

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

ISO New England Inc.)	
and)	Docket No. ER09-1051-000
New England Power Pool)	

**NOTICE OF INTERVENTION OF THE
MAINE PUBLIC UTILITIES COMMISSION
AND COMMENTS OF THE
THE MAINE PUBLIC UTILITIES COMMISSION
AND THE INDUSTRIAL ENERGY CONSUMERS GROUP
ON ISO NEW ENGLAND’S ORDER NO. 719 COMPLIANCE FILING**

In accordance with Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. §§ 385.211 and 385.214 (2009), and the May 1, 2009 Notice of Filing, the Maine Public Utilities Commission (“MPUC”), by and through counsel, Lisa Fink and Ben Smith, hereby submits its notice of intervention in the above-captioned proceeding. MPUC and the Industrial Energy Consumers Group (“IECG”) also jointly submit the comments included herein.

I. PRELIMINARY STATEMENT

The persons to whom correspondence, pleadings, and other papers in relation to this proceeding should be addressed and the persons whose names are to be placed on the Commission’s official service list are designated as follows pursuant to Rule 203, 18 C.F.R. § 385.203 (2009):

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II. NOTICE OF INTERVENTION

Under Maine law, the MPUC is the state commission designated by statute with jurisdiction over rates and service of electric utilities in the state. *See* 35-A M.R.S.A. § 101 *et seq.* It is, therefore, a “state commission” under the Commission’s regulations. 18 C.F.R. § 1.101(k) (2009). Accordingly, the MPUC hereby gives notice of its intervention pursuant to Rule 214(a)(2) of the Commission’s rules of practice and procedure. 18 C.F.R. § 385.214(a)(2) (2009).

III. INTRODUCTION

ISO New England, Inc. (“ISO-NE”) introduces its responsiveness compliance filing by stating that it believes it is currently in compliance with the Commission’s requirements for responsiveness without the need to change any of its existing practices or procedures. ISO-NE then provides a summary of the various meetings it had with stakeholders and explains the contractually negotiated decisionmaking structure that it follows in making decisions through the NEPOOL process as evidence of inclusiveness, fairness, and representation of minority interests.

The Commission defined what it expected as a demonstration of responsiveness that included policies and procedures that not only provide for direct input to the Board of Directors (“Board”) but demonstrate that the Board has fully considered and taken action on the input. ISO-NE explains that there exists opportunities to meet directly with the Board formally and informally and that there is a website link allowing for submission of documents to the Board. What is missing is any *direct* feedback that the Board has considered or taken any action in response to a position advanced by a stakeholder, but not necessarily supported by ISO management. ISO-NE includes statements in its filing that management “routinely” informs the Board of non-prevailing positions and of contested issues. However, assurances that the CEO is reporting orally to the Board do not demonstrate or assure stakeholders that concerns have been considered or action taken as a result of raising concerns. Without a concrete method for feedback, the current ISO-NE operation is not inclusive or transparent.

ISO-NE even asserts that the current objectives statement in the NEPOOL Participants Agreement and other governing documents meets the requirement of having a mission statement. The current objectives statement does not meet the Commission’s definition of the purpose, guiding principles, and commitment to responsiveness that such a document must embody. The fact the ISO-NE begins its filing by asserting that it is in compliance with responsiveness requirements clearly demonstrates the problem that the Commission is seeking to correct through Order No. 719. This prevailing approach throughout the stakeholder process inhibited the opportunity for comprehensive change and meeting compliance objectives.

IV. **BACKGROUND**

On October 17, 2008, the Commission issued Order No. 719.¹ One of the areas covered by the Order No. 719 is the responsiveness of Independent System Operators (“ISOs”) and Regional Transmission Organizations (“RTOs”). Specifically, Order No. 719 states:

In this section of the Final Rule, the Commission requires RTOs and ISOs to establish a means for customers and other stakeholders to have a form of direct access to the board of directors, and thereby to increase the boards of directors’ responsiveness to these entities. (By responsiveness, we mean an RTO or ISO board’s willingness, as evidenced in its practices and procedures, to directly receive concerns and recommendations from customers and other stakeholders, and to fully consider and take actions in response to the issues that are raised.) The Commission requires each RTO or ISO to submit a compliance filing demonstrating that it has in place, or will adopt practices and procedures to ensure that its board of directors is responsive to customers.²

Order No. 719 also directs

each RTO and ISO to post on its web site its mission statement or organizational charter. 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.³

The Commission concluded that the mission statement requirement “will improve communication between RTOs and ISOs and their stakeholders and the community at large, as well as provide a statement of goals by which the RTO’s and ISO’s progress may be judged.”⁴

¹ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats & Regs. ¶ 31,281 (2008) (“Order No. 719”), *reh’g pending*.

