

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

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

ISO New England Inc.

Docket Nos. ER13-193-000
ER13-196-000

ORDER ON COMPLIANCE FILINGS

(Issued May 17, 2013)

	<u>Paragraph Numbers</u>
I. Background	<u>2.</u>
II. Compliance Filing.....	<u>5.</u>
III. Notice of Filing and Responsive Pleadings.....	<u>7.</u>
IV. Discussion	<u>8.</u>
A. Procedural Matters	<u>8.</u>
B. Substantive Matters	<u>11.</u>
1. Regional Transmission Planning Requirements.....	<u>12.</u>
a. Transmission Planning Region.....	<u>13.</u>
i. Filing Parties' Filing	<u>16.</u>
ii. Protests/Comments	<u>21.</u>
iii. Commission Determination.....	<u>22.</u>
b. Regional Transmission Planning Process General Requirements	<u>30.</u>
i. Filing Parties' Filing	<u>32.</u>
ii. Protests/Comments	<u>37.</u>
iii. Answers	<u>41.</u>
iv. Commission Determination.....	<u>45.</u>
c. Requirement to Plan on a Regional Basis to Identify More Efficient or Cost- Effective Transmission Solutions	<u>51.</u>
i. Filing Parties' Filing	<u>54.</u>
ii. Protests/Comments	<u>58.</u>
iii. Answers	<u>61.</u>
iv. Commission Determination.....	<u>64.</u>
d. Consideration of Transmission Needs Driven by Public Policy Requirements	<u>71.</u>
i. Regional Transmission Planning Process.....	<u>77.</u>

(a) Filing Parties' Filing	<u>77.</u>
(1) Initial Actions	<u>79.</u>
(2) Stage One	<u>82.</u>
(3) Stage Two.....	<u>84.</u>
(b) Protests/Comments	<u>85.</u>
(1) Definition of Public Policy Requirements	<u>86.</u>
(2) Procedures Relating to the Consideration of Transmission Needs Driven by Public Policy Requirements in the Regional Transmission Planning Process	<u>90.</u>
(c) Answers.....	<u>100.</u>
(d) Commission Determination	<u>108.</u>
(1) Definition of Public Policy Requirements	<u>109.</u>
(2) Procedures To Identify Transmission Needs Driven by Public Policy Requirements in the Regional Transmission Planning Process.....	<u>110.</u>
(3) Procedures to Evaluate Potential Solutions to Meet Identified Transmission Needs Driven by Public Policy Requirements in the Regional Transmission Planning Process	<u>116.</u>
(4) Selection of More Efficient or Cost-Effective Solutions to be Included in the Regional Transmission Plan for Purposes of Cost Allocation.....	<u>118.</u>
(5) Public Policy Transmission Planning Process Driven by NESCOE and the New England States	<u>120.</u>
ii. Local Transmission Planning Process	<u>122.</u>
(a) Filing Parties' Filing	<u>122.</u>
(b) Protest	<u>123.</u>
(c) Commission Determination	<u>124.</u>
2. Nonincumbent Transmission Developer Reforms	<u>128.</u>
a. Federal Rights of First Refusal.....	<u>129.</u>
i. Mobile-Sierra.....	<u>133.</u>
(a) Filing Parties' Filing	<u>133.</u>
(b) Protests/Comments	<u>140.</u>
(c) Answers.....	<u>149.</u>
(d) Commission Determination	<u>160.</u>
ii. Existing Federal Right of First Refusal and Exceptions to the Requirement to Eliminate Federal Right of First Refusal	<u>199.</u>
(a) Filing Parties' Filing	<u>199.</u>
(b) Protests/Comments	<u>207.</u>
(c) Answers.....	<u>220.</u>
(d) Commission Determination	<u>227.</u>
(1) Existing Federal Right of First Refusal.....	<u>227.</u>
(2) Exceptions to the Requirement to Eliminate a Federal Right of First Refusal	<u>228.</u>
(3) "Time-Based" Federal Right of First Refusal.....	<u>235.</u>

b. Qualification Criteria.....	<u>242.</u>
i. Filing Parties' Filing.....	<u>245.</u>
ii. Protests/Comments.....	<u>251.</u>
iii. Answer.....	<u>259.</u>
iv. Commission Determination.....	<u>267.</u>
c. Information Requirements.....	<u>283.</u>
i. Filing Parties' Filing.....	<u>285.</u>
ii. Protests/Comments.....	<u>289.</u>
iii. Commission Determination.....	<u>291.</u>
d. Evaluation Process for Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation.....	<u>295.</u>
i. Filing Parties' Filing.....	<u>297.</u>
(a) Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades.....	<u>297.</u>
(b) Public Policy Transmission Upgrades.....	<u>302.</u>
ii. Protests/Comments.....	<u>305.</u>
iii. Answer.....	<u>306.</u>
iv. Commission Determination.....	<u>307.</u>
(a) Evaluation of Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades.....	<u>308.</u>
(b) Public Policy Transmission Upgrades.....	<u>313.</u>
e. Reevaluation Process for Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation.....	<u>316.</u>
i. Filing Parties' Filing.....	<u>317.</u>
ii. Protests/Comments.....	<u>321.</u>
iii. Commission Determination.....	<u>322.</u>
f. Cost Allocation for Transmission Projects Selected in the Regional Transmission Plan for Purposes of Cost Allocation.....	<u>324.</u>
i. Filing Parties' Filing.....	<u>326.</u>
ii. Protests.....	<u>328.</u>
iii. Commission Determination.....	<u>329.</u>
3. Cost Allocation.....	<u>331.</u>
a. Cost Allocation Associated with Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades.....	<u>342.</u>
i. Filing Parties' Filing.....	<u>342.</u>
(a) Cost Allocation For Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades.....	<u>342.</u>
(b) Allocation and Recovery of Study Costs Related to Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades.....	<u>350.</u>
ii. Commission Determination.....	<u>352.</u>
(a) Cost Allocation for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades.....	<u>353.</u>

- (b) Allocation and Recovery of Study Costs Related to Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades[359.](#)
 - b. Cost Allocation Associated with Public Policy Transmission Upgrades[360.](#)
 - i. Filing Parties’ Summary[360.](#)
 - (a) Cost Allocation for Public Policy Transmission Upgrades[360.](#)
 - (b) Allocation and Recovery of Study Costs Related to Public Policy Transmission Upgrades[364.](#)
 - ii. Protests/Comments[369.](#)
 - iii. Answers[381.](#)
 - iv. Commission Determination[389.](#)
 - (a) Cost Allocation for Public Policy Transmission Upgrades[390.](#)
 - (b) Allocation and Recovery of Study Costs Related to Public Policy Transmission Upgrades[398.](#)

- Appendix A: Abbreviated Names of Intervenors
- Appendix B: Abbreviated Names of Initial Commenters
- Appendix C: Abbreviated Names of Reply Commenters

1. On October 25, 2012, ISO New England Inc. (ISO-NE) and the PTO Administrative Committee¹ (together, the Filing Parties) submitted, pursuant to section 206 of the Federal Power Act (FPA),² revisions to sections I and II of the ISO-NE Open Access Transmission Tariff (OATT) and the Transmission Operating Agreement (TOA) to comply with the local and regional transmission planning and cost allocation

¹ The PTO Administrative Committee states that it joins this filing on behalf of the Participating Transmission Owners (referred to as incumbent transmission owners) in New England. The transmission owners who voted in favor of the filing are: Bangor Hydro-Electric Company; NSTAR Electric & Gas Corporation; Central Maine Power Company; Maine Electric Power Corporation; New England Power Company d/b/a National Grid; Northeast Utilities Service Company on behalf of its affiliates; The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, Holyoke Power and Electric Company and Holyoke Water Power Company; The United Illuminating Company; Vermont Electric Power Company, Inc.; and Vermont Transco, LLC. The transmission owners who voted in favor of the filing are also joining this filing individually. New Hampshire Transmission, LLC did not join the transmission owners in the filing.

² 16 U.S.C. § 824e (2006).

requirements of Order No. 1000.³ In this order, we accept the Filing Parties' compliance filing, subject to further compliance filings, as discussed below.

I. Background

2. In Order No. 1000, the Commission amended the transmission planning and cost allocation requirements of Order No. 890⁴ 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. Order No. 1000's transmission planning reforms 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 processes; (3) remove federal rights of first refusal from Commission-jurisdictional tariffs and agreements for certain new transmission facilities; and (4) improve coordination between neighboring transmission planning regions for new interregional transmission facilities.

3. Order No. 1000's cost allocation reforms require that each public utility transmission provider participate in a regional transmission planning process that has: (1) a regional cost allocation method or methods for the cost of new transmission facilities selected in a regional transmission plan for purposes of cost allocation and (2) an interregional cost allocation method or methods for the cost of new transmission facilities that are located in two neighboring transmission planning regions and are jointly evaluated by the two regions in the interregional transmission coordination procedures required by Order No. 1000. Order No. 1000 also requires that each cost allocation method satisfy six cost allocation principles.

4. The Commission acknowledged in Order No. 1000 that each transmission planning region has unique characteristics, and, therefore, Order No. 1000 accords

³ *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).

⁴ *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).

transmission planning regions significant flexibility to tailor regional transmission planning and cost allocation processes to accommodate regional differences.⁵ Order No. 1000 does not prescribe the exact manner in which public utility transmission providers must fulfill the regional transmission planning requirements.⁶ Similarly, because the Commission did not want to prescribe a uniform method of cost allocation for every transmission planning region, Order No. 1000 adopts the use of cost allocation principles.⁷ The Commission stated that it was acting to identify a minimum set of requirements that must be met to ensure that all transmission planning processes and cost allocation mechanisms subject to its jurisdiction result in Commission-jurisdictional services being provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential, and it acknowledged that public utility transmission providers in some regions may already meet or exceed some requirements of Order No. 1000.⁸

II. Compliance Filing

5. On October 25, 2012, the Filing Parties proposed revisions to sections I and II of the ISO-NE OATT and to the TOA. The Filing Parties state that they are filing the changes to the OATT in Docket No. ER13-193-000, and the changes to the TOA in a separate docket, Docket No. ER13-196-000. With respect to the regional transmission planning process, the Filing Parties submit two alternative proposals; the “primary process” or Primary Version, based on their current 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. In support of the Primary Version, the Filing Parties raise arguments relating to *Mobile-Sierra* treatment pertaining to certain provisions in their current regional transmission planning process.⁹ They seek an effective date of sixty days after a Commission order accepting the Primary Version of their filing.¹⁰ In

⁵ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 61.

⁶ *Id.* P 157.

⁷ *Id.* P 604.

⁸ *Id.* P 13.

⁹ See Order No. 1000-A, 139 FERC ¶ 61,132 at P 389 (“As the Commission explained in Order No. 1000, a public utility transmission provider that considers its contract to be protected by a *Mobile-Sierra* provision may present its arguments as part of its compliance filing.”).

¹⁰ Filing Parties Transmittal at 72.

case the Filing Parties' *Mobile-Sierra* arguments are unsuccessful, they submitted the Secondary Version in compliance with Order No. 1000. In this order, all references to the Filing Parties' proposal and OATT revisions are to this Secondary Version, unless otherwise specifically noted.¹¹

6. The Filing Parties request that the Commission consolidate the proceedings in Docket Nos. ER13-193-000 and ER13-196-000.¹²

III. Notice of Filing and Responsive Pleadings

7. Notice of the Filing Parties' filing was published in the *Federal Register*, 77 Fed. Reg. 66,820 (2012), with interventions and protests due on or before December 12, 2012. Listings of intervenors can be found in Appendix A; commenters and protestors in Appendix B; and those entities filing answers in Appendix C.

IV. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.¹³

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest or an answer unless otherwise

¹¹ We note whether each citation to ISO-NE's OATT comes from the Primary or the Secondary Version.

¹² Filing Parties October 26, 2012 Motion to Consolidate (explaining that the two parts of the compliance filing were intended by the Filing Parties to be a single compliance submission but that the two-part filing was necessitated by the technical limitations associated with the Commission's eTariff system).

¹³ NEPOOL submitted in its comments what it calls an "alternative proposal" that it asks the Commission to direct the Filing Parties to adopt instead of the proposal submitted in the Filing Parties' compliance filing. Although we refer to NEPOOL's submittal as the "NEPOOL proposal" throughout this order, consistent with the terminology used by NEPOOL, this submittal is appropriately considered comments. We note that NEPOOL is not subject to the requirements of Order No. 1000 and, therefore, we will not evaluate NEPOOL's proposal as an alternative compliance filing.

ordered by the decisional authority. We accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

10. We deny the Filing Parties' request to consolidate Docket Nos. ER13-193-000 and ER13-196-000. The Commission's policy is to consolidate matters only if a trial-type evidentiary hearing is required to resolve common issues of law and fact and consolidation will ultimately result in greater administrative efficiency.¹⁴ Although there are common issues of law and fact in the two proceedings, we do not believe consolidating these proceedings would achieve greater administrative efficiency because the issues in each proceeding can be resolved and have been resolved in this order based on the written record without need for an evidentiary hearing.¹⁵

B. Substantive Matters

11. We find that Filing Parties' compliance filing, with certain modifications, and with the exception of the Filing Parties' proposal to retain a federal right of first refusal and certain revisions related to the public policy process, partially complies with the obligations relating to regional transmission planning and cost allocation requirements imposed by Order No. 1000. Because we reject the claim of *Mobile-Sierra* protection for a right of first refusal in the TOA, we reject the Filing Parties' Primary Version. Accordingly, we accept the Filing Parties' Secondary Version, subject to a further compliance filing, as discussed below. ISO-NE states that significant time will be required to implement the revised planning process so as to ensure that continuing work is not abandoned and system reliability put on hold.¹⁶ We direct the Filing Parties to submit a compliance filing within 120 days of the date of the issuance of this order, requesting an appropriate effective date to coincide with the beginning of an ISO-NE planning cycle, and providing further information regarding ISO-NE's transition to the revised regional transmission planning process.

¹⁴ See *Southern Cal. Edison Co.*, 129 FERC ¶ 61304, at P 26 (2009), amended by 130 FERC ¶ 61,092 (2010); *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089, at P 27 (2008), order on reh'g, 127 FERC ¶ 61,164 (2009), order on remand, 134 FERC ¶ 61,155, reh'g denied, 136 FERC ¶ 61,222 (2011); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,253, at P 25 (2008).

¹⁵ See *Southern Cal. Edison Co.*, 129 FERC ¶ 61304 at P 26; *Columbia Gulf Trans. Co.*, 139 FERC ¶ 61236, at P 20 (2012) (citing *El Paso Natural Gas Co.*, 136 FERC ¶ 61,180, at P 28 (2011)).

¹⁶ ISO-NE January 18, 2013 Answer at 85.

1. Regional Transmission Planning Requirements

12. Order No. 1000 requires each public utility transmission provider to participate in a regional transmission planning process that complies with the identified transmission planning principles of Order No. 890 and that, in consultation with stakeholders, results in the development of a regional transmission plan.¹⁷ The regional transmission plan will identify transmission facilities that meet the region's reliability, economic, and Public Policy Requirements-related¹⁸ needs more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning processes.¹⁹ A primary objective of the reforms in Order No. 1000 is to ensure that transmission planning processes at the regional level consider and evaluate, on a non-discriminatory basis, possible transmission alternatives and produce a transmission plan that can meet a transmission planning region's needs more efficiently and cost-effectively.²⁰

a. Transmission Planning Region

13. Order No. 1000 specifies that a transmission planning region is one in which public utility transmission providers, in consultation with stakeholders and affected states, have agreed to participate for purposes of regional transmission planning and development of a single regional transmission plan.²¹ 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.²² However, an individual public utility transmission provider cannot, by itself, satisfy the regional transmission planning requirements of Order No. 1000.²³

¹⁷ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 6, 11, 146.

¹⁸ Public policy requirements are defined and described below.

¹⁹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 11, 148.

²⁰ *Id.* PP 4, 6.

²¹ *Id.* P 160.

²² *Id.* P 160 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 527).

²³ *Id.* P 160.

14. In addition, Order No. 1000 requires that public utility transmission providers explain in their compliance filings how they will determine which transmission facilities evaluated in their local and regional transmission planning processes will be subject to the requirements of Order No. 1000.²⁴ Order No. 1000's requirements are intended to 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 compliance filing.²⁵ Each region must determine at what point a previously approved project is no longer subject to reevaluation and, as a result, whether it is subject to these requirements.²⁶

15. Order No. 1000-A states that public utility 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.²⁷ Each public utility transmission provider (or regional transmission planning entity acting for all of the public utility transmission providers in its transmission planning region) must 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.²⁸ A non-public utility transmission provider will not be considered to have made the choice to join a transmission planning region and thus be eligible to be allocated costs under the regional cost allocation method until it has enrolled in the transmission planning region.²⁹

i. Filing Parties' Filing

16. According to the Filing Parties, ISO-NE conducts planning activities in coordination with the transmission-owning entities in the New England transmission system. The Filing Parties state that, on a regional and local basis, ISO-NE coordinates

²⁴ *Id.* PP 65, 162.

