

150 FERC ¶ 61,209  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
Norman C. Bay, and Colette D. Honorable.

ISO New England Inc.	Docket Nos.	ER13-193-001
		ER13-193-003
		ER13-196-001
		ER13-196-002

ORDER ON REHEARING AND COMPLIANCE

(Issued March 19, 2015)

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1. On May 17, 2013, the Commission issued an order accepting, subject to modifications,<sup>1</sup> compliance filings that ISO New England Inc. (ISO-NE) and the Participating Transmission Owners Administrative Committee (Administrative

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<sup>1</sup> *ISO New England Inc.*, 143 FERC ¶ 61,150 (2013) (First Compliance Order).

Committee) made to comply with the local and regional transmission planning and cost allocation requirements of Order No. 1000.<sup>2</sup>

2. On June 17, 2013, ISO-NE, Administrative Committee, LS Power Transmission, LLC and LSP Transmission Holdings, LLC (together, LS Power), and the New England States Committee on Electricity (NESCOE) jointly with the state regulatory agencies in five states,<sup>3</sup> filed requests for rehearing and clarification of the First Compliance Order. On November 15, 2013,<sup>4</sup> ISO-NE and Administrative Committee<sup>5</sup> (together, Filing Parties) submitted, pursuant to section 206 of the Federal Power Act (FPA),<sup>6</sup> revisions to

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<sup>2</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>3</sup> NESCOE is joined in its request for rehearing by agencies of five New England states: Massachusetts Department of Public Utilities, Rhode Island Public Utilities Commission, Connecticut Public Utilities Regulatory Authority, Commissioner of the Connecticut Department of Energy and Environmental Protection, New Hampshire Public Utilities Commission, Vermont Public Service Board, and Vermont Public Service Department.

<sup>4</sup> On July 22, 2013, Filing Parties were granted a 60-day extension of time to submit their compliance filing.

<sup>5</sup> Administrative Committee states that it joins this filing on behalf of the Participating Transmission Owners (also referred to herein as incumbent transmission owners) based on a vote of the Administrative Committee. The incumbent transmission owners who voted in favor of the filing are: Bangor Hydro-Electric Company; Central Maine Power Company; Maine Electric Power Corporation; New England Power Company; Northeast Utilities Service Company on behalf of its affiliates: The Connecticut Light and Power Company, Western Massachusetts Electric Company, and Public Service Company of New Hampshire; NSTAR Electric Company; The United Illuminating Company; Vermont Electric Power Company, Inc.; and Vermont Transco, LLC. Vermont Electric Power Company, Inc. and Vermont Transco, LLC support the filing with the exception of the proposed cost allocation for public policy transmission upgrades. The transmission owners who voted in favor of the filing are also joining this filing individually.

<sup>6</sup> 16 U.S.C. § 824e (2012).

sections I (General Terms and Conditions) and II (Open Access Transmission Tariff) of the ISO-NE Open Access Transmission Tariff (OATT) (in Docket No. ER13-193-003), as well as to the Transmission Operating Agreement (Operating Agreement) (in Docket No. ER13-196-002), to comply with the First Compliance Order (together, Second Compliance Filing).<sup>7</sup> For the reasons discussed below, we grant in part and deny in part rehearing and accept Filing Parties' proposed OATT revisions, subject to conditions, and direct Filing Parties to submit further revisions to the OATT in a further compliance filing due within 60 days of the date of issuance of this order.<sup>8</sup>

## **I. Background**

3. In Order No. 1000, the Commission adopted a package of reforms addressing transmission planning and cost allocation that, taken together, are designed to ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential. In particular, regarding regional transmission planning, Order No. 1000 amended the transmission planning requirements of Order No. 890<sup>9</sup> to require that each public utility transmission provider: (1) participate in a regional transmission planning process that produces a regional transmission plan; (2) amend its OATT to describe procedures for the consideration of transmission needs driven by public policy requirements established by local, state, or federal laws or regulations in the local and regional transmission planning

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<sup>7</sup> Filing Parties state that the Commission should treat the two filings as a single compliance filing. They explain that the two-part filing was necessitated by the technical limitations associated with the Commission's eTariff system. Second Compliance Filing at 2.

<sup>8</sup> We note that the same or similar issues are addressed in the following orders that have been issued: *Cal. Indep. Sys. Operator Corp.*, 146 FERC ¶ 61,198 (2014); *PacifiCorp*, 147 FERC ¶ 61,057 (2014); *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128 (2014); *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 (2014); *S.C. Elec. & Gas Co.*, 147 FERC ¶ 61,126 (2014); *Louisville Gas & Elec. Co.*, 147 FERC ¶ 61,241 (2014); *N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044 (2014); *Me. Pub. Serv. Co.*, 147 FERC ¶ 61,129 (2014).

<sup>9</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

processes; and (3) remove federal rights of first refusal from Commission-jurisdictional tariffs and agreements for certain new transmission facilities.

4. The regional cost allocation reforms in Order No. 1000 also required each public utility transmission provider to set forth in its OATT a method, or set of methods, for allocating the costs of new regional transmission facilities selected in a regional transmission plan for purposes of cost allocation. Order No. 1000 also required that each cost allocation method adhere to six cost allocation principles.

5. On October 25, 2012, Filing Parties submitted revisions to sections I and II of the ISO-NE OATT and to the Operating Agreement to comply with the local and regional transmission planning and cost allocation requirements of Order No. 1000. On May 17, 2013, the Commission accepted Filing Parties' compliance filing, subject to further modifications.

## **II. Requests for Rehearing or Clarification – Docket Nos. ER13-193-001 and ER13-196-001**

6. Timely requests for rehearing and clarification were filed by ISO-NE, Administrative Committee, NESCOE, and LS Power. ISO-NE seeks rehearing of issues related to the First Compliance Order's determinations regarding: (1) the Order No. 890 transparency transmission planning principle; (2) the consideration of transmission needs driven by public policy requirements; (3) the applicability of *Mobile-Sierra* protection to the Operating Agreement; (4) the time-limited right of first refusal for certain transmission projects; and (5) the proposed qualification criteria.

7. Administrative Committee seeks rehearing and clarification of the First Compliance Order's determinations regarding: (1) the applicability of *Mobile-Sierra* protection to the Operating Agreement; (2) exceptions to removing federal rights of first refusal; (3) the time-limited right of first refusal for certain transmission projects; and (4) the reevaluation process.

8. NESCOE seeks rehearing of the First Compliance Order's determinations regarding: (1) the consideration of transmission needs driven by public policy requirements; (2) the regional cost allocation method applied to facilities to meet transmission needs driven by public policy requirements; and (3) the allocation and recovery of study costs related to facilities to meet transmission needs driven by public policy requirements.

9. Finally, LS Power seeks rehearing and clarification with respect to the First Compliance Order's determinations related to: (1) the effective date of the compliance filing; (2) the applicability of *Mobile-Sierra* protection to the Operating Agreement; and (3) the proposed qualification criteria.

10. On June 28, 2013, ISO-NE submitted an answer in response to LS Power's request for rehearing and clarification with respect to the effective date of the compliance filing.

### **III. Compliance Filing – Docket Nos. ER13-193-003 and ER13-196-002**

11. In response to the First Compliance Order, Filing Parties have submitted further revisions to their local and regional transmission planning processes, including modifications to the effective date, qualification criteria, general transmission planning requirements, reliability planning, public policy planning and cost allocation. Filing Parties state that the stakeholder process used to develop this filing commenced in July 2013 with the presentation by ISO-NE (for the input of the New England Power Pool (NEPOOL) Transmission Committee) of an initial set of draft tariff changes. They state that Administrative Committee's concepts for the allocation of the costs of public policy projects were vetted in August, and additional revisions, including revised proposals for public policy cost allocation, were developed and considered by the NEPOOL Transmission Committee during September and October. Filing Parties state that, at a meeting of the NEPOOL Transmission Committee held on October 30, 2013, a vote of 17.16 percent was received in favor of recommending the proposed transmission planning process revisions to sections I and II of the ISO-NE OATT and to the Operating Agreement, although a motion to recommend the revisions to the cost allocation method for Public Policy Transmission Upgrades received a vote of 76.55 percent in favor. They further state, however, that at the November 8, 2013 NEPOOL Participants Committee meeting, support for the proposed transmission planning process revisions failed by a show of hands and support for the proposed cost allocation revisions failed by a vote of 51.57 percent in favor.

12. Filing Parties request an effective date for their compliance filing of the later of May 1, 2014, or 60 days after a Commission order addressing their proposed compliance revisions.

13. Notice of Filing Parties' compliance filings was published in the *Federal Register*, 78 Fed. Reg. 70,297 (Nov. 25, 2013), with interventions and protests due on or before December 16, 2013.

14. On December 10, 2013, NEPOOL Participants Committee (referred to herein as NEPOOL) filed comments. On December 16, 2013, the following parties also filed comments: Conservation Law Foundation and The Sustainable FERC Project; Massachusetts Department of Public Utilities (Massachusetts DPU); NESCOE; and, jointly, ENE, Connecticut Fund for the Environment, Environment Council of Rhode Island, Health Care Without Harm, The Natural Resources Council of Maine, and The Sustainable FERC Project (collectively, Environmental Parties).

15. On December 16, 2013, Vermont Department of Public Service filed a motion to intervene. On the same date, Energy New England, Inc. (Energy New England) and

Participating Municipal Systems<sup>10</sup> filed a motion to intervene and joint protest with Eastern Massachusetts Consumer-Owned Systems<sup>11</sup> (collectively, Energy New England and Two Systems).

16. The following parties also filed protests on December 16, 2013: New Hampshire Public Utilities Commission, Rhode Island Public Utilities Commission, Vermont Public Service Board, Vermont Public Service Department, Vermont Electric Power Company, Inc., and Vermont Transco, L.L.C. (collectively, Protesting Parties); Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc. (together, Public Systems); and New Hampshire Transmission, LLC (New Hampshire Transmission).

17. On January 7, 2014, LS Power filed out-of-time comments.

18. On January 15, 2014, ISO-NE, New England Transmission Owners,<sup>12</sup> and Massachusetts DPU submitted answers in response to protests and comments filed regarding the treatment of proposed projects, the hold harmless provision, and the proposed public policy transmission upgrade cost allocation methodology. On February 4, 2014, New Hampshire Transmission submitted an answer in response to ISO-NE and New England Transmission Owners' answers.

19. On February 18, 2014, ISO-NE submitted an answer in response to New Hampshire Transmission's answer.

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<sup>10</sup> Participating Municipal Systems include: Concord Municipal Light Plant, Groveland Electric Light Department, Littleton Electric Light & Water Department, Merrimac Municipal Light Department, Middleton Electric Light Department, Rowley Municipal Lighting Plant, and Wellesley Municipal Light Plant.

<sup>11</sup> Eastern Massachusetts Consumer-Owned Systems include: Braintree Electric Light Department, Hingham Municipal Lighting Plant, Reading Municipal Light Department, and Taunton Municipal Lighting Plant.

<sup>12</sup> New England Transmission Owners are comprised of: Emera Maine; Central Maine Power Company; Maine Electric Power Corporation; New England Power Company; the United Illuminating Company; and Northeast Utilities Service Company on behalf of its affiliates NSTAR Electric Company, The Connecticut Light and Power Company, Western Massachusetts Electric Company, and Public Service Company of New Hampshire; and the United Illuminating Company. Vermont Electric Power Company, Inc. and Vermont Transco, LLC support the portions of the answer not related to the proposed cost allocation for public policy transmission upgrades.

#### **IV. Discussion**

##### **A. Procedural Matters**

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding related to Filing Parties' compliance filing because they have provided information that assisted us in our decision-making process.

22. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2014), prohibits an answer to a request for rehearing. Accordingly, the Commission rejects ISO-NE's Answer to LS Power's request for rehearing.

23. We note that the tariff records Filing Parties submitted here in response to the First Compliance Order also include language pending in tariff records that Filing Parties separately filed on July 11, 2014, to comply with the interregional transmission coordination and cost allocation requirements of Order No. 1000. The tariff records Filing Parties submitted in their interregional compliance filings are pending before the Commission and will be addressed in a separate order. Therefore, any acceptance of the tariff records in the instant filing that include tariff provisions submitted to comply with the interregional transmission coordination and cost allocation requirements of Order No. 1000 is made subject to the outcome of the Commission orders addressing Filing Parties' interregional compliance filings in Docket Nos. ER13-1957 and ER13-1960.

##### **B. Substantive Matters**

24. We grant in part and deny in part the requests for rehearing, as discussed herein.

25. We find that Filing Parties' compliance filing partially complies with the directives in the First Compliance Order. Accordingly, we accept Filing Parties' compliance filing to be effective 60 days following the date of issuance of this order, as discussed below. We direct Filing Parties to submit a further compliance filing within 60 days of the date of issuance of this order.<sup>13</sup>

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<sup>13</sup> We note that the same or similar issues are addressed in the following orders that have been issued: *Cal. Indep. Sys. Operator Corp.*, 146 FERC ¶ 61,198; *PacifiCorp*,

## 1. Overview of ISO-NE Regional Transmission Planning Process

26. Under ISO-NE'S OATT, as proposed in the Second Compliance Filing, ISO-NE has two regional transmission planning processes; namely, one for transmission projects involving reliability and market efficiency (economic) solutions, and a second for public policy project solutions.<sup>14</sup> The ISO-NE regional transmission planning process for reliability and market efficiency solutions begins on a regular basis with the preparation of a Needs Assessment and evaluation of transmission solutions,<sup>15</sup> conducted by ISO-NE, its incumbent transmission owners, the Planning Advisory Committee, and other stakeholders. This Needs Assessment also considers whether market responses, such as demand response, energy efficiency, merchant transmission facilities, or distributed generation might alleviate the need for a transmission solution.<sup>16</sup> If the need-by date of the solution(s) to meet reliability-based criteria is within 3 years or less from when a Needs Assessment is completed, ISO-NE will evaluate the appropriateness of the proposed solution(s) and assign the project to the appropriate incumbent transmission owner(s).<sup>17</sup>

27. If the need-by date of a reliability-related solution(s) is more than three years away, or if the solution(s) is identified as a market efficiency solution, ISO-NE will utilize a two-step process, in which Qualified Transmission Project Sponsors (Qualified Sponsors) will submit proposals (called Phase One Proposals) that address the needs identified in the Needs Assessment. ISO-NE's process also provides an opportunity for a member of the Planning Advisory Committee to find a sponsor for a project that it does not want to develop, but believes ISO-NE should consider. Phase One requires that a project sponsor submit a comprehensive description of how the project meets the identified need, a milestone schedule for development, siting and required rights of way,

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147 FERC ¶ 61,057; *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128; *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127; *S.C. Elec. & Gas Co.*, 147 FERC ¶ 61,126; *Me. Pub. Serv. Co.*, 147 FERC ¶ 61,129; *N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044; *Duke Energy Carolinas LLC et al.*, 147 FERC ¶ 61,241.

<sup>14</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.1(f) (Treatment of Market Solutions in Needs Assessment).

<sup>15</sup> *Id.* § 3.5 (Market Responses in Regional System Plan).

<sup>16</sup> *Id.* § 3.5 (Market Responses in Regional System Plan).

<sup>17</sup> *Id.* § 4.2 (Non-Applicability of Sections 4.1 through 4.3; Needs Assessments).

permits, construction, and completion.<sup>18</sup> Submittal of a Phase One Proposal requires a \$100,000 deposit to cover the cost of analyses for Phase One and Phase Two. ISO-NE will conduct a preliminary feasibility review of each Phase One Proposal to determine, among other things, whether the Qualified Sponsor provided sufficient quality data, the proposed project meets the needs described in the Needs Assessment, and the project is technically practical.<sup>19</sup>

28. ISO-NE then seeks input from the Planning Advisory Committee to determine which proposals would move forward to Phase Two, based on the selection criteria of cost, electrical performance, future system expandability, or feasibility. Further, ISO-NE will post on its website an explanation of why a Phase One Proposal was not moved into Phase Two, if applicable.<sup>20</sup> In addition, ISO-NE will identify which Phase Two proposal best meets the selection criteria, seeking stakeholder input from the Planning Advisory Committee on the preliminary preferred solution. ISO-NE will also post on its website why a transmission solution is ultimately selected in the regional transmission plan for purposes of cost allocation, and include the transmission project as either a reliability upgrade or market efficiency upgrade, as appropriate, in its Regional System Plan.<sup>21</sup>

29. ISO-NE's public policy transmission planning process begins with a request to NESCOE to provide input on transmission needs driven by public policy requirements. Further, other stakeholders are eligible to suggest that ISO-NE evaluate a transmission need driven by public policy requirements. NESCOE will decide which transmission needs driven by public policy requirements the ISO-NE transmission planning process will evaluate for potential solutions, and, to the extent ISO-NE decides not to evaluate a transmission need driven by public policy requirements, it must post on its website the reason why the identified transmission need driven by public policy will not be evaluated.<sup>22</sup> Following this, ISO-NE will prepare a proposed scope for a public policy requirements transmission study and seek input from the Planning Advisory Committee on that scope. ISO-NE will then prepare and post on its website a high-level general

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<sup>18</sup> *Id.* § 4.3(c) (Information Required for Phase One Proposals; Study Deposit; Timing).

<sup>19</sup> *Id.* § 4.3(g) (Listing of Qualifying Phase One Proposals).

<sup>20</sup> *Id.* § 4.3(g) (Listing of Qualifying Phase One Proposals).

<sup>21</sup> *Id.* § 4.3(h) (Information Required for Phase Two Solutions; Identification and Reporting of Preliminary Preferred Phase Two Solution).

<sup>22</sup> *Id.* § 4A.1 (NESCOE Requests for Public Policy Transmission Studies).

design and estimate of the costs and benefits of projects arising from public policy requirements. ISO-NE also will include proposed market responses, such as demand-side projects and distributed generation, in the analyses.

30. ISO-NE will provide the results of the public policy transmission study analyses to Qualified Sponsors to use in the development of their Stage One<sup>23</sup> proposals to develop, build, and operate one or more public policy transmission projects. Such Qualified Sponsors in Stage One of the public policy process are required to submit a comprehensive description of how their projects meet the identified need and a milestone schedule for development, siting, required rights of way and permits, construction, and completion. Moreover, submittal of a Stage One Proposal requires a \$100,000 deposit to cover the cost of analyses for Stage One and Stage Two.<sup>24</sup>

31. Following the submission of Stage One Proposals, ISO-NE will conduct a preliminary feasibility review of each proposal and, after posting the information on its website, will meet with the Planning Advisory Committee to determine which Stage One Proposals should move forward to Stage Two.<sup>25</sup> ISO-NE requires Qualified Sponsors whose Stage One Proposals qualify for Stage Two to provide a comprehensive description of how their public policy proposals meet the identified need; a milestone schedule for development, siting, permits, construction, and expandability; and authority for and experience in obtaining required rights of way.<sup>26</sup>

32. Finally, after considering input from stakeholders, ISO-NE will select the preferred Stage Two Solution and post on its website a rationale for the selection that it determines would best meet the identified public policy requirement in terms of electrical performance, cost, future system expandability, and feasibility to meet the need in the

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<sup>23</sup> To avoid confusion, ISO-NE refers to Phase One/Phase Two for its reliability and market efficiency competitive transmission planning process, and to Stage One/Stage Two for its public policy competitive planning process.

<sup>24</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4A.5(a) (Information Required for Stage One Proposals).

<sup>25</sup> *Id.* § 4A.5(e) (Public Policy Transmission Studies; Public Policy Transmission Upgrades).

<sup>26</sup> *Id.* § 4A.5 (Public Policy Transmission Studies; Public Policy Upgrades).

required timeframe. Finally, ISO-NE will notify the proposing Qualified Sponsor that its project has been selected in the Regional System Plan for purposes of cost allocation.<sup>27</sup>

## 2. **Regional Transmission Planning Requirements**

33. Order No. 1000 required each public utility transmission provider to participate in a regional transmission planning process that produces a regional transmission plan and that complies with the identified transmission planning principles of Order No. 890.<sup>28</sup> The regional transmission planning reforms required public utility transmission providers to consider and select, in consultation with stakeholders, transmission facilities that meet the region's reliability, economic, and public policy requirements-related transmission needs more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning processes.<sup>29</sup>

### a. **Transmission Planning Region**

34. Order No. 1000 required each public utility transmission provider to participate in a transmission planning region, which is a region in which public utility transmission providers, in consultation with stakeholders and affected states, agree to participate for purposes of regional transmission planning.<sup>30</sup> The scope of a transmission planning region should be governed by the integrated nature of the regional power grid and the particular reliability and resource issues affecting individual regions.<sup>31</sup> However, an individual public utility transmission provider cannot, by itself, satisfy Order No. 1000.<sup>32</sup>

35. In addition, Order No. 1000 required public utility transmission providers to explain how they will determine which transmission facilities are subject to the requirements of Order No. 1000.<sup>33</sup> Order No. 1000 also required public utility transmission providers in each transmission planning region to have a clear enrollment

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<sup>27</sup> *Id.* § 4A.5(a) (Information Required for Stage One Proposals).

<sup>28</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 6, 11, 146.

<sup>29</sup> *Id.* PP 11, 148.

<sup>30</sup> *Id.* P 160.

<sup>31</sup> *Id.* (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 527).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* PP 65, 162.

process that defines how entities, including non-public utility transmission providers, make the choice to become part of the transmission planning region<sup>34</sup> and, thus, become eligible to be allocated costs under the regional cost allocation method.<sup>35</sup> Order No. 1000 also required that each public utility transmission provider include in its OATT a list of all the public utility and non-public utility transmission providers enrolled as transmission providers in the transmission planning region.<sup>36</sup>

**i. First Compliance Order**

36. In the First Compliance Order, the Commission found that the scope of Filing Parties' transmission planning region complied with the requirements of Order No. 1000.<sup>37</sup>

37. The Commission also found that Filing Parties partially complied with Order No. 1000's requirements to explain how the transmission planning region will determine which transmission facilities will be subject to the requirements of Order No. 1000.<sup>38</sup> However, the Commission found that Filing Parties' proposal was inconsistent with the Commission's definition of new transmission facilities, which are the transmission facilities subject to the requirements of Order No. 1000.<sup>39</sup> Accordingly, the Commission directed Filing Parties to revise section 3.3 of the ISO-NE OATT to delete the language that exempts from Order No. 1000's requirements any identified needs that have been approved by the ISO-NE Board of Directors and included in a regional transmission system plan, as well as any needs assessment concluded by ISO-NE, prior to the effective date of the compliance filing.<sup>40</sup>

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<sup>34</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 275.

<sup>35</sup> *Id.* PP 276-277.

<sup>36</sup> *Id.* P 275.

<sup>37</sup> *ISO New England Inc.*, 143 FERC ¶ 61,150, at P 23 (2013) (First Compliance Order).

<sup>38</sup> *Id.* P 24.

<sup>39</sup> *Id.* P 25.

<sup>40</sup> *Id.* PP 24-25.

38. In addition, the Commission directed Filing Parties to submit a further compliance filing requesting an appropriate effective date to coincide with the beginning of the next ISO-NE transmission planning cycle, or propose a different effective date and provide a showing demonstrating why such an effective date is more appropriate. The Commission also directed Filing Parties to provide additional information regarding ISO-NE's transition to the revised regional transmission planning process.<sup>41</sup>

39. The Commission also found that Filing Parties did not address Order No. 1000's requirement that each transmission planning region have a clear enrollment process that defines how entities, including non-public utility transmission providers, make the choice to become part of the transmission planning region, nor did they include in the OATT a list of all the public utility and non-public utility transmission providers that have enrolled as transmission providers in the transmission planning region.<sup>42</sup> Thus, the Commission directed Filing Parties to set forth in the OATT the enrollment process, including a list of enrolled transmission providers.

40. Finally, the Commission rejected certain proposed revisions to the Operating Agreement, which provided that the revisions to Schedule 3.09(a) of that agreement become effective only if the Commission does not modify the Operating Agreement, or if it does direct any modification, if the directed modification(s) is supported by ISO-NE and by a sufficient vote of the Participating Transmission Owners.<sup>43</sup> The Commission found this language inappropriate because it appeared that Filing Parties asserted that some revisions are contingent on the acceptance of others. Accordingly, the Commission directed Filing Parties to remove this provision from the Operating Agreement.<sup>44</sup>

## **ii. Requests for Rehearing or Clarification**

41. LS Power requests clarification that, to the extent ISO-NE does not have a defined beginning to its transmission planning cycle, the effective date of the proposed Order No. 1000 changes on compliance should be as soon as practicable, but no later than

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<sup>41</sup> *Id.* P 26.

<sup>42</sup> *Id.* P 27.

<sup>43</sup> ISO-NE defines Participating Transmission Owner as a transmission owner that is a party to the Operating Agreement. ISO-NE, Transmission, Markets and Services Tariff, § I.2.2 (Definitions) (52.0.0).

<sup>44</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 28.

January 1, 2014.<sup>45</sup> LS Power states that this clarification is necessary to prevent ISO-NE from simply achieving through delay what the Commission prohibited in the First Compliance Order; specifically, LS Power is concerned that a delay in the effective date will allow incumbent transmission owners to push projects through the transmission planning process to become selected projects prior to the effective date.<sup>46</sup>

### iii. Compliance

42. Filing Parties request an effective date for the revised transmission planning process of the later of May 1, 2014, or 60 days following the issuance of a Commission order addressing their proposed compliance revisions.<sup>47</sup> Filing Parties state that ISO-NE does not have a fixed date on which it begins its regional transmission planning cycle, but May 1, 2014, is a suitable proxy for the start of the ISO-NE transmission planning process. ISO-NE explains that, on May 1 of each year, for example, it issues its Forecast Report of Capacity, Energy, Loads and Transmission, which is the primary source for assumptions used in ISO-NE's regional planning and reliability studies.<sup>48</sup>

43. Filing Parties further state that the request for an effective date of the *later of* May 1, 2014, or 60 days following issuance of an order on the Second Compliance Filing is justified due to the significant number of changes the Commission directed in the First Compliance Order. Filing Parties argue that, given the significance of these pending changes, if implementation were attempted in advance of the order's issuance, ISO-NE could have to re-perform portions of the transmission planning process in accordance with an order issued subsequently, resulting in a concomitant waste of resources for ISO-NE, transmission developers, and stakeholders alike. They also argue that a 60-day period following the issuance of an order on the Second Compliance Filing will give ISO-NE and regional stakeholders sufficient time to make any necessary business process adjustments before initiating the revised transmission planning process.<sup>49</sup>

44. In response to the First Compliance Order's directives, Filing Parties propose to delete the language in the OATT that exempts from Order No. 1000's requirements the

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<sup>45</sup> LS Power Request for Rehearing at 1-2.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> Second Compliance Filing at 7.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 7-8.

“identified needs” included in a regional system plan and “any needs assessment” concluded by ISO-NE prior to the effective date of the revised transmission planning process.

45. To comply with the requirement to provide further information about the transition to the revised transmission planning process, Filing Parties have revised the OATT to state that the revisions submitted to comply with Order No. 1000 shall not apply to any “Proposed”<sup>50</sup> or “Planned”<sup>51</sup> project included in a regional system plan approved by the ISO-NE Board of Directors (or in a Regional System Plan Project List<sup>52</sup> update) prior to

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<sup>50</sup> ISO-NE describes a “Proposed” project as follows:

For purposes of Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades, “Proposed” shall include a regulated transmission solution that (a) has been proposed in response to a specific need identified by [ISO-NE] in a Needs Assessment or the [Regional System Plan] and (b) has been evaluated or further defined and developed in a Solutions Study ... or in the competitive solutions process ... such that there is significant analysis that supports a determination by [ISO-NE], as communicated to the Planning Advisory Committee, that the proposed regulated transmission solution would likely meet the need identified by [ISO-NE] in a Needs Assessment or the [Regional System Plan], but has not received approval by [ISO-NE]....

For purposes of Public Policy Transmission Upgrades, “Proposed” means that [ISO-NE] has included the project in the [Regional System Plan] Project List ... but that the project has not yet been approved by [ISO-NE]....

ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 3.6(a)(ii).

<sup>51</sup> “‘Planned’ shall include a Transmission Upgrade that has met the requirements for a Proposed project and has been approved by [ISO-NE]....” ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 3.6(a)(iii).

<sup>52</sup> The Regional System Plan Project List is described as follows:

The [Regional System Plan] Project List shall identify regulated transmission solutions proposed in response to the

(continued ...)

the effective date of Filing Parties' Order No. 1000 Second Compliance Filing, unless ISO-NE is reevaluating the solution design for such a project as of that effective date or subsequently determines that the solution design for such a project requires reevaluation.<sup>53</sup> Filing Parties state that this exemption is appropriate, because Proposed and Planned projects have been the subject of a Solutions Study<sup>54</sup> and comprehensive analysis, such that ISO-NE has communicated to the Planning Advisory Committee<sup>55</sup> that

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needs identified in a [Regional System Plan] or Needs Assessments ... and shall identify Public Policy Transmission Upgrades.... The [Regional System Plan] Project List shall identify the proposed regulated transmission solutions separately as a Reliability Transmission Upgrade, a Market Efficiency Transmission Upgrade, or a Public Policy Transmission Upgrade.

ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 3.6(a) (Elements of the Regional System Plan Project List).

<sup>53</sup> *Id.* § 3.3.

<sup>54</sup> The Solution Studies are described as follows:

In the case of Market Efficiency Transmission upgrades and Reliability Transmission upgrades, [ISO-NE], in coordination with the proponents of regulated transmission solutions and other interested or affected stakeholders, shall conduct or participate in studies ("Solution Studies") to evaluate whether proposed regulated transmission solutions meet the [Pool Transmission Facility] system needs identified in Needs Assessments.

ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.2(a) (Evaluation and Development of Regulated Transmission Solutions in Solutions Studies for Market Efficiency Transmission Upgrades and Reliability Transmission Upgrades).

<sup>55</sup> The Planning Advisory Committee is described as follows:

The Planning Advisory Committee serves to review and provide input and comment on (i) the development of the [Regional System Plan], (ii) assumptions for studies, (iii) the results of Needs Assessments, Solutions Studies, and competitive solutions developed pursuant to Section 4.3 of

(continued ...)

the proposed regulated transmission solution is the best alternative to meet the needs identified in a Needs Assessment or Regional System Plan. Filing Parties also assert this exemption is appropriate because there have been substantial resources consumed by transmission developers, stakeholders, and ISO-NE in the review of Proposed projects.<sup>56</sup>

46. To comply with the requirement to include an enrollment process in its OATT, ISO-NE adds a new section that provides that an entity will become part of the ISO-NE transmission planning region as a Participating Transmission Owner Qualified Transmission Project Sponsor<sup>57</sup> or a non-Participating Transmission Owner Qualified Transmission Project Sponsor.<sup>58</sup> They also propose to add an appendix to Attachment K listing all enrolled Participating Transmission Owners and non-Participating Transmission Owners Qualified Sponsors.<sup>59</sup> Finally, Filing Parties propose to remove the contractual provision in the Operating Agreement that provides that the Order No. 1000 compliance revisions to the Operating Agreement would only be effective if the Commission accepted the First Compliance Filing without modification or with such modification that is later supported by ISO-NE and the Participating Transmission Owners.<sup>60</sup>

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[Attachment K], and (iv) potential market responses to the needs identified by [ISO-NE] in a Needs Assessment or the [Regional System Plan].

ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 2.2 (Role of Planning Advisory Committee).

<sup>56</sup> Second Compliance Filing at 8-9.

<sup>57</sup> Attachment K indicates that a Qualified Sponsor is an entity that meets the qualification requirements to propose a Reliability Transmission Upgrade, Market Efficiency Transmission Upgrade, or Public Policy Transmission Upgrade pursuant to Attachment K. *See* ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4B.1 (Periodic Evaluation of Applications).

<sup>58</sup> *Id.* § 1.1 (Enrollment).

<sup>59</sup> *Id.*, app. 2 (Lists of Enrolled PTO Qualified Transmission Project Sponsors and Enrolled Non-PTO Qualified Transmission Project Sponsors).

<sup>60</sup> Second Compliance Filing at 8.

iv. **Protests/Comments**

47. LS Power states in its protest that ISO-NE's compliance filing confirms that the ISO-NE transmission planning process does not have a fixed date on which it begins, and notes that Filing Parties now request an effective date of May 1, 2014. LS Power reiterates that the only reason to delay the effective date is to allow ISO-NE and incumbent transmission owners to push projects through the planning process to become selected projects prior to the effective date. LS Power therefore requests that the Commission grant LS Power's request for clarification and set an effective date of January 1, 2014, for the compliance revisions. LS Power argues that while not every aspect of the Order No. 1000 compliance revisions will have been established by that date, it does not harm the continuing implementation and would prevent the effective date from becoming a tool for excluding projects.<sup>61</sup>

48. NEPOOL, LS Power, Energy New England and Two Systems, and New Hampshire Transmission argue that Filing Parties' proposal to grandfather both Planned and Proposed projects is contrary to the requirements of Order No. 1000 and does not comply with the requirements of the First Compliance Order.<sup>62</sup>

49. NEPOOL and New Hampshire Transmission argue that unlike Planned projects, Proposed projects have not received approval under section I.3.9 that implementing the project will not have a significant adverse effect upon the reliability or operating characteristics of the interconnected transmission owner's transmission facilities, the transmission facilities of another transmission owner, or the system of a Market Participant. Thus, they argue that Proposed projects are still undergoing initial evaluation and, consequently, fall under Order No. 1000's definition of new transmission facilities.

50. NEPOOL further asserts that Proposed projects are projects that by definition are still being—or are still to be—evaluated and not yet at a point where they can be “re-evaluated.” NEPOOL, Energy New England and Two Systems, and New Hampshire Transmission offer revisions that remove Filing Parties' proposal to grandfather Proposed projects.<sup>63</sup> With respect to grandfathered Planned projects, New Hampshire Transmission also proposes that ISO-NE should publicly post if such grandfathered

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<sup>61</sup> LS Power Protest at 4.

<sup>62</sup> NEPOOL Protest at 10-11; LS Power Protest at 5-6; Energy New England and Two Systems Protest at 6-7; New Hampshire Transmission Protest at 7.

<sup>63</sup> NEPOOL Comments at 12; Energy New England and Two Systems Protest at 6; New Hampshire Transmission Protest at 11.

solutions are being reevaluated, so that all stakeholders can monitor such changes and understand that the Planned projects have become subject to Order No. 1000's requirements.<sup>64</sup>

51. With respect to Filing Parties' arguments that removing the proposed exemptions will result in setbacks and substantial costs, New Hampshire Transmission argues that Filing Parties overstate the burden of complying with Order No. 1000, while understating the potential benefits.<sup>65</sup> It argues that applying the competitive solicitation process to all Proposed projects would not be wasteful, because only nonincumbent Qualified Sponsors would need to perform work to attempt to devise better solutions than the incumbent transmission owner's already-prepared solution.<sup>66</sup> New Hampshire Transmission also argues that time should not be an issue, as projects needed within three years are likely to be subject to the conditional three-year right of first refusal. New Hampshire Transmission proposes that Proposed projects be treated in one of two ways: (1) ISO-NE runs a competitive process to see if there is any interest by nonincumbent Qualified Sponsors to develop new solutions, or (2) the Commission directs ISO-NE to run a unique competitive solicitation process under which the existing Proposed projects are bid out for construction and ownership by any qualified sponsors, and ISO-NE would select the most cost-effective offer.<sup>67</sup> New Hampshire requests that the Commission direct Filing Parties to remove the exemption for Proposed projects.

**v. Answers**

52. ISO-NE states that LS Power's proposed January 1, 2014 effective date for the Order No. 1000 changes is unworkable and disruptive.<sup>68</sup>

53. ISO-NE and New England Transmission Owners state that New Hampshire Transmission mischaracterizes the existing transmission planning process and Proposed projects.<sup>69</sup> They state that once a project has been designated as "Proposed," it has been

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<sup>64</sup> New Hampshire Transmission Protest at 7.

<sup>65</sup> *Id.* at 9.

<sup>66</sup> *Id.* at 9-10.

<sup>67</sup> *Id.* at 10-11.

<sup>68</sup> ISO-NE Answer at 22.

<sup>69</sup> New England Transmission Owners Answer at 4.

the subject of detailed study and comparison with other potential solutions to identified needs and note that, under Attachment K, a Proposed project is one that has been evaluated.<sup>70</sup> With respect to arguments that removal of the exemption for Proposed projects will not create harm, ISO-NE states that these parties ignore the fact that Proposed projects (1) have been comprehensively and completely planned and designed, (2) will likely have had a substantial amount of detailed engineering and facility siting assessment performed, and (3) will have received extensive technical review. ISO-NE and New England Transmission Owners argue that if the Commission was to mandate the changes sought by New Hampshire Transmission and others on this issue, the planning process in ISO-NE would be set back by several years by requiring the reevaluation of projects that have already been fully vetted and compared with alternatives.<sup>71</sup> ISO-NE adds that the changes also would result in substantial costs for ratepayers.<sup>72</sup>

54. Furthermore, they argue that the changes proposed by New Hampshire Transmission and others will not result in a fair opportunity to compete for new projects because they would allow opportunistic developers to take the technical work that has already been performed by others and then put their own name on those proposals.<sup>73</sup> ISO-NE and New England Transmission Owners also contend that these arguments are not appropriate for this stage of the compliance process, as the Commission only directed Filing Parties to delete the language that exempts from Order No. 1000's requirements identified needs included in a Regional System Plan and any Needs Assessment concluded by ISO-NE prior to the effective date of the compliance filing.

55. In response, New Hampshire Transmission states that Filing Parties misread the First Compliance Order's requirement that the Order No. 1000 tariff provisions should apply to transmission facilities that are subject to evaluation or reevaluation.<sup>74</sup> New Hampshire Transmission states that Order No. 1000 makes clear that a transmission project remains within the scope of Order No. 1000 if the project is still subject to some degree of evaluation or reevaluation within the planning process.<sup>75</sup> Based on this

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<sup>70</sup> ISO-NE Answer at 9.

<sup>71</sup> New England Transmission Owners Answer at 5.

<sup>72</sup> ISO-NE Answer 9-10.

<sup>73</sup> New England Transmission Owners Answer at 5-6.

<sup>74</sup> New Hampshire Transmission Answer at 2.

<sup>75</sup> *Id.* at 3.

assertion, New Hampshire Transmission argues that all Proposed projects are within the scope of Order No. 1000's requirements, although some may be exempted (e.g., by being upgrades to existing facilities, under the three-year right of first refusal, or projects not subject to regional cost allocation).

56. New Hampshire Transmission argues that Proposed projects have not received final approval and are still subject to additional review.<sup>76</sup> It states that the additional review qualifies as an evaluation or reevaluation and, therefore, Order No. 1000's requirements should apply to Proposed projects.<sup>77</sup> However, New Hampshire Transmission argues that, besides the significant additional review, various examples of project evaluation under the ISO-NE transmission planning process show how Proposed projects are often subject to evaluation or reevaluation after being designated as Proposed. New Hampshire Transmission cites three Proposed projects from the October 2013 Regional System Plan Project List that were cancelled or changed.<sup>78</sup> Based on this evidence, New Hampshire Transmission contends that many, if not all, Proposed projects are continually being evaluated or reevaluated under the regional transmission planning process, and thus, fall under the requirements of Order No. 1000.

57. In response to New Hampshire Transmission, ISO-NE clarifies that the competitive solicitation process will be utilized in situations where a Proposed project is being reevaluated as of the effective date of the Second Compliance Filing, or is subsequently reevaluated.<sup>79</sup> ISO-NE explains that the additional review referenced by New Hampshire Transmission in section I.3.9 of the OATT is not a continuation of the reliability solution design or evaluation process but rather identifies any additional work to other parts of the ISO-NE system that must be performed in order to ensure that the proposed solution can be reliably integrated into the system.<sup>80</sup>

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<sup>76</sup> *Id.* at 4 (citing ISO-NE, Transmission, Markets and Services Tariff, § I.3.9 (Review of Market Participant's Proposed Plans) (4.0.0)).

<sup>77</sup> *Id.* at 5.

<sup>78</sup> *Id.* at 6.

<sup>79</sup> ISO-NE February 18 Answer at 3-4.

<sup>80</sup> *Id.* at 4.

**vi. Commission Determination**

58. We find that the description of transmission facilities that will be subject to the requirements of Order No. 1000 complies with the directives in the First Compliance Order. We find that Filing Parties also comply with the requirement to remove language from the OATT that exempts from the requirements of Order No. 1000 identified needs included in a Regional System Plan, and any Needs Assessment ISO-NE concluded prior to the effective date of the compliance filing.

59. We deny LS Power's request for clarification and protest regarding Filing Parties' proposed effective date. We agree with Filing Parties that in this case where ISO-NE does not have a fixed date on which it begins its regional transmission planning cycle, allowing the revised transmission planning process to take effect 60 days following the date of issuance of this order will allow Filing Parties sufficient time to make any necessary business process adjustments. In response to LS Power's requested effective date of no later than January 1, 2014, for the Order No. 1000 changes, we note that the First Compliance Order allowed Filing Parties flexibility in proposing an effective date so long as they make a showing of why such an effective date is appropriate. We find that Filing Parties have made a sufficient showing as to why the proposed effective date is appropriate. We therefore deny rehearing on this issue, accept Filing Parties' justification, and accept Filing Parties' proposed effective date of 60 days following the date of issuance of this order, which is May 18, 2015.

60. We also accept Filing Parties' proposal that the revised ISO-NE transmission planning process will not apply to Proposed and Planned projects included in the Regional System Plan<sup>81</sup> or Regional System Plan Project List update prior to the effective date of the Order No. 1000 compliance filing, unless ISO-NE is reevaluating, or subsequently determines it necessary to reevaluate, the solution design for such transmission projects as of the effective date. We accept Filing Parties' justification that grandfathering such transmission projects will allow ISO-NE to transition to its revised transmission planning process without requiring that it assume additional costs to redevelop transmission solutions that have already undergone a Solution Study and comprehensive analysis by ISO-NE and stakeholders. Additionally, we note that ISO-NE's OATT clearly defines the requirements for a transmission solution to be designated

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<sup>81</sup> “[The Regional System Plan] includes a description of proposed regulated transmission solutions that, based on the Solutions Studies . . . and the competitive solution process . . . described in [Attachment K], may meet the needs identified in the Needs Assessments.” ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 3.1 (Description of Regional System Plan).

as “Proposed” or “Planned.”<sup>82</sup> We find this to be a clear and reasonable threshold for which transmission projects will be exempt from the competitive solicitation process during the transition to the revised regional transmission planning process.

61. We disagree with the arguments by NEPOOL, LS Power, and Energy New England and Two Systems that Filing Parties’ proposal to grandfather both Planned and Proposed projects does not comply with the requirements of Order No. 1000 and the First Compliance Order. Furthermore, we disagree with protesters that the requirements of Order No. 1000 must in all cases apply to Proposed projects. Although a Proposed project must still undergo additional review to determine if there are significant adverse effects on reliability or operability,<sup>83</sup> we find that exempting Proposed projects is consistent with Order No. 1000’s directive that the requirements of Order No. 1000 “apply to new transmission facilities, which are those transmission facilities that are subject to evaluation or reevaluation, as the case may be, within a public utility transmission provider’s local or regional transmission planning process after the effective date of the public utility transmission provider’s filing adopting the relevant requirements of [Order No. 1000].”<sup>84</sup> According to Filing Parties, Proposed projects will have already begun the existing evaluation process prior to the effective date of the Order No. 1000-compliant OATT, which includes a Solutions Study process involving stakeholders. We accept Filing Parties’ claim that it would be disruptive to require ISO-NE to halt the evaluation of Proposed projects mid-stream under the existing process. Moreover, Filing Parties’ revisions state that, if ISO-NE is reevaluating the solution design of a Proposed project as of the effective date, or subsequently determines that the solution design for such a project requires reevaluation, then the revised transmission planning process would apply to the Proposed project, including the competitive solicitation process.<sup>85</sup>

62. We find Filing Parties’ proposed enrollment process, which provides that an entity makes the choice to become part of the ISO-NE transmission planning region by becoming a Participating Transmission Owner Qualified Sponsor or non-Participating Transmission Owner Qualified Sponsor, does not comply with the requirements of Order No. 1000. As the Commission explained in the First Compliance Order, public utility

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<sup>82</sup> *Id.* § 3.6(a) (Elements of the Regional System Plan Project List).

<sup>83</sup> ISO-NE, Transmission, Markets and Services Tariff, § I.3.9 (Review of Market Participant’s Proposed Plans) (4.0.0).

<sup>84</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 65.

<sup>85</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 3.3.

transmission providers in each transmission planning region must have a clear enrollment process that defines how entities, including non-public utility transmission providers, make the choice to become part of the transmission planning region and, thus, become eligible to be allocated costs under the regional cost allocation method.<sup>86</sup> Linking enrollment to being a Qualified Sponsor captures only a narrow subset of entities that may want to enroll in the ISO-NE transmission planning region. In addition, public utility transmission providers have an obligation under Order No. 1000 to participate in a regional transmission planning process. Public utility transmission providers that intend to satisfy this obligation by participating in the ISO-NE transmission planning region must enroll, and should not wait until they are deemed a Participating Transmission Owner Qualified Sponsor. Furthermore, we note that having a clear enrollment process provides certainty regarding who is a potential beneficiary that may be allocated costs.<sup>87</sup> One way that Filing Parties may satisfy the requirement to have a clear enrollment process is to use ISO-NE's existing process to become a member of ISO-NE as the process to enroll in the ISO-NE transmission planning region. Accordingly, we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further compliance filing to set forth in the ISO-NE OATT the enrollment process that defines how transmission providers enroll in the transmission planning region.

63. In addition, Filing Parties have proposed a blank list of entities that have enrolled in the ISO-NE Order No. 1000 regional transmission planning process. Order No. 1000 requires public utility transmission providers in each transmission planning region to include in its OATT a list of all the public utility and non-public utility transmission providers that have enrolled as transmission providers in its transmission planning region. That list must include, at a minimum, the public utility transmission providers in ISO-NE, which Order No. 1000 requires to participate in a transmission planning region and that the Commission assumed would be enrolled when it made the finding in the First Compliance Order that the ISO-NE transmission planning region is of sufficient scope to comply with Order No. 1000. Accordingly, we direct Filing Parties to submit, within

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<sup>86</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 27 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at PP 275).

<sup>87</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 275.

60 days of the date of issuance of this order, a further compliance filing that includes a list of enrolled transmission providers in the ISO-NE OATT.<sup>88</sup>

64. Finally, we find that Filing Parties' revisions to the Operating Agreement comply with the Commission's directive to remove language from section 1.4 of Schedule 3.09(a) that provides that the revisions to Schedule 3.09(a) become effective only if the Commission does not modify the Operating Agreement, or if any directed modifications are supported by ISO-NE and a sufficient vote of Participating Transmission Owners.

**b. Order No. 890 and Other Regional Transmission Planning Process General Requirements**

65. Order No. 1000 required that the regional transmission planning process result in a regional transmission plan<sup>89</sup> and satisfy the Order No. 890 transmission planning principles of (1) coordination, (2) openness, (3) transparency, (4) information exchange, (5) comparability, (6) dispute resolution, and (7) economic planning.<sup>90</sup>

**i. First Compliance Order**

66. In the First Compliance Order, the Commission found that Filing Parties' proposal complied with the openness, coordination, information exchange, dispute resolution, and economic studies transmission planning principles.<sup>91</sup> However, the Commission directed Filing Parties to submit a compliance filing to address certain deficiencies in ISO-NE's transmission planning process related to the transparency and comparability transmission planning principles.<sup>92</sup>

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<sup>88</sup> For example, the enrollment process may comprise those specific procedures an entity must complete to become a member of an RTO/ISO. *E.g.*, *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 (2013); *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 (2013); *Sw. Power Pool, Inc.*, 144 FERC ¶ 61,059 (2013); *Cal. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,057 (2013).

<sup>89</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 147.

<sup>90</sup> *Id.* PP 146, 151. These transmission planning principles are explained more fully in Order No. 890.

<sup>91</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 45.

<sup>92</sup> *Id.*

67. The Commission found that the existing framework of the Needs Assessment Study Group might be inconsistent with the transparency principle of Order No. 1000.<sup>93</sup> The Commission explained that excluding nonincumbent transmission developers that have experienced transmission planning staff and intend to build transmission projects in the ISO-NE transmission planning region from the Needs Assessment Study Groups makes it more difficult for such developers to propose transmission projects than it would be if they were permitted to participate. The Commission explained that nonincumbent transmission developers would be unable to engage in the interactive dialogue that takes place among transmission planning engineers as they develop the stressed base cases, specific transmission knowledge, and understanding of the transmission needs, as well as access to the development of the actual models and study files.<sup>94</sup> Accordingly, the Commission directed Filing Parties to revise the definition of “affected stakeholders” who participate in the Needs Assessment Study Groups to allow participation by (1) technically-qualified staff of ISO-NE market participants, and (2) other stakeholders that have an interest in, and are technically qualified to contribute to, the Needs Assessment. The Commission also directed Filing Parties to explain how ISO-NE will resolve disputes over whether a stakeholder is technically qualified.<sup>95</sup>

68. With respect to Filing Parties’ proposal to comply with the comparability principle through existing language in section 4.2 of Attachment K to ISO-NE’s OATT, the Commission noted that it previously had found ISO-NE to be in compliance with the comparability transmission planning principle. However, the Commission noted that Filing Parties had proposed to limit the applicability of section 4.2 to those Reliability Transmission Upgrades needed in five years or less or to those other Reliability Transmission Upgrades or Market Efficiency Transmission Upgrades for which the relevant Participating Transmission Owner has offered the only solution. As a result of this more limited scope, the Commission directed Filing Parties to explain how ISO-NE will satisfy the comparability principle with respect to all types of projects (i.e., Reliability Transmission Upgrades needed in more than five years, Market Efficiency Transmission Upgrades, and Public Policy Transmission Upgrades).<sup>96</sup>

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<sup>93</sup> *Id.* P 46.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* P 47.

