

107 FERC ¶ 61,246
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Northeast Utilities Service Company

Docket No. EL04-92-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued June 2, 2004)

1. In this order, the Commission grants a petition for declaratory order filed by Northeast Utilities Service Company (NUSCO), on behalf of its operating company affiliates, The Connecticut Light and Power Company (CL&P), Public Service Company of New Hampshire (PSNH), and Western Massachusetts Electric Company (WMECO) (collectively, Applicants),¹ seeking a Commission ruling approving Applicants' proposed reclassifications of their electric facilities as either transmission or local distribution facilities.

I. Background

2. On March 26, 2004, Applicants filed a petition for declaratory order requesting that the Commission approve their proposed reclassifications of their electric facilities as either transmission or local distribution facilities (Petition). Applicants state that the purpose of the Petition is to facilitate and support the separation of costs for the development of Commission-jurisdictional and state-jurisdictional rates in the three states in which Applicants provide retail electric services (Connecticut, New Hampshire, and Massachusetts), and to provide a consistent reclassification methodology among the Applicants.

¹ CL&P, PSNH, and WMECO are public utility subsidiaries of NUSCO, a registered public utility holding company under the Public Utility Holding Company Act of 1935. CL&P, PSNH, and WMECO are operating company utilities and are also public utilities under the Federal Power Act (FPA). The NUSCO Operating Companies provide open access transmission services over Pool Transmission Facilities (PTF) under the New England Power Pool Open Access Transmission Tariff and over non-PTF under NUSCO Operating Companies Tariff No. 10. Northeast Utilities Service Co., 105 FERC ¶ 61,089 (2003).

3. Applicants state that, in accordance with Order No. 888,² they propose to reclassify their electric facilities as either transmission (subject to Commission jurisdiction) or local distribution (subject to state regulation) to identify the jurisdiction under which the particular facilities fall. Applicants assert that the proposed reclassifications are based upon and in accordance with the Commission's seven-factor test³ for identifying local distribution facilities established in Order No. 888. Applicants state that the Connecticut Department of Public Utility Control (Connecticut Commission), the New Hampshire Public Utilities Commission (New Hampshire Commission), and the Massachusetts Department of Telecommunications and Energy (Massachusetts Commission), the three state regulatory authorities that have jurisdiction over the Applicants, have approved their reclassification proposals based upon the Commission's seven-factor test. Applicants assert that, under Order No. 888, the Commission will defer to state commission recommendations provided that such recommendations are consistent with the essential elements of Order No. 888.⁴ Thus, Applicants request that, in accordance with Order No. 888, the Commission defer to the determinations of Applicants' state commissions and issue an order accepting Applicants' Petition.

² Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs., Regulations Preambles January 1991 - June 1996 ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996 - December 2000 ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

³ The indicators of local distribution in the Commission's seven-factor test are: (1) local distribution facilities are normally in close proximity to retail customers; (2) local distribution facilities are primarily radial in character; (3) power flows into local distribution systems, and rarely, if ever flows out; (4) when power enters a local distribution system, it is not reconsigned or transported on to some other market; (5) power entering a local distribution system is consumed in a comparatively restricted geographic area; (6) meters are based at the transmission/local distribution interface to measure flow into the local distribution system; and (7) local distribution systems will be of reduced voltage. Order No. 888 at 31,771 and 31,981.

⁴ Petition at 6 (citing Order No. 888 at 31,783-84 and n.548).

