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C O U N S E L L O R S   A T   L A W

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October 14, 2004

## **VIA ELECTRONIC FILING**

The Honorable Magalie R. Salas  
Secretary  
Federal Energy Regulatory Commission  
888 First Street  
Washington, DC 20426

Re: Reply of the New England Power Pool to Comments Regarding Settlement Agreement, ISO New England Inc.; FERC Docket Nos. RT04-2-000, -001 and -002, ER04-116-000, -001 and -002

Dear Secretary Salas:

The New England Power Pool (“NEPOOL”) Participants Committee hereby submits electronically its Reply to Comments Regarding Settlement Agreement in the above-referenced dockets.

Respectfully submitted,

Scott P. Myers  
Counsel to the NEPOOL Participants  
Committee

cc: Persons identified on the Service List in the captioned dockets.

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

<b>ISO New England Inc., et al.</b>	)	<b>Docket Nos. RT04-2-000, -001, and -002;</b>
	)	<b>ER04-116-000, -001 and -002</b>
	)	
<b>The Consumers of New England v.</b>	)	<b>Docket No. EL01-39-000, -001 and -002</b>
<b>New England Power Pool</b>	)	
<b>(Not Consolidated)</b>		

**REPLY OF THE NEW ENGLAND POWER POOL  
TO COMMENTS REGARDING SETTLEMENT AGREEMENT**  
**(October 14, 2004)**

On September 14, 2004, the New England Power Pool (“NEPOOL”) Participants Committee, ISO New England Inc. (“the ISO”) and the New England Transmission Owners (the “TOs”)<sup>1</sup> jointly filed a Settlement Agreement Resolving Specified Issues (the “Settlement Agreement”) in the above-captioned proceedings.<sup>2</sup> Pursuant to Rule 602(f)(2),<sup>3</sup> NEPOOL hereby responds to comments regarding the Settlement Agreement filed by: (1) the New England Conference of Public Utilities Commissioners (“NECPUC”);<sup>4</sup> (2) certain statutory consumer advocates and the Attorney General for the Commonwealth of Massachusetts (the

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<sup>1</sup>The TOs, all of whom are NEPOOL Participants, are: Bangor Hydro-Electric Company; Central Maine Power Company; New England Power Company; Northeast Utilities Service Company on behalf of its operating companies: The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, Holyoke Power and Electric Company, and Holyoke Water Power Company; NSTAR Electric & Gas Corporation on behalf of its operating affiliates: Boston Edison Company, Commonwealth Electric Company, Canal Electric Company, and Cambridge Electric Light Company; The United Illuminating Company; and Vermont Electric Power Company, Inc.

<sup>2</sup> That filing was made pursuant to Rule 602 of the Federal Energy Regulatory Commission’s (the “Commission’s”) Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2004).

<sup>3</sup> 18 C.F.R. § 385.602(f)(2).

<sup>4</sup> “Comments Of The New England Conference Of Public Utilities Commissioners Contesting, In Part, Offer Of Settlement” (the “NECPUC Comments”).

“Advocates”);<sup>5</sup> and (3) the Attorney General of the State of Connecticut (“CTAG”)<sup>6</sup> (collectively, the “Commenting Parties”). As a preliminary matter, CTAG’s comments were untimely filed and should be rejected by the Commission on that basis. Even if CTAG’s Comments are not rejected, however, CTAG raises no issue that is not also raised by the Advocates. As is the case with the Advocates Comments, CTAG’s untimely-filed comments also do not justify the rejection of or any changes or conditions to the Settlement Agreement. No other comments were filed.

For the reasons set forth below, the Commission should approve the Settlement Agreement as filed, without modification or condition, and as requested by NEPOOL, the ISO and the TOs. NEPOOL supports the reply comments being filed by the ISO and the TOs (collectively, the “Filing Parties”), and its comments are intended to supplement that filing.<sup>7</sup>

## **I. RESPONSE**

In reviewing the Settlement Agreement, the comments and the reply comments, the Commission should consider that the Settlement Agreement is supported by Participants with more than 90% vote in NEPOOL, representing the full range of interests in New England, including end users, suppliers, generators, and publicly owned entities, as well as the transmission owners which were the proponents of the RTO proposal filed in this proceeding.