<sup>96</sup> *Id.* P 50.

ii. **Requests for Rehearing or Clarification**

(a) **Summary of Requests for Rehearing or Clarification**

69. ISO-NE seeks rehearing of the Commission's decision to expand the definition of affected stakeholders who may participate in a Needs Assessment Study Group to allow participation by qualified staff of ISO-NE market participants and other technically qualified stakeholders.<sup>97</sup> ISO-NE asserts that its existing Needs Assessment Study Group process already has been found compliant with Order No. 890. Furthermore, ISO-NE asserts that the Needs Assessment Study Group process was not changed as part of the First Compliance Filing and that this process can only be changed under FPA section 206, either through a complaint or upon the Commission's initiative, where the complaining party or the Commission is able to meet the burden of showing that (1) the existing process is not just and reasonable, and (2) the change imposed is just and reasonable.<sup>98</sup> ISO-NE states that no such complaint was submitted and no such showing was made by the Commission. Accordingly, ISO-NE contends that this issue is outside the scope of compliance with Order No. 1000 and, consequently, is not a compliance obligation that can be imposed in the First Compliance Order.<sup>99</sup>

70. ISO-NE also states that the First Compliance Order does not explain how the Needs Assessment Study Group process can be legally opened to all entities with interest and technical qualification without violation of the ISO-NE Information Policy<sup>100</sup> or Order No. 889 and the Commission's Standards of Conduct.<sup>101</sup> The ISO-NE Information Policy establishes rules and guidelines regarding the appropriate disclosure of information received, created, and distributed in connection with the operation of and participation in the markets administered by ISO-NE, and ensures that appropriate

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<sup>97</sup> ISO-NE Request for Rehearing at 74.

<sup>98</sup> *Id.* at 75.

<sup>99</sup> *Id.* at 76.

<sup>100</sup> ISO-NE, Transmission, Markets and Services Tariff, Section IV, Attachment D (ISO-NE Information Policy) (14.0.0).

<sup>101</sup> ISO-NE Request for Rehearing at 76 (referring to *Open-Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996); *order on reh'g*, Order No. 889-A, FERC Stats & Regs. ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997)).

confidentiality will be maintained. ISO-NE states that the Needs Assessment Study Group process relies heavily on confidential non-public transmission system information and that its existing Information Policy is inadequate to resolve the issues that would be raised by disclosing non-public transmission system information to interested market entities. Additionally, ISO-NE argues that if the process is opened to all technically qualified stakeholders, compliance with Order No. 889's required separation of transmission and merchant functions and the Commission's Standards of Conduct and the No Conduit Rule prohibiting disclosure of non-public transmission information to marketing employees would be severely jeopardized and unmanageable.<sup>102</sup>

71. Finally, ISO-NE argues that the First Compliance Order misunderstood the role or the transparency of the study groups. ISO-NE explains that the Needs Assessment is started by first announcing the study and then conducting open discussions regarding study assumptions. ISO-NE points out that even though it performs the study with a study group made up of the local affected transmission owners, it keeps the Planning Advisory Committee informed by taking the information back to the Planning Advisory Committee at each iteration and explaining the study results. ISO-NE re-iterates that it makes publicly available all study models to participants upon request, and posts them whenever they are requested.<sup>103</sup> Accordingly, ISO-NE contends that its process is already transparent and that it provides stakeholders with all the relevant information throughout the process, except for information restricted by the Commission-approved Information Policy.<sup>104</sup>

**(b) Commission Determination**

72. We affirm the finding in the First Compliance Order that the existing framework of the Needs Assessment Study Group is inconsistent with the transparency principle of Order No. 1000 and thus deny ISO-NE's request for rehearing. As a threshold matter, ISO-NE states that the Needs Assessment Study Group process can only be changed under FPA section 206, where the complaining party or the Commission is able to meet the burden of showing that the existing process is not just and reasonable and the change imposed is just and reasonable. We note that this Order No. 1000 compliance proceeding is a section 206 proceeding. When the Commission considered ISO-NE's Needs Assessment Study Group process in light of Order No. 1000's requirements, it concluded that changes are necessary for the process to be compliant with Order No. 1000. Here,

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<sup>102</sup> *Id.* at 77 (citing Order No. 889, FERC Stats. & Regs ¶ 31,035 at 31,595).

<sup>103</sup> *Id.* at 78-79.

<sup>104</sup> *Id.* at 77-78.

the Commission found that, in light of the changes the Commission required in Order No. 1000, the existing structure of the Needs Assessment Study Group was unjust and unreasonable and therefore directed ISO-NE to make further OATT revisions to make that structure just and reasonable and thus compliant with Order No. 1000. Accordingly, we disagree with ISO-NE that the Commission acted impermissibly under section 206 of the FPA.

73. That the Commission previously found ISO-NE compliant with the Order No. 890 transmission planning principles, including the transparency principle, does not bar the Commission from ordering these changes to the Needs Assessment Study Group process. The Commission now has a duty in this proceeding to ensure that public utility transmission providers continue to comply in light of the changes required by Order No. 1000. Here, the Commission reasonably found that changes were necessary for Filing Parties to comply with the transparency principle.

74. We are not persuaded by ISO-NE's argument that the First Compliance Order's directive will result in a violation of Order No. 889, which requires "separation of transmission and merchant functions," and the Commission's Standards of Conduct, which requires that transmission employees function independently of marketing employees.<sup>105</sup> In particular, ISO-NE does not explain how permitting participation in the Needs Assessment Study Group by technically qualified stakeholders would violate any separation of functions or Standards of Conduct requirements. These requirements continue to apply and we find no convincing basis to conclude that the directive in the First Compliance Order would contravene these requirements.

75. We also disagree with ISO-NE's argument that the Commission's directive in the First Compliance Order will result in a violation of the "no conduit" rule through the disclosure of non-public transmission system information to marketing employees, and that such a disclosure will create a chain reaction of publishing all confidential transmission system information in New England to all stakeholders to ensure fairness. ISO-NE states that it already makes available all system models and files necessary to reproduce all system needs upon request, subject to parties meeting the requirements of Critical Energy Infrastructure Information (CEII) and ISO-NE's Information Policy. As it relates to the no conduit rule, we see no substantive difference between providing any interested stakeholders all necessary information that is required to fully understand and accurately model the transmission system needs (subject to meeting CEII and Information Policy restrictions) upon completion of the Needs Assessment Study and

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<sup>105</sup> Order No. 889, FERC Stats. & Regs. ¶ 31,035; *order on reh'g*, Order No. 889-A, FERC Stats & Regs. ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253.

providing such information to all technically qualified stakeholders during the Needs Assessment Study Group process.

76. Finally, we disagree with ISO-NE's argument that the Needs Assessment Study Group process is already transparent and find that it is not sufficient to comply with the transparency principle. This Needs Assessment Study Group process potentially involves important discussions among participants as well as the performance of interim studies to better understand and quantify system needs.<sup>106</sup> The information gained from this work potentially puts entities that are allowed to participate in the Needs Assessment Study Group at an advantage for developing and proposing a regulated transmission solution, as compared to those entities that would not be allowed to participate under ISO-NE's existing procedures. Therefore, we deny ISO-NE's request for rehearing.

### iii. Compliance

#### (a) Summary of Compliance Filing

77. Filing Parties propose to discontinue the use of the smaller Needs Assessment Study Groups and instead allow all interested participants of the Planning Advisory Committee to support ISO-NE's performance of Needs Assessments.<sup>107</sup> Filing Parties propose that ISO-NE will post on its website the models, files, cases, contingencies, assumptions, and other information used to perform Needs Assessments. Additionally, to ensure that sensitive material is not disclosed in an inappropriate fashion, Filing Parties propose to have ISO-NE establish requirements that any Participating Transmission Owner or member of the Planning Advisory Committee must satisfy in order to access certain information considered CEII or addressed in the ISO-NE Information Policy. The proposed revisions also allow ISO-NE to ask Participating Transmission Owners or other Planning Advisory Committee members with special expertise to provide technical support or perform studies required to assess a potential need.<sup>108</sup> Filing Parties' proposed revisions require that these entities will provide, and ISO-NE will post, the models, files, cases contingencies, assumptions, and other information used by the entities ISO-NE requests to perform such studies.<sup>109</sup> Finally, Filing Parties' proposed revisions require that ISO-NE post draft results of Needs Assessment studies on ISO-NE's website and

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<sup>106</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0) § 4.1(g) (Needs Assessment Support).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

that ISO-NE convene meetings that are open to any representative of an entity that is a member of the Planning Advisory Committee in order to facilitate input on draft Needs Assessment studies prior to ISO-NE's completion of a draft Needs Assessment report.<sup>110</sup>

78. In response to the Commission's directive to demonstrate compliance with the comparability transmission planning principle with respect to all types of projects (and not just certain reliability projects), Filing Parties propose to move the provision that the Commission previously found complied with the comparability principle so that it is now located in a section of the OATT that applies to both reliability and market efficiency projects.<sup>111</sup> In addition, Filing Parties also propose to add an essentially identical comparability provision to the section of the OATT related to public policy projects.<sup>112</sup>

**(b) Protests/Comments**

79. New Hampshire Transmission argues that Filing Parties' proposal to eliminate Needs Assessment Study Groups does not comply with the First Compliance Order and raises two significant problems. First, New Hampshire Transmission argues that using the Planning Advisory Committee for what small, technical teams do today would be ineffective and would greatly slow down the planning process.<sup>113</sup> According to New Hampshire Transmission, existing study groups are small in size (comprised of technical staff from ISO-NE and affected transmission owners, which review results and debate assumptions and modeling techniques on weekly calls). In contrast, according to New Hampshire Transmission, the Planning Advisory Committee has 30 or more members that meet less frequently (once a month) and that not every Planning Advisory Committee member is likely to be interested in every project.<sup>114</sup> Second, New Hampshire Transmission argues that Filing Parties' proposal indicates that the review by the Planning Advisory Committee would occur after ISO-NE has already worked on details of the solution with selected parties, i.e., Participating Transmission Owners, and, thus, preserves the privileged position of the Participating Transmission Owner in Needs Assessments and solution development.<sup>115</sup> To remedy this problem, New Hampshire

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* § 4.1(f) (Treatment of Market Solutions in Needs Assessments).

<sup>112</sup> *Id.* § 4A.3(b) (Treatment of Market Solutions in Needs Assessments).

<sup>113</sup> New Hampshire Transmission Protest at 12.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 13.

Transmission states that any communications with Participating Transmission Owners or others must be noticed ahead of time and interested stakeholders, particularly those that are developing solutions to address the transmission need, must be allowed to attend any such meetings.<sup>116</sup> Accordingly, New Hampshire Transmission states that the Commission should reject Filing Parties' proposal to eliminate Needs Assessment Study Groups and direct Filing Parties to adopt its proposed language to ISO-NE's Attachment K.<sup>117</sup>

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<sup>116</sup> *Id.* at 14.

<sup>117</sup> New Hampshire Transmission proposes to revise section 4.1(g) as follows:

For the development of the Needs Assessments, the ISO will coordinate with ~~the PTOs~~ all QTPSs and the Planning Advisory Committee to support the ISO's performance of Needs Assessments. Participation in such study groups is voluntary and is intended to provide an opportunity to stakeholders for early involvement in the regional planning process. To facilitate this support, the ISO will post on its website the models, files, cases, contingencies, assumptions and other information used to perform Needs Assessments. The ISO may establish requirements that any QTPS ~~PTO~~ or member of the Planning Advisory Committee must satisfy in order to access certain information used to perform Needs Assessments, due to ISO New England Information Policy and CEII constraints. The ISO may form Needs Assessment study groups which shall include on a voluntary basis, all Qualified Transmission Project Sponsors or Planning Advisory Committee members with special expertise, to provide technical support or to assist ISO-NE in ~~The ISO may ask PTOs or Planning Advisory Committee members with special expertise to provide technical support or performing~~ performing studies required to assess one or more potential needs that will be considered in the Needs Assessments process. These entities will provide, and the ISO will post on its website, the models, files, cases, contingencies, assumptions and other information used by those entities to assist ISO-NE in performing ~~perform~~ studies. The ISO will post the draft results of any such Needs Assessment studies on its website. The ISO will convene meetings open to any representative of

(continued ...)

80. NEPOOL states that Filing Parties' proposed revisions fail to provide comparable treatment of potential transmission developers with respect to consultation with ISO-NE regarding transmission Needs Assessments and Solution Studies.<sup>118</sup> Specifically, it contends that the proposed language puts non-Participating Transmission Owners in a less favorable position than Participating Transmission Owners by expressly authorizing ISO-NE to involve Participating Transmission Owners in informal coordination without authorizing the involvement of other Qualified Sponsors in the exchange of information with ISO-NE regarding transmission Needs Assessments and Solution Studies.<sup>119</sup> NEPOOL states that the Commission should require Filing Parties to adopt New Hampshire Transmission's proposed revisions to sections 4.1 and 4.2 ISO-NE's Attachment K, which it states are intended to ensure that ISO-NE places all Qualified Sponsors on an equal footing.<sup>120</sup>

(c) **Answer**

81. ISO-NE states that NEPOOL's and New Hampshire Transmission's proposed changes to sections 4.1 and 4.2 of ISO-NE's Attachment K should be rejected because they go beyond the compliance directive in the First Compliance Order, do not make sense in the context of that OATT provision, and are unnecessary.<sup>121</sup> ISO-NE argues that it is unnecessary to replace "[Participating Transmission Owners] and the Planning

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an entity that is a member of the Planning Advisory Committee to facilitate input on draft Needs Assessments studies and the inputs to those studies prior to the ISO's completion of a draft Needs Assessment report to be reviewed by the entire Planning Advisory Committee pursuant to Section 4.1(i) of this Attachment. All provisions of this subsection (g) relating to the provision and sharing of information shall be subject to the ISO-NE Information Policy.

*Id.* at 14. New Hampshire Transmission also proposes similar revisions to section 4.2(a) of ISO-NE's Attachment K.

<sup>118</sup> NEPOOL Comments at 12.

<sup>119</sup> *Id.* at 15-16.

<sup>120</sup> *Id.* at 16.

<sup>121</sup> ISO-NE Answer at 10.

Advisory Committee” with “all [Qualified Sponsors] and the Planning Advisory Committee,” because it believes that all Qualified Sponsors will certainly be members of the Planning Advisory Committee.<sup>122</sup> ISO-NE further states that the Commission should reject NEPOOL and New Hampshire Transmission’s proposed revisions because the use of the Planning Advisory Committee is consistent with the First Compliance Order. In addition, ISO-NE states that NEPOOL’s and New Hampshire Transmission’s proposed changes to section 4.2(a) are unnecessary, because section 4.2 deals solely with situations in which only Participating Transmission Owner Qualified Sponsors will be providing the solutions.<sup>123</sup> ISO-NE further states that even if there were such a need, the proposed changes are unnecessary because the existing language already accommodates participation by non-Participating Transmission Owner Qualified Sponsors.

82. ISO-NE disagrees with New Hampshire Transmission’s contention that the Planning Advisory Committee has a different objective and scope from the existing Needs Assessment Study Group. It states that its OATT makes plain that the scope of the Planning Advisory Committee’s role includes providing “input and feedback . . . concerning . . . development of . . . Needs Assessments.”<sup>124</sup> Additionally, it disagrees with New Hampshire Transmission’s protest that use of the Planning Advisory Committee to support Needs Assessment development is inefficient and argues that members of the committee are free to participate only in the agenda items in which they have interest.<sup>125</sup>

83. Finally, with respect to concerns that an inability to participate in study groups would prevent access to the development of the actual models and study files, which a non-incumbent transmission developer may need to reproduce a transmission need for which a solution is sought, ISO-NE states that Filing Parties’ proposal addresses this concern by requiring all that models, files, cases, contingencies, assumptions, and other information used by any entity to perform a study must be disclosed.<sup>126</sup> ISO-NE claims that simply permitting ISO-NE to call upon Participating Transmission Owners or Planning Advisory Committee members (which will include Qualified Sponsors) to

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<sup>122</sup> *Id.* at 11.

<sup>123</sup> *Id.* at 14.

<sup>124</sup> *Id.* at 12 (citing ISO-NE, Transmission, Markets and Services Tariff, Attachment K (7.0.0), § 2.2 (Role of Planning Advisory Committee)).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 13.

provide technical support or perform studies in no way portends the formation of *de facto* Participating Transmission Owner-only study groups.<sup>127</sup>

**(d) Commission Determination**

84. We find the Filing Parties' tariff revisions clarify that the provisions the Commission previously found in compliance with the comparability principle now explicitly apply to reliability, market efficiency, and public policy projects rather than just to certain reliability projects. Hence, we find the Filing Parties' proposal complies with the comparability principle.

85. We find that Filing Parties' proposed revisions also comply with the Commission's directive to revise the definition of "affected stakeholders" who participate in the Needs Assessment Study Groups to allow participation by (1) technically-qualified staff of ISO-NE market participants, and (2) other stakeholders that have an interest in, and are technically qualified to contribute to, the Needs Assessment.<sup>128</sup> ISO-NE proposes to eliminate the Needs Assessment Study Groups and instead allow any interested stakeholder to participate in the full Needs Assessment process through the Planning Advisory Committee. In addition, ISO-NE may ask both Participating Transmission Owners and Planning Advisory Committee members with special expertise to provide technical support or perform studies required to assess one or more potential needs that will be considered in the Needs Assessments process. If ISO-NE requests support from a Participating Transmission Owner and/or a member of the Planning Advisory Committee, ISO-NE will post the models, files, cases, contingencies, assumption and other information used by those entities to perform the requested studies. ISO-NE will also convene a meeting to facilitate input from the Planning Advisory Committee on the draft Needs Assessment studies and the inputs to those studies prior to ISO-NE completing a draft Needs Assessment report, with such report also being subject to review by the Planning Advisory Committee. We find that, with these changes, ISO-NE OATT now complies with the transparency principle.

86. We disagree with New Hampshire Transmission's and NEPOOL's proposal to replace Participating Transmission Owners with "Qualified Transmission Project Sponsors" in the proposed tariff language. As ISO-NE explains in its answer, it is unnecessary to specifically list Qualified Sponsors because the proposed language also refers to members of the Planning Advisory Committee and membership in that

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<sup>127</sup> *Id.*

<sup>128</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 47.

committee is open to any interested stakeholder, including any Qualified Sponsor.<sup>129</sup> We also disagree with New Hampshire Transmission's concern that opening the entire Needs Assessment process to members of the Planning Advisory Committee may lead to an ineffective study that would greatly slow down the planning process.<sup>130</sup> New Hampshire Transmission is correct that completion of the Needs Assessment Study in an accurate and timely manner is important, but it has not shown that the proposed process will lead to significant or material delays.

c. **Requirement to Plan on a Regional Basis to Identify More Efficient or Cost-Effective Transmission Solutions**

87. Through the regional transmission planning process, public utility transmission providers must evaluate, in consultation with stakeholders, alternative transmission solutions that might meet the needs of the transmission planning region more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning process.<sup>131</sup> Public utility transmission providers have the flexibility to develop, in consultation with stakeholders, procedures by which the public utility transmission providers in the transmission planning region identify and evaluate the set of potential solutions that may meet the region's needs more efficiently or cost-effectively.<sup>132</sup> In addition, whether or not public utility transmission providers within a transmission planning region select a transmission facility in the regional transmission plan for purposes of cost allocation will depend in part on their combined view of whether the transmission facility is a more efficient or cost-effective solution to their needs.<sup>133</sup>

88. Public utility transmission providers in each transmission planning region, in consultation with stakeholders, must propose what information and data a merchant transmission developer<sup>134</sup> must provide to the regional transmission planning process to

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<sup>129</sup> See ISO-NE Answer at 11.

<sup>130</sup> New Hampshire Transmission Protest at 13.

<sup>131</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 148.

<sup>132</sup> *Id.* P 149.

<sup>133</sup> *Id.* P 331.

<sup>134</sup> Order No. 1000 defines merchant transmission projects as projects “for which the costs of constructing the proposed transmission facilities will be recovered through negotiated rates instead of cost-based rates.” *Id.* P 119.

allow the public utility transmission providers in the transmission planning region to assess the potential reliability and operational impacts of the merchant transmission developer's proposed transmission facilities on other systems in the region.<sup>135</sup>

89. Finally, the regional transmission planning process developed by public utility transmission providers, in consultation with stakeholders, must result in a regional transmission plan that reflects the determination of the set of transmission facilities that more efficiently or cost-effectively meet the region's transmission needs.<sup>136</sup> Order No. 1000 does not require that the resulting regional transmission plan be filed with the Commission.

**i. First Compliance Order**

90. In the First Compliance Order, the Commission found that the regional transmission planning process specified in Filing Parties' First Compliance Filing partially complied with the requirements of Order No. 1000.<sup>137</sup> With respect to Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades, the Commission found that, through the procedures set forth in its Attachment K, ISO-NE will conduct a transmission planning process that produces a regional transmission plan that meets the needs of the transmission planning region more efficiently or cost-effectively. The Commission therefore found that, with respect to Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades, these OATT provisions satisfy Order No. 1000's requirement that public utility transmission providers establish a regional transmission planning process that culminates in a regional transmission plan that includes the more efficient or cost-effective solutions to the region's transmission needs.<sup>138</sup>

91. However, the Commission found that Filing Parties' standard of identifying the "most cost-effective and reliable" solution to meet an identified need in section 4.2 appeared to be inconsistent with Order No. 1000's standard of identifying "more efficient or cost-effective" transmission solutions, particularly as section 4.2 addresses, in some circumstances, not just Reliability Transmission Upgrades but also Market Efficiency Transmission Upgrades. By contrast, the Commission found that the standard set forth in

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<sup>135</sup> *Id.* P 164; Order No. 1000-A, 139 FERC ¶ 61,132 at PP 297-298.

<sup>136</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 147.

<sup>137</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 64.

<sup>138</sup> *Id.* P 65.

section 4.3 that requires ISO-NE to identify the solution “that offers the best combination of electrical performance, cost, future system expandability, and feasibility to meet the need in the required time frame” is consistent with Order No. 1000’s standard because it looks to a broader set of factors.<sup>139</sup> The Commission therefore directed Filing Parties to remove the language in section 4.2 referencing the “cost-effective and reliable” standard and replace it with the standard set forth in section 4.3 of identifying the solution “that offers the best combination of electrical performance, cost, future system expandability, and feasibility to meet the need in the required time frame.”<sup>140</sup>

92. The Commission also found that the First Compliance Filing complied with Order No. 1000 regarding merchant transmission developer information requirements.<sup>141</sup> In addition, while the Commission encouraged Filing Parties and their stakeholders to continue to explore options to improve the regional transmission planning and cost allocation processes, it found that Filing Parties’ approach of conducting separate analyses of Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades and Public Policy Transmission Upgrades was consistent with Order No. 1000.<sup>142</sup>

## ii. Compliance

93. Filing Parties state that they revised the ISO-NE OATT to replace the proposed “cost-effective and reliable” standard for identification of reliability solutions developed using the existing solutions study process with section 4.3(h)’s standard of identifying the solution “that offers the best combination of electrical performance, cost, future system expandability, and feasibility to meet the need in the required time frame”, as required in the First Compliance Order.<sup>143</sup>

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<sup>139</sup> *Id.* P 66.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* P 70.

<sup>142</sup> *Id.* P 68. The Commission also found that Filing Parties’ proposed regional transmission planning process for Public Policy Transmission Upgrades did not comply with Order No. 1000’s requirements. *Id.* P 67.

<sup>143</sup> Second Compliance Filing at 18 (citing ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.2(a)).

**iii. Protests/Comments**

94. New Hampshire Transmission states that ISO-NE should consider all relevant project costs when it makes the project selection, including capital costs, operation and maintenance costs, the costs of congestion associated with outages when a project is constructed, and the positive cost impact of when a project will go into operation. New Hampshire Transmission also states that ISO-NE's planning procedures already contain a set of factors for comparing alternative solutions, and that these factors should be embedded in the tariff rather than be left to the secondary materials that are not reviewed by the Commission.<sup>144</sup>

**iv. Answer**

95. ISO-NE states that the Commission should dismiss New Hampshire Transmission's concerns regarding the degree to which "overall cost" and "all relevant project costs" will be considered by ISO-NE as they go beyond compliance and because the cost-related points raised by New Hampshire Transmission are out of sync with the directives of the First Compliance Order. ISO-NE states that in the First Compliance Order the Commission accepted as the governing selection standard, "the project that offers the best combination of electrical performance, cost, future system expandability and feasibility to meet the need in the required timeframe," mandated its use in section 4.2, and thus required a balanced consideration of factors in addition to cost.<sup>145</sup>

**v. Commission Determination**

96. We find that the proposed revision to section 4.2(a) of the ISO-NE OATT to replace the "cost-effective and reliable" standard for identification of reliability solutions developed using the existing solutions study process, with the standard in section 4.3 of the ISO-NE OATT, complies with our directive in the First Compliance Order.

97. Moreover, we find New Hampshire Transmission's protest to be beyond the scope of the First Compliance Order. Specifically, New Hampshire Transmission's concerns regarding the degree to which "overall cost" and "all relevant project costs" will be considered by ISO-NE go beyond what the Commission directed on compliance. In addition, in the First Compliance Order, we accepted Filing Parties' proposal to consider factors in addition to cost, such as electrical performance, future system expandability, and feasibility to meet the need in the required timeframe, and mandated the

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<sup>144</sup> New Hampshire Transmission Protest at 21-22.

<sup>145</sup> ISO-NE Answer at 20.

consideration of these factors in ISO-NE's OATT. Therefore, we reject New Hampshire Transmission's protest on this issue.

**d. Consideration of Transmission Needs Driven by Public Policy Requirements**

98. Order No. 1000 required public utility transmission providers to amend their OATTs to include procedures for the consideration of transmission needs driven by public policy requirements in both the local and regional transmission planning processes.<sup>146</sup> Public policy requirements are requirements established by local, state or federal laws or regulations (i.e., enacted statutes passed by the legislature and signed by the executive and regulations promulgated by a relevant jurisdiction, whether within a state or at the federal level).<sup>147</sup>

99. The Commission in Order No. 1000 explained that, to consider transmission needs driven by public policy requirements, public utility transmission providers must adopt procedures to (1) identify transmission needs driven by public policy requirements and (2) evaluate potential solutions to meet those identified needs.<sup>148</sup> More specifically, public utility transmission providers must adopt procedures in their local and regional transmission planning processes for identifying transmission needs driven by public policy requirements that give all stakeholders a meaningful opportunity to provide input and to offer proposals regarding what they believe are transmission needs driven by public policy requirements.<sup>149</sup> Each public utility transmission provider must explain how it will determine at both the local and regional level, the transmission needs driven by public policy requirements for which solutions will be evaluated<sup>150</sup> and must post on its website an explanation of: (1) those transmission needs driven by public policy requirements that were identified for evaluation for potential solutions in the local and

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<sup>146</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 203.

<sup>147</sup> *Id.* P 2. Order No. 1000-A clarified that Public Policy Requirements included local laws and regulations passed by a local governmental entity, such as a municipal or county government. Order No. 1000-A, 139 FERC ¶ 61,132 at P 319.

<sup>148</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 205.

<sup>149</sup> *Id.* PP 206-209; Order No. 1000-A, 139 FERC ¶ 61,132 at P 335.

<sup>150</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 208-209.

regional transmission planning processes and (2) why other proposed transmission needs driven by public policy requirements were not selected for further evaluation.<sup>151</sup>

100. Order No. 1000 also required public utility transmission providers, in consultation with stakeholders, to evaluate at the local and regional level potential solutions to identified transmission needs driven by public policy requirements, including transmission facilities proposed by stakeholders.<sup>152</sup> The evaluation procedures must give stakeholders the opportunity to provide input and enable the Commission and stakeholders to review the record created by the process.<sup>153</sup>

i. **Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in the Regional Transmission Planning Process**

(a) **First Compliance Order**

101. The Commission found that Filing Parties' compliance filing partially complied with the provisions of Order No. 1000 addressing transmission needs driven by public policy requirements. The Commission found that Filing Parties did not propose a definition of public policy requirements in ISO-NE's OATT.<sup>154</sup> Thus, the Commission directed Filing Parties to submit a further compliance filing revising ISO-NE's OATT to include a definition of public policy requirements consistent with the definition of public policy requirements set forth in Order No. 1000, and noted that Filing Parties may, but are not required to, include potential future public policy directives and requirements in their proposed definition of public policy requirements.<sup>155</sup>

102. The Commission also found that Filing Parties partially complied with the requirement to establish procedures for identifying transmission needs driven by public policy requirements in ISO-NE's regional transmission planning process. Specifically,

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<sup>151</sup> *Id.* P 209; *see also* Order No. 1000-A, 139 FERC ¶ 61,132 at P 325.

<sup>152</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 211 & n.191.

<sup>153</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at PP 320-321.

<sup>154</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 109 (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 2, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 319).

<sup>155</sup> *Id.*

the Commission found that ISO-NE's regional transmission planning process, as described in Attachment K of ISO-NE's OATT, satisfies Order No. 1000's requirement that public utility transmission providers establish procedures in their OATTs for identifying transmission needs driven by public policy requirements that allow stakeholders an opportunity to provide input and to offer proposals regarding the transmission needs they believe are driven by public policy requirements.<sup>156</sup>

103. The Commission further found that Filing Parties' proposal complied with Order No. 1000's requirement that public utility transmission providers establish a just and reasonable and not unduly discriminatory process through which public utility transmission providers will identify, out of the larger set of transmission needs driven by public policy requirements proposed, those needs for which transmission solutions will be evaluated. The Commission found that Filing Parties' proposal to rely on NESCOE to identify transmission needs driven by federal and state public policy requirements is consistent with the Commission's determination in Order No. 1000 that public utility transmission providers may rely on a committee of state regulators to identify transmission needs driven by public policy requirements.<sup>157</sup> The Commission also noted that ISO-NE's OATT requires it to post NESCOE's explanation of which transmission needs driven by public policy requirements ISO-NE will evaluate for potential solutions and why other suggested transmission needs will not be evaluated.<sup>158</sup>

104. With respect to federal public policies not identified by NESCOE, the Commission found that section 4A.1.1 of Attachment K of the ISO-NE OATT, which would allow ISO-NE, at the request of stakeholders or based on its own findings, to study federal public policies not identified by NESCOE, was reasonable and consistent with Order No. 1000. However, the Commission found that Filing Parties partially complied with Order No. 1000's requirement that each public utility transmission provider post on its website an explanation of: (1) those transmission needs driven by public policy requirements that have been identified for evaluation for potential transmission solutions in the regional transmission planning process and (2) why other suggested transmission needs driven by public policy requirements will not be evaluated. The Commission found that Filing Parties did not meet this posting requirement with respect to

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<sup>156</sup> *Id.* P 110.

<sup>157</sup> *Id.* P 111.

<sup>158</sup> *Id.* P 114. The Commission further noted that, while ISO-NE may rely on NESCOE to provide the written explanation that ISO-NE will post, should NESCOE choose not to provide such statement, ISO-NE must submit an alternative proposal to comply with this requirement of Order No. 1000. *Id.* P 114 n.214.

transmission needs driven by federal public policy requirements that are not identified by NESCOE. The Commission required that Filing Parties amend the ISO-NE OATT to provide for a means of posting on ISO-NE's website an explanation of (1) those transmission needs driven by federal public policy requirements not identified by NESCOE that have been identified for evaluation for potential transmission solutions in the regional transmission planning process and (2) why other suggested transmission needs driven by federal public policy requirements not identified by NESCOE will not be evaluated.<sup>159</sup>

105. In addition, the Commission found that section 4A.1.1 was not transparent with respect to the steps that ISO-NE will take after receiving input from states and stakeholders regarding transmission needs driven by federal public policy requirements not identified by NESCOE. Specifically, the Commission found that it was unclear whether any such identified needs will be open to a competitive solicitation process, as set forth in sections 4A.5 through 4A.9 of Attachment K, or whether ISO-NE may use other means to address such needs. The Commission therefore required Filing Parties to make a compliance filing revising section 4A.4 to describe the process through which ISO-NE will evaluate at the regional level potential solutions to identified transmission needs driven by federal public policy requirements not identified by NESCOE, as required by Order No. 1000.<sup>160</sup>

106. The Commission found that Filing Parties' proffered revisions did not comply with Order No. 1000's requirement that each public utility transmission provider establish procedures in its OATT to evaluate at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements, and that Filing Parties did not propose an evaluation process for transmission solutions to identified transmission needs driven by public policy requirements that satisfies the requirements of Order No. 1000. The Commission found Filing Parties did not propose to evaluate such solutions to determine whether they are more efficient or cost-effective solutions to transmission needs driven by public policy requirements. The Commission stated that to comply with Order No. 1000, Filing Parties must develop procedures to evaluate at the regional level all identified potential transmission solutions to transmission needs driven by public policy requirements, not only those that NESCOE indicated that it would like ISO-NE to study further, as Filing Parties proposed.<sup>161</sup> The Commission therefore directed Filing Parties to submit a further compliance filing that

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<sup>159</sup> *Id.* P 114.

<sup>160</sup> *Id.* P 113.

<sup>161</sup> *Id.* P 116.

adopted procedures in the ISO-NE OATT to evaluate at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements, reiterating that these procedures must address the evaluation of transmission facilities stakeholders propose to satisfy an identified transmission need driven by public policy requirements and provide stakeholders with an opportunity to offer input during the evaluation of potential transmission solutions to identified transmission needs, as required by Order No. 1000.<sup>162</sup>

107. Further, the Commission found that Filing Parties failed to comply with Order No. 1000's requirement that public utility transmission providers select more efficient or cost-effective transmission solutions to address transmission needs driven by public policy requirements in the regional transmission plan for purposes of cost allocation. Specifically, the Commission found that Filing Parties did not propose for ISO-NE to select the more efficient or cost-effective solutions to the identified transmission needs driven by public policy requirements and that, as proposed, ISO-NE would have neither the authority nor responsibility for selecting a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation.<sup>163</sup> The Commission stated that Order No. 1000 places an affirmative obligation on public utility transmission providers to select transmission solutions that may meet the region's transmission needs driven by public policy requirements more efficiently or cost-effectively and that Filing Parties' proposal does not provide that a public utility transmission provider will select the more efficient or cost-effective solutions in the regional transmission plan for purposes of cost allocation. The Commission therefore found that Filing Parties must propose a process for the public utility transmission providers in the region to use in regional transmission planning to select, for purposes of cost allocation, the more efficient or cost-effective transmission solution that resolves an identified transmission need driven by public policy requirements to comply with Order No. 1000 and directed Filing Parties to file a compliance filing addressing these concerns.<sup>164</sup>

108. In addition, the Commission found that Filing Parties' proposal did not comply with Order No. 1000 because ISO-NE will evaluate only those potential transmission solutions proposed to resolve transmission needs driven by public policy requirements that NESCOE indicates it would like ISO-NE to study, and relies on NESCOE or the participating states' utility regulatory authorities to decide which Public Policy

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<sup>162</sup> *Id.* P 117.

<sup>163</sup> *Id.* P 118.

<sup>164</sup> *Id.* P 119.

Transmission Upgrades to select in the regional transmission plan for purposes of cost allocation. However, the Commission found that certain provisions in Filing Parties' proposed public policy transmission planning process, while not compliant with Order No. 1000, may remain in ISO-NE's OATT as a complement to the Order No. 1000-compliant process that Filing Parties must submit in their further compliance filing.<sup>165</sup>

109. The Commission stated that Filing Parties' proposal to allow NESCOE or public utility regulators to: (1) provide ISO-NE with a written list of one or more options that the states are interested in exploring through the submission of Stage One competitive project submissions once ISO-NE has shared the results of its Public Policy Transmission Study, which will identify high level solutions to identified transmission needs driven by public policy requirements; (2) submit to ISO-NE a list of Stage One Proposal projects that one or more of the states would like to have further developed in a Stage Two study phase; (3) determine whether to include a Public Policy Transmission Upgrade in the regional transmission plan; and (4) enable NESCOE and public utility regulators to determine whether to include proposed transmission projects in the regional transmission plan for purposes of the complementary cost allocation method that permits states to opt-out of cost allocation for a particular transmission project, while not compliant with Order No. 1000, represents a just and reasonable alternative voluntary process that will not conflict or otherwise replace the process that Filing Parties must submit to comply with Order No. 1000.

**(b) Requests for Rehearing or Clarification**

**(1) Summary of Requests for Rehearing or Clarification**

110. ISO-NE and NESCOE requested rehearing of the Commission's rejection of Filing Parties' proposed OATT provisions governing the consideration of transmission needs driven by public policy requirements. Both ISO-NE and NESCOE contend that the Commission erred by imposing on ISO-NE the allegedly new obligation "to select" a Public Policy Transmission Upgrade, even though they contend that Order No. 1000 requires only that there be a process in place for public utility transmission providers, in consultation with stakeholders, to consider transmission needs driven by public policy requirements.<sup>166</sup> ISO-NE and NESCOE maintain that Order No. 1000 referred only to an obligation to "identify" transmission needs and "evaluate" potential transmission

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<sup>165</sup> *Id.* PP 120-121.

<sup>166</sup> ISO-NE Request for Rehearing at 53 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 205-206); NESCOE Request for Rehearing at 7-8, 18-19.

solutions, not to select solutions and turn them into projects included in the regional transmission plan.<sup>167</sup>

111. NESCOE asserts that the Commission is improperly confusing the evaluation of whether a transmission project is needed with the selection of a transmission project itself.<sup>168</sup> NESCOE states that the First Compliance Order appears to require ISO-NE to both establish criteria for selection and to actually select and put into the regional system plan the more efficient or cost-effective solution among the options studied. NESCOE therefore asks the Commission to grant clarification or rehearing that public utility transmission providers are not required to select any project for inclusion in the regional transmission plan.<sup>169</sup>

112. Similarly, ISO-NE states that the language the Commission cited to support the requirement imposed on ISO-NE to select a Public Policy Transmission Upgrade simply refers to the “consideration of transmission needs driven by public policy” and requires transmission providers to “have in place processes” that provide stakeholders with the opportunity to provide input about public policy requirements that could drive transmission needs, as opposed to having the transmission provider plan only for its own needs or the needs of its native load customers.<sup>170</sup> ISO-NE also avers that Order No. 1000 does not state who must select a transmission solution or even that a solution be selected.<sup>171</sup>

113. Moreover, ISO-NE states that, in Order No. 1000-A, the Commission affirmed that it was “not requiring anything more than what [it] directed in Order No. 1000, namely, the two-part identification and evaluation process.”<sup>172</sup> ISO-NE opines that,

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<sup>167</sup> ISO-NE Request for Rehearing at 54 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 205); NESCOE Request for Rehearing at 9-11 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 205, *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 321).

<sup>168</sup> NESCOE Request for Rehearing at 7-8.

<sup>169</sup> *Id.* at 19-22 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 211; *see also id.* P 331; Order 1000-A, 139 FERC ¶ 61,132 at PP 329, 455).

<sup>170</sup> ISO-NE Request for Rehearing at 53 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 203).

<sup>171</sup> *Id.* at 54.

<sup>172</sup> *Id.* at 55 (quoting Order No. 1000-A, 139 FERC ¶ 61,132 at P 321).

contrary to this statement, the First Compliance Order did require something more than identification and evaluation—it requires that ISO-NE “select” the Public Policy Transmission Upgrade. ISO-NE argues that this is beyond the requirements of Order Nos. 1000 and 1000-A, and therefore cannot be imposed as a compliance matter.<sup>173</sup> ISO-NE further argues that, even if Order No. 1000 does permit the Commission to require the transmission provider to select Public Policy Transmission Upgrades, the Commission erred by finding a lack of participation in the evaluation process by ISO-NE. As support, ISO-NE states that it actively participates in the evaluation of Public Policy Transmission Upgrades and that it will engage in the studies and evaluations that ultimately will impact the selection of which projects will be built.<sup>174</sup>

114. Both ISO-NE and NESCOE object to the Commission’s determination that their proposed public policy transmission planning process did not comply with Order No. 1000’s requirement that each public utility transmission provider establish procedures in its OATT to evaluate at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements. In particular, ISO-NE and NESCOE assert that the Commission erred in requiring a process be established to evaluate at the regional level all identified potential solutions to transmission needs driven by public policy requirements, not just those that NESCOE indicates it would like ISO-NE to study further.<sup>175</sup> NESCOE states that Filing Parties did, in fact, propose a process for considering transmission needs driven by public policy requirements that is consistent with the requirements of Order No. 1000.<sup>176</sup> Both ISO-NE and NESCOE argue that, given state siting authority, evaluating all solutions regardless of state interest is an inefficient use of resources.<sup>177</sup> NESCOE adds that evaluating all potential solutions would distract from the evaluation of viable solutions to identified needs,<sup>178</sup> and is inconsistent with the statement in Order No. 1000-A that not every proposal by stakeholders during the identification stage will necessarily be identified for further

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 55-56.

<sup>175</sup> *Id.* at 57-58; NESCOE Request for Rehearing at 8-9.

<sup>176</sup> NESCOE Request for Rehearing at 11-12.

<sup>177</sup> ISO-NE Request for Rehearing at 57; NESCOE Request for Rehearing at 13.

<sup>178</sup> NESCOE Request for Rehearing at 13.

evaluation.<sup>179</sup> NESCOE concludes that the First Compliance Order therefore appears to be expanding the scope of Order No. 1000.<sup>180</sup>

115. NESCOE further maintains that any concern the Commission may have regarding opportunities for stakeholder input is unwarranted given that all interested stakeholders may become members of the Planning Advisory Committee, which provides input on the scope, parameters, and assumptions used in ISO-NE's Public Policy Transmission Study, and may identify solutions for ISO-NE to study.<sup>181</sup>

116. NESCOE also argues that the Commission mischaracterized the First Compliance Filing as proposing that NESCOE, not the public utility transmission providers in the transmission planning region, determine which high-level solutions to identified transmission needs driven by public policy requirements are explored during Stage One of the process, and which Stage One Proposals are further developed in a Stage Two study phase.<sup>182</sup> NESCOE asserts that further analysis of transmission solutions performed at NESCOE's request—beyond the scenario analysis offered as one evaluation option in Order No. 1000—is an additional study that exceeds the requirements of Order No. 1000, conducted at state officials' request to inform whether and how they decide to execute state laws.<sup>183</sup>

117. ISO-NE and NESCOE both state that the Commission's rejection of aspects of the public policy transmission planning process fails to provide regional flexibility regarding evaluation offered in Order Nos. 1000 and 1000-A. ISO-NE states that Filing Parties' proposed public policy provisions fully comply with and, in fact, exceed the requirements of Order No. 1000, and that the Commission's ruling in the First Compliance Order is inconsistent with Order No. 1000. ISO-NE argues that the Commission has not provided a reasoned explanation of why the Commission directed "very specific outcomes for compliance" with a rule that contained no *pro forma* tariff language, that set minimum

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<sup>179</sup> *Id.* (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 321).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 12, 14.

<sup>182</sup> *Id.* at 14 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 313).

<sup>183</sup> *Id.* at 15 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 211, which explained that "there are many ways potential upgrades to the transmission system can be evaluated, ranging from the use of scenario analyses to production cost or power flow simulations").

requirements that ISO-NE asserts have been met or exceeded, and that afforded regional flexibility. In fact, ISO-NE states that the Commission has required a “‘cookie cutter’ approach” that ignores ISO-NE’s regional circumstances.<sup>184</sup> NESCOE argues that the Commission contradicted its desire to provide regional flexibility by denying Filing Parties’ proposal regarding the role of NESCOE, “a committee of states,” in the process for evaluating potential solutions to transmission needs driven by public policy requirements.<sup>185</sup> NESCOE and ISO-NE both contend that the Commission made clear in Order No. 1000-A that this principle of flexibility applied to the role played by state regulators in the regional transmission planning process.<sup>186</sup>

118. NESCOE argues that, despite assurances of regional flexibility and the clear declaration of Order No. 1000 that the reforms were not intended to usurp state authority, including authority over transmission facilities,<sup>187</sup> the Commission required revisions to the public policy transmission planning process in the First Compliance Order that would substitute the judgment of state officials over the implementation of their own state laws and policies with that of the public utility transmission provider. NESCOE further asserts that the Commission has acknowledged that “state regulators play an important and unique role in the transmission planning process, given their oversight over transmission siting, permitting, and similar processes,”<sup>188</sup> and that Order No. 1000 encourages states’ active participation in the consideration of transmission needs driven by public policy requirements.<sup>189</sup> NESCOE states that it and other stakeholders in the region relied on these assurances to develop procedures that met the requirements of Order No. 1000 while recognizing the states’ role in identifying and evaluating transmission needs driven by state public policy requirements, and contends that “the Commission gave with one

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<sup>184</sup> ISO-NE Request for Rehearing at 59-60.

<sup>185</sup> NESCOE Request for Rehearing at 4, 15-17.

<sup>186</sup> *Id.* at 27 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 338); ISO-NE Request for Rehearing at 57-58 & n.176 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at PP 337-338).

<sup>187</sup> NESCOE Request for Rehearing at 25 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 107).

<sup>188</sup> *Id.* at 25-26 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 337).

<sup>189</sup> *Id.* at 15-16 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 211, 212).

hand and took away with the other assurances that [it] was not intruding into matters exclusively reserved to states.”<sup>190</sup>

119. NESCOE further argues that the “public policies identified by the states for consideration in the regional planning process trigger the evaluation and selection of projects, and it is essential that the public policy makers—the states—play the prominent decision-making role throughout the entirety of the process.” NESCOE contends that Filing Parties’ proposal appropriately gave the states a major role in the regional transmission planning process with respect to Public Policy Transmission Upgrades, because such projects are not driven solely by engineering or economic analyses. Instead, it asserts that Public Policy Transmission Upgrades reflect state goals, laws, and regulations, which require state officials to exercise judgment in their execution. NESCOE posits that a state may determine that its citizens’ electricity needs are best served with sustainable, renewable, or clean energy technologies and will factor in the relative costs and benefits of state policies, along with often hard-to-quantify societal benefits. According to NESCOE, achieving those public policy objectives may result in construction of certain resources and facilities that are more costly than other types of facilities, but the state may determine that the benefits from achieving public policy goals outweigh those direct and specifically quantifiable costs. NESCOE concludes that “the decision about whether, how and at what price to execute state public policies is uniquely the state’s [rather than the public utility transmission provider’s, the Commission’s, or stakeholders’] to make.”<sup>191</sup>

120. NESCOE avers that, in contrast to the states, ISO-NE has no authority to make judgments on state policies or the means by which a state will satisfy its state public policy objectives. NESCOE contends that the Commission likewise lacks authority regarding decisions about the means of implementing state public policies, as do stakeholders. Thus, NESCOE argues, the First Compliance Order improperly attempts to confer upon ISO-NE the authority to make decisions about the implementation of state policies, thereby stifling the ability of each state to implement its own public policies over matters within its jurisdiction (such as energy and environmental policies).<sup>192</sup> NESCOE further asserts that providing states with a central role in the local and regional transmission planning process for Public Policy Transmission Upgrades will reduce the potential for litigation concerning policy and project selection and that, because the

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<sup>190</sup> *Id.* at 25-27.

<sup>191</sup> *Id.* at 28.

<sup>192</sup> *Id.* at 28-29.

support of each affected state is necessary for multi-state projects, agreement among the states facilitates project construction.<sup>193</sup>

121. Along these lines, NESCOE contends that the Commission has misunderstood NESCOE's role in the process of evaluating whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation.<sup>194</sup> NESCOE asserts that Order No. 1000 encouraged states to play a central role in its implementation, so as to ensure that ISO-NE's judgment is not substituted for that of the states in the execution of state laws.<sup>195</sup> NESCOE argues that Filing Parties' proposal ensures that the state-federal jurisdictional boundaries are appropriately maintained.<sup>196</sup> NESCOE further argues that the First Compliance Order sets up potential disagreements between ISO-NE and a state over the approach to addressing a state's public policy requirements. NESCOE continues that, if such a disagreement arose, the Commission could not resolve it, and neither ISO-NE nor the Commission has any authority to find that the state's judgment is "wrong" in terms of whether and how the state decides to execute its state laws. Thus, NESCOE concludes, the process that the First Compliance Order describes (i.e., that ISO-NE makes the final evaluation and selection decisions) is impractical.<sup>197</sup>

122. NESCOE contends the First Compliance Order is inconsistent with the statement in Order No. 1000 that public utility transmission providers, with input from stakeholders, are the appropriate entity to design procedures for identifying and evaluating the transmission needs driven by public policy requirements.<sup>198</sup> NESCOE asserts that Filing Parties' proposed procedures allow for input and involvement from stakeholders, but, to the extent a Public Policy Transmission Upgrade is considered for selection in the regional transmission planning process, that project—and its potential costs to consumers—will be subject to each state's requirements regarding the process for approval separate from the process through which a state regulatory authority will evaluate whether to grant siting approval. NESCOE explains that states have procedures

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<sup>193</sup> *Id.* at 30.

<sup>194</sup> *Id.* at 22 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 314).

<sup>195</sup> *Id.* at 23 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at PP 318, 327).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 24.

