

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

ISO New England Inc.

)

Docket No. ER07-1324-000

JOINT ANSWER OF NEW ENGLAND GOVERNORS' CONFERENCE AND ISO NEW ENGLAND INC. TO MOTION TO REJECT OF PUBLIC ENTITIES

On September 21, 2007, Public Entities¹ filed a motion to reject the August 31, 2007 filing in this docket. The New England Governors' Conference (NEGC) and ISO New England Inc. (ISO-NE) hereby submit pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission)² this answer in opposition to Public Entities' motion. The Commission should reject the Public Entities' contentions as wholly without merit and unconditionally accept the August 31 Filing.

I. BACKGROUND

On August 31, 2007, ISO-NE, the New England Power Pool (NEPOOL) Participants Committee, the NEGC, and five of the six New England Governors filed with the Commission a proposal to add a new Schedule 5 to Section IV.A of the ISO New England Inc. Transmission, Markets and Services Tariff (ISO Tariff) (plus corresponding amendments to the main body of Section IV.A of the ISO Tariff) for the purpose of recovering funding to operate the New England States Committee on Electricity (NESCOE), a Regional State Committee (RSC). On September 21, 2007, the Public Entities filed a protest and a motion to reject the filing. Specifically, Public Entities argue (1) that the filing is premature because NESCOE has not yet

¹ Public Entities include the Massachusetts Municipal Wholesale Electric Company, Braintree Electric Light Department, Reading Municipal Light Department, Taunton Municipal Lighting Plant, Wellesley Municipal Light Plant, Concord Municipal Light Plant and Hingham Municipal Lighting Plant.

² See 18 C.F.R. §§ 385.212 & 385.213 (2007).

been formed and (2) that no showing has been made that the cost of funding NESCOE is a reasonable business expense. Motion to Reject at 7-8.

As discussed in more detail below, these contentions are wholly without merit, because the former contention misapprehends the nature of the filing and the latter contention simply disregards the terms of the filing.

II. ANSWER

A. The Contention that NESCOE Must Be Operational Before Schedule 5 Can Be Filed Misapprehends Both the Nature of the Filing and NESCOE's Status.

By its terms, proposed Schedule 5 of the ISO Tariff allows ISO-NE to collect and charge to ratepayers the amounts reflected in an annual NESCOE budget. But no funds will flow to NESCOE until it is formed and until after ISO-NE has made an annual filing setting out NESCOE's budget. Public Entities argue that the filing is premature because "NESCOE has not been formed, the scope of its 'jurisdiction' is admittedly in flux, documents fundamental to the organization's structure and operation have apparently not been drafted, and, even more important, NESCOE does not currently enjoy the *unqualified* support of all of the Governors of the New England states." Motion to Reject at 3. These arguments misapprehend both the nature of the filing and NESCOE's status.

- ***There is no requirement that NESCOE be operational before Schedule 5 can be approved.***

Consider first the argument that the filing is premature because NESCOE does not yet exist. Citing this Commission's orders in *ISO New England Inc.*, 109 F.E.R.C. ¶ 61,383, P 46 (2005) and *The Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont*, 112 F.E.R.C. ¶ 61,049, P41 (2005) (*Governors of New England*), Public

Entities assert that the Commission has previously rejected a Schedule 5 filing to fund NESCOE because NESCOE was not yet formed. Motion to Reject at 7. The Commission, however, did not hold in those cases that ISO-NE's filing was premature because NESCOE had not yet formed. Rather, the Commission had concluded that it was premature to have a tariff provision (1) with no funding requirements or limits, (2) where it was the RSC that was "seek[ing] to justify and recover its costs through the ISO's tariff structure," and (3) where the separate petition for declaratory to create the RSC was still pending. *ISO New England Inc.*, 109 F.E.R.C. ¶ 61,383 at PP 6, 14. (2005). FERC reiterated these points in *Governors of New England, supra*, 112 F.E.R.C. ¶ 61,049 at P 6.