A. CL&P's Reclassification Proposal

4. On April 16, 2002, CL&P⁵ filed an application with the Connecticut Commission for approval of its reclassification proposal. CL&P proposed that, based on the Commission's seven-factor test, all electric lines rated 69 kV and above should be classified as transmission, and lines rated below 69 kV should be classified as local distribution facilities. Under this formulation, CL&P proposed to classify as transmission its 345 kV system, its 138 kV Norwalk Harbor - Northport submarine cable (the tie line between the New England and New York control areas), its 115 kV system, and its 69 kV system because these systems, among other things, provide parallel paths to interconnect major generation, other transmission systems and lower-voltage systems.⁶

5. CL&P proposed to classify its 4 kV to 34.5 kV lines as local distribution facilities because these facilities are primarily used as load serving facilities for CL&P. CL&P also proposed to change the classification of its substation facilities (where voltage is transformed from 69 kV or 115 kV to the 4 kV to 34.5 kV systems). Historically, CL&P states that it has classified substations with step-down transformers as either 100 percent transmission or 100 percent local distribution. However, CL&P applied the seven-factor test to the equipment within the substations and concluded that these facilities should be classified based upon their primary function. Thus, as with lines, CL&P proposed to classify all facilities rated 69-kV and above as transmission. Further, all facilities used to support the technical and functional capabilities of CL&P's 4 kV to 34.5 kV systems would be classified as local distribution.⁷ In addition, ancillary electrical equipment is classified as either transmission or local distribution if such a determination can be made. Shared facilities, such as control house, lighting, fencing and protective relay are proposed to be assigned 100 percent to local distribution.

⁵ CL&P, a public service company under Connecticut law, owns and operates transmission and local distribution facilities and provides transitional standard offer service to approximately 1.1 million customers in the State of Connecticut.

⁶ Petition at 7.

⁷ CP&L explains that the line of demarcation between transmission and local distribution at all step-down substations occurs at the point of interconnection between the bulk power electrical network and the facilities serving local area loads.

6. On February 27, 2003, the Connecticut Commission issued an order approving CL&P's proposed reclassification, stating that CL&P's proposed classification is "consistent with the methodology promulgated by [the Commission]."⁸

B. PSNH's Reclassification Proposal

7. On August 2, 1999, as part of its filing to comply with New Hampshire state restructuring laws, PSNH⁹ submitted a proposal to reclassify its transmission and local distribution facilities.¹⁰ PSNH proposed that its 345 kV, 230 kV and 115 kV systems be classified as transmission facilities because these systems, among other things, provide parallel paths both under normal and outage conditions with typical carrying load capabilities ranging from 300 MW to 1500 MW.¹¹

8. PSNH proposed to classify its 34.5 kV lines as local distribution facilities because these systems are the primary load serving facilities for PSNH, and their technical characteristics and functional capabilities match the definition of local distribution under the Commission's seven-factor test. PSNH also proposed to reclassify its substation facilities (where voltage is transformed from 345 kV and 115 kV to 34.5 kV, 13.2 kV and 12.47 kV systems). PSNH proposed to apply the Commission's seven-factor test to determine the classification of individual components of each substation and thus proposed that all facilities rated 115 kV and higher be classified as transmission. All facilities, including step-down transformers, which are used to support the technical and functional capabilities of the PSNH 34.5 kV system, are classified as local distribution facilities.

⁸ Application of the Connecticut Light and Power Company for Review and Approval of Plan to Reclassify the Demarcation of Assets between Transmission and Distribution, Docket No. 02-04-15 at 7 (Department of Public Util. Control Feb. 27, 2003).

⁹ PSNH, a public utility under New Hampshire law, owns and operates transmission and local distribution facilities and provides wholesale and retail electric service in the State of New Hampshire.

¹⁰ In support of its proposal, PSNH submitted the testimony of K. David Rogers, Manager of Transmission Asset Management for NUSCO, who evaluated PSNH's proposed reclassification, based on the Commission's seven-factor test.

¹¹ Petition at 8.

9. On September 22, 2000, the Governor of New Hampshire, PSNH, Staff of the New Hampshire Public Utilities Commission, and various other parties¹² executed a final settlement agreement as revised to conform with the approving orders¹³ of the New Hampshire Commission to resolve issues surrounding PSNH's compliance with New Hampshire state restructuring laws.¹⁴ On April 19, 2000, in Order No. 23,443, the New Hampshire Commission accepted the Settlement Agreement, including PSNH's proposed reclassification (New Hampshire Commission Order No. 23,443).