<sup>198</sup> *Id.* at 30-31 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 208).

for interested stakeholders to intervene and participate in state proceedings, and parties who are aggrieved by a state's decision not to approve a project or to site a particular line have recourse through the state courts; however, NESCOE notes that these state processes are not detailed in compliance filings submitted to the Commission because they are not a proper subject matter for federal tariffs.<sup>199</sup>

123. NESCOE further argues that, in the First Compliance Order, the Commission exceeded the bounds of its statutory authority by abrogating the central role of the New England states over the execution of their state policies and intruding into state authority over the development of transmission facilities.<sup>200</sup>

124. NESCOE asserts that the Commission has exceeded its jurisdiction under the FPA, despite having previously acknowledged that questions such as “what transmission facilities will be built and where” are “normally [decided] at the state level.”<sup>201</sup> NESCOE states that section 201(a) of the FPA provides that federal regulation under the FPA “extend[s] only to those matters which are not subject to regulation by the States,” and thus limits the authority granted to the Commission by section 201(b) over the regulation of the transmission of electricity in interstate commerce.<sup>202</sup> NESCOE claims that the First Compliance Order infringes on state authority over the implementation of state public policies by requiring the Filing Parties to remove from their regional transmission planning process the states' role in evaluating potential solutions to transmission needs driven by public policy requirements, and over construction of transmission facilities by requiring ISO-NE to select transmission projects in the regional transmission plan.

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<sup>199</sup> *Id.* at 31-32.

<sup>200</sup> *Id.* at 6, 24, 32-35.

<sup>201</sup> *Id.* at 35 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 188). NESCOE also cites Order No. 888 with respect to state authority. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,782 n.544 (1996) (“This Final rule will not affect or encroach upon state authority.”), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *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 Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>202</sup> NESCOE Request for Rehearing at 32 (citing FPA § 201(a), (b), 16 U.S.C. § 824(a), (b) (2012)).

NESCOE further states that it has previously raised these concerns, and the Commission failed to address them in the First Compliance Order.<sup>203</sup>

## (2) Commission Determination

125. We deny rehearing and affirm the finding in the First Compliance Order that ISO-NE's proposed regional transmission planning process for Public Policy Transmission Upgrades does not comply with Order No. 1000's requirements. Under Filing Parties' proposal in the First Compliance Filing, ISO-NE would have evaluated only those potential transmission solutions to identified transmission needs driven by public policy requirements that NESCOE indicated it would like ISO-NE to study further, and to the extent that any transmission solution was selected in the regional transmission plan for purposes of cost allocation, NESCOE, rather than ISO-NE, would have selected the Public Policy Transmission Upgrade. We affirm our finding in the First Compliance Order that, to comply with the requirements of Order No. 1000, ISO-NE must have a process to evaluate at the regional level all identified potential transmission solutions to transmission needs driven by public policy requirements, not only those transmission proposals that NESCOE indicates that it would like ISO-NE to study further, and must have a process for the public utility transmission providers in the region to select in the regional transmission plan for purposes of cost allocation the more efficient or cost-effective transmission solution that addresses an identified transmission need driven by public policy requirements.<sup>204</sup>

126. However, we grant NESCOE's request for clarification concerning whether public utility transmission providers must select a transmission project in the regional transmission plan for purposes of cost allocation. We note that Order No. 1000 stated, "[w]hether or not public utility transmission providers within a region select a transmission facility in the regional transmission plan for purposes of cost allocation will depend in part on their combined view of whether the transmission facility is an efficient or cost-effective solution to their needs."<sup>205</sup> We therefore provide clarification that, if ISO-NE determines that there is not a more efficient or cost-effective solution to transmission needs driven by public policy requirements in the regional transmission planning process, ISO-NE need not select a transmission project in the regional transmission plan for purposes of cost allocation. In the First Compliance Order, the Commission did not require that ISO-NE must select in the regional transmission plan for

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<sup>203</sup> *Id.* at 32, 34-35.

<sup>204</sup> First Compliance Order, 143 FERC ¶ 61,150 at PP 116, 119.

<sup>205</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 331.

purposes of cost allocation a transmission solution to address every identified transmission need driven by a public policy requirement. Instead, the Commission found that, to the extent that a transmission solution to an identified transmission need driven by public policy requirements is selected in the regional transmission plan for purposes of cost allocation, that transmission solution must be selected by ISO-NE rather than by NESCOE.

127. The requirements in the First Compliance Order that ISO-NE evaluate potential transmission solutions to identified transmission needs driven by public policy requirements and that, to the extent that a transmission solution is selected in the regional transmission plan for purposes of cost allocation to meet those needs, ISO-NE should be the entity to select it, are consistent with the Commission's statement that regional transmission plans "will identify transmission facilities that more efficiently or cost-effectively meet the region's reliability, economic and Public Policy Requirements."<sup>206</sup> To fulfill this objective, the Commission in Order No. 1000 required public utility transmission providers to "participate in a regional transmission planning process that evaluates transmission alternatives at the regional level that may resolve the transmission planning region's needs more efficiently and cost-effectively than alternatives identified by individual public utility transmission providers in their local transmission planning processes."<sup>207</sup> The Commission reiterated that "[t]hrough the regional transmission planning process, public utility transmission providers will be required to evaluate, in consultation with stakeholders, alternative transmission solutions that might meet the needs of the transmission planning region more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning process."<sup>208</sup> Thus, in Order No. 1000, the Commission required public utility transmission providers to conduct a regional analysis to identify and evaluate potential regional solutions regardless of whether stakeholders, prospective transmission developers, or other interested parties propose such solutions.<sup>209</sup>

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<sup>206</sup> *Id.* P 11.

<sup>207</sup> *Id.* P 6.

<sup>208</sup> *Id.* P 148.

<sup>209</sup> The Commission also noted that Order No. 890 does not create an explicit obligation for public utility transmission providers to take affirmative steps to identify potential solutions at the regional level that could better meet the needs of the region, nor does Order No. 890 obligate public utility transmission providers within the region to develop a single transmission plan for the region that reflects their determination of the set of transmission facilities that more efficiently or cost-effectively meets the region's

(continued ...)

128. Furthermore, the Commission recognized that state utility regulators play an important, crucial, and unique role in transmission planning processes that is distinctly different from the roles played by other stakeholders.<sup>210</sup> The Commission added that the best place for a state to determine the role it will play is in the Order No. 1000 compliance process.<sup>211</sup> Transmission planning regions and states have the flexibility to determine the role of state utility regulators in the process, and Order No. 1000 does not require any particular role for state regulators in the regional transmission planning process.<sup>212</sup> That said, while states may play a central role in the regional transmission planning process, a public utility transmission provider cannot delegate its obligation to evaluate and determine whether to select the transmission solution, if any, that more efficiently or cost-effectively meets the needs of the transmission planning region. However, we understand the concerns presented by NESCOE regarding the role of state authorities in the regional transmission planning process. We reiterate that, if it so chooses, a state commission or group of state regulators may take an active role in that process and may advise the public utility transmission providers on the state commission's views of the relative merits of proposed transmission projects or may recommend particular transmission proposals. Moreover, we note that selection in the ISO-NE regional transmission plan for purposes of cost allocation does not confer a right to construct, and such selection does not preempt state laws regarding siting or construction of transmission facilities.<sup>213</sup>

129. Contrary to NESCOE's arguments, the First Compliance Order does not expand the scope of Order No. 1000 in requiring ISO-NE to have processes to evaluate at the regional level all identified potential transmission solutions to transmission needs driven by public policy requirements instead of only those that NESCOE indicates that it would like ISO-NE to study further. Under the proposed evaluation process for Public Policy Transmission Upgrades, ISO-NE would only develop rough estimates of the costs and benefits of conceptual transmission projects to address identified transmission needs driven by public policy requirements, unless NESCOE requested ISO-NE to perform a

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needs. The Commission stated that Order No. 1000 is meant to address these deficiencies. *See id.* PP 147-148.

<sup>210</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at PP 291, 293.

<sup>211</sup> *Id.* PP 294-295.

<sup>212</sup> *See id.* PP 291-295.

<sup>213</sup> *See* First Compliance Order, 143 FERC ¶ 61,150 at P 130 & n.234 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319).

more detailed analysis. Order No. 1000 does not require that every potential transmission need driven by public policy requirements proposed by stakeholders must be selected for further evaluation.<sup>214</sup>

130. However, Order No. 1000 does require that public utility transmission providers establish procedures for identifying those transmission needs driven by public policy requirements for which potential transmission solutions will be evaluated and for evaluating potential transmission solutions to those needs.<sup>215</sup> As Filing Parties proposed, ISO-NE would not evaluate such transmission solutions in detail unless NESCOE requested that it do so, but instead would only provide rough estimates of each solution's costs and benefits without fully evaluating whether the solution is the more efficient or cost-effective solution to an identified transmission need driven by public policy requirements. Therefore, we affirm our finding in the First Compliance Order that ISO-NE's proposed regional transmission process for Public Policy Transmission Upgrades does not comply with Order No. 1000's requirements.

131. With regard to ISO-NE's and NESCOE's protests related to regional flexibility, we agree that the Commission declined in Order No. 1000 to specify a particular set of analyses that must be performed by public utility transmission providers within the regional transmission planning process, but instead provided flexibility for the public utility transmission providers in each transmission planning region to develop, in consultation with stakeholders, procedures by which the public utility transmission providers in the region identify and evaluate the set of potential solutions that might meet the region's needs more efficiently or cost-effectively.<sup>216</sup> However, the Commission affirmed that, "[w]ith regard to the evaluation of potential solutions to the identified transmission needs driven by [public policy requirements], we again leave to public utility transmission providers to determine, in consultation with stakeholders, the procedures for how such evaluations will be undertaken, *subject to the Commission's review on compliance and with the objective of meeting the identified transmission needs more efficiently and cost-effectively.*"<sup>217</sup> In other words, while Order No. 1000 allows flexibility in the method of compliance, it does not allow flexibility in whether or not public utility transmission providers must comply with its requirements, and furthermore the method of compliance is subject to Commission review. In the First Compliance

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<sup>214</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 320.

<sup>215</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 205, 207, 211.

<sup>216</sup> *Id.* P 149.

<sup>217</sup> *Id.* P 211 (emphasis added).

Order, the Commission found that Filing Parties did not comply with the requirements of Order No. 1000 that public utility transmission providers must have procedures to evaluate at the regional level all identified potential transmission solutions to transmission needs driven by public policy requirements and a process to select in the regional transmission plan for purposes of cost allocation the more efficient or cost-effective transmission solution that resolves an identified transmission need driven by public policy requirements.<sup>218</sup> We therefore uphold our finding, as discussed above, and deny ISO-NE's and NESCOE's requests for rehearing on the issue that the First Compliance Order departed from the flexibility principles of Order No. 1000.

132. With respect to NESCOE's argument that the Commission has exceeded its authority and that public policy makers—i.e., the states—should play the prominent decision-making role throughout the regional transmission planning process, the Commission has explained that Order No. 1000 does not place “public utility transmission providers in the position of being policymakers or allowing them to substitute their public policy judgments in the place of legislators and regulators.”<sup>219</sup> Transmission needs driven by public policy requirements, and not the public policy requirements themselves, are what must be considered by public utility transmission providers under Order No. 1000.<sup>220</sup> The Commission stated that the rule “requires that public utility transmission providers amend their OATTs to provide for the consideration of transmission needs driven by Public Policy Requirements. Order No. 1000 did not require that Public Policy Requirements themselves be considered. This is a critical distinction.”<sup>221</sup> Furthermore, in Order No. 1000-A, the Commission assigned responsibility for considering transmission needs driven by public policy requirements to public utility transmission providers, noting that “it will be up to public utility transmission providers, in consultation with stakeholders, to develop a process that considers transmission needs driven by Public Policy Requirements.”<sup>222</sup>

133. By requiring, in the First Compliance Order, that ISO-NE, rather than NESCOE or the states individually, has the responsibility to determine whether to select potential Public Policy Transmission Upgrades in the Regional System Plan for purposes of cost

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<sup>218</sup> First Compliance Order, 143 FERC ¶ 61,150 at PP 116, 119.

<sup>219</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at PP 318.

<sup>220</sup> *See id.* PP 318 & 326-333.

<sup>221</sup> *Id.* P 318.

<sup>222</sup> *Id.* P 176.

allocation, the Commission is in no way interfering with the New England states' authority over the design or execution of their own public policies. Furthermore, ISO-NE, in its role proposed in the Second Compliance Filing, will not, as NESCOE implies, "have the authority to make judgments on states' behalf *about state policies* or to make decisions for a state *about the means by which a state will satisfy its state public policy objectives or at what costs.*"<sup>223</sup> Rather, ISO-NE will consider, with input from stakeholders, only transmission needs driven by public policy requirements, which is a role appropriate for its function as a regional transmission organization and independent system operator. Order No. 1000 facilitates the identification of transmission facilities that are more efficient or cost-effective transmission solutions to address identified transmission needs and those transmission needs may be driven by those resource selections. Public utility transmission providers and states can use the results of the Order No. 1000 regional transmission planning process to inform their resource selections, just as they can use their resource selections to inform the regional transmission planning process. However, Order No. 1000 does not require public utility transmission providers or states to modify their resource selections.<sup>224</sup> Thus, to the extent ISO-NE's Order No. 1000 regional transmission planning process results in the identification of transmission facilities driven by public policy requirements, neither Order No. 1000 nor the First Compliance Order requires that states modify any decisions about the means by which it will satisfy its state public policy objectives or at what costs. Thus, the Commission is not interfering with the New England states' authority over the design or execution of their own public policies.

134. Finally, we disagree with NESCOE's contention that the directives in the First Compliance Order exceed the Commission's jurisdiction under the FPA by infringing on state authority over construction of transmission facilities. In Order No. 1000-A, the Commission considered the argument that adopting the nonincumbent transmission developer reforms exceeded our jurisdiction under the FPA; the Commission found such "arguments rest on the faulty premise that the Commission is somehow regulating the construction of transmission facilities."<sup>225</sup> The Commission reiterated that "nothing in Order No. 1000 creates any new authority for the Commission nor public utility

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<sup>223</sup> NESCOE Request for Rehearing at 28 (emphasis added).

<sup>224</sup> *See, e.g.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 107 (explaining that Order No. 1000's reforms "in no way involves an exercise of authority over those specific substantive matters traditionally reserved to the states, including integrated resource planning....").

<sup>225</sup> Order No. 1000-A, FERC Stats. & Regs ¶ 31,132 at PP 378-382.

transmission providers acting through a regional transmission planning process to site or authorize the construction of transmission projects.”<sup>226</sup>

(c) **Compliance**

(1) **Summary of Compliance Filing**

135. In the Second Compliance Filing, Filing Parties add a responsive definition of “Public Policy Requirement” to section I.2.2 of the ISO-NE OATT to address the requirement in the First Compliance Order to add such a definition, which includes reference to statutes and regulations of the federal government, as well as to those of the state or local (e.g., municipal or county) government.<sup>227</sup>

136. Filing Parties propose modifications to ISO-NE’s OATT to address the requirements in the First Compliance Order that the OATT include a means of posting on ISO-NE’s website an explanation of: (i) those transmission needs driven by federal public policy requirements not identified by NESCOE that have been identified for evaluation for potential transmission solutions in the regional transmission planning process; and (ii) why other suggested transmission needs driven by federal public policy requirements not identified by NESCOE will not be evaluated. Specifically, Filing Parties propose revisions to require this website posting and to ensure transparency, also propose to post on the ISO-NE website an explanation of those transmission needs driven by local (i.e., municipal or county) public policy requirements that will be evaluated for potential transmission solutions in the regional system planning process, and why other suggested transmission needs driven by local public policy requirements will not be evaluated.<sup>228</sup> In addition, the revised OATT specifies that stakeholders have 15 days after

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<sup>226</sup> *Id.* P 382.

<sup>227</sup> Second Compliance Filing at 19 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 109); *see also* ISO-NE, Transmission, Market and Services Tariff, § I.2.2 (Definitions) (52.0.0).

<sup>228</sup> Second Compliance Filing at 19 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 114); *see also* ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4A.1.1 (Study of Federal Public Policy Requirements Not Identified by NESCOE; Local Public Policy Requirements).

the posting of NESCOE's explanation to request that ISO-NE consider a particular federal public policy requirement.<sup>229</sup>

137. The First Compliance Order also stated that if NESCOE does not provide a written explanation of the needs driven by state and federal public policy requirements that have been identified for evaluation for potential solutions and why other suggested transmission needs were not selected for evaluation, ISO-NE must submit an alternative proposal to comply with this requirement.<sup>230</sup> Filing Parties propose modifications to ISO-NE's OATT to state that if NESCOE does not provide a listing of identified transmission needs (which may consist of a NESCOE statement of its determination that no transmission needs driven by state or federal public policy requirements have been identified during the stakeholder process) and an explanation (which may consist of a NESCOE explanation of why no transmission needs driven by state or federal public policy requirements have been identified during the stakeholder process), ISO-NE will note on its website that a NESCOE listing and explanation has not been provided. Under this proposed modification, ISO-NE subsequently will determine (after the opportunity for Planning Advisory Committee input)—and will post on its website an explanation of—which transmission needs driven by state or federal public policy requirements ISO-NE will evaluate in the regional transmission planning process, including why other suggested transmission needs will not be evaluated.<sup>231</sup>

138. In response to the First Compliance Order's finding that the proposed evaluation and selection process for regional public policy transmission solutions did not meet the requirements of Order No. 1000, and the Commission's directive for the submission of OATT amendments to "describe a transparent and not unduly discriminatory process" for evaluating whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation,<sup>232</sup> Filing Parties proposed

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<sup>229</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4A.1.1 (Study of Federal Public Policy Requirements Not Identified by NESCOE; Local Public Policy Requirements).

<sup>230</sup> Second Compliance Filing at 19 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 114 n.214).

<sup>231</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4A.1 (NESCOE Requests for Public Policy Transmission Studies).

<sup>232</sup> First Compliance Order, 143 FERC ¶ 61,150 at PP 116-119, 315.

numerous modifications to ISO-NE's OATT.<sup>233</sup> In general, the proposed revisions give ISO-NE a more prominent, and NESCOE a less prominent, role in evaluating and selecting solutions to transmission needs driven by public policy requirements in the regional transmission planning process.<sup>234</sup>

139. For example, ISO-NE, rather than NESCOE, will determine the scope, parameters and assumptions of Public Policy Transmission Studies, based on stakeholder input, and the results of these studies will be posted on ISO-NE's website and presented at a meeting of the Planning Advisory Committee. As a follow-up to the Public Policy Transmission Study, ISO-NE may perform more detailed analysis and engineering work on the high-level concepts.<sup>235</sup> NESCOE will no longer be able to include or exclude particular conceptual projects or alternatives from the study.

140. In light of NESCOE's modified role in the process, the states may update ISO-NE on any methods by which they are satisfying their respective public policy requirements included in the Public Policy Transmission Study.<sup>236</sup> NESCOE will no longer submit to ISO-NE a written list of transmission options that the states are interested in exploring further or a matrix of key desirable features for each option for use in soliciting Stage One Proposals from Qualified Sponsors. ISO-NE will post on its website a notice inviting Stage One Proposals, including proposals from members of the Planning Advisory Committee that do not intend to develop and construct the proposed transmission project.<sup>237</sup> ISO-NE, rather than NESCOE, will select Stage One Proposals to advance into Stage Two and will post on its website a list of Stage One Proposals that

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<sup>233</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4A. (Public Policy Transmission Studies; Public Policy Transmission Upgrades).

<sup>234</sup> *See* Second Compliance Filing at 20-21.

<sup>235</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), §§ 4A.2 (Preparation for Conduct of Public Policy Transmission Studies; Stakeholder Input), 4A.3(a) (Conduct of Public Policy Transmission Studies; Stakeholder Input).

<sup>236</sup> *Id.* §§ 4A.3(a) (Conduct of Public Policy Transmission Studies; Stakeholder Input), 4A.4 (Response to Public Policy Transmission Studies).

<sup>237</sup> *Id.* §§ 4A.4 (Response to Public Policy Transmission Studies), 4A.5(a) (Information Required for Stage One Proposals).

meet the preliminary project criteria. Based on input from the Planning Advisory Committee, ISO-NE may exclude projects from consideration in Stage Two.<sup>238</sup>

141. ISO-NE will report preliminary preferred Stage Two Solutions to the Planning Advisory Committee and will seek stakeholder input on those solutions.<sup>239</sup> Based on that input, ISO-NE, rather than NESCOE, will identify the preferred Stage Two Solution for inclusion in the Regional System Plan and Regional System Plan Project List.<sup>240</sup> In addition, ISO-NE, rather than NESCOE, will determine based on stakeholder input whether to delete a Public Policy Transmission Upgrade from the Regional System Plan Project List because the need no longer exists.<sup>241</sup>

## (2) Commission Determination

142. Filing Parties modify the definition of a public policy requirement in section I.2.2 of the ISO-NE OATT to read, “[Public policy requirement] is a requirement reflected in statute enacted by, or a regulation promulgated by, the federal government or a state or local (e.g., municipal or county) government.”<sup>242</sup> We find that Filing Parties’ proposed revisions to the definition of public policy requirements comply with the requirement in the First Compliance Order to include a definition that is consistent with the definition set forth in Order No. 1000, and to consider duly enacted local laws and regulations.

143. We find that Filing Parties’ proposed OATT changes comply with the Commission’s directive in the First Compliance Order regarding the posting on ISO-NE’s website an explanation of (1) those transmission needs driven by federal public policy requirements not identified by NESCOE that have been identified for evaluation for potential transmission solutions in the regional transmission planning process and (2) why other suggested transmission needs driven by federal public policy requirements not identified by NESCOE will not be evaluated. We also accept Filing Parties’ proposal

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<sup>238</sup> *Id.* § 4A.5(e) (List of Qualifying Stage One Proposals).

<sup>239</sup> *Id.* § 4A.7 (Information Required for Stage Two Solutions; Identification and Reporting of Preliminary Preferred Stage Two Solutions).

<sup>240</sup> *Id.* § 4A.8 (Inclusion of Public Policy Transmission Upgrades in the Regional System Plan and RSP Project List; Milestone Schedules; Removal from RSP List).

<sup>241</sup> *Id.* § 3.6(c) (RSP Project List Updating Procedures and Criteria).

<sup>242</sup> ISO-NE, Transmission, Markets and Services Tariff, § I.2.2 (Definitions) (52.0.0).

that stakeholders have 15 days after the posting of NESCOE's explanation to request that ISO-NE consider a particular transmission need driven by federal public policy requirements not identified by NESCOE. Also with respect to posting requirements, we find that Filing Parties' proposed OATT revisions stipulating that ISO-NE will post an explanation of which transmission needs driven by local public policy requirements will be evaluated for potential solutions in the regional transmission planning process, and why others will not be evaluated,<sup>243</sup> comply with the posting requirements of Order No. 1000. We accept Filing Parties' proposal that, if NESCOE does not provide to ISO-NE an explanation of which transmission needs driven by state and federal public policy requirements will and will not be evaluated for potential solutions, ISO-NE must post such an explanation on its website.

144. We further find that Filing Parties' proposed revisions to ISO-NE's OATT describe procedures through which ISO-NE will evaluate at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements, consistent with the Commission's directives in the First Compliance Order.<sup>244</sup> First, Filing Parties propose to modify the regional transmission planning process so that ISO-NE (with stakeholder input), rather than NESCOE, has the responsibility for evaluating potential transmission solutions to transmission needs driven by public policy requirements and determining whether to select such solutions in the regional transmission plan for purposes of cost allocation. Specifically, Filing Parties propose to modify the initial stages of the transmission planning process so that ISO-NE determines the scope, parameters, and assumptions of the Public Policy Transmission Study and considers all initial proposed solutions to transmission needs driven by public policy requirements.<sup>245</sup> In addition, Filing Parties removed language stipulating that NESCOE submit to ISO-NE a list of transmission options that the states are interested in exploring further or a matrix of key desirable features for each option, for use in

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<sup>243</sup> *Id.* § 4A.1.1 (Study of Federal Public Policy Requirements Not Identified by NESCOE; Local Public Policy Requirements).

<sup>244</sup> For a further discussion of ISO-NE's evaluation process for transmission facilities to address transmission needs driven by public policy requirements proposed for selection in the regional transmission plan for purposes of cost allocation, see below section titled Evaluation Process for Transmission Proposals Selection in the Regional Transmission Plan for Purposes of Cost Allocation.

<sup>245</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4A.3(a) (Conduct of Public Policy Transmission Studies; Stakeholder Input).

soliciting Stage One Proposals.<sup>246</sup> Further, Filing Parties propose to modify the process so that ISO-NE (with stakeholder input), rather than NESCOE, evaluates which Stage One proposals qualify for Stage Two,<sup>247</sup> selects Stage Two solutions in the Regional System Plan for purposes of cost allocation,<sup>248</sup> and determines whether to remove a Public Policy Transmission Upgrade from the Regional System Plan Project List.<sup>249</sup> Given the modified role for NESCOE in this process, we find that Filing Parties comply with the requirement that ISO-NE, as the public utility transmission provider, evaluate at the regional level all potential solutions to transmission needs driven by public policy requirements and not only those solutions that NESCOE indicates that it would like ISO-NE to study further.

145. Second, Filing Parties' proposed revisions clarify stakeholders' role in providing input to ISO-NE, rather than NESCOE, on: (1) the scope, parameters, and assumptions used in the Public Policy Transmission Study;<sup>250</sup> (2) results of the initial study phase and the scope, parameters, and assumptions for any additional study phase;<sup>251</sup> (3) results of the Public Policy Transmission Studies, including any updates from the states on methods by which they are satisfying their public policy requirements;<sup>252</sup> (4) the list of qualifying Stage One proposals and which projects may be excluded from consideration in Stage

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<sup>246</sup> *Id.* § 4A.4 (Response to Public Policy Transmission Studies).

<sup>247</sup> *Id.* §§ 4A.5(e) (List of Qualifying Stage One Proposals), 4A.5 (g) (NESCOE Identification of Projects for Stage Two Solutions).

<sup>248</sup> *Id.* §§ 4A.7 (Information Required for Stage Two Solutions; Identification and Reporting of Preliminary Preferred Stage Two Solution), 4A.8 (a) (Inclusion of Public Policy Transmission Upgrades in the Regional System Plan and Regional System Plan Project List). Note that the definition for Public Policy Transmittal has been deleted. *See* ISO-NE, Transmission, Markets and Services Tariff, § I.2.2 (Definitions) (52.0.0).

<sup>249</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 3.6(c) (RSP Project List Updating Procedures and Criteria).

<sup>250</sup> *Id.* § 4A.2 (Preparation for Conduct of Public Policy Transmission Studies; Stakeholder Input).

<sup>251</sup> *Id.* § 4A.3(a) (Conduct of Public Policy Transmission Studies; Stakeholder Input).

<sup>252</sup> *Id.* § 4A.4 (Response to Public Policy Transmission Studies).

Two;<sup>253</sup> and (5) the preliminary list of preferred Stage Two solution(s).<sup>254</sup> We find that Filing Parties' proposed evaluation process thus complies with Order No. 1000's requirement that the procedures for evaluating at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements provide stakeholders with an opportunity to offer input.

146. Because Filing Parties propose that members of the Planning Advisory Committee that do not intend to develop and construct the proposed transmission project may submit Stage One Proposals,<sup>255</sup> we also find that Filing Parties' proposed OATT revisions comply with Order No. 1000's requirement that the procedures for evaluating at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements address the evaluation of transmission facilities that stakeholders propose. However, we note that, under Order No. 1000, public utility transmission providers must allow any stakeholder to suggest potential transmission and non-transmission solutions as part of providing input into a public utility transmission provider's local and regional transmission planning processes.<sup>256</sup> We therefore remind Filing Parties that stakeholders must be permitted to suggest potential transmission solutions as part of providing input into the ISO-NE regional transmission planning process without providing all of the information necessary to submit a Stage One Proposal.

ii. **Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in the Local Transmission Planning Process**

(a) **First Compliance Order**

147. The Commission found that Filing Parties' proposal partially complied with the requirement to consider transmission needs driven by public policy requirements in the local transmission planning process. First, the Commission found that Filing Parties' proposal satisfied Order No. 1000's requirement to allow stakeholders an opportunity to

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<sup>253</sup> *Id.* § 4A.5(e) (List of Qualifying Stage One Proposals).

<sup>254</sup> *Id.* § 4A.7 (Information Required for Stage Two Solutions; Identification and Reporting of Preliminary Preferred Stage Two Solution).

<sup>255</sup> We address Filing Parties' proposal with respect to such Stage One Proposals below in the Cost Allocation section.

<sup>256</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 70.

provide input and to offer transmission proposals regarding the transmission needs they believe are driven by public policy requirements.<sup>257</sup> The Commission noted that each Participating Transmission Owner must post a notice, not less than every three years, indicating that members of the Planning Advisory Committee, NESCOE, or any state may provide input regarding state and federal public policy requirements they believe drive a local transmission need.

148. However, the Commission found that Filing Parties did not comply with the requirement to describe a just and reasonable and not unduly discriminatory process through which each Participating Transmission Owner will identify, out of the larger set of potential transmission needs driven by public policy requirements that may be proposed, those transmission needs for which transmission solutions will be evaluated in the local transmission planning process. The Commission directed Filing Parties to make a further compliance filing to revise the OATT to include a just and reasonable and not unduly discriminatory process through which each Participating Transmission Owner will identify, out of the larger set of transmission needs driven by public policy requirements that may be proposed, those transmission needs for which transmission solutions will be evaluated in the local transmission planning process.<sup>258</sup>

149. The Commission further found that Filing Parties complied with the posting requirement that each Participating Transmission Owner provide a written explanation, to be posted on ISO-NE's website, of which transmission needs driven by public policy requirements the Participating Transmission Owner will evaluate for potential solutions in the local system planning process. However, it found that Filing Parties did not comply with the posting requirement that they post an explanation on ISO-NE's website explaining why other suggested transmission needs driven by public policy requirements would not be evaluated in the local transmission planning process. The Commission directed Filing Parties to make a further compliance filing revising the ISO-NE OATT to provide for a posting on ISO-NE's website of an explanation of why other suggested transmission needs driven by public policy requirements will not be evaluated in each Participating Transmission Owner's local transmission planning process. Additionally, the Commission found that Filing Parties did not comply with the Order No. 1000 requirements regarding evaluation at the local level of potential transmission solutions to identified transmission needs driven by public policy requirements, because Filing Parties did not include procedures to evaluate at the local level potential transmission solutions to identified transmission needs driven by public policy requirements, including those proposed by stakeholders. The Commission directed Filing Parties to make a further

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<sup>257</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 124.

<sup>258</sup> *Id.* P 125.

compliance filing revising their procedures for how transmission solutions to identify transmission needs driven by public policy requirements will be evaluated in the local transmission planning process.<sup>259</sup>

**(b) Compliance**

150. Filing Parties revised Attachment K-Local<sup>260</sup> of the ISO-NE OATT to state that each Participating Transmission Owner will provide a written explanation, to be posted on the ISO-NE website, of why suggested transmission needs driven by public policy requirements will or will not be evaluated in the Participating Transmission Owner's local system planning process. Further, Filing Parties added a new section to Attachment K-Local<sup>261</sup> explaining the procedures for local public policy studies, which establish a timeline for conducting such studies and provisions requiring coordination with appropriate state and local authorities.<sup>262</sup>

151. In this new section, Filing Parties propose that each Participating Transmission Owner review the public policy requirements posted by ISO-NE to determine and evaluate at a high level any public policy needs, including those suggested by third parties, potentially driving any transmission needs on their respective Non-Pool Transmission Facilities. If any identified needs are driven by state or local public policy requirements, each Participating Transmission Owner will use good faith efforts to contact and solicit feedback from local and state authorities about whether further study is warranted to identify solutions for local transmission system needs. If the potential Non-Pool Transmission Facilities transmission needs would affect Non-Pool Transmission Facilities of more than one Participating Transmission Owner, the affected Participating Transmission Owners will coordinate their efforts. Each Participating Transmission Owner will use good faith efforts to communicate the results of the studies with state and local authorities and to seek feedback about whether to proceed with further planning and construction of a Local Public Policy Transmission Upgrade.<sup>263</sup>

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<sup>259</sup> *Id.* P 126.

<sup>260</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), app. 1, § 1.2 (Planning Advisory Committee Review).

<sup>261</sup> *Id.*, app. 1, § 1.6 (Public Policy Studies).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

(c) **Commission Determination**

152. We find that Filing Parties' proposed changes to section 1.2 of Attachment K-Local, as described above, comply with the posting requirements for transmission needs driven by public policy requirements in the local system planning process.

153. We find that Filing Parties partially comply with the requirement to describe a just and reasonable and not unduly discriminatory process through which each Participating Transmission Owner will identify, out of the larger set of potential transmission needs driven by public policy requirements that may be proposed, those transmission needs for which transmission solutions will be evaluated in the local transmission planning process. Section 1.6 of Attachment K-Local stipulates that each Participating Transmission Owner will review the public policy requirements posted by ISO-NE and suggested by third parties to determine whether any of these public policy requirements drive local transmission needs. Filing Parties note that, if any of the identified transmission needs are driven by state or local public policy requirements, they will coordinate with the appropriate state and local authorities to determine which of these needs will be further evaluated for potential solutions. Filing Parties do not, however, describe a process for identifying which federal public policy requirements that drive local transmission needs, if any, will be evaluated for potential solutions in the local transmission planning process. Therefore, we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further compliance filing that describes a just and reasonable and not unduly discriminatory process through which each Participating Transmission Owner will identify, out of the larger set of potential transmission needs driven by federal public policy requirements that may be proposed, those transmission needs for which transmission solutions will be evaluated in the local transmission planning process.

154. Further, we find that Filing Parties partially comply with the requirement to include procedures to evaluate at the local level potential transmission solutions to identified transmission needs driven by public policy requirements, including those proposed by stakeholders. Filing Parties state that each Participating Transmission Owner will use good faith efforts to contact and solicit feedback from local and state authorities about whether further study is warranted to identify solutions for local transmission system needs and to seek recommendations about whether to proceed with such studies. They also state that each Participating Transmission Owner will use good faith efforts to share the results of the studies with the appropriate local and state authorities and to seek recommendations about whether to proceed with further planning and construction of a proposed Local Public Policy Transmission Upgrade. However, Filing Parties do not describe in detail a process for evaluating proposed solutions, including those proposed by stakeholders, to transmission needs driven by public policy requirements, and they do not describe the process for incorporating feedback from stakeholders other than appropriate local and state authorities. Therefore, we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further

compliance filing that describes: (1) procedures to evaluate at the local level potential transmission solutions to identified transmission needs driven by public policy requirements, including those proposed by stakeholders; and (2) how Participating Transmission Owners will provide stakeholders other than local and state authorities with an opportunity to offer input during the evaluation of those potential transmission solutions in the local transmission planning process.

### **3. Nonincumbent Transmission Developer Reforms**

155. In Order No. 1000, the Commission adopted a framework of reforms to ensure that nonincumbent transmission developers have the opportunity to participate in the transmission development process. In particular, public utility transmission providers must eliminate federal rights of first refusal from Commission-jurisdictional tariffs and agreements and develop not unduly discriminatory qualification criteria and processes governing the submission and evaluation of proposals for new transmission facilities.

#### **a. Federal Rights of First Refusal**

156. Order No. 1000 required each public utility transmission provider to remove provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.<sup>264</sup> The requirement to eliminate a federal right of first refusal does not apply to local transmission facilities,<sup>265</sup> or to the right of an incumbent transmission provider to build,

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<sup>264</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313. In Order No. 1000-A, the Commission clarified that the phrase “a federal right of first refusal” refers only to rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements. Order No. 1000-A, 139 FERC ¶ 61,132 at P 415.

<sup>265</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 226, 258, 318. Order No. 1000 defined local transmission facilities as transmission facilities located solely within a public utility transmission provider’s retail distribution service territory or footprint that are not selected in the regional transmission plan for purposes of cost allocation. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 63. The Commission clarified in Order No. 1000-A that a local transmission facility is one that is located within the geographical boundaries of a public utility transmission provider’s retail distribution service territory, if it has one; otherwise, the area is defined by the public utility transmission provider’s footprint. In the case of a regional transmission organization or independent system operator whose footprint covers the entire region, local transmission facilities are defined by reference to the retail distribution service

(continued ...)

own, and recover costs for upgrades to its own transmission facilities, regardless of whether an upgrade has been selected in the regional transmission plan for purposes of cost allocation.<sup>266</sup> In addition, the requirement does not remove, alter, or limit an incumbent transmission provider's use and control of its existing rights-of-way under state law.<sup>267</sup>

157. The Commission determined in Order No. 1000 that issues concerning the applicability of the *Mobile-Sierra* doctrine<sup>268</sup> to transmission owners' rights to build found in Commission-jurisdictional agreements are better addressed as part of the proceedings on Order No. 1000 compliance, where interested parties may provide additional information.<sup>269</sup>

**i. Mobile-Sierra**

**(a) First Compliance Order**

158. In the First Compliance Order, in addressing *Mobile-Sierra*-related issues, the Commission conducted a three-step analysis. First, the Commission addressed whether *Mobile-Sierra* protection necessarily (or automatically) applies to the provisions that Filing Parties contend include a federal right of first refusal, namely, section 3.09 and

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territories or footprints of its underlying transmission owning members. Order No. 1000-A, 139 FERC ¶ 61,132 at P 429.

<sup>266</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 226, 319, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 426. The Commission stated in Order No. 1000 that upgrades to transmission facilities included such things as tower change outs or reconductoring, regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319. The Commission clarified in Order No. 1000-A that the term "upgrade" means an improvement to, addition to, or replacement of a part of, an existing transmission facility. The term does not refer to an entirely new transmission facility. Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

<sup>267</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319.

<sup>268</sup> The *Mobile-Sierra* doctrine originated in the Supreme Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

<sup>269</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 292.

Schedule 3.09(a) of the Operating Agreement. The Commission concluded that it does not, because the Operating Agreement does not exhibit the characteristics that establish a *Mobile-Sierra* presumption.<sup>270</sup>

159. The Commission explained in the First Compliance Order that contract rates are individualized rates that are negotiated freely at arm's length, in contrast to generally applicable rates or rates that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. The *Mobile-Sierra* presumption necessarily applies to contract rates but does not automatically apply in other circumstances. The Commission explained, however, that it may exercise discretion to grant *Mobile-Sierra* protection outside the context of contract rates.<sup>271</sup>

160. Applying this framework the Commission found that the right-of-first-refusal provisions in the Operating Agreement were better characterized as prescriptions of general applicability to which the *Mobile-Sierra* presumption does not attach. Further, the Commission found that the negotiation that led to the right-of-first-refusal provisions in the Operating Agreement was primarily among parties with the same interest: protecting themselves from competition in transmission development. For this reason, the Commission also concluded that the *Mobile-Sierra* presumption does not apply to the right-of-first-refusal provisions in the Operating Agreement because those provisions arose in circumstances that do not provide assurance of justness and reasonableness on which the *Mobile-Sierra* presumption rests.<sup>272</sup>

161. The Commission noted that its finding in the First Compliance Order that the *Mobile-Sierra* presumption does not automatically apply to the right-of-first-refusal provisions in the ISO-NE Operating Agreement is consistent with the Commission's action in the 2004 TOA Orders<sup>273</sup> with respect to the standard of review applicable to these provisions. In those orders, the Commission found that, rather than being entitled

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<sup>270</sup> First Compliance Order, 143 FERC ¶ 61,150 at PP 160-198.

<sup>271</sup> See *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. Feb. 15, 2013) (*NEPGA*).

<sup>272</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 168.

<sup>273</sup> *ISO New England Inc.*, 106 FERC ¶ 61,280 (2004 TOA Order) (accepting partial settlement relating to the ISO-NE Transmission Operating Agreement), *order on reh'g*, 109 FERC ¶ 61,147 (2004) (2004 TOA Rehearing Order). The 2004 TOA Order and 2004 TOA Rehearing Order are referred to jointly as the 2004 TOA Orders.

to a presumption of justness and reasonableness, Filing Parties had not “carried their burden in showing” that the *Mobile-Sierra* protection they requested was appropriate.<sup>274</sup>

162. Second, the Commission explained in the First Compliance Order that, although not entitled to the *Mobile-Sierra* presumption as a matter of law, the Commission in the 2004 TOA Orders engaged in a balancing analysis to determine whether it should grant *Mobile-Sierra* treatment to specific Operating Agreement provisions. More specifically, in the 2004 TOA orders, the Commission stated that “where the interests of third-party market participants, or the effects on the market as a whole, are significant, we cannot find that a two-party agreement that would have the effect of limiting our ability to protect these broader interests is just and reasonable.”<sup>275</sup> Based on this balancing analysis, the Commission in the 2004 TOA Orders granted *Mobile-Sierra* protection to the right-of-first-refusal provision in the Operating Agreement based on the finding that “this provision will have no adverse impact on third parties or the New England market.”<sup>276</sup>

163. Third, recognizing that the Commission in the 2004 TOA Orders had exercised its discretion to allow *Mobile-Sierra* protection to apply to the right-of-first-refusal provisions in the Operating Agreement, the Commission in the First Compliance Order analyzed whether these provisions severely harm the public interest. The Commission concluded that these provisions do severely harm the public interest and, therefore, required their removal from the Operating Agreement. Among other considerations in support of that conclusion, the Commission noted that removal of barriers, such as a right of first refusal, to participation by nonincumbent transmission developers in the regional transmission planning processes lies at the core of Order No. 1000 and is essential to meeting the demands of changing circumstances facing the electric industry.<sup>277</sup> The Commission also noted that it had found in Order No. 1000 that generic action was necessary and that it is “critical that the Commission act now to address deficiencies to

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<sup>274</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 171 (citing 2004 TOA Order, 106 FERC ¶ 61,280 at P 126).

<sup>275</sup> *Id.* P 172 (citing 2004 TOA Rehearing Order, 109 FERC ¶ 61,147 at P 73).

<sup>276</sup> *Id.* (citing 2004 TOA Rehearing Order, 109 FERC ¶ 61,147 at P 78).

<sup>277</sup> *Id.* P 188.

ensure that more efficient or cost-effective investments are made as the industry addresses its challenges.”<sup>278</sup>

(b) **Requests for Rehearing or Clarification**

164. ISO-NE contends that the Commission failed to meet the legal standard for overcoming *Mobile-Sierra* protection pertaining to section 3.09 and Schedule 3.09(a) of its Operating Agreement, which relate to the incumbent transmission owners’ right of first refusal. ISO-NE states that the Commission granted *Mobile-Sierra* protection in 2004 and presented no valid ground in the First Compliance Order for finding that the public interest now requires a change. ISO-NE maintains that the Commission erred by relying on generic findings, averring that the First Compliance Order fails to explain how changed circumstances relate to New England.<sup>279</sup>

165. ISO-NE argues that, in Order No. 1000, the Commission found that the record was insufficient to address the specific issues raised by the protestor with respect to *Mobile-Sierra* protection of rights of first refusal.<sup>280</sup> ISO-NE concludes that, subsequently, in the First Compliance Order, the Commission seeks to minimize its statements in Order No. 1000 with respect to the lack of evidence upon which to make a public interest determination.<sup>281</sup> Further, ISO-NE addresses the case law relating to abrogation of contracts, averring that the First Compliance Order misapplied this precedent and that its generic reasoning is not legally sufficient to make a public interest finding as to the circumstances in New England.

166. Specifically, ISO-NE quotes *Texaco Inc. v. FERC* to differentiate the “public interest” showing as it relates to rulemakings, versus the modification of private contracts:<sup>282</sup>

[T]he “public interest” that permits [the Commission] to modify private contracts is different from and more exacting

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<sup>278</sup> *Id.* P 186 (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 46; *see also id.* P 50).

<sup>279</sup> ISO-NE Request for Rehearing at 24.

<sup>280</sup> *Id.* at 24-25 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 292).

<sup>281</sup> *Id.* at 25.

<sup>282</sup> 148 F.3d 1091 (D.C. Cir. 1998).

than the “public interest” that [the Commission] seeks to serve when it promulgates its rules . . . the public interest necessary to override a private contract, however, is significantly more particularized . . . .<sup>283</sup>

167. ISO-NE also claims that the First Compliance Order violates the holding in *Transmission Access Policy Study Group v. FERC*,<sup>284</sup> because in that case there was a particularized harm, supported by evidence of substantial monetary impact.<sup>285</sup> But here, ISO-NE avers, “there is no evidence of any harm at all, just conjecture, or ‘predictions’ about possible harm.”<sup>286</sup>

168. Finally, ISO-NE takes issue with the Commission’s application of *Permian Basin Area Rate Cases*,<sup>287</sup> stating that this case recognizes that the Commission’s “plenary authority” over contractual arrangements is subject to the restraint of *Mobile-Sierra*, and the Federal Power Act contemplates abrogation of such agreements “only in circumstances of unequivocal public necessity.”<sup>288</sup>

169. In addition to an alleged lack of evidentiary support to make a public interest finding to overcome the right of first refusal provision’s *Mobile-Sierra* protection, ISO-NE contends that the First Compliance Order does not address particularized evidence that the current right of first refusal is beneficial to consumers. ISO-NE maintains that Filing Parties submitted substantial evidence demonstrating the success of ISO-NE’s existing transmission planning process, which includes a right of first refusal. ISO-NE states that, “[o]ver the last decade, \$4.7 billion in new transmission facilities have been placed in service, with another \$5.7 billion in projects included in the ISO-NE [Regional

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<sup>283</sup> *Texaco*, 148 F.3d at 1097.

<sup>284</sup> 225 F.3d 667, 711 (D.C. Cir. 2000) (*TAPS*).

<sup>285</sup> ISO-NE Request for Rehearing at 27.

<sup>286</sup> *Id.* at 27 & n.83; *see also id.* at 29-31 (discussing Order No. 888, which was affirmed in *TAPS*, and averring that, unlike *TAPS*, “no evidence was produced in the ISO-NE compliance proceeding that would justify abrogation”).

<sup>287</sup> 390 U.S. 747, 822 (1968) (*Permian Basin*).

<sup>288</sup> ISO-NE Request for Rehearing at 28.

System Plan] that are in different stages of development.”<sup>289</sup> ISO-NE also states that the Commission did not rebut evidence that consumers in New England will be harmed if the right of first refusal (i.e., right to build) provisions are abrogated.<sup>290</sup>

170. With respect to the Commission’s consideration of whether the *Mobile-Sierra* presumption necessarily, or automatically, applies to the Operating Agreement, ISO-NE states that this argument is unnecessary and, in any event, the finding that the presumption does not apply is legally incorrect. ISO-NE states that *New England Power Generators Association, Inc. v. FERC*<sup>291</sup> did not hold that the Commission could classify provisions of contracts as tariff provisions and, thereby, deny *Mobile-Sierra* protection.<sup>292</sup> ISO-NE disagrees with the Commission’s characterization of the right-of-first-refusal provisions as generally applicable tariff provisions.<sup>293</sup> ISO-NE explains that “neither the [transmission owners] nor ISO-NE is a customer that has signed a service agreement to take service under an existing tariff at the ‘going rate.’”<sup>294</sup> ISO-NE maintains that the Operating Agreement is a bilaterally negotiated contract between ISO-NE and the

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<sup>289</sup> *Id.* at 33 (citing Filing Parties Filing, Testimony of David Boguslawski, Northeast Utilities’ Vice President of Transmission Strategy and Operations, and Carol Sedewitz, Director of Electric Transmission Planning at National Grid USA, at 13-14 (Transmission Owner Test.); Testimony of Stephen J. Rourke, at 14-15 (Rourke Test.)); *see also id.* at 34-35 (contending Commission relies on “a theoretical threat that the alleged common economic interest reflected in the TOA may preclude cheaper projects from being built” (citation omitted)).

<sup>290</sup> *Id.* at 35-36 (consumers “would have less reliable transmission service due to the delays in constructing reliability projects while dueling projects are considered, would suffer economic harm . . . , as well as high levels of congestion”). With respect to the prudence of costs, ISO-NE states that the transmission owners must annually submit their transmission costs in rates for review, upon which customers may comment; “there is no opportunity for the transmission providers to ‘gold plate’ the projects, or to use regional cost allocation to pay for local preferences . . . .” *Id.* at 36.

<sup>291</sup> 707 F.3d 364 (D.C. Cir. 2013) (*NEPGA*).

<sup>292</sup> ISO-NE Request for Rehearing at 38-39. “Nothing in *NEPGA* indicates that the Commission may treat provisions in contracts as tariff rates, and thereby eviscerate *Mobile-Sierra* protection.” *Id.* at 39.

<sup>293</sup> *See id.* at 42-43.

<sup>294</sup> *Id.* at 43.

transmission owners and, therefore, there is no basis to treat the Operating Agreement as a tariff of general applicability.

171. As far as the agreement itself, ISO-NE maintains that the Commission erred by finding the Operating Agreement arose in circumstances that do not provide the assurances of justness and reasonableness on which the *Mobile-Sierra* presumption relies, based on a common interest among competing transmission owners. ISO-NE asserts that the right-of-first-refusal provisions were agreed to by the incumbent transmission owners as a trade-off for giving up their facilities and the transformation of ISO-NE into a regional transmission organization.