² *Id.* P 477.

³ *Id.* P 478.

⁴ *Id.*

Prior to the issuance of Order No. 719, U.S. Senators Susan Collins and Joe Lieberman had requested that the General Accounting Office (“GAO”) perform a study to review RTO expenses, how RTOs and the Commission review and make decisions that may affect electricity prices and the extent to which there is consensus on the benefits that RTOs provide. In September 2008, the GAO issued a report entitled, “Electricity Restructuring: FERC Could Take Additional Steps to Analyze Regional Transmission Organizations’ Benefits and Performance.” The report found, among other things, that stakeholders representing consumers expressed concern that RTOs did not place adequate emphasis on how decisions may affect consumer prices and that RTOs base some of their decisions on overly conservative assumptions about reliability that may raise consumer prices.”⁵ On February 2, 2009, Senators Lieberman and Collins wrote a letter to Chairman Jon Wellinghoff stating

We are aware that in October 2008, the Commission issued Order No. 719, a new rule on wholesale market reform. The rule specifically addresses the need GAO identified to improve the responsiveness of RTOs and ISOs to their customers and stakeholders, and ultimately the consumers who benefit from and pay for electricity services.⁶

The Senators asked to be updated on proposed improvements to increase the responsiveness of RTOs.⁷

ISO-NE convened an RTO Responsiveness working group in which numerous parties, including the MPUC, the Maine Office of Public Advocate (“OPA”), the Connecticut Department of Public Utilities (“CTDPUC”), and other entities representing state consumers

⁵ GENERAL ACCOUNTING OFFICE, ELECTRICITY RESTRUCTURING: FERC COULD TAKE ADDITIONAL STEPS TO ANALYZE REGIONAL TRANSMISSION ORGANIZATIONS’ BENEFITS AND PERFORMANCE at 6 (2008).

⁶ See Letter from U.S. Senators Susan Collins and Joe Lieberman to Chairman Jon Wellinghoff, Commission (Feb. 2, 2009). The letter is attached hereto as Attachment A.

⁷ *Id.*

participated and developed proposals to improve ISO-NE responsiveness. Of specific relevance to this pleading, the MPUC, the CTDPU, the Vermont Board of Public Service, and the New Hampshire Public Utilities Commission developed a mission statement, the MPUC submitted a proposal and supported an alternate proposal to increase Board transparency, and the MPUC suggested language to strengthen the Board's interest in having a consumer voice on the Board.

On January 16, 2009, the MPUC issued an Order in MPUC Docket No. 2008-156, which is an investigation of whether Central Maine Power Company ("CMP") and Bangor Hydro-Electric Company ("BHE") should continue to participate in ISO-NE, which serves as the RTO for New England. The investigation resulted from two legislative resolves, the second of which required the MPUC to hold a proceeding after which the MPUC was required to submit a report to the Legislature on the results of the proceeding and to include a determination of whether it is in the interests of Maine ratepayers for Maine's T&D utilities to provide notice of non-renewal in ISO-NE. In its January 16, 2009 Order, the MPUC concluded that "the present arrangement with ISO-NE is inadequate in the areas of transmission cost containment, transmission cost allocation, and ISO-NE governance." The MPUC specifically noted that "the ISO-NE objectives do not include ensuring that costs are reasonable or the need to choose the most cost effective alternative."⁸

V. COMMENTS

A. The Mission Statement Adopted by ISO-NE Is an Improvement on the Status Quo but Must Be Strengthened.

The mission statement language ultimately adopted by ISO-NE is as follows:

⁸ Investigation of Maine Utilities Continued Participation In ISO-NE, MPUC Docket No. 2008-156, Order, January 16, 2009 ("January 16 Order") at 48. Document available at MPUC website at: http://mpuc.informe.org/easyfile/cache/easyfile_doc213150.DOC.