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<sup>5</sup> “Comments On Settlement Agreement Of The Connecticut Office Of Consumer Counsel, The Attorney General Of The Commonwealth Of Massachusetts, The Maine Public Advocate, And The New Hampshire Office Of Consumer Advocate (the “Advocates Comments”).

<sup>6</sup> “Request For Leave To File Comments Out Of Time And Comments Of Richard Blumenthal, Attorney General For The State Of Connecticut, On Settlement Agreement” (the “CTAG Comments”).

<sup>7</sup> All capitalized terms used but not defined herein have the same meaning as in the Explanatory Statement filed in support of the Settlement Agreement.

The Settlement Agreement has been signed by all the Filing Parties and various individual NEPOOL Participants who had protested or objected to the RTO proposal. Absent the Settlement Agreement, all New England stakeholders and the Commenting Parties would likely face protracted litigation to resolve the myriad of policy, legal and factual issues raised in protests of the RTO filing and in pending requests for rehearing of the Commission's March 24 Order,<sup>8</sup> issues that the settling parties have resolved through the Settlement Agreement.

The Settlement Agreement does not resolve all issues in this proceeding. The Commission must still address certain issues raised in rehearing of the March 24 Order. Indeed, the Comments by the Advocates and the CTAG merely reassert their pending issues on rehearing that are not resolved by the Settlement Agreement. NECPUC seeks modifications to the broadly supported statement of RTO Objectives agreed upon in settlement. That NECPUC's proposal might, in and of itself, be reasonable does not make the Objectives reflected in the Settlement Agreement unjust, unreasonable or contrary to the public interest. NECPUC's proposal should be rejected because it would likely undo the delicate compromise reflected in the Settlement Agreement. If an RTO is to proceed, NEPOOL urges that it proceed on the basis set forth in the Settlement Agreement.

The Settlement Agreement reflects a particularly delicate balancing of a broad variety of interests and perspectives, and was the product of intensive multi-party negotiations conducted over a several month period.<sup>9</sup> The effectiveness of the Settlement Agreement is specifically

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<sup>8</sup>See *ISO New England Inc.*, 106 FERC ¶ 61,280 (2004).

<sup>9</sup> Indeed, some of those involved would say that these issues have been the subject of negotiations for several years, with this particular proposal (as modified in the Settlement Agreement) obtaining sufficiently broad support to enable the consensual establishment of an RTO in New England if the Settlement Agreement is approved without condition or modification by the Commission.

conditioned on its approval as filed. Approving the Settlement Agreement conditionally or with modifications could (and likely would) upset the delicate balance that the Settling Parties have achieved. A conditional approval carries with it a not insubstantial risk that the Settling Parties will be unable to achieve a consensus on modified arrangements.<sup>10</sup>

**A. The Settlement Agreement Should be Approved Notwithstanding the Advocates' Concerns**

The Commission should approve the Settlement Agreement without change or condition notwithstanding the ongoing concerns of the Advocates. Advocates in their Comments state that they cannot support the Settlement Agreement because they believe that the RTO structure as initially proposed and as modified in the Settlement Agreement will, in light of the existing arrangements, provide no quantifiable benefits for New England consumers which would justify implementation of the proposed RTO structure. The Commission considered and addressed these arguments already. *See, e.g.*, March 24 Order at PP 4, 245.<sup>11</sup>

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<sup>10</sup> As set forth more fully herein, the Commenting Parties essentially continue to assert policy or policy-based challenges to the agreements regarding the proposed RTO reached in settlement. Approval as being fair, reasonable and in the public interest is warranted because policy arguments do not make the settlement contested. *See, e.g., Koch Gateway Pipeline Company*, 74 FERC ¶ 61,088, at p.61,271 (1996) (dispute over a matter of policy may be resolved on that basis). In any event, approval of even a contested settlement is appropriate where the settlement as a whole, considering not just the contested issue but also the uncontested issues, provides a just and reasonable result, and the anticipated overall benefits outbalance the nature of the objections. *See, e.g.*, Docket Nos. RP97-408-004 and -005, *Trailblazer Pipeline Company*, 85 FERC ¶ 61,345 (1998) (discussing applicable standards); *Arctic Slope Regional Corporation v. FERC*, 832 F.2d 158, 164 (D.C. Cir. 1987) (Commission's rules gives the Commission broad discretion in dealing with contested settlements).