172. The Administrative Committee also takes issue with the Commission's analysis of whether the Operating Agreement contains "contract rates" or "tariff rates," whether the rates, terms, and conditions are "individualized" or generally applicable, and whether they were bargained at arm's length. The Administrative Committee avers that the *Mobile-Sierra* doctrine does not distinguish between types of contractual provisions, i.e., case law does not support "exclusion from the scope of the *Mobile-Sierra* doctrine of contract provisions that [the Commission] views as 'generally applicable' or that it concludes were not the product of 'arm's length negotiations.'"<sup>295</sup> The Administrative Committee states that in the First Compliance Order the Commission relies on the 2004 orders granting *Mobile-Sierra* protection;<sup>296</sup> however, the Administrative Committee states that in those orders the Commission did not distinguish between "individualized" and generally applicable rates. Rather, according to the Administrative Committee, the Commission exercised authority that it believed it had to refuse *Mobile-Sierra* protection to certain sections of the Operating Agreement.<sup>297</sup> The Administrative Committee states that, as clarified by the Supreme Court, the Commission has no such authority.<sup>298</sup> Further, with respect to the Commission's finding that the contract provisions are generally applicable because they impact potential competitors, the Administrative Committee posits, "To conclude that an impact on potential competitors prevents application of the *Mobile-Sierra* doctrine would negate the effect of the Court's holding

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<sup>295</sup> Administrative Committee Request for Rehearing at 9-10 (discussing *NRG Power Mktg., LLC v. Me. Pub. Util. Comm'n*, 558 U.S. 165 (2010) (*NRG*)).

<sup>296</sup> 2004 TOA Order, 106 FERC ¶ 61,280, *order on reh'g*, 2004 TOA Rehearing Order, 109 FERC ¶ 61,147.

<sup>297</sup> Administrative Committee Request for Rehearing at 11.

<sup>298</sup> *Id.* at 11-12 (citing *Morgan Stanley Capital Grp., Inc. v. Pub. Util. District No. 1 of Snohomish Cnty.*, 554 U.S. 527 (2008) (*Morgan Stanley*)).

in *NRG* that third parties are bound by the *Mobile-Sierra* presumption.”<sup>299</sup> Moreover, the Administrative Committee maintains that the fact that new signatories to the Operating Agreement would have to accept the Operating Agreement provisions as-is, with limited room for negotiation, is the position of a third party to any contract.<sup>300</sup>

173. The Administrative Committee contends that *Mobile-Sierra* protection does not turn on whether the parties to the agreement had adverse interests. It states, “Neither the *Mobile-Sierra* cases nor any subsequent precedent has imposed a requirement that the contracting parties have adverse interests.”<sup>301</sup> The Administrative Committee states that the Court was clear in *Morgan Stanley* that the Commission may not impose barriers or prerequisites to applying *Mobile-Sierra* treatment; rather, *Morgan Stanley* allows only three circumstances under which the Commission could set aside a contractual rate, *viz.*, fraud, duress, and unlawful activity, which are not present here.<sup>302</sup> But here, the Administrative Committee states that ISO-NE was and is a party to the Operating Agreement and does not have a common interest with the signatory transmission owners. The Administrative Committee contends that there is “no basis for concluding that all [signatory transmission owners] share a common interest.”<sup>303</sup> In support, the Administrative Committee states that the transmission owners “bring different concerns and goals to the table,” and that during negotiations some of the transmission owners disagreed on a number of provisions in the Operating Agreement. The Administrative Committee states that other members of the NEPOOL also reviewed and commented on the Operating Agreement.

174. Next, the Administrative Committee asserts that the public interest finding—namely, that the public interest requires the elimination of the right-of-first-refusal provisions—is not supported by substantial evidence. It states that the Commission has not proffered evidence that extraordinary circumstances require overcoming the *Mobile-Sierra* protection of the Operating Agreement and, in fact, the Commission disregards evidence that the right of first refusal does not severely harm the public interest.<sup>304</sup> The

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<sup>299</sup> *Id.* at 12, 15.

<sup>300</sup> *Id.* at 14.

<sup>301</sup> *Id.* at 13.

<sup>302</sup> *Id.* at 14 (citing *Morgan Stanley*, 554 U.S. at 547).

<sup>303</sup> *Id.* at 16.

<sup>304</sup> *Id.* at 18, 19.

Administrative Committee predicts that removing the right of first refusal “will interfere with this beneficial and productive collaboration” that has resulted in \$4.7 billion in new transmission facilities over the last decade, with another \$5.7 billion under development.<sup>305</sup> The Administrative Committee reasons that the transmission owners “will no longer wish to share information, and they will not be able to share their expertise with ISO-NE in the same manner because they will be relegated to being submitters of competing projects, for which they will have to protect their competitive positions,” causing ISO-NE to have to “staff up” for this expertise and thereby increase its costs substantially.<sup>306</sup> Among other things, the Administrative Committee points out that testimony also established the incumbent transmission owners’ “longstanding relationships with State regulators and local officials responsible for permitting projects, which facilitates siting.”<sup>307</sup> The Administrative Committee maintains that the Commission ignores this evidence and relied instead on the theoretical benefits of competition.

175. The Administrative Committee states that the Commission reiterates its previous generic conclusions that the electric industry is entering a period of investment in new transmission facilities and that any future scenario will require significant expansion of the electric grid. The Administrative Committee contends that the Commission does not cite any evidence or otherwise explain its conclusion that the incumbent transmission owners’ existing federal rights of first refusal have interfered with, or will interfere with, this expansion of the New England electric grid so as to threaten severe harm to the public interest.<sup>308</sup> Moreover, the Administrative Committee avers that the Commission “merely observes that an increasing number of nonincumbent transmission developers have expressed interest in developing transmission facilities and incumbents have no economic incentive to allow them to compete.”<sup>309</sup> But these generic conclusions remain insufficient to make a public interest finding, the Administrative Committee explains, citing the Commission’s statements in Order No. 1000.<sup>310</sup> According to the

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<sup>305</sup> *Id.* at 19-20.

<sup>306</sup> *Id.* at 20.

<sup>307</sup> *Id.* at 21.

<sup>308</sup> *Id.* at 23.

<sup>309</sup> *Id.* at 24.

<sup>310</sup> *Id.* at 24-25 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 292 (“[T]he record is not sufficient to address the specific [*Mobile-Sierra*] issues raised by National Grid in this generic proceeding.”)).

Administrative Committee, the only material added to the record was the evidence provided by the transmission owners and ISO-NE, which the Commission ignored. Further, the Administrative Committee claims that the Commission, in removing the federal right of first refusal, did not take into account its previous factual finding that the section 3.09 right of first refusal “will have no adverse impact on third parties or the New England market.”<sup>311</sup>

176. These theoretical benefits of expanding opportunities for nonincumbent transmission developers, in the Administrative Committee’s view, do not support a reasonable expectation that eliminating the federal right of first refusal is an unequivocal public necessity. It states,

The Commission has not demonstrated or even explained, how providing new opportunities for nonincumbent transmission developers in these circumstances would reduce the cost of transmission service, let alone how the lack of such competition causes exceptional harm to consumers. . . . [T]he Commission is misusing the general economic theory that competition reduces costs by applying it to a situation where rates are not competitively determined.[<sup>312</sup>]

177. LS Power also filed a request for rehearing with respect to *Mobile-Sierra*-related issues. At the outset of its argument, LS Power does not dispute that the Commission granted *Mobile-Sierra* treatment in 2004 to section 3.09 of ISO-NE’s Operating Agreement. But, in LS Power’s view, the Commission’s conclusion that section 3.09 has *Mobile-Sierra* protection “is only one-half the required analysis.”<sup>313</sup> LS Power maintains that the Commission failed to address the second half, namely, whether, in addition to the right of first refusal for their projects, the incumbent transmission owners were also granted protection for “unfettered and unchangeable access to regional cost allocation” for these projects.<sup>314</sup>

178. LS Power also argues as a threshold matter that, because section 3.09 created a right of first refusal for incumbent transmission owners but did not provide them with a

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<sup>311</sup> *Id.* at 25-26 (quoting 2004 TOA Rehearing Order, 109 FERC ¶ 61,147 at P 78).

<sup>312</sup> *Id.* at 28-29.

<sup>313</sup> LS Power Request for Rehearing at 5.

<sup>314</sup> *Id.* (citing First Compliance Order, 143 FERC ¶ 61,150 at P 172).

*Mobile-Sierra*-protected right to regional cost allocation for *all* transmission projects, the Commission is not required to meet the public interest standard to condition access to the regional cost allocation method on the removal of any federal right of first refusal.<sup>315</sup> LS Power states that in Order No. 1000 the Commission did not make a blanket finding that all rights of first refusal must be eliminated but rather directed that public utility transmission providers eliminate federal rights of first refusal for incumbents “*with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.*”<sup>316</sup> LS Power states that the Commission therefore gave incumbent transmission owners a choice: to maintain the right of first refusal and build locally, billing only their ratepayers for the new transmission additions; or to participate in regional cost allocation but give up the right of first refusal.<sup>317</sup> LS Power asserts that the Commission reiterated this point in Order No. 1000-A, stating that “[t]he Commission did not . . . require public utility transmission providers to remove a federal right of first refusal for local transmission facilities or upgrades to an incumbent transmission provider’s own transmission facilities . . . ,”<sup>318</sup> and that Order No. 1000 does not mandate that incumbent transmission owners use regional cost allocation for their projects. LS Power argues that ISO-NE’s compliance filing, therefore, left the Commission to determine how to reconcile the incumbent transmission owners’ claim that *Mobile-Sierra* protected their right of first refusal with the fact that, under Order No. 1000, access to regional cost allocation is not a right protected by *Mobile-Sierra*.<sup>319</sup>

179. LS Power avers that ISO-NE misunderstands this *Mobile-Sierra* protection.<sup>320</sup> LS Power explains that, while section 3.04 of the Operating Agreement gives the transmission owners acting together the right to make section 205 filings for a regional

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<sup>315</sup> *Id.* It further notes that the Filing Parties did not establish that any other Transmission Operating Agreement or OATT section had *Mobile-Sierra* protection and gave incumbent transmission owners a guarantee of regional cost allocation without regard to later Commission determinations as to the circumstances under which such regional cost allocation would be available. *Id.* at 6.

<sup>316</sup> *Id.* (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313 (emphasis supplied by LS Power)).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 357).

<sup>319</sup> *Id.* at 7.

<sup>320</sup> *See id.* (citing First Compliance Order, 143 FERC ¶ 61,150 at P 155).

cost allocation methodology, the section does not mandate a particular methodology and does not remove the Commission's right to place appropriate conditions on regional cost allocation. LS Power asserts that "if ISO-NE's argument that incumbent transmission owners had a *Mobile-Sierra* protected right to regional cost allocation had any merit, it would have been a central feature to ISO-NE's *Mobile-Sierra* argument in the first instance as Order No. 1000 did not prohibit all rights of first refusal, only those tied to projects seeking regional cost allocation."<sup>321</sup>

180. LS Power further states that the Commission conducted a balancing test in 2004 before concluding that it would permit *Mobile-Sierra* protection for section 3.09, and found that "where the interests of third-party market participants, or the effects on the market as a whole, are significant, we cannot find that a two-party agreement that would have the effect of limiting our ability to protect these broader interests is just and reasonable."<sup>322</sup> Thus, LS Power asserts, the Commission accorded *Mobile-Sierra* protection to section 3.09 on the basis of the Filing Parties' representation that section 3.09 would have no adverse impact on third parties or the New England market. But, LS Power points out, the Commission made no reference to any assertions by the Filing Parties in 2004 that acceptance of *Mobile-Sierra* protection for section 3.09 would prohibit the Commission from restricting access to regional cost allocation in the future, and the Commission did not, therefore, consider that question in its balancing process. In fact, LS Power asserts, if the Filing Parties had made such an argument, it would have been directly contrary to the assertions that they had made in 2004, namely, that the provision will "have no adverse impact on third parties or the New England market."<sup>323</sup>

181. LS Power states that the Commission has not analyzed the full scope of section 3.09 or the interrelationship between that provision and other provisions of the OATT that do not have *Mobile-Sierra* protection. On this basis, LS Power argues that the Commission erred in the First Compliance Order by (a) relying on the 2004 determination that section 3.09 had *Mobile-Sierra* protection and (b) concluding therefore that the Commission must make a public interest determination to restrict regional cost allocation. LS Power argues that the Commission is only now in a position to review "the exact scope of Section 3.09" and to balance the *Mobile-Sierra* protection granted to that section with the mandate in Order No. 1000 regarding access to regional cost allocation methodologies. LS Power states that, in restricting access to regional cost allocation to only those projects selected in a fair and non-discriminatory process devoid

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<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 7-8 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 172).

<sup>323</sup> *Id.* at 8.

of rights of first refusal, the Commission did not deprive incumbent transmission owners of a contractually-protected right because those transmission owners never had a *Mobile-Sierra*-protect “right” to regional cost allocation or to bill the costs of their projects to others than their ratepayers. Thus, LS Power argues, the Commission was not required to show significant adverse harm to the public interest, as required by the *Mobile-Sierra* doctrine.

(c) **Commission Determination**

182. As discussed above, the Commission in the First Compliance Order conducted a three-step analysis in addressing *Mobile-Sierra*-related issues. In their requests for rehearing, ISO-NE and the Administrative Committee challenge many aspects of that analysis. For the reasons discussed below, we deny ISO-NE’s and the Administrative Committee’s requests for rehearing with respect to *Mobile-Sierra*-related issues.

183. The Commission continues to believe that the appropriate first step in analyzing these issues is considering whether *Mobile-Sierra* protection necessarily (or automatically) applies to section 3.09 and Schedule 3.09(a) of the Operating Agreement, which Filing Parties contend include a federal right of first refusal. As the Commission stated in the First Compliance Order, in determining whether a *Mobile-Sierra* presumption applies in a specific instance, the Commission must determine whether the instrument or provision at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. The former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption; that presumption does not necessarily apply to the latter, although the U.S. Court of Appeals for the District of Columbia Circuit has determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that do not present contract rates.<sup>324</sup> The Commission concluded that the subject provisions of the Operating Agreement are not entitled to the *Mobile-Sierra* presumption because those provisions are generally applicable and also because those provisions arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations.

184. ISO-NE contends that considering whether the *Mobile-Sierra* presumption necessarily applies to the Transmission Operating Agreement is unnecessary. Similarly, the Administrative Committee questions this aspect of the Commission’s analysis,

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<sup>324</sup> See *NEPGA*, 707 F.3d at 370-71.

arguing that the *Mobile-Sierra* doctrine does not support “exclusion from the scope of the *Mobile-Sierra* doctrine of contract provisions that [the Commission] views as ‘generally applicable’ or that it concludes were not the product of ‘arm’s length negotiations.’” To the extent that ISO-NE and the Administrative Committee are arguing that all contracts, regardless of their characteristics, are entitled to *Mobile-Sierra* protection, we disagree. That view is overbroad, as it would sweep in even a situation where the terms of an agreement, if approved, would be incorporated into the service agreements of all present and future customers. In contrast to such an overbroad approach, the Commission reasonably distinguished between “contract rates,” i.e., rates in a contract that qualifies for a *Mobile-Sierra* presumption, and rates, terms, or conditions in an agreement that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations.

185. ISO-NE and the Administrative Committee next take issue with the characterization of the right of first refusal as a generally applicable provision. We affirm our prior conclusion on this point. The Commission supported this conclusion in part by observing that any new Participating Transmission Owner would have to accept these provisions as-is, with limited room for negotiation. The Commission further observed that amending the Transmission Operating Agreement requires action by a sixty-five percent majority of current ISO-NE Participating Transmission Owners (i.e., parties to the Transmission Operating Agreement).<sup>325</sup> Thus, the Commission found that new transmission owners are placed in a position that differs fundamentally from that of parties who are able to negotiate freely like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption.

186. ISO-NE and the Administrative Committee next take issue with the Commission’s finding that the subject provisions of the Operating Agreement arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. We reaffirm our prior conclusion on this point, as well. The Commission explained in the First Compliance Order that, while the *Mobile-Sierra* doctrine may not require that parties to an agreement have completely adverse interests, the *Mobile-Sierra* presumption does require that the contract provisions arise in circumstances that provide the assurance of justness and reasonableness.<sup>326</sup> Significant

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<sup>325</sup> ISO-NE, Agreements and Contracts, Transmission Operating Agreement (3.0.0), § 11.04(a)(iii)(B)(1).

<sup>326</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 168 (citing *Morgan Stanley*, 554 U.S. at 554, which explained that “the premise on which the *Mobile-Sierra* presumption rests” is “that the contracts are the product of fair, arm’s length

commonality of interests serves to undermine such assurance of justness and reasonableness. Here, the right-of-first-refusal provisions arose in a negotiation aimed at protecting a common interest among competing Participating Transmission Owners. Their common agreement would maintain each Participating Transmission Owner's service territory for its exclusive use, preventing any competitor from owning or constructing any new facility or transmission upgrade in that territory.<sup>327</sup>

187. The Administrative Committee also argues that the Commission's above-noted analysis "would negate the effect of the Supreme Court's holding in *NRG* that third parties are bound by the *Mobile-Sierra* presumption."<sup>328</sup> However, in contrast to the Administrative Committee's argument, *NRG* does not resolve the question of whether the *Mobile-Sierra* presumption applies to the rates at issue in a particular case. In *NRG*, the U.S. Supreme Court held that a *Mobile-Sierra* presumption applies to third-party challenges to "contract rates," i.e., rates that possess the factual preconditions for a *Mobile-Sierra* presumption, but it remanded to the court of appeals the questions of whether the rates at issue qualify as contract rates and, if not, whether they could nevertheless be treated analogously.<sup>329</sup> The court of appeals then remanded these questions back to the Commission,<sup>330</sup> which found that the rates were not contract rates, but did possess characteristics that justified treating them analogously to contract rates.<sup>331</sup> Thus, consistent with the *NRG* remand, the issue presented here is whether the Operating Agreement provisions in question possess the factual preconditions for a *Mobile-Sierra*

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negotiations." Arm's-length bargaining serves an important role in confirming that the transaction price reflects fair market value.

<sup>327</sup> As noted in the First Compliance Order, we repeat that in reaching these conclusions we do not imply that the parties have acted in bad faith. Rather, for purposes of *Mobile-Sierra* analysis, the courts have found that it is relevant whether, in seeking to advance their interests, the parties are situated in relation to each other in a way that allows one to make a specific assumption about the results of their negotiations. We reach our conclusions here based in part on that analysis.

<sup>328</sup> Administrative Committee Request for Rehearing at 12, 15.

<sup>329</sup> *NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 130 S.Ct. 693, 701 (2010) (*NRG*).

<sup>330</sup> *Me. Pub. Util. Comm'n v. FERC*, 625 F.3d 754, 759-60 (D.C. Cir. 2010).

<sup>331</sup> *Devon Power LLC*, 134 FERC ¶ 61,208, at PP 12-14 (2011).

presumption. For the reasons discussed above, we conclude that the preconditions for a *Mobile-Sierra* presumption do not exist here.

188. In its second step of its three-part analysis of *Mobile-Sierra*-related issues in the First Compliance order, the Commission addressed the 2004 TOA Orders. The Commission explained that in the 2004 TOA Orders, the Commission engaged in a balancing analysis and concluded that although the Operating Agreement provisions at issue here were not entitled to the *Mobile-Sierra* presumption as a matter of law, it was appropriate to exercise discretion and grant *Mobile-Sierra* treatment to those provisions.

189. The Administrative Committee disagrees with the Commission's reading of the 2004 TOA Orders. The Administrative Committee argues that the Commission in those orders exercised authority that it believed it had to refuse *Mobile-Sierra* protection to certain sections of the Operating Agreement, but that subsequent Supreme Court precedent makes clear that the Commission has no such authority. We disagree with the Administrative Committee's interpretation of court precedent. The Administrative Committee's view that all contracts, regardless of their characteristics, are entitled to *Mobile-Sierra* protection is overbroad, as discussed above, and is not required by either *Morgan Stanley* or *NRG*. Rather, the Commission's consideration in the 2004 TOA Orders as to whether particular Operating Agreement provisions warranted the requested *Mobile-Sierra* treatment reflects the type of discretionary analysis that the D.C. Circuit in *NEPGA* specifically found to be within the Commission's authority.

190. In its third and final step of its analysis of *Mobile-Sierra*-related issues in the First Compliance order, the Commission analyzed whether the subject Operating Agreement provisions severely harm the public interest. The Commission concluded that these provisions do severely harm the public interest and, therefore, required their removal from the Operating Agreement.

191. On rehearing, ISO-NE and the Administrative Committee raise two arguments against this conclusion. First, ISO-NE and the Administrative Committee argue that the Commission has not made a showing sufficient to demonstrate that the subject provisions severely harm the public interest. Second, ISO-NE disagrees with the Commission's reading of several court cases that the Commission cited in support of these conclusions. We address these arguments, in turn.

192. In a first line of argument, ISO-NE and the Administrative Committee contend that the Commission has not made a particularized "public interest" showing to overcome the grant of *Mobile-Sierra* treatment made in the 2004 TOA Orders. They point out that the Commission stated in Order No. 1000 that the record was "not sufficient" to address such issues and that those issues are better addressed as part of the Order No. 1000

compliance proceeding, where interested parties may provide additional information.<sup>332</sup> ISO-NE maintains that the Commission's generic findings in the First Compliance Order fail to explain how changed circumstances relate in any way to New England.<sup>333</sup>

193. In Order No. 1000, in response to an individual request to address an issue relating to the right-of-first-refusal provision in a specific agreement, the Commission found that the record was not sufficient and explained that the Commission does not generally interpret individual contracts in generic rulemaking proceedings.<sup>334</sup> As the Commission said in Order No. 1000, prior to having before it the universe of contracts and arguments to determine which lend support to, or provide evidence against the specific issue, the record remained insufficient. Rather than consider the single contract and the particular isolated issue in the generic proceeding, the Commission proposed to consider all such relevant contracts and arguments that reach the content of the rulemaking proceeding together, at one time, in a fuller record on compliance. Once submitted on compliance, the Commission was able to examine together all the arguments relating to this specific issue—*Mobile-Sierra* protection of the right of first refusal provisions—as well as the individual contract provisions and other related documents, such as Commission orders addressing these provisions. The Commission findings on compliance were based on this more complete, and now sufficient, record.<sup>335</sup>

194. In the First Compliance Order, the Commission explained that the elimination of federal rights of first refusal in Order No. 1000 was intended to benefit customers by fostering competition in transmission development.<sup>336</sup> Like the reforms in Order No. 888,<sup>337</sup> the elimination of federal rights of first refusal in Order No. 1000 “fundamentally changes the regulatory environment in which utilities operate, introducing meaningful competition into an industry that since its inception has been

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<sup>332</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 292.

<sup>333</sup> ISO-NE Request for Rehearing at 24.

<sup>334</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 292.

<sup>335</sup> See First Compliance Order, 143 FERC ¶ 61,150 at P 132.

<sup>336</sup> *Id.* P 182.

<sup>337</sup> Order No. 888, FERC Stats. & Regs. ¶ 31,036, *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046, *aff'd in relevant part sub nom.*, *TAPS*, 225 F.3d 667, *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

highly regulated and affecting all utilities in a similar way.”<sup>338</sup> The Commission likewise explained in Order No. 1000 that “it is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region’s needs.”<sup>339</sup>

195. The Commission further explained in the First Compliance Order that the reforms of Order No. 1000, including the elimination of rights of first refusal, were needed because the electric industry is entering “a longer-term period of investment in new transmission facilities,” with corresponding costs estimated in some reports as likely to reach nearly \$300 billion over the next 20 years.<sup>340</sup> The Commission noted that “[s]ignificant expansion of the transmission grid will be required under any future electric industry scenario,”<sup>341</sup> as “existing and potential environmental regulation and state renewable portfolio standards are driving significant changes in the mix of generation resources, resulting in early retirements of coal-fired generation, an increasing reliance on natural gas, and large-scale integration of renewable generation.”<sup>342</sup> The Commission further observed that the existing transmission system was not built to accommodate this shifting generation fleet and that incumbent transmission owners have no economic incentive to allow nonincumbent transmission developers to compete,<sup>343</sup> notwithstanding

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<sup>338</sup> *TAPS*, 225 F.3d at 711. Moreover, “[t]he possibility of competitive entry is the principal limitation on monopoly power in a market economy.” Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* 116 (1988).

<sup>339</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 256.

<sup>340</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 185 (referring to Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 44).

<sup>341</sup> *Id.*; Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 29 (quoting U.S. Department of Energy, *20% Wind Energy by 2030*, at 93 (July 2008), *available at* <http://www.nrel.gov/docs/fy08osti/41869.pdf> (last visited Mar. 9, 2015); *see also id.* PP 26-28 & accompanying notes.

<sup>342</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 185 (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 45).

<sup>343</sup> *Id.*

an increasing number of nonincumbent transmission developers that have expressed interest in developing transmission facilities.<sup>344</sup>

196. ISO-NE acknowledges this longer-term period of investment in new transmission facilities, proffering its own evidence of this ongoing expansion.<sup>345</sup> On rehearing, ISO-NE avers that, over the last decade, it has placed \$4.7 billion in new transmission facilities in service and has placed another \$5.7 billion in projects (in different stages of development) in the ISO-NE Regional System Plan.<sup>346</sup> This ramping up over the last ten years demonstrates a trajectory of transmission system expansion.

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<sup>344</sup> See, e.g., *Pioneer Transmission, LLC v. N. Ind. Pub. Serv. Co.*, 140 FERC ¶ 61,057 (2012) (finding that tariff dictated that ownership and responsibility to construct the portion of the transmission project in incumbent's service territory belonged to the incumbent transmission owner); *W. Grid Dev., LLC v. Cal. Indep. Sys. Operator Corp.*, 135 FERC ¶ 61,077, at P 30 (2011) (finding that tariff "only authorizes [incumbent transmission owners] with distribution service territories to finance, construct, and own reliability projects").

<sup>345</sup> Likewise, NESCOE recognizes this build-up of transmission facilities. See, e.g., E-mail from Ann G. Berwick, President, NESCOE, to Gordon van Welie, President and CEO, ISO-NE (Jan. 21, 2014) (discussing plans to increase infrastructure in New England), available at <http://www.nescoc.com>; *NESCOE asks ISO-NE for tariff changes to pay for infrastructure*, Restructuring Today, Jan. 24, 2014, <http://www.restructuringtoday.com/members/11083.cfm> ("Just last month, [NESCOE's] members committed to work together to build out more energy infrastructure for the region."); Rod Kuckro, *Transmission: In New England, Governors Team Up to Tackle Region's Infrastructure Deficit* (E&E Publishing Jan. 3, 2014), <http://www.eenews.net/stories/1059992362> ("New England's governors have set an ambitious course to fast-track the construction of hundreds of miles of new transmission lines . . . in the region . . ."); Gordon van Welie, *Infrastructure Needs: Electricity-Natural Gas Interdependencies*; U.S. Dep't of Energy Quadrennial Energy Review, at 11 (Apr. 21, 2014) ("New England Governors request ISO's Support to Develop Electric and Natural Gas Infrastructure"), available at [http://energy.gov/sites/prod/files/2014/04/f15/Remarksof\\_vanWelie\\_ISONE\\_ppt\\_April21.pdf](http://energy.gov/sites/prod/files/2014/04/f15/Remarksof_vanWelie_ISONE_ppt_April21.pdf).

<sup>346</sup> ISO-NE Request for Rehearing at 33 (citing Filing Parties Filing, Transmission Owner Test. at 13-14; Rourke Test. at 14-15); see also *id.* at 34-35 (contending Commission relies on "a theoretical threat that the alleged common economic interest reflected in the TOA may preclude cheaper projects from being built" (citation omitted)).

197. Both ISO-NE and the Administrative Committee characterize this robust continuing trend of system expansion as particularized evidence that the current right of first refusal is beneficial to consumers.<sup>347</sup> The inference they would draw from this ongoing build-up of the transmission system, presumably, is that the incumbent transmission owners are sufficiently developing projects under the existing framework with their current rights of first refusal. While ISO-NE may be addressing its transmission system needs notwithstanding the changes to system planning and cost allocation introduced by Order No. 1000, the particular data proffered by ISO-NE and the Administrative Committee affirm the industry's—and particularly ISO-NE's—entry into “a longer-term period of investment in new transmission facilities.”<sup>348</sup> The onset of this development trend in New England (and across the nation) demonstrates a changing circumstance in the marketplace,<sup>349</sup> which continues to threaten the public interest by avoiding expected efficiencies and cost savings and makes the need to foster competitive practices more acute.<sup>350</sup> We therefore disagree with the inference that, because there has been investment in new transmission facilities in recent years while the current right-of-first-refusal provisions have been in effect, those provisions do not harm the public interest. To the contrary, the issue before the Commission is not whether transmission development has previously occurred either because, or in spite, of the existence of the right-of-first-refusal provisions, but rather whether the continued existence of those provisions will harm the public interest. We continue to believe that the Commission's findings, discussed further below, in Order No. 1000 regarding the benefits of competitive transmission development to customers, as well as the documented need for additional transmission development in the ISO-NE region, demonstrate that the right-of-first-refusal provisions are contrary to the public interest.

198. Further, the Commission's original grant of *Mobile-Sierra* treatment to the right-of-first-refusal provisions was not open-ended but explicitly based on the lack of harm,

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<sup>347</sup> See ISO-NE Request for Rehearing at 33; Administrative Committee Request for Rehearing at 19-20.

<sup>348</sup> We note that the significant values ISO-NE and the Administrative Committee give for projects currently in development (totaling \$5.7 billion in projects in different stages of development), which already exhibit a large volume, may in fact be even larger, as cost-overruns are often to be expected. See, e.g., *New England Conference of Pub. Utils. Comm'n, Inc. v. Bangor Hydro-Elec. Co.*, 124 FERC ¶ 61,291 (2008), *denying reh'g*, 135 FERC ¶ 61,140 (2011).

<sup>349</sup> See First Compliance Order, 143 FERC ¶ 61,150 at PP 185-186.

<sup>350</sup> See *supra* note 345 and accompanying text.

finding that “this provision will have no adverse impact on third parties or the New England market.”<sup>351</sup> With respect to any harm to third parties, the Commission explained in the First Compliance Order that, in making a public interest finding in this case, the Commission also took notice of the Supreme Court’s recent statement that “the *Mobile-Sierra* doctrine does not overlook third-party interests; it is framed with a view to their protection.”<sup>352</sup> The Commission also pointed out that, similarly, the U.S. Court of Appeals for the First Circuit has stated that the “most attractive case” for contract reformation pursuant to the *Mobile-Sierra* doctrine “is where the protection is intended to safeguard the interests of third parties.”<sup>353</sup> Moreover, as discussed above, at some point commonality of interests undermines the assurance of justness and reasonableness of the rate, term, or condition. In this case, the right-of-first-refusal provisions effectively protect competing Participating Transmission Owners’ common interest and essentially contract competition out of the market.

199. In a second line of argument, ISO-NE disagrees with the Commission’s reading of several court cases that the Commission cited in support of its conclusion that the subject provisions of the Operating Agreement severely harm the public interest. Based on its interpretation of those cases, ISO-NE argues that the public interest that permits the Commission to modify private contracts is different from and more exacting than the public interest that the Commission seeks to serve when promulgating its rules. ISO-NE argues that the Commission has not met the more exacting standard here, because it has not provided the particularized evidence necessary to override a private contract and has instead relied on “conjecture or ‘predictions’ of possible harm.”<sup>354</sup>

200. Before addressing the specific court cases, we note that the U.S. Court of Appeals for the District of Columbia Circuit has rejected a characterization similar to ISO-NE’s view of the evidence that the Commission relied on in the Order No. 1000 proceeding. The court considered the argument that the Commission acted in Order No. 1000 on insufficient evidence at some length and in considerable detail and found it to be unsupported.<sup>355</sup> The court noted that the Commission had indeed acted, in part, on

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<sup>351</sup> 2004 TOA Rehearing Order, 109 FERC ¶ 61,147 at P 78.

<sup>352</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 194 (quoting *NRG*, 130 S.Ct at 700).

<sup>353</sup> *Id.* (quoting *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993)).

<sup>354</sup> ISO-NE Request for Rehearing at 27.

<sup>355</sup> *S.C. Pub. Serv. Comm’n v. FERC*, 762 F.3d 41, 64-71 (D.C. Cir. 2014).

predictions of possible harm, but it had done so appropriately, as the matters involved were within the Commission's authority, and the Commission's decisions were based on reasonable economic assumptions.<sup>356</sup> The court noted that the Commission had considered data concerning the expected expansion of the transmission grid, as well as evidence regarding transmission projects that had not gone ahead due to overlaps and deficiencies in transmission planning and cost allocation processes.<sup>357</sup> It stated that the Commission also had considered deficiencies in the Order No. 890 planning requirements, as well as the complexities of the planning process and the long lead times involved in the process.<sup>358</sup> The court found this analysis by the Commission provided sufficient evidentiary support for the requirements of Order No. 1000. The question thus becomes how the substantial evidence that supports Order No. 1000 is related to the Commission's finding that the right of first refusal in the ISO-NE Transmission Operating Agreement harms the public interest in a way that overcomes *Mobile-Sierra* protection.

201. Turning to the specific court cases that the Commission cited in the First Compliance Order and that ISO-NE addresses in its request for rehearing, we note first that when dealing with *Mobile-Sierra* in the context of bilateral service contracts, the fact pattern involved in most cases where *Mobile-Sierra* is invoked, the question presented is whether an unfavorable contract provision will adversely affect the private interest of a utility service provider to such a degree that it will also affect the public interest, the primary example being where "the rate is so low" that "it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."<sup>359</sup> However, as the Commission noted in the First Compliance Order, "when, as here, the Commission is implementing new regulations that affect existing contracts, the issue is not whether Commission action impermissibly relieves one party of its 'improvident bargain,' but whether the Commission is properly exercising its 'plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests.'"<sup>360</sup>

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<sup>356</sup> *Id.* at 65, 68.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at 66.

<sup>359</sup> *Sierra*, 350 U.S. at 355.

<sup>360</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 175 (quoting *Permian Basin*, 390 U.S. at 784).

202. This is because the purpose of Commission regulation, as specified in section 201 of the FPA, is protection of the public interest. As the Supreme Court noted in *Sierra* invoking section 201, “the purpose of the power given the Commission by § 206(a) is the protection of the public interest.”<sup>361</sup> Thus, in acting under section 206 in the Order No. 1000 rulemaking, the Commission was establishing requirements whose purposes is the protection of the public interest. To override a private contract because it harms the public interest protected by the rule “requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract’s deleterious effect.”<sup>362</sup> That analysis is particularly straightforward when assessing the impact of a contractual right of first refusal, as the right substantially negates the efficacy of the requirements put in place to protect the public interest by placing the projects for which the right can be asserted beyond the reach of those requirements.

203. We reaffirm that the Commission’s citation of court precedent in the First Compliance Order supports these conclusions. For instance, the Commission noted in the First Compliance Order that, in *Texaco*, the court upheld the Commission’s authority to reform firm gas transportation contracts to incorporate straight fixed-variable, rather than modified fixed-variable rates, as required under Commission Order No. 636. The court found that the Commission satisfied its burden of providing a “particularized” “analysis of the manner in which the contract harms the public interest and [] the extent to which abrogation or reformation mitigates the contract’s deleterious effect” by finding that retention of modified fixed-variable rates “would distort gas market pricing to the detriment of the ‘integrated national gas sales market’” and “‘would be particularly anti-competitive’ because it would harm [the pipeline’s] main competitor . . . .”<sup>363</sup>

204. The Commission concluded that there was no material distinction between its action in that case and its finding that failure to eliminate the right of first refusal in the ISO-NE Transmission Operating Agreement would adversely affect transmission development for the reasons given in Order No. 1000, i.e., because it effectively restricts the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process and because it deprives customers of the benefits of competition in transmission development and associated potential savings.<sup>364</sup>

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<sup>361</sup> *Sierra*, 350 U.S. at 355.

<sup>362</sup> *Texaco*, 148 F.3d at 1097.

<sup>363</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 190 (quoting *Texaco*, 148 F.3d at 1097 (internal citations deleted)).

<sup>364</sup> *Id.* PP 191-192.

ISO-NE argues that the Commission has failed to provide the particularized analysis that *Texaco* requires. We disagree. A finding that a contract provision harms the public interest by negating Commission rules promulgated for the purpose of protecting the public interest is a particularized analysis of the manner in which the contract harms the public interest and the extent to which abrogation mitigates the deleterious effect. The fact that the same conclusion applies to other rights of first refusal does not affect this conclusion.<sup>365</sup>

205. The Commission cited *TAPS* in the First Compliance Order for the proposition that the *Mobile-Sierra* doctrine does not bar the Commission from exercising its authority to abrogate contracts in a generic proceeding, particularly in response to changed circumstances or in order to remedy serious harm to the public interest caused by anticompetitive provisions.<sup>366</sup> ISO-NE maintains that *TAPS* is inapplicable here because in that case there was a particularized harm, supported by evidence of substantial monetary impact of \$200 billion or more in stranded costs, whereas here there is no evidence of any harm but rather only “conjecture, or ‘predictions’ about possible harm.”<sup>367</sup> However, as discussed above, the Court of Appeals for the District of Columbia Circuit has rejected this argument and has found that the Commission has provided substantial evidence to support the requirements of Order No. 1000, which includes quantified estimates of transmission needs that the Commission’s planning requirements are intended to support.

206. Finally the Commission cited *Permian Basin* as support for the proposition that an order may not be set aside merely because the Commission has on an earlier occasion reached another result, as administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances.<sup>368</sup> ISO-NE maintains that *Permian Basin* does not support the Commission’s position because the court in that case stated that the Commission’s

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<sup>365</sup> See First Compliance Order, 143 FERC ¶ 61,150 at P 173 (quoting *TAPS*, 225 F.3d at 710 (holding that “nothing in the *Mobile-Sierra* doctrine [] prohibit[s] [the Commission] from responding with a public interest finding applicable to all contracts of that class.”)).

<sup>366</sup> *Id.* P 173 (quoting *TAPS*, 225 F.3d at 710).

<sup>367</sup> ISO-NE Request for Rehearing at 27.

<sup>368</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 197.

authority to reach different results was subject to *Mobile-Sierra* requirements.<sup>369</sup> That is indeed the case, but, as discussed above, our action here satisfies those requirements.

207. LS Power argues that, while the Commission may have granted *Mobile-Sierra* protection to section 3.09, which created a right of first refusal for incumbent transmission owners, the Commission did not grant any such protection to regional cost allocation for *all* transmission projects.<sup>370</sup> Thus, LS Power explains, the Commission is not required to make a public interest showing in order to condition access to the regional cost allocation method on the removal of any federal right of first refusal. While LS Power's basic contention is not per se objectionable, the Commission does not need to address this alternative theory because it already has demonstrated the significant adverse harm to the public interest resulting from maintaining a federal right of first refusal.

ii. **Exceptions to the Requirement to Eliminate the Federal Right of First Refusal**

(a) **First Compliance Order**

208. The Commission found in the First Compliance Order that Filing Parties had partially complied with Order No. 1000's requirements regarding the removal of federal rights of first refusal.<sup>371</sup> In their First Compliance Filing, Filing Parties proposed to add new sections to the Operating Agreement that would preserve the Participating Transmission Owner's rights to: (1) build an upgrade to a Participating Transmission Owner's own transmission facilities, regardless of whether the upgrade has been selected in the regional transmission plan for purposes of cost allocation; (2) retain, modify, or transfer rights of way subject to relevant law or regulation granting such rights of way; and (3) develop a transmission solution that is not eligible for regional cost allocation to meet its reliability transmission needs or service obligations in its own service territory or footprint.<sup>372</sup> With respect to the proposed exception for upgrades, the Commission found that Filing Parties' proposed definition of "upgrade" was partially compliant with Order No. 1000.<sup>373</sup> Specifically, the Commission found that Filing Parties' proposal to classify any Transmission Facility that requires expansion of a transmission owner's existing

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<sup>369</sup> ISO-NE Request for Rehearing at 27-28.

<sup>370</sup> LS Power Request for Rehearing at 5.

<sup>371</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 227.

<sup>372</sup> *Id.* P 229.

<sup>373</sup> *Id.* P 230.

right of way as an “upgrade” to be built by a transmission owner was inconsistent with the definition of “upgrade” as clarified in Order No. 1000-A. Accordingly, the Commission directed Filing Parties to remove this proposed language.

209. With respect to Filing Parties’ proposed revisions to preserve a Participating Transmission Owner’s rights to retain, modify, or transfer rights of way subject to relevant law or regulation, the Commission acknowledged that Order No. 1000’s reforms are not intended to alter an incumbent transmission provider’s use and control of its existing rights of way, nor does Order No. 1000 grant or deny transmission developers the ability to use rights of way held by other entities.<sup>374</sup> However, the Commission also noted that Order No. 1000 does not allow a public utility transmission provider to add a federal right of first refusal for a new transmission facility based on an existing right of way. Therefore, the Commission directed Filing Parties to remove certain proposed revisions related to rights of way in sections (b) and (f) of Schedule 3.09(a) and section 4.3(a) of Attachment K.

210. In the First Compliance Filing, Filing Parties proposed that, where the forecasted year of need for a reliability-related project is five years or less from the completion of a Needs Assessment, ISO-NE will assign the existing transmission owner to develop the needed transmission facility. The Commission found that this proposal only partially complied with the directives of Order No. 1000.<sup>375</sup> In particular, the Commission found that Filing Parties did not sufficiently support the proposed five-year period to assign development of a reliability project to the Participating Transmission Owners.<sup>376</sup> However, the Commission recognized that there may be instances in which it may not be feasible to hold a competitive solicitation process to solve a reliability violation.

211. While the Commission approved this exception from the requirement to eliminate a federal right of first refusal, the Commission adopted the following five criteria, which it believed would place reasonable bounds on ISO-NE’s discretion to determine whether there is sufficient time to permit competition to develop a reliability project and, as a result, would ensure that an exception from the requirement to eliminate a federal right of first refusal for reliability projects will be used in limited circumstances.<sup>377</sup> First, the reliability project must be needed in three years or less to solve reliability criteria

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<sup>374</sup> *Id.* P 231 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319).

<sup>375</sup> *Id.* P 335.

<sup>376</sup> *Id.* P 337.

<sup>377</sup> *Id.* P 236.

violations. Second, ISO-NE must separately identify and then post an explanation of the reliability violations and system conditions in advance for which there is a time-sensitive need. The explanation must be in sufficient detail to allow stakeholders to understand the need and why it is time-sensitive. Third, the process that ISO-NE uses to decide whether a reliability project is assigned to a Participating Transmission Owner must be clearly outlined in ISO-NE's OATT and must be open, transparent, and not unduly discriminatory. ISO-NE must provide to stakeholders and post on its website a full and supported written description explaining: (1) the decision to designate a Participating Transmission Owner as the entity responsible for construction and ownership of the project, including an explanation of other transmission or non-transmission options that the region considered but concluded would not sufficiently address the immediate reliability need; and (2) the circumstances that generated the immediate reliability need and an explanation of why that immediate reliability need was not identified earlier. Fourth, stakeholders must be permitted time to provide comments in response to the description in criterion three and such comments must be made publicly available. Finally, ISO-NE must maintain and post a list of prior year designations of all projects in the limited category of transmission projects for which the Participating Transmission Owner was designated as the entity responsible for construction and ownership of the project. The list must include the project's need-by date and the date the Participating Transmission Owner actually energized the project, and must be filed with the Commission as an informational filing in January of each calendar year covering the designations of the prior calendar year.<sup>378</sup>

212. Regarding the first criterion, the Commission noted that the Filing Parties did not sufficiently support the proposed five-year period to assign development of a reliability project to the Participating Transmission Owner. Specifically, the Commission did not find Mr. Rourke's testimony in support of the five-year period persuasive. Thus, the Commission found that, on balance, three years is just and reasonable.<sup>379</sup> The Commission explained that, on one side of the balance is Order No. 1000's removal of barriers to entry that discourage nonincumbent transmission developers from proposing alternative solutions at the regional level and Order No. 1000's recognition that it is not in the economic self-interest of public utility transmission providers to expand the transmission grid to permit access to competing sources of supply.<sup>380</sup> The Commission

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<sup>378</sup> *See id.* P 236.

<sup>379</sup> *See id.* P 238.

<sup>380</sup> *See id.* (referring to Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 254 (citing, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,682; Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 524), 256).

directed the removal of the federal right of first refusal to decrease the potential of undermining the identification and evaluation of more efficient or cost-effective transmission solutions, which in turn can result in rates that are unjust, unreasonable, or unduly discriminatory. The Commission found that the more transmission projects that an exception for reliability projects covers, the more barriers are maintained against potential competitive transmission solutions proposed by nonincumbent transmission developers.<sup>381</sup>

213. The Commission explained that on the other side of the balance is the fact that delays in the development of a reliability project could adversely affect the ability of Participating Transmission Owners, and ISO-NE, to meet their reliability transmission needs.<sup>382</sup> When balancing these goals of Order No. 1000, the Commission found that limiting this exception to those reliability projects needed in three years or less to solve a reliability violation strikes a reasonable balance.

214. Finding these criteria reasonable, the Commission directed Filing Parties to submit (1) revisions clarifying that Filing Parties' proposal to assign certain New Transmission Facilities and Transmission Upgrades needed to meet reliability requirements to the Participating Transmission Owner only applies to those projects that are needed to solve a reliability violation within three years, and (2) a demonstration of how ISO-NE's process for assigning such transmission projects to the Participating Transmission Owner complies with criteria two through five; or, if such demonstration is not possible, revisions to comply with those criteria.<sup>383</sup>

(b) **Requests for Rehearing or Clarification**

(1) **Summary of Requests for Rehearing or Clarification**

215. On rehearing, both ISO-NE and Administrative Committee request rehearing of the Commission's determination rejecting the five-year threshold before triggering a competitive solicitation process for reliability transmission projects and replacing that proposal with a three-year threshold. ISO-NE argues that the Commission's rejection of the proposed five-year threshold under which ISO-NE would assign, outside of the competitive process, an incumbent transmission owner to develop a transmission facility

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<sup>381</sup> *See id.* PP 238-239.

<sup>382</sup> *See id.* P 239 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 263).

<sup>383</sup> *Id.* P 241.

to address an identified reliability need, is arbitrary, capricious, and an abuse of discretion, and not founded upon reasoned decision-making or substantial evidence.<sup>384</sup> ISO-NE contends that the Commission ignored testimony that explained that projects in New England often require two years to complete detailed planning, two years to complete the siting and permitting processes, and two years to construct, and both ISO-NE and Administrative Committee state that the proposed five-year period reflected the typical construction time for a transmission project from the time of the Needs Assessment.<sup>385</sup> ISO-NE also contends that the Commission disregarded record evidence in support of the five-year time period, because the Commission found it to not be thorough and precise enough, while at the same time approving a three-year “compromise” time period that was not supported by evidence.<sup>386</sup>

216. Regarding the Commission’s conclusion that the application of a five-year right of first refusal in this instance would effectively preclude the benefits of competition in selecting the more efficient or cost-effective projects, both ISO-NE and Administrative Committee state that the five-year threshold is needed to ensure that needed reliability projects are put into service in a timely manner and delaying those projects would jeopardize reliability.<sup>387</sup> Administrative Committee contends that the Commission has not explained why it is appropriate to balance reliability needs against opportunities for third party transmission developers to participate in the competitive solicitation process, arguing that reliability is not a goal that the Commission is free to weigh against other policy interests.<sup>388</sup> Administrative Committee also maintains that the Commission identified no rationale or evidence supporting the four other conditions it imposed.<sup>389</sup>

217. ISO-NE argues the rejection of the five-year threshold violates the goal of Order No. 1000 to provide “more efficient and cost-effective regional transmission planning.”<sup>390</sup> ISO-NE explains that a shorter threshold would impose delays through a

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<sup>384</sup> ISO-NE Request for Rehearing at 64.

<sup>385</sup> *Id.* at 67; Administrative Committee Request for Rehearing at 41.

<sup>386</sup> *Id.* at 69-70.

<sup>387</sup> *Id.* at 66, 71; Administrative Committee Request for Rehearing at 41.

<sup>388</sup> Administrative Committee Request for Rehearing at 45.

<sup>389</sup> *Id.* at 46-47.

<sup>390</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 2.

“dueling-projects” process on a variety of reliability projects, and such delays may create millions of dollars in costs for the region.<sup>391</sup> ISO-NE and Administrative Committee further argue that tasking Filing Parties to demonstrate otherwise, through the First Compliance Order’s requirement that Filing Parties demonstrate that many reliability projects cannot be completed in less than five years, is inappropriate and impossible to meet.<sup>392</sup> Moreover, Administrative Committee states that each project is different, so it would be irrational to insist on evidence focused on individual projects, rather than on the average duration of the projects’ selection, siting, development, and construction periods.<sup>393</sup> In addition, ISO-NE and Administrative Committee argue that the First Compliance Order diverged from Order No. 1000’s recognition that each transmission planning region has unique characteristics and is entitled to flexibility in accommodating these regional differences and, instead of citing evidence, based its ruling in the case of ISO-NE on the decision in *PJM Interconnection, L.L.C.*,<sup>394</sup> in which it approved a three-year threshold for the PJM region.<sup>395</sup>

218. Administrative Committee also asserts that the Commission improperly rejected provisions that recognize the transmission owners’ rights to build upgrades to their facilities and to retain use and control of their rights of way. It states that the Commission discussed two exceptions in Order No. 1000 to the elimination of federal rights of first refusal; namely, (1) preserving those rights for upgrades to existing facilities, and (2) affirming that the reforms of Order No. 1000 were not intended to alter an incumbent transmission provider’s use and control of its existing rights of way.<sup>396</sup> With respect to Filing Parties’ proposal to define upgrades to include any upgrade that requires expansion of existing rights of way, Administrative Committee explains that the First Compliance Filing used the Commission’s language from Order No. 1000-A.<sup>397</sup>

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<sup>391</sup> ISO-NE Request for Rehearing at 72; Administrative Committee Request for Rehearing at 43.

<sup>392</sup> ISO-NE Request for Rehearing at 72.

<sup>393</sup> Administrative Committee Request for Rehearing at 42.

<sup>394</sup> 142 FERC ¶ 61,214 (2013) (PJM Compliance Order).