In fulfilling this mission and consistent with the preceding principles, the ISO shall strive to perform all its functions and services in a cost-effective manner, for the benefit of all those served by the ISO. To assist stakeholders in evaluating any major ISO initiative that affects market design, system planning or operation of the New England bulk power system, the ISO will provide quantitative and qualitative information on the need for and the impacts, including costs, of the initiative.⁹

The MPUC and IECG support the second sentence in this new language and recognize that ISO-NE has taken a major step in committing to perform and provide (1) analyses of the need for measures that the ISO identifies as appropriate and (2) most importantly of the cost impact of the proposed measure.¹⁰

Several states and 57% of NEPOOL participants supported the following alternative language:

[t]o ensure just and reasonable rates as mandated by the Federal Power Act and as determined by the Federal Energy Regulatory Commission, the ISO shall fulfill its mission at the lowest reasonable cost, consistent with the preceding principles ultimately to the benefit of all consumers who pay for electricity products and services. In evaluating any major ISO initiative that affects market design, system planning or operation of the New England bulk power system, and to improve the functioning of ISO-NE competitive markets for the benefit of consumers, the ISO will provide quantitative and qualitative information on the need for and the impacts, including costs, of the initiative.

The MPUC and IECG disagree with ISO-NE approach in the first sentence of the new mission statement. The primary difference between the alternative mission statement and ISO-NE's language is that ISO-NE's version uses the term "cost effective" rather than the

⁹ ISO-NE Transmittal Letter at 117.

¹⁰ The MPUC notes that had this provision been in place in 2004, when ISO-NE introduced its LICAP proposal, it would have required ISO-NE to provide a cost analysis at the outset of the LICAP initiative rather than waiting until three quarters of the way into the litigated proceeding.

“lowest reasonable cost” language advocated by the MPUC and others.¹¹ ISO-NE states that it prefers the “cost-effective” language because it gives ISO the *option* to identify a “cost effective” option, but apparently does not *require* ISO to even *identify* the lowest reasonable cost transmission solution or non-transmission solutions.¹²

ISO-NE’s explanation supports the need for stronger language. The fundamental issue before the Commission is whether ISO should have the *discretion* to refuse to identify a lower cost solution that meets the reliability need. It should not. It is ISO-NE, not consumers, that has the transmission planning expertise to identify lower cost transmission alternatives. Moreover, consumers are paying the salaries of these transmission planners and should have the benefit of their expertise in identifying the lowest “reasonable” cost transmission solution that will meet the need. Similarly, if demand response is a lower cost solution to keeping an inefficient or environmentally unsound resource in place, ISO-NE should have an obligation to identify this option. Finally, because transmission projects approved by ISO-NE through the RSP process are absorbed into a formula and may be challenged on a prudence basis only through a section 206 complaint, the ISO should have some responsibility for ensuring that the rate effects of its planning process meet a just and reasonable standard.

¹¹ An additional difference is that ISO-NE’s mission statement requires cost-effectiveness in ISO-NE’s *performance* of its functions, not necessarily in the determinations it makes. Thus, under the literal reading of this language, ISO-NE could approve a costly and unreasonable major initiative but do it in a cost-effective manner and would be compliant with its mission. However, ISO-NE notes that this sentence is “intended to express ISO-NE’s commitment to cost-effectiveness in all of its functions and services, including market design, operations and planning.” Transmittal Letter at 117. In comparison, the alternative language is clear that ISO-NE should commit to the lowest reasonable cost standard in planning, market design and operations.

¹² *Id* at 118.