<sup>11</sup> In its October 1, 2004 Order on Rehearing at P 11-12 in Docket Nos. RT04-1-001 and ER04-48-001, *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, the Commission rejected claims of the New Mexico Attorney General that the Commission violated the Federal Power Act by not requiring, before granting conditional approval to the RTO or allowing it to become operational, that the movants provide a cost/benefit analysis showing that the RTO will benefit users of SPP's system and result in just and reasonable rates. Citing Order 2000 and Order 2000-A, the Commission concluded that a cost/benefit analysis demonstrating that a specific RTO proposal will result in just and reasonable rates is not required prior to Commission approval of the RTO

The Advocates object to the Commission’s policy determination regarding RTOs reflected in Order No. 2000, and consequently object to the *concept* of the RTO proposal filed in this proceeding, which they describe as a “step backwards” for New England. They state that they “do not support the settlement” because it does not address “specific concerns” raised in their December 8, 2003 Protest filed in this proceeding. *See* Advocates Comments at 3 and 4. However, they do not cite any specific provision of the Settlement Agreement (or its attachments) that they find objectionable and offer no proposed alternatives for the Commission to consider. Instead, they simply restate in summary fashion and in bullet form five of the “specific concerns” regarding the RTO proposal as initially filed they had identified in their original Protest. Their pleading provides no basis for a reasoned Commission decision modifying or conditioning the Settlement Agreement to address their concerns, and should be ignored for that reason.<sup>12</sup>

The Advocates claim that the “transfer of Section 205 filing rights from NEPOOL to ISO-NE and the TOs will make it more difficult for New England stakeholder opinions and positions to be represented in future Section 205 filings.” Advocates Comments at 3. The Advocates do not actually claim that the allocation of Section 205 filing rights as proposed under

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because the Commission has determined that “RTOs in general offer numerous benefits that will help ensure just and reasonable rates for jurisdictional services.”

<sup>12</sup> For example, the Advocates do not support the Settlement Agreement because “[t]here are no standards and evaluation methods by which the Commission can appropriately determine the effectiveness of *an* RTO in achieving the Commission’s ‘core mission under the Federal Power Act’ for wholesale markets that produce ‘just and reasonable prices and work for customers.’” Advocates Comments at 3 (emphasis added). A more appropriate forum for Commission consideration of these generic concerns raised by the Advocates is Commission Docket RM04-12-000, *Financial Reporting and Cost Accounting, Oversight and Recovery Practices for Regional Transmission Organizations and Independent System Operators*. *See* Notice of Inquiry, 108 FERC ¶ 61,237 (2004).

the Settlement Agreement violates the Federal Power Act. Without regard to whether the balancing of filing rights reflected in the Settlement Agreement will or will not “make it more difficult” for stakeholder opinions to be represented, the NEPOOL Participants have agreed to the allocation of these rights as set forth in the Settlement Agreement. These are not rights of the Advocates, and their preference for a different assignment of rights does not justify any change in the Settlement Agreement.

**B. The Commission Should Not Modify The Settlement Based On NECPUC’s Comments**

NECPUC challenges Paragraphs (b) and (c) of the statement of RTO Objectives agreed upon in settlement. NECPUC’s objections reflect its view as a policy matter that the Objectives as agreed in settlement do not strike an appropriate balance among the interests of the buyers, sellers and consumers of electricity in New England.

The positions now reflected in NECPUC’s comments were carefully and fully considered in the settlement process. NEPOOL welcomed and encouraged participation in settlement negotiations by representatives of NECPUC through the regional regulators. A number of those representatives, in fact, did participate in the settlement discussions in person or by telephone when available. NECPUC’s comments were fully considered in the settlement negotiations and the final language of the Objectives was crafted with sensitivity to those comments. Agreement on the statement of RTO Objectives was critical to finalizing the Settlement Agreement as a whole. The Objectives language reflects substantial compromise among all parties, including the regulatory representatives.