C. WMECO's Reclassification Proposal

10. On May 16, 2003, WMECO¹⁵ filed with the Massachusetts Commission a proposal to reclassify certain transmission and local distribution facilities to better represent the manner in which WMECO's system is planned, designed, operated and maintained. This proposal represented a change in the classification of WMECO's transmission and local distribution facilities that the Massachusetts Commission approved in 1998. WMECO's proposed changes sought to further fine-tune the classification of actual substation equipment to reflect its primary function (*i.e.*, whether it serves a transmission or local distribution function).

11. Under WMECO's reclassification proposal, all transmission lines rated at 69 kV and above (345 kV, 115 kV, 69 kV transmission lines) would continue to be classified as transmission and all equipment operating below 69 kV would continue to be classified as local distribution facilities. With respect to its substations, WMECO proposed that the reclassification reflect the assets' primary function (whether the substation serves a transmission or local distribution function). Under WMECO's proposal, all substation facilities, including step-down transformers, which are used to directly support the technical and functional capabilities of WMECO's 34.5 kV and below systems would be

¹² The other parties include the Governor's Office of Energy and Community Services, the Office of the Attorney General, and NUSCO.

¹³ Order No. 23,443, April 19, 2000 and Order No. 23,549, September 8, 2000.

¹⁴ Agreement to Settle PSNH Restructuring, Revised and Conformed in Compliance with Order No. 23,549 at 36 (New Hampshire Public Utilities Commission August 2, 1999) (Settlement Agreement). The Settlement Agreement provides that PSNH's proposed classification of its transmission and local distribution facilities meets the Commission's seven-factor test. Petition at 9.

¹⁵ WMECO, a public utility under Massachusetts law, provides transmission, local distribution, standard offer service and default service to electric consumers in portions of Western Massachusetts.

classified as local distribution.¹⁶ Further, ancillary electrical equipment would be classified as either transmission or local distribution to the extent such a determination can be made. Shared facilities, such as control house, lighting and fencing were proposed to be assigned 100 percent to local distribution.

12. On February 24, 2004, the Massachusetts Commission issued an order accepting WMECO's reclassification proposal, applying the seven-factor test, and found that WMECO's reclassification proposal was appropriate.¹⁷

II. Notice of Filing and Pleadings

13. Notice of Applicants filing was published in the Federal Register, 69 Fed. Reg. 18,894 (2004), with comments, protests, or interventions due on or before April 23, 2004. Unitil Power Corporation and Unitil Energy Systems, Inc. (collectively, the Unitil Companies) and NRG Power Marketing, Inc., Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC and Somerset Power LLC (collectively, the NRG Companies) filed timely motions to intervene. New Hampshire Electric Cooperative, Inc. (NHEC) filed a timely motion to intervene and protest. On May 10, 2004, Applicants filed an answer to NHEC's protest.

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁸ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

¹⁶ WMECO proposes that the demarcation line between transmission and local distribution at all step-down substations occur at the point of interconnection between the bulk power electrical network and the facilities serving local area loads.

¹⁷ Petition of Western Massachusetts Electric Company for approval of its transmission and local distribution facilities, D.T.E. 03-71 (Feb. 24, 2004).

¹⁸ 18 C.F.R. § 385.214 (2003).

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹⁹ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in our decision-making process.

B. Protest and Answer

16. NHEC asserts that, at this time, it does not take a position on the merits of Applicants' assertion that all of its 34.5 kV facilities should be classified as local distribution under the seven-factor test. However, NHEC states that, with respect to the reclassification of PSNH's facilities, it is not clear that the Commission's deference is due. NHEC states that Applicants' Petition does not demonstrate that the New Hampshire Commission has "specifically evaluate[d] the seven factor test indicators and any other relevant facts and [made] recommendations consistent with the essential elements of the Rule' as required by Order No. 888 and Commission precedent."²⁰

17. Specifically, NHEC asserts that while PSNH submitted to the New Hampshire Commission a proposal to reclassify its transmission and local distribution facilities supported by the testimony of a company witness,²¹ neither the Settlement Agreement²² nor the portions of the New Hampshire Commission's Order No. 23,443 approving the Settlement Agreement²³ (attached to Applicants' Petition) demonstrates that the New Hampshire Commission's evaluation of the proposed reclassification was based on the Commission's seven-factor test.²⁴ NHEC points out that the Commission has declined to defer to state commission determinations regarding classification of facilities where the

¹⁹ 18 C.F.R. § 385.213(a)(2) (2003).