ISO-NE's suggestion that the term "reasonable" forces it to act as a regulator and that it does not seek to embrace this role, is without merit. The tariff already requires it to make "reasonableness" determinations. For example, under Schedule 12C to the ISO-NE OATT, the ISO is charged with determining whether localized costs exist for the purpose of excluding these costs from regional rate recovery. Schedule 12C states:

[i]n making its determination of whether Localized Costs exist, the ISO will consider, in accordance with Schedule 12C of this OATT, the *reasonableness* of the proposed design and construction method with respect to (i) Good Utility Practice, (ii) the current engineering design and construction practices in the area in which the Transmission Upgrade is built, (iii) alternate feasible and practical Transmission Upgrades and (iv) the relative costs, operation, timing of implementation, efficiency and reliability of the proposed Transmission Upgrades. The costs of Transmission Upgrades that exceed those reasonable requirements, as determined above, shall be deemed Localized Costs.

Thus, where ISO-NE is already charged with determining "reasonableness" for the purpose of the localized cost determination, it is difficult to understand the objection to identifying a transmission approach which is most reasonable from both a *cost and reliability* perspective in the initial planning of the proposed transmission project. Nor is it unheard of for an RTO to have an obligation to protect consumers from unreasonable costs. In PJM, for example, the planning process manual establishes the requirements for PJM's responsibility for developing a regional transmission plan. The manual requires the RTEP to (in relevant part):

- E. Provide an assessment based on maintaining the PJM region's reliability *in an economic manner*.
- F. Avoid any unnecessary duplication of facilities.
- G. *Avoid the imposition of unreasonable costs on any Interconnected Transmission Owner (ITO) or any user of transmission facilities.*¹³

¹³

PJM Planning Manual at 33, *available at* <http://www.pjm.com/documents/%7E/media/documents/manuals/m14b.ashx>.

Finally, PJM's adoption of an obligation to plan to a reasonableness standard is consistent with the standard expected of utilities. ISO-NE, as a public utility, should have no lesser obligation.

Accordingly, the Commission should find that ISO-NE needs to take further steps to improve its responsiveness, by developing language similar to that proposed by the MPUC and others. Alternatively, the Commission should interpret the existing language to require ISO-NE to identify the lowest reasonable cost transmission solution in the RSP process, and adopt in other areas such as resource adequacy and reliability determinations, an approach that avoids the imposition of unreasonable costs on consumers. ISO-NE is qualified to make these determinations and it should not be allowed to shirk its obligation to do so.

B. Further Reforms Are Needed to Increase Transparency.

The Commission found that one of the keys to RTO responsiveness was to ensure that customers had a means of direct access to the ISO-NE Board and to have concerns fully considered by the Board. It stated:

RTO and ISO independence remains fundamental, and we will preserve it; however, we find that RTOs and ISOs must provide an avenue for customers and other stakeholders to present their views on RTO and ISO decision-making, and to have those views considered. Establishing practices and procedures that would allow RTO and ISO boards to be responsive to the concerns of customers and other stakeholders is important to providing these entities with confidence in RTOs' and ISOs independent governance processes.¹⁴

¹⁴ Order No. 719 at P 503.

The MPUC and others had proposed a number of approaches to provide more assurance that the position advocated by consumers and in particular state regulators was fully considered by the ISO-NE Board.¹⁵ Specifically, MPUC and others proposed:

[p]rior to every meeting of the Board of Directors or appropriate Standing or Special Board Committee, ISO-NE shall post on its website an agenda of the matters that will be discussed.

No later than 14 days after any Board or Board Special or Standing Committee meeting, ISO-NE shall post on its website the minutes of that meeting. Where confidential items were addressed, the minutes will identify the confidential item but not disclose in detail any confidential substance of the discussion.

ISO-NE management is obligated to provide in writing to the Board and the appropriate Standing or Special Committee to which it makes a recommendation, any position differing from that recommended by ISO-NE management if that differing position is supported by a majority of one NEPOOL sector or any state regulatory commission.

Other entities, proposed open Board meetings, which the MPUC and IECG also supported. ISO-NE did not adopt either opening meetings or providing the minutes of the meeting. It already posts the agendas for full Board meetings, and it agreed to post agendas of Board committee meetings to allow any stakeholder to submit written materials on any topic to the Board and to provide for a CEO oral report of Board and Committee actions in his monthly report to the Participants Committee.