<sup>395</sup> ISO-NE Request for Rehearing at 73; Administrative Committee Request for Rehearing at 44 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 239).

<sup>396</sup> Administrative Committee Request for Rehearing at 32-33.

<sup>397</sup> *Id.* at 34-35. Administrative Committee quoted Order No. 1000-A’s clarification, emphasizing that “the requirement to eliminate a federal right of first refusal

According to Administrative Committee, the Commission mischaracterized Filing Parties' proposal, which confirmed that a transmission project that otherwise qualified as an upgrade would not lose its status as an upgrade because it required an expanded right of way, consistent with the Commission's clarification in Order No. 1000-A.<sup>398</sup>

219. With respect to Filing Parties' proposed provisions to preserve the Participating Transmission Owners' rights to use and control their rights of way,<sup>399</sup> Administrative Committee contends that the proposed provisions simply state that the transmission owners' existing rights to maintain use and control of their rights of way are not altered or abridged, but the provisions do not expand those rights.<sup>400</sup> Despite this,

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does not apply to any upgrade, *even where the upgrade requires the expansion of an existing right of way.*" *Id.* at 34 (quoting Order No. 1000-A, 139 FERC ¶ 61,132 at P 427).

<sup>398</sup> *Id.* at 35-36.

<sup>399</sup> In the First Compliance Filing, Filing Parties proposed to add this provision to the Operating Agreement, as well as a similar provision to the ISO-NE OATT:

The regional system planning provisions of the ISO OATT shall include statements that: (i) the submission of a project by a Qualified Transmission Project Sponsor or selection of projects for inclusion in the Regional System Plan Project List shall not alter a [transmission owner]'s use and control of an existing right of way, the retention, modification, or transfer of which remain subject to the relevant state or federal law or regulation, including property or contractual rights, that granted the right-of-way; and (ii) no [transmission owner] shall be required pursuant to this Agreement or the ISO OATT to relinquish any of its rights-of-way in order to permit a Qualified Transmission Project Sponsor to develop, construct or own a project.

Administrative Committee Request for Rehearing at 36-37 (citing ISO-NE, Agreements and Contracts, Transmission Operating Agreement (3.0.0), Schedule 3.09(f) (Secondary Version)). In their First Compliance Filing, Filing Parties submitted two alternative proposals, the "primary process" or Primary Version, based on their current regional transmission planning process, and the "secondary process" or Secondary Version, based on Order No. 1000's directives mandating removal of all federal rights of first refusal.

<sup>400</sup> *Id.*

Administrative Committee argues, the Commission characterized these provisions as creating new federal rights of first refusal. It therefore contends that the First Compliance Order effectively expanded the Commission's prohibition on federal rights of first refusal to encompass incumbent transmission owners' rights under state law to use and control their rights of way.<sup>401</sup>

220. Administrative Committee further notes that the provisions would not have prevented a third party from acquiring rights to use an incumbent transmission owner's right of way if permitted by state law. Rather, according to Administrative Committee, the provisions would only have prevented a third party from relying on the ISO-NE regional transmission planning process to support a claim that it is entitled to such rights. Administrative Committee contends that such a claim would be contrary to Order No. 1000.<sup>402</sup> Finally, Administrative Committee states that the provisions used language identical to that used in Order No. 1000 to describe the treatment of existing rights of way.<sup>403</sup>

## (2) Commission Determination

221. We deny the requests for rehearing regarding the five-year threshold for transmission projects that address reliability needs. However, as discussed below, we grant Administrative Committee's request for rehearing as to whether the First Compliance Order erred in rejecting provisions that recognize the transmission owners' rights to build upgrades to their transmission facilities and to retain use and control of their rights of way.

222. We are not persuaded by ISO-NE and Administrative Committee that we should accept a five-year rather than a three-year threshold for the class of transmission facilities needed to resolve a time-sensitive reliability criteria violation. Indeed, Filing Parties do not explain just how many reliability projects would be open to competitive solicitation if a five-year threshold were adopted. While ISO-NE and Administrative Committee argue that historically such transmission projects have taken longer than five years to plan, site, permit, and construct, neither provides sufficient context as to whether those reliability projects addressed urgent reliability needs. The fact that certain reliability projects took more than five years to complete does not demonstrate that many reliability projects cannot be completed in less than five years. As the Commission found in the First

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<sup>401</sup> *Id.* at 37-39.

<sup>402</sup> *Id.* at 40.

<sup>403</sup> *Id.* at 40-41.

Compliance Order, New Hampshire Transmission’s analysis of planning data from April 2009 through June 2012 has shown that only 6 of 48 approved projects in the Greater Boston Needs Report would have been “needed” more than five years from the date the need was identified, and these 6 were upgrades to existing facilities and, therefore, were not subject to Order No. 1000’s requirement that public utility transmission providers remove any federal right of first refusal.<sup>404</sup> Thus, application of a five-year federal right of first refusal to the “need by” date in this instance would effectively preclude the benefits of competition in selecting the more efficient or cost-effective transmission projects. Further, ISO-NE could, for example, propose an expedited process that could be run in a shorter timeframe, as some other regions have done.<sup>405</sup> Notably, the three-year threshold received significantly more stakeholder support in the stakeholder process than the five-year threshold proposed by the Filing Parties.<sup>406</sup>

223. We continue to find that removal of the federal right of first refusal promotes the identification and evaluation of more efficient or cost-effective transmission solutions. We also continue to find that a longer exception period would maintain barriers against potential competitive transmission solutions proposed by nonincumbent transmission developers, despite that “[t]here are many other new and emerging technologies that may be available to address transmission needs on a shorter timeline than five years.”<sup>407</sup>

224. We reject Administrative Committee’s claim that we are compromising reliability by “balancing” reliability needs against opportunities for third party transmission developers to participate in the competitive solicitation process. Setting this exception at three years rather than five years is not trading off reliability for increased participation by nonincumbent transmission developers, but rather allows nonincumbent transmission developers to participate in the regional transmission planning process when there is sufficient time to do so without jeopardizing reliability. Further, the Commission addressed Administrative Committee’s very concern in Order No. 1000 through the reevaluation requirement, which requires public utility transmission providers to “describe the circumstances and procedures under which public utility transmission providers in the regional transmission planning process will reevaluate the regional transmission plan to determine if delays in the development of a transmission facility selected in a regional transmission plan for purposes of cost allocation require evaluation

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<sup>404</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 237.

<sup>405</sup> *See, e.g.*, PJM Compliance Order, 142 FERC ¶ 61,214 at PP 247-255.

<sup>406</sup> First Compliance Order, 143 FERC ¶ 61,150 at PP 237-239.

<sup>407</sup> *Id.* P 238 (quoting LS Power Protest at 18).

of alternative solutions, including those proposed by the incumbent transmission provider, to ensure the incumbent transmission provider can meet its reliability needs or service obligations.”<sup>408</sup> In Order No. 1000-A, the Commission stated, “if these processes are followed, incumbent transmission providers should be able to meet reliability related requirements.”<sup>409</sup>

225. The Commission accepted ISO-NE’s proposed reevaluation process and the criteria that ISO-NE will use to assess the continued viability of transmission projects, including the status of final permits and construction phases. In addition, the Commission noted that the Participating Transmission Owners have an obligation to work with ISO-NE to develop a backstop solution in the event that the Qualified Sponsor who has been designated by ISO-NE to construct such facilities cannot complete them on a timely basis.<sup>410</sup> Administrative Committee has not explained how the Filing Parties’ proposed reevaluation process does not meet these reevaluation requirements of Order No. 1000 such that the reliability needs of the transmission planning region will not be met in the absence of the proposed five-year threshold.

226. We also disagree with Administrative Committee’s contention that we identified no rationale or evidence supporting the additional criteria the Commission laid out in the First Compliance Order to ensure that an exception from the competitive solicitation process will be used in limited circumstances. The criteria that the Commission provided place reasonable bounds on ISO-NE’s discretion to determine whether there is sufficient time to permit competition to develop time-sensitive reliability projects and, as a result, to ensure that an exception from the requirement to eliminate any federal rights of first refusal will be used in limited circumstances.<sup>411</sup> In addition, the criteria the Commission

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<sup>408</sup> Order 1000, FERC Stats. & Regs. ¶ 31,323 at P 329, *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 490.

<sup>409</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 490.

<sup>410</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 322.

<sup>411</sup> The four additional criteria are: (1) ISO-NE must separately identify and then post on its website an explanation of the reliability violations and system conditions in advance for which there is a time-sensitive need, and the explanation must be in sufficient detail to allow stakeholders to understand the need and why it is time-sensitive; (2) the process that ISO-NE uses to decide whether a reliability project is assigned to a Participating Transmission Owner must be clearly outlined in ISO-NE’s OATT and must be open, transparent, and not unduly discriminatory, and ISO-NE must provide to stakeholders and post on its website a full and supported written description explaining: (a) the decision to designate a Participating Transmission Owner as the entity responsible

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adopted increase the transparency of the process because ISO-NE must post information such as an explanation of the reliability violations and system conditions that lead to a time-sensitive need as well as the circumstances that generated the reliability need.

227. Finally, upon further consideration, we grant Administrative Committee's request for rehearing on the issue of whether, in the First Compliance Order, the Commission improperly rejected provisions that recognize the transmission owners' rights to retain use and control of their existing rights of way. The relevant provisions ISO-NE proposed in the Operating Agreement and the OATT read as follows:

[T]he submission of a project by a Qualified Transmission Project Sponsor or selection of projects for inclusion in the Regional System Plan] Project List shall not alter a [Participating Transmission Owner]'s use and control of an existing right of way, the retention, modification, or transfer of which remain subject to the relevant state or federal law or regulation, including property or contractual rights, that granted the right-of-way; and (ii) no [Participating Transmission Owner] shall be required pursuant to this Agreement or the ISO OATT to relinquish any of its rights-of-way in order to permit a Qualified Transmission Project Sponsor to develop, construct or own a project.<sup>412</sup>

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for construction and ownership of the project, including an explanation of other transmission or non-transmission options that the region considered but concluded would not sufficiently address the immediate reliability need, and (b) the circumstances that generated the reliability need and an explanation of why that reliability need was not identified earlier; (3) stakeholders must be permitted time to provide comments in response to the description in the previous criterion and such comments must be made publicly available; and (4) ISO-NE must maintain and post on its website a list of prior year designations of all projects in the limited category of transmission projects for which the Participating Transmission Owner was designated as the entity responsible for construction and ownership of the project. The list must include the project's need-by date and the date the Participating Transmission Owner actually energized the project, i.e., placed the project into service. Such list must be filed with the Commission as an informational filing in January of each calendar year, covering the designations of the prior calendar year. First Compliance Order, 143 FERC ¶ 61,150 at P 236.

<sup>412</sup> ISO-NE, Agreements and Contracts, Transmission Operating Agreement (3.0.0), Schedule 3.09 §1.1(f).

and

Neither the submission of a project by a Qualified Transmission Project Sponsor nor the selection by the ISO of a project submitted by a Qualified Transmission Project Sponsor for inclusion in the [Regional System Plan] Project List shall alter a [Participating Transmission Owner]'s use and control of an existing right of way, the retention, modification, or transfer of which remain subject to the relevant law or regulation, including property or contractual rights, that granted the right-of-way. Nothing in the processes described in this Attachment K requires a Participating Transmission Owner] to relinquish any of its rights-of-way in order to permit a Qualified Transmission Project Sponsor to develop, construct or own a project.<sup>413</sup>

We find that these provisions are consistent with the following statement in Order No. 1000:

[T]his Final Rule does not remove or limit any right an incumbent may have to build, own and recover costs for upgrades to the facilities owned by an incumbent, nor does this Final Rule grant or deny transmission developers the ability to use rights-of-way held by other entities, even if transmission facilities associated with such upgrades or uses of existing rights-of-way are selected in the regional transmission plan for purposes of cost allocation. The retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way.<sup>414</sup>

228. Specifically, we find that the proposed provisions regarding rights of way, when read in their entirety, are consistent with Order No. 1000 because each states that modification or transfer of existing rights-of-way remain subject to relevant laws or

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<sup>413</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(a).

<sup>414</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319.

regulations. While the provisions provide that the Participating Transmission Owner shall not be required to relinquish its rights of way pursuant to the Operating Agreement or the OATT to permit a Qualified Transmission Project Sponsor to develop, construct or own a project, they also state that the retention, modification, or transfer of such rights of way remain subject to the relevant state or federal law or regulation, including property or contractual rights, that granted the right-of-way. Thus, consistent with Order No. 1000, neither the Operating Agreement nor the OATT may grant or deny Participating Transmission Owners or Qualified Transmission Project Sponsors the ability to use rights of way held by each other, even if transmission facilities associated with such rights of way are selected in the regional transmission plan for purposes of cost allocation. These provisions confirm that the retention, modification, or transfer of such rights of way remain subject to the relevant state or federal law or regulation, including property or contractual rights, that granted the right of way. We also note that Administrative Committee's request for rehearing explicitly states that the provisions regarding rights of way are meant to ensure that the Participating Transmission Owners' existing rights under state law to use and control their rights of way are not diminished by the revisions to the ISO-NE OATT and the Operating Agreement that are required to comply with Order No. 1000, but neither do these revised provisions expand those rights. We therefore find that the proposed revisions to the ISO-NE OATT and Operating Agreement in the First Compliance Filing dealing with existing rights of way in section 4.3(a) of the OATT and Schedule 3.09, section 1.1 (f) of the Operating Agreement are consistent with Order No. 1000. We direct ISO-NE to submit, within 60 days of the date of issuance of this order, a further compliance filing to restore these provisions as proposed in its First Compliance Filing.

(c) **Compliance**

(1) **Summary of Compliance Filing**

229. In response to the First Compliance Order, Filing Parties propose to modify ISO-NE's OATT to change the time-based exception to the competitive solicitation process from five years to three years.<sup>415</sup> Filing Parties also propose to adapt the First Compliance Order's other four criteria for deciding whether to assign a reliability project to the incumbent Participating Transmission Owner and incorporate them into a new

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<sup>415</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.1(i).

section 4.1(j) of Attachment K.<sup>416</sup> Filing Parties have also proposed corresponding changes to section 1.1(b)(iii) of Schedule 3.09(a) of the Operating Agreement.<sup>417</sup>

230. Regarding the First Compliance Order's directives related to rights of way, Filing Parties propose to delete language set forth in section 1.1(b) of the Operating Agreement defining an "upgrade" to be built by a Participating Transmission Owner as including any Transmission Facility "that requires expansion of a [transmission owner's] existing right of way."<sup>418</sup> Filing Parties also propose to remove language from section 1.1(f) of Schedule 3.09(a) of the Operating Agreement and sections 4.3(b) (formerly section 4.3(a)) and 4A.4 of the OATT stating that the submission of a project by a Qualified Sponsor or the selection of projects in the Regional System Plan Project List shall not alter a Participating Transmission Owner's use and control of an existing right of way, and that a Participating Transmission Owner shall not be required to relinquish any of its rights of way in order to permit a Qualified Sponsor to develop, construct, or own a project, as well as other proposed language related to rights of way.<sup>419</sup>

231. Under Filing Parties' compliance proposal, ISO-NE proposes to conduct a solution-based two-phase competition, as described in new section 4.3 of Attachment K. First, ISO-NE will conduct a "Preliminary Solicitation of Alternatives", where:

If, in the ISO's judgment, it appears that the only efficient and cost-effective solution to a need identified in the Needs Assessment is an upgrade to existing PTO facilities,<sup>[420]</sup> the

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<sup>416</sup> *Id.* § 4.1(j), (j)(i).

<sup>417</sup> ISO-NE, Agreements and Contracts, Transmission Operating Agreement (3.0.0), Schedule 3.09(a), §1.1(b)(iii).

<sup>418</sup> Second Compliance Filing at 30 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 230).

<sup>419</sup> *Id.* at 18 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 231).

<sup>420</sup> In this context, ISO-NE has defined an upgrade to an existing Participating Transmission Owner's transmission or distribution facilities as "any improvement to, addition to, or replacement of a part of, an existing transmission or distribution facility of a [Participating Transmission Owner]; provided that a Qualified Transmission Project Sponsor may construct and own a New Transmission Facility or Transmission Upgrade where the only upgrades to existing transmission or distribution facilities of a [Participating Transmission Owner] consist of required upgrades to existing substations of a [Participating Transmission Owner] to which such Qualified Transmission Project

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ISO will solicit confidential alternative conceptual solutions from the Planning Advisory Committee.<sup>[421]</sup>

Filing Parties state that the solicitation process should be confidential because, otherwise, it would expose to each competitor the others' confidential conceptual solutions that they might proffer if ISO-NE decides to proceed under the section 4.3 process.<sup>422</sup> As a result of this confidential solicitation with the Planning Advisory Committee, Filing Parties propose that if ISO-NE determines that there are credible and feasible transmission solutions that may be more cost-effective and efficient than an upgrade to existing Participating Transmission Owner facilities, then ISO-NE will proceed to issue the public notice specified in section 4.3(b) and undertake the competitive solicitation process. Alternatively, Filing Parties propose that ISO-NE will proceed under section 4.2 and develop a project through Solutions Studies. Filing Parties propose corresponding changes to Attachment K, along with clarifications that the Solutions Studies process will also be used in lieu of the competitive solicitation process where: (1) there is only one Phase One Proposal or Stage One Proposal submitted in response to a public notice, or (2) only one proposed solution that is selected to move on to Phase Two or Stage Two.<sup>423</sup>

(2) **Protests/Comments**

232. New Hampshire Transmission states that Filing Parties propose to grant ISO-NE the authority to determine that a particular solution may only be an upgrade (versus a

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Sponsor's proposed project will interconnect or other upgrades to a [Participating Transmission Owner's] transmission or distribution facilities to address reliability impacts identified pursuant to the ISO Tariff." ISO-NE, Agreements and Contracts, Transmission Operating Agreement (3.0.0), Schedule 3.09(a), §1.1(b)(ii).

<sup>421</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(a) (Preliminary Solicitation of Alternatives); *id.* § 2.3(Planning Advisory Committee Membership) "Any entity, including State regulators or agencies and NESCOE, as specified in Attachment N of the OATT, may designate a member to the Planning Advisory Committee by providing written notice to the Secretary of the Committee identifying the name of the entity represented by the member and the member's name, address, telephone number, facsimile number and electronic mail address."

<sup>422</sup> ISO-NE Answer at 17-18.

<sup>423</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.1(i) (Publication of Needs Assessment and Response Thereto).

project in a competitive process), so that the solution must be built by an incumbent transmission developer.<sup>424</sup> It states that it is not clear how ISO-NE will make its determination, or come to its original presumption that a project might have to be an upgrade.<sup>425</sup> Additionally, New Hampshire Transmission states that the Commission should prohibit ISO-NE from having private discussions with incumbent Participating Transmission Owners, and instead require that any discussion with the incumbent Participating Transmission Owner be open to other qualified parties.

233. New Hampshire Transmission also states that the test for “credible and feasible conceptual transmission solutions” is subjective and that ISO-NE offers no standard for how it will make this evaluation. It recommends that if any party suggests that a non-upgrade solution is technically possible and offers some details in support, the competitive solicitation process should proceed. New Hampshire Transmission proposes tariff language requiring that if ISO-NE concludes that the project can only be an upgrade, it should post a draft decision with the opportunity for stakeholders to comment before it makes a final decision.

### (3) Answer

234. ISO-NE states that the revisions that would allow ISO-NE to determine if an upgrade to existing Participating Transmission Owner facilities is the only efficient and cost-effective solution were intended to provide even greater transparency and accountability for ISO-NE’s decision-making regarding whether a project should be entrusted to an incumbent Participating Transmission Owner Qualified Sponsor.<sup>426</sup> It states that some system upgrades are limited in nature because the only economic option is to simply upgrade an existing facility. According to ISO-NE, rather than simply assuming that this is the case, Filing Parties’ proposed revisions call for submission of confidential alternative conceptual solutions from members of the Planning Advisory Committee.<sup>427</sup> ISO-NE states that the language proposed by New Hampshire Transmission should be rejected as inappropriate and prejudicial to Qualified Sponsors because it would expose to each other the confidential conceptual solutions that they might offer.<sup>428</sup> ISO-NE also states that New Hampshire Transmission’s recommendation

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<sup>424</sup> See New Hampshire Transmission Protest at 17.

<sup>425</sup> *Id.* at 18.

<sup>426</sup> ISO-NE Answer at 17.

<sup>427</sup> *Id.* at 17-18.

<sup>428</sup> *Id.* at 19.

that ISO-NE be prohibited from having private discussions with incumbent Participating Transmission Owners is unnecessary and presumes that ISO-NE is not independent and impartial. Finally, with respect to New Hampshire Transmission's proposal that the competitive solicitation process should be applied if any party suggests that a non-upgrade solution is technically possible and offers some details, ISO-NE states that this sets the bar too low and that Filing Parties' proposal is appropriately receptive to alternatives to an upgrade.<sup>429</sup>

#### (4) Commission Determination

235. We find that Filing Parties' proposal complies with the Commission's directive in the First Compliance Order to include the five criteria required to maintain a federal right of first refusal for transmission projects needed to address reliability needs in a shortened timeframe.

236. We also find that Filing Parties have complied with our requirement to delete language in the Operating Agreement defining an "upgrade" to be built by a Participating Transmission Owner as including any Transmission Facility "that requires expansion of a [transmission owner's] existing right of way." However, Filing Parties also propose to add a new provision allowing them to solicit preliminary alternatives before soliciting Stage One Proposals. Under their proposal, ISO-NE could solicit confidential alternative conceptual solutions from the Planning Advisory, if, in ISO-NE's judgment, it appears that the only efficient and cost-effective solution to a need identified in the Needs Assessment is an upgrade to a Participating Transmission Owner's facilities. We share New Hampshire Transmission's concern that the Filing Parties' proposal gives ISO-NE too much discretion because Filing Parties do not explain how ISO-NE will determine that "it appears that the only efficient and cost-effective solution to a need identified in a Needs Assessment is an upgrade to existing PTO facilities..."<sup>430</sup> We also are concerned that, if ISO-NE stops at this preliminary stage before soliciting Phase One Proposals, then it may miss alternative transmission solutions that are more efficient or cost-effective than an upgrade to a Participating Transmission Owner's facilities. While the OATT states that ISO-NE will solicit confidential alternative conceptual solutions, it is unclear to what extent ISO-NE will evaluate these alternative conceptual solutions and what criteria ISO-NE will use to evaluate them to determine whether the alternative conceptual solutions are credible and feasible and potentially more efficient and cost-effective alternatives to an upgrade. Furthermore, we note that this additional preliminary solicitation may be unnecessary because ISO-NE already proposes to use a two-step

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<sup>429</sup> *Id.* at 18.

<sup>430</sup> New Hampshire Transmission Protest at 17-18.

evaluation process that will allow it to conduct a preliminary review to determine whether Phase One Proposals are feasible. Accordingly, we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further compliance filing that removes the proposed language in section 4.3(a) and makes conforming changes section 4.1(h).<sup>431</sup>

237. Because, as discussed above, we grant Administrative Committee's request for rehearing on the issue of whether, in the First Compliance Order, the Commission improperly rejected provisions that recognize the transmission owners' rights to build upgrades to their facilities and to retain use and control of their rights of way, we need not evaluate whether Filing Parties complied with the Commission's directives on these issues. Thus, we find that Filing Parties' proposal to delete the proposed language related to rights of way in section 1.1(f) of Schedule 3.09(a) of the Operating Agreement, and to modify sections 4.3(b) (formerly section 4.3(a)) and 4A.4 of the OATT, is moot. Accordingly, we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further compliance filing to restore the relevant deleted or modified sections in the Operating Agreement and the OATT.

**b. Qualification Criteria**

238. Order No. 1000 required each public utility transmission provider to revise its OATT to establish appropriate qualification criteria for determining an entity's eligibility to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation.<sup>432</sup> These criteria must not be unduly discriminatory or preferential when applied to either an incumbent transmission provider or a nonincumbent transmission developer.<sup>433</sup> In addition, public utility transmission providers must adopt procedures for timely notifying transmission developers of whether

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<sup>431</sup> Section 4.1(h) currently states that ISO-NE will evaluate the adequacy of proposed regulated solutions by performing Solutions Studies, as described in section 4.2, where "[ISO-NE] finds that there is no feasible and credible alternative conceptual solution pursuant to Section 4.3(a) of this Attachment." ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.1(h) (Publication of Needs Assessment and Response Thereto).

<sup>432</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 225, 323.

<sup>433</sup> *Id.* P 323.

they satisfy the region's qualification criteria and allowing them to remedy any deficiencies.<sup>434</sup>

239. Order No. 1000-A clarified that it would be an impermissible barrier to entry to require a transmission developer to demonstrate, as part of the qualification criteria, that it has, or can obtain, state approvals necessary to operate in a state to be eligible to propose a transmission facility.<sup>435</sup>

**i. First Compliance Order**

240. In the First Compliance Order, the Commission found that Filing Parties' proposed qualification criteria provisions partially complied with the requirements of Order No. 1000. Specifically, the Commission found that the financial and technical qualification criteria were generally fair and not unreasonably stringent. However, the Commission found that the qualification criteria must apply to Participating Transmission Owners and independent transmission companies, as well as nonincumbent transmission developers.<sup>436</sup> The Commission noted that, although Order No. 1000 allows for the possibility that an existing public utility transmission provider already satisfies the criteria, this does not mean that ISO-NE can exempt Participating Transmission Owners from having to meet the qualification criteria. Therefore, the Commission directed Filing Parties to provide fair and not unreasonably stringent qualification criteria for Participating Transmission Owners, independent transmission companies, and nonincumbent transmission developers.<sup>437</sup>

241. The Commission also directed Filing Parties to remove qualification criteria that would require a prospective transmission developer to demonstrate: (1) the satisfaction of state legal or regulatory requirements for siting, constructing, owning, and operating transmission projects; (2) experience in acquiring rights-of-way and the authority to acquire rights-of-way by eminent domain, if necessary; and (3) the capabilities of an entity to license a proposed solution, finding that these qualification criteria could act as a barrier to entry.<sup>438</sup> Similarly, the Commission required Filing Parties to remove or clarify

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<sup>434</sup> *Id.* P 324.

<sup>435</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 441.

<sup>436</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 267.

<sup>437</sup> *Id.* P 270.

<sup>438</sup> *Id.* PP 268-269.

the qualification criterion regarding an entity's "legal status" while being mindful of the directives of Order No. 1000-A as to unreasonable barriers to participation by nonincumbent transmission developers.<sup>439</sup> The Commission also directed Filing Parties to clarify that incumbent transmission owners are required to provide the information necessary to perform system impact and feasibility studies on nonincumbent transmission developer projects that may be proposed to interconnect with the Participating Transmission Owner's system.<sup>440</sup>

242. In evaluating the qualifications of a transmission developer, the Commission found it reasonable for ISO-NE to consider whether the developer's existing resources and commitments provide sufficient assurance that the developer will be able to operate and maintain a facility for the life of the project.<sup>441</sup> However, the Commission found Filing Parties' proposed qualification criterion that a transmission developer demonstrate its ability to assume liability for major losses resulting from any failure of transmission facilities to be unclear. The Commission therefore directed Filing Parties to remove or explain why this additional provision is necessary and not unduly discriminatory, given that transmission developers are already required to demonstrate their financial resources.<sup>442</sup> Noting that ISO-NE did not explain when it will inform the entity whether it has received qualified status, the Commission also directed Filing Parties to provide this information.<sup>443</sup>

243. In addition, the Commission accepted Filing Parties' proposed Non-Incumbent Transmission Developer Operating Agreement (Nonincumbent Agreement), except for section 9.01, which is the hold harmless section, as well as the dispute resolution procedures.<sup>444</sup> Specifically, the Commission found that requiring nonincumbent Qualified Sponsors to hold harmless "all affected transmission owners" was vague and overly broad because there is no way to determine, from reading the Nonincumbent Agreement, who "affected [transmission owners]" are.<sup>445</sup> In addition, the Commission

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<sup>439</sup> *Id.* P 269.

<sup>440</sup> *Id.* P 272.

<sup>441</sup> *Id.* 273.

<sup>442</sup> *Id.* P 271.

<sup>443</sup> *Id.* P 274.

<sup>444</sup> *Id.* PP 275, 280.

<sup>445</sup> *Id.* P 277.

found that the phrases “reliability project” and “failure to timely complete” were vague because the Nonincumbent Agreement does not define these phrases.<sup>446</sup> The Commission also found it unreasonable to require nonincumbent Qualified Sponsors to hold harmless “affected [transmission]” owners from not only gross negligence and intentional acts but also ordinary negligence, and rejected this provision.<sup>447</sup> Therefore, the Commission required Filing Parties to remove or revise section 9.01 of the Nonincumbent Agreement and to remove or revise section 1.1(g) of Schedule 3.09(a) of the Transmission Owners Agreement consistent with the removal or revision of section 9.01 of the Nonincumbent Agreement.<sup>448</sup>

244. Consequently, the Commission directed Filing Parties to remove such provisions and to add a provision clarifying that nothing in the Nonincumbent Agreement restricts the rights of any party to file a complaint with the Commission under relevant provisions of the FPA.<sup>449</sup>

**ii. Requests for Rehearing or Clarification**

**(a) Summary of Requests for Rehearing or Clarification**

245. LS Power seeks clarification of the Commission’s determination in the First Compliance Order that it is reasonable for ISO-NE, in evaluating the qualifications of a transmission developer, to consider whether the developer’s existing resources and commitments provide sufficient assurance that the developer will be able to operate and maintain a facility for the life of the project.<sup>450</sup> LS Power argues that without additional clarification it is impossible to determine whether the method of evaluating a competing developer’s capability to operate and maintain a project for 40 years into the future is fair and not unreasonably stringent. LS Power requests the Commission clarify that although it determined that the capability of a developer to operate and maintain a project for the life of the project is a reasonable qualification criterion, ISO-NE’s further compliance filing should include additional information on ISO-NE’s mechanism for judging the

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<sup>446</sup> *Id.*

<sup>447</sup> *Id.* P 278.

<sup>448</sup> *Id.* P 280.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* P 273.

relative ability of competing developers to operate and maintain a project for the life of the project.<sup>451</sup>

**(b) Commission Determination**

246. We deny LS Power's request for clarification regarding the ISO-NE mechanism for judging the relative ability of competing developers to operate and maintain projects 40 years into the future. The Commission previously found that it is reasonable for a transmission planning region to consider whether the incumbent transmission developer's existing resources and commitments provide sufficient assurance that the developer will be able to operate and maintain a particular proposed facility for the life of the project.<sup>452</sup> We find that ISO-NE's OATT provides a sufficient level of detail concerning how ISO-NE will evaluate the competing transmission developers' respective capabilities to operate and maintain a transmission facility for the life of the project. In addition, we note that ISO-NE's OATT provides clarity as to the specific information that potential transmission developers must submit to demonstrate that they satisfy ISO-NE's qualification criteria with respect to "operating and maintaining the facilities consistent with Good Utility Practice and applicable reliability for the life of the project."<sup>453</sup> We therefore deny LS Power's request for clarification on the relative ability of competing developers.

**iii. Compliance**

**(a) Summary of Compliance Filing**

247. Filing Parties removed the qualification criteria regarding the satisfaction of legal or regulatory requirements, experience in acquiring and authority to acquire rights of way, "licensing" capability, legal status, and ability to assume liability for major

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<sup>451</sup> LS Power Request for Rehearing at 3-4.

<sup>452</sup> First Compliance Order, 143 FERC ¶ 61,150 at 273.

<sup>453</sup> For instance, ISO-NE's OATT requires a potential developer to provide, among other things, its financial resources; technical and engineering qualifications and experience; record of its construction and maintenance of transmission facilities; demonstrated capability to adhere to construction, maintenance and operating Good Utility Practices, including the capability to respond to outages; and ability of the application to comply with all applicable reliability standards. ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4B.2 (Information To Be Submitted).

losses.<sup>454</sup> With respect to the Commission’s directive to apply qualification criteria on a not unduly discriminatory basis to Participating Transmission Owners, independent transmission companies, and nonincumbent transmission developers, Filing Parties propose revisions to Attachment K to clarify that a Participating Transmission Owner will be deemed a Qualified Sponsor when ISO-NE determines that it has met all of the qualification criteria.<sup>455</sup> Additionally, Filing Parties propose that ISO-NE will use its best efforts to inform the applicant within 90 days of the application filing whether the applicant has met all the criteria.<sup>456</sup> The proposed modifications also include changes to Schedule 3.09(a) of the Operating Agreement to clarify that a Participating Transmission Owner must provide information necessary to perform system impact and feasibility studies on nonincumbent Qualified Sponsor projects that may be proposed to interconnect with the Participating Transmission Owners’ facilities.<sup>457</sup>

248. Responding to the Commission’s concern that the “hold harmless” provision was vague and overly broad in the Nonincumbent Agreement, Filing Parties propose to clarify that an “affected [Participating Transmission Owner]” is one that would be subject to penalties assessed by the North American Electricity Reliability Corporation (NERC) or the Commission, or to adverse regulatory orders or monetary claims or damages due to the nonincumbent Qualified Sponsor’s failure to timely complete a Reliability Transmission Upgrade.<sup>458</sup> Additionally, Filing Parties propose to replace “reliability projects” with Reliability Transmission Upgrade, a term defined in the ISO-NE Tariff. To more effectively judge timeliness of a Reliability Transmission Upgrade, Filing Parties propose further modifications to ISO-NE’s OATT to require the submission of a milestone schedule and monthly progress updates.<sup>459</sup> Further, Filing Parties include language that states that a nonincumbent Qualified Sponsor has no obligation to hold a Participating Transmission Owner harmless to the extent the liability stems from the

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<sup>454</sup> *Id.* § 4B.2 (Information To Be Submitted).

<sup>455</sup> *Id.* §§ 4B.2 (Information To Be Submitted). 4B.3 (Review of Qualifications).

<sup>456</sup> *Id.* § 4B.3 (Review of Qualifications).

<sup>457</sup> ISO-NE, Agreements and Contracts, Transmission Operating Agreement (3.0.0), Schedule 3.09(a), § 2.1 (PTO Obligations).

<sup>458</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment O (3.0.0), § 9.01 (Hold Harmless).

<sup>459</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(k) (Milestone Schedules).

affected Participating Transmission Owner's gross negligence or willful misconduct.<sup>460</sup> Corresponding changes were made to the Operating Agreement.<sup>461</sup>

249. To address the perceived restrictions on the rights of the parties to the Nonincumbent Agreement, Filing Parties removed language that could be construed as restricting FPA section 206 rights and added language explicitly stating that nothing in the Nonincumbent Agreement restricts a party's right to file a complaint with the Commission under the FPA.<sup>462</sup>

**(b) Protests/Comments**

250. LS Power argues that the proposed hold harmless provision in the Nonincumbent Agreement for nonincumbent Qualified Sponsors is discriminatory and an inappropriate barrier to entry. LS Power states the Commission has repeatedly mandated that any obligations placed on nonincumbent Qualified Sponsors must be equally applied to incumbent Qualified Sponsors, but argues that ISO-NE's hold harmless provision violates this principle by requiring only nonincumbent Qualified Sponsors to hold incumbent Qualified Sponsors harmless.<sup>463</sup> LS Power states that incumbent transmission owners have never been required to hold each other harmless for delays in constructing transmission, and have not proposed to do so. Consequently, LS Power requests the Commission reject these provisions in the Compliance Filing.<sup>464</sup>

**(c) Answer**

251. New England Transmission Owners explain that the hold harmless provision in the Nonincumbent Agreement was developed in response to the adverse impacts of delays in meeting reliability needs, a concern that the Commission expressed in Order

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<sup>460</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment O (3.0.0), § 9.01 (Hold Harmless).

<sup>461</sup> ISO-NE Agreements and Contracts, Transmission Operating Agreement (3.0.0), Schedule 3.09(a), § 1.1(f) (PTOs' Rights and Obligations to Build and Associated Conditions Including Cost Recovery).

<sup>462</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment O (3.0.0), § 11.12 (Dispute Resolution).

<sup>463</sup> LS Power Comments at 7.

<sup>464</sup> *Id.*

No. 1000.<sup>465</sup> New England Transmission Owners argue that it is not discriminatory to require a nonincumbent Qualified Sponsor, which does not yet have the same obligations as a NERC-registered entity or an incumbent Participating Transmission Owner, to assume different contractual obligations to ensure that the transmission system remains reliable while they are constructing their project.<sup>466</sup>

**(d) Commission Determination**

252. We find that Filing Parties' proposed revisions to its qualification criteria partially comply with the directives in the First Compliance Order.

253. With regard to the Commission's directive to clarify or remove certain qualification criteria, Filing Parties comply by removing the criteria requiring the satisfaction of state legal or regulatory requirements, experience in acquiring and authority to acquire rights of way, "licensing" capability, legal status, and ability to assume liability for major losses.<sup>467</sup> As directed by the Commission, except as noted below, Filing Parties delete and clarify existing language to apply the qualification criteria on a not unduly discriminatory basis to incumbent and nonincumbent Qualified Sponsors.<sup>468</sup> We find that Filing Parties comply with the required clarification that Participating Transmission Owners must provide the information necessary to perform needed studies.<sup>469</sup> Furthermore, as directed, Filing Parties propose revisions to ISO-NE's OATT that ISO-NE will use its best effort to inform an applicant of its qualification status within 90 days of the application filing.<sup>470</sup>

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<sup>465</sup> New England Transmission Owner Answer at 7 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 7, 263, 329).

<sup>466</sup> *Id.* at 7-8.

<sup>467</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4B.2 (Information To Be Submitted).

<sup>468</sup> *Id.* §§ 4B.2 (Information To Be Submitted), 4B.3 (Review of Qualifications).

<sup>469</sup> ISO-NE, Agreements and Contracts, Transmission Operating Agreement (3.0.0), Schedule 3.09(a), § 2.1 (PTO Obligations).

<sup>470</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4B.2 (Information To Be Submitted); *id.* § 4B.3 (Review of Qualifications).

254. Filing Parties removed language from the Nonincumbent Agreement that could be construed as restricting FPA section 206 rights and added language stating that nothing in the Nonincumbent Agreement shall restrict a party's right to file a complaint with the Commission under the relevant provisions of the FPA.<sup>471</sup> We find that this complies with the requirements in the First Compliance Order to remove restrictions on the rights of any party to file a complaint with the Commission under relevant provisions of the FPA.<sup>472</sup>

255. Filing Parties have proposed to retain the hold harmless provision in the Nonincumbent Agreement, but have made revisions to address the Commission's concerns laid out in the First Compliance Order. LS Power argues that, irrespective of the revisions, the hold harmless provision is discriminatory because Participating Transmission Owners are not required to hold each other harmless. Indeed, while the definition of a nonincumbent transmission developer in ISO-NE's OATT includes a "Participating Transmission Owner that proposes the development of a transmission facility not located within or connected to its existing electric system," it exempts a Participating Transmission Owner from entering into a Nonincumbent Agreement, and therefore from the requirement to hold harmless and indemnify other Participating Transmission Owners.<sup>473</sup> We agree with LS Power that it is discriminatory for nonincumbent transmission developers to be required to hold harmless and indemnify affected Participating Transmission Owners, while Participating Transmission Owners are not required to hold harmless and indemnify each other when a Participating Transmission Owner is building outside of its own retail distribution service territory or

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<sup>471</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment O (3.0.0), § 11.12 (Dispute Resolution).

<sup>472</sup> We note that section 2.06 of the Nonincumbent Agreement requires a nonincumbent transmission developer's transmission project to undergo review for any significant adverse impacts, which ISO-NE has stated will be pursuant to section I.3.9 of the ISO-NE Tariff. First Compliance Filing at 60. Our understanding is that, because the I.3.9 review is required by the Nonincumbent Agreement, a party to the Nonincumbent Agreement does not need to wait to seek resolution from the Commission for a dispute regarding ISO-NE's I.3.9 review, notwithstanding the provisions in the OATT that require parties to disputes regarding ISO-NE's I.3.9 review to wait until the conclusion of any dispute negotiations before seeking resolution from the Commission. ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 12.4; ISO-NE, Transmission, Markets and Services Tariff, § I.6 (Dispute Resolution) (0.0.0).

<sup>473</sup> ISO-NE, Transmission, Markets and Services Tariff, § I.2.2 (Definitions) (52.0.0).

footprint. In that situation, the Participating Transmission Owner is acting as a nonincumbent transmission developer and therefore should satisfy the same qualification criteria, including entering into the Nonincumbent Agreement, as other nonincumbent transmission developers. Therefore, we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further compliance filing revising the definition of a nonincumbent transmission developer in the ISO-NE OATT to require that a Participating Transmission Owner that proposes to develop a transmission facility not located within or connected to its existing electric system enter into a Nonincumbent Agreement.

256. While we accept the provision and find that Filing Parties proposed revisions to the hold harmless provision are consistent with the First Compliance Order, we continue to find that the hold harmless provision in the Nonincumbent Agreement is overly broad in two respects. In the First Compliance Order, the Commission found that Filing Parties' indemnification proposal to "require the nonincumbent transmission developers to hold harmless a Participating Transmission Owner from its own acts of ordinary negligence as well as gross negligence and intentional acts" was unreasonable, vague, and overly broad.<sup>474</sup> The Commission also explained that the requirements in Order No. 1000 should provide incumbent transmission owners with the ability to meet their reliability obligations as well as sufficient protection from FERC penalties such that it would be unnecessary to require a nonincumbent transmission developer to indemnify and hold harmless a Participating Transmission Owner.<sup>475</sup> Furthermore, permitting ISO-NE to require nonincumbent transmission owners to indemnify and hold harmless Participating Transmission Owners for FERC penalties would give an incumbent no incentive to comply with the requirements in Order No. 1000 related to reliability.<sup>476</sup> On compliance, Filing Parties revised the hold harmless provision to state that a nonincumbent transmission developer will indemnify and hold harmless all affected Participating Transmission Owners from any and all liability "(except for that stemming

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<sup>474</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 277.

<sup>475</sup> *Id.* P 276 (the Commission cited to the reevaluation requirement as well as the decision in Order No. 1000 to "not subject a Registered Entity<sup>1</sup> to a penalty for a violation of a NERC reliability standard caused by a nonincumbent transmission developer's decision to abandon any type of transmission facility selected in the regional transmission plan for purposes of cost allocation if, on a timely basis, that Registered Entity identifies the violation and complies with all of its obligations under the NERC reliability standards to address it.").

<sup>476</sup> *Id.*

from an affected [Participating Transmission Owner's] gross negligence or willful misconduct), including but not limited to liability for penalties assessed by NERC and FERC ... ."<sup>477</sup> This revision partially addresses the Commission's concern in the First Compliance Order regarding gross negligence and intentional acts but does not address the concern that the hold harmless provision requires a nonincumbent transmission developer to hold harmless a Participating Transmission Owner from the Participating Transmission Owner's own acts of ordinary negligence. In addition, the provision requires a nonincumbent transmission owner to hold harmless and indemnify a Participating Transmission Owner for FERC penalties, which is inconsistent with the Commission's statements in the First Compliance Order. Therefore, we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further compliance filing with revisions to also exempt from the hold harmless provision a Participating Transmission Owner's own ordinary negligence and to remove the reference to FERC penalties.

**c. Information Requirements**

257. Order No. 1000 required each public utility transmission provider to identify in its OATT the information that a prospective transmission developer must submit in support of a transmission project proposed in the regional transmission planning process.<sup>478</sup> The information requirements must be sufficiently detailed to allow a proposed transmission project to be evaluated comparably to other transmission facilities proposed in the regional transmission planning process. The information requirements must be fair and not be so cumbersome as to effectively prohibit transmission developers from proposing transmission facilities, yet not be so relaxed that they allow for relatively unsupported proposals.<sup>479</sup> Order No. 1000 also required each public utility transmission provider to identify in its OATT the date by which a transmission developer must submit information on a proposed transmission project to be considered in a given transmission planning cycle.<sup>480</sup>

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<sup>477</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment O, § 9.01 (Hold Harmless).

<sup>478</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 325.

<sup>479</sup> *Id.* P 326.

<sup>480</sup> *Id.* P 325.

**i. First Compliance Order**

258. The Commission found that the proposed information requirements associated with submitting Phase One Proposals for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades and Stage One Proposals for Public Policy Transmission Upgrades partially complied with the requirements of Order No. 1000.<sup>481</sup> The Commission stated that Filing Parties' proposed information requirements identified the information that a transmission developer must submit to allow ISO-NE to evaluate a proposed transmission project, striking a reasonable balance between being not overly cumbersome yet allowing for sufficiently supported proposals.<sup>482</sup>

259. However, the Commission found that Filing Parties' proposal to require a prospective transmission developer to provide the following information for proposed upgrades did not comply with Order No. 1000: (1) feasibility studies, as requested by ISO-NE, to demonstrate how the proposed solution will address the identified need, and (2) a list of affected existing transmission system facilities that the Participating Transmission Owner or Qualified Sponsor believes will require modification as part of the proposal.<sup>483</sup> The Commission found that requiring a prospective transmission developer to perform such studies to have its proposed transmission project evaluated in the regional transmission planning process was overly burdensome.<sup>484</sup> The Commission stated that, while the information requirements should permit a transmission developer to submit studies and analysis it performed in support of its proposed project, it should not require studies and analyses that only incumbent transmission owners are likely to have sufficient information to complete.<sup>485</sup> The Commission found that the transmission planning region must conduct the studies and analysis that it will use to evaluate proposed transmission projects as part of the regional transmission planning process.<sup>486</sup> Consequently, the Commission directed Filing Parties to remove these information

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<sup>481</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 291.

<sup>482</sup> *Id.*

<sup>483</sup> *Id.* P 292.

<sup>484</sup> *Id.*

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*

requirements for Reliability Transmission Upgrades, Market Efficiency Transmission Upgrades, and Public Policy Transmission Upgrades from ISO-NE's OATT.<sup>487</sup>

ii. **Requests for Rehearing or Clarification**

(a) **Summary of Requests for Rehearing or Clarification**

260. ISO-NE seeks rehearing of the First Compliance Order's directive to remove the proposed requirement for prospective transmission developers to provide feasibility studies to demonstrate how their proposed transmission solutions will address the identified needs.<sup>488</sup> ISO-NE states that this decision should be reversed because it is unworkable and it is contrary to Order No. 1000's goal of more efficient and cost-effective regional transmission planning. ISO-NE argues this decision was not based on any comment or protest to the filing nor was the finding that the requirement did not comply with Order No. 1000 substantiated with a citation or language from Order No. 1000. ISO-NE also states that the requirement that Qualified Sponsors perform feasibility studies would ensure that only reasonably developed alternatives are put forward for further consideration. Furthermore, ISO-NE argues that if it performs all feasibility studies, the related costs would burden the region as a whole and would introduce an unintended lack of accountability to the process. ISO-NE therefore requests that the Commission grant rehearing reversing this determination.<sup>489</sup>

(b) **Commission Determination**

261. We deny ISO-NE's request for rehearing. We affirm the finding in the First Compliance Order that the requirement for prospective transmission developers to provide feasibility studies to demonstrate how their proposed transmission solutions will address the identified needs is overly burdensome.<sup>490</sup> Order No. 1000 states that information requirements must not be so cumbersome that they effectively prohibit transmission developers from proposing transmission projects.<sup>491</sup> As discussed in the

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<sup>487</sup> *Id.*

<sup>488</sup> ISO-NE Request for Rehearing at 61.

<sup>489</sup> *Id.* at 61-63.

<sup>490</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 292.

<sup>491</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 326.

First Compliance Order, while the information requirements should permit a transmission developer to submit studies and analysis it performed in support of its proposed project, the information requirements should not require studies and analyses that only incumbent transmission owners are likely to have sufficient information to complete.<sup>492</sup>

Furthermore, such detailed studies are more appropriately performed in the regional transmission planning process, as Order No. 1000 requires public utility transmission providers to evaluate the merits of the proposed transmission solutions.<sup>493</sup> With respect to the study costs that ISO-NE contends would burden the region as a whole, we note that Order No. 1000 does not prohibit the use of study deposits, which Filing Parties have proposed in their compliance filing to respond to the First Compliance Order's directive on this matter.<sup>494</sup>

### iii. Compliance

#### (a) Summary of Compliance Filing

262. With respect to the information requirements for submitting Phase One and Stage One Proposals, Filing Parties propose to clarify in ISO-NE's OATT that Qualified Sponsors must submit a proposed schedule, including key high-level milestones, for development, siting, procurement of real estate rights, permitting, construction, and completion of the proposed transmission solution and a high-level itemization of the components of the cost estimate.<sup>495</sup> Filing Parties state that, as the Commission directed in the First Compliance Order, they have deleted the language in ISO-NE's OATT requiring transmission developers to provide information on feasibility studies and affected transmission facilities in Phase One and Stage One Proposals.<sup>496</sup> Filing Parties

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<sup>492</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 292.

<sup>493</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 315.

<sup>494</sup> *Id.*; *see also* ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), §§ 4.3(c) (Information Required for Phase One Proposals; Study Deposit; Timing), 4A.5(a) (Information Required for Stage One Proposals).

<sup>495</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(c) (Information Required for Phase One Proposals; Study Deposit; Timing); *id.* § 4A.5(a) (Information Required for Stage One Proposals).