²⁵ *Id.* PP 65, 162.

²⁶ *Id.* PP 65 162.

²⁷ Order No. 1000-A, 139 FERC ¶ 61,132 at P 275.

²⁸ *Id.*

²⁹ *Id.* PP 276-277.

its planning-related activities with the Participating Transmission Owners,³⁰ who, pursuant to the ISO-NE OATT and the TOA, retain planning responsibility over Non-Pool Transmission Facilities.³¹ ISO-NE also must coordinate with the owners of other transmission facilities and merchant transmission facilities that are part of the New England transmission system. Under the ISO-NE OATT and applicable transmission operating agreements, these Participating Transmission Owners are required to participate in the regional system planning process and perform and/or support studies of the impacts of regional system plans on their respective facilities.³²

17. The Rourke Testimony and testimony submitted by the PTO Administrative Committee explain that the existing planning process in New England is a “needs based” planning process,³³ which first focuses on identifying transmission needs (whether due to emerging reliability standard violations, or congestion or other market efficiency challenges), followed by a collaborative and iterative process that develops the best solutions to the needs that have been identified.³⁴

18. Proposed market responses, including resources such as demand-side projects and distributed generation, Merchant Transmission Facilities, and Elective Transmission Upgrades, can be proposed by stakeholders, and are considered in the regional system planning process. Studies are also conducted by ISO-NE to evaluate and identify regulated transmission solutions (i.e., solutions that may be proposed by Participating Transmission Owners and nonincumbent transmission developers for selection in the regional transmission plan for purposes of cost allocation) that meet the transmission

³⁰ ISO-NE refers to transmission owner members of the ISO-NE region as Participating Transmission Owners (PTO).

³¹ “Non-PTF Transmission Facilities (Non-PTF) are the transmission facilities owned by the PTOs that do not constitute Pool Transmission Facilities....” ISO-NE OATT, § I.2.2 (Definitions) (Secondary Version).

³² Filing Parties Transmittal at 39-40.

³³ Filing Parties Filing, Testimony of Stephen J. Rourke, at 6-8 (Rourke Test.); *id.*, 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 6 (Transmission Owner Test.).

³⁴ Filing Parties Transmittal at 23.

system needs identified in needs assessments³⁵ that have been prepared with stakeholders.³⁶ As stated in Attachment K, “These solutions may differ from a transmission solution proposed by a[n] [incumbent] transmission owner.”³⁷ Regulated transmission solutions are classified as either a Reliability Transmission Upgrade and/or a Market Efficiency Transmission Upgrade and these projects are eligible for selection in the regional transmission plan for purposes of cost allocation. In addition, as discussed in section IV.B.1.d., the Filing Parties propose to add a new category of Public Policy Transmission Upgrades, which are transmission projects included in the regional transmission plan for purposes of cost allocation that resolve an identified transmission need driven by public policy requirements.³⁸

19. The Filing Parties request that the effective date for the Primary Version of the compliance filing be sixty days after a Commission order accepting the filing of that version.³⁹ In addition, section 3.3 of ISO-NE’s Attachment K provides that the revisions made to comply with Order No. 1000 “shall not apply to any identified needs or transmission solutions included in [a regional system plan] approved by the [ISO-NE] Board of Directors prior to the effective date of the Order No. 1000 compliance filing . . . or to any needs assessment concluded by [ISO-NE] or proposed solutions listed in [a regional system plan] update prior to such effective date.”⁴⁰ In the event that the

³⁵ ISO-NE’s needs assessments analyze whether the Pool Transmission Facilities in the New England Transmission System: (i) meet applicable reliability standards; (ii) have adequate transfer capability to support local, regional, and inter-regional reliability; (iii) support the efficient operation of the wholesale electric markets; (iv) are sufficient to integrate new resources and loads on an aggregate or regional basis; or (v) otherwise examine various aspects of its performance and capability. A needs assessment shall also identify: (i) the location and nature of any potential problems with respect to the Pool Transmission Facilities and (ii) situations that significantly affect the reliable and efficient operation of the Pool Transmission Facilities along with any critical time constraints for addressing the needs of the Pool Transmission Facilities to facilitate the development of market responses and to initiate the pursuit of regulated transmission solutions. ISO-NE, OATT, Attachment K, § 4.1 (Secondary Version).

³⁶ Filing Parties Transmittal at 47.

³⁷ ISO-NE, OATT, Attachment K, § 4.2(b) (Secondary Version).

³⁸ *Id.* § 4.2(d) (Secondary Version).

³⁹ Filing Parties Transmittal at 72.

⁴⁰ ISO-NE, OATT, Attachment K, § 3.3 (Secondary Version).

Commission rejects the Primary Version, and instead accepts the Secondary Version of the compliance filing, the Filing Parties do not specify a requested effective date but do indicate that a considerable amount of time would be necessary to put in place procedures and hire staff to implement the revised planning process in the Secondary Version, and that an immediate effective date for the Secondary Version would be inappropriate.⁴¹

20. Finally, the Filing Parties also propose to revise section 1.4 of Schedule 3.09(a) of the TOA to provide that the revisions to Schedule 3.09(a) will only become effective if the Commission accepts the amendments to the TOA without modifications (or with modifications that are supported by ISO-NE and a sufficient vote of the Participating Transmission Owners).⁴²

ii. Protests/Comments

21. The New England States Committee on Electricity (NESCOE) states that the Filing Parties' proposal to revise section 1.4 of Schedule 3.09(a) should be rejected, because it is an attempt to incorporate a non-severability clause whereby revisions to Schedule 3.09(a) would only become effective if the Commission accepts all proposed revisions contained in the Filing Parties' proposal without modification. NESCOE argues that the Filing Parties' proposal should be rejected because it is contrary to Commission practice and precedent without providing justification or rationale for supporting a divergence from the Commission's established practice.⁴³

iii. Commission Determination

22. We find that the Filing Parties partially comply with Order No. 1000's requirements concerning the scope of the transmission planning region, the description of transmission facilities that will be subject to the requirements of Order No. 1000, and the enrollment requirements of Order No. 1000. We therefore direct the Filing Parties to make a compliance filing within 120 days of the date of issuance of this order.

23. First, we find that the Filing Parties comply with Order No. 1000's requirements regarding the scope of the transmission planning region. The Commission previously

⁴¹ ISO-NE January 18, 2013 Answer at 85.

⁴² ISO-NE, Agreements and Contracts, Transmission Operating Agreement, Schedule 3.09(a), § 1.4 (TOA) (Secondary Version).

⁴³ NESCOE Protest at 58-59.

found that ISO-NE's transmission planning process satisfied Order No. 890's regional participation principle.⁴⁴ There has been no reduction in the scope of the region since the Commission made that finding. Accordingly, we find that the scope of the transmission planning region complies with the requirements of Order No. 1000.

24. Second, we find that the Filing Parties partially comply with Order No. 1000's requirement that public utility transmission providers explain how the transmission planning region will determine which transmission facilities will be subject to the requirements of Order No. 1000. The Filing Parties propose to exempt from the requirements of Order No. 1000 those transmission facilities that are included in a regional system plan, approved by the ISO-NE Board of Directors or listed in a regional system plan update prior to the effective date of the compliance filing. However, the Filing Parties appear to exempt from the requirements of Order No. 1000 transmission facilities that address any regional *need* that would be identified prior to the effective date of the compliance filing. Specifically section 3.3 of ISO-NE's Attachment K provides that the compliance revisions "shall not apply to any identified needs or transmission solutions included in [a regional system plan] approved by the [ISO-NE] Board of Directors prior to the effective date of the Order No. 1000 compliance filing . . . or to any needs assessment concluded by [ISO-NE] or proposed solutions listed in [a regional system plan] update prior to such effective date."⁴⁵

25. We find that the Filing Parties' proposal to exempt from the requirements of Order No. 1000 any "identified needs" that have been approved by the ISO-NE Board of Directors for inclusion in the regional system plan and any "needs assessment" concluded by ISO-NE prior to the effective date of the Order No. 1000 compliance does not comply with Order No. 1000. We find that this proposal is inconsistent with the Commission's definition of new transmission facilities, to which the requirements of Order No. 1000 will apply, as 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 compliance filing.⁴⁶ Thus, we find that this aspect of the proposal inappropriately limits the transmission facilities that will be subject to the requirements of Order No. 1000 and direct the Filing Parties in the further compliance filing we require

⁴⁴ See *ISO New England Inc.*, 123 FERC ¶ 61,161 (890 Compliance Order); 125 FERC ¶ 61,097 (2008) (890-A Compliance Order); delegated letter order in Docket Nos. OA09-9-000 and ER09-37-000 (issued Nov. 7, 2008) (890-B Compliance Order).

⁴⁵ ISO-NE, OATT, Attachment K, § 3.3 (Secondary Version).

⁴⁶ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 65, 162.

below to revise section 3.3 of the ISO-NE OATT 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 the effective date of the compliance filing.

26. With respect to the effective date, the Filing Parties state that significant time will be required to implement the revisions contained in the Secondary Version, so as to ensure that continuing work is not abandoned and system reliability put on hold.⁴⁷ Since we are accepting the Filing Parties' Secondary Version, subject to further compliance, we direct the Filing Parties to submit, within 120 days of the date of issuance of this order, a compliance filing requesting an appropriate effective date to coincide with the beginning of an ISO-NE planning cycle, and providing further information regarding ISO-NE's transition to the revised regional transmission planning process. The Commission anticipates that this appropriate effective date will coincide with the beginning of the next transmission planning cycle following the issuance of this order. The Filing Parties may propose a different effective date but must provide a showing demonstrating why such an effective date is more appropriate. We note that any proposed effective date must coincide with the beginning of a regional transmission planning cycle.

27. Order No. 1000-A states that public utility 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.⁴⁸ Order No. 1000-A also requires that each public utility transmission provider (or regional transmission planning entity acting for all of the public utility transmission providers in its transmission planning region) 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.⁴⁹ Filing Parties have not addressed these requirements by explaining how transmission providers enroll in the transmission planning region (and thus make the choice to become part of that region), nor is a list of enrollees in the transmission planning region provided in the ISO-NE OATT. Therefore, we direct the Filing Parties in the further compliance filing discussed below to set forth in the ISO-NE OATT the enrollment process and to include a list of enrolled transmission providers in the ISO-NE OATT.

⁴⁷ ISO-NE January 18, 2013 Answer at 85.

⁴⁸ Order No. 1000-A, 139 FERC ¶ 61,132 at P 275.

⁴⁹ *Id.*

28. We also reject the proposed revision to section 1.4 of Schedule 3.09(a) of the TOA, which provides that the revisions to Schedule 3.09(a) become effective only if the Commission does not modify the TOA or if any directed modifications are supported by ISO-NE and a sufficient vote of the Participating Transmission Owners. By including such a provision, the Filing Parties appear to assert that some revisions are contingent on the acceptance of others. We find that such a condition is inappropriate. While the Filing Parties had a certain amount of flexibility in developing their compliance filing, they are obligated by Order No. 1000 to make necessary revisions to tariffs and agreements on file with the Commission. Changes necessary to comply with Order No. 1000 are not discretionary. Accordingly, we direct the Filing Parties to remove this provision from the TOA.

29. In sum, we direct the Filing Parties to submit, within 120 days of the date of issuance of this order, a further compliance filing that (1) revises section 3.3 of the ISO-NE OATT 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; (2) requests an appropriate effective date to coincide with the beginning of an ISO-NE planning cycle; (3) provides further information regarding ISO-NE's transition to the revised regional transmission planning process; (4) sets forth in the ISO-NE OATT a clear enrollment process that defines how entities, including non-public utility transmission providers, make the choice to become part of the ISO-NE transmission planning region; (5) includes a list of enrolled transmission providers in the ISO-NE OATT; and (6) removes from the TOA the proposed revision to section 1.4 of Schedule 3.09(a) of the TOA that provides that the revisions to Schedule 3.09(a) become effective only if the Commission does not modify the TOA or if any directed modifications are supported by ISO-NE and a sufficient vote of Participating Transmission Owners.

b. Regional Transmission Planning Process General Requirements

30. Order No. 1000 requires that each public utility transmission provider participate in a regional transmission planning process that produces a regional transmission plan and that complies with certain transmission planning principles of Order No. 890 identified in Order No. 1000.⁵⁰ 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

⁵⁰ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 146, 151.

utility transmission providers in their local transmission planning process.⁵¹ Public utility transmission providers have the flexibility 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 may meet the region's needs more efficiently or cost-effectively.⁵² The procedures 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 needs.⁵³ The process used to produce the regional transmission plan must satisfy the following Order No. 890 transmission planning principles: (1) coordination; (2) openness; (3) transparency; (4) information exchange; (5) comparability; (6) dispute resolution; and (7) economic planning.⁵⁴

31. Application of these transmission planning principles will ensure that stakeholders have an opportunity to participate in the regional transmission planning process in a timely and meaningful manner. Stakeholders must have an opportunity to express their needs, have access to information, and an opportunity to provide information, and thus have an opportunity to participate in the identification and evaluation of regional solutions.⁵⁵ In addition, when evaluating the merits of alternative transmission solutions, proposed non-transmission alternatives must be considered on a comparable basis.⁵⁶ Public utility transmission providers must identify how they will evaluate and select from competing solutions and resources such that all types of resources are considered on a comparable basis.⁵⁷

⁵¹ *Id.* P 148.

⁵² *Id.* P 149.

⁵³ *Id.* P 147.

⁵⁴ *Id.* P 151. These transmission planning principles are explained more fully in Order No. 890.

⁵⁵ *Id.* P 150. As explained in Order No. 1000, the term "stakeholder" means any interested party. *Id.* P 151 n.143.

⁵⁶ *Id.* P 148.

⁵⁷ *Id.* P 155.

i. Filing Parties' Filing

32. The Filing Parties state that the Commission has determined, in a series of orders, that ISO-NE's existing regional system planning process satisfies the transmission planning principles of Order No. 890 and produces a regional transmission plan that satisfies those principles.⁵⁸ The Filing Parties also state that ISO-NE's regional system planning process provides for ISO-NE to meet the specific requests of its transmission customers and other stakeholders comparably.⁵⁹ The Filing Parties further state that, so as to enable the participation of non-transmission alternatives on a comparable basis with transmission, existing sections 3.5 and 4.2(a) of Attachment K address the manner in which "market responses" (i.e., non-transmission alternatives) can displace regulated transmission solutions. Section 4.2 of Attachment K also specifies the manner in which market responses, including demand response resources, are accounted for in needs assessments to determine whether the reliability or market efficiency need persists in light of a market solution.⁶⁰

33. Market responses may include, but are not limited to, resources (e.g., demand-side projects and distributed generation), Merchant Transmission Facilities, and Elective Transmission Facilities.⁶¹ As stated in the ISO-NE OATT, market responses that are identified to ISO-NE and are determined by ISO-NE, in consultation with the Planning Advisory Committee, "to be sufficient to alleviate the need for a particular regulated transmission solution or Transmission Upgrade, based on the criteria specified in the pertinent [n]eeds [a]ssessment or [regional system plan], and are judged by [ISO-NE] to

⁵⁸ Filing Parties Transmittal at 33.

⁵⁹ *Id.* at 38-39.

⁶⁰ *Id.* at 37.