ISO-NE rejected arguments that it was imbued with a public purpose and thus should embrace the kind of transparency that would result from open meetings or publishing meeting minutes. It stated:

¹⁵ In fact, in discussions with ISO-NE about the need for a more direct link with the Board, it became clear that MPUC's and NECPUC's position regarding double recovery of reactive service payments (in Docket Nos. EL07-38 and ER07-397) was never even brought to the Board for consideration in developing ISO-NE's position that there is no double recovery.

[w]hile ISO-NE recognizes that the fulfillment of its purpose has an indisputable impact on the public, it is a private corporation, like a hospital or university. It is not a government agency or a regulator. As a private organization, it is entitled to establish its own governance within the boundaries of the laws of the state in which it is incorporated.

ISO-NE is also concerned that open meetings or public records thereof would constrain frank debate, the consideration of a wide variety of alternatives, and helpful “brainstorming.” Moreover, private Board meetings allow for the protection of stakeholder confidential information, which is discussed in the context of market rules as well as reliability and planning issues. Stakeholders have argued that this information could be considered in private executive sessions; however, this alternative would force division of agenda items (including related topics) into open and closed sessions, thereby constraining an open and free-ranging discussion.¹⁶

These arguments suggest that, as a “private organization,” ISO-NE does not have to be responsive to the need for transparency. While it is true that Order No. 719 does not explicitly require open meetings, ISO-NE’s reluctance to give stakeholders an opportunity to directly observe how the Board addresses their concerns is telling of the degree to which ISO-NE is willing to ensure its customers that it is willing to be inclusive and responsive. Further, while it is true that ISO-NE is a private corporation, it is nevertheless a not-for-profit corporation that is imbued with a public purpose. Thus, it has no fiduciary obligation to maximize benefits to shareholders. Accordingly, it is reasonable to expect a higher degree of transparency than ISO-NE has been willing to provide. In addition, when stakeholders have an advisory vote on a slate of nominees for the Board, it is important for stakeholders to be able to observe how these Board members actually engage in the decision-making process.

Finally, other RTOs have found ways to function while allowing open meetings. For example, the California Independent System Operator, the Midwest Independent System Operator, and the Southwest Power Pool all hold open meetings.¹⁷

¹⁶ Transmittal Letter at 114-15.

C. The Creation of a Consumer Liaison Does Not Provide the Function of a Consumer Advocate.

During the collaborative process, proposals were made for a regional consumer advocate. The MPUC and IECG supported these proposals as a way of ensuring that consumers had the expertise to fully participate in the ISO-NE stakeholder processes regarding planning, market design, system operation, and market monitoring. The proposal eventually was transformed into a “consumer liaison” function that would be a part of ISO-NE’s external affairs division. While the MPUC and IECG did not object to the consumer liaison proposal, there is still a need for expert representation of consumers and regulators to be able to fully and productively participate in the ISO-NE stakeholder process. Establishing a Consumer Advisory Group holds the promise for additional access to information but what information is provided and how concerns from the Group are communicated to management and the Board still remains under the control of ISO-NE.

D. Executive Compensation Should Be Linked to the Cost Aspects of the Mission Statement.

Order No. 719 stated with regard to the mission statement,

We find that this requirement will improve communication between RTOs and ISOs and their stakeholders and the community at large, as well as provide a statement of goals by which the RTO’s and ISO’s progress may be judged.¹⁸

¹⁷ See Cal. Indep. Sys. Operator Corp. Compliance Filing at 8, Docket No. ER09-1048 (May 1, 2009) (“Because the CAISO’s Board of Governors holds open meetings, stakeholders have the opportunity to express their concerns directly to board members in the course of the board’s deliberation on an issue. This has garnered positive feedback from stakeholders.”); Midwest Indep. Transmission Sys. Operator, Inc. Compliance Filing at 40, Docket No. ER09-1049 (May 1, 2009); Southwest Power Pool, Inc. Compliance Filing at 31, Docket No. ER09-1050 (May 1, 2009).

¹⁸ Order No. 719 at P 557.

