have been negotiated in a manner that produced "reasonable results." 481 F.3d at 803. The Court disagreed, however. "Although the system operator plainly has an incentive to ensure that system-critical power is available to ensure grid stability and reliability, FERC neither in its decisions nor at oral argument was able to identify incentives driving ISO-NE to bargain for low prices." *Id.*¹⁹

¹⁸ Former Market Rule 17.3 provided that "[t]he ISO may enter into negotiation with a resource owner for any reasonable payment terms if the ISO reasonably expects the markets will function more reliably, competitively, or efficiently as a result." 481 F.3d at 797.

¹⁹ On remand, the Commission summarized the Court's findings, but did not comment upon them. "Order on Remand Establishing Hearing and Settlement Judge Procedures," 120 F.E.R.C. ¶ 61,264, PP 6-8, *order on reh'g*, 121 F.E.R.C. ¶ 61, 197 (2007).

In light of these multiple and well-recognized concerns, MMWEC and CMEEC urge the Commission to do far more than “encourage” RTOs and ISOs to include general language in their “mission statement” or “charter” referencing a commitment to “consumers who benefit and pay for electricity services.” NOPR at P 280. Instead, the Commission should *require* RTOs and ISOs to adopt a mission or charter that includes an *obligation* to provide or facilitate the provision of reliable service at the lowest reasonable cost.

C. The Commission Should Require ISOs and RTOs to Perform Cost Benefit Studies in Support of Proposed Rates, Charges and Related Rules

In their ANOPR comments, MMWEC and CMEEC urged that the Commission “[r]equire that rate filings that include expenses for major new initiatives, and other RTO filings that may result in significant costs to consumers, be accompanied by cost-benefit analyses.” ANOPR Comments at 6. This proposal is consistent with both the recent Senate and House bills on RTO accountability issues, each of which would obligate an RTO or ISO to accompany new filings with supporting cost-benefit analyses. As explained by Senator Sanders in his statement accompanying S.2660:

In New England, we have seen what can happen — there have been several instances in which ISO-New England has implemented expensive market mechanisms, over the objection of significant segments of electric stakeholders, without either conducting a cost-benefit analysis or comparing the costs of the proposed initiative with alternative means of achieving the desired results.

154 Cong. Rec. S1126 (February 25, 2008).

One of the concerns that has been voiced regarding the proposed legislative requirement to support rate, market-rule, and other proposals with cost-benefit analyses is

a fear that such analyses will stifle the development of renewable resources or other programs needed to address climate-change concerns. We think these concerns are unfounded. The requirement that MMWEC and CMEEC seek to have the Commission impose is not one that would be overly prescriptive, or would require that “costs” or “benefits” be defined in certain ways or be measured in every situation over the same set of precisely defined time lines.²⁰ Indeed, this requirement should be sufficiently flexible as to permit, for example, within the assessment of costs and benefits, inquiry into whether a given proposal would increase our nation’s energy independence and address, over time, important global warming/climate change concerns. The requirement would not mandate how cost-benefit tradeoffs are structured. What it would do -- what the Commission must do -- is to ensure that RTOs and ISOs make express and that the Commission evaluate expressly the cost-benefit tradeoffs that are inherent in ISO and RTO market-design initiatives and system-operation decisions.

D. The NOPR Wrongly Ignores Other Important Proposals for how Best to Address RTO Accountability Issues

In our view, the proposals presented in the NOPR are at best of a subset of the types of actions that the Commission must be prepared to take if it intends to confront and address the significant cost accountability issues that are inherent in the current structure.

MMWEC and CMEEC made several additional suggestions in their ANOPR comments that were not addressed in the NOPR. We restate those suggestions here, and

²⁰ The proposed requirement would likewise not require RTOs, ISOs, and FERC to focus only on out-of-pocket payments or savings to the exclusion of environmental costs and benefits.

urge that the Commission consider them, both for the reasons stated here and in our ANOPR presentation:

- Ensure that all RTO rates are based on revenue requirements that have been reviewed and accepted under FPA Section 205 before the rates become effective.
- Ensure that stakeholder review processes preceding rate filings are as thorough, focused, and well-informed as possible.
- Permit stakeholders to vote on RTO budgets on a line-item basis, and require RTOs to include the results of such votes with their filings.
- Require that RTO rate filings address the recommendations (if any) of biennial independent, stakeholder-funded audits.²¹
- Adopt rate filing requirements that ensure, as much as possible, that unjust and unreasonable rate increases either will not be collected or can be refunded without surcharging customers.
- Require Commission approval (or at least advance notice to stakeholders and the Commission) before RTOs can spend funds in excess of budgeted amounts, or in ways other than those for which approval was received.

²¹ This requirement is consistent with provisions in both S.2660 and H.5547.

CONCLUSION

WHEREFORE, for the reasons stated here and in our ANOPR comments, MMWEC and CMEEEC request that the Commission modify the NOPR to take account of the positions expressed herein.

Respectfully submitted,

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