

Administrative Committee (“PTO AC”).³ In addition, Joint Movants are authorized to represent herein that New Brunswick Power Transmission Corporation does not oppose the relief requested.

Casco Bay’s claims were raised in the context of the joint proposal by ISO-NE, MEPCO and the PTO AC (collectively, the “Filing Parties”) to include the MEPCO facilities in the regional Pool Transmission Facilities (“PTF”) transmission system for purposes of both rate recovery and transmission service (the “MEPCO Roll-In Proposal”), as fully explained in the August 16, 2007 filing of the MEPCO Roll-In Proposal. As a condition of implementing the MEPCO Roll-In Proposal, the Commission in its order issued October 29, 2007 (“October 29 Order”) directed the Filing Parties to give “Casco Bay a grandfathering option that will preserve all of Casco Bay’s existing rights, with the exception that it will become subject to the same scheduling and curtailment provisions as other grandfathered agreements.”⁴ While the ISO and MEPCO previously raised concerns regarding implementation of the condition imposed by the October 29 Order,⁵ over the course of this case it has become absolutely clear that genuine issues of material fact regarding Casco Bay’s claims, identified below, also render implementation of the condition impossible.

³ The PTO-AC supported joining the motion with 97.24% in favor, no opposition and four entities abstaining.

⁴ *ISO New England Inc.*, 121 FERC ¶ 61,097 at P 41 (2007).

⁵ *See Expedited Motion To Delay The Effective Date And To Hold A Technical Conference Or, In The Alternative, Notice Of Cancellation Of ISO New England Inc. And Maine Electric Power Company*, Docket No. ER07-1289-005 (November 28, 2007).

The genuine issues of material fact, about which a record needs to be developed, at a high level, relate solely to defining the nature and scope of any rights Casco Bay has claimed under the TSA. They include more specifically the following:

- (1) the nature and exact scope of any congestion hedge under the TSA;
- (2) the nature and exact scope of any marginal loss hedge under the TSA; and
- (3) the nature and exact scope of any Capacity Transfer Rights (“CTRs”) under the TSA.

Sufficient factual information has not been developed through the voluntary discovery process established in the settlement proceeding ordered by the Commission on February 4, 2008. As a result, the participants find themselves unable to proceed with meaningful settlement negotiations because they do not understand Casco Bay’s claims for congestion, loss hedges and CTRs.⁶ The only information in this proceeding about Casco Bay’s existing rights is contained in Casco Bay’s alleged claims in several pleadings. Because the Commission’s settlement procedures do not contemplate obligatory discovery, a trial-type hearing is necessary to subject such claims to a full examination so that all parties to this proceeding can understand the nature of any such rights. Detailed examination is necessary to resolve this dispute and, thereby, open up the full transfer capability of the New England/New Brunswick interface to commercial transactions. Until the Filing Parties are able to implement the MEPCO Roll-In Proposal, market participants and consumers on both sides of the international boundary are being

⁶ The Joint Movants are not adverse to resuming settlement discussions in the future, but: (1) only after sufficient factual material has been collected through the discovery process so that all participants are able to make an informed contribution to the discussion, should they so choose; and (2) only if the hearing process continues to proceed at the same time

precluded from realizing potential economic benefits from the increased transfer capability between New Brunswick and Maine.⁷

Joint Movants seek expedited resolution of this case so that the economic benefits that result from the increase of transfer capability can be realized by market participants and their consumers on both sides of the New England/New Brunswick border as soon as possible. As reflected in the August 16 filing, the full utilization of the transfer capability of the North East Reliability Interconnection (“NRI”) that is permitted by the MEPCO Roll-In Proposal is expected to yield substantial electricity cost savings to the benefit of market participants and consumers on both sides of the international boundary. Accordingly, the Commission should grant this motion, and set the matter for a trial-type hearing before an administrative law judge, with an expedited “Track 1” schedule. In addition, the Commission should establish a shortened period for submitting answers to this motion, such that answers must be filed no later than Friday, April 25, 2008. It is the hope of the Joint Movants that the Commission will act expeditiously on the instant motion so that procedures leading to a trial-type hearing commence in the next several weeks.