One way to link the mission statement to performance is through compensation. In this regard, ISO-NE states:

Regarding executive compensation, the Commission encourages, but does not require, RTOs and ISOs to ensure that its executive compensation gives appropriate weight to responsiveness. ISO-NE notes in its case that the compensation of all employees is tied to the customer satisfaction through an annual bonus program that is tied, in part, to achievement of results on the annual customer survey. (The survey is discussed further in Section VI.B.4.) The remainder of the bonus is determined by individual performance and corporate performance on other goals established by the Board of Directors in advance of the bonus year.¹⁹

ISO further states that it conducts a survey each year that is designed to assess customer satisfaction and that the survey is a means of obtaining customer feedback on the services provided by ISO-NE. ISO states that because the survey results are reported to the Board and thus “[t]he survey ensures that the Board and management are continually evaluating stakeholder satisfaction and making enhancements as necessary.”²⁰ However, the surveys have no questions about costs or cost effectiveness. Further, the survey should be given to state regulators and consumer representatives even though they are not market participants. Finally providing a link between executive compensation and cost control will provide more balance and responsiveness to ISO-NE’s performance of its functions and services. In order to require ISO-NE to be more responsive to consumer focus on cost containment, the Commission should direct ISO-NE to add cost concerns to both the customer survey and the incentive payment mechanisms.

¹⁹ Transmittal Letter at 107.

²⁰ *Id.* at 104.

VI. CONCLUSION

While ISO-NE has taken steps to improve the status quo, the Commission should direct the ISO to undertake the further reforms as outlined herein.

Dated in Augusta, Maine, this 26th day of May, 2009.

Respectfully submitted,

/s/ Lisa Fink

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ATTACHMENT A

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United States Senate

COMMITTEE ON
 HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
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February 2, 2009

Commissioner Jon Wellinghoff, Acting Chairman
 Federal Energy Regulatory Commission
 888 First Street, NE
 Washington, DC 20426

Dear Chairman Wellinghoff:

In September 2008, the General Accounting Office (GAO) issued report GAO-08-987, entitled "*Electricity Restructuring: FERC Could Take Additional Steps to Analyze Regional Transmission Organizations' Benefits and Performance.*" This report was prepared in response to our request that the GAO examine Regional Transmission Organizations' (RTOs) key expenses and investments, how RTOs and the Commission review and make decisions that may affect electricity prices, and the extent to which there is consensus on the benefits that RTOs provide.

In its report, the GAO noted that "FERC's efforts to regulate RTOs as it does utilities may no longer be sufficient," and recommended that the Commission develop standardized measures to assess the benefits that RTOs and Independent System Operators (ISOs) provide customers, implement additional oversight of RTO budgets and report back to Congress and the public regarding the results of the Commission's evaluations.

Chairman Joseph Kelliher, in his response to the draft report, indicated the Commission's general agreement with the GAO's findings and recommendations, and indicated that the Commission has already initiated some actions consistent with the GAO's recommendations. We request an update on actions the Commission has taken or will take to implement all the GAO's recommendations, in particular the development of standardized measures to evaluate the performance of RTOs/ISOs and analysis to determine whether the benefits provided by these organizations outweigh their costs.


We are aware that in October 2008, the Commission issued Order No. 719, a new rule on wholesale market reform. The rule specifically addresses the need GAO identified to improve the responsiveness of RTOs and ISOs to their customers and stakeholders, and ultimately the consumers who benefit from and pay for electricity services. As the initial filings under this new rule are due in April 2009, we would appreciate a timely update on the findings from these filings once available as well as any proposed improvements to increase responsiveness.

We look forward to your response to the GAO's recommendations and we stand ready to assist you in meeting these ambitious goals to improve RTOs and ISOs.

Rm 07-19-000

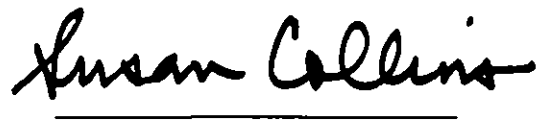
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 REGULATORY COMMISSION

2009-00018



Joseph I. Lieberman
Chairman

Sincerely,



Susan M. Collins
Ranking Member

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by electronic service or U.S. Mail, as appropriate. Dated at Washington, D.C., this 26th day of May, 2009.

/s/ Harry A. Dupre
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