⁶¹ *Id.* An Elective Transmission Upgrade is defined as a transmission upgrade that is participant-funded (i.e., voluntarily funded by an entity or entities that have agreed to pay for all of the costs of the upgrade). ISO-NE OATT, § I.2.2 Definitions (Secondary Version). ISO-NE will incorporate or update information regarding a proposed Merchant Transmission Facility or Elective Transmission Upgrade in a [n]eeds [a]ssessment after the studies corresponding to the Merchant Transmission Facility or Elective Transmission Upgrade are completed and a commercial operation date is ascertained. Elective Transmission Upgrades that are proposed in conjunction with the interconnection of a resource will be considered with the proposed resource in the needs assessment. *Id.*

be achievable within the required time period, shall be reflected in the next [regional system plan] and/or in a new or updated [needs assessment].”⁶²

34. Additionally, the Filing Parties state that ISO-NE’s regional system planning process complies with the openness principle because Planning Advisory Committee meetings are open to all affected and any other interested parties, and that to date, ISO-NE has been able to conduct an open and transparent planning process while protecting both confidential and market-sensitive information as required under the ISO-NE Information Policy contained in Attachment D of the ISO-NE OATT and Critical Energy Infrastructure Information (CEII). They further state that the Commission found that the existing planning process met the openness principle of Order No. 890.⁶³

35. The Filing Parties state that the ISO-NE regional system planning process is conducted in a transparent manner. Pursuant to existing section 4.1(d) of Attachment K, ISO-NE notifies the Planning Advisory Committee and other affected or interested parties of the initiation of ISO-NE’s needs assessments to identify the needs of the Pool Transmission Facilities system. ISO-NE defines the scope of the needs assessment study with input from the Planning Advisory Committee as well as state agencies, such as NESCOE and state regulators.⁶⁴ Meetings of the Planning Advisory Committee will be convened to identify additional considerations relating to a needs assessment that were not identified in support of initiating the assessment, and to provide input on the need assessment’s scope, assumptions and procedures. ISO-NE’s OATT states that to develop the needs assessments, ISO-NE “may form a targeted study group of representatives of affected stakeholders based on the particular Needs Assessment.”⁶⁵ This Needs Assessment Study Group is intended to provide an opportunity to affected stakeholders for their early involvement in the regional system planning process.⁶⁶

36. ISO-NE also coordinates with the Participating Transmission Owners regarding any impacts of such needs on their transmission facilities. At the initiation of studies to develop and/or review proposed regulated transmission solutions, ISO-NE also provides

⁶² *Id.* § 3.5 (Secondary Version).

⁶³ Filing Parties Transmittal at 35 (citing 890 Compliance Order, 123 FERC ¶ 61,161 at PP 29-31).

⁶⁴ ISO-NE, OATT, Attachment K, § 4.1(e) (Secondary Version).

⁶⁵ *Id.* § 4.1(f) (Secondary Version).

⁶⁶ *Id.*

notice to the Planning Advisory Committee and other affected or interested parties to ensure their early involvement and understanding of system problems and potential solutions. The Filing Parties state that ISO-NE's regional system planning process also requires ISO-NE to maintain a cumulative list—the Regional System Plan Project List—of all the regulated transmission projects that are considered part of the regional system plan in New England. The Regional System Plan Project List is available on ISO-NE's website along with other system planning materials. Section 3.6 of ISO-NE's Attachment K describes the elements of the Regional System Plan Project List, including the specific categories that indicate the status of each transmission project included in the regional system plan (i.e., “Concept,” “Proposed,” “Planned,” “Under Construction,” and “In-Service”). Section 3.6 of Attachment K also specifies the procedures and criteria applicable to periodic updating of the Regional System Plan Project List.⁶⁷

ii. Protests/Comments

37. NESCOE asserts that the planning process is biased regarding access to information and with respect to the timing of access to such information in favor of Participating Transmission Owners and against competitive nonincumbent transmission developers, because, with limited exception, the Needs Assessment Study Groups are only open to Participating Transmission Owners and ISO-NE.⁶⁸ NESCOE argues that ISO-NE should open the Needs Assessment Study Groups to technical personnel from all pre-qualified transmission developers with CEII clearance. Additionally, NESCOE states that the Commission should find that increasing the transparency of the transmission planning process will foster competition and benefit ratepayers.⁶⁹ NESCOE states that allowing planning engineers from both the Participating Transmission Owners as well as the nonincumbent transmission developers access to the Needs Assessment Study Groups would enhance the openness and transparency of the planning process. According to NESCOE, allowing such access would eliminate bias in favor of the Participating Transmission Owners with respect to the access to information and the timing of access to information.⁷⁰

38. Joint Movants assert that the ISO-NE region could be doing more to ensure a more inclusive, broader level of meaningful participation in the planning process. According

⁶⁷ Filing Parties Transmittal at 35-36.

⁶⁸ NESCOE Protest at 42-43.

⁶⁹ *Id.* at 45-56.

⁷⁰ *See id.* at 42.

to Joint Movants, although ISO-NE appears to have a transparent process in place, participation in the process is expensive, cumbersome, and time intensive for average non-engineer citizens, small-to-medium-sized businesses, and non-governmental organizations. Accordingly, Joint Movants claim the process does not encourage broad and continuing participation by stakeholders who rely on private funding for their own participation.⁷¹ Joint Movants urge the Commission to reconsider whether it is possible to have an open and fair planning process without some level of financial support for certain stakeholders.⁷²

39. Joint Movants assert that, while the Filing Parties allow for an opportunity for non-transmission alternatives to be considered in the regional planning process, the current process does not allow for similar consideration of transmission and non-transmission alternatives, as evidenced by the dearth of alternatives that have been identified and incorporated into the planning process. Joint Movants argue that without changes to the existing planning process, marginalization of non-transmission alternatives as a solution to identified reliability needs will continue and the planning process will not comply with the goal of Order No. 1000 to advance the region's ability to achieve more efficient and cost-effective planning outcomes. Joint Movants state that to the extent that ISO-NE plans to rely on the market to identify non-transmission alternatives, ISO-NE will employ procedures distinct from the process for considering transmission responses, such that it is unclear how non-transmission alternatives will be afforded consideration comparable to transmission solutions. Joint Movants contend that, since ISO-NE's current strategic plan to align planning and markets addresses only capacity resources, without Commission action other non-transmission alternatives (such as energy efficiency or demand response) will continue to be considered under an existing planning process that appears incapable of adopting non-transmission solutions.⁷³

40. Finally, Joint Movants request that the Commission encourage ISO-NE to adopt a cost-benefit analysis requirement that evaluates all available alternatives as the best means for the region to determine whether transmission or non-transmission alternatives better achieve the goals of Order No. 1000, to advance the region's ability to achieve more efficient and cost-effective planning outcomes and to ensure right-sizing of transmission.⁷⁴

⁷¹ Joint Movants Protest at 10.

⁷² *Id.* at 12.

⁷³ *Id.* at 4-15.

⁷⁴ *Id.* at 15-16.

iii. Answers

41. ISO-NE states that the Filing Parties' compliance filing demonstrated that the existing open and transparent transmission planning process—far from constituting a serious harm or unequivocal public necessity that demands change to protect consumers—has been very successful in leading to new and significant cost-effective investments in the New England transmission system that have resulted in significant benefits for electric consumers.⁷⁵ ISO-NE also states that it independently leads the planning process in the region through all phases, from needs assessments through development, comparison, and selection of alternative solutions, in a needs-based process that is open to state and other stakeholder input and selects the best combination of electrical performance, expandability, cost and other factors to be moved forward to siting and construction.⁷⁶

42. ISO-NE also states that the suggestion to open up the needs assessment process further is unworkable for at least two reasons: (i) the study groups identify needs, and do not develop solutions; and (ii) if the solutions were to be open to competition, no entity (whether incumbent or nonincumbent) would share its proprietary approaches and local knowledge with competitors. ISO-NE states that the purpose of the Needs Assessment Study Groups is to bring engineering expertise and the local knowledge of the Participating Transmission Owners (not possessed by ISO-NE) to bear on determining where needs exist on the system. According to ISO-NE, the involvement of multiple stakeholder personnel will not add valuable collaboration.⁷⁷

43. ISO-NE further states that the Commission has already found the New England planning process compliant with the comparability requirement of Order No. 890. The Commission found that ISO-NE's Attachment K clearly indicates how competing alternatives, including transmission, generation and demand resources, would be considered on a comparable basis.⁷⁸

44. Joint Movants acknowledge that comparable consideration does not require that non-transmission alternatives be constructed on a basis comparable to transmission facilities, but argues that ISO-NE has not incorporated a single non-transmission

⁷⁵ ISO-NE March 7, 2013 Answer at 10.

⁷⁶ ISO-NE January 18, 2013 Answer at 8.

⁷⁷ *Id.* at 58.

⁷⁸ *Id.* at 82 (citing *ISO New England Inc.*, 127 FERC ¶ 61,170, at P 13 (2009)).

alternative into the regional system plan, raising the question whether “comparable” consideration in compliance with Order No. 1000 has been achieved.⁷⁹ Joint Movants argue that if the Commission’s intent is to ensure that non-transmission alternatives receive comparable consideration as a means to address undue discrimination, it is unclear how the ISO-NE planning process, which has not adopted a non-transmission solution, satisfies the Commission’s concern.⁸⁰

iv. Commission Determination

45. The Commission previously has found that ISO-NE’s regional transmission planning process satisfied each of the Order No. 890 transmission planning principles.⁸¹ The Commission’s focus in this proceeding is therefore on the incremental changes to ISO-NE’s regional transmission planning process developed to comply with the requirements of Order No. 1000. We find that the amendments to the regional transmission planning process proposed in the Filing Parties’ filing largely comply with the requirements of Order No. 1000 and are otherwise just and reasonable and not unduly discriminatory. Specifically, we find that the Filing Parties’ filing fully complies with the openness, coordination, information exchange, dispute resolution, and economic studies transmission planning principles. However, as discussed below, we direct the 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.

46. Regarding the transparency principle, we find that the existing framework of the Needs Assessment Study Group may be inconsistent with this principle in light of changes made to address the elimination of federal rights of first refusal. 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. Entities that may only attend Planning Advisory Committee proceedings, without also participating in the Needs Assessment Study Groups, are 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

⁷⁹ Joint Movants Answer at 6 n.14.

⁸⁰ *Id.* at 6.

⁸¹ See 890 Compliance Order, 123 FERC ¶ 61,161; *ISO New England Inc.*, 127 FERC ¶ 61,170 (2009).

the transmission needs. In addition, participation in the Needs Assessment Study Group provides access to the development of the actual models and study files, which a nonincumbent transmission developer may need to reproduce the transmission need for which a solution is sought. ISO-NE distributes the ultimate results of the Needs Assessment Study Group meetings in a report that contains summaries of the stressed study cases and contingencies studied,⁸² which does not completely contain all information embedded in the study models and also does not reflect the iterative nature of the needs assessment process.

47. We recognize that broader participation by stakeholders that are not technically qualified to contribute in a meaningful way to the Needs Assessment Study Groups might unreasonably delay and overly complicate the way that process runs. Our intent is to open this process to those that have both an interest in contributing and are technically qualified to make a contribution to the Needs Assessment Study Group. Accordingly, we direct the Filing Parties, in a further compliance filing due within 120 days of the date of issuance of this order, to submit revisions to ISO-NE's OATT 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 Study Groups. In that compliance filing, we also direct the Filing Parties to explain how ISO-NE will resolve disputes over whether a stakeholder is qualified.

48. We decline to reconsider the Commission's determination in Order No. 1000 not to require the inclusion of funding for other stakeholder interests.⁸³ We note that in Order No. 1000, the Commission affirmed the general approach it took in Order No. 890 regarding the recovery of costs associated with participation in the regional transmission planning process. In that proceeding, the Commission directed public utility transmission providers to "include relevant cost recovery for state regulators, to the extent requested."⁸⁴ In Order No. 1000, the Commission declined to expand that directive to

⁸² This report information is available to Planning Advisory Committee members through ISO-NE's website, at http://www.iso-ne.com/committees/comm_wkgrps/prtcpnts_comm/pac/reports/index.html.

⁸³ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 162.

⁸⁴ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at PP 574 n.339, 586.

include funding for other stakeholder interests.⁸⁵ While the Commission did not preclude public utility transmission providers from proposing funding mechanisms for other stakeholders, ISO-NE did not make such a proposal and requiring that it do so would be inconsistent with Order No. 1000.

49. Additionally, we recognize that the Filing Parties may have legitimate concerns regarding the disclosure of confidential information. While we believe most of these concerns would be addressed through the execution of non-disclosure agreements and other procedures for accessing CEII and other information, we acknowledge that the case may be different for proprietary information held by participating entities. We are not requiring that any participant in the Needs Assessment Study Groups divulge such proprietary, commercially sensitive information to potentially competing entities, and we encourage ISO-NE and participating entities to structure participation in the Need Assessment Study Groups in a manner that allows for maximum participation of technically qualified personnel but that protects such proprietary, commercially sensitive information from disclosure absent a voluntary agreement to do so. However, consistent with the Order No. 890 transparency principle requirement that stakeholders have sufficient information to replicate all transmission planning studies,⁸⁶ information must be disclosed, under applicable confidentiality provisions, if the information is needed to participate in the transmission planning process and to replicate transmission planning studies. In addition, we find that to exclude technically qualified market participants, including nonincumbent transmission developers, from the early stages of regional transmission planning (or from the needs assessment process) undermines the transparency of ISO-NE's transmission planning process and it therefore not compliant with that transmission planning principle.

50. The Commission previously found ISO-NE to be in compliance with the comparability transmission planning principle. Here, the Filing Parties rely on sections 3.5 and 4.2 of Attachment K of ISO-NE's OATT to demonstrate that ISO-NE satisfies the comparability principle. However, the Filing Parties have limited the applicability of section 4.2 in their Secondary Version to those Reliability Transmission

⁸⁵ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 162; *see also PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 54 (2013).

⁸⁶ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 471. The Commission also noted that without certain generator dispatch and economic information, it becomes difficult or impossible to conduct meaningful load flow studies for some transmission planning purposes. The Commission therefore required disclosure of criteria, assumptions, data, and other information that underlie transmission plans. *Id.* P 478.

Upgrades needed in five years or less, or for other Reliability Transmission Upgrades or Market Efficiency Transmission Upgrades for which the relevant Participating Transmission Owner has offered the only solution. As noted above, we reject the Primary Version and consider only the Secondary Version. Therefore, as a result of this more limited scope of section 4.2, we direct the Filing Parties, in a further compliance filing due within 120 days of the date of this order, 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). While we believe this compliance directive may address some of the concerns expressed by Joint Movants, we will not require the Filing Parties to do more than what was required by Order No. 1000, and thus we reject Joint Movants' specific arguments.⁸⁷

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

51. 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.⁸⁸ Public utility transmission providers have the flexibility 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 may meet the region's needs more efficiently or cost-

⁸⁷ As the Filing Parties note in their transmittal, "'Market Responses' is the terminology used in New England for non-transmission alternatives. Existing sections 3.5 [Market Responses in RSP] and 4.2(a) [Treatment of Market Solutions in Needs Assessments] of Attachment K address the manner in which non-transmission alternatives can displace regulated transmission solutions." Transmittal at 37. Additionally, when the Commission approved ISO-NE's Order No. 890 compliance filing, they relied on section 4.1(b) (Requests by Stakeholders for Needs Assessments for Economic Considerations) and the planning process by virtue of its independent structure to fulfill the comparability principle. *See* Order No. 890 Compliance Order, 123 FERC ¶ 61,161 at P 42 (explaining, "[a]s a part of its assessment, ISO-NE will incorporate market responses into a needs assessment or regional system plan"); *see also id.* PP 43, 45.

⁸⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 148.

effectively.⁸⁹ 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.⁹⁰

52. Public utility transmission providers in each transmission planning region, in consultation with stakeholders, must propose what information and data a merchant transmission developer⁹¹ must provide to the regional transmission planning process to 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.⁹²

53. 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 needs.⁹³ Order No. 1000 does not require that the resulting regional transmission plan be filed with the Commission.

i. Filing Parties' Filing

54. Under section 4.1 of Attachment K to its OATT, ISO-NE, in coordination with Participating Transmission Owners and stakeholders, conducts needs assessments to determine whether Pool Transmission Facilities meet reliability needs, support the efficient operation of wholesale electric markets, are sufficient to integrate new resources and loads on an aggregate or regional basis, or examine other aspects of performance and

⁸⁹ *Id.* P 149.

⁹⁰ *Id.* P 331.

⁹¹ 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.” Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 119. The Commission noted in Order No. 1000 that “a merchant transmission developer assumes all financial risk for developing its transmission project and constructing the proposed transmission facilities. . . .” *Id.* P 163.

⁹² *Id.* P 164; Order No. 1000-A, 139 FERC ¶ 61,132 at PP 297-298.

⁹³ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 147.

capability. In addition, a needs assessments will also identify the location and nature of potential problems with respect to Pool Transmission Facilities. The needs assessment will also identify situations that significantly affect the reliable and efficient operation of the Pool Transmission Facilities, along with any critical time constraints for addressing the needs, to facilitate the development of market and regulated responses to meet the needs.