BACKGROUND

On August 16, 2007, the Filing Parties jointly submitted the MEPCO Roll-In Proposal that is the subject of this case. Under the proposal, point-to-point transmission service over MEPCO’s facilities, which has been provided by MEPCO pursuant to

so that if settlement discussions do not produce an agreement that can be taken to the Commission for approval, a litigated result can be obtained as quickly as possible.

⁷ See Background, *infra* at 4.

Schedule 20B of the ISO-NE OATT since April 1, 2005,⁸ would be terminated. Instead, MEPCO's facilities would become PTF over which regional transmission service – *i.e.* Regional Network Service (“RNS”) and Through or Out Service (“TOut”) - is provided. Not only does the proposal make service over MEPCO facilities more consistent and integrated with the rest of the high voltage system in New England, it also facilitates operation of the NRI, a newly constructed intertie at the Maine-New Brunswick border that became operational in December 2007. The NRI increases the transfer capability at the border from 700 MW to a maximum of 1000 MW for imports from New Brunswick, and from 280 MW to a maximum of 550 MW for exports to New Brunswick.

On September 6, 2007, Casco Bay filed a protest of the MEPCO Roll-In Proposal, in which it asked the Commission to grandfather its claimed rights under the TSA as a condition of acceptance. Casco Bay offered the following limited description of its rights:

While compensating MEPCO for the necessary upgrades to its system, the Casco Bay TSA *has provided benefits* to Casco Bay in the form of a hedge against congestion between Orrington and Maine Yankee. In addition, because MEPCO uses system average, instead of marginal losses, the Casco Bay TSA *has also served as a hedge* against marginal losses over the same path. It also confirms firm delivery of MIS's capacity over that path.⁹ (Emphasis added.)

⁸ Schedule 20B is limited in scope to the terms and conditions of transmission service over the MEPCO transmission facilities; it does not govern market rights and obligations. Schedule 20B went into effect on April 1, 2005. Prior to the adoption of Schedule 20B, the terms and conditions of transmission service over MEPCO's facilities were found in MEPCO's Order No. 888 *pro forma* open access transmission tariff.

⁹ Motion to Intervene and Protest of Casco Bay Energy Company, LLC, Docket No. ER07-1289-000 at 4 (Sept 6, 2007) (the “Casco Bay Protest”).

Casco Bay also asserted, in passing, that it had specifically bargained for such rights in 1999, when it entered into the TSA.¹⁰ Casco Bay offered no evidence to support any of these contentions. As an alternative to conditioning acceptance of the proposal, *Casco Bay stated that the matter should be set for hearing.*¹¹

On October 29, 2007, the Commission issued an order conditionally accepting the MEPCO Roll-In Proposal.¹² Among the conditions that the Commission imposed, the Filing Parties were to provide Casco Bay “a grandfathering option that will preserve all of Casco Bay’s *existing rights*, with the exception that it will become subject to the same scheduling and curtailment provisions as other grandfathered agreements.”¹³ (Emphasis added.) The order did not provide any explanation as to the nature or scope of those existing rights.

On November 28, 2007, ISO-NE and MEPCO jointly submitted a request for clarification and rehearing in which they claimed that the Commission erred in its October 29 Order in finding, *inter alia*, that Casco Bay’s TSA provides a hedge against congestion charges and marginal losses. In particular, ISO-NE and MEPCO noted that the TSA language is silent regarding any hedging rights or any other rights except the right to transmission service.¹⁴ They observed that the TSA had been executed before New England’s Standard Market Design (“SMD”) and the Locational Marginal Pricing

¹⁰ *Id* at 9.

¹¹ *Id.* at 2, 13.

¹² *ISO New England Inc.*, 121 FERC ¶ 61,097 (2007).

¹³ *Id.* at P 41.

¹⁴ Additional Request for Clarification and Rehearing of ISO New England Inc. and Maine Electric Power Company, Docket No. ER07-1289-004 at 6-7 (Nov. 28, 2007).