The circumstances here are substantially different than those before the Commission when the predecessor to ISO-NE's Schedule 5 was submitted. NESCOE, as the Commission noted, had previously sought to impose a requirement on ISO-NE to fund its operations. P 14. As the transmittal letter in this proceeding has pointed out, the Commission had already said that an RSC could not make its own 205 filing -- it is not a public utility. *ISO New England Inc.*, 106 FERC ¶ 61,280 at P 79 (2004). What was premature, therefore, was assuming that NESCOE would exist when there was still no agreement to fund it. The Commission made that clear in *Governors of New England, supra* at P. 41. In contrast, broad agreement among NEPOOL participants to fund NESCOE now exists. And, as important, after *Governors of New England, supra*, the Commission held that funding an RSC in order to facilitate communications with the states is a reasonable -- and recoverable -- RTO expense. *PJM Interconnection, LLC*, 113 FERC ¶ 61,292 at P 39 (2005) (*PJM*). Finally, the assertion that NESCOE had to be fully formed before ISO-NE could file a rate provision that assumes its existence runs directly contrary to the Commission's actions in the very orders cited by Public Entities. The Commission expressly

noted in *Governors of New England* that it had “already approved, in the March 2004 Order, an RTO organizational structure that contemplates the participation of a Regional State Committee in the stakeholder process.” *Id.* at P 25.

- ***The assumption in Schedule 5 that NESCOE will come into existence is not speculative.***

Public Entities also argue that, even if NESCOE need not formally exist before the Commission can accept Schedule 5, its existence is speculative: “none of the organizational documents associated with NESCOE have been completed” and “there is no target date mentioned in the filing for their submission to the NEPOOL Participants or the Commission.” Motion to Reject at 9. By contrast, they state, PJM’s filing to fund the Organization of PJM States, Inc. (OPSI) “was accompanied by copies of OPSI’s Certificate of Incorporation as well as a Memorandum of Understanding between PJM and OPSI.” *Id.* at n. 4. Public Entities then assert that they “do not perceive how the Commission can determine the justness or reasonableness of Schedule 5 without a clear understanding of the relative ‘responsibilities’ of NESCOE and the ISO to each other.” *Id.* This argument is wholly without merit.

It is certainly true that the “organizational documents” did not exist at the time the filing in this case was made. The organizational documents *are* currently being developed, but their existence or nonexistence at the time of the filing is simply irrelevant. There is nothing speculative about NESCOE’s formation. It has been approved by NEGC and has the support of the vast majority of NEPOOL participants. And, while the organizational documents are not perfunctory, neither is it necessary for the Commission to have them in hand before it can pass on the reasonableness of Schedule 5. The Commission knows what function NESCOE will perform and how it will interact with ISO-NE -- it is fully described in the term sheet and in the transmittal letter. It also knows the cap on the amount of money ISO-NE will disburse to

NESCOE. It is not the Commission's function to micromanage the terms of the day-to-day relationship between ISO-NE and NESCOE, but simply to pass on whether it is reasonable for ISO-NE to remit to NESCOE the amounts described in the term sheet for the purposes also described therein. Further, the fact that PJM submitted such documents in its case is irrelevant. There is no reference to the organizational documents in the order approving the PJM tariff funding provision, much less any suggestion that the existence of those documents was determinative of FERC's decision to approve the rate filing. Finally, as for a target date, it is implicit that the documents must be completed to ISO-NE's satisfaction before January 1, 2008 - in practical terms well before that date if funds are to start flowing to NESCOE.

- ***There is no uncertainty about Maine's status.***

Public Entities maintain that the Commission cannot act on the filing because of Maine's uncertain status: "Maine's participation in NESCOE," they assert, "will apparently depend upon whether the Maine transmission owners ultimately decide to remain in the New England RTO arrangements." Motion to Reject at 10. "If the Maine Transmission Owners exit the RTO," they add, "and Maine subsequently chooses not to participate in NESCOE, then the "Filing Parties" (a group that includes ISO, the five remaining Governors, and NEPOOL, though in this instance only ISO-NE itself has Section 205 filing rights) assert they "will all need to modify the regional RSC arrangements ... as this joint filing, the Term Sheet, and support for NESCOE in general is premised upon participation by all six New England States." *Id.* This argument mischaracterizes Maine's status.