55. Sections 4.2 and 4.3 of Attachment K describe the procedures under which proposed Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades are evaluated in the regional transmission planning process. Under section 4.2, ISO-NE will participate in solutions studies to evaluate whether proposed solutions meet system needs identified in the needs assessments.⁹⁴ Through the solutions study process, ISO-NE “may identify the most cost-effective and reliable solutions for the region” to meet a need identified in a needs assessment, which may differ from a transmission owner’s proposed transmission solution.⁹⁵ The results of solution studies will be reported to the Planning Advisory Committee and, after receiving feedback from the Planning Advisory Committee, ISO-NE will identify the preferred solution, which, along with an overview of why the solution is preferred, will be included in the regional system plan or the regional system plan project list.⁹⁶ Section 4.3 governs the competitive solution process where there is more than one proposal for Market Efficiency Transmission Upgrades and Reliability Transmission Upgrades that are needed in more than five years.⁹⁷ The ISO-NE OATT provides that ISO-NE’s “identification 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.”⁹⁸

⁹⁴ ISO-NE, OATT, Attachment K, § 4.2 (Secondary Version). Section 4.2 applies to Reliability Transmission Upgrades that are needed in five years or less, as well as to Market Efficiency Transmission Upgrades and Reliability Transmission Upgrades needed in more than five years where the only project proposal was offered by the transmission owner in whose existing electric system that the proposed project would be in or connected with. *Id.* § 4.3(d) (Secondary Version).

⁹⁵ *Id.* § 4.2(b) (Secondary Version).

⁹⁶ *Id.* § 4.2(e) (Secondary Version).

⁹⁷ *Id.* § 4.3 (Secondary Version).

⁹⁸ *Id.* § 4.3(g) (Secondary Version).

56. Section 3 of Attachment K describes the regional system plan, which is based on periodic comprehensive assessments of system-wide needs “to maintain the reliability of the New England Transmission System while accounting for market efficiency, economic, environmental, and other considerations, as agreed to from time to time.”⁹⁹ The regional system plan is based on a five-to-ten year planning horizon. ISO-NE is required to update the regional system plan to reflect the results of needs assessments, and it must include a description of the proposed regulated transmission solutions that, based on the solutions studies under section 4.2 and the competitive solution process described in section 4.3, may meet the identified needs. Thus, ISO-NE is required to establish the regional system plan project list, which is a cumulative listing of proposed regulated transmission solutions classified (to the extent known) as Reliability Transmission Upgrades, Market Efficiency Transmission Upgrades, and Public Policy Transmission Upgrades.¹⁰⁰

57. With respect to information requirements for merchant transmission developers, the Filing Parties explain that ISO-NE’s existing OATT requires merchant transmission developers and others to submit to ISO-NE any new plan for additions to or changes to any transmission facilities rated 69 kV or above, as well as any new or materially changed plan for any other action that may have a significant effect on the stability, reliability or operating characteristics of the transmission facilities of another Participating Transmission Owner or the system of a market participant. According to the Filing Parties, these existing tariff provisions satisfy Order No. 1000.¹⁰¹

ii. Protests/Comments

58. LS Power argues that ISO-NE’s OATT should be revised to establish a single reliability and public policy planning process.¹⁰² Similarly, Joint Parties request that the Commission direct ISO-NE to utilize a more encompassing definition of benefits conferred by reliability, market efficiency, and public policy projects. Joint Parties request that the Commission order ISO-NE to include, early in its planning process, mechanisms to inform ISO-NE, participants, and stakeholders of the full scope of

⁹⁹ *Id.* § 3 (Secondary Version).

¹⁰⁰ The regional system plan must also account for market responses to identified needs. Market responses include non-transmission alternatives and merchant transmission facilities. ISO-NE, OATT, Attachment K, § 3.5 (Secondary Version).

¹⁰¹ Filing Parties Transmittal at 49.

¹⁰² LS Power Protest at 2.

benefits (i.e., reliability, market efficiency, and public policy) associated with a project, and to ensure that costs are allocated to reflect as fully as possible the range of benefits provided by the project.¹⁰³

59. AWEA also urges the Commission to direct ISO-NE to adopt transparent planning procedures that will allow public policy requirements to be considered on equal footing with reliability needs and economic benefits in selecting projects for inclusion in regional transmission plans.¹⁰⁴

60. Joint Movants ask the Commission to require ISO-NE to state in its OATT that it will use cost-benefit analyses for determining whether transmission or non-transmission alternatives achieve the goal of efficient and cost-effective regional planning when meeting system reliability needs.¹⁰⁵ According to Joint Movants, this approach would emphasize maximizing the use of existing transmission and generation resources to respond to system needs, studying non-transmission alternatives and hybrid solutions (combining transmission and non-transmission solutions), and resorting to wires solutions only after considering whether cheaper options exist that are consistent with state and federal public policy requirements, noting that non-transmission alternatives are an option when addressing reliability needs arising from the thermal or voltage issues.¹⁰⁶

iii. Answers

61. Stating that the reliability and the optional public policy planning process have different aims and requirements, ISO-NE argues the LS Power proposal to require ISO-NE to develop a single process for reliability, market efficiency, and public policy should be rejected since such a process is not required by Order No. 1000.¹⁰⁷ ISO-NE states that it is inappropriate for Joint Movants to argue that the compliance filing is non-compliant with Order No. 1000 due to the absence in the New England planning process of an

¹⁰³ Joint Parties Protest at 18.

¹⁰⁴ AWEA Comments at 3, 7.

¹⁰⁵ Joint Movants Protest at 22.

¹⁰⁶ *Id.* at 8.

¹⁰⁷ ISO-NE January 18, 2013 Answer at 70.

integrated resource planning process. ISO-NE states that “Order No. 1000 expressly eschews a mandate for integrated resource planning.”¹⁰⁸

62. Joint Movants respond that they are not requesting that the Commission require integrated resource planning, but rather a comprehensive process that is capable of identifying in all instances opportunities for alternative resources that can address reliability needs and displace or defer transmission line construction.¹⁰⁹

63. NESCOE also asserts that the Commission should reject requests urging the Commission to require ISO-NE to work towards a single integrated planning process because (1) the requests are outside the scope of Order No. 1000 compliance and represent a collateral attack on the orders accepting ISO-NE’s Order No. 890 compliance filing and (2) the Commission need not act on commenters’ interest in alternative resource analysis given current work underway in New England.¹¹⁰

iv. Commission Determination

64. We find that the regional transmission planning process specified in the Filing Parties’ filing partially complies with the requirements of Order No. 1000. ISO-NE conducts a transmission planning process in consultation with stakeholders that produces a regional transmission plan that identifies the more efficient or cost-effective solutions for reliability and market efficiency needs.¹¹¹ However, ISO-NE’s regional transmission planning process for transmission needs driven by public policy requirements does not comply with Order No. 1000’s requirements that (1) public utility transmission providers must evaluate 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

¹⁰⁸ *Id.* at 82 (citing Order No 1000, FERC Stats. & Regs. ¶ 31,323 at P 154, which states, “the regional transmission planning process is not the vehicle by which integrated resource planning is conducted”).

¹⁰⁹ Joint Movants Answer at 2-3.

¹¹⁰ NESCOE Answer at 9, 34-38.

¹¹¹ The Filing Parties proposed OATT revisions state that ISO-NE will identify the preferred transmission solution and that the “identification 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.” *See* ISO-NE, OATT, Attachment K, § 4.3(g) (Secondary Version).

processes¹¹² and (2) 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 needs.¹¹³ Accordingly, we direct the Filing Parties to submit, within 120 days of the date of issuance of this order, a further compliance filing that establishes a regional transmission planning process for transmission needs driven by public policy requirements that satisfies these requirements of Order No. 1000, as discussed below.

65. We conclude that the Filing Parties' regional transmission planning process for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades partially complies with the requirements of Order No. 1000. We find that, through the procedures set forth in its Attachment K, ISO-NE will conduct a transmission planning process that produces a regional transmission plan and that meets the needs of the transmission planning region more efficiently or cost-effectively. Attachment K sets forth a comprehensive process to identify transmission needs and provide for the selection of more efficient or cost-effective Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades. It accomplishes this through the needs assessment process set forth in section 4.1 of Attachment K, the processes for identifying more efficient and cost-effective transmission solutions in sections 4.2 and 4.3, and the development of the regional system plan in section 3. Therefore, in general, we find 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.¹¹⁴

66. However, section 4.2's standard of identifying the "most cost-effective and reliable" solution to meet an identified need appears 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, we find that section 4.3's standard of identifying the solution "that offers the best combination of electrical performance, cost, future system expandability, and feasibility

¹¹² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 148.

¹¹³ *Id.* P 147.

¹¹⁴ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 148.

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. Therefore, we direct the 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 in a further compliance filing to be submitted within 120 days of the date of issuance of this order.

67. In addition, as discussed in more detail below, we find that the Filing Parties’ proposed regional transmission planning process for Public Policy Transmission Upgrades does not comply with Order No. 1000’s requirements. In brief, under the Filing Parties’ proposed new section 4A in Attachment K, NESCOE and the states determine the specific transmission projects for which proposals are solicited, make the decision about which transmission projects are placed into the regional system plan, and provide which states are allocated costs for those transmission projects and the methodology by which those costs will be allocated. The Filing Parties’ proposals prevent the public utility transmission provider from meeting its obligation under Order No. 1000 to evaluate and select the transmission solution that more efficiently or cost-effectively meets the needs of the transmission planning region. We address the Filing Parties’ failure to evaluate at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements in Part IV.B.1.d.i.d.3 and Part IV.B.2.d.iv.b below. Likewise, we address the Filing Parties’ failure to 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 in Part IV.B.1.d.i.d.4 below.

68. With respect to suggestions that the Commission require the Filing Parties to develop a single, integrated transmission planning process that incorporates transmission solutions that more efficiently or cost-effectively meet reliability requirements, address economic considerations and meet transmission needs driven by public policy requirements, we note that Order No. 1000 gave regions the flexibility to craft their own processes consistent with the order’s requirements. Moreover, Order No. 1000 recognized that it may be appropriate to have different cost allocation methods for transmission facilities that are planned for different purposes or planned pursuant to different regional transmission planning processes.¹¹⁵ While we encourage the Filing Parties and their stakeholders to continue to explore options to improve the regional transmission planning and cost allocation processes, we find that the Filing Parties’ approach of having separate analysis of Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades and Public Policy Transmission Upgrades is consistent with Order No. 1000.

¹¹⁵ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 687.

69. Similarly, we will not require ISO-NE expressly to provide in its OATT that it will use a cost-benefit analysis in every case to determine the “right-sized” or most cost-effective transmission solution to a reliability need. ISO-NE will identify, under section 4.3 of Attachment K of the ISO-NE OATT, 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.”¹¹⁶ As directed above, the Filing Parties must revise section 4.2 of Attachment K of the ISO-NE OATT to provide that ISO-NE will identify transmission solutions pursuant to section 4.2 based on the same set of factors. Order No. 1000 provides ISO-NE with flexibility to develop appropriate procedures to evaluate different transmission solutions so as to identify the more efficient or cost-effective solution,¹¹⁷ and we consider the evaluation criteria that ISO-NE has chosen to be reasonable.¹¹⁸ Specifically, under section 4.2 and section 4.3 of the ISO-NE OATT, as described above, ISO-NE will consider “the relative efficiency and cost-effectiveness of [any proposed transmission] solution”¹¹⁹ when considering whether to select a transmission facility in the regional transmission plan as the more efficient or cost-effective solution to the transmission planning region’s transmission needs, subject to the revisions we direct the Filing Parties to make to section 4.2, discussed above.

70. Finally, we find that the Filing Parties comply with Order No. 1000 regarding merchant transmission developer information requirements. ISO-NE’s existing OATT provisions in section 9.1 require merchant transmission developers, as well as others, to provide information relevant to their proposed merchant transmission projects, including reliability and operational impacts. These provisions are consistent with Order No. 1000’s requirements regarding merchant transmission developers.

d. Consideration of Transmission Needs Driven by Public Policy Requirements

71. Order No. 1000 requires public utility transmission providers to amend their OATTs to describe procedures that provide for the consideration of transmission needs driven by Public Policy Requirements in the local and regional transmission planning

¹¹⁶ ISO-NE, OATT, Attachment K, § 4.3(g) (Secondary Version).

¹¹⁷ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 149.

¹¹⁸ We discuss the specific criteria that ISO-NE will use to evaluate different transmission solutions in Part IV.B.1.c.iv below.

¹¹⁹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 331 n.307.

processes.¹²⁰ The Commission clarified in Order No. 1000-A that Order No. 1000 requires that transmission needs driven by Public Policy Requirements be considered just as transmission needs driven by reliability or economic concerns are also considered.¹²¹

72. 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).¹²² As explained further below, Order No. 1000 specifies that the consideration of transmission needs driven by Public Policy Requirements means: (1) the identification of transmission needs driven by Public Policy Requirements and (2) the evaluation of potential solutions to meet those identified needs.¹²³

73. To comply with the requirement to identify transmission needs driven by Public Policy Requirements, public utility transmission providers, in consultation with their stakeholders, must establish procedures in their OATTs to identify at the local and regional level those transmission needs driven by Public Policy Requirements for which potential transmission solutions will be evaluated.¹²⁴ The process for identifying transmission needs driven by Public Policy Requirements must allow stakeholders, including, but not limited to, those responsible for complying with the Public Policy Requirements at issue and the developers of potential transmission facilities that are needed to comply with one or more Public Policy Requirements, an opportunity to provide input and to offer proposals regarding the transmission needs they believe are driven by Public Policy Requirements.¹²⁵ Public utility transmission providers must explain in their compliance filings how the procedures adopted give all stakeholders a

¹²⁰ *Id.* P 203.

¹²¹ Order No. 1000-A, 139 FERC ¶ 61,132 at PP 204, 206, 208-211, 317-319.

¹²² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at 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.

¹²³ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 205.

¹²⁴ *Id.* PP 206, 207.

¹²⁵ *Id.* PP 207, 208.

meaningful opportunity to submit what the stakeholders believe are transmission needs driven by Public Policy Requirements.¹²⁶

74. In addition, public utility transmission providers, in consultation with stakeholders, must establish a just and reasonable and not unduly discriminatory process through which public utility transmission providers will identify, out of this larger set of needs, those needs for which transmission solutions will be evaluated.¹²⁷ Public utility transmission providers must explain in their compliance filings how their open and transparent transmission planning process determines whether to move forward regarding transmission needs driven by Public Policy Requirements.¹²⁸ In addition, each public utility transmission provider must post on its website an explanation of: (1) those transmission needs driven by Public Policy Requirements that have been identified for evaluation for potential solutions in the local and regional transmission planning processes and (2) how other transmission needs driven by Public Policy Requirements introduced by stakeholders were considered during the identification stage and why they were not selected for further evaluation.¹²⁹

75. To comply with the requirement to evaluate potential solutions to meet the identified transmission needs driven by Public Policy Requirements, Public utility transmission providers, in consultation with stakeholders, must also establish procedures in their OATTs to evaluate at the local and regional level potential solutions to identified transmission needs driven by Public Policy Requirements.¹³⁰ These procedures must include the evaluation of transmission facilities stakeholders propose to satisfy an identified transmission need driven by Public Policy Requirements.¹³¹ Stakeholders must be provided an opportunity to provide input during the evaluation of potential solutions to

¹²⁶ Order No. 1000-A, 139 FERC ¶ 61,132 at P 335.

¹²⁷ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 209.

¹²⁸ Order No. 1000-A, 139 FERC ¶ 61,132 at P 335.

¹²⁹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 209; *see also* Order No. 1000-A, 139 FERC ¶ 61,132 at P 325.

¹³⁰ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 211.

¹³¹ *Id.* P 211 & n.191 (“This requirement is consistent with the existing requirements of Order Nos. 890 and 890-A which permit sponsors of transmission and non-transmission solutions to propose alternatives to identified needs.”).

identified needs.¹³² In addition, the Commission and stakeholders must be able to review the record that is created by the process to help ensure that the identification and evaluation decisions are open and fair, and not unduly discriminatory or preferential.¹³³ The Commission will review the proposed evaluation procedures to ensure they comply with the objective of meeting the identified transmission needs more efficiently or cost-effectively.¹³⁴

76. Public utility transmission providers must amend their OATTs to describe procedures that provide for the consideration of transmission needs driven by Public Policy Requirements in the local and regional transmission planning processes.¹³⁵ There are no restrictions on the type or number of Public Policy Requirements to be considered as long as any such requirements arise from local, state, or federal laws or regulations that drive transmission needs and as long as the requirements of the procedures required in Order No. 1000 are met.¹³⁶ In addition, Order No. 1000 does not preclude any public utility transmission provider from considering in its transmission planning process transmission needs driven by additional public policy objectives not specifically required by local, state or federal laws or regulations. However, Order No. 1000 creates no obligation for any public utility transmission provider or its transmission planning processes to consider transmission needs driven by a public policy objective that is not specifically required by local, state or federal laws or regulations.¹³⁷ In addition, public utility transmission providers are not required to consider Public Policy Requirements themselves as part of the transmission planning process.¹³⁸

¹³² *Id.* P 220.

¹³³ Order No. 1000-A, 139 FERC ¶ 61,132 at P 321.

¹³⁴ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 211.