(“LMP”) framework came into existence, when ISO-NE energy charges were not based on the location of generating sources (as they are now), but based on a single region-wide energy clearing price.¹⁵ ISO-NE and MEPCO also argued that if the Commission were to grant Casco Bay hedging rights via the conversion of MEPCO transmission facilities from Other Transmission Facilities (“OTF”) to PTF, it would violate the Commission’s policy against granting new rights to customers that harm existing customers during market or transmission transitions.¹⁶ On December 28, 2007, the Commission issued an “Order Granting Rehearing for Further Consideration.” The ISO-NE/MEPCO rehearing request is still pending.

Also on November 28, 2007, ISO-NE and MEPCO submitted a request to extend the effective date of the MEPCO Roll-In Proposal to February 1, 2008, and before then to convene a technical conference at which the hedging issues could be addressed. On January 22, 2008, ISO-NE and MEPCO submitted another motion to further extend the effective date of the MEPCO Roll-In Proposal to March 1, 2008.

On February 4, 2008, the Commission issued an order denying the request for a technical conference. Instead, the Commission initiated settlement proceedings to be held before an administrative law judge.¹⁷ The Commission initiated this procedural course without first setting the matter for hearing and holding the hearing in abeyance, as is typically done. The Commission also clarified that it was expressing “no opinion on

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 8 (citing *New England Power Pool*, 102 FERC ¶ 61,112, at P 21 (2003); *New England Power Pool and ISO New England Inc.*, 101 FERC ¶ 61,344, at P 76 (2002)).

¹⁷ The February 4 order also delayed the effective date of the MEPCO Roll-in Proposal indefinitely. *ISO New England, Inc.*, 122 FERC ¶ 61,093 at P 1 (2008).

the merits of the issues at that time.”¹⁸ Moreover, the Commission described the “issues presented” solely as “whether the Casco Bay TSA provides a hedge against congestion and/or a hedge against losses.”¹⁹

Since then, settlement discussions have been on-going with the assistance of Administrative Law Judge Steven A. Glazer. Despite diligent efforts by the parties and the settlement judge, the parties have not been able to achieve settlement due in large part to insufficient information concerning the existence, nature and scope of the rights claimed by Casco Bay under its TSA, *i.e.* the “existing” rights that the Commission directed the Filing Parties to grandfather as part of the MEPCO Roll-In Proposal. By its nature, settlement is an informal process, in which discovery and the exchange of data is voluntary. To date, the parties participating in the settlement discussions have not been able to obtain the information necessary to understand the nature and scope of Casco Bay’s claimed rights. Setting this matter for hearing will allow the parties to pursue discovery more fully and will result in the development of substantial evidence upon which the parties or the Commission itself can make an informed decision about the nature of any existing Casco Bay rights.

¹⁸ *ISO New England Inc.*, 122 FERC ¶ 61,093 at P 26 (2008).

¹⁹ *Id.* at P 25.

ARGUMENT

A. A hearing is needed in order to develop a complete record upon which issues of material fact can be resolved.

When there are genuine issues of material fact in dispute, the Commission must set the matter for hearing.²⁰ In particular, a trial-type hearing is warranted when a trier-of-fact needs to see and hear a witness in order to determine his/her credibility, especially where the issue involves a dispute over a past occurrence because the “credibility of the witness may be more relevant to determine which account of the circumstances is more credible.”²¹

The Commission has the discretion to set this matter for hearing at this time,²² and should do so because the settlement process that was initiated here made it abundantly clear that there are issues of material fact that are outstanding, and about which evidence in the current record is virtually non-existent. These issues relate to the nature and scope of Casco Bay’s purported rights under the TSA that are supposed to be grandfathered when the MEPCO Roll-In Proposal takes effect. These issues clearly exist and are material. Resolution of these issues, or at least a better understanding of them, stands in the way of compliance with the October 29 Order and the parties’ ability to settle the matter. Indeed, Casco Bay seems to have anticipated the difficulty others would have in understanding what existing rights it had under the TSA when it suggested

²⁰ See, e.g., *Vermont Department of Public Service v. FERC*, 817 F.2d 127, 140 (D.C. Cir. 1987).

²¹ *Iroquois Gas Transmission System, L.P.*, 54 FERC ¶ 61,103 at 41 (1991).