Maine does not oppose the filing and *will* be a member of NESCOE. Indeed, the filing states that it is expressly "premiered on participation by all six New England states." Transmittal Letter at 1 n. 1. The fact that Maine *may*, at some future date, "cease its participation in

NESCOE,” *Id.*, does not make the current filing premature. On the contrary, rejecting the filing on the possibility that Maine may later withdraw from NESCOE would, *at best*, be premature. ISO-NE has already recognized that, should such an event occur, there would be a need to modify the arrangements in place. In theory, *any* of the six states might decide to withdraw from NESCOE, but the possibility that this might occur does not make it premature to fund the current six state organization.

- ***Schedule 5 is not contingent on determination of Commission jurisdiction over resource adequacy.***

Similar to their argument about Maine’s status, Public Entities point to the filing’s statement that “it is predicated upon ‘a continuation of Commission jurisdiction’ over the establishment of Installed Capacity Requirements” and that, if that status changes, “the parties will reevaluate these NESCOE arrangements and submit any necessary modifications.” *Id.* at 11 (quoting Transmittal letter at 3). From this they argue that the Commission cannot make informed judgments about the relationships between ISO-NE and NESCOE or about the reasonableness of NESCOE’s proposed budget frameworks for New England. This argument suffers from the same flaw as Public Entities’ contention about Maine’s status.

As with Maine’s participation in NESCOE, if the jurisdictional status quo changes, but there is no change to Schedule 5, any party would be free to file a Section 206 complaint alleging that the tariff is no longer reasonable. But it is no grounds to reject the current filing that some future event *may* change the relationship of the parties.

B. The Filing Amply Demonstrates that the Framework Underlying Schedule 5 Will Ensure that Charges Thereunder Constitute a Reasonable Business Expense for ISO-NE.

In addition to their argument that the filing was premature, Public Entities maintain that “the ISO’s proposed Tariff amendment should be rejected because there has been no assertion

(let alone a demonstration) that NESCOE’s budget is a reasonable business expense of ISO New England.” Motion to Reject at 2, 8. This contention is not only demonstrably untrue, it ignores the fact that the filing conforms directly to the guidance previously provided by the Commission in *Governors of New England*.

1. Safeguards in the Funding Mechanism Ensure Its Reasonableness.

Consider first the contention that there has been “no assertion” that NESCOE’s budget will constitute a reasonable business expense of ISO-NE. Motion to Reject at 2. At page 2 of the transmittal letter, ISO-NE makes its contrary view quite clear:

The filing reflects the ISO’s judgment that, in general terms, there will be adequate opportunities for stakeholder review of NESCOE’s costs of operation and that this stakeholder review process, as well as the framework for development of NESCOE’s budget and FERC’s approval of NESCOE’s actual budget, establish that this tariff filing is just and reasonable.

To the extent the reference by Public Entities to NESCOE’s budget implies that the approval of Schedule 5 itself depends on a showing of the reasonableness of the actual NESCOE budget, their argument rests on a misapprehension of the nature of the filing. Schedule 5 is a funding *mechanism*. By the express terms of Schedule 5, NESCOE’s budget will be the subject of a separate filing later this month. This is not to say that the amount ultimately recoverable from ratepayers under Schedule 5 is irrelevant to its approval. On the contrary, the Commission’s order in *Governors of New England* advised that, in developing a “cost recovery mechanism” the parties should provide that the RSC’s budget would be “transparent and indicate clearly the anticipated, future costs associated with the establishment and operation of NESCOE.”

Governors of New England, supra, 112 FERC ¶ 61,049 at P 40. While no charges will be assessed until the actual budget filing is made and accepted by the Commission, ratepayers know at the outset – because the issue was made part of the Term Sheet approved by 81% of NEPOOL

participants – that NESCOE expenses under Schedule 5 cannot exceed “\$1.4 million per year in its first two years of operation or more than \$2.2 million in its third through fifth years of operation.” Transmittal letter at 15.