While NECPUC’s alternative articulation of these two objectives may, in and of themselves, be reasonable, and while some Participants may have supported such an alternative articulation, NEPOOL could not achieve the requisite vote in support of the regulators’ requested

articulation of Objectives, and the compromise that had been achieved in settlement would not have been possible if further adjustments were made to the Objectives as requested by NECPUC. The Commission should consider NECPUC's comments in this context, because even minor (and innocuous-looking) changes to the wording of the statement of RTO Objectives places the viability of the entire Settlement Agreement at great risk.<sup>13</sup>

### **1. Objections to Objectives Paragraph (b)**

NECPUC contends (Comments at 6-7) that the wording of proposed Objective Paragraph (b) conflicts with the policy goals in Order No. 2000 because it inserts an “implicit cost-of-service” concept into the Objectives by “appearing to establish an ‘extra-market’ right of generators to compensation” or a “presumption that proposed market rules should ensure that participants receive compensation for services provided.” NECPUC proposes to address that concern by replacing the word “compensation” with the word “payment” because in NECPUC's view the use of the term “compensation” connotes “an amount commensurate with the value of the service provided or the amount of the loss incurred” and market participants are not “entitled to a particular price level.” *See* NECPUC Comments at 9-10. NECPUC also contends that stakeholders are better served by more detailed market rules rather than general statements of principle. *Id.*

No changes are needed to address NECPUC's concerns in this regard. Having considered these concerns, the settling parties reflected in Objectives Paragraph (b) language that provides sellers only with an *opportunity* to receive compensation *through the market*. This language does not guarantee cost of service rates as NECPUC contends. An “opportunity” for

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<sup>13</sup> For convenience, Attachment A hereto shows the language of the Objectives agreed upon in settlement, and NECPUC's proposed changes.



compensation is not a “right” to cost reimbursement, and the phrase “through the market” would not support NECPUC’s concern that the Objectives create an “extra-market right.” Moreover, the Objectives clearly are *not* a substitute for “specific market rules.” Rather, the Objectives will guide NEPOOL and the ISO (as the RTO) in the development and refinement of market rules. No change to any market rule will be implemented without Commission review and acceptance or approval.

## **2. Objections to Objectives Paragraph (c)**

NECPUC (Comments at 7-8) contends that the language “promote a market based on voluntary participation” in proposed Objectives Paragraph (c) is vague and that, “without qualification,” could be “used to support rules that would allow withholding capacity, the right to bid in whatever manner one wants, and the right to exit the market regardless of impact on others.” NECPUC also contends that the phrases “required service” and “fair value (considering both benefits and risks)” are vague and undefined. NECPUC suggests that its proposed modifications to Paragraph (c)(i) are intended to clarify that although participation in the market is voluntary, once an entity voluntarily participates in the market it must act in a manner that ensures reliability and protects consumers from unreasonable financial harm. This, NECPUC contends, shifts the focus away from “‘cost of service’ rubric to reflect more accurately how markets are expected to operate.” The proposed changes to Paragraph (c)(iv), NECPUC states, are intended to reflect the interests of the ultimate consumers as part of the factors to be considered in market design. *See* NECPUC Comments at 10-11.

Again, while the RTO Objectives language does not adopt NECPUC’s proposed wording, it reflects language that in its current form address the issues now presented by NECPUC. For example, the language, as written, is qualified: Objective Paragraph (c)(iii)

expressly acknowledges that in certain instances, services may be required (potentially to address the concerns that NECPUC raises). The Objectives are also qualified to acknowledge that the market rules are subject to Commission jurisdiction and review and presumes that the Commission will not allow market rules to be placed into effect that would risk reliability or result in the exercise of market power. Indeed, the market rules currently provide consumers protection against the types of behavior with which NECPUC seems to be concerned. For example, physical and economic withholding are already prohibited under the Commission's rules and the Transmission, Markets and Services Tariff for the RTO sets out the requirements that must be met prior to exiting the market (*i.e.*, the 18.4 process). Those rules cannot be changed without a filing with the Commission and input from all interested parties, including NECPUC.

NECPUC's proposed language did not enjoy the required support at NEPOOL, because in the view of a number of Participants, removing the suggestion that the level of payment should be "compensatory" created an unbalanced objective. As reflected in the RTO Objectives as filed, a market with a goal of voluntary participation enhances the likelihood of connecting willing buyers with willing sellers. Markets with voluntary purchases and sales increase the likelihood that the resulting prices fairly balance the interests of buyers and sellers through a market determination of price versus administered or regulated prices. A number of Participants concluded that that balance could be subverted if the Objectives were caveated either as requested by NECPUC so as to protect consumers over suppliers, or vice versa.

## **II. CONCLUSION**

For the reasons specified herein, in the response of the Filing Parties to the Comments that were filed, and in the Explanatory Statement in support of the Settlement Agreement,

NEPOOL urges the Commission to reject the claims of the Advocates and NECPUC on the merits and approve the Settlement Agreement without modification or condition as requested.