<sup>496</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(c) (Information Required for Phase One Proposals; Study Deposit; Timing); *id.* § 4A.5(a) (Information Required for Stage One Proposals).

emphasize these efforts cannot be undertaken without funding and, accordingly, propose the addition of a requirement that the Qualified Sponsors must include payment of a \$100,000 study deposit per submitted proposal to support the cost of Phase One and Phase Two and Stage One and Stage Two study work by ISO-NE.<sup>497</sup> Additionally, Filing Parties propose revisions that specify that any difference between a Qualified Sponsor's study deposit and the actual cost of the Phase One and Phase Two and Stage One and Stage Two studies for a project shall be paid by or refunded to the Qualified Sponsor, with interest calculated per the Commission's regulations.<sup>498</sup>

263. In addition, Filing Parties propose that a member of the Planning Advisory Committee that is not a Qualified Sponsor, but that would like ISO-NE to consider a Phase One or Stage One Proposal, must identify a Qualified Sponsor willing to submit a corresponding Phase One or Stage One Proposal and to develop and construct the transmission project if selected. If the Planning Advisory Committee member requests ISO-NE's assistance in identifying a Qualified Sponsor to submit the proposal, Filing Parties propose that ISO-NE will post on its website and distribute to the Planning Advisory Committee a notice that solicits expressions of interest from Qualified Sponsors to sponsor the proposed transmission project. Filing Parties propose that if no Qualified Sponsors expresses interest, the Planning Advisory Committee member's proposal may not be submitted as a Phase One or Stage One Proposal.<sup>499</sup>

264. Filing Parties also propose to require Qualified Sponsors to provide twelve types of information in support of its proposed Phase Two and Stage Two Solutions for ISO-NE to consider when selecting the preliminary preferred solution that constitutes the transmission project that offers the best combination of electrical performance, cost, future system expandability, and feasibility to meet the need in the required timeframe. These information requirements include: (1) updates to the information provided in the Phase One or Stage One Proposal, or a certification that the information remains current

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<sup>497</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(c) (Information Required for Phase One Proposals; Study Deposit; Timing); *id.* § 4A.5(a) (Information Required for Stage One Proposals).

<sup>498</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(i) (Reimbursement of Phase Two Solution Costs; collection and Refund of ISO Study Costs); *id.* § 4A.6 (Reimbursement of Stage One Proposal and Stage Two Solution costs; collection and Refund of ISO Study Costs); *see also* 18 C.F.R. § 35.19 (2014).

<sup>499</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), §§ 4.3(b) (Public Notice Initiating Competitive Solution Process), 4A.5(a) (Information Required for Stage One Proposals).

and correct; (2) a list of required federal, state, and local permits; (3) description of construction sequencing, a conceptual plan for the anticipated transmission and generation outages necessary to construct the transmission project and their respective durations, and possible constraints; (4) project schedule with additional detail as specified by ISO-NE; (5) detailed cost component itemization and life-cycle costs; (6) design standards to be used; (7) description of the authority the Qualified Sponsor has to acquire rights of way; (8) experience of the Qualified Sponsor in acquiring rights of way; (9) status of acquisition of right, title, and interest in rights of way, substations, and other property or facilities, if any, that are necessary for the proposed project; (10) a detailed explanation of project feasibility and potential constraints and challenges; (11) a description of the means by which the Qualified Sponsor proposes to satisfy state legal or regulatory requirements for siting, constructing, owning, and operating transmission projects; and (12) a detailed explanation of potential future expandability.<sup>500</sup>

265. In addition, Filing Parties propose changes that they characterize as ensuring a transparent public policy transmission planning process.<sup>501</sup> These include adding timeframes for submittal of Stage One Proposals;<sup>502</sup> moving the timing of ISO-NE's identification of Stage One Proposal deficiencies and ISO-NE's requests for information to occur prior to the publication by ISO-NE of any Stage One Proposals;<sup>503</sup> allowing only clarifications of projects, not material modifications or new project submissions, in Stage Two;<sup>504</sup> and requiring monthly progress reports from Qualified Sponsors selected to develop and construct Public Policy Transmission Upgrades.<sup>505</sup>

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<sup>500</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(h) (Information Required for Phase Two Solutions; Identification and Reporting of Preliminary Preferred Phase Two Solution); *id.* § 4A.7 (Information Required for Stage Two Solutions; Identification and Reporting of Preliminary Preferred Stage Two Solution).

<sup>501</sup> Second Compliance Filing at 21.

<sup>502</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4A.5(a) (Information Required for Stage One Proposals).

<sup>503</sup> *Id.* § 4A.5(d) (Proposal Deficiencies; Further Information).

<sup>504</sup> *Id.*

<sup>505</sup> *Id.* § 4A.8 (b) (Milestone Schedules).

(b) **Protests/Comments**

266. LS Power argues that ISO-NE has not provided support for the proposed \$100,000 study deposit required to support the cost of Phase One and Phase Two study work. LS Power contends that ISO-NE has neither made an effort to correlate the suggested deposit with actual costs incurred nor explained why incumbent transmission developers are excluded from study deposits. Furthermore, LS Power notes ISO-NE's \$100,000 study deposit is inconsistent with Southwest Power Pool's suggested \$10,000 study deposit and PJM's suggested \$50,000 study deposit, \$20,000 of which is non-refundable and \$30,000 of which will only be used once a project passes initial screening. Consequently, LS Power recommends that the Commission reject ISO-NE's approach and instead implement PJM's approach, to be applied to incumbent transmission owners and nonincumbent transmission developers alike.<sup>506</sup>

(c) **Answer**

267. In response to LS Power's protest, ISO-NE contends that the proposed study deposit of \$100,000 is reasonable, appropriate, and modest in comparison with the \$250,000 or greater deposit required for an Interconnection System Impact Study, as well as the cost of the transmission projects that developers will be proposing. ISO-NE also notes that unlike PJM's proposed deposit, of which \$20,000 is non-refundable, ISO-NE's proposed deposit is fully refundable, ensuring that project proponents are only charged for their actual study costs.<sup>507</sup>

(d) **Commission Determination**

268. We find that the proposed revisions to the information requirements for submitting proposals partially comply with the directives of the First Compliance Order. We find that the proposed clarifications to the information requirements for submitting Phase One and Stage One Proposals, along with revisions to the provisions addressing the timeframe for submitting Stage One Proposals, Stage One Proposal deficiencies, and milestone reporting for Public Policy Transmission Upgrades, comply with Order No. 1000. Furthermore, we find that Filing Parties have complied with the directive in the First Compliance Order to remove the information requirements for a transmission developer to provide feasibility studies and a list of affected existing transmission system facilities.

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<sup>506</sup> LS Power Comments at 9.

<sup>507</sup> ISO-NE Answer at 21-22.

269. Regarding the requirement for ISO-NE to perform the feasibility studies and identification of affected facilities on behalf of the Qualified Sponsors, Filing Parties propose that the Qualified Sponsors submit a \$100,000 study deposit per proposal to support the cost of Phase One and Phase Two study work by ISO-NE.<sup>508</sup> Filing Parties state that the study deposit will allow ISO-NE to have funding available in order to conduct the required feasibility studies. Filing Parties also propose revisions that specify any difference between a Qualified Sponsor's study deposit and the actual cost of the studies shall be paid by or refunded to the Qualified Sponsor, with interest calculated per the Commission's regulations.<sup>509</sup> We find that the application of a study deposit in this circumstance is consistent with Order No. 1000.<sup>510</sup> Recognizing that the Commission has accepted proposals to require study deposits to offset the costs of reviewing, processing, and evaluating proposals in other transmission planning regions,<sup>511</sup> we find that the proposed refundable \$100,000 study deposit is just and reasonable. We disagree with LS Power that the deposit is excessive and unreasonable, as the deposit is fully refundable with interest<sup>512</sup> and applies to all Qualified Sponsors, both incumbent and nonincumbent.<sup>513</sup> Furthermore, as ISO-NE's Answer states, the proposed study deposit is modest relative to the cost of new transmission facilities developers will be proposing.

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<sup>508</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), §§ 4.3(c) (Information Required for Phase One Proposals; Study Deposit; Timing), 4A.5(a) (Information Required for Stage One Proposals).

<sup>509</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(i) (Reimbursement of Phase Two Solution Costs; collection and Refund of ISO Study Costs); *id.* § 4A.6 (Reimbursement of Stage Once Proposal and Stage Two Solution).

<sup>510</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 327.

<sup>511</sup> *See, e.g., Fla. Power & Light Co.*, 143 FERC ¶ 61,254, at P 147 (2013); *see also Cal. Indep. Sys. Operator Corp.*, 146 FERC ¶ 61,237, at P 34 (2014).

<sup>512</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(i) (Reimbursement of Phase Two Solution Costs; collection and Refund of ISO Study Costs); *id.* § 4A.6 (Reimbursement of Stage Once Proposal and Stage Two Solution costs; collection and Refund of ISO Study Costs); *see also* 18 C.F.R. § 35.19 (2014).

<sup>513</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4B.3 (Review of Qualifications).

270. However, we find that Filing Parties' provisions regarding the handling of the difference between a Qualified Sponsor's study deposit and the actual cost only partially comply with the Commission requirements for deposits, refunds, and interest calculations.<sup>514</sup> In Order No. 2003,<sup>515</sup> the Commission required certain conditions to ensure that the Interconnection Customer is adequately informed regarding the actual costs of studies. In addition to the proposed refund and interest provisions, Filing Parties must provide to each Qualified Sponsor a detailed and itemized accounting of the study costs in the relevant invoices.<sup>516</sup> Furthermore, Filing Parties must make clear in ISO-NE's OATT that any disputes regarding the accounting for specific deposits should be addressed under ISO-NE's transmission planning dispute resolution procedures.

271. Accordingly, Filing Parties we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further compliance filing that modifies the study deposit provisions to: (1) provide to each Qualified Sponsor a description of the costs to which the deposit will be applied, how those costs will be calculated, and an accounting of the actual costs, and (2) provide a provision that any disputes arising from this process be addressed under ISO-NE's dispute resolution process.

272. We also accept Filing Parties' proposed requirements for members of the Planning Advisory Committee that are not Qualified Sponsors that wish to propose a Phase One or Stage One Proposal. However, as discussed above, we note that ISO-NE must allow stakeholders to submit ideas into the regional transmission planning process without

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<sup>514</sup> See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 123 (2003) (if Interconnection Customer withdraws request for studies, Transmission Provider must refund Interconnection Customer any portion of Interconnection Customer's deposits or study costs that exceeds the costs that Transmission Provider has incurred, including interest).

<sup>515</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

<sup>516</sup> See Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 220 (requiring Transmission Provider to provide "detailed and itemized accounting" of Interconnection Study costs).

being required to provide the full scope of information that Filing Parties propose to require for Stage One Proposals.<sup>517</sup>

273. We find that Filing Parties' proposed information requirements for submitting Phase Two and Stage Two Solutions comply with the requirements of Order No. 1000. Specifically, the proposed information requirements provide sufficient detail to allow a proposed transmission project to be evaluated in the regional transmission planning process on a basis comparable to other transmission projects that are proposed in this process. However, Filing Parties do not comply with Order No. 1000's requirement that each public utility transmission provider identify in its OATT the date by which a transmission developer must submit information on a proposed transmission project to be considered in a given transmission planning cycle. While Order No. 1000 provides that such date may be rolling or flexible to reflect the iterative nature of the regional transmission planning process,<sup>518</sup> Filing Parties have not proposed to revise ISO-NE's OATT to specify how much time after ISO-NE posts the list of Phase One and Stage One Proposals that Qualified Sponsors will have to submit their Phase Two and Stage Two Solutions. In contrast, ISO-NE's OATT provides, for example, that Phase One Proposals must be submitted by the deadline specified in the public notice initiating the competitive solicitation process to address an identified need, which will not be less than 60 days from the posting date of the notice.<sup>519</sup> Thus, we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further compliance filing revising ISO-NE's OATT to clarify when a Qualified Sponsors whose Phase One or Stage One Proposal will be considered in Phase Two or Stage Two must submit the required information regarding its Phase Two or Stage Two Solution.

274. With respect to Filing Parties' proposal that a Qualified Sponsor must submit a conceptual plan for the anticipated transmission and generation outages necessary to construct the transmission project and their respective durations, as well as possible constraints, we note that, given ISO-NE's specialized knowledge of its system, ISO-NE must work with the Qualified Sponsor to determine the outages and their durations, as well as possible constraints, providing any information necessary for the Qualified Sponsor to identify the outages and constraints. Filing Parties also propose to require a Qualified Sponsor to submit a list of required federal, state, and local permits; a

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<sup>517</sup> See above section titled Incorporating Consideration of Transmission Needs Driven by Public Policy Requirements in the Regional Transmission Planning Process.

<sup>518</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 327.

<sup>519</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(c) (Information Required for Phase One Proposals; Study Deposit; Timing).

description of its authority to acquire rights of way; its experience in acquiring rights of way; the status of acquisition of right, title, and interest in rights of way, substations, and other property or facilities, if any, that are necessary for the proposed project; and a description of the means by which it proposes to satisfy state legal or regulatory requirements for siting, constructing, owning, and operating transmission projects. We find that these proposed information requirements comply with Order No. 1000 and are consistent with the Commission's statement in the First Compliance Order that "it would be appropriate for ISO-NE to consider the extent to which a prospective transmission developer satisfies state legal or regulatory requirements for siting, constructing, owning, and operating transmission projects and whether an entity has experience in acquiring, or the authority to acquire, rights-of-way as part of its process for evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation."<sup>520</sup> However, we note that when considering this information in the evaluation process, ISO-NE must evaluate all other factors with respect to the proposed Phase Two or Stage Two Solution as well.<sup>521</sup>

**d. Evaluation Process for Transmission Proposals Selection in the Regional Transmission Plan for Purposes of Cost Allocation**

275. Order No. 1000 required each public utility transmission provider to amend its OATT to describe a transparent and not unduly discriminatory process for evaluating whether to select a proposed transmission facility in the regional transmission plan for

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<sup>520</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 268.

<sup>521</sup> When evaluating Phase Two Solutions, ISO-NE will identify the transmission project that offers the best combination of electrical performance, cost, future system expandability, and feasibility to meet the need in the required timeframe. ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(h) (Information Required for Phase Two Solutions; Identification and Reporting of Preliminary Preferred Phase Two Solution). As discussed below in the Evaluation Process for Transmission Proposals Selection in the Regional Transmission Plan for Purposes of Cost Allocation section of this order, ISO-NE proposes to evaluate Stage Two Solutions to determine the transmission project that best addresses the identified public policy requirement while utilizing the best combination of electrical performance, cost, future system expandability, and feasibility to meet the need in the required timeframe. ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4A.8(a) (Inclusion of Public Policy Transmission Upgrades in the Regional System Plan and RSP Project List).

purposes of cost allocation.<sup>522</sup> The evaluation process must ensure transparency and provide the opportunity for stakeholder coordination.<sup>523</sup> In addition, the evaluation process must culminate in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation.<sup>524</sup>

**i. First Compliance Order**

276. In the First Compliance Order, the Commission found that Filing Parties' proposed provisions related to evaluating proposed Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades partially complied with the requirements of Order No. 1000.<sup>525</sup> The Commission also found that Filing Parties' proposed provisions related to evaluating proposed Public Policy Transmission Upgrades did not comply with the requirements of Order No. 1000.<sup>526</sup>

277. Regarding the specific evaluation criteria, the Commission found that Filing Parties' proposal to identify the project that "offers the best combination of electrical performance, cost, future system expandability and feasibility to meet the need in the required timeframe as the preliminary preferred Phase Two Solution" complied with Order No. 1000's requirement to consider the "relative efficiency and cost-effectiveness of [a proposed transmission] solution."<sup>527</sup> The Commission also found that the evaluation process for Reliability and Market Efficiency Transmission Upgrades ensures transparency and provides the opportunity for stakeholder coordination as required by Order No. 1000.<sup>528</sup> Furthermore, the Commission found that the evaluation process

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<sup>522</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 452.

<sup>523</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 454.

<sup>524</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 267.

<sup>525</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 307.

<sup>526</sup> *Id.*

<sup>527</sup> *Id.* P 311 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 267).

<sup>528</sup> *Id.* P 309.

culminates in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation.<sup>529</sup>

278. The Commission also conditionally accepted Filing Parties' proposal that if the sole Phase One Proposal for a Reliability or Market Efficiency Transmission Upgrade has been submitted by a Participating Transmission Owner proposing a project that would be located within or connected to its existing electric system, then ISO-NE will use its existing process for evaluating and developing regulated transmission projects.<sup>530</sup> However, the Commission required that Filing Parties replace the "cost-effective and reliable" standard in section 4.2 of Attachment K to ISO-NE's OATT with the standard set forth in section 4.3 (i.e., identifying the solution "that offers the best combination of electrical performance, cost, future system expandability, and feasibility to meet the need in the required time frame").<sup>531</sup> Finally, the Commission found that Filing Parties did not meet the requirement that the evaluation process culminate in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation for the Phase One Proposals that it proposed to exclude from consideration in Phase Two.<sup>532</sup> The Commission found that Filing Parties' proposed process for evaluating Phase One Proposals for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades and Phase Two Solutions, when more than one Phase One Proposal is submitted, met Order No. 1000's requirement that regions must use the same process to evaluate a new transmission facility proposed by a nonincumbent transmission developer as for a project proposed by an incumbent transmission developer.

279. With respect to Filing Parties' proposed evaluation process for Public Policy Transmission Upgrades, the Commission found that their proposal did not comply with the requirements of Order No. 1000.<sup>533</sup> The Commission found that, with reference to NESCOE's role in the proposed evaluation process, Filing Parties did not explain how this process will provide transparency for stakeholders seeking to understand and provide

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<sup>529</sup> *Id.*

<sup>530</sup> *Id.* P 308.

<sup>531</sup> *Id.*

<sup>532</sup> *Id.* P 312.

<sup>533</sup> *Id.* P 313.

input in the evaluation of whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation, or otherwise culminate in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected.<sup>534</sup>

280. Finally, the Commission found that because Filing Parties' proposal provides that NESCOE, or all of the participating states' utility regulatory authorities jointly, will select Public Policy Transmission Upgrades in the regional transmission plan for purposes of cost allocation, Filing Parties' proposed evaluation process failed to comply with Order No. 1000's requirement that public utility transmission providers select more efficient or cost-effective transmission solutions to address transmission needs driven by public policy requirements in the regional transmission plan for purposes of cost allocation. Accordingly, the Commission directed Filing Parties to submit a further compliance filing that amends the ISO-NE OATT to describe a transparent and not unduly discriminatory process for evaluating whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation.<sup>535</sup> The Commission noted that this process must evaluate at the regional level all identified potential transmission solutions to transmission needs driven by public policy requirements, not only those solutions that NESCOE indicates that it would like ISO-NE to study further. Moreover, the Commission stated that the OATT must provide that ISO-NE, as the regulated public utility transmission provider in the ISO-NE transmission planning region, selects the more efficient or cost-effective transmission solutions to address transmission needs driven by public policy requirements in the regional transmission plan for purposes of cost allocation.

## ii. Compliance

281. As discussed above, Filing Parties propose to revise section 4.2(a) of Attachment K to replace the original "cost-effective and reliable" standard for identification of reliability solutions developed using the existing solutions study process with the standard in section 4.3, pursuant to which ISO-NE will identify "the solutions for the region that offer the best combination of electrical performance, cost, future system expandability, and feasibility to meet a need identified in a Needs Assessment in the required time frame."<sup>536</sup> With respect to the Commission's directive that Filing Parties'

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<sup>534</sup> *Id.* P 314.

<sup>535</sup> *Id.* P 315.

<sup>536</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.2(a) (Evaluation and Development of Regulated Transmission Solutions in Solutions

revise the Phase One Proposal evaluation process to specify that ISO-NE will explain why a particular Phase One Proposal was excluded from Phase Two, Filing Parties propose that ISO-NE will post such an explanation on its website.<sup>537</sup>

282. With respect to the Commission's requirement that Filing Parties describe a transparent and not unduly discriminatory process for evaluating whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation, Filing Parties propose several key modifications to Attachment K. They propose to remove NESCOE's selection of Stage One Proposals to advance into Stage Two, and allow ISO-NE to make this selection.<sup>538</sup> The proposed revisions permit ISO-NE, with input from the Planning Advisory Committee, to exclude a proposed Public Policy Transmission Upgrade from consideration in Stage Two based on a determination that it is not competitive in terms of cost, electrical performance, future system expandability, or feasibility.<sup>539</sup> Similarly, Filing Parties propose that ISO-NE, and not NESCOE, will identify the preferred Stage Two Solution for selection in the Regional System Plan and Regional System Plan Project List.<sup>540</sup> ISO-NE will select the Public Policy Transmission Upgrade that best addresses the identified public policy requirement, while utilizing the best combination of electrical performance, cost, future system expandability, and feasibility to meet the need in the required timeframe.<sup>541</sup> Finally, Filing Parties propose that ISO-NE, rather than NESCOE, will determine whether to delete a Public Policy Transmission Upgrade from the Regional System Plan Project List because the need no longer exists.<sup>542</sup>

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Studies for Market Efficiency Transmission Upgrades and Reliability Transmission Upgrades).

<sup>537</sup> *Id.* § 4.3(g) (Listing of Qualifying Phase One Proposals).

<sup>538</sup> *Id.* §§ 4A.5(g), 4A.5(e), 4A.7, 4A.5(f).

<sup>539</sup> *Id.* § 4A.5(e) (List of Qualifying Stage One Proposals).

<sup>540</sup> *Id.* §§ 4A.8, 4A.8(a).

<sup>541</sup> *Id.* § 4A.8(a) (Inclusion of Public Policy Transmission Upgrades in the Regional System Plan and RSP Project List).

<sup>542</sup> *Id.* § 3.6(c) (Regional System Plan Project List Updating Procedures and Criteria).

### iii. Protests/Comments

283. LS Power maintains that ISO-NE's proposed evaluation process does not identify how ISO-NE will determine the more efficient or cost-effective project, or how significant the focus on cost will be in the evaluation process.<sup>543</sup> It states that the evaluation and selection process should be substantially more robust, and states that the Commission should reject the proposed evaluation process and require additional details.

284. With respect to Filing Parties' proposed additional standard for evaluating and developing regulated transmission solutions in the existing process, New Hampshire Transmission argues that, while Filing Parties clarify that ISO-NE will select the project that offers the best combination of electrical performance, cost, future system expandability, and feasibility to meet the need in the required timeframe, Filing Parties offer no explanation about how ISO-NE would make this determination. They further argue that Filing Parties have not provided any explanation for how ISO-NE will apply this standard in selecting projects under other provisions of Attachment K.<sup>544</sup> To increase certainty and transparency in the selection process, New Hampshire Transmission states that Filing Parties should provide further information on how ISO-NE will determine what is the best combination of these factors. It argues that the objectives of Order No. 1000 compel assigning greater weight to cost items than to other metrics in this evaluation. It also states that ISO-NE systematically should consider the factors already contained in the Solution Study template in ISO-NE's planning procedures.<sup>545</sup> Moreover, as part of its project selection, New Hampshire Transmission states that ISO-NE should be required to provide a comparison matrix showing the performance of the alternative solutions against each of the factors, and these factors should be embedded in the OATT rather than be left to the secondary materials that are not reviewed by the Commission.

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<sup>543</sup> LS Power Comments at 8.

<sup>544</sup> New Hampshire Transmission Protest at 20.

<sup>545</sup> New Hampshire Transmission explains that these factors for comparing solutions are: operation performance, constructability, construction outage requirements/impacts, interface impacts, siting issues such as environmental impact or right-of-way acquisition, expansion capabilities, lifetime efficiency/expectancy, maintenance requirements, expected in service dates, and costs. New Hampshire Transmission Protest at 22.

**iv. Answer**

285. In response to LS Power's protest, ISO-NE states that the First Compliance Order did not require embedding of additional selection process steps in the OATT. Furthermore, ISO-NE argues that LS Power is fundamentally wrong about the level of detail provided in the OATT of the factors that ISO-NE will use to evaluate proposals. ISO-NE states that it has specified twelve separate types of information to be considered when selecting the preliminary preferred solution that offers the best combination of electrical performance, cost, future system expandability, and feasibility to meet the need in the required timeframe.<sup>546</sup>

286. Regarding New Hampshire Transmission's proposal that ISO-NE explain how it will apply the standard accepted by the Commission for selecting from among Phase Two Proposals and embed in the OATT a template reflected in ISO-NE's planning procedures, ISO-NE argues that these proposed changes go beyond compliance and the cost-related points raised by New Hampshire Transmission are out of sync with the directive of the First Compliance Order that there be a balanced consideration of factors in addition to cost. ISO-NE notes that the First Compliance Order simply directed Filing Parties to apply the standard used in one OATT provision in a separate provision as well.<sup>547</sup>

**v. Commission Determination**

287. We find that the provisions in Filing Parties' compliance filing addressing the evaluation of proposed transmission facilities comply with the directives in the First Compliance Order. As discussed above, we find that Filing Parties' revisions to section 4.2 of Attachment K to ISO-NE's OATT comply with the First Compliance Order's directive to replace the "cost-effective and reliable" standard with the standard set for in section 4.3.<sup>548</sup> We also find that Filing Parties' proposal to require, for Reliability and Market Efficiency Transmission Projects, ISO-NE to post on its website an explanation of why it has determined to exclude a Phase One Proposal from consideration in Phase Two complies with Order No. 1000's requirements that the evaluation process culminate in a determination that is sufficiently detailed for stakeholders to understand why a

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<sup>546</sup> ISO-NE Answer at 20-21 (referring to ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(h) (Information Required for Phase Two Solutions; Identification and Reporting of Preliminary Preferred Phase Two Solution)).

<sup>547</sup> *Id.* at 20.

<sup>548</sup> *See supra* P 96 (Requirement to Plan on a Regional Basis to Identify More Efficient or Cost-Effective Solutions).

particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation.<sup>549</sup>

288. With respect to LS Power's and New Hampshire Transmission's arguments that the proposed evaluation process does not provide sufficient explanation as to how ISO-NE will determine the more efficient or cost-effective project, we note that the First Compliance Order found that Filing Parties' evaluation process for selecting Phase Two Solutions complied with the requirements of Order No. 1000. Specifically, the Commission found that Filing Parties' criteria for selecting Phase Two Solutions comply with Order No. 1000's requirement to consider the relative efficiency and cost-effectiveness of a proposed transmission solution.<sup>550</sup> We affirm that these evaluation criteria are sufficiently descriptive to provide prospective transmission developers with an understanding of how their proposals will be evaluated and are consistent with Order No. 1000. Regarding New Hampshire Transmission's argument that the objectives of Order No. 1000 compel assigning greater weight to cost items than to other metrics in the evaluation process, we note that Order No. 1000 does not require a public utility transmission provider to specify in its OATT the relative weight of the factors considered in the evaluation process. We also note that, in the First Compliance Order, the Commission found that Filing Parties' evaluation process is transparent and provides opportunities for stakeholder coordination as well as culminates in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation.<sup>551</sup> We therefore reject New Hampshire Transmission's proposed OATT revisions and LS Power's request that Filing Parties be required to provide additional detail regarding how ISO-NE will determine the more efficient or cost-effective transmission project.

289. As discussed above regarding Public Policy Transmission Upgrades, we find that Filing Parties have proposed an evaluation process that complies with Order No. 1000's requirements that public utility transmission providers select more efficient or cost-effective transmission solutions to address transmission needs driven by public policy requirements in the regional transmission plan for purposes of cost allocation. Here, we find that Filing Parties have described a transparent and not unduly discriminatory

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<sup>549</sup> See ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4A.8(a) (Inclusion of Public Policy Transmission Upgrades in the Regional System Plan and RSP Project List).

<sup>550</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 311.

<sup>551</sup> *Id.* P 312.

process for evaluating whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation. Filing Parties state that ISO-NE will identify the preferred Stage Two Solution in accordance with the stated criteria and following receipt of stakeholder input, and will post on its website an overview of why the solution is preferred. We find that this process will ensure transparency and provide the opportunity for stakeholder coordination, and will culminate in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation.

e. **Reevaluation Process for Transmission Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation**

290. To ensure the incumbent transmission provider can meet its reliability needs or service obligations, Order No. 1000 required each public utility transmission provider to amend its OATT to describe the circumstances and procedures for reevaluating the regional transmission plan to determine if alternative transmission solutions must be evaluated as a result of delays in the development of a transmission facility selected in a regional transmission plan for purposes of cost allocation.<sup>552</sup> If an evaluation of alternatives is needed, the regional transmission planning process must allow the incumbent transmission provider to propose solutions that it would implement within its retail distribution service territory or footprint, and if that solution is a transmission facility, then the proposed transmission facility should be evaluated for possible selection in the regional transmission plan for purposes of cost allocation.<sup>553</sup>

i. **First Compliance Order**

291. In the First Compliance Order, the Commission found Filing Parties partially complied with the reevaluation requirements of Order No. 1000. The Commission found that Filing Parties met the requirement that, if an evaluation of alternatives is needed, an incumbent transmission provider must be allowed to propose solutions that it would implement within its retail distribution service territory or footprint, and if that solution is

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<sup>552</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 263, 329, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 477.

<sup>553</sup> *Id.* P 329.

a transmission facility, then the proposed transmission facility should be evaluated for possible selection in the regional transmission plan for purposes of cost allocation.<sup>554</sup> The Commission found that ISO-NE meets this requirement because, in the event that a Qualified Sponsor that ISO-NE has designated to construct transmission facilities cannot complete them on a timely basis, Participating Transmission Owners have an obligation to work with ISO-NE to develop a backstop solution.<sup>555</sup> The Commission also noted that the ISO-NE OATT described the criteria that ISO-NE will use to assess the continued viability of projects, including status of final permits, and construction phases.<sup>556</sup> However, the Commission found that the proposed OATT revisions did not provide for evaluation of alternatives other than the Participating Transmission Owner's backstop transmission solution under such circumstances, and, thus, it was unclear whether ISO-NE will rely on the backstop transmission solution prepared by the Participating Transmission Owner or whether ISO-NE may pursue other options, such as retaining the original transmission project or considering alternative solutions. Accordingly, the Commission directed Filing Parties to clarify the options that ISO-NE will pursue when a transmission project selected in the regional transmission plan for purposes of cost allocation is delayed.<sup>557</sup>

292. The Commission also accepted Filing Parties' proposed revisions to the Operating Agreement, which provide that if a Qualified Sponsor other than the applicable Participating Transmission Owner has been designated by ISO-NE to construct a new transmission facility, the obligation to own and construct that transmission facility does not attach to the Participating Transmission Owner unless the Qualified Sponsor is unable to complete such project on a timely basis.<sup>558</sup> The Commission noted that the Operating Agreement already obligates transmission owners to construct certain non-reliability projects in some instances, and the proposed revisions reflect the fact that Qualified Sponsors may be designated by ISO-NE to build such projects.

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<sup>554</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 322 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 329).

<sup>555</sup> *Id.*; *see also id.* P 319 (citing TOA, Schedule 3.09(a), §1.1(g) (Secondary Version)).

<sup>556</sup> *Id.* P 322 (citing ISO-NE, OATT, Attachment K, §§ 4A.9(b) 4.3(j) (Secondary Version)).

<sup>557</sup> *Id.*

<sup>558</sup> *Id.* P 323.

**ii. Requests for Rehearing or Clarification**

293. Administrative Committee seeks clarification or rehearing of the First Compliance Order's determination regarding Participating Transmission Owners' obligation with respect to a project abandoned by a nonincumbent Qualified Sponsor.<sup>559</sup> Administrative Committee maintains that the Commission erred in its interpretation of the obligations of Participating Transmission Owners under the Operating Agreement, stating:

[C]onsistent with the changes to the regional transmission planning process in compliance with Order No. 1000, Qualified Sponsors may be designated by ISO-NE to build [non-reliability] projects. Under the existing language in the [Operating Agreement], the Participating Transmission Owner will retain *the obligation to build those projects* if the designated Qualified Sponsor cannot do so.<sup>560</sup>

294. Administrative Committee states that the emphasized language incorrectly describes the obligations of the Participating Transmission Owners, because their obligation is not to complete the proposed project abandoned by a nonincumbent Qualified Sponsor, but rather to "provide a backstop solution" to maintain reliability. Administrative Committee asks that the Commission clarify its incorrect statement in the First Compliance Order to the contrary, or grant rehearing for that purpose.<sup>561</sup>

**iii. Compliance**

295. Filing Parties propose revisions to ISO-NE's OATT to clarify that ISO-NE will pursue only the Participating Transmission Owner's backstop transmission solution when a reliability or economic efficiency transmission project selected in the regional transmission plan for purposes of cost allocation is delayed. Specifically, if ISO-NE finds, after consultation with a non-Participating Transmission Owner Qualified Sponsor, that the sponsor has failed to pursue project approvals or construction for a Reliability Transmission Upgrade or Market Efficiency Transmission Upgrade in a reasonably diligent fashion, or is unable to proceed due to forces beyond its reasonable control, ISO-NE shall request the applicable Participating Transmission Owner implement the

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<sup>559</sup> Administrative Committee Request for Rehearing at 6.

<sup>560</sup> *Id.* at 47-48 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 323).

<sup>561</sup> *Id.* at 48.

backstop transmission solution.<sup>562</sup> A determination by ISO-NE for the Participating Transmission Owner to continue work on the backstop project shall be communicated by ISO-NE to the Participating Transmission Owner in writing and shall also be communicated to the Planning Advisory Committee.<sup>563</sup> In the event that the delayed transmission project is a Public Policy Transmission Upgrade, Filing Parties propose that ISO-NE may consider and select another Stage Two Proposal relating to the pertinent transmission need driven by a public policy requirement, or the re-solicitation of Stage One Proposals to meet the pertinent public policy requirement.<sup>564</sup> Filing Parties also propose to require ISO-NE to file a report with the Commission explaining why the transmission project was reassigned (in the case of a Reliability Transmission Upgrade or Market Efficiency Transmission Upgrade) or its proposed course of action (for a Public Policy Transmission Upgrade).<sup>565</sup>

296. In addition, Filing Parties propose revisions to Attachment K that require a Qualified Transmission Project Sponsor whose transmission project has been selected in the regional transmission plan for purposes of cost allocation to submit to ISO-NE its “acceptance of responsibility to proceed” within 30 business days of receiving “all necessary siting and other approvals.”<sup>566</sup> Filing Parties have also revised Attachment K to state that the schedule of dates by which typical project construction phases will be completed that a Qualified Transmission Project Sponsor must submit be “acceptable to [ISO-NE].”<sup>567</sup> Filing Parties also propose to require the Qualified Transmission Project Sponsor to submit to ISO-NE on a monthly basis thereafter, until the selected

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<sup>562</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(k) (Milestone Schedules).

<sup>563</sup> *Id.*

<sup>564</sup> *Id.* § 4A.8(b) (Milestone Schedules).

<sup>565</sup> *Id.* §§ 4.3(k), 4A8(b) (Milestone Schedules). Filing Parties also propose revisions to clarify that, if the Qualified Sponsor that is failing or unable to proceed is a Participating Transmission Owner, the report ISO-NE prepare will explain ISO-NE’s proposed course of action with respect to that Participating Transmission Owner. *Id.*

<sup>566</sup> *Id.* §§ 4.3(k), 4A8(b) (Milestone Schedules).

<sup>567</sup> *Id.* §§ 4.3(k), 4A8(b) (Milestone Schedules).

transmission project is placed into service, a report that provides updated information, as specified by ISO-NE showing the progress of the selected transmission project.<sup>568</sup>

297. In addition, Filing Parties propose revisions to Attachment K stating that ISO-NE shall notify any Participating Transmission Owner providing a backstop transmission solution for a Reliability Transmission Upgrade or Market Efficiency Transmission Upgrade to cease developing the backstop transmission solution as of the date of the selected transmission sponsor's acceptance of responsibility, unless the year of need or other factors, as applicable, associated with the project are such that ISO-NE determines that the Participating Transmission Owner should continue the development of the backstop transmission solution.<sup>569</sup>

#### iv. Protests/Comments

298. New Hampshire Transmission states that Filing Parties' proposed revisions to the reassignment process are unclear as to what would trigger such a reassignment.<sup>570</sup> New Hampshire Transmission states that such a determination would be purely subjective and that there is no baseline schedule for ISO-NE to use to determine whether there is a delay. It proposes revisions to ISO-NE's OATT requiring that either the nonincumbent Qualified Sponsor must consent to the reassignment or that there must be uncontestable evidence of project abandonment and evidence that the Participating Transmission Owner would not have the same problems. New Hampshire Transmission also argues that Filing Parties' proposal is biased against new entrant developers. It contends that the zero-tolerance policy for nonincumbent Qualified Sponsors would likely result in projects being reassigned to the incumbent Participating Transmission Owner for any minor delay.<sup>571</sup>

299. New Hampshire Transmission further states that it is not clear that ISO-NE's reassignment should always be to the incumbent Participating Transmission Owner.<sup>572</sup> New Hampshire Transmission acknowledges that the Commission approved use of a backstop transmission solution by a Participating Transmission Owner when a Qualified

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<sup>568</sup> *Id.* §§ 4.3(k), 4A8(b) (Milestone Schedules).

<sup>569</sup> *Id.* § 4.3(k) (Milestone Schedules).

<sup>570</sup> New Hampshire Transmission Protest at 15.

<sup>571</sup> *Id.* at 16.

<sup>572</sup> *Id.*

Sponsor is unable to complete a reliability or economic efficiency transmission project on a timely basis, but it argues that this does not mean that the Participating Transmission Owner would have exclusive right to take over abandoned projects. It states that if a nonincumbent Qualified Sponsor cannot complete the project but another nonincumbent Qualified Sponsor can execute the project more economically than the incumbent Participating Transmission Owner, the nonincumbent Qualified Sponsor should have the opportunity to do so. New Hampshire Transmission proposes OATT revisions that would require ISO-NE to reassign projects to the runner-up in the competitive solicitation process or, if required by the three-year right of first refusal, to the applicable Participating Transmission Owner.<sup>573</sup> Additionally, New Hampshire Transmission states that Filing Parties' proposal does not adequately specify what is being reassigned, whether it is the specific transmission project or the opportunity. New Hampshire Transmission states that there needs to be enough flexibility so that this determination can be made on a cost-effective basis in each circumstance.

v. Answer

300. ISO-NE states that New Hampshire Transmission's recommended changes to ISO-NE's OATT reassignment provisions should be rejected.<sup>574</sup> First, ISO-NE states that the backstop obligation of Participating Transmission Owners reinforces the appropriateness of reassigning the Qualified Sponsor's obligation to the incumbent Participating Transmission Owner. Second, ISO-NE states that it is inappropriate to reassign a project to the runner-up in the competitive solicitation process because the competitive solicitation process does not require a ranking of Stage Two Proposals, and a runner-up may no longer have the desire or ability to pursue its original proposal at the time that the project is being reassigned.<sup>575</sup> Lastly, to the extent that New Hampshire Transmission finds that ISO-NE's reassignment process is insufficiently detailed, ISO-NE notes that it will consult with a non-Participating Transmission Owner Qualified Sponsor before reassignment and that ISO-NE is accountable to the Commission through the required report filed with the Commission explaining why the reassignment occurred.<sup>576</sup>

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<sup>573</sup> *Id.* at 17.

<sup>574</sup> ISO-NE Answer at 15.

<sup>575</sup> *Id.* at 16.

<sup>576</sup> *Id.* at 16-17.

vi. **Commission Determination**

301. We find that Filing Parties' proposal partially complies with the requirement to clarify the options ISO-NE will pursue when a transmission project selected in the regional transmission plan for purposes of cost allocation is delayed. Under the proposal, if ISO-NE determines, after consultation with a non-Participating Transmission Owner Qualified Sponsor, that the non-Participating Transmission Owner Qualified Sponsor selected to develop a Reliability Transmission Upgrade or Market Efficiency Transmission Upgrade has failed to pursue project approvals or construction in a reasonably diligent fashion, or is unable to proceed due to forces beyond its reasonable control, ISO-NE will replace the selected Reliability Transmission Upgrade or Market Efficiency Transmission Upgrade with the Participating Transmission Owner's backstop transmission solution and request the applicable Participating Transmission Owner implement that backstop transmission solution.<sup>577</sup> We also accept Filing Parties' proposal that, in the case of Public Policy Transmission Upgrades, ISO-NE may consider and select another Stage Two Proposal relating to the pertinent transmission need driven by a public policy requirement, or the re-solicitation of Stage One Proposals. We also accept Filing Parties' proposal to require monthly updates from the selected transmission sponsor, as well as provisions requiring ISO-NE to provide a report to the Commission describing why it requested that the Participating Transmission Owner implement a backstop transmission solution or explain its proposed course of action if a transmission project selected in the regional transmission plan for purposes of cost allocation is delayed.

302. In response to Administrative Committee's request for clarification, we clarify that a Participating Transmission Owner's obligation to build under the Operating Agreement applies to the backstop transmission solution that a Participating Transmission Owner must provide and not to the Reliability Transmission Upgrade or Market Efficiency Transmission Upgrade that the non-Participating Transmission Owner Qualified Sponsor proposed and ISO-NE selected. We find that this comports with Filing Parties' proposed clarification that ISO-NE will request that the Participating Transmission Owner implement its backstop transmission solution if a non-Participating Transmission Owner Qualified Sponsor fails to pursue approvals or construction in a reasonably diligent fashion, or if the sponsor is unable to proceed with the project due to forces beyond its reasonable control.<sup>578</sup> Our clarification here should also address New Hampshire

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<sup>577</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(k) (Milestones Schedule).

<sup>578</sup> *Id.* § 4.3(k) (Milestones Schedule).

Transmission's concern that Filing Parties' proposal does not adequately specify what is being reassigned, whether it is the specific transmission project or the opportunity.

303. We disagree with New Hampshire Transmission's protest that Filing Parties' proposed reassignment process for Reliability and Market Efficiency Transmission Upgrades is unclear as to what would trigger a reassignment. While ISO-NE has some discretion in determining whether the Qualified Sponsor is failing to pursue approvals or construction in a reasonably diligent fashion or unable to proceed due to forces beyond its reasonable control, ISO-NE's determination is based on the up-front milestone schedule and monthly reports from the Qualified Sponsor. ISO-NE will also consult with the Qualified Sponsor before making a decision to request that a Participating Transmission Owner implement the backstop transmission solution. In addition, any decision ISO-NE makes to direct a Participating Transmission Owner to implement a backstop transmission solution in place of a selected transmission solution is open and transparent, with ISO-NE providing written notification of any such determination to the Planning Advisory Committee and filing with the Commission a report explaining why it has directed the Participating Transmission Owner to implement its backstop transmission solution.<sup>579</sup> We also note that ISO-NE requires the Qualified Sponsor to submit a schedule that indicates the dates by which applications for siting and other approvals necessary to develop and construct the Reliability or Market Efficiency Transmission Upgrade by the required in-service date, and later to submit a schedule, acceptable to ISO-NE, of dates by which typical project construction phases will be completed.<sup>580</sup> Thus, contrary to New Hampshire Transmission's assertions, there is a baseline for ISO-NE to use to determine whether a Qualified Sponsor is failing to pursue approvals or construction in a reasonably diligent fashion or is unable to proceed due to forces beyond its control. Similarly, we find that, the open and transparent nature of ISO-NE's decision making process mitigates New Hampshire Transmission's concern that ISO-NE will provide a preference to a Participating Transmission Owner by replacing a non-Participating Transmission Owner Qualified Sponsor's selected transmission project with a Participating Transmission Owner's backstop transmission solution for any minor delay.

304. With respect to New Hampshire Transmission's proposed revisions to have Reliability and Market Efficiency Transmission Upgrades reassigned to the runner-up in the competitive solicitation process, we find that this proposal is beyond the scope of the requirements of the First Compliance Order. In the First Compliance Order, the Commission directed Filing Parties to clarify the options ISO-NE will pursue when a

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<sup>579</sup> *See id.* § 4.3(k) (Milestones Schedule).

<sup>580</sup> *See id.* § 4.3(k) (Milestones Schedule).

transmission project selected in the regional transmission plan for purposes of cost allocation is delayed. In the Second Compliance Filing, Filing Parties explained that ISO-NE will request the applicable Participating Transmission Owner to implement the backstop regulated transmission solution and file a report with the Commission explaining why the project was reassigned. Filing Parties also explain that if the Qualified Sponsor that is failing or unable to proceed is a Participating Transmission Owner, the proposed revisions require ISO-NE to prepare a report to the Commission explaining ISO-NE's proposed course of action. Finally, Filing Parties propose that if the delayed project is a Public Policy Transmission Upgrade, ISO-NE's course of action may include a consideration and selection of another Stage Two Proposal relating to the pertinent public policy requirement, or the re-solicitation of Stage One Proposals to meet the pertinent public policy requirement.

305. However, while we accept ISO-NE's proposal to replace a delayed transmission project that was selected in the regional transmission plan for purposes of cost allocation with a Participating Transmission Owner's backstop transmission solution in certain instances, we find that ISO-NE must make revisions to its OATT and Operating Agreement to provide more clarity about such backstop transmission solutions. As an initial matter, in its transmittal letter, its OATT, and the Operating Agreement, Filing Parties use the undefined terms "backstop solution," "backstop project," "backstop transmission project," and "backstop regulated transmission solution," interchangeably.<sup>581</sup> Our understanding is that all the terms describe the same thing. To avoid confusion, we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further compliance filing revising its OATT and Operating Agreement to create a defined term for a backstop transmission solution and to use this single term consistently in both documents.

306. In addition, Filing Parties have proposed language in the OATT that expands the scope of the backstop transmission solution a Participating Transmission Owner must provide but have not explained or otherwise justified this expansion. Our understanding of the original backstop proposal, which the Commission accepted in the First Compliance Order,<sup>582</sup> is that a Participating Transmission Owner must provide a backstop transmission solution for every reliability or economic efficiency transmission

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<sup>581</sup> See, e.g., Transmittal Letter at 16; ISO-NE; Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(k) (Milestones Schedule); ISO-NE, Agreements and Contracts, Transmission Operating Agreement (3.0.0), Schedule 3.09(a) §§ 1.1(a)(i) and 1.1(f) (PTOs' Rights and Obligations to Build and Associated Conditions Including Cost Recovery).

<sup>582</sup> First Compliance Order, 143 FERC ¶ 61,150 at PP 319 & 322.

project that has been selected in the regional transmission plan for purposes of cost allocation and for which ISO-NE has designated a developer other than the applicable Participating Transmission Owner to construct.<sup>583</sup> To fulfill this obligation, the OATT requires a Participating Transmission Owner to submit a Phase One Proposal for any need that would be solved by a transmission project within or connected to its existing electric system.<sup>584</sup> The Participating Transmission Owner's Phase One Proposal must meet the requirements to move to Phase Two,<sup>585</sup> but if the Participating Transmission Owner's Phase Two project is not ultimately selected in the regional transmission plan for purposes of cost allocation as the preferred Stage Two Solution to meet a reliability or economic need, then the Participating Transmission Owner's proposed Phase Two transmission project becomes the backstop transmission solution for the Reliability Transmission Upgrade or Market Efficiency Transmission Upgrade that ISO-NE selects in the regional transmission plan for purposes of cost allocation. The Participating Transmission Owner would not continue to develop the backstop transmission solution unless and until a selected transmission project is abandoned or ISO-NE determines that the sponsor has failed to pursue project approvals or construction for a Reliability Transmission Upgrade or Market Efficiency Transmission Upgrade in a reasonably diligent fashion, or is unable to proceed due to forces beyond its reasonable control.<sup>586</sup> The Commission accepted this proposal in the First Compliance Order and required only that ISO-NE clarify what options (other than the Participating Transmission Owner's

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<sup>583</sup> ISO-NE, Agreements and Contracts, Transmission Operating Agreement (3.0.0), Schedule 3.09(a), § 1.1(a)(i) states:

[E]ach [Participating Transmission Owner] will retain an obligation to provide a backstop solution in the event that a Qualified Transmission Project Sponsor is unable to complete a system reliability or economic efficiency project on a timely basis.

<sup>584</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(b) (Competitive Solution Process for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades).

<sup>585</sup> ISO-NE's two-phase transmission planning process is described above in the Overview of ISO-NE Regional Transmission Planning Process section of this order.

<sup>586</sup> See First Compliance Order, 143 FERC ¶ 61,150 at PP 318-319.

backstop transmission solution) that ISO-NE will pursue when a transmission project selected in the regional transmission plan for purposes of cost allocation is delayed.<sup>587</sup>

307. As we discuss earlier in this section, we find compliant with the reevaluation requirements of Order No. 1000 and the First Compliance Order the proposal for ISO-NE to request the applicable Participating Transmission Owner to implement the backstop transmission solution, if, after consultation with a non-Participating Transmission Owner Qualified Sponsor, ISO-NE finds that the sponsor has failed to pursue project approvals or construction in a reasonably diligent fashion, or is unable to proceed due to forces beyond its reasonable control.<sup>588</sup> However, Filing Parties also propose new language in their OATT that expands a Participating Transmission Owner's obligation to provide a Phase One Proposal as a backstop transmission solution by requiring the Participating Transmission Owner to continue developing the backstop transmission solution until ISO-NE notifies the Participating Transmission Owner that the sponsor has accepted responsibility for the selected transmission project (and thus has obtained all siting and other approvals). ISO-NE can also require a Participating Transmission Owner to continue to develop a backstop transmission solution even past that point if the year of need or other factors, as applicable, associated with the project are such that ISO-NE determines that the Participating Transmission Owner should continue developing the backstop transmission solution.<sup>589</sup> This new proposal goes beyond what the Commission accepted in the First Compliance Order by requiring a Participating Transmission Owner to continue developing its backstop transmission solution beyond what is required in Phase One and Phase Two of the transmission planning process and to instead continue to develop the backstop transmission solution until the selected transmission project has all siting and other approvals, or even past that point if ISO-NE decides it is necessary.