The key here is that funding an RSC has been recognized as a reasonable business expense³ and that under Schedule 5 there is a cap already in place and a review process to ensure that costs are kept within a reasonable range.⁴ As stated in the transmittal letter, “there will be adequate opportunities for stakeholder review of NESCOE’s costs of operation.” Transmittal letter at 2. It adds that “the stakeholder process, as well as the framework for development of the NESCOE budget” establish its justness and reasonableness. In other words, the structure of the budget development process, in particular the opportunities for ISO and stakeholder review and consultation, provide adequate safeguards to ensure the reasonableness of ISO expenditures under Schedule 5. Indeed, the term sheet, which details the maximum – and relatively modest – amounts that can be spent on NESCOE operations (comparable to the level of expenditures approved in PJM for funding of OPSI), and its broad approval by stakeholders is itself evidence of the reasonableness of the tariff mechanism.

2. There Is No Requirement That, to Constitute a Reasonable Business Expense, Funding NESCOE Must Be the Only Means of Facilitating a “Single Point of Contact” Between ISO-NE and the States.

Perhaps in recognition of the considerable safeguards established to ensure the reasonableness of NESCOE’s costs, Public Entities alternatively maintain that the reasonableness of those costs does not matter. There is no Commission policy, they assert,

³ *PJM, supra*, 113 FERC ¶ 61,292 (2005).

⁴ This, it should be noted, is more than is required in a Section 205 filing. While the filing utility bears the burden of establishing the reasonableness of its expenditures, there is a presumption that those expenditures are prudent absent evidence raising a “serious doubt” as to their prudence. *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312 (1980). Public Entities make no assertion that Schedule 5, which allows ISO-NE to collect charges to fund NESCOE only after the budget amount has been filed with, and accepted by the Commission, is not reasonable or prudent.

holding that “the operation of an RSC is a “reasonable business expense” of an ISO or RTO;” *PJM, supra*, did not establish any generic policy. Motion to Reject at 11. By Public Entities’ account, the Commission’s decision approving the funding of OPSI through the PJM tariff was different because OPSI allowed PJM a “single point of contact” and because, with either the Power Planning Committee of the New England Governors Conference or NECPUC, “a single point of contact already exists.” *Id.* at 13, 15. Then, shifting gears, they state that “the ISO Tariff has never been used as a vehicle through which to funnel NECPUC’s administrative costs.” *Id.* at 14, and that organizations like NECPUC “are already funded, *as they should be*, from state appropriations.” *Id.* at 16. Public Entities’ attempted distinction between *PJM* and this case is untenable and their assertion that an RSC must be publicly funded is a collateral attack on *PJM*.

The argument that ISO-NE cannot fund NESCOE because NECPUC is an existing single point of contact finds no support in *PJM*. The states made a collective judgment that it was necessary to have a focused and reliably financed organization with a staff dedicated specifically to regional transmission planning and reliability issues. This decision was vetted with NEPOOL members and with ISO-NE, and ISO-NE’s decision to facilitate the funding of NESCOE – rather than some other organization -- through Schedule 5 was a prudent, considered business decision. That is determinative, regardless of whether some other vehicle for facilitating coordination with the states might also be reasonable. *City of Bethany v. FERC*, 272 F.2d 1131, 1136 (D.C. Cir. 1984).

As to the argument that an RTO cannot fund the activities of an RSC because those activities should be funded by taxpayers, that argument was effectively rejected in *PJM*, which approved RTO funding of OPSI. Indeed, the fact that NECPUC is currently funded by the states does not mean that, had ISO-NE chosen to coordinate with the states through NECPUC rather

than NESCOE, it could not have filed a tariff to fund NECPUC like the one approved in PJM. But that is the clear import of Public Entities' untenable argument.

III. CONCLUSION

For the reasons stated herein Public Entities' motion to reject the August 31, 2007 filing should be denied.

Respectfully submitted,

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October 9, 2007

CERTIFICATE OF SERVICE

I hereby 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.

Dated at Washington, D.C., this 9th day of October, 2007.

/s/ Lyndsey Sites

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