²⁰ NHEC protest at 3 (citing *Detroit Edison Co., et al.*, 105 FERC ¶ 61,209 at P 30 (2003) (Detroit Edison) and Order No. 888 at 31,784 and n.548).

²¹ See Direct Testimony of K. David Rogers before the New Hampshire Commission, attached to Applicants' Petition.

²² The Settlement Agreement states that "[t]he Parties agree that the allocations satisfy the FERC 7 Factor Test... [and that] [t]he line of demarcation between Transmission and Distribution is at the high side of the facilities that interconnect with facilities rated 69 kV and above and that step-down to facilities rated at or below 34.5 kV." Settlement Agreement at 36.

²³ New Hampshire Commission Order No. 23,443 at 24.

²⁴ NHEC protest at 3.

state commission decision alleged to apply the seven-factor test, but does not do such an evaluation.²⁵ NHEC also argues that if the Commission grants Applicants' Petition, it should make clear that:

to the extent that any facilities, regardless of their original nominal classification, in fact, prove to be used by public utilities to provide transmission service in interstate commerce in order to deliver power and energy to wholesale purchasers, such facilities become subject to [the] Commission's jurisdiction and review.²⁶

18. As a result, NHEC states that it reserves the right to argue that PSNH's 34.5 kV facilities are not properly classified as "local distribution." NHEC argues that Applicants provided no information in their Petition about the rate impact of the proposed reclassification on NHEC and would need to provide such information if, and when, NUSCO or the New Hampshire Commission seeks to increase rates charged to NHEC. Further, NHEC states that if the Commission grants the Petition, in order to avoid double-charging, Applicants should not be permitted to seek rate increases based on the addition of 34.5 kV facilities to local distribution accounts without decreasing rates to reflect the subtraction of the 34.5 kV facilities from transmission accounts.

19. In its answer, Applicants assert that NHEC's claim that the portions of the New Hampshire Commission's Order No. 23,443 approving PSNH's reclassification submitted with its filing did not discuss the seven-factor test is incorrect. Applicants state that, in Order No. 23,443, the New Hampshire Commission accepted a comprehensive Settlement Agreement that resolved numerous issues relating to PSNH's restructuring proposal,²⁷ including the reclassification. Applicants direct NHEC, as well as the Commission, to pages 23-24 of the New Hampshire Commission Order No. 23,443

²⁵ NHEC protest at 4 (citing Detroit Edison, 105 FERC at P 30 (holding that because a Michigan Commission decision cited by Detroit Edison in its filing did not discuss an application of the Commission's seven-factor test or reclassification of the portion of the facility at issue in that particular proceeding, the Commission declined to reopen the record)).

²⁶ NHEC protest at 4 (citing MidAmerican Energy Co., et al., 90 FERC ¶ 61,105 at 61,337 (2000) (MidAmerican)).

²⁷ Applicants explain that, in compliance with the restructuring requirements of the state of New Hampshire, PSNH submitted a comprehensive restructuring proposal to the New Hampshire Commission, which included, in detail, PSNH's proposed reclassification, as supported by the testimony of Mr. K. David Rogers, Manager of Transmission Asset Management for NUSCO.