²² Even in those cases where the presiding officer has closed the evidentiary record pursuant to Rule 510(c), it can be reopened pursuant to Rule 716. See 18 C.F.R. § 385.510(c) and 385.716 (2007).

in its September 6, 2007 protest (“Casco Bay Protest”) that setting this case for hearing would be appropriate.²³

Issues of material fact exist with regard to the existence, nature and scope of the congestion and marginal loss hedges and CTRs that Casco Bay has claimed under the TSA. In its protest, Casco Bay alleged that it has been receiving a congestion hedge between Orrington and Maine Yankee, two distinct nodes in Maine.²⁴ Casco Bay has not offered any particular evidence as to the nature and scope of the alleged congestion hedge, how it is specified in the TSA, how it has worked, when it served as a hedge, what the limitations on its use have been, etc. ISO-NE has indicated that, in accordance with the ISO-NE Tariff, Casco Bay has received the LMP at the Graham pricing node, where the Maine Independence Station is directly interconnected to PTF, since the inception of LMP in New England in March 2003. This suggests that the TSA has never actually afforded Casco Bay the hedge it claims to have received. There is no evidence in this proceeding from these parties, or any others that have knowledge related to the issues, that provides any basis for understanding Casco Bay’s rights and whether and how they might differ from the rights under the MEPCO Roll-In Proposal. Consequently, there is simply no basis to determine with any specificity what rights should be grandfathered for Casco Bay. A hearing, and with it the opportunity for mandatory discovery and examination of witnesses, is necessary to gather the relevant evidence and develop a complete record upon which these issues are to be resolved.

²³ See Casco Bay Protest at 13.

²⁴ See, e.g., Casco Bay Protest at 4, 13.

The same rationale for initiating a litigation track that culminates in a trial-type hearing is equally applicable to all the outstanding issues of material fact, for which there is currently little or no evidence in the record, including issues related to the nature and scope of any congestion or marginal loss hedge, CTRs, and whether the TSA in fact grants any rights that are different in any way from the rights under the MEPCO Roll-In Proposal.

The crux of each outstanding issue is the same. Casco Bay asserts that it has certain rights under the TSA that the Commission required to be preserved. On its face the TSA does not identify or address those rights. Other parties assert that the TSA does not provide Casco Bay with the rights that it claims. Accordingly, for these issues to be resolved, trial-type hearings are necessary. Only through such hearings can the precise rights afforded by the TSA be identified and preserved to the extent necessary following implementation of the MEPCO Roll-In Proposal.

The difficulty in resolving these issues of fact has been exacerbated by the lack of any precedent on which to determine the nature of Casco Bay's rights, and prior Commission precedent that needs to be reconciled with the October 29 Order. This is the first time in New England that the Commission has determined that the rights of a customer taking internal point-to-point transmission service should be grandfathered upon conversion to Regional Network Service. When SMD was proposed in New England, some parties with existing transmission arrangements claimed special rights under SMD by virtue of such arrangements. The Commission rejected every one of these

claims as attempts to use a change in transmission and market regimes as an opportunity to gain new rights.²⁵

Importantly, hearings will facilitate a complete and mandatory discovery process, through which the pertinent evidence related to these issues can be gathered and analyzed. With that information, the parties will be better able to assess whether any settlement is achievable. If no settlement is achievable, the developed record will certainly facilitate the Commission's ability to determine the nature and scope of the rights that Casco Bay has under the TSA. That determination is necessary to define how Casco Bay's rights can be grandfathered without providing new rights.

In sum, on the limited record that currently exists, it is impossible for the parties to determine with any certainty or detail the Casco Bay rights to grandfather in order to comply with the October 29 Order. Accordingly, the Commission should set this case for a trial-type hearing before an administrative law judge.

B. To resolve this dispute as quickly as possible, so that the full benefit of the NRI can be realized, the Commission should set the hearing for Fast Track procedures.

Joint Movants urge the Commission to adopt an expedited hearing schedule that will result in a hearing before an administrative law judge that would commence no later than September 2008. It is within the Commission's discretion to set such a schedule and it is particularly appropriate to do so when harm will be caused or exacerbated by delay.²⁶

²⁵ *New England Power Pool, ISO New England Inc.*, 101 FERC ¶ 61,344 at P 76 (2003).