¹³⁵ *Id.* P 203.

¹³⁶ *Id.* P 214; Order No. 1000-A, 139 FERC ¶ 61,132 at P 319.

¹³⁷ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 216.

¹³⁸ Order No. 1000-A, 139 FERC ¶ 61,132 at P 204.

i. **Regional Transmission Planning Process**

(a) **Filing Parties' Filing**

77. The Filing Parties propose new section 4A in Attachment K that describes the public policy transmission planning process.¹³⁹ The Filing Parties state that, under this new process, NESCOE will be the primary body to identify state and federal public policies that may drive the need for transmission in New England. The Filing Parties state that, following the identification of transmission needs driven by public policy requirements, ISO-NE will undertake scenario studies to provide a sense of the costs and benefits of various high-level alternatives. If some or all states determine that those transmission solutions may meet their identified public policies, then the Filing Parties state that the states may ask ISO-NE to solicit Stage One proposals from pre-qualified incumbent and nonincumbent transmission developers.¹⁴⁰

78. The Filing Parties state that, because Public Policy Transmission Upgrades are optional in nature, “[t]he states should take a leading role in the identification of public policies that may drive the need for transmission projects.”¹⁴¹ The Filing Parties note that in Order No. 1000, the Commission provided that all stakeholders must have an opportunity to provide input and offer proposals regarding the transmission needs they believe should be so identified, but that “[s]ome public utility transmission providers might conclude, in consultation with stakeholders, to develop procedures that rely on a committee of load-serving entities, *a committee of state regulators*, or a stakeholder group to identify those transmission needs for which potential solutions will be evaluated in the transmission planning process.”¹⁴²

(1) **Initial Actions**

79. Under section 4A.1 of Attachment K, the proposed public policy transmission planning process will commence with a notice from ISO-NE by January 15 of at least every third year. The Filing Parties explain that the transmission planning cycle is described in this manner to make it clear that a public policy transmission planning

¹³⁹ Filing Parties Transmittal at 49-50.

¹⁴⁰ *Id.* at 52.

¹⁴¹ *Id.* at 50.

¹⁴² *Id.* at 50-51 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 209 (emphasis added)).

process may commence more often if resources allow, but must occur with a minimum three-year frequency.¹⁴³ The Filing Parties state that the notice informs members of the Planning Advisory Committee that they may provide input to NESCOE regarding which state and federal public policies may drive the need for transmission in the New England system. They state that NESCOE may then submit a written request for a New Public Policy Transmission Study or an update of an existing study by no later than April 1. The Filing Parties explain that NESCOE's request must identify the public policy requirements that are driving transmission needs on the New England system and explain why other suggested needs are not being identified for evaluation. However, if a stakeholder believes that a federal public policy requirement has not been appropriately addressed by NESCOE, that stakeholder may file with ISO-NE a written request that explains the stakeholder's reasoning and that seeks consideration by ISO-NE of NESCOE's position regarding that requirement.¹⁴⁴ The Filing Parties state that this process satisfies the requirements of Order No. 1000 to receive input from all stakeholders and ensure transparency by the posting of written explanations.¹⁴⁵

80. After NESCOE submits a request for a New Public Policy Transmission Study, the Filing Parties state that ISO-NE will initiate and conduct a Public Policy Transmission Study to identify high-level solutions along with the costs and benefits of various scenarios. The Filing Parties state that ISO-NE, with input from the Planning Advisory Committee, will determine the scope, parameters and assumptions of the Public Policy Transmission Study. The Filing Parties state that ISO-NE will post the results of the Public Policy Transmission Study on ISO-NE's website and hold a meeting of the Planning Advisory Committee to solicit input on the scope of possible transmission solutions which may be used as the basis for a competitive Stage One solicitation. The Filing Parties state that, if a follow-on study is conducted to evaluate possible transmission solutions, then ISO-NE will again post the results to its website and provide the results to NESCOE and the Planning Advisory Committee. Within 90 days of receipt, the Filing Parties state that NESCOE may 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. The Filing Parties state that NESCOE will

¹⁴³ *Id.* at 50.

¹⁴⁴ See ISO-NE, OATT, Attachment K, § 4A1.1 (Study of Federal Public Policies Not Identified by NESCOE) (Secondary Version).

¹⁴⁵ Filing Parties Transmittal at 51.

make its submittal together with a non-binding matrix of key desirable features of each of the options that the states wish to explore further.¹⁴⁶

81. In addition, the Filing Parties state that the proposed process includes a means for ISO-NE or stakeholders to identify federal public policies that are not implemented through states or regulated utilities that could arguably drive transmission needs.¹⁴⁷ Specifically, if a stakeholder believes that a federal public policy requirement that may drive transmission needs has not been appropriately addressed by NESCOE, it may request that ISO-NE consider NESCOE's position regarding a federal public policy requirement. Where ISO-NE agrees with a stakeholder position, or based on its own finding, then ISO-NE may perform an evaluation under sections 4A.2 through 4A.4 of Attachment K, as described below. The Filing Parties state that, where ISO-NE initiated a study for a federal public policy that is not selected by one or more states through NESCOE for further development through Stage One proposals, ISO-NE will determine the appropriate next steps to take with regard to such study with input from NESCOE and the Planning Advisory Committee.¹⁴⁸ The Filing Parties state, however, that ISO-NE will not undertake steps in the regional planning process with regard to such a study that have not been approved by the Commission where necessary.¹⁴⁹

(2) Stage One

82. The Filing Parties state that ISO-NE will invite the submission of Stage One Proposals from all interested entities that have pre-qualified as Qualified Transmission Project Sponsors (Qualified Sponsor). The Filing Parties also state that ISO-NE will conduct a preliminary review and will provide NESCOE and the Planning Advisory Committee with a list of Stage One Proposals that meet the required criteria and will post this information on the ISO-NE website.¹⁵⁰ In addition, the Filing Parties state that ISO-NE will inform the region if any of the projects in the Stage One Proposals appear to satisfy reliability needs in the region, so that, if that public policy project were built, then that reliability need and solution could be removed from the regional system plan. At this point, the Filing Parties state that NESCOE may request cost estimates for the estimated

¹⁴⁶ *Id.* at 52.

¹⁴⁷ ISO-NE, OATT, Attachment K, § 4A.1.1 (Secondary Version).

¹⁴⁸ *Id.* § 4A.4 (Secondary Version).

¹⁴⁹ Filing Parties Transmittal at 5 n.23.

¹⁵⁰ The details of this evaluation process is discussed below in Part IV.B.2.c.i.

Stage Two Solution study costs from each of the Qualified Sponsors, thus allowing states to understand the potentially significant study costs before deciding which Stage One Proposal projects to move forward to Stage Two, if any.

83. The Filing Parties state that, within 120 days after ISO-NE holds a Planning Advisory Committee meeting to receive input on the Stage One Proposals that meet the required criteria, as described above, NESCOE may submit to ISO-NE a list of projects that one or more of the states would like to have further developed in a Stage Two study phase. The Filing Parties further explain that, if NESCOE does not identify any projects for Stage Two evaluation, then the public policy planning process cycle will end.¹⁵¹

(3) Stage Two

84. In Stage Two, the Filing Parties state that ISO-NE will work with the Qualified Sponsors of listed projects and with affected transmission owners to evaluate and further develop the projects into engineering plans that can be used in the siting process, reviewed for adverse system impacts, and used for other system integration issues. They state that ISO-NE will report those solutions to NESCOE and to the Planning Advisory Committee for stakeholder input, along with ISO-NE's view as to whether the solutions would also satisfy identified reliability needs. Within 12 months from ISO-NE's report regarding the reliability benefits of any preliminary preferred solutions, the Filing Parties state that either NESCOE or public utility regulators may provide a Public Policy Transmittal to ISO-NE.¹⁵² The Filing Parties explain that the Public Policy Transmittal triggers ISO-NE to place the public policy project into the regional system plan as a Public Policy Transmission Upgrade. The Filing Parties further explain that the Public Policy Transmittal must specify which states support the identified project, as well as the cost allocation that will be used. The Filing Parties add that a Public Policy Transmission Upgrade can only be removed from the Regional System Plan Project List through a written communication from all of the original sponsor states.¹⁵³

¹⁵¹ Filing Parties Transmittal at 55-56.

¹⁵² The Public Policy Transmittal is a written document sent by NESCOE, or jointly by all of the participating states' utility regulatory authorities, to ISO-NE that indicates which of the New England states support inclusion of a particular Public Policy Transmission Upgrade in the Regional System Plan and provides each state's final decision concerning such proposed Public Policy Transmission Upgrade and associated cost allocation as set forth in such state's regulatory authority decisions that is to be utilized for the project costs. ISO-NE, OATT, § I.2.2 (Definitions) (Secondary Version).

¹⁵³ Filing Parties Transmittal at 56.

(b) **Protests/Comments**

85. NEPOOL asserts that it does not support the compliance filing, but instead supports an alternative proposal developed through the NEPOOL stakeholder process.¹⁵⁴ NEPOOL explains NESCOE took the lead in proposing a process for planning and cost allocation associated with public policy requirements in the NEPOOL proposal.¹⁵⁵ NEPOOL further explains that its alternative proposal was developed with various NEPOOL participants and NESCOE to address concerns not addressed in the compliance filing.¹⁵⁶ NEPOOL argues its alternative proposal is more compliant with Order No. 1000, and NEPOOL requests that the Commission direct the Filing Parties to revise their Order No. 1000 compliance filing to reflect the NEPOOL proposal.¹⁵⁷

(1) **Definition of Public Policy Requirements**

86. PSEG Companies generally support ISO-NE's approach with respect to planning for transmission needs driven by public policy requirements.¹⁵⁸ PSEG Companies state that the Filing Parties' proposal is largely consistent with the State Agreement Approach adopted in the PJM Interconnection, L.L.C. (PJM) region.¹⁵⁹ PSEG Companies contend that authorizing state agencies to be responsible for determining what projects will satisfy transmission needs arising out of state public policy requirements avoids the legally

¹⁵⁴ NEPOOL states the NEPOOL proposal received an 83 percent Participants Committee Vote in favor, while ISO-NE's proposal received a 17 percent vote of support, solely from the transmission sector. NEPOOL Comments at 2.

¹⁵⁵ The NEPOOL proposal also includes language proposed by LS Power for the competitive transmission development process, as well as recommendations from other NEPOOL participants (e.g., Massachusetts Municipal Wholesale Electric Company, Conservation Law Foundation, and Synapse Energy Economics (Synapse)). NEPOOL Comments at 10-13.

¹⁵⁶ *Id.* at 10.

¹⁵⁷ *Id.* at 3.

¹⁵⁸ PSEG Companies Comments at 5.

¹⁵⁹ *Id.*; see also *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at PP 42, 142-148 (2013).

impermissible scenario of regional transmission organizations (RTO) engaging in what essentially amounts to policy-making.¹⁶⁰

87. However, PSEG Companies point out that the compliance filing does not define “public policy requirements.” Without a definition, PSEG Companies raise concerns that the new public policy planning process does not adequately delineate whether transmission upgrades being planned to address public policy requirements are derived solely from actual laws or regulations or whether they also include projects that address public policy goals or objectives.¹⁶¹ Thus, PSEG Companies assert that NESCOE’s requests can include needs that may not be reflected in statutes or regulations but which NESCOE identifies as potential policy driven needs, and this will tend toward overbuilding transmission, undermining market signals, and imposing higher costs on consumers.¹⁶²

88. NEPOOL states its alternative proposal adds a definition of public policy requirements to require ISO-NE to account for the impacts of state and federal public policies in the development of the regional system plan.¹⁶³ PowerOptions supports the proposed revisions presented by its consultant, Synapse, to the NEPOOL proposal that would provide a definition of public policy requirements and would require ISO-NE to take such requirements into account in the regional system plan in various ways, including in its development of the plan’s baseline and the impacts of such requirements on capacity and load forecasts and on assumed supply resources.¹⁶⁴

¹⁶⁰ PSEG Companies Comments at 5.

¹⁶¹ *Id.* at 6-7.

¹⁶² *See id.* at 7 n.5; *see also id.* at 6.

¹⁶³ NEPOOL Comments at 11-12. NEPOOL proposes the following definition of public policy requirements: “Public Policy Requirements shall refer to policies pursued by state or federal entities, where such policies impact key elements of system planning such as load forecasts and supply resources, and where such policies are reflected in enacted statutes or regulations, including but not limited to, state energy efficiency programs and requirements under Environmental Protection Agency regulations.” *Id.*, Attachment 1 at 2.

¹⁶⁴ PowerOptions Comments at 1.

89. AWEA also raises issues with the proposed definition of public policy requirements.¹⁶⁵ Specifically, it is concerned that the phrase “where such policies impact key elements of system planning such as load forecasts and supply resources” will inappropriately limit the public policy requirements identified and evaluated in the transmission planning process.¹⁶⁶ AWEA notes that ISO-NE’s definition of public policy requirements does not include consideration of laws and regulations enacted by local governments.¹⁶⁷ Finally, AWEA argues that ISO-NE’s OATT should be amended to at least provide for consideration of public policy objectives that are not yet enacted into federal, state, or local laws or regulations.¹⁶⁸

(2) **Procedures Relating to the
Consideration of Transmission Needs
Driven by Public Policy Requirements
in the Regional Transmission Planning
Process**

90. NEPOOL recommends eliminating section 4A.1.1. of Attachment K, which allows ISO-NE to study federal public policy requirements not identified by NESCOE. AWEA acknowledges that ISO-NE recognizes that there may be federal public policies that are not implemented through the states or directly through regulated utilities that could drive transmission needs. However, AWEA argues that the compliance filing is not transparent with respect to the steps ISO-NE will take after receiving input from the states and stakeholders about transmission needs driven by federal public policy requirements.¹⁶⁹

91. Additionally, NEPOOL urges a change to the language of section 4A.8 that would provide for the public policy planning process to terminate if ISO-NE does not receive a Public Policy Transmittal within twelve months.¹⁷⁰ The Massachusetts Attorney

¹⁶⁵ AWEA Comments at 8. We note that, while AWEA refers to ISO-NE’s definition of public policy requirements, we understand AWEA to instead refer to NEPOOL’s proposed definition of public policy requirements.

¹⁶⁶ *Id.*

¹⁶⁷ *See id.* at 9.

¹⁶⁸ *Id.* at 10.

¹⁶⁹ *Id.* at 16-17.

¹⁷⁰ NEPOOL proposes a number of additional changes related to cost containment. The changes are addressed in Part IV.B.3.b.ii below.

General¹⁷¹ and NESCOE support this change. NESCOE asserts that this change would allow states to continue to consider a proposed project through such means as designating it as an elective upgrade, requesting that the project be studied again in the next public policy planning cycle, or requesting from the Commission a departure from the 12-month tariff deadline and continuing deliberations.¹⁷²

92. Others argue either that the Filing Parties' proposal does not comply with Order No. 1000 or that the NEPOOL proposal is superior to the Filing Parties' proposal. These commenters urge the Commission to direct the Filing Parties to modify their public policy project proposal to conform to the NEPOOL proposal proffered by NEPOOL in its comments.¹⁷³

93. NESCOE emphasizes three elements that are central to its support for the public policy process: (1) the process must recognize a state's central role in identifying the public policies that ISO-NE would consider in its planning; (2) the process must acknowledge that only the states will determine whether and how each state will satisfy its respective state public policy objectives; and (3) each state must decide for itself whether the benefits of a proposed project that are identified in a competitive process outweigh the costs from the perspective of that state's policies and ratepayers pursuant to that state's analysis of its laws and policies.¹⁷⁴ NESCOE maintains that, to the extent details to implement these three fundamental points are not included in ISO-NE's OATT, the states are likely to pursue processes other than Order No. 1000 regional planning (e.g., non-transmission solutions or alternative compliance payment compliance mechanisms) to advance state public policies.¹⁷⁵

94. Moreover, NESCOE submits that, for the states to be able to use the public policy process created pursuant to Order No. 1000, states must (1) have the determinative role in any competitive process that identifies potential transmission solutions that would advance that state's public policies, (2) determine which potential solutions should move forward and under what terms and conditions after final negotiations with a transmission

¹⁷¹ Massachusetts Attorney General Protest at 24.

¹⁷² NESCOE Protest at 33.

¹⁷³ E.g., Connecticut Department of Energy and Environmental Protection Comments at 4; Public Systems Protest at 2; Southern New England States Protest at 54.

¹⁷⁴ NESCOE Protest at 18-19.