Respectfully submitted,

**NEW ENGLAND POWER POOL  
PARTICIPANTS COMMITTEE,**

**By: /s/** \_\_\_\_\_  
David T. Doot  
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(860) 275-0102

### **CERTIFICATE OF SERVICE**

I hereby certify that I have caused on this day to be served, by first class, a copy of the foregoing document on each party named in the official service list in this proceeding, on the New England Governors and utility regulatory agencies, and on non-NEPOOL Participant Transmission customers, and, electronically, upon the NEPOOL Participants.

**By:** /s/ \_\_\_\_\_  
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**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

ISO New England Inc., et al.	)	Docket Nos. RT04-2-000, -001, and -002;
	)	ER04-116-000, -001 and -002
	)	
The Consumers of New England v. New England Power Pool	)	Docket No. EL01-39-000, -001 and -002
	)	

(Not Consolidated)

**ATTACHMENT A TO REPLY OF THE NEW ENGLAND POWER POOL  
TO COMMENTS REGARDING SETTLEMENT AGREEMENT  
(October 14, 2004)**

RTO Objectives as Stated in the Settlement Agreement		NECPUC's Requested Modifications to Objectives
The Objectives of the ISO as the RTO for the New England Control Area are (through means including but not limited to planning, central dispatching, coordinated maintenance of electric supply and demand-side resources and transmission facilities, obtaining emergency power for Market Participants from other Control Areas, system restoration (where required), the development of market rules, the provision of an open access transmission tariff and the provision of a means for effective coordination with other control areas and utilities situated in the United States and Canada):		[None]
(a)	to assure the bulk power supply of the New England Control Area conforms to proper standards of reliability;	[None]

	<b>RTO Objectives as Stated in the Settlement Agreement</b>	<b>NECPUC's Requested Modifications to Objectives</b>
(b)	to create and sustain open, non-discriminatory, competitive, unbundled markets for energy, capacity and ancillary services (including Operating Reserves) that are (i) economically efficient and balance between buyers and sellers, and (ii) provide an opportunity for a participant to receive compensation through the market for a service it provides, in a manner consistent with proper standards of reliability and the long-term sustainability of competitive markets;	to create and sustain open, non-discriminatory, competitive, unbundled markets for energy, capacity and ancillary services (including Operating Reserves) that are (i) economically efficient and balance between buyers and sellers, and (ii) provide an opportunity for a participant to receive <u>payment compensation</u> through the market for a service it provides, in a manner consistent with proper standards of reliability and the long-term sustainability of competitive markets, <u>as well as in the interest of consumers in receiving the price benefits of a competitive wholesale electric market;</u> <sup>1</sup>
(c)	to provide market rules that (i) promote a market based on voluntary participation, (ii) allow market participants to manage the risks involved in offering and purchasing services, and (iii) compensate at fair value (considering both benefits and risks) any required service, subject to FERC's jurisdiction and review;	to provide market rules that, <u>subject to FERC's jurisdiction and review,</u> (i) promote a market based on voluntary participation, <u>subject to the need for requirements that ensure reliability and protect the legitimate financial interests of consumers,</u> (ii) allow market participants to manage the risks involved in offering and purchasing services, <u>and (iii) compensate at afford market participants a reasonable opportunity to receive fair value (considering both benefits and risks) for any required service, subject to FERC's jurisdiction and review provided that the determination of fair value may include other benefits that the affected market participants receive under the market rules, and</u> (iv) <u>provide consumers with the price and other benefits of a competitive market;</u>

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<sup>1</sup> In the alternative, NECPUC suggests restoring the language of this paragraph as originally filed by the Filing Parties.

	<b>RTO Objectives as Stated in the Settlement Agreement</b>	<b>NECPUC's Requested Modifications to Objectives</b>
(d)	to allow informed participation and encourage ongoing market improvements;	[None]
(e)	to provide transparency with respect to the operation of and the pricing in markets and purchase programs;	[None]
(f)	to provide access to competitive markets within the New England Control Area and to neighboring regions[;]	[None]
(g)	to provide for an equitable allocation of costs, benefits and responsibilities among market participants.	[None]
The preceding Objectives are consistent with the Federal Power Act and do not in and of themselves create independent causes of action.		[None]