308. The Commission noted in the First Compliance Order that Participating Transmission Owners have an existing obligation to construct certain non-reliability transmission projects in some instances and thus accepted the proposal to require Participating Transmission Owners to provide a backstop transmission solution for both reliability and economic efficiency transmission projects.<sup>590</sup> In addition, as ISO-NE itself states, the Commission found that, except for the requirement to clarify what other

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<sup>587</sup> *Id.* P 322.

<sup>588</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(k) (Milestone Schedules).

<sup>589</sup> *Id.* § 4.3(k) (Milestones Schedule).

<sup>590</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 323.

options ISO-NE will consider if a transmission project selected in the regional transmission plan for purposes of cost allocation is delayed, ISO-NE's original proposal complied with the reevaluation requirements of Order No. 1000 because, in the event a Qualified Sponsor who has been designated by ISO-NE to construct such facilities cannot complete them on a timely basis, the Participating Transmission Owners have an obligation to work with ISO-NE and develop a backstop solution.<sup>591</sup> Filing Parties have not, however, explained or provided justification for requiring a Participating Transmission Owner to go beyond developing a Phase One or Phase Two Proposal as a backstop transmission solution for a selected reliability or economic efficiency transmission project before ISO-NE determines that the backstop solution must replace the selected transmission solution. ISO-NE also has not explained how its proposal to expand the backstop requirement is necessary to meet the compliance requirement for it to clarify the options ISO-NE will pursue when a transmission project selected in the regional transmission plan for purposes of cost allocation is delayed.<sup>592</sup> Accordingly, we direct Filing Parties to submit, within 60 days of the date of issuance of this order, a further compliance filing to remove the new language in section 4.3(k) of Attachment K that would require a Participating Transmission Owner to continue developing a backstop transmission solution beyond what was originally proposed and that the Commission accepted in the First Compliance Order.

f. **Cost Allocation for Transmission Facilities Selected in the Regional Transmission Plan for Purposes of Cost Allocation**

309. Order No. 1000 required each public utility transmission provider to participate in a regional transmission planning process that provides nonincumbent transmission developers and incumbent transmission developers the same eligibility to use a regional cost allocation method or methods for any transmission facility selected in the regional transmission plan for purposes of cost allocation.<sup>593</sup> Order No. 1000 also required that the regional transmission planning process have a fair and not unduly discriminatory

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<sup>591</sup> Transmittal Letter at 16 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 322).

<sup>592</sup> When explaining how they comply with the directive to clarify the options ISO-NE will pursue when a transmission project selected in the regional transmission plan for purposes of cost allocation is delayed, Filing Parties reference only the proposal to request a Participating Transmission Owner to implement the backstop transmission solution. *See* Transmittal Letter at 15-16.

<sup>593</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 332.

mechanism to grant to an incumbent transmission provider or nonincumbent transmission developer the right to use the regional cost allocation method for transmission facilities selected in the regional transmission plan for purposes of cost allocation.<sup>594</sup>

**i. First Compliance Order**

310. The Commission found that Filing Parties partially complied with Order No. 1000, stating that Filing Parties' proposed tariff revisions allow any entity to use the regional cost allocation method for Regional Transmission Upgrades, Market Efficiency Upgrades, or Public Policy Transmission Upgrades. However, the Commission noted that Order No. 1000 also required the regional transmission planning process to have a fair and not unduly discriminatory mechanism to grant to an incumbent transmission owner or nonincumbent transmission developer the right to use the regional cost allocation method for unsponsored transmission facilities selected in the regional transmission plan for purposes of cost allocation. In the First Compliance Order, the Commission disagreed with Filing Parties' position that there should be no unsponsored projects, stating that it would be possible that an entity other than a Qualified Sponsor could propose a new project that is selected in the regional transmission plan for purposes of cost allocation, and that project would be considered unsponsored. The Commission directed Filing Parties to make a compliance filing that would ensure that there is an equitable and not unduly discriminatory mechanism to grant a Participating Transmission Owner or nonincumbent Qualified Sponsor the right to use the regional cost allocation method for unsponsored projects.<sup>595</sup>

**ii. Compliance**

311. In the Second Compliance Filing, Filing Parties explain that they have incorporated a mechanism that would allow an initially unsponsored project to be selected for inclusion in the Regional System Plan in sections 4.3(b) (for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades) and 4A.5(a) (for Public Policy Transmission Upgrades) of Attachment K. Under the revised process, a member of the Planning Advisory Committee that is not a Qualified Sponsor,<sup>596</sup> but

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<sup>594</sup> *Id.* P 336.

<sup>595</sup> *Id.* P 330.

<sup>596</sup> The entity would need to be a member of the Planning Advisory Committee. *See* ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), §§ 4.3(b) (for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades), 4A.5(a) (for Public Policy Transmission Upgrades).

would like to have its concept considered as a Phase/Stage One Proposal in response to a Needs Assessment, would be required to identify, before the competitive solicitation process deadline for the submission of Phase/Stage One Proposals, a Qualified Sponsor that would be willing to carry the project through the Phase/Stage One and Phase/Stage Two Proposal process.<sup>597</sup> ISO-NE indicates that, upon request, it would provide the member of the Planning Advisory Committee with assistance in locating a Qualified Sponsor willing to develop and construct the project (if selected in the competitive solicitation process) by posting on its website and sending a notice to members of the Planning Advisory Committee a solicitation for expression of interest in the unsponsored project by Qualified Sponsors.<sup>598</sup> Filing Parties state that without “fully developed project proposal data to consider,” ISO-NE would not be able to select a project for regional cost allocation, and therefore a sponsor is “critical” to provide the “extensive amount and types of supporting data and analysis that must be submitted as part of Phase/Stage One and Phase/Stage Two Proposals.”<sup>599</sup>

312. Filing Parties propose that all Qualified Sponsors’ expressions of interest must include a detailed explanation of why the Qualified Sponsor is best qualified to construct, own, and operate the unsponsored transmission project. If only one Qualified Sponsor expresses interest, Filing Parties propose that ISO-NE will designate that Qualified Sponsor as the transmission project sponsor. If more than one Qualified Sponsor expresses interest, Filing Parties propose that the Planning Advisory Committee member proposing the transmission project will select the transmission project sponsor.<sup>600</sup>

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<sup>597</sup> The terms Phase and Stage are used by ISO-NE to distinguish the process used for evaluating Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades from the process used to evaluate Public Policy Transmission Upgrades.

<sup>598</sup> Second Compliance Filing at 16, 17 (citing ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), §§ 4.3(b) (for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades), 4A.5(a) (for Public Policy Transmission Upgrades)).

<sup>599</sup> *Id.* at 17.

<sup>600</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), §§ 4.3(b) (for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades), 4A.5(a) (for Public Policy Transmission Upgrades).

### iii. Commission Determination

313. We find that the provisions in Filing Parties' filing addressing eligibility for cost allocation comply with the directives in the First Compliance Order. In the First Compliance Order, the Commission expressed the concern that the developer of an unsponsored transmission project that evolved through the Planning Advisory Committee process might not have the same ability to use the regional cost allocation method for that transmission project that a sponsored transmission project would have. The Commission therefore required Filing Parties to provide a mechanism that would enable the developer of an unsponsored transmission project to use the regional cost allocation method for such projects.<sup>601</sup>

314. We find that ISO-NE's proposal satisfies the requirement in Order No. 1000 that the regional transmission planning process must contain a fair and not unduly discriminatory mechanism to grant to an incumbent transmission owner or nonincumbent transmission developer the right to use the regional cost allocation method for unsponsored transmission facilities selected in the regional transmission plan for purposes of cost allocation.<sup>602</sup> Filing Parties have proposed that, if a member of the Planning Advisory Committee would like ISO-NE to consider a concept for a potential transmission project in response to a Needs Assessment, then ISO-NE will assist the member in finding a sponsor for the transmission project.<sup>603</sup> To the extent that more than one Qualified Sponsor is interested in sponsoring the transmission project, Filing Parties propose that the Planning Advisory Committee member proposing the transmission project will select the transmission project sponsor. In this way, ISO-NE ensures that there is a mechanism to grant a transmission developer the right to use the regional cost allocation method for an unsponsored transmission facility.

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<sup>601</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 330 (“[T]he Planning Advisory Committee provides an open forum in which all stakeholders can review work performed by ISO-NE and the transmission owners and . . . it is possible that an entity other than a Qualified Sponsor could, through this process, propose . . . [an unsponsored] project that is selected in the regional transmission plan for purposes of cost allocation . . . .”) (footnotes omitted).

<sup>602</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 336.

<sup>603</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.3(b). For example, ISO-NE shall post a notice on its website soliciting interest by a Qualified Transmission Project Sponsor to sponsor the member's conceptual project. *Id.*

#### 4. Cost Allocation

315. Order No. 1000 required each public utility transmission provider to have in its OATT a method, or set of methods, for allocating the costs of any new transmission facility selected in the regional transmission plan for purposes of cost allocation.<sup>604</sup> Each public utility transmission provider must demonstrate that its cost allocation method satisfies six regional cost allocation principles.<sup>605</sup> In addition, while Order No. 1000 permitted participant funding, participant funding cannot be the regional cost allocation method.<sup>606</sup>

316. Regional Cost Allocation Principle 1 requires that the cost of transmission facilities be allocated to those within the transmission planning region that benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits. The cost allocation methods must clearly and definitively specify identifiable benefits and the class of beneficiaries, and the allocation of transmission facility costs must be roughly commensurate with that benefit.<sup>607</sup>

317. Regional Cost Allocation Principle 2 requires that those that receive no benefit from transmission facilities, either at present or in a likely future scenario, not be involuntarily allocated any of the costs of those transmission facilities.<sup>608</sup>

318. Regional Cost Allocation Principle 3 specifies that, if a benefit to cost threshold is used to determine which transmission facilities have sufficient net benefits to be selected in a regional transmission plan for the purpose of cost allocation, the threshold must not be so high that transmission facilities with significant positive net benefits are excluded from cost allocation. Such a threshold may not include a ratio of benefits to costs that exceeds 1.25 unless the transmission planning region or public utility transmission provider justifies, and the Commission approves, a higher ratio.<sup>609</sup>

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<sup>604</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 558, 690.

<sup>605</sup> *Id.* P 603.

<sup>606</sup> *Id.* P 723.

<sup>607</sup> *Id.* PP 625, 678.

<sup>608</sup> *Id.* P 637.

<sup>609</sup> *Id.* P 646.

319. Regional Cost Allocation Principle 4 specifies that the regional cost allocation methods must allocate costs solely within that transmission planning region unless another entity outside the region or another transmission planning region voluntarily agrees to assume a portion of those costs. In addition, each regional transmission planning process must identify consequences for other transmission planning regions, such as upgrades that may be required in another region and, if the original region agrees to bear costs associated with such upgrades, then the original region's cost allocation method or methods must include provisions for allocating the costs of the upgrades among the beneficiaries in the original region.<sup>610</sup>

320. Regional Cost Allocation Principle 5 specifies that the cost allocation method and data requirements for determining benefits and identifying beneficiaries for a transmission facility must be transparent with adequate documentation to allow a stakeholder to determine how they were applied to a proposed transmission facility.<sup>611</sup>

321. Regional Cost Allocation Principle 6 specifies that a transmission planning region may choose to use a different cost allocation method for different types of transmission facilities in the regional transmission plan, but there can be only one cost allocation method for each type of transmission facility.<sup>612</sup> If a transmission planning region chooses to use a different cost allocation method for different types of transmission facilities, each cost allocation method must be determined in advance for each type of facility.<sup>613</sup> A regional cost allocation method may include voting requirements for identified beneficiaries to vote on proposed transmission facilities.<sup>614</sup>

a. **Cost Allocation for Reliability and Market Efficiency  
Transmission Projects**

i. **First Compliance Order**

322. The Commission found that Filing Parties' filing partially complied with the Regional Cost Allocation Principles of Order No. 1000 with respect to Filing Parties'

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<sup>610</sup> *Id.* P 657.

<sup>611</sup> *Id.* P 668.

<sup>612</sup> *Id.* PP 685-686.

<sup>613</sup> *Id.* P 560.

<sup>614</sup> *Id.* P 689.

proposed regional cost allocation method for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades.<sup>615</sup> Specifically, Filing Parties proposed that for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades that meet the criteria for Pool Transmission Facilities,<sup>616</sup> the costs of such facilities will be allocated to network transmission load across the entire New England region, based on load-ratio share. While the Commission found that Filing Parties' regional cost allocation method for such transmission facilities complied with Regional Cost Allocation Principles 1, 2, 3, 5, and 6, it directed Filing Parties to comply with the requirement of Regional Cost Allocation Principle 4 that the regional transmission planning process identify consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation on other transmission planning regions.<sup>617</sup>

**ii. Summary of Compliance Filing**

323. To comply with Regional Cost Allocation Principle 4, Filing Parties state that they have added language to the ISO-NE OATT for Reliability Transmission Upgrades and

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<sup>615</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 352.

<sup>616</sup> Pool Transmission Facilities are rated 115 kV or above and must also meet certain non-voltage criteria.

<sup>617</sup> Regional Cost Allocation Principle 4 requires:

The allocation method for the cost of a transmission facility selected in a regional transmission plan must allocate costs solely within that transmission planning region unless another entity outside the region or another transmission planning region voluntarily agrees to assume a portion of those costs. However, the transmission planning process in the original region must identify consequences for other transmission planning regions, such as upgrades that may be required in another region and, if there is an agreement for the original region to bear costs associated with such upgrades, then the original region's cost allocation method or methods must include provisions for allocating the costs of the upgrades among the entities in the original region.

Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 657.

Market Efficiency Transmission Upgrades.<sup>618</sup> Filing Parties' proposed language states that where external impacts of New England regional upgrades are identified through coordination between ISO-NE and neighboring entities, those impacts will be identified in the Regional System Plan. With respect to cost allocation, Filing Parties assert that Schedule 15 of the ISO-NE OATT, which was filed as part of their Order No. 1000 interregional compliance filing, provides that New England customers will not bear the costs of any external impacts of New England regional transmission projects.<sup>619</sup>

### iii. Commission Determination

324. With respect to Reliability Transmission Upgrades and Market Efficiency Upgrades, we find that Filing Parties' proposed Tariff language is consistent with Regional Cost Allocation Principle 4 because it identifies the impact of a transmission facility selected in the regional plan for purposes of cost allocation on other transmission planning regions. Specifically, Filing Parties propose that, where external impacts of a regional transmission facility are identified through coordination with neighboring entities, they will reflect such impacts in the Regional System Plan. We understand the proposal to mean that, by coordinating with neighboring entities, Filing Parties *will* identify consequences (if any) of regional transmission projects for other transmission planning regions, as required by Order No. 1000. However, in addition to identifying the consequences of such regional transmission projects for other planning regions, Filing Parties state in their Second Compliance Filing that "the costs of any external impacts of New England regional projects will not be borne by New England customers."<sup>620</sup>

325. We accept Filing Parties' proposal, subject to a compliance filing that ensures that the costs of new transmission projects selected in the regional transmission plan for purposes of cost allocation are not imposed *involuntarily* on parties outside the transmission planning region who did not cause such costs, consistent with our finding in *California Independent System Operator Corp. (CAISO Second Compliance Order)*.<sup>621</sup> In that case, to support the finding that CAISO complied with Regional Cost Allocation

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<sup>618</sup> Second Compliance Filing at 15 (referring to ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4.2(d)).

<sup>619</sup> See ISO-NE, Compliance Filing, Docket No. ER13-1960-000 (filed July 10, 2013) (OATT Schedule 15).

<sup>620</sup> Second Compliance Filing at 15.

<sup>621</sup> 146 FERC ¶ 61,198 at PP 171-174 (2014) (footnotes omitted) (*CAISO Second Compliance Order*).

Principle 4, the Commission relied on CAISO's proposal to "identify the impacts of regional transmission facilities on neighboring planning regions" and to "coordinate with such neighbors to reassess and redesign the regional transmission facilities to be constructed."<sup>622</sup> CAISO also proposed to mitigate such impacts if possible through other solutions on the CAISO-controlled grid or through operational adjustments, and to recover the costs of such solutions through CAISO's regional access charge as part of the costs of the transmission solution.<sup>623</sup> The Commission stated that "in the past, CAISO has successfully resolved issues pertaining to reliability impacts of new transmission facilities on neighboring systems by following the [Western Electricity Coordinating Council (WECC)] Project Coordination and Path Rating Processes and CAISO's internal practices, [and] Order No. 1000's requirements are not intended to circumvent or replace the WECC processes."<sup>624</sup> The Commission encouraged CAISO to continue working with its neighboring regions to address those regions' concerns regarding impacts on their transmission systems of transmission facilities selected in CAISO's regional transmission plan for purposes of cost allocation. Therefore, we require Filing Parties to 1) submit a compliance filing that ensures that the costs of new transmission projects selected in the regional transmission plan for purposes of cost allocation are not imposed involuntarily on parties outside the transmission planning region, including removal of the language that "the costs of any external impacts of New England regional projects will not be borne by New England customers;" and 2) either demonstrate that a process exists in ISO-NE through which such impacts on neighboring regions and their associated costs will be resolved (such as the WECC process referenced in *CAISO Second Compliance Order*) or propose language in the ISO-NE OATT explicitly describing how such impacts and their associated costs will be addressed. Finally, the Commission will address Filing Parties' proposed interregional cost allocation method in Docket No. ER13-1960-000.<sup>625</sup>

**b. Cost Allocation for Public Policy Transmission Upgrades**

**i. First Compliance Order**

326. The Commission found that Filing Parties' proposed regional cost allocation method for Public Policy Transmission Upgrades, which assigned costs based on the

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<sup>622</sup> *Id.* P 171 (footnotes omitted).

<sup>623</sup> *Id.*

<sup>624</sup> *Id.* P 172.

<sup>625</sup> Consideration of other aspects of interregional transmission coordination are outside the scope of this proceeding.

load-ratio shares of those states choosing to “opt-in” to a particular project, did not comply with Order No. 1000. The Commission found that allowing states to independently decide to opt-in or opt-out of cost allocation was tantamount to participant funding.<sup>626</sup> Further, the Commission found that the fact that some beneficiaries could opt-out of cost allocation for a particular Public Policy Transmission Upgrade, even though they may potentially receive benefits from that project, would violate the requirement of Regional Cost Allocation Principle 1 that costs be allocated in a manner that is at least roughly commensurate with estimated benefits.<sup>627</sup>

327. The Commission also determined that the First Compliance Filing lacked a clearly defined *ex ante* cost allocation approach<sup>628</sup> for Public Policy Transmission Upgrades, such that the benefits of a proposed transmission project may not be identified and understood in order to inform an appropriate allocation of the project’s costs. The Commission explained that, because the proposal permits states to opt-out of cost allocation for a particular transmission project, the default cost allocation method is not a transparent method with adequate documentation to allow a potential transmission developer to determine how the method was applied to a proposed transmission facility.<sup>629</sup>

328. The Commission therefore directed Filing Parties to make a further compliance filing to establish a regional cost allocation method for Public Policy Transmission Upgrades that meets the regional cost allocation principles of Order No. 1000.<sup>630</sup> However, the Commission did find that the proposed cost allocation method would be an

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<sup>626</sup> Order No. 1000 defines a participant funding approach to cost allocation as one in which “the costs of a transmission facility are allocated only to those entities that volunteer to bear those costs.” Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 486 n.375.

<sup>627</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 391.

<sup>628</sup> *See, e.g.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 499 (“We agree with many commenters that the lack of clear *ex ante* cost allocation methods that identify beneficiaries of proposed regional and interregional transmission facilities may be impairing the ability of public utility transmission providers to implement more efficient or cost-effective transmission solutions identified during the transmission planning process.”).

<sup>629</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 392.

<sup>630</sup> *Id.* P 389.

acceptable, complementary mechanism for allocating the costs of such transmission facilities.

329. Next, the Commission accepted, as just and reasonable, Filing Parties' proposed cost recovery provisions for a public policy project that has been included on the Regional System Plan Project List, as well as cost recovery for the associated study costs.<sup>631</sup> In doing so, the Commission rejected an alternative proposal submitted by NEPOOL.<sup>632</sup> Specifically, the Commission rejected NEPOOL's proposal that cost recovery for approved Public Policy Transmission Upgrades be limited to a mechanism negotiated between the opting-in states and the applicable Qualified Sponsor. The Commission found that Filing Parties' proposal was just and reasonable, noting that it allows for substantial involvement by the states because it allows them to receive cost estimates and agree to a cost allocation mechanism prior to bringing a policy-driven project to fruition.<sup>633</sup>

330. The Commission accepted Filing Parties' proposal that, if a Participating Transmission Owner or Qualified Sponsor is requested to submit a Stage One Proposal by NESCOE, a state, or a regulatory agency, that transmission developer may recover its prudently incurred Stage One Proposal development costs from the network load of the requesting state, and any transmission developer who proceeds to the Stage Two process may recover its development costs. The Commission also accepted Filing Parties'

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<sup>631</sup> *Id.* P 398. The Commission additionally noted that, although it was not finding that this type of project complied with Order No. 1000, it was accepting this proposal as an "appropriate complementary option." *Id.*

<sup>632</sup> NEPOOL supported Filing Parties' proposal to allow each of the New England states to opt-in to the selection and financial support of a proposed solution, but also supported permitting consumer-owned utilities to opt-out of cost responsibility for each Public Policy Transmission Upgrade that is intended to address a public policy requirement that is not applicable to such consumer-owned utility. NEPOOL's proposed alternative also included provisions related to revised cost estimates and documenting costs, which are discussed more fully below. NEPOOL further proposed that, with respect to transmission projects that have been approved, cost recovery for such projects shall be limited by the cost recovery mechanism negotiated between the opting-in states and the applicable Qualified Sponsor. First Compliance Order, 143 FERC ¶ 61,150 at PP 369-371 (footnotes omitted).

<sup>633</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 398.

proposal that the costs of conducting a Public Policy Study be allocated across the region as part of ISO-NE's operating expenses.<sup>634</sup>

331. Finally, the Commission rejected NEPOOL's proposal that would have required Participating Transmission Owners to provide NESCOE with documentation supporting all costs for which recovery is being sought, upon request of NESCOE or the states requesting a particular transmission project, noting that the public policy transmission planning process proposed by Filing Parties already allows for participation by NESCOE and the states. The Commission stated that Filing Parties' proposal allowed NESCOE to request an estimate of study costs from the Qualified Sponsor for Stage Two Solutions, as well as required the Qualified Sponsor to notify NESCOE and the states if it expects actual costs to exceed expected costs by 25 percent.<sup>635</sup> The Commission similarly refused to adopt NEPOOL's proposal that a Qualified Sponsor be required to notify NESCOE and the states when the actual costs of a study reach 90 percent of the estimated costs, reasoning, "Initial study cost estimates provided by the Qualified Sponsor are precisely that—estimates" and unanticipated costs might arise as the Qualified Sponsor conducts its study, and Filing Parties' proposal already provided adequate flexibility and transparency in accounting for such costs.<sup>636</sup>

**ii. Requests for Rehearing or Clarification**

**(a) Summary of Requests for Rehearing or Clarification**

**(1) Cost Allocation for Public Policy Transmission Upgrades**

332. NESCOE states that the Commission erred in rejecting the inclusion of an "opt-in" provision in the proposed cost allocation method for public policy transmission upgrades. NESCOE asserts that such an opt-in provision is consistent with Order No. 1000's provision for regional flexibility.<sup>637</sup> NESCOE further asserts that in the First Compliance

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<sup>634</sup> *Id.* PP 400-401.

<sup>635</sup> *Id.* P 402 n.726 (citing ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § A.5(f) (Stage Two Cost Estimate Requests)).

<sup>636</sup> *Id.* P 403.

<sup>637</sup> NESCOE states that Order No. 1000 required each region to implement a method or set of methods to allocate the costs of new transmission facilities selected in the regional transmission plan for purposes of cost allocation, which must be consistent

(continued ...)

Order, the Commission failed to address its demonstration that allowing states in New England to opt-in to public policy projects will ensure compliance with Regional Cost Allocation Principles 1 and 2 and will not result in free ridership.<sup>638</sup>

333. NESCOE states that it is illogical to presume that New England states will refuse to participate in a given project irrespective of any benefit they may derive from it, and NESCOE expects that the costs and benefits of projects to meet public policy requirements will be debated in an open process. But, NESCOE asserts, even if a public policy project provides some benefit to a state, that project may not be the optimal method of executing a state's policy objective and a state's ratepayers should not be forced to bear the costs of such a project. According to NESCOE, the question of whether and how much a state's consumers should underwrite a project intended to further state policy objectives are decisions for that state to make. NESCOE asserts that the Commission's finding that the opt-out provision results in "free ridership" ignores the fact that state officials are the participants in the regional transmission planning process who can determine how best to meet the public policy requirements of that state. Thus, NESCOE states, the opt-in provision resolves the tension between Regional Cost Allocation Principles 1 and 2, whereas the elimination of the opt-in provision will result in the violation of both Regional Cost Allocation Principles 1 and 2.<sup>639</sup>

334. NESCOE further states that the Commission erred in finding that the Filing Parties' proposed cost allocation method constitutes participant funding. NESCOE argues that the Commission defined participant funding in Order No. 1000 as a cost allocation method under which one or more transmission developers, or one or more individual transmission customers, funds a transmission project, and under which the project is not selected in a regional transmission plan for purposes of cost allocation.<sup>640</sup> NESCOE claims that the Commission conflated the funding of a particular transmission project by developers or customers with the determination by a New England state that some or all of the ratepayers in its state will benefit from the project. NESCOE states that under the NEPOOL alternative proposal (which NESCOE supports), each of the

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with Order No. 1000's six Regional Cost Allocation Principles, but that the order also provided for regional flexibility. NESCOE Request for Rehearing at 37-38 nn.91-92 (citing to Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 558, 604-606).

<sup>638</sup> NESCOE Request for Rehearing at 39 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 392).

<sup>639</sup> *Id.* at 39-41.

<sup>640</sup> *Id.* at 41 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 724).

New England states may decline to fund a project because it believes that the costs of the project will outweigh its benefits, or the state will not benefit from the project, or that the public policy requirements the project advances are not relevant to or in furtherance of that particular state's policies or laws. But, NESCOE states, the NEPOOL alternative proposal does not require the allocation of the costs of public policy projects only to those transmission developers who sponsor the project, or to their customers; rather, these costs will be allocated on either a region-wide or sub-regional basis, unless one or more of the states determines that there will be no benefits to it and therefore does not opt in to that project. NESCOE avers that this is not participant funding, but rather an allocation of the costs throughout the region, unless one or more of the states opts out of a Public Policy Transmission Upgrade.<sup>641</sup>

335. NESCOE further asserts that the Commission erred in finding that the proposed default cost allocation method is not a transparent *ex ante* cost allocation method.<sup>642</sup> It states that, if a Public Policy Transmission Upgrade is considered for selection in the regional transmission planning process, that project and its potential costs to customers will be subject to each applicable state's requirements regarding the process for approval. NESCOE states that all interested stakeholders can fully participate in this process, as well as seek recourse through the state courts. NESCOE states that such state regulatory processes will provide transparency, and that they should not be detailed in compliance filings submitted to the Commission because state regulatory processes are not an appropriate subject for federal tariffs.<sup>643</sup>

(2) **Issues Related to Study Costs and Cost Overruns with Regard to Public Policy Transmission Upgrades**

336. NESCOE argues that the Commission erred in accepting Filing Parties' compliance filing without the cost containment provisions for Public Policy Transmission Upgrades that was included in the NEPOOL alternative proposal. According to NESCOE, these cost containment provisions are necessary to make the transmission planning process for public policy requirements just and reasonable.<sup>644</sup> NESCOE contends that the Commission demonstrated both a misunderstanding of those provisions

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<sup>641</sup> *Id.* at 41-42.

<sup>642</sup> *Id.* at 42-43 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 392).

<sup>643</sup> *Id.* at 43.

<sup>644</sup> *Id.* at 7.

and a disregard for the states' reasonable concerns about overruns of study costs for public policy projects.<sup>645</sup>

337. NESCOE first asks the Commission to require the Filing Parties to implement NEPOOL's alternative proposal addressing the need for stricter requirements with regard to study cost estimates.<sup>646</sup> NESCOE states that the cost estimate language the Commission accepted permits NESCOE to request cost estimates from Qualified Sponsors for Stage Two Solutions study work and requires each such sponsor to provide ISO-NE and NESCOE with a revised cost estimate if the sponsor expects the study costs to exceed the estimate by 25 percent.<sup>647</sup> NESCOE asks the Commission to order the elimination of the provision regarding the expected 25 percent cost overrun, and replace it with a requirement that, if the actual costs of a study reach 90 percent of the original cost estimate, then the Qualified Sponsor must provide ISO-NE, NESCOE, and the supporting states with a revised estimate of the costs to complete the study work, as proposed in the NEPOOL alternative. According to NESCOE, such a provision is necessary to protect consumers, particularly since transmission studies for public policy-related projects are related to projects that are not required to be built, unlike studies for reliability projects.<sup>648</sup> NESCOE argues that the ISO-NE OATT provision approved by the Commission would allow project sponsors to incur and recover significant study costs over their prior estimate without informing the states or permitting the states to revisit their decision to proceed with this layer of study.<sup>649</sup> In NESCOE's view, the

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<sup>645</sup> *Id.* at 43-44.

<sup>646</sup> *Id.* (citing ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), §§ 4A.5(f), 4A.6, 4A.9(a)).

<sup>647</sup> *Id.* at 44 (citing ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4A.5(f)).

<sup>648</sup> *Id.* at 45-46 (citing NESCOE, Protest, Docket No. ER13-193-000, at 32 (filed Dec. 10, 2012) (“If one or more New England states are to use the public policy process to select projects based on state cost-benefit analysis, the New England states *must* be able to cancel a project that exceeds its cost estimate. Transmission studies for public policy-related projects differ from transmission studies for reliability projects, in that a public policy project is not needed to maintain the reliability of the grid, and does not necessarily have to be built.”)).

<sup>649</sup> *Id.*

Commission's finding that estimates are "precisely that—estimates" is an oversimplification of a complex issue that does not rise to reasoned decision-making.<sup>650</sup>

338. Separately from the question of study costs, NESCOE further argues that the Commission erred in rejecting NEPOOL's proposal to limit cost recovery for approved Public Policy Transmission Upgrades to the cost recovery mechanism negotiated between the opting-in states and the Qualified Sponsor.<sup>651</sup> NESCOE asserts that the Commission found that Filing Parties' proposal was reasonable, based on its provision for "substantial involvement by the states by allowing them to receive cost estimates, and agree to a cost allocation mechanism prior to bringing a policy-driven project to fruition."<sup>652</sup> NESCOE argues that the Commission misunderstood the ability of the states to obtain cost estimates, and confused estimates for *study* costs (which are required by section 4A.5(f) of Filing Parties' proposal) with the states' ability to obtain estimates for an actual *project*.<sup>653</sup>

339. More broadly, however, NESCOE challenges the Commission's refusal to accept the provisions in the NEPOOL proposal that would limit cost recovery for public policy projects to a mechanism negotiated between the opting-in states and the applicable Qualified Sponsors.<sup>654</sup> NESCOE argues that, even if the states were able to receive estimates for the construction of projects, those provisions would not provide protections against cost overruns. NESCOE states that many recent transmission projects in New England have, in moving from the planning to the operational phase, significantly exceeded the project costs that incumbent transmission owners estimated at the time the

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<sup>650</sup> *Id.* at 46 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 403).

<sup>651</sup> *Id.* at 47 n.117 (citing NEPOOL's alternative proposed Attachment K, section 4A.9(a) at 42).

<sup>652</sup> *Id.* (citing First Compliance Order, 143 FERC ¶ 61,150 at P 398).

<sup>653</sup> *Id.*

<sup>654</sup> *Id.* (citing First Compliance Order, 143 FERC ¶ 61,150 at P 398) ("With respect to the cost recovery for approved public policy projects, we will not accept the provisions set forth in the NEPOOL proposal that would limit cost recovery for approved public policy projects to a mechanism negotiated between the opting-in states and the applicable Qualified Sponsor.").

project was selected.<sup>655</sup> NESCOE states that, without the states' ability to enter into final negotiations with the project proponent and to control conditions on cost recovery, states could lose the benefits of competitively-procured Public Policy Transmission Upgrades through lax cost controls and inefficient construction practices.<sup>656</sup> NESCOE argues that the Commission failed to respond to these considerations.

(b) **Commission Determination**

(1) **Cost Allocation for Public Policy Transmission Upgrades**

340. We deny NESCOE's requests for rehearing for the reasons discussed below. We affirm our findings in the First Compliance Order on these issues.

341. We disagree with NESCOE's position that Filing Parties' originally-proposed cost allocation method for Public Policy Transmission Upgrades generally is compliant with Order No. 1000. The Commission stated in the First Compliance Order that "ISO-NE's cost allocation proposal for Public Policy Transmission Upgrades is akin to having participant funding as the regional cost allocation method."<sup>657</sup> As noted in the First Compliance Order, participant funding is an approach to cost allocation in which "the costs of a transmission facility are allocated only to those entities that volunteer to bear those costs."<sup>658</sup> Although NESCOE suggests that Filing Parties' proposal is not

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<sup>655</sup> *Id.* (citing NESCOE, Protest, Docket Nos. ER13-193-000 and ER13-196-000, at 15 (filed Dec. 10, 2012); Southern New England States, Protest, Docket Nos. ER13-193-000 and ER13-196-000, at 35-36 (filed Dec. 10, 2012) (providing project details)).

<sup>656</sup> *Id.* at 48.

<sup>657</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 391.

<sup>658</sup> *Id.* P 391 n.714 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 486 n.375); *see also* *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,660, at PP 127-128 (2010). As examples of participant funding, the Commission accepted a method proposed by El Paso Electric Company to use as a cost allocation method in which entities would proportionally share the costs based on each participant's desired use of the facility to be constructed. *El Paso Elec. Co.*, 124 FERC ¶ 61,051, at P 44 (2008); *see also* *Xcel Energy Services, Inc.*, 124 FERC ¶ 61,052 (2008). South Carolina Electric & Gas Company included in its Order No. 890 compliance filing a process under which costs for economic-driven upgrades will be born entirely by the transmission owner that builds the facilities. *S.C. Elec. & Gas Co.*, 127 FERC ¶ 61,275,

(continued ...)

equivalent to participant funding, this is precisely the situation that an opt-in/opt-out cost allocation regime would create: only those states that choose to opt into paying for a particular transmission project will pay for it. In our view, there is no distinction between a voluntary “opt-in/opt-out” approach, as at issue here, and agreement between or among entities to voluntarily pay for the costs of a transmission project. Both cases represent a participant funding approach. In Order No. 1000, the Commission found that, if a participant funding approach is used, any individual beneficiary of a “project[] that affect[s] multiple utilities’ transmission systems and therefore may have multiple beneficiaries . . . has an incentive to defer investment in the hopes that other beneficiaries will value the project enough to fund its development.”<sup>659</sup> Because of this risk of free ridership, Order No. 1000 prohibited the use of participant funding as a regional or interregional cost allocation method.<sup>660</sup>

342. Moreover, under an opt-in/opt-out regime, states may opt-out of paying for transmission projects from which they receive benefits, so states that opt-in will therefore pay a greater share of the costs of those projects relative to the share of those projects’ benefits that they receive. In addition, certain transmission projects may not be built under an opt-in/opt-out scheme that would have been built if all states that benefitted from a project chose to opt-in, since the benefits to the remaining beneficiaries may not be commensurate with their allocated costs. In these two ways, an opt-in/opt-out regime would violate the requirement of Regional Cost Allocation Principle 1 that costs be allocated in a manner that is at least roughly commensurate with estimated benefits. In addition, NESCOE does not show that an opt-in/opt-out cost allocation regime would comply with Regional Cost Allocation Principle 2, since beneficiaries could choose to opt-out of cost allocation without showing that they receive no benefit from transmission facilities, either at present or in a likely future scenario. In Order No. 1000, the

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at P 50 (2009). Entergy Services, Inc. developed a method in which the costs for projects developed under its Regional Planning Process and its interregional transmission planning process would be borne by the party that constructs the facilities. *Entergy Services, Inc.*, 127 FERC ¶ 61,272 (2009). Finally, ColumbiaGrid and the Northern Tier Transmission Group both utilized a study committee process whereby alternative cost allocation methods can be proposed for projects within their respective regions, but if no agreement on cost allocation among the study team participants or the project proponents is obtained, the entities requesting the project will bear the costs. *See Avista Corp.*, 128 FERC ¶ 61,065 (2009); *Idaho Power Co.*, 128 FERC ¶ 61,064 (2009).

<sup>659</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 486.

<sup>660</sup> *See id.* P 723.

Commission stated that “we retain regional flexibility and allow the public utility transmission providers in each transmission planning region, as well as pairs of transmission planning regions, to develop transmission cost allocation methods that best suit the needs of each transmission planning region or pair of transmission planning regions, so long as those approaches comply with the regional and interregional cost allocation principles of this Final Rule.”<sup>661</sup> In other words, public utility transmission providers were afforded flexibility in meeting the requirements of Order No. 1000, but such flexibility does not mean that public utility transmission providers can avoid compliance with those Order No. 1000 requirements. NESCOE has not demonstrated that an opt-in method would comply with Regional Cost Allocation Principles 1 and 2.

343. NESCOE further asserts that no state will refuse to participate in a transmission project from which it will benefit, and that simply because a transmission project provides a benefit to a state does not mean that that project “is the most beneficial means to execute a states’ policy objective,” and “[w]hether . . . any or all of a state’s consumers should underwrite a public policy project intended to further state policy objectives[] are decisions intrinsically for the state to make.”<sup>662</sup> This argument ignores a basic premise of Order No. 1000; namely, that, in light of changes within the industry, the existing requirements of Order No. 890 are no longer adequate to ensure rates, terms and conditions of jurisdictional service are just and reasonable and not unduly discriminatory or preferential.<sup>663</sup> Instead, the Commission has required public utility transmission

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<sup>661</sup> *Id.* P 604.

<sup>662</sup> NESCOE Request for Rehearing at 40.

<sup>663</sup> *See* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 497:

[T]he expansion of regional power markets . . . has led to a growing need for transmission facilities that cross several utility, RTO, ISO, or other regions. The industry’s continuing transition also has enabled greater utilization of resources (e.g., reserve sharing) resulting in, among other effects, broader diffusion of the benefits associated with transmission facilities. Additionally, the increasing adoption of state resource policies, such as renewable portfolio standard measures, has contributed to rapid growth of renewable energy resources that are frequently remote from load centers, and thus [has led to] a growing need for transmission facilities to access remote resources, often traversing several utility and/or ISO/RTO regions.

providers to plan regional transmission projects through a regional transmission planning process, through which the more efficient or cost-effective solution to a regional transmission need may be discovered, and have an associated cost allocation method that allocates costs roughly commensurate with benefits.<sup>664</sup> If the state receives benefits from the transmission project, and if the transmission project provides sufficient benefits to the New England region as a whole to be selected in the regional transmission planning process for regional cost allocation, that state should be allocated its appropriate share of costs. Moreover, we find NESCOE's argument that a state will not refuse to participate in a transmission project from which it benefits to be conclusory and without support. Indeed, this statement is belied by NESCOE's subsequent statement that the determinations about whether to pay for a transmission project are "decisions intrinsically for the state to make." As this makes clear, under the regional cost allocation method that NESCOE supports, a state would always be able to make the choice to opt-in or opt-out of paying for a given Public Policy Transmission Upgrade, irrespective of the benefits from the transmission project.

344. Finally, we find that the opt-in/opt-out approach undermines Cost Allocation Principle 5, which requires public utility transmission providers to develop a regional cost allocation method that provides for *ex ante* certainty. By proposing a regional cost allocation method that allows states to opt-in or opt-out of paying for individual transmission projects, Filing Parties have effectively vitiated this principle, even if the cost allocation formula itself is transparent. This proposal could never truly provide *ex ante* certainty because it would allow states to choose to opt-out of individual Public Policy Transmission Upgrades, even if the application of the cost allocation method in that particular instance showed that beneficiaries of the transmission project were located in that state. Thus, even if the beneficiaries and their customers of a Public Policy

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<sup>664</sup> *See id.* P 485:

[C]onstructing new transmission facilities requires a significant amount of capital and, therefore, a threshold consideration for any company considering investing in transmission is whether it will have a reasonable opportunity to recover its costs. . . . [H]owever, that there are few rate structures in place today that provide both for analysis of the beneficiaries of a transmission facility that is proposed to be located within a transmission planning region that is outside of an RTO or ISO, or in more than one transmission planning region, and for corresponding allocation and recovery of the facility's costs. . . .

Transmission Upgrade know the costs they would be allocated under the cost allocation method, they will never be able to rely on that method if one or more states could opt-out of paying the costs of each individual Public Policy Transmission Upgrade.<sup>665</sup>

(2) **Issues Related to Study Costs and Cost Overruns with Regard to Public Policy Transmission Upgrades**

345. We reject NESCOE’s request for rehearing related to the cost recovery provisions proposed by Filing Parties. As an initial matter, we note that, in reviewing Filing Parties’ proposal, the Commission’s focused on ensuring that the proposed tariff language was just and reasonable. We acknowledge that other provisions, such as those contained in the NEPOOL alternative proposal and supported by NESCOE, might also be just and reasonable. However, when the Commission has found that a proposal is just and reasonable, it need not address the merits of an alternative proposal.<sup>666</sup>

346. Regarding NESCOE’s assertion that it should be notified when the actual costs of a study reach 90 percent of the original cost, rather than when they exceed 125 percent of the original cost, we note that Order No. 1000 did not address study costs. Thus, Filing Parties’ initial proposal provided information to the states above and beyond that required by Order No. 1000. Further, in conjunction with revisions that would require ISO-NE to evaluate and select a Public Policy Transmission Upgrade, Filing Parties removed from section 4a.5(f) the provision that “NESCOE may request from any [Qualified Sponsor] a written estimate of the anticipated costs of proceeding with Stage Two Solution study work, and . . . [i]f a [Qualified Sponsor] thereafter expects the actual costs of the studies to exceed the estimated costs by 25 percent, the sponsor shall provide [ISO-NE] and

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<sup>665</sup> NESCOE’s assertion that the opt-in cost allocation method is a transparent *ex ante* cost allocation method, because it will be subject to state regulatory processes, similarly misses the mark. The regulatory process of any given state will not and cannot address whether, and to what extent, a transmission project will or will not benefit the citizens of another state(s), and, in this way, a state regulatory process cannot substitute for the regional transmission planning process that evaluates the needs of an entire region.

<sup>666</sup> See, e.g., *Sw. Power Pool, Inc.*, 131 FERC ¶ 61,252, at P 20 (2010) (“What the Commission has before it in this proceeding is the SPP Highway/Byway Methodology, which SPP filed to address cost allocation in its region. No other cost allocation proposal or method is before us in the instant proceeding.”).

NESCOE a revised estimate of the costs to complete the work.”<sup>667</sup> NESCOE did not protest this aspect of the filing. We therefore find that NESCOE’s request for rehearing of this provision is now moot.

347. With regard to NESCOE’s concerns regarding cost overruns, we note that the Commission considered in Order No. 1000-A whether to require cost overrun protections, and chose not to do so, stating:

We affirm the Commission’s decision in Order No. 1000 that cost containment issues relate to the level of costs and not how costs should be allocated among beneficiaries. As the Commission emphasized in Order No. 1000, this proceeding relates to transmission planning reforms, including the role of cost allocation in transmission planning, not the level of transmission costs, and therefore this proceeding is not the appropriate forum for addressing the transmission cost containment issues raised by petitioners.<sup>[668]</sup>

348. Thus, we reject NESCOE’s argument that the Commission erred by failing to include mandatory cost overrun protection.

### iii. Compliance

#### (a) Summary of Compliance Filing

349. In response to the First Compliance Order, Filing Parties propose a revised default cost allocation method for Public Policy Transmission Upgrades that meet the criteria of Pool Transmission Facilities. Specifically, Filing Parties propose a “hybrid” method, under which they will allocate a portion of the costs of any Public Policy Transmission

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<sup>667</sup> Second Compliance Filing at 21; *see also* ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § 4a.5(f).

<sup>668</sup> Order No. 1000-A, FERC Stats. & Regs. ¶ 31,132 at P 625 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 704). The Commission noted, however, that “cost containment may be considered as part of a region’s stakeholder process in developing a cost allocation method or methods to comply with Order No. 1000” and “to the extent that cost containment provisions are considered in connection with a cost allocation method or methods for a regional or interregional transmission facility, public utility transmission providers may include transmission cost containment provisions in their compliance filings.” *Id.* P 625.

Upgrades region-wide, based on load ratio share, and the remaining costs to those states whose public policy requirement is addressed by the Public Policy Transmission Upgrade. Filing Parties state that stakeholders were unable to reach consensus on the precise split between regionally allocated costs and specifically identified beneficiaries, but they explain that three states, whose combined load represents about 80 percent of total New England load—namely, Maine, Massachusetts, and Connecticut (one a probable exporter of renewable power and the other two probably importers of renewable power)—agreed on a cost allocation proposal that would allocate 70 percent of the costs of Public Policy Transmission Upgrades throughout the region based on load ratio shares and 30 percent of the costs of these upgrades based on a more precise identification of beneficiaries of specific public policy requirements being addressed.

350. Filing Parties assert that allocating 70 percent of the costs of Public Policy Transmission Upgrades throughout the region is appropriate, noting that the Commission and federal courts have consistently held that there is a presumption that transmission system enhancements benefit all members of an integrated transmission system.<sup>669</sup> Filing Parties assert that this approach captures the full spectrum of benefits associated with high-voltage transmission facilities, including improved reliability, reduced congestion costs, reduced power losses, greater carrying capacity, reduced operating reserve requirements, and environmental benefits such as reduced air pollutant emissions. Filing Parties also state that this approach recognizes the high degree of integration of the New England grid.

351. Regarding how costs will be allocated among those states specifically identified as beneficiaries (i.e., those states whose public policy requirement is addressed by the Public Policy Transmission Upgrade), Filing Parties propose to consider the specific megawatt-hours (MWh) or megawatts (MW) of need of those states. Filing Parties state that agreement on specific MWh or MW quantities generally will be left to NESCOE, but that if NESCOE is unable to reach consensus, the remaining 30 percent of the costs would be allocated on a load ratio basis among those states with a public policy planning need that a particular project is intended to meet. ISO-NE indicated that it supports this proposal and would be prepared to assist in implementing it.<sup>670</sup>

352. With regard to cost recovery, Filing Parties maintain that project sponsors that are requested to submit a Stage One Proposal may recover their prudently incurred costs

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<sup>669</sup> Second Compliance Filing at 25 (citing *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927-28 (D.C. Cir. 1999); *Pac. Gas and Elec. Co.*, 106 FERC ¶ 61,144, at P 22 (2004); *Otter Tail Power Co.*, 12 FERC ¶ 61,169, at 61,420 (1980)).

<sup>670</sup> *Id.* at 22-24.

from the Regional Network Load of the states, and any transmission developer who proceeds to the Stage Two process may also recover its development costs.<sup>671</sup> However, in conjunction with revisions that would require ISO-NE to evaluate and select a Public Policy Transmission Upgrade, ISO-NE proposes to delete language that would require a Qualified Sponsor to notify NESCOE if the actual costs of its Stage Two study work are expected to exceed estimated costs by 25 percent.

**(b) Protests/Comments**

353. The protests and comments filed in response to Filing Parties' proposal either support the filing or provide supplementary information, address the proposed 70/30 split between regional cost allocation and beneficiary-specific cost allocation for public policy transmission projects, or address the question of whether consumer-owned entities should be required to pay for the costs of constructing public policy transmission upgrades.

354. NEPOOL states that it did not have a sufficient consensus to take a position on the revisions regarding cost allocation proposed by the New England Transmission Owners or on a Participant-proposed amendment to them.<sup>672</sup> It notes that the New England Transmission Owners' cost allocation proposal—regionalizing 70 percent of the costs of Public Policy Transmission Upgrades and allocating the remaining 30 percent to identified beneficiaries (states with public policy requirements driving the transmission needs)—was controversial, and neither NEPOOL members nor the states were able to reach a consensus to support it. They note that Connecticut, Maine, and Massachusetts supported the New England Transmission Owners' proposal, while New Hampshire, Rhode Island, and Vermont opposed it.<sup>673</sup> NEPOOL states that it was also presented with a proposed alternative to the 70/30 proposal, which sought to reduce the level of costs to be regionalized under the default proposal, and to insulate certain public power entities from paying for certain Public Policy Transmission Upgrades.<sup>674</sup>

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<sup>671</sup> ISO-NE, Transmission, Markets and Services Tariff, Attachment K (11.0.0), § Section 4A.6.

<sup>672</sup> NEPOOL Comments at 3.

<sup>673</sup> *Id.* at 6.

<sup>674</sup> *Id.* at 6-7.