¹⁷⁵ *Id.* at 19, 24.

developer that prevails in a competitive process, and (3) determine whether such a project(s) should be removed from further consideration.¹⁷⁶

95. NESCOE submits that, by definition, any process that the states would not use to further Order No. 1000's goal of creating a process in which states may consider state public policy requirements in the local and regional transmission planning processes is *per se* unjust and unreasonable and should be rejected.¹⁷⁷ NESCOE submits several modifications to the Filing Parties compliance filing and suggests that if these modifications were to be ordered by the Commission, the New England states could use the proposed public policy planning process.

96. Southern New England States assert that the proposed regional transmission planning process for public policy projects is not compliant with Order No. 1000, and argue that the NEPOOL proposal is a balanced proposal reflecting stakeholder consensus.¹⁷⁸ Southern New England States request that the Commission direct the Filing Parties to implement the NEPOOL proposal in total; if changes are made to the NEPOOL proposal that upset its balance, the consensus support for the alternative proposal may well dissolve.¹⁷⁹ Southern New England States assert that the fundamental principle of the NEPOOL proposal is that the regional transmission planning process for public policy projects be driven by the public policy goals and decisions of the six New England states; the NEPOOL proposal provides critical details omitted from the Filing Parties' public policy project proposal.¹⁸⁰

97. On the other hand, AWEA does not believe that ISO-NE has met obligations of Order No. 1000 with respect to considering transmission needs driven by public policy requirements.¹⁸¹ AWEA states that the compliance filing allows state backing for a particular project to be the determinative factor as to whether a transmission solution to support a public policy requirement will be identified, evaluated, and selected for cost

¹⁷⁶ *Id.* at 22.

¹⁷⁷ *Id.* at 29.

¹⁷⁸ Southern New England States Protest at 54.

¹⁷⁹ *Id.* at 3, 55.

¹⁸⁰ *Id.* at 55-56.

¹⁸¹ AWEA Comments at 2.

allocation.¹⁸² AWEA argues, however, that ISO-NE, as the relevant public utility transmission provider, is explicitly required to retain ultimate authority for determining what transmission projects are ultimately required to address transmission needs driven by public policy requirements and is essentially delegating that duty to state regulators.¹⁸³

98. Similarly, the Maine Commission raises concerns about the significant state role in the planning for public policy projects. The Maine Commission states that the states are in the position to determine “what, if any, public policy should be the subject of regional transmission planning.”¹⁸⁴ However, they object to the fact that, in several stages of the planning process the states are the entities that decide whether regional transmission planning should be done, as well as whether the state should be required to pay for it.¹⁸⁵

99. Joint Parties urge the Commission to require ISO-NE to submit revisions to fully comply with Order No. 1000, to ensure a truly competitive process for selecting Public Policy Transmission Upgrades based upon objective criteria administered by ISO-NE.¹⁸⁶

(c) Answers

100. NESCOE argues that the Commission should reject AWEA’s request that the Commission modify the process to allow ISO-NE to consider “potential future public policies” in transmission planning, as well as their request that the Commission reject the states’ role in identifying state public policies.¹⁸⁷ NESCOE also argues against AWEA’s request that the Commission reject a framework in which states must determine whether, how and at what cost states will implement state public policy objectives.

101. The PTO Administrative Committee argues that the Commission should reject the NEPOOL language on federal public policies, and state that the compliance filing allows at least for a study by ISO-NE of federal public policy requirements identified by

¹⁸² *Id.* at 2-3.

¹⁸³ *Id.* at 13-14.

¹⁸⁴ Maine Commission Protest at 6.

¹⁸⁵ *Id.* at 6-7.

¹⁸⁶ Joint Parties Protest at 20.

¹⁸⁷ NESCOE Answer at 8-9.

stakeholders but not selected by NESCOE.¹⁸⁸ Similarly, ISO-NE argues against the NEPOOL proposal to eliminate language at section 4A.1.1 that provides a path for ISO-NE to identify federal public policy requirements that may drive transmission needs and develop transmission solutions for consideration. ISO-NE states there may be federal public policies that are not designed to be implemented by states through individual compliance plans, and ISO-NE has proposed language so that there is a backstop process in place if the states either will not or cannot identify the relevant federal public policies for the consideration of transmission needs driven by public policy.¹⁸⁹ ISO-NE argues the proposed language is all the more necessary given NESCOE's indication that the states may simply choose not to participate in the public policy transmission planning process proposed in the compliance filing.

102. ISO-NE states various protestors argue the compliance filing provisions regarding public policy transmission planning should be rejected in favor of substantially similar provisions put forward by NEPOOL; however, the protestors have failed to demonstrate that the compliance filing's provisions for public policy transmission planning fail to comply with Order No. 1000.¹⁹⁰

103. ISO-NE states NEPOOL's proposed revision to the first paragraph of section 4.1 of Attachment K, which would require ISO-NE to evaluate the various benefits and then determine which planning process should apply, is a preference that is not workable and is not a requirement of Order No. 1000.¹⁹¹

104. ISO-NE also responds to NESCOE's statement that without certain of the modifications proposed in the NEPOOL proposal, states are not likely to make use of the Filing Parties' public policy planning process.¹⁹² ISO-NE notes that the same is true for the substantially similar NEPOOL process that provides the states with even greater power in the public policy transmission planning process.¹⁹³ ISO-NE argues that the alternative to the compliance filing is not NEPOOL's proposal, providing the states with

¹⁸⁸ PTO Administrative Committee Answer at 56.

¹⁸⁹ ISO-NE January 18, 2013 Answer at 64-65.

¹⁹⁰ *Id.* at 62.

¹⁹¹ *Id.* at 67.

¹⁹² *Id.* at 72.

¹⁹³ *Id.*

even more control, but rather the elimination of the NESCOE role from the process so that it is not dependent on the states' desire to participate.¹⁹⁴

105. In response to protests submitted by the Maine Commission, Joint Parties, and AWEA arguing that the public policy transmission planning process should be redesigned so that it creates more of an obligation on states to participant and move projects forward, ISO-NE states Order No. 1000 does not require that projects be developed past the "consideration" stage and the protests appear to exceed the scope of Order No. 1000.¹⁹⁵

106. NESCOE also states the Commission should reject AWEA's arguments to confer upon ISO-NE the authority to make decisions about the implementation of state policies for the states.¹⁹⁶ NESCOE argues that neither the Commission nor ISO-NE have the authority or expertise to substitute its judgment for that of the states in connection with state statutory requirements or policy preferences codified in state law, many of which contemplate that state officials will exercise their judgment in balancing the interests and goals identified by state legislatures.¹⁹⁷

107. NESCOE also argues the Commission should reject AWEA's assertion that ISO-NE has the same authority over transmission that could advance state public policies as it does over transmission ISO-NE identifies as being needed to maintain power system reliability.¹⁹⁸ NESCOE points out that some power system reliability needs ISO-NE identifies in system planning can only be satisfied by incremental transmission facilities, while states may satisfy state public policy objectives through diverse means. NESCOE further explains that supporting the development of transmission solutions to reach distant renewable generation resources is only one of many options available to states. NESCOE notes that some New England states allow Renewable Portfolio Standard requirements to be satisfied through alternative compliance payments to effectively cap the costs to consumers of Renewable Portfolio Standard requirements.¹⁹⁹ NESCOE

¹⁹⁴ *Id.* at 73.

¹⁹⁵ *Id.* at 71.

¹⁹⁶ NESCOE Answer at 12-13.

¹⁹⁷ *Id.* at 13.

¹⁹⁸ *Id.* at 16.

¹⁹⁹ *Id.* at 16-17.

argues that alternative compliance payments, codified in state law, represent a state decision that certain levels of renewable resources are not to be funded by state ratepayers at any cost.

(d) Commission Determination

108. We find that the Filing Parties' filing partially complies with the provisions of Order No. 1000 addressing transmission needs driven by public policy requirements, as discussed below. In this section, we find that the Filing Parties must include in ISO-NE's OATT a definition of public policy requirements that includes "enacted statutes (i.e., 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,"²⁰⁰ as well as "duly enacted laws or regulations passed by a local governmental entity, such as a municipal or county government."²⁰¹ Next, we find that the 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. Moreover, we find reasonable and not inconsistent with Order No. 1000 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. We also find, however, that public utility transmission providers in a region may not rely on a committee of state regulators to select Public Policy Transmission Upgrades in the regional transmission plan for purposes of cost allocation. As discussed more fully below, to comply with Order No. 1000 the Filing Parties must propose 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 resolves an identified transmission need driven by public policy requirements. In the final section, we find that the Filing Parties' proposal to allow NESCOE to select Public Policy Transmission Upgrades, while insufficient to comply with Order No. 1000, is acceptable as a complementary process to the regional transmission planning process required by Order No. 1000.

²⁰⁰ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 2.

²⁰¹ Order No. 1000-A, 139 FERC ¶ 61,132 at P 319.

(1) **Definition of Public Policy Requirements**

109. While the Filing Parties have proposed revisions to consider transmission needs driven by public policy requirements, they did not propose to include a definition of public policy requirements in ISO-NE's OATT. We agree with protestors that ISO-NE's OATT must define public policy requirements. Order No. 1000 requires public utility transmission providers to consider "enacted statutes (i.e., 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,"²⁰² as well as "duly enacted laws or regulations passed by a local governmental entity, such as a municipal or county government."²⁰³ Including a specific definition of public policy requirements in ISO-NE's OATT would provide greater clarity for participants in the regional transmission planning process. Accordingly, we direct the Filing Parties to submit, within 120 days of the date of issuance of this order, 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 to consider duly enacted local laws and regulations. In response to commenters, we note the Filing Parties may, but are not required to, include potential future public policy directives and requirements in their proposed definition of public policy requirements, as Order No. 1000 creates no obligation for any public utility transmission provider or its transmission planning processes to consider transmission needs driven by a public policy objective that is not specifically required by local, state or federal laws or regulations.²⁰⁴

(2) **Procedures To Identify Transmission Needs Driven by Public Policy Requirements in the Regional Transmission Planning Process**

110. We find that the Filing Parties partially comply with the requirement to establish procedures for identifying transmission needs driven by public policy requirements in ISO-NE's regional transmission planning process. ISO-NE's regional transmission planning process as described in Attachment K of ISO-NE's OATT makes clear that stakeholders may propose and provide input regarding public policy requirements that

²⁰² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 2.

²⁰³ Order No. 1000-A, 139 FERC ¶ 61,132 at P 319.

²⁰⁴ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 216.

they believe drive transmission needs.²⁰⁵ Specifically, no less often than every three years, by January 15 of that year, ISO-NE will post a notice indicating that members of the Planning Advisory Committee²⁰⁶ may provide NESCOE with input regarding state and federal public policy requirements that drive transmission needs in the New England transmission system. Thus, we find that by allowing members of the Planning Advisory Committee to provide input to NESCOE on transmission needs driven by public policy requirements, the Filing Parties' proposal 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.²⁰⁷

111. Moreover, we find that the Filing Parties' proposal complies 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.²⁰⁸ Under the Filing Parties' proposal, NESCOE may submit to ISO-NE a request for a new public policy transmission study, or an update of a previously conducted study, no later than April of the year in which the Planning Advisory Committee's members provide input to NESCOE regarding state and federal public policy requirements that drive transmission needs.²⁰⁹ In Order No. 1000, the Commission "strongly encourage[d] states to participate actively in the identification of transmission needs driven by public policy requirements," providing that a public utility transmission provider may "conclude, in consultation with stakeholders, to develop procedures that rely on . . . a committee of state regulators . . . to identify those

²⁰⁵ ISO-NE, OATT, Attachment K, § 4A.1 (Secondary Version).

²⁰⁶ Section 2.3 of Attachment K states that, "[a]ny entity . . . may designate a member to the Planning Advisory Committee." ISO-NE, OATT, Attachment K, § 2.3 (Secondary Version). The Commission previously found that Planning Advisory Committee meetings are open to all interested New England constituents. *See* 890 Compliance Order, 123 FERC ¶ 61,161 at P 29.

²⁰⁷ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 206-208.

²⁰⁸ *Id.* P 209.

²⁰⁹ Filing Parties Transmittal at 51; ISO-NE, OATT, Attachment K, § 4A.1 (Secondary Version).

transmission needs for which potential solutions will be evaluated in the transmission planning processes.”²¹⁰ The Filing Parties’ proposal, according to which NESCOE will review proposed state and federal public policy requirements that drive transmission needs and request a new public policy transmission study or an update of a previously conducted study, is consistent with the Commission’s determination in Order No. 1000 that such procedures may rely on a committee of state regulators.

112. NEPOOL requests that the Commission require the Filing Parties to eliminate section 4A.1.1, 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, from ISO-NE’s Attachment K. However, NEPOOL does not explain why this provision is inconsistent with Order No. 1000. Order No. 1000 requires that the process for identifying transmission needs driven by public policy requirements must allow stakeholders an opportunity to provide input and to offer proposals regarding the transmission needs they believe are driven by public policy requirements.²¹¹ As explained above, we find that ISO-NE satisfies this requirement because, under section 4A.1 members of the Planning Advisory Committee may provide input to NESCOE regarding those transmission needs they believe are driven by public policy requirements. Section 4A.1.1 is an additional opportunity for stakeholders to provide input regarding which federal public policy requirements they believe drive transmission needs. While Order No. 1000 does not require this additional procedure, we find that it is reasonable and not inconsistent with Order No. 1000.

113. We agree, however, with AWEA’s arguments that section 4A.1.1 is 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. Under section 4A.1.1, ISO-NE will consider a stakeholders’ request and determine whether ISO-NE should perform an evaluation under sections 4A.2 through 4A.4 of Attachment K of a federal public policy not identified by NESCOE. Among other things, sections 4A.2 through 4A.4 state that information pertaining to a Public Policy Transmission Study will be posted on the ISO-NE website, provided to the Planning Advisory Committee, and discussed with stakeholders. Section 4A.4 additionally states that ISO-NE “will determine the appropriate next steps to take with regard to such study with input from NESCOE and the Planning Advisory Committee [and] will not undertake steps in the regional planning process with regard to

²¹⁰ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 209 & n.189.

²¹¹ *Id.* PP 207, 208.

such a study that have not been approved by the Commission where necessary.”²¹² Under this broad language, it is 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. We therefore require the Filing Parties, within 120 days of the date of the issuance of this order, 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.

114. We find that the Filing Parties have 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 local and regional transmission planning processes, and (2) why other suggested transmission needs driven by public policy requirements will not be evaluated. Under ISO-NE’s OATT, NESCOE may submit to ISO-NE a request for a new Public Policy Transmission Study, or an update of a previously conducted study. Along with this request, ISO-NE’s OATT states that “NESCOE will provide [ISO-NE] with a written explanation of which transmission needs driven by public policy requirements [ISO-NE] will evaluate for potential solutions in the regional planning process, including why other suggested transmission needs will not be evaluated.”²¹³ Further, ISO-NE’s OATT states that ISO-NE will post NESCOE’s explanation on ISO-NE’s website.²¹⁴ Accordingly, we find that the Filing Parties’ proposal partially complies with this posting requirement in Order No. 1000. We find that the Filing Parties have not met this posting requirement with respect to transmission needs driven by federal public policy requirements not identified

²¹² ISO-NE, OATT, Attachment K (Secondary Version), § 4A.4.

²¹³ *Id.* § 4A.1 (Secondary Version).

²¹⁴ *Id.* § 4A.1 (Secondary Version). We note that ISO-NE is required to post on its website an explanation of (1) those transmission needs driven by public policy requirements that have been identified for evaluation for potential solutions in the regional transmission planning process and (2) why other suggested transmission needs driven by public policy requirements introduced by stakeholders were not selected for further evaluation. 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, then ISO-NE must submit an alternative proposal to comply with this requirement of Order No. 1000.

by NESCOE. Thus, we require that, within 120 days of the date of the issuance of this order, the 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.

115. The Commission rejects NEPOOL's suggestions as to changes to the length of time for which parties may consider transmission projects to meet public policy needs in section 4A.8. The Commission finds that the OATT provisions as filed by the Filing Parties are just and reasonable, and we will therefore approve them. As the Commission has stated in other cases, "there may be more than one just and reasonable [filing], and in determining whether to accept [a utility's] filing, the Commission must only determine that [that utility's] proposed solution is just and reasonable, not that it is superior to other possible solutions."²¹⁵ Nonetheless, we recognize that NEPOOL's proposed modifications may provide benefits to all parties, and we encourage the Filing Parties and all market participants to continue to negotiate potential improvements to the public policy planning process.

(3) **Procedures to Evaluate Potential Solutions to Meet Identified Transmission Needs Driven by Public Policy Requirements in the Regional Transmission Planning Process**

116. As we noted in Part IV B.1.c, we find that the Filing Parties' do 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. As discussed in further detail in Part IV.B.2.d.iv.b below, the Filing Parties have not proposed an evaluation process for transmission solutions to identified transmission needs driven by public policy requirements that satisfies the requirements of Order No. 1000.²¹⁶

²¹⁵ *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157, at P 77 (2009).