²⁶ *See, e.g., BP West Coast Products, LLC v. Calnev Pipe Line, L.L.C.*, 121 FERC ¶ 61,242 at P12 (2007).

For example, the Commission ordered expedited hearings to address issues related to grandfathering agreements in the Midwest ISO during its transition to competitive markets.²⁷ This case, while different in scope, implicates many of the same considerations that were underlying the Midwest ISO case, most notably the potential for lost market opportunities that result from delayed resolution, to the detriment of market participants and consumers.

Delay has the potential to harm the entire region because the full import capacity at the New England/New Brunswick border over the NRI intertie is unavailable for market transactions. Hundreds of millions of dollars have been invested on both sides of the New England/New Brunswick border related to those facilities. The NRI became operational in early December 2007. While the reliability benefits of the line are available to the regions, the full commercial benefits of the additional transfer capability between Canada and New England are not yet available, much to the frustration of market participants on both sides of the border.²⁸ This situation will persist until the factual issues in this case, described above, are resolved.

An expedited schedule will not prejudice any party. Since the parties have been grappling with these issues for several months, in litigation and settlement, they should already have at the ready the necessary resources to engage in meaningful discovery and develop the substantial record evidence. Indeed, a hearing on an expedited basis is beneficial to all involved. Such a procedural course balances the need to develop a

²⁷ See *Midwest Independent Transmission System Operator, Inc.*, 107 FERC ¶ 61,191 at P 76 (2004).

complete record upon which the grandfathering issues can be determined, while proceeding as expeditiously as possible so that, upon resolution, the parties can participate in the marketplace with certainty as to how the system will be operated and charges will be levied, and the full transfer capability of the NRI intertie can be used, to the benefit of market participants and consumers on both sides of the international boundary.

C. The Commission should establish a shortened response time for submitting answers in response to this motion.

Joint Movants also request that the Commission shorten the period for submission of answers in response to this motion from the usual 15 days, as provided in Rule 213(d),²⁹ so that answers must be filed no later than April 25, 2008. Shortening the period for submission of answers will enable the Commission to rule on this motion, initiate hearing procedures and establish a fast track schedule in an expedited manner. As described above, further delay in resolving this case is harmful to market participants and consumers on both sides of the international boundary because the outstanding issues of material fact must be addressed before resolution can be reached, and resolution of these issues is a prerequisite to full operation of the transfer capability enhancements provided by the new NRI intertie.

²⁸ Indeed, on April 18, 2008, in Docket No. EL08-56-000, New Brunswick Power Transmission Corporation and Northern Maine Independent System Administrator, Inc. filed a Complaint addressing issues related to the matters in dispute here.

²⁹ 18 C.F.R. §385.213(d) (2007).

Establishing a shortened answer period is consistent with a prior decision in this case reached by the Chief Administrative Law Judge who shortened to one business day the period for submitting answers in response to Casco Bay's motion to postpone the settlement conference and establish a new settlement process.³⁰ It is also consistent with prior Commission decisions allowing for a shortened answer period when honoring requests to fast-track complaints.³¹ Accordingly, shortening the period for submission of answers is reasonable and warranted in this instance.

CONCLUSION

WHEREFORE, for the reasons stated hereinabove, Joint Movants request that the Commission schedule this matter for a trial-type hearing, with full discovery as permitted under FERC's Rules of Practice and Procedure, and establish an expedited schedule for such hearing. Additionally, the Joint Movants request that the Commission set Friday, April 25, 2008, as the deadline for submitting answers to this motion.

³⁰ Order of the Chief Judge Shortening Time for Answers, Docket No. ER07-1289-002, et al. (Mar. 28, 2008).

³¹ See, e.g., Order of Chief Judge Shortening Time to File Comments, *Dominion Resources Services, Inc. v. PJM Interconnection, LLC*, Docket No. EL08-36-000 (March 13, 2008).

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Dated: April 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing documents, in accordance with Rule 2010,³² upon each person designated on the official service list compiled by the Secretary of the Commission in these proceedings.

Dated at Washington, DC
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³² 18 C.F.R. § 385.2010 (2007).