355. NEPOOL notes that the New England states were evenly split on whether they support those proposed revisions and, therefore, the NEPOOL Participants Committee vote reflects a similar split.<sup>675</sup>

356. NESCOE states that, while it does not have a position on the default cost allocation proposal reflected in the further compliance filing, including the proposed 70/30 allocation split, it does support the role proposed for NESCOE in Filing Parties' proposal. Under that proposal, NESCOE would have an opportunity to provide an estimated "Planning Need" in its request to ISO-NE to conduct a Public Policy Transmission Study, which would reflect NESCOE's estimate of the MWhs or MWs needed to satisfy the state and federal public policy requirements and how these needs are apportioned among the states. Moreover, NESCOE explains that under that proposal, to the extent that NESCOE does not include a Planning Need in its study request, the 30 percent would be allocated on a load ratio share basis to those states identified as having a Public Policy Requirement.<sup>676</sup>

(1) **70/30 Division Between Regional and Beneficiary-Specific Cost Allocation**

357. Massachusetts DPU urges the Commission to accept the cost allocation methodology for Public Policy Transmission Upgrades proposed in the Second Compliance Filing as it comports with all of the applicable cost allocation principles outlined in Order No. 1000, including the six regional cost allocation principles.<sup>677</sup> Massachusetts DPU states that to be eligible for regional cost allocation, a Public Policy Transmission Upgrade must meet voltage and non-voltage criteria to qualify as a Pool Transmission Facility and ISO-NE will apply the "localized cost review" that it uses for Reliability and Market Efficiency Projects to Public Policy Transmission Upgrades. Massachusetts DPU states that since any approved Public Policy Transmission Upgrade will provide significant benefits to the region, including, but not limited to, production cost savings, reliability and resource adequacy benefits, market benefits, environmental benefits, employment and economic benefits, this justifies the allocation of 70 percent of the costs to the entire region. Massachusetts DPU also states that since these projects benefit the states that had the public policy planning need that gave rise to the transmission upgrade, it is reasonable to allocate the remaining 30 percent of the costs to

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<sup>675</sup> *Id.* at 16.

<sup>676</sup> NESCOE Comments at 2-3.

<sup>677</sup> Massachusetts DPU Comments at 4.

those states.<sup>678</sup> Massachusetts DPU states that the cost allocation method is described in detail in Schedule 12 of the Tariff and is part of the public policy planning process, which is incorporated in ISO-NE's regional planning process as detailed in Schedule 12 and Attachment K of the OATT, and thus this information will be transparent and readily available to stakeholders.<sup>679</sup>

358. Massachusetts DPU further states that the cost allocation methodology for Public Policy Transmission Upgrades is supported by the states of Massachusetts, Connecticut, and Maine, which together comprise approximately 80 percent of the network load in New England. Massachusetts DPU states a cost allocation methodology that does not distribute some of the costs to each state in the region would allow for free-ridership,<sup>680</sup> and since all customers in New England will enjoy a wide range of benefits from a Public Policy Transmission Upgrade, it is reasonable to allocate a significant portion of the costs on a region-wide basis.<sup>681</sup> Massachusetts DPU states that it has identified similar benefits associated with Public Policy Transmission Upgrades, and that a transmission upgrade would lower the locational marginal price for the entire region, produce cleaner air and allow all the states to satisfy requirements associated with Regional Greenhouse Gas Initiatives and promote economic development; and that the overall reliability of the New England grid would be enhanced by providing greater redundancy.<sup>682</sup>

359. Conservation Law Foundation and the Sustainable FERC Project state that they support the regional cost allocation proposal in the Second Compliance Filing. They support this proposal because it is clearly defined in the OATT; is applicable to all projects, unless an alternative approach is agreed to by all participating parties and is approved by the Commission; provides for an assessment of the costs and benefits of a project and allocates those costs in a manner commensurate with benefits; and is

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<sup>678</sup> *Id.* at 5.

<sup>679</sup> *Id.* at 7.

<sup>680</sup> *Id.* at 8-9.

<sup>681</sup> *Id.* at 10-11 (citing Second Compliance Filing at 25 n.31, which cites The Brattle Group, *The Benefits of Electric Transmission: Identifying and Analyzing the Value of Investments* (July 2013), available at [http://brattle.com/system/news/pdfs/000/000/020/original/The\\_Benefits\\_of\\_Electric\\_Transmission\\_Identifying\\_and\\_Analyzing\\_the\\_Value\\_of\\_Investments\\_Chang\\_Pfeifenberger\\_Hagerty\\_Jul\\_2013.pdf?1377791283](http://brattle.com/system/news/pdfs/000/000/020/original/The_Benefits_of_Electric_Transmission_Identifying_and_Analyzing_the_Value_of_Investments_Chang_Pfeifenberger_Hagerty_Jul_2013.pdf?1377791283)).

<sup>682</sup> *Id.* at 11.

transparent and appropriately vests final authority to identify and approve projects with ISO-NE.<sup>683</sup> They also note that the cost allocation proposal acknowledges that transmission developed to access new renewable energy resources can result in system-wide benefits including improved reliability, reduced environmental emissions, lower production costs, and increased economic opportunity.<sup>684</sup> They state that the First Compliance Filing improperly granted states the discretion to choose whether to participate in project selection and development and, ultimately, whether to pay for a project, irrespective of benefits conferred and without consideration of objective criteria associated with cost or benefit. They point out that, while the Second Compliance Filing's revised approach to the project selection, development, and cost allocation has the states determining the policies that may drive transmission, ISO-NE retains the authority to select the most cost-effective project and to allocate the costs to all states.<sup>685</sup>

360. Environmental Parties state that the cost allocation policy with respect to public policy projects adopted by the Commission can have a significant impact on the greenhouse gas and other emissions generated by the region's power plants, and that it would be appropriate to implement cost allocation policies that reward transmission owners for investments in the transmission needed to integrate bulk renewable generation.<sup>686</sup> Environmental Parties state that they therefore support regional allocation of 100 percent of the costs of transmission needed to achieve the region's renewable energy goals, but because it represents a step in the right direction, they would also agree with the default 70 percent regional allocation filed on compliance with the Commission.<sup>687</sup> Environmental Parties also state that they remain concerned about the current cost allocation treatment for grid reliability because transmission owners continue to be rewarded for ignoring non-transmission alternatives, which leads to outcomes that are not more cost-effective and efficient.<sup>688</sup>

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<sup>683</sup> Conservation Law Foundation and the Sustainable FERC Project Comments at 10.

<sup>684</sup> *Id.* at 10-11.

<sup>685</sup> *Id.* at 12.

<sup>686</sup> Environmental Parties Comments at 6-7.

<sup>687</sup> *Id.* at 7.

<sup>688</sup> *Id.*

361. Protesting Parties state that Filing Parties have arrived at a conclusory presumption of uniformly-distributed benefits from the Public Policy Transmission Upgrades, and the purported benefits from these projects must be examined on a state-specific basis. Protesting Parties maintain that, under the current proposal, there is a danger that those states that have met their renewable energy goals under their laws will subsidize, through the 70 percent automatic cost allocation, the states that have yet to meet their goals.<sup>689</sup> Protesting Parties further argue that Filing Parties' proposal violates Cost Allocation Principle 2, which provides that those that receive no benefit from a transmission facility must not be involuntarily allocated any costs of that facility.<sup>690</sup>

362. Protesting Parties state that Filing Parties' 70/30 default cost allocation methodology, pursuant to which all states pay 70 percent of the cost of a particular public policy project, focuses on the incidental benefits of the upgrades rather than the primary purpose, which is not to enhance reliability, reduce congestion, or lower power prices, but rather to advance the public policy goals of specific states. They aver that the incidental regional benefits that Filing Parties list in their filing are not supported by studies or other evidence quantifying how those benefits are distributed among the New England states, and that most of the claimed benefits do not withstand close inspection.

363. With regard to the claim that Public Policy Transmission Upgrades enhance power system reliability and reduce congestion, Protesting Parties contend that reliability and congestion benefits are likely to be small, because public policy projects are likely to include radial lines, and such generator interconnection facilities historically have been recognized to provide little or no regional reliability and congestion benefits.<sup>691</sup> Moreover, Protesting Parties state that the costs of these upgrades should be borne primarily by the states that created the need for the upgrades, so that states that have no statutory authority to advance a public policy that seeks to reduce power plant air pollution below existing levels should not be required to subsidize states that do.<sup>692</sup>

364. With regard to the assertion that Public Policy Transmission Upgrades will reduce power system losses and thus benefit all the states, Protesting Parties state that absent studies, no party can sustain this claim.<sup>693</sup> Protesting Parties suggest that arguably,

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<sup>689</sup> Protesting Parties Protest at 20-21.

<sup>690</sup> *Id.* at 8 (quoting Order No. 1000, FERC Stats. & Regs. ¶31,323 at P 545).

<sup>691</sup> *Id.* at 11.

<sup>692</sup> *Id.* at 13.

<sup>693</sup> *See id.*

average power system losses are more likely to increase because most public policy projects will be constructed to interconnect intermittent generation assets located long distances from the nearest high voltage network interface.<sup>694</sup> Protesting Parties also note that not all states have the same public policies, and even when the policies are similar, the states may be at different stages in meeting their requirements.<sup>695</sup> With regard to Filing Parties' citation to *Western Massachusetts Electric Co. v. FERC*, Protesting Parties state that that case's "presumption that transmission system enhancements benefit all members of an integrated transmission system" should be interpreted within the context of reliability upgrade projects.<sup>696</sup> They argue that in the case of a public policy-driven transmission upgrade, however, any reliability benefits are incidental and such projects may have very little reliability benefit. Protesting Parties note that one factor for weighing the reasonableness of a cost allocation proposal is whether the proposal is generally supported by state authorities and participants across the region,<sup>697</sup> but there was no general support among NEPOOL stakeholders, since the 70/30 proposal barely received 50 percent of the Participants Committee vote and was opposed by two of the six New England states.

365. With respect to the proposed state-specific portion of the cost allocation methodology, Protesting Parties view the "more empirically-grounded approach to determining project-specific benefits for cost allocation purposes" that Filing Parties propose to use to determine this portion of a project's costs as an improvement upon the load-ratio share approach,<sup>698</sup> but they state that the language of this part of the proposal is too broad and leaves room for dispute. Protesting Parties state that the amended proposal—under which up to 30 percent of Public Policy Transmission Upgrade costs could be allocated regionally, if supported by providing empirical evidence of the claimed regional benefits, with the remaining costs allocated among the states in proportion to each state's share of the public policy planning need giving rise to the

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<sup>694</sup> *Id.*

<sup>695</sup> *Id.* at 15.

<sup>696</sup> *Id.* at 16 (citing *W. Mass. Electric Co. v. FERC*, 165 F.2d 922, 927-928 (D.C. Cir. 1999)).

<sup>697</sup> *Id.* at 17 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 559).

<sup>698</sup> *Id.* at 18.

Public Policy Transmission Upgrade—offered by Massachusetts Municipal Wholesale Electric Company during the stakeholder process presented a more equitable approach.<sup>699</sup>

366. Public Systems request that the Commission reject the proposal to allocate 70 percent of the costs of public policy projects to be allocated on a region wide, load ratio share basis.<sup>700</sup> Public Systems point out that the proposed cost allocation violates Regional Cost Allocation Principle 1 that costs be allocated in a manner that is at least roughly commensurate with estimated benefits. They state that there has been no showing that it would be just and reasonable to default to a region-wide allocation of 70 percent of the costs of any Public Policy Transmission Upgrade, regardless of circumstances, and the percentage of Public Policy Transmission Upgrade costs subject to region-wide allocation should be lower and reasonably justified on a project-specific showing.

367. Public Systems assert that absent a more defined linkage between particular Public Policy Transmission Upgrades and their claimed reliability benefits, there is no “cost-causation” basis on which to allocate the majority of these costs throughout the New England region. They further state that Public Policy Transmission Upgrades are most likely to be driven by the need to deliver renewable energy products to entities that need them and thus are most likely to be radial lines to remotely located wind or hydroelectric generation resources, but such radial facilities are not the type of “looped” resources that typically have been eligible to be Pool Transmission Facilities. Public Systems states that the proposal to allocate the costs of such radial facilities on a regional basis, even if the facilities are planned for public policy reasons, is a departure from New England’s normal transmission cost allocation paradigm. Finally, Public Systems assert that there has been no study or other showing that the types of projects likely to be labeled Public Policy Transmission Upgrades will in fact provide region-wide benefits sufficient to justify a default allocation of 70 percent of project costs on a region-wide basis.<sup>701</sup> Public Systems endorse the *ex-ante* method proposed in the stakeholder process by Massachusetts Municipal Wholesale Electric Company described above.

368. Energy New England and Two Systems state that the Filing Parties’ 70/30 proposal is flawed in that the proposed allocation of 70 percent of the cost of such projects to Regional Network Load and 30 percent to the sponsoring state(s) should be

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<sup>699</sup> *Id.* at 22.

<sup>700</sup> Public Systems Protest at 4.

<sup>701</sup> *Id.* at 4-6.

reversed, in that sponsoring states should be prepared to absorb the majority of the costs of the projects from which those states will benefit.<sup>702</sup>

(2) **Allocation of Costs of Public Policy Transmission Projects to Consumer-Owned Systems**

369. Public Systems state that the Filing Parties should allow consumer-owned utilities to opt out of paying for projects that are driven primarily by public policy requirements from which state or federal lawmakers have determined to exempt consumer-owned entities.<sup>703</sup> They assert that by not doing so, Filing Parties have failed to satisfy Regional Cost Allocation Principle 2—that those who receive no benefit from transmission facilities must not be involuntarily allocated any of the costs of those transmission facilities. Public Systems further assert that Filing Parties failed to explain “how entities that receive no benefit from transmission facilities, either at present or in a likely future scenario, must not be involuntarily allocated any of the costs of those transmission facilities,”<sup>704</sup> as directed by the Commission. Public Systems further state that consumer-owned systems have already been at the forefront of implementing public policies such as developing renewable generation, pointing to the example of Massachusetts Municipal Wholesale Electric Company funding construction of the largest wind farm in Massachusetts. Thus, Public Systems states that it would make sense for Massachusetts to allow Massachusetts Municipal Wholesale Electric Company to opt out of funding the state’s share of a Public Policy Transmission Upgrade planned and constructed to import renewable resources into the State.<sup>705</sup>

370. Energy New England and Two Systems state that there must be an exemption from funding Public Policy Transmission Upgrades for consumer-owned utilities, because they are not subject to a state renewable portfolio standard or similar public policy requirement, and thus the absence of this exemption disregards cost causation requirements.<sup>706</sup> Energy New England and Two Systems state that Filing Parties have both eliminated the possibility of broad regional cost support for any Public Policy

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<sup>702</sup> Energy New England and Two Systems Protest at 2.

<sup>703</sup> Public Systems Protest at 8-11.

<sup>704</sup> *Id.* at 10 n.8 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 394).

<sup>705</sup> *Id.* at 12.

<sup>706</sup> Energy New England and Two Systems Protest at 7.

Transmission Upgrade arising out of a public policy requirement of any local government, and attempted to allocate the costs of Public Policy Transmission Upgrades to municipally-owned utilities that are not themselves subject to a state renewable portfolio standard or similar public policy requirement.<sup>707</sup> Energy New England and Two Systems note that the Commission previously declined to determine whether the allocation to public power systems of costs for Public Policy Transmission Upgrades from which they do not benefit was permissible under Order No. 1000, or the FPA generally,<sup>708</sup> but that the Commission must decide that question here.

(c) **Answer**

(1) **70/30 Division Between Regional and Beneficiary-Specific Cost Allocation**

371. In its answer to protests, Massachusetts DPU reiterates its view that since all customers in New England would share in a wide-range of benefits from a transmission upgrade, it is reasonable that 70 percent of the costs be allocated on a region-wide basis and 30 percent be allocated to the states that directly benefit from the transmission upgrade. Massachusetts DPU states that Protesting Parties fail to produce studies supporting their preferred cost allocation methodology, but that in fact this insistence on studies is misguided, since Regional Cost Allocation Principle 1 only requires that costs be allocated in a manner that is roughly commensurate with benefits, and precision in this area would likely be unattainable.<sup>709</sup>

372. Massachusetts DPU points to a study prepared by Black & Veatch on behalf of NESCOE documenting the impact of importing incremental volumes of power (predominantly hydropower) from Québec in the period 2018 to 2029, and on the basis of that study, estimating that if both a 1,200 MW line from New Brunswick to Massachusetts and a 1,200 MW line from Québec to Connecticut via New York were to be built, New England ratepayers would realize average annual savings in electricity prices of \$227-354 million (2013 dollars) over 2018-2029 based on the lower prices of

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<sup>707</sup> *Id.* at 5.

<sup>708</sup> *Id.* at 5-6 (citing First Compliance Order, 143 FERC ¶ 61,150 at P 394 (“[W]e will not address, at this time, NEPOOL’s and Public Systems’ suggestions that consumer owned utilities be permitted to opt-out of the cost allocation for a Public Policy Transmission Upgrade from which they receive no benefits”)).

<sup>709</sup> Massachusetts DPU Answer at 4.

import capacity.<sup>710</sup> Massachusetts DPU further notes that, contrary to Protesting Parties' argument that the major part of the costs of a transmission upgrade will be allocated to all the states, under most scenarios, Massachusetts and Connecticut would bear the largest share of the costs associated with any transmission upgrade.<sup>711</sup>

373. Massachusetts DPU further asserts that Regional Cost Allocation Principle 1 requires that the costs associated with new transmission facilities be allocated in a manner that is roughly commensurate with the benefits, and this "rough justice" is employed for allocating costs of reliability projects in New England. The region has long decided that the costs associated with the construction of a transmission line for reliability reasons warrant allocation on a region-wide load-ratio share basis, and has so allocated the costs of Pool Transmission Facilities. Massachusetts DPU states that although there are a variety of options for allocating costs, New England has decided it is reasonable to allocate the costs associated with reliability projects on a load-ratio share basis, without performing empirical studies. Thus, similarly, Massachusetts DPU states that there is no need to do so for public policy transmission upgrades.<sup>712</sup>

374. Massachusetts DPU also notes that Public Policy Transmission Upgrades are likely to be backbone transmission projects, such as transmission lines designed to import large quantities of Canadian hydropower that would provide additional benefits both to the region as a whole and to individual states, and not primarily radial lines. Massachusetts DPU states that additional clean hydropower will benefit the region by enhancing the system's fuel diversity, and also that Public Policy Transmission Upgrades are likely to lower Locational Marginal Prices throughout the region.<sup>713</sup> Finally, with

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<sup>710</sup> *Id.* at 5 n.16 (citing Black & Veatch, Hydro Imports Analysis: BV Project No. 180696 (Nov. 1, 2013), *available at* [http://www.nescoe.com/uploads/Hydro\\_Imports\\_Analysis\\_Report\\_01\\_Nov\\_\\_2013\\_Final.pdf](http://www.nescoe.com/uploads/Hydro_Imports_Analysis_Report_01_Nov__2013_Final.pdf)).

<sup>711</sup> *Id.* at 7-8. As an example, Massachusetts DPU asserts that if a new transmission line is built at a cost of \$1,000,000,000, then under the current load-ratio share allocation method, Connecticut and Massachusetts would pay \$720,000,000, but if the costs were allocated 70 percent to the entire region and 30 percent to those states whose public policies are being met, Massachusetts and Connecticut would pay 80.4 percent of the total cost of the line or \$804,000,000.

<sup>712</sup> *Id.* at 8-9.

<sup>713</sup> *Id.* at 6. Massachusetts DPU additionally refers to an occasion in July 2013, on which ISO-NE was forced to curtail Green Mountain Power's Kingdom Community Wind facility in Vermont due to insufficient transmission. Massachusetts DPU Answer

(continued ...)

regard to Protesting Parties' assertion that states that have no statutory authority to advance a public policy that seeks to reduce air pollution should not be required to subsidize states that do, Massachusetts DPU states that all New England states are members of the Regional Greenhouse Gas Initiative and the clean air produced by a Public Policy Transmission Upgrade will allow all the New England states to satisfy their Regional Greenhouse Gas Initiative requirements.<sup>714</sup>

375. New England Transmission Owners, in their answer, argue that there is no single "correct" way to allocate the costs of Public Policy Transmission Upgrades, and the 70/30 split, which is supported by the three states whose combined load represents about 80 percent of total New England load, represents a fair compromise of competing interests which satisfies the requirements of Order No. 1000.<sup>715</sup> They further state that Protesting Parties have failed to point to any provision of Order No. 1000 or Commission precedent that would require a region-specific study to support region-wide allocation of transmission projects developed to address public policy needs, and have not rebutted the Brattle Group's conclusion that new high voltage transmission investments provide numerous benefits to customers in a range of categories.<sup>716</sup> They also state, with regard to the Massachusetts Municipal Wholesale Electric Company's proposal to allocate up to 30 percent of the costs of Public Policy Transmission Upgrades on a region-wide basis based on empirical evidence, that Public Systems provide no details on what sort of "empirical evidence" would result in a percentage of the costs of Public Policy Transmission Upgrades being allocated on a region-wide basis or how that percentage would be calculated,<sup>717</sup> and that this approach provides insufficient detail concerning the potential allocation of the costs of proposed projects in advance of particular transmission facilities being proposed. The New England Transmission Owners therefore argue that

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at 6 n.17 (citing Letter from Gordon van Welie, President and CEO, ISO-NE, to Peter Shumlin, Governor, State of Vermont (Aug. 6, 2013)).

<sup>714</sup> *Id.* at 13-14.

<sup>715</sup> New England Transmission Owners Answer at 10-11.

<sup>716</sup> *Id.* at 11.

<sup>717</sup> *Id.* at 10 n.22 (citing Public Systems Protest at 6-8; Protesting Parties Protest at 22-23).

the Massachusetts Municipal Wholesale Electric Company proposal is inconsistent with the requirements of Order No. 1000.<sup>718</sup>

(2) **Allocation of Costs of Public Policy Projects to Consumer-Owned Systems**

376. The New England Transmission Owners urge the Commission to reject requests by Public Systems to direct the Filing Parties to give municipal or consumer-owned transmission customers the right to opt out of paying for Public Policy Transmission Upgrades if they unilaterally determine that the corresponding public policy does not apply to them. The New England Transmission Owners state that this proposal is inconsistent with Order No. 1000 and contrary to Commission precedent. They argue that, even if a consumer-owned entity is not subject to a particular public policy requirement, the customers that the consumer-owned entity serves will still benefit from Public Policy Transmission Upgrades—for instance, municipal customers will benefit from the cleaner air produced by a state renewable portfolio standard requirement as much as other customers.<sup>719</sup> The New England Transmission Owners further state that evidence supports the view that all residents of a New England state, and indeed of the entire region, are likely to benefit from public policy requirements such as renewable portfolio standards.<sup>720</sup> They assert that transmission projects to address public policy

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<sup>718</sup> *Id.* at 12 & n.26 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 562).

<sup>719</sup> *Id.* at 12-13.

<sup>720</sup> *Id.* at 13 nn.28-29 (citing Massachusetts Executive Office of Housing and Economic Development and Executive Office of Energy and Environmental Affairs, Recent Electricity Market Reforms in Massachusetts (2011), *available at* <http://www.mass.gov/hed/docs/eohed/electricity-report-final-7-12-11.pdf> (averring that renewable and alternative energy requirements “producing cost savings for ratepayers, primarily through suppression of the electricity clearing price, that substantially exceed program costs” and “promise direct benefits to ratepayers and the Commonwealth as a whole”); London Economics International LLC, MPUC RPS Report 2011 – Review of RPS Requirements and Compliance in Maine 18 (2012), <http://www.maine.gov/tools/whatsnew/attach.php?id=349454&an=1> (finding that renewable portfolio standards implemented by Maine and other states in the region would contribute to employment within the state as well as other benefits, “including the potential for emissions reductions, fuel diversification, fuel cost savings and— through the addition of a large amount of low cost renewable resources like wind—lower electricity prices as wind displaces existing higher cost generation”).

requirements are expected to provide production cost savings, reliability and resource adequacy benefits, market benefits, environmental benefits, employment and economic development benefits, and other project-specific benefits to the entire region, and transmission customers represented by municipal or consumer-owned entities will receive these benefits.<sup>721</sup>

377. The New England Transmission Owners disagree with Public Systems' claim that absent such a consumer-owned entity opt-out right, a proposal to allocate the costs of Public Policy Transmission Upgrades would violate Regional Cost Allocation Principle 2, which prohibits the allocation of costs of transmission facilities to those who receive no benefit from them. The New England Transmission Owners respond that if this were the case, the public policy transmission cost allocation methodology in every region would require a comparable opt-out provision for consumer-owned entities to be compliant with Order No. 1000, but Public Systems fail to identify any comparable opt-out provision approved by the Commission in any other region.<sup>722</sup>

378. The New England Transmission Owners further assert that Public Systems' proposal would introduce a form of "participant funding" for public policy projects, in that the beneficiaries of particular projects must agree to fund them before project costs would be allocated to them. The New England Transmission Owners state, however, that Order No. 1000 firmly rejected participant funding as a basis for the regional or interregional cost allocation for new transmission development or upgrades,<sup>723</sup> and it did so to prevent free rider problems.<sup>724</sup> The New England Transmission Owners state that the proposed consumer-owned entity opt-out proposal is a form of participant funding, inasmuch as it permits certain parties to refuse to contribute to the costs of regional

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<sup>721</sup> *Id.* at 13-14.

<sup>722</sup> *Id.* at 14.

<sup>723</sup> *Id.* at 14-15 n.32 ("[W]e will not permit participant funding to be the cost allocation method for regional or interregional projects that are selected in a regional transmission plan for purposes of cost allocation").

<sup>724</sup> *Id.* at 15 n.33 ("[T]he risk of the free rider problems associated with new transmission investment is particularly high for projects that affect multiple utilities' transmission systems and therefore may have multiple beneficiaries. . . . [A] cost allocation method that relies exclusively on a participant funding approach, without respect to other beneficiaries of a transmission facility, increases . . . the likelihood that needed transmission facilities will not be constructed in a timely manner").

transmission upgrades that will benefit customers throughout the region.<sup>725</sup> The New England Transmission Owners note, however, that a consumer-owned entity could theoretically demonstrate that it receives no benefit from a particular upgrade, and should therefore not be required to pay for it, but that this is not an argument for a general rule allowing consumer-owned entities to opt out of paying for an upgrade without making such a showing.<sup>726</sup>

**(d) Commission Determination**

379. We find that Filing Parties' proposed regional cost allocation method for Public Policy Transmission Upgrades complies with the Commission's directives in the First Compliance Order. We also accept Filing Parties' proposed revisions related to cost recovery.

**(1) 70/30 Division Between Regional and Beneficiary-Specific Cost Allocation**

380. We find Filing Parties' cost allocation proposal for Public Policy Transmission Upgrades—i.e., allocating 70 percent of the costs of such upgrades region-wide based on load-ratio share, and the remaining 30 percent to those states whose public policy necessitated a given project—to be just and reasonable and not unduly discriminatory, as explained more fully below.

381. Before comparing the instant filing to Order No. 1000's Regional Cost Allocation Principles, we address protesters' arguments that it does not bear the hallmarks of a just and reasonable cost allocation methodology because: (1) not all stakeholders agree on its substance; or (2) because there may be other just and reasonable cost allocation methods for ISO-NE's Public Policy Transmission Upgrades.

382. With respect to the first argument, the Commission stated in Order No. 890 that when considering a dispute over cost allocation of new transmission facilities, "We ... exercise our judgment by weighing several important factors."<sup>727</sup> Such factors include the fair assignment of costs among participants, the provision of adequate incentives to construct new transmission, and general support by state authorities and participants

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<sup>725</sup> *Id.* at 15.

<sup>726</sup> *Id.* at 15 n.34.

<sup>727</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 559.

across the region in question.<sup>728</sup> Protesting Parties assert that the instant filing should be rejected because it fails the third factor. We disagree. The Commission's consideration of these factors reflects the premise that "[a]llocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science."<sup>729</sup> Protesting Parties' argument rests on the fact that the instant filing "barely received 50 percent of the Participants Committee vote and was opposed by two of the six New England states and nearly all members of the generation group."<sup>730</sup> However, we note that more states supported than opposed the instant proposal in the Participants Committee.<sup>731</sup> The instant filing represents a compromise by a diverse group of stakeholders, including New England Transmission Owners; Connecticut, Maine, and Massachusetts; and, Environmental Parties, the Conservation Law Foundation, and The Sustainable FERC Project. In any case, simply highlighting a dispute over a cost allocation proposal is not enough to prove that such a proposal is unjust and unreasonable. As the Commission has previously stated in connection with an Order No. 890 compliance proposal, "we note that general support, not consensus, is the touchstone of Order No. 890."<sup>732</sup> That consideration is true with respect to this Order No. 1000 compliance proposal as well.

383. Further, we emphasize that stakeholder support is just one criterion that the Commission examines in determining whether a cost allocation method is just and reasonable. The Commission also considers whether costs are fairly assigned and whether the cost allocation method provides adequate incentives. As will be demonstrated below, by meeting the six Regional Cost Allocation Principles of Order No. 1000, the instant filing satisfies these two additional criteria. Therefore, we find Protesting Parties' arguments with respect to Order No. 890 unpersuasive.

384. Similarly, we are not persuaded by Public Systems' and Protesting Parties' arguments that other cost allocation methodologies discussed during the stakeholder

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<sup>728</sup> *Id.*

<sup>729</sup> *Id.* (citing *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945)).

<sup>730</sup> Protesting Parties at 17 (internal citations omitted).

<sup>731</sup> At the Participants Committee, Massachusetts, Connecticut, and Maine supported the filing; Rhode Island and New Hampshire opposed it; and Vermont neither supported nor opposed it. *See* Protesting Parties Protest at 17 n.28.

<sup>732</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,074, at P 174 (2011).

process are germane to the instant filing. They are not. At issue before the Commission, as discussed below, is whether the instant filing is just and reasonable, not whether it is the most just and reasonable proposal out of the universe of conceivable cost allocation methodologies.<sup>733</sup> On this basis, we will not consider arguments regarding other potential cost allocation methodologies.

385. We turn now to the mechanics of Filing Parties' cost allocation proposal for Public Policy Transmission Upgrades, beginning with Regional Cost Allocation Principle 1. As an initial matter, we note that Public Policy Transmission Upgrades must meet many of the same requirements as Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades; specifically, all of these upgrades must meet the same voltage (115 kV and above) and non-voltage criteria of Pool Transmission Facilities. As stated in ISO-NE's First Compliance Filing, "[s]ince the Commission's acceptance of the first regional open access transmission tariff in New England in 1997, the ISO-NE OATT and its predecessor, the NEPOOL Tariff, have had terms, conditions and rates in place for regional network transmission service over New England's PTF facilities. Since that time, the costs of such facilities have been allocated to network transmission load in the entire region, based on load ratio share."<sup>734</sup> Thus, all Public Policy Transmission Upgrades will fall within a class for which the load-ratio share cost allocation method was previously approved by the Commission as being for the benefit of the entire regional transmission grid.

386. Additionally, all of these upgrades must undergo "localized cost review," according to Schedule 12C of the ISO-NE OATT, to ensure that no costs that exceed the regional requirements for the facility are allocated regionally. The Commission previously determined that it is appropriate for the costs of Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades to be allocated to all load within the New England region on a load-ratio share basis, reasoning, in part, that because the New England grid is highly integrated, such upgrades provide benefits across the New England region.<sup>735</sup> Moreover, as Filing Parties correctly note, both the Commission and federal courts have consistently held that there is a presumption that transmission system

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<sup>733</sup> See, e.g., *Sw. Power Pool, Inc.*, 131 FERC ¶ 61,252, at P 20 (2010) ("What the Commission has before it in this proceeding is the SPP Highway/Byway Methodology, which SPP filed to address cost allocation in its region. No other cost allocation proposal or method is before us in the instant proceeding.").

<sup>734</sup> Filing Parties Filing, Transmission Owner Test. at 49.

<sup>735</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 354.

enhancements benefit all members of an integrated transmission system.<sup>736</sup> We find that, by requiring Public Policy Transmission Upgrades to meet the criteria of Pool Transmission Facilities, Filing Parties' proposal justifies allocating some portion of the costs of such facilities to all load in the New England region. As discussed more fully below, we find Filing Parties' proposed 70/30 hybrid to be just and reasonable because it allocates costs in a manner roughly commensurate with benefits; the majority of costs are allocated regionally based on load-ratio share, while the remainder are allocated to those states whose public policy planning needs are carried out via ISO-NE's regional transmission planning process.

387. Regarding Filing Parties' proposal to allocate 70 percent of the costs of Public Policy Transmission Upgrades to all load in the New England region, we agree with Massachusetts DPU that distributing most of the costs of Public Policy Transmission Upgrades to each state in the region will protect against free-ridership by some of the beneficiaries from such upgrades.<sup>737</sup> Although a Public Policy Transmission Upgrade is designed to address a public policy need, addressing such a need is not the only benefit provided by such a project. Just like Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades, the benefits of high voltage Public Policy Transmission Upgrades include production cost savings, reliability and resource adequacy benefits, market benefits, and environmental benefits, among others, throughout the region.<sup>738</sup> Since all loads will receive a portion of these benefits, Filing Parties are proposing that those states whose customers consume more electric energy at peak times will pay more than those that consume less. We find that such a cost allocation mechanism is "roughly commensurate" with the benefits derived from such facilities and consistent with the cost causation principle. Therefore, we disagree with Public Systems' assertion that the instant proposal violates Cost Allocation Principle 1. The courts have never "required a ratemaking agency to allocate costs with exacting precision."<sup>739</sup> Instead, the courts have found that "the cost allocation mechanism must

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<sup>736</sup> Second Compliance Filing at 25 n.29 (citing *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927-28 (D.C. Cir. 1999); *Pac. Gas and Elec. Co.*, 106 FERC ¶ 61,144 at P 22); *Otter Tail Power Co.*, 12 FERC at 61,420).

<sup>737</sup> Massachusetts DPU Comments at 8-9.

<sup>738</sup> Second Compliance Filing at 27.

<sup>739</sup> *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369 (D.C. Cir. 2004) (citing *Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1, 5 (*Sithe*) (D.C. Cir. 2002)).

not be ‘arbitrary or capricious’ in light of the burdens imposed or benefits received.”<sup>740</sup> Thus, we find that allocating 70 percent of the load region-wide, based on load-ratio share, is just and reasonable.

388. We also find that allocating 30 percent of the costs of Public Policy Transmission Upgrades to the states whose public policy requirement necessitated such transmission upgrades in the first place to be just and reasonable, and consistent with the cost causation principle. As Filing Parties note, “NESCOE would attempt to agree on specific MWh or MW quantities for the affected states that would be used for planning and cost allocation purposes (i.e., the 30 percent cost allocation), but if NESCOE is unable to reach such agreement, 30 percent of the costs would be allocated among those states with a public policy planning need that a particular project is designed to satisfy on a load ratio basis. The latter methodology would be the *default* for allocating 30 percent of the costs if NESCOE is unable to agree on a more granular MWh or MW quantities to be used.”<sup>741</sup> This allocation accounts for a given Public Policy Transmission Upgrade’s purpose: to address specific states’ transmission needs driven by public policy requirements.

389. While detailed engineering or economic studies are not a prerequisite for determining whether a given cost allocation method is just and reasonable, we note that Filing Parties have provided some studies here. For example, the Black & Veatch analysis that NESCOE commissioned demonstrates that, with respect to, for example, transmission projects intended to facilitate the import of hydropower from Québec, the benefits of potential hydropower projects will be shared region-wide.<sup>742</sup> Such analysis demonstrates that allocating the majority of costs of Public Policy Transmission Upgrades (i.e., 70 percent) regionally based on load-ratio share is just and reasonable. In addition to the Black & Veatch analysis, Massachusetts DPU also provides a numerical example showing that under the proposed 70/30 cost allocation method, Massachusetts

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<sup>740</sup> *Id.* at 1369; *see also Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009) (discussing that in ratemaking matters, the court’s review is highly deferential since issues of rate design are fairly technical and, if not technical, involve agency policy judgments).

<sup>741</sup> *See* Second Compliance Filing at 24 (emphasis added).

<sup>742</sup> Massachusetts DPU Answer at 5 n.16 (citing Black & Veatch, Hydro Imports Analysis: BV Project No. 180696 (Nov. 1, 2013), *available at* [http://www.nescoe.com/uploads/Hydro\\_Imports\\_Analysis\\_Report\\_01\\_Nov\\_\\_2013\\_Final.pdf](http://www.nescoe.com/uploads/Hydro_Imports_Analysis_Report_01_Nov__2013_Final.pdf)).

and Connecticut ratepayers would bear most of the costs of such a hypothetical Public Policy Transmission Upgrade.<sup>743</sup>

390. Based on the foregoing, we find that this proposal allocates costs in a manner that is roughly commensurate with benefits and consistent with Cost Allocation Principle 1.

391. We disagree with Protesting Parties' allegation that a 70/30 cost allocation methodology violates Cost Allocation Principle 2. Contrary to the assertion that Protesting Parties will receive "no benefit," we find that they will derive benefits from Public Policy Transmission Upgrades, as these facilities must meet the same voltage and non-voltage criteria as a Pool Transmission Facility, and undergo localized cost review. While benefits may be difficult to quantify, Protesting Parties have made no showing that they will receive no, or even minimal, benefits, which is the threshold required by Cost Allocation Principle 2. Rather, we concur with Filing Parties' assertion that all ISO-NE customers will share in the broad regional benefits.

392. Protesting Parties make a number of other assertions about Public Policy Transmission Upgrades that do not withstand close inspection. They maintain that, absent studies, no party can claim that Public Policy Transmission Upgrades will reduce power system losses; that Filing Parties need to present studies to prove that there will be incidental regional benefits to justify regional cost allocation; and that such upgrades are likely to include radial lines, which provide little to no reliability or congestion benefit. We disagree on all counts; we find that Filing Parties' proposal to subject Public Policy Transmission Upgrades to the same voltage and non-voltage criteria as Pool Transmission Facilities is just, reasonable, and not unduly discriminatory because it is consistent with the region's practice since 1997.<sup>744</sup> As Massachusetts DPU notes, ISO-NE does not undertake project-specific empirical studies on cost allocation prior to implementing regional cost allocation for reliability projects, and we see no compelling reason to require them to do so here.<sup>745</sup> As we have stated previously, the voltage and non-voltage criteria that Public Policy Transmission Upgrades share with Pool Transmission Facilities ensure that New England's integrated electric transmission system will improve to the region's benefit.

393. Moreover, by subjecting Public Policy Transmission Upgrades to localized cost review, Filing Parties have ensured that if any such facility is predominantly local in

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<sup>743</sup> *Id.* at 6-8, tbl.1

<sup>744</sup> *See* Filing Parties Filing, Transmission Owner Test. at 49.

<sup>745</sup> *See* Massachusetts DPU Answer at 9.

nature, and its benefits will not accrue to ISO-NE's integrated transmission system, those costs will not be allocated region-wide. This mechanism adequately ensures those utilities receiving no benefit from a local upgrade are not assessed costs for it. Our finding here is consistent with the Court's finding in *Illinois Commerce Commission* that the Commission need not "calculate benefits to ... the last million or ten million or perhaps hundred million dollars,"<sup>746</sup> as Protesting Parties seem to imply with the assertion that the absence of studies is adequate proof that no benefits will accrue to them. Further protecting entities from being allocated the costs of a transmission facility from which they do not benefit, Filing Parties' propose tariff language stating that "[n]othing in this Schedule 12 shall prevent the applicable [Participating Transmission Owners or Qualified Transmission Project Sponsors] from filing with the Commission an alternative cost allocation for a Public Policy Transmission Upgrade."<sup>747</sup> Thus, the proposed regional cost allocation method reasonably ensures that those who receive no benefit from transmission facilities, either in a present or likely future scenario, are not involuntarily allocated any of the costs.

394. We also find that ISO-NE's cost allocation method for Public Policy Transmission Upgrades is consistent with Regional Cost Allocation Principle 3, because ISO-NE does not use a benefit-to-cost threshold for Public Policy Transmission Upgrades.

395. With respect to Regional Cost Allocation Principle 4, we find that Filing Parties' proposed Tariff language adequately identifies consequences of a Public Policy Transmission Upgrade selected in the regional transmission plan for purposes of cost allocation on other transmission planning regions. Specifically, Filing Parties propose to identify such impacts through coordination with neighboring entities, and that such impacts will be identified in the Regional System Plan. However, Filing Parties state in their Second Compliance Filing that "the costs of any external impacts of New England regional projects will not be borne by New England customers."<sup>748</sup>

396. Therefore, we accept Filing Parties' proposal as consistent with Regional Cost Allocation Principle 4, subject to a further compliance filing. As noted above, we require Filing Parties to: 1) submit a compliance filing that ensures that the costs of new transmission projects selected in the regional transmission plan for purposes of cost allocation are not imposed involuntarily on parties outside the transmission planning

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<sup>746</sup> *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009).

<sup>747</sup> See ISO-NE, Transmission, Markets and Services Tariff, Schedule 12(B)6(b) (6.0.0).

<sup>748</sup> Second Compliance Filing at 15.

region, including removal of the language that “the costs of any external impacts of New England regional projects will not be borne by New England customers;” and 2) either demonstrate that a process exists in ISO-NE through which such impacts on neighboring regions and their associated costs will be resolved (such as the WECC process referenced in *CAISO Second Compliance Order*) or propose language in the ISO-NE OATT explicitly describing how such impacts and their associated costs will be addressed.

397. With respect to Regional Cost Allocation Principle 5, we find that the ISO-NE OATT contains sufficient detail to allow a stakeholder to reproduce the results of the cost allocation method for Public Policy Transmission Upgrades. The nature of ISO-NE’s pre-established 70/30 cost allocation method is formulaic and based upon publicly available data (*e.g.*, load-ratio share). We further find that the Filing Parties’ proposal satisfies Regional Cost Allocation Principle 6 by providing for a 70/30 cost allocation method. As we noted in the First Compliance Order, it is reasonable for the Filing Parties to establish a cost allocation method for Public Policy Transmission Upgrades that differs from the method used for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades.<sup>749</sup>

(2) **Allocation of Costs of Public Policy Projects to Consumer-Owned Systems**

398. With regard to the question of whether consumer-owned systems should be permitted to opt out of sharing the costs of Public Policy Transmission Upgrades, we find that Public Systems and Energy New England have failed to persuade us that the cost allocation method for public policy projects must contain an opt out provision for consumer-owned systems.

399. The question on which cost allocation turns is not whether particular consumer-owned utilities are or are not subject to certain state mandates (such as renewable portfolio standards); the question is whether and to what extent those utilities and their customers benefit from specific transmission projects, even if those transmission projects were developed to meet mandates to which those utilities are not subject.

400. Public policy transmission upgrades in New England meet the same voltage (*i.e.*, 115 kV and up) and non-voltage criteria of all Pool Transmission Facilities (PTF). ISO-NE stated, in its first compliance filing, that “[s]ince the Commission’s acceptance of the first regional open access transmission tariff in New England in 1997, the ISO-NE OATT and its predecessor, the NEPOOL Tariff, have had terms, conditions and rates in place for regional network transmission service over New England’s PTF facilities.

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<sup>749</sup> First Compliance Order, 143 FERC ¶ 61,150 at P 358.

Since that time, the costs of such facilities have been allocated to network transmission load in the entire region, based on load ratio share.”<sup>750</sup> Thus, public policy upgrades in New England fall within a class of transmission projects that are allocated using a load ratio share cost allocation method, which the Commission previously approved as being for the benefit of the entire regional transmission grid. Many consumer-owned systems in New England purchase network service from ISO-NE.<sup>751</sup> Additionally, the D.C. Circuit has upheld the Commission’s policy that “[w]hen a system is integrated, any system enhancements are presumed to benefit the entire system,”<sup>752</sup> and such “[i]ntegration has been described as higher and lower voltage facilities operating in an interconnected and parallel way.”<sup>753</sup>

401. Moreover, we agree with Administrative Committee that such projects will provide benefits that extend beyond the specific benefits associated with addressing transmission needs driven by public policy requirements, such as production cost savings, reliability benefits, and market benefits, to all energy customers in the region, including the customers of consumer-owned systems. Thus, not allocating some of the costs of projects driven by those mandates to enrolled consumer-owned systems would violate Regional Cost Allocation Principle 1, which requires that the cost of transmission facilities be allocated to those within the transmission planning region that benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits. Moreover, allowing certain parties an automatic ability to opt out of paying for public policy projects would constitute participant funding, with its attendant free rider problems.

402. Public Systems states that even though they are exempt from Massachusetts’ renewable portfolio standard, the Massachusetts municipal light departments have been at the forefront of developing new renewable resources in the state.<sup>754</sup> It argues that, under these circumstances, Massachusetts would permit Massachusetts Municipal Wholesale Electric Company (MMWEC) and the municipal light departments to opt out of funding

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<sup>750</sup> Filing Parties Filing, Transmission Owner Test. at 49.

<sup>751</sup> Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative state that they purchase regional network service under ISO-NE’s OATT. Public Systems, Protest, Docket Nos. ER13-193-000 and ER13-196-000, at 5-6.

<sup>752</sup> *W. Mass. Elec. Co.*, 165 F.2d at 927.

<sup>753</sup> *Me. Pub. Serv. Co. v. FERC*, 964 F.2d 5, 8 (D.C. Cir. 1992).

<sup>754</sup> Public Systems Protest at 12.

the state's share of a Public Policy Transmission Upgrade. Public Systems appears to suggest that since MMWEC is addressing the state's public policy of supporting renewable generation by funding the generation, MMWEC should not be required also to fund the transmission that may carry that renewable generation to customers. But in fact, MMWEC's Berkshire Wind Project is in Hancock, Massachusetts,<sup>755</sup> in the northwestern corner of the state, and transmission capacity is necessary to transport the energy generated by that project to MMWEC members located throughout the state. Thus, if at some future point ISO-NE determines in its regional transmission planning process that new transmission capacity is necessary to transport the energy, Regional Cost Allocation Principle 1 requires that those MMWEC members that have enrolled and that receive benefits be allocated an appropriate portion of those costs. Additionally, transmission projects that are developed through the regional transmission planning process to support a state's public policy may provide customers with other benefits as well. As noted above, if such transmission projects are Pool Transmission Facilities, they may provide customers throughout the region with benefits including production cost savings, reliability benefits, and market benefits.<sup>756</sup>

403. We further note that particular groups of customers have opportunities to demonstrate whether they benefit less than or differently from others, so that an adjustment to the costs allocated to those parties might be justified. The Commission has previously found that the question of whether costs are appropriately allocated to a particular entity can be addressed in the regional transmission planning process, rather than in the development of a default cost allocation method.<sup>757</sup> When this question came

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<sup>755</sup> For more information about this entity, see information posted on Berkshire Wind Power Coop's website, <http://www.berkshirewindcoop.org>.

<sup>756</sup> If, for example, a transmission project is developed in the future to transport wind generation from northern New Hampshire to southern New England to meet the renewable portfolio standards of Massachusetts and Connecticut, those members of MMWEC that are in the Boston suburbs will benefit from the opportunity to purchase that wind generation.

<sup>757</sup> *N.Y. Indep. Sys. Operator*, 148 FERC ¶ 61,044 at P 333 (“There may be circumstances in which some parties believe that the use of a default load ratio share cost allocation method is not just and reasonable. . . . In such a circumstance, however, parties will have an opportunity to make those arguments during the regional planning process that leads up to the selection of a transmission project in the regional transmission plan, and seek to arrive at a solution that addresses those parties’ concerns.”).

up prior to the First Compliance Order, while both ISO-NE and the Participating Transmission Owners opposed granting consumer-owned systems the ability to opt out of paying for transmission projects driven by public policy, they noted that if a consumer-owned system could demonstrate that it did not receive benefits from a particular public policy project, a cost allocation method for such a project could be negotiated that would not be the default, and that would recognize the degree of benefit received by the consumer-owned system in question.<sup>758</sup> We therefore reject the suggestion that consumer-owned systems must be given the ability to opt-out of regional cost allocation for public policy projects.

The Commission orders:

(A) The requests for rehearing and clarification are hereby granted in part and denied in part, as discussed in the body of this order.

(B) Filing Parties' compliance filing is hereby accepted, effective 60 days following the date of issuance of this order, subject to further a compliance filing, as discussed in the body of this order.

(C) Filing Parties are hereby directed to submit a further compliance filing, within 60 days of the date of issuance of this order, as discussed in the body of this order.

By the Commission. Commissioner Moeller is dissenting in part with a separate statement attached. Commissioner Clark is dissenting in part with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>758</sup> See ISO-NE January 18, 2013 Answer at 66 (“[N]othing . . . precludes a state or states from explaining to the Commission in the required rate filing for a given project (which is required in the event that the default cost allocation is not used) why a specific type of entity should be excluded from the regional transmission rate for a specific project.”); Participating Transmission Owners January 17, 2013 Answer at 47 (“[I]n the case of individual projects, it may be appropriate for consumer-owned entities to show that they in fact receive no benefit from a transmission upgrade, and thus should not be required to pay for it.”).

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.

Docket Nos. ER13-193-001  
ER13-193-003  
ER13-196-001  
ER13-196-002

(Issued March 19, 2015)

MOELLER, Commissioner, *dissenting in part*:

As discussed in my previous dissent in this proceeding,<sup>759</sup> I find that the majority has not demonstrated that a *Mobile-Sierra* public interest finding should not continue to protect certain provisions of the ISO-NE Transmission Owners' Agreement.

Accordingly, I respectfully dissent in part.

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Philip D. Moeller  
Commissioner

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<sup>759</sup> *ISO New England, Inc.*, 143 FERC ¶ 61,150 (2013).

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.

Docket Nos. ER13-193-001  
ER13-193-003  
ER13-196-001  
ER13-196-002

(Issued March 19, 2015)

CLARK, Commissioner, *dissenting in part*:

I write separately to note my partial dissent in today's order with respect to the *Mobile-Sierra* issue raised, for the same reasons more fully explained in my previous dissent in this proceeding.<sup>760</sup>

On rehearing, the Commission again declines to provide the actual quantitative or granular analysis of public interest harm that is required to overcome the *Mobile-Sierra* protection previously granted. The result in the instant case is thus legally suspect. Moreover, the decision has the unfortunate side effect of calling into question the Commission's commitment to upholding the regulatory certainty provided under our *Mobile-Sierra* decisions.

Accordingly, I respectfully dissent in part.

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Tony Clark  
Commissioner

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<sup>760</sup> *ISO New England, Inc.*, 143 FERC ¶ 61,150 (2013).