²¹⁶ For example, Order No. 1000 requires 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 purposes of cost allocation. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 452. This process must ensure

(continued...)

Specifically, the Filing Parties do 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. Instead, the Filing Parties propose that (1) NESCOE may 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, and (2) NESCOE may 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.²¹⁷ To comply with Order No. 1000, we find that the 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 indicates that it would like ISO-NE to study further, as the Filing Parties propose.

117. Accordingly, we direct the Filing Parties to submit, within 120 days of the date of issuance of this order, a further compliance filing that adopts procedures in the ISO-NE OATT to evaluate at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements. We reiterate 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. 1000.²¹⁸

(4) **Selection of More Efficient or Cost-Effective Solutions to be Included in the Regional Transmission Plan for Purposes of Cost Allocation**

118. As we noted in Part IV.B.1.c.iv, above, we find that the Filing Parties fail to comply with Order No. 1000's requirement that public utility transmission providers

transparency and provide the opportunity for stakeholder coordination and 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. *See* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at PP 267 & 454.

²¹⁷ Filing Parties Transmittal at 52 & 55-56.

²¹⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 203.

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.²¹⁹ Specifically, we find that the Filing Parties do not propose for ISO-NE to select the more efficient or cost-effective solutions to the identified transmission needs driven by public policy requirements. As proposed, a Public Policy Transmission Upgrade is selected in the regional transmission plan when NESCOE, or all of the participating states' utility regulatory authorities jointly, submit a Public Policy Transmittal to ISO-NE. Therefore, 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.

119. 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.²²⁰ For example, Order No. 1000 provides, "[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."²²¹ Similarly, Order No. 1000-A explains, "Order No. 1000 . . . *requires public utility transmission providers* in a region to adopt transparent and not unduly discriminatory criteria for selecting a new transmission project in a regional transmission plan for purposes of cost allocation."²²² The 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. We therefore find that the 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. Accordingly, we direct the Filing Parties to file, within 120 days of the date of this order, a compliance filing that addresses the above concerns.

²¹⁹ The Evaluation Process is discussed in Part IV.B.1.d.i.d.3 of this order.

²²⁰ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 80, 148-149.

²²¹ *Id.* P 331 (emphasis added).

²²² Order No. 1000-A, 139 FERC ¶ 61,132 at P 455 (emphasis added).

(5) **Public Policy Transmission Planning Process Driven by NESCOE and the New England States**

120. As explained in the two preceding sections, we find that the Filing Parties' proposal does 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 Transmission Upgrades to select in the regional transmission plan for purposes of cost allocation.

121. However, we find that certain provisions in the 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 the Filing Parties must submit in their further compliance filing. While the Filing Parties may not rely on their proposed public policy-related transmission planning process to comply with Order No. 1000, we find that certain aspects of the proposal are related to the Filing Parties' proposed cost allocation method for Public Policy Transmission Upgrades, which we find in section IV.B.3.iii.(b) below is an acceptable, complementary cost allocation method to an Order No. 1000 compliant cost allocation method. Specifically, the Filing Parties propose 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; and (3) determine whether to include a Public Policy Transmission Upgrade in the regional transmission plan. These provisions 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. Taken together, the Filing Parties' proposed public policy transmission planning process and proposed cost allocation method for Public Policy Transmission Upgrades, while not compliant with Order No. 1000, represent a just and reasonable alternative voluntary process that will not conflict or otherwise replace the process that the Filing Parties must submit to comply with Order No. 1000.

ii. Local Transmission Planning Process**(a) Filing Parties' Filing**

122. The Filing Parties state that they are amending Attachment K – Local to incorporate a local system planning process for public policy requirements. They explain that, under the local system planning process, each Participating Transmission Owner serves as a transmission planner. Under the current process, the Planning Advisory Committee will periodically provide input and feedback to the Participating Transmission Owners regarding the development of a Local System Plan and the conduct of associated system enhancement and expansion studies. Local System Plan issues identified for local areas will also be periodically addressed at the end of regularly scheduled Planning Advisory Committee meetings. If a Participating Transmission Owner contemplates the addition of new non-Pool Transmission Facilities, then it will present its Local System Plan to the Planning Advisory Committee not less than once per year.²²³ The Filing Parties have added to this process that, not less than every three years, the Filing Parties state that each Participating Transmission Owner will post a notice indicating that members of the Planning Advisory Committee, NESCOE, or any state may provide the Participating Transmission Owner with input regarding state and federal public policy requirements identified as driving particular local transmission needs driven by public policy requirements. The Filing Parties explain that the Participating Transmission Owner will 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. After applicable public policy requirements have been identified, each Participating Transmission Owner will then utilize its existing planning to determine if Non-Pool Transmission Facilities should be built to address transmission needs driven by such public policy requirements. They add that each Participating Transmission Owner will consult with NESCOE and applicable states and will consider their views prior to including a Local Public Policy Transmission Upgrade in its local system plan.

(b) Protest

123. As discussed above, Joint Movants assert that the compliance filing does not state whether procedures are in place to ensure that the local planning process provides comparable consideration for non-transmission alternatives, nor does it identify OATT-based procedures and metrics to help ensure comparable consideration and more efficient

²²³ See ISO-NE, OATT, Attachment K – Local, § 1.2 (Planning Advisory Committee Review) (Secondary Version).

and cost-effective outcomes. They assert that this is important for non-transmission alternatives, because it is likely that many non-transmission alternatives will be linked to lower voltage, non-pool transmission facilities subject to local (i.e., non-pool transmission) system planning. Joint Movants express concern that, because the entities responsible for local planning are Participating Transmission Owners rather than an independent entity, there may be an opportunity for undue discrimination or preference.²²⁴

(c) Commission Determination

124. We find that the Filing Parties' proposal partially complies with the requirement to consider transmission needs driven by public policy requirements in the local transmission planning process. Each Participating Transmission Owner must post a notice, not less than every three years, indicating that the members of the Planning Advisory Committee, NESCOE, or any state may provide input regarding state and federal public policy requirements identified as driving transmission. We find that the Filing Parties' proposal satisfies Order No. 1000's requirement that each public utility transmission provider revise its OATT to include procedures to identify local transmission needs driven by public policy requirements that allow stakeholders an opportunity to provide input and to offer transmission proposals regarding the transmission needs they believe are driven by public policy requirements.

125. We find that the Filing Parties have not complied 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. As noted above, while each Participating Transmission Owner will decide which transmission needs driven by public policy requirements to identify for further evaluation after consulting with stakeholders, the Filing Parties' proposal does not describe the process that each Participating Transmission Owner will use to do so. Accordingly, we direct the Filing Parties to submit, within 120 days of the date of issuance of this order, a further compliance filing to revise its 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.

²²⁴ Joint Movants Protest at 20-21.

126. Order No. 1000 also requires that each public utility transmission provider must 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 local transmission planning process, and (2) why other suggested transmission needs driven by public policy requirements will not be evaluated. The Filing Parties partially comply with this requirement. We find that the Filing Parties comply with the first part of the posting requirement because each Participating Transmission Owner will 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 plan. However, the Filing Parties do not comply with the second part of the posting requirement because they will not post an explanation of why other suggested transmission needs driven by public policy requirements will not be evaluated in the local transmission planning process. Accordingly, we require the Filing Parties to submit, within 120 days of the issuance of this order, a further compliance filing to revise 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, we find that the Filing Parties have not met the Order No. 1000 requirements with respect to evaluating at the local level potential transmission solutions to identified transmission needs driven by public policy requirements. While the Participating Transmission Owners will decide which transmission needs driven by public policy requirements to identify for further evaluation after consulting with stakeholders, the Filing Parties do 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. Therefore, we will require the Filing Parties, within 120 days of the date of this order, to file with the Commission its procedures for how transmission solutions to identify transmission needs driven by public policy requirements will be evaluated in the local transmission planning process, as required by Order No. 1000.

127. In response to Joint Movants, we find that the local planning process allows for formal stakeholder input²²⁵ and for feedback from the Planning Advisory Committee, at which time consideration of non-transmission alternatives could be requested. Additionally, the local planning process requires each Participating Transmission Owner to consider the planning impact of identified generation and/or demand resources.²²⁶

²²⁵ ISO-NE, OATT, Attachment K – Local, § 1.1 (Secondary Version).

²²⁶ *Id.* § 1.3 (Secondary Version).

Further, Attachment K – Local requires that the local system plan “shall provide sufficient information to allow Market Participants to assess the quantity, general locations and operating characteristics of the type of incremental supply or demand-side resources, or merchant transmission projects, that would satisfy the identified needs or that may serve to modify, offset or defer proposed regulated transmission upgrades.”²²⁷

2. Nonincumbent Transmission Developer Reforms

128. Order No. 1000 institutes a number of reforms that seek to ensure that nonincumbent transmission developers have an opportunity to participate in the transmission development process. These reforms involve the elimination of federal rights of first refusal from Commission-jurisdictional tariffs and agreements, and the development of requirements regarding qualification criteria for transmission developers and processes for evaluating proposals for new transmission facilities.

a. Federal Rights of First Refusal

129. Order No. 1000 requires that each public utility transmission provider eliminate 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.²²⁸

Order No. 1000 defines a transmission facility selected in a regional transmission plan for purposes of cost allocation as a transmission facility that has been selected pursuant to a transmission planning region’s Commission-approved regional transmission planning process for inclusion in a regional transmission plan for purposes of cost allocation because it is a more efficient or cost-effective solution to regional transmission needs.²²⁹ If a public utility transmission provider’s tariff or other Commission-jurisdictional agreements does not contain a federal right of first refusal provision, the public utility transmission provider should state this in its compliance filing.²³⁰

²²⁷ *Id.* § 1.4 (Secondary Version).

²²⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313. 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.

²²⁹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 5, 63.

²³⁰ *See id.* P 314 n.294.

130. The requirement in Order No. 1000 to eliminate a federal right of first refusal does not apply to local transmission facilities,²³¹ which are defined 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.²³² The requirement also does not apply to the right of an incumbent transmission provider to build, 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.²³³ In addition, the Commission noted that 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.²³⁴

131. The Commission clarified in Order No. 1000-A that Order No. 1000 does not require elimination of a federal right of first refusal for a new transmission facility if the regional cost allocation method results in an allocation of 100 percent of the facility's costs to the public utility transmission provider in whose retail distribution service territory or footprint the facility is to be located.²³⁵ The Commission also clarified in

²³¹ *Id.* PP 226, 258, 318.

²³² *Id.* 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 an RTO or ISO whose footprint covers the entire region, local transmission facilities are defined by reference to the retail distribution service territories or footprints of its underlying transmission owning members. Order No. 1000-A, 139 FERC ¶ 61,132 at P 429.

²³³ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 226, 319; 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.

²³⁴ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319.

²³⁵ Order No. 1000-A, 139 FERC ¶ 61,132 at P 423.

Order No. 1000-A that the phrase “selected in a regional transmission plan for purposes of cost allocation” excludes a new transmission facility if the costs of that facility are borne entirely by the public utility transmission provider in whose retail distribution service territory or footprint that new transmission facility is to be located.²³⁶ However, the Commission acknowledged in Order No. 1000-A that there may be a range of examples of multi-transmission provider zones and that it would address whether a cost allocation to a multi-transmission provider zone is regional on a case-by-case basis based on the facts presented on compliance.²³⁷

132. The Commission received comments during the rulemaking process regarding the applicability of the *Mobile-Sierra* doctrine to rights of incumbent transmission owners to build found in agreements subject to Commission jurisdiction.²³⁸ The Commission stated in Order No. 1000 that the record was not sufficient in the generic rulemaking 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.²³⁹ The Commission stated in Order No. 1000-A, and reiterated in Order No. 1000-B, that any compliance filing must include revisions to any Commission-jurisdictional tariffs and agreements necessary to comply with Order No. 1000 as well as the *Mobile-Sierra* arguments. The Commission will first decide—based on a more complete record, including the viewpoints of other interested parties—whether the agreement has *Mobile-Sierra* protection, and if so, whether the Commission has met the applicable standard of review such that it can require the modification of the particular provisions involved. If the Commission determines that the agreement does have *Mobile-Sierra* protection and that it cannot meet the applicable standard of review, the Commission will not consider whether the revisions submitted to the Commission-jurisdictional tariffs and agreements comply with Order No. 1000. However, if the Commission determines that the agreement is not protected by a *Mobile-Sierra* provision or that the Commission is able to meet the applicable standard of review, then the Commission will decide whether the submitted revisions to the Commission-jurisdictional tariffs and agreements comply with

²³⁶ *Id.*

²³⁷ *Id.* P 424; Order No. 1000-B, 141 FERC ¶ 61,044 at P 40.

²³⁸ 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*).

²³⁹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 292.

Order No. 1000. Moreover, if such tariffs and agreements are accepted, they would become effective consistent with the approved effective date.²⁴⁰

i. Mobile-Sierra

(a) Filing Parties' Filing

133. According to the Filing Parties, when ISO-NE became an RTO, the Commission accepted the TOA, which they characterize as a contract between ISO-NE and the Participating Transmission Owners that defines the relationship, rights, and responsibilities of the parties. The Filing Parties assert that the negotiation of the TOA was essential to the formation of the RTO; it was a key element of the package that allowed for the further restructuring between the new ISO-NE and the Participating Transmission Owners. They state that the TOA reflects a balanced agreement for which *Mobile-Sierra* protection of key provisions was an essential element for all parties.

134. They state, in particular, that TOA section 3.09 (as detailed in Schedule 3.09(a)) provides for the right and obligation of each Participating Transmission Owner to own and construct new or upgraded transmission facilities listed in the regional system plan that are located within or connected to its existing electric system.²⁴¹ Section 11.04(c) of the TOA accords *Mobile-Sierra* protection against amendment of section 3.09 and Schedule 3.09(a). Section 11.04(c) states:

²⁴⁰ Order No. 1000-A, 139 FERC ¶ 61,132 at P 389.

²⁴¹ Schedule 3.09(a) states that “[e]ach PTO shall perform all of its responsibilities, and exercise each of its rights, with respect to the planning and expansion of the New England Transmission System in accordance with the ISO OATT and Schedule 3.09(a) hereto. . . .” Schedule 3.09(a) further states:

Subject to the requirements of applicable law, government regulations and approvals, including requirements to obtain any necessary federal, state or local siting, construction and operating permits; the availability of required financing; the ability to acquire necessary rights-of-way; and satisfaction of the other conditions set forth in this Section 1.1, each [Transmission Owner] shall have the obligation to own and construct (or cause to be constructed) any New Transmission Facility or Transmission Upgrade that is designated in the ISO System Plan as necessary and appropriate for system reliability or economic efficiency. . . .

Absent the agreement of the Parties to any proposed change hereof or an amendment hereof pursuant to Section 11.04(a), the standard of review for changes to the following sections of this Agreement (*or changes to any schedules associated with such sections*) proposed by a Party, a non-party or the Federal Energy Regulatory Commission acting sua sponte shall be the “public interest” standard of review under the Mobile-Sierra Doctrine: ...3.09,...11.04(a)-(d).^[242]

135. The Filing Parties contend that this *Mobile-Sierra* provision affects not just the parties to the TOA, as well as non-parties, but it also includes the Commission itself. Thus, they contend that anyone who would propose to amend some provision must make a showing that the “public interest” requires modification to these planning- and expansion-related responsibilities and contractual rights of ISO-NE and the Participating Transmission Owners under section 3.09 and Schedule 3.09(a).

136. Moreover, the Filing Parties state the Commission expressly approved *Mobile-Sierra* treatment of the incumbent transmission owners’ right to build in section 3.09.²⁴³ They state that the Commission’s intent in accepting the TOA was clear.²⁴⁴

137. The Filing Parties maintain that *Mobile-Sierra* treatment prevents changes to executed contracts except in extraordinary circumstances where the Commission finds that a contract seriously harms the public interest.²⁴⁵ They note that the *Mobile-Sierra* doctrine prevents any single party or the Commission from modifying or rescinding an existing contract, except in cases of “unequivocal public necessity” or “extraordinary

²⁴² Filing Parties Transmittal at 15 (citing TOA § 11.04(c)) (emphasis in original).

²⁴³ *Id.* (citing *ISO New England Inc.*, 109 FERC ¶ 61,147, at P 74 (2004) (2004 TOA Rehearing Order) (“Specifically, we will grant Mobile-Sierra protection, as requested, applicable to the following provisions of the Transmission Operating Agreement: sections 3.01, 3.09, 3.11, 3.13, 4.01(e), 4.07, 11.04(a)-(d) and 11.05”); *see also ISO New England Inc.*, 106 FERC ¶ 61,280 (2004 TOA Order) (accepting partial settlement). The 2004 TOA Order and 2004 TOA Rehearing Order are referred to jointly as the 2004 TOA Orders.