(included in Applicants' Petition), where the New Hampshire Commission specifically stated that the parties to the Settlement Agreement, including the New Hampshire Commission, agreed that PSNH's reclassification proposal was done in accordance with the "Seven Factor classification test adopted by FERC." Applicants state that it appears that NHEC may have missed those relevant pages included in the Petition and that by referring NHEC and the Commission to these pages, Applicants believe that the issue raised by NHEC is fully resolved. Thus, Applicants state that the Commission should find that NHEC's concern with respect to the New Hampshire Commission's approval of PSNH's reclassification proposal is unfounded, and to accept Applicants' reclassification proposals, without conditions or modifications.

C. Commission Determination

20. The Commission stated in Order No. 888 that it would defer to state commission recommendations regarding classification of facilities provided that such recommendations are consistent with the essential elements of Order No. 888.²⁸ For example, in Nevada Power Co., 88 FERC ¶ 61,234 (1999) (Nevada Power), the Commission deferred to the state commission's approval of Nevada Power's reclassification of its transmission and local distribution plant where Nevada Power reclassified this plant after applying the seven-factor test, and filing it with the Nevada Commission.²⁹

21. The Connecticut Commission, the New Hampshire Commission, and the Massachusetts Commission, the three state regulatory authorities that have jurisdiction over Applicants, have approved Applicants' proposed reclassifications based on the Commission's seven-factor test. In PSNH's case, both the Settlement Agreement and the New Hampshire Commission Order No. 23,443 approving the Settlement Agreement specifically state that the parties to the Settlement Agreement agree that the allocations satisfy the Commission's seven-factor test.³⁰ Thus, consistent with Order No. 888, and notwithstanding NHEC's arguments to the contrary, we are persuaded to defer to the

²⁸ Order No. 888 at 31,784 and n.548. See also Detroit Edison, 105 FERC at P 30.

²⁹ Nevada Power, 88 FERC at 61,768 and n.4.

³⁰ Settlement Agreement at 36 (stating that "[t]he Parties agree that the allocations satisfy the FERC 7 Factor Test"); Direct Testimony of K. David Rogers before the New Hampshire Commission, attached to Applicants' Petition at 9-16 (specifically evaluating and applying the Commission's seven-factor test to PSNH's proposed reclassification); and New Hampshire Commission Order No. 23,443 at 24 (stating that "[t]he Settling Parties agree that this paradigm satisfies the so-called Seven Factor classification test adopted by FERC.").

New Hampshire Commission, as well as the other state commissions, and adopt the state commissions' determinations regarding the facilities that are the subject of the Petition before us in this proceeding.³¹ Accordingly, we will grant Applicants' Petition.

22. Although we are accepting the state commissions' classifications, we reiterate our finding in Order No. 888 that to the extent that any facilities, regardless of their original nominal classification, in fact, prove to be used by public utilities to provide transmission service in interstate commerce in order to deliver power and energy to wholesale purchasers, such facilities become subject to this Commission's jurisdiction and review.³² In addition, we note that the rates, terms and conditions of all wholesale and unbundled retail transmission service provided by public utilities in interstate commerce are subject to this Commission's jurisdiction and review.³³

23. Our deference in this proceeding only resolves the identification of the facilities used in the local distribution component of unbundled retail service; this ruling does not dictate transmission pricing. Further, our deference in this proceeding does not affect the Commission's separate determination of what facilities must be under the operational control of Regional Transmission Organizations (RTOs), including Independent System Operators (ISOs) and Transcos.³⁴

³¹ The rate arguments raised by NHEC in its protest are premature. NHEC may raise any potential rate impacts or double-charging if and when NUSCO files to change its rates before this Commission.

³² Order No. 888 at 31,969. While NHEC may argue in the future the facilities reclassified here as local distribution should, because of their usage, become subject to this Commission's jurisdiction and review, it cannot reserve the right to argue in this proceeding that PSNH's 34.5 kV facilities are not properly classified.

³³ MidAmerican, 90 FERC at 61,337 (citing 16 U.S.C. §§ 824, 824d, 824e (2000)).

³⁴ MidAmerican, 90 FERC at 61,337; Central Illinois Light Company, 102 FERC ¶ 61,286 at P 4 (2003).

The Commission orders:

Applicants' petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.