²⁴⁴ *Id.* at 19 (citing 2004 TOA Rehearing Order, 109 FERC ¶ 61,147 at PP 77-78).

²⁴⁵ *Id.* (citing *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*) and *Fed. Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*)).

circumstances.”²⁴⁶ The Filing Parties further cite to the Supreme Court’s *Morgan Stanley* decision which, they assert, makes clear that the Court considers the doctrine to be a substantial limitation on the Commission’s authority to change signed contracts under section 206.²⁴⁷ The Filing Parties state that *Morgan Stanley* holds that the just and reasonable standard requires a different level of review for negotiated bilateral contracts, as opposed to unilaterally filed tariffs or other agreements that are not executed by the buyers. They maintain that, in the context of negotiated bilateral (or multilateral) contracts, the Commission is required to presume that an electricity rate, term, or condition, or other practice set by a freely negotiated contract meets the FPA’s just and reasonable standard.

138. The Filing Parties further state that in *NRG*, the Supreme Court further held that the *Mobile-Sierra* presumption is not limited to the contracting parties, but applies to changes requested by or proposed by the Commission as well.²⁴⁸ Thus, they assert, the Commission cannot avoid *Mobile-Sierra* by arguing that it is acting on behalf of the interests of non-parties to a contract. Further, the Filing Parties state that the Commission has acknowledged that *Morgan Stanley* requires it to assume that the parties to an executed agreement intend that the contract will receive *Mobile-Sierra* protection, unless the parties expressly provide otherwise.²⁴⁹

139. The Filing Parties maintain that the record supports the conclusion that New England’s existing planning process is “consistent with, or superior to” the provisions generically proposed by the Commission.²⁵⁰ In support, they state, *inter alia*,

²⁴⁶ *Id.* at 19 n.59 (citing *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) (*Permian Basin*); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 582 (1981)).

²⁴⁷ *Id.* at 19 (citing *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist No. 1 of Snohomish Cnty.*, 554 U.S. 527, 530 (2008) (*Morgan Stanley*) (“Under the *Mobile-Sierra* doctrine, the [Commission] must presume that the rate set out in a freely negotiated . . . contract meets the ‘just and reasonable’ requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest”).

²⁴⁸ *Id.* (citing *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 130 S. Ct. 693, 699 (2010) (*NRG*)).

²⁴⁹ *Id.* at 21 n.66 (citing *Standard of Review for Modifications to Jurisdictional Agreements*, FERC Stats. & Regs. ¶ 35,562 (cross-referenced at 125 FERC ¶ 61,310, at P 4 (2008))).

²⁵⁰ *Id.* at 22.

that New England differs from the rest of the country with respect to transmission planning, because it has already completed a substantial build-out and upgrading of its transmission system in the last decade and has approved a large number of additional projects.²⁵¹

(b) **Protests/Comments**

140. NEPOOL asks the Commission to consider two factors in its *Mobile-Sierra* analysis, i.e., whether the current right of first refusal is contrary to the public interest.²⁵² First, NEPOOL emphasizes that the Filing Parties' proposal received support only from the Participating Transmission Owners. NEPOOL avers that there is a clear "public preference" from the wholesale market participants, representative from the states, and consumer advocates; NEPOOL maintains that the New England states "expressed a clear preference for competitive transmission development" for Reliability, Market Efficiency, and Public Policy Transmission Upgrades.²⁵³ According to NEPOOL, the Commission should take into account this preference and the competitive market structure already established in New England. Secondly, NEPOOL points out that the purpose behind the *Mobile-Sierra* doctrine is to promote the stability of commercial supply contracts in the energy industry, but the exclusive right to build in ISO-NE's TOA is not the typical "contract rate" protected by *Mobile-Sierra*.²⁵⁴

141. NESCOE avers that the "animating purpose of the *Mobile-Sierra* doctrine, which is to promote the stability of commercial supply contracts in the energy industry, is not served by applying the doctrine to the TOA."²⁵⁵ In NESCOE's view, such application "frustrates the achievement of other important policy goals, such as ratepayer benefits."²⁵⁶ But, in any case, NESCOE contends that the Commission could make the requisite public interest showing to modify these provisions of the TOA. In fact, NESCOE points out that the Commission has already addressed the rate impact, and the impact on the regional transmission planning processes, of the right of first refusal

²⁵¹ *Id.* at 23.

²⁵² NEPOOL Comments at 18.

²⁵³ *Id.*

²⁵⁴ *Id.* at 19.

²⁵⁵ NESCOE Protest at 46.

²⁵⁶ *Id.* at 47.

provisions.²⁵⁷ Finally, as NEPOOL, NESCOE calls on the Commission to take into account the “clear preference for competitive transmission development” contained in the NEPOOL-supported proposal.²⁵⁸

142. New Hampshire Transmission states that the right of first refusal provisions are not contract rates to which the *Mobile-Sierra* presumption necessarily applies, nor did the Commission exercise discretion to treat these provisions as contract rates for *Mobile-Sierra* purposes. New Hampshire Transmission makes the point that, to be a “contract rate,” the rate must be negotiated between the party charging and the party charged, which is not the case, as here, where A and B contract for A’s price to C.²⁵⁹ New Hampshire Transmission contends that, while the Commission stated that it was granting *Mobile-Sierra* treatment to section 3.09 of the TOA, including Schedule 3.09(a), the Commission did not exercise such discretion with respect to the right of first refusal. With reference to current case law, New Hampshire Transmission maintains that the Commission did not understand its action to be bestowing *Mobile-Sierra* protection on the right of first refusal as a non-contract rate.²⁶⁰ In any case, New Hampshire Transmission states that the Commission has made the public interest showing required to overcome *Mobile-Sierra* treatment by its determination in Order Nos. 1000 and 1000-A to end discrimination and ensure that rates are just and reasonable. New Hampshire Transmission remarks, however, that this case “is nothing like the typical *Mobile-Sierra* case,” but instead relates to non-rate terms and conditions.²⁶¹ New Hampshire Transmission characterizes the Filing Parties’ argument as a collateral attack on Order No. 1000, and New Hampshire Transmission argues that the merit of the Filing Parties’ proposal is reflected by garnering just 17 percent of the vote in support.

143. Public Systems contend that the *Mobile-Sierra* doctrine is not important, because the rights and obligations in Schedule 3.09(a) of the TOA pertain only to the Participating Transmission Owner selected by ISO-NE following the process mandated by Order No. 1000, which allows for submissions by both incumbent and nonincumbent

²⁵⁷ *Id.* at 47-48 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 3, 256, 260, 292, 313; Order No. 1000-A, 139 FERC ¶ 61,132 at PP 361, 388-389).

²⁵⁸ *Id.* at 49.

²⁵⁹ *See* New Hampshire Transmission Protest at 25-26, 27.

²⁶⁰ *See* New Hampshire Transmission Protest at 29-31 and accompanying notes.

²⁶¹ *Id.* at 35.

transmission developers.²⁶² And if an Participating Transmission Owner is not subject to the obligation to build, it does not possess the corresponding right.²⁶³ Public Systems maintain that the Commission has already met the *Mobile-Sierra* public interest showing by concluding that continuing a monopoly over the development of transmission facilities harms consumers. They state that the Commission has already found that leaving in place practices that may undermine the identification and evaluation of more efficient or cost-effective solutions can, in turn, result in unjust and unreasonable rates. They posit that retaining exclusionary rights of first refusal “will hurt consumers by limiting alternatives.”²⁶⁴

144. Southern New England States agree that the TOA alone does not establish a *Mobile-Sierra* presumption. Further, they contend that the 2004 Order granting *Mobile-Sierra* treatment of section 3.09 does not require a public interest showing any different from that which the Commission already has made in Order No. 1000.²⁶⁵ According to Southern New England States, the 2004 Order’s grant of *Mobile-Sierra* treatment was explicitly conditioned on section 3.09 being subject to the provisions of the ISO-NE OATT. Thus, they explain, that such *Mobile-Sierra* treatment “does *not* insulate [section 3.09]—including its federal right of first refusal—from conforming to the governing provisions of the ISO-NE OATT as they may exist from time to time (and understanding that the OATT will be changed from time to time).”²⁶⁶ In this “limited *Mobile-Sierra* protection,” the Filing Parties “assumed the risk that the planning procedures in the ISO-NE OATT might be modified in ways that required modification of their right of first refusal.”²⁶⁷ Therefore, according to Southern New England States, the Filing Parties have things backwards: section 3.09 does not override the OATT; rather, the OATT overrides section 3.09. “The *Mobile-Sierra* treatment accorded to section 3.09 by the Commission’s 2004 order expressly makes that section of the TOA subject to future changes to the [ISO-NE] OATT’s planning procedures.” Southern New

²⁶² See Public Systems Protest at 9.

²⁶³ *Id.* at 11.

²⁶⁴ *Id.* at 14.

²⁶⁵ Southern New England States Protest at 14.

²⁶⁶ *Id.* at 15 (emphasis in original).

²⁶⁷ *Id.* at 15 & n.45 (citing *Texaco Inc. v. FERC*, 148 F.3d 1091, 1098 (D.C. Cir. 1998) (*Texaco*) (stating that parties “always contract in the shadow of the regulatory state, and they cannot presume that their contracts are immune to its inherent risks”)).

England States aver that the rationale in Order Nos. 1000 and 1000-A provides a basis for a public interest finding, should that be necessary.²⁶⁸

145. The Massachusetts Attorney General maintains that section 3.09 of the TOA does not contain a right of first refusal. The Attorney General explains that, at the time these provisions were approved, the Commission had a different understanding of their meaning. According to the Massachusetts Attorney General, the Commission characterized the provisions of section 3.09 as “provid[ing] direction to the Participating Transmission Owners and [ISO-NE] to follow planning procedures contained in the

[ISO-NE] OATT.”²⁶⁹ Thus, the Attorney General explains, the Commission found that the provision will have no adverse impact on third parties or the New England Market. But, as the Massachusetts Attorney General contends, a right of first refusal unquestionably has an adverse impact on third parties. Further, contracts affecting the public interest are to be construed in favor of the public. Interpreting the language of the TOA to grant a right of first refusal would render it contrary to the public interest.²⁷⁰ According to the Massachusetts Attorney General, this purported right of first refusal is not protected by the *Mobile-Sierra* doctrine because the provision would be contrary to section 205 of the FPA.²⁷¹ The Attorney General avers that the Commission could correct unlawful provisions under FPA section 206; “[u]nlawful contract provisions certainly do not merit *Mobile-Sierra* protection.”²⁷² If section 3.09 is found to have a right of first refusal and the *Mobile-Sierra* treatment is found to apply, the Commission

²⁶⁸ Southern New England States specifically reference the discussion in those orders relating to the right of first refusal’s adverse effect on competition and, thus, potential to lead to unjust and unreasonable rates; and, secondly, the elimination of these provisions to remedy undue discrimination and preference against nonincumbents. Southern New England States Protest at 19-20 & nn.66, 67.

²⁶⁹ Massachusetts Attorney General Protest at 11 (quoting 2004 TOA Rehearing Order, 109 FERC ¶ 61,147 at P 78).

²⁷⁰ *Id.* at 14.

²⁷¹ The Massachusetts Attorney General quotes FPA section 205, which reads, in part: “No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage. . . .” Massachusetts Attorney General Protest at 16 (quoting 16 U.S.C. § 824d (2006)).

²⁷² *Id.* at 15, 16.

should find it is contrary to the public interest.²⁷³ In the Massachusetts Attorney General’s view, the Commission could have made a generic public interest finding in Order No. 1000 that would have applied to this TOA. Moreover, “nothing stops the Commission from applying its generic finds regarding undue discrimination to make a specific finding here.”²⁷⁴

146. LS Power contends that Order No. 1000 did not make a blanket finding that all rights of first refusal must be eliminated but instead only eliminated rights of first refusal for projects subject to regional cost allocation.²⁷⁵ In LS Power’s view, there is no *Mobile-Sierra*-protected right to any particular cost allocation method.²⁷⁶ LS Power explains that, in restricting access to regional cost allocation to only those projects selected in a fair and non-discriminatory process not subject to rights of first refusal, the Commission did not deprive incumbent transmission owners of a contractually protected right.²⁷⁷ LS Power maintains that the Commission was well within its authority to determine that regional cost allocation is only available for regions and individual incumbent transmission owners that do not allow a right of first refusal for regional projects. LS Power reads Order No. 1000 as “mandat[ing] that regional cost allocation is only available for projects that have been vetted in a non-discriminatory process that does not recognize a right of first refusal.”²⁷⁸

²⁷³ *Id.* at 17-18.

²⁷⁴ *Id.* at 19.

²⁷⁵ LS Power Supplemental Protest at 2-3 (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313; Order No. 1000-A, 139 FERC ¶ 61,132 at P 357); *see also id.* at 6-7, 8, 9 (averring, “the focus of the Commission’s initial determination of whether Order No. 1000, infringes on a *Mobile-Sierra* protected contractual right is whether or not incumbent transmission providers have a contractual right to regional cost allocation”), 10.

²⁷⁶ *Id.* at 16-17.

²⁷⁷ *Id.* at 3-4. “Stated more bluntly, an incumbent transmission owner who chooses to do so can exercise the rights it always had; it can continue to build every project it chooses to construct in its retail service territory so long as it allocates 100 percent of the costs of that project to its ratepayers.” *Id.* at 3 n.12; *see also id.* at 12 (right of first refusal maintained for local projects).

²⁷⁸ *Id.* at 12.

147. LS Power further states that “[t]he [Participating Transmission Owners] point to no case in the fifty-year history of *Mobile-Sierra* contract protection supporting their proposition that parties A, B, C and D can enter into a contract to exclude party E, and all other parties, from market participation and a finding that such a contract would be entitled to protection under the heightened *Mobile-Sierra* standard.”²⁷⁹ But even if *Mobile-Sierra* protection is not precluded for such right of first refusal provisions, LS Power maintains that “antitrust concepts are intimately involved in determining whether an action is in the public interest.”²⁸⁰ And that “[right of first refusals] are facially anticompetitive” because “[t]hey provide incumbent utilities with the right to foreclose competing companies from building similarly reliable and economic transmission projects, potentially at a lower cost.”²⁸¹ LS Power states that the Commission must take into account the anticompetitive effects associated with rights of first refusal as part of its *Mobile-Sierra* public interest standard analysis. LS Power maintains that, in any case, Order No. 1000 has met the standard imposed by the *Mobile-Sierra* doctrine since it is a rule, based on national policy goals, that is generally-applied to all contracts.²⁸² Moreover, referencing specific data and studies, LS Power argues that the Commission has made a sufficient showing.²⁸³

148. The Eastern Massachusetts Consumer-Owned Systems first contend that the Commission’s grant of *Mobile-Sierra* treatment to section 3.09 and Schedule 3.09(a) was premised on an incomplete understanding; the Commission stated that these provisions simply provide “direction to the [incumbent] transmission owners and [ISO-NE] to follow planning procedures contained in the [ISO-NE] OATT.”²⁸⁴ Next, the Eastern Massachusetts Consumer-Owned Systems argue that the “*Mobile-Sierra* doctrine allows [the Commission] to modify the terms of a private contract when third parties are threatened by possible ‘undue discrimination’ or the imposition of an ‘excessive burden.’”²⁸⁵ Moreover, they read case law to permit “generalized findings of public

²⁷⁹ *Id.* at 21.

²⁸⁰ *Id.* at 21-22.

²⁸¹ *Id.* at 23.

²⁸² *See id.* at 23-26.

²⁸³ *See id.* at 27-31.

²⁸⁴ Eastern Massachusetts Consumer-Owned Systems Protest at 14 (quoting 2004 TOA Rehearing Order, 109 FERC ¶ 61,147 at P 77).

²⁸⁵ *Id.* (quoting *Ne. Utils. Servs. Co. v. FERC*, 55 F.3d 686, 691 (1st Cir. 1995)).

interest when intervening circumstances affect a class of contracts in the same manner.”²⁸⁶

(c) Answers

149. In its answer, the PTO Administrative Committee states, at the outset, that NEPOOL has no right to make an alternative compliance filing.²⁸⁷ The Administrative Committee contends that *Mobile-Sierra* treatment applies to TOA Schedule 3.09(a), notwithstanding arguments to the contrary.²⁸⁸ According to the PTO Administrative Committee, this issue has already been fully litigated and resolved by the Commission; this determination cannot be collaterally attacked here.²⁸⁹ The PTO Administrative Committee maintains that “[i]t also is irrelevant whether or not Schedule 3.09(a) affects the rights of third parties.”²⁹⁰

150. The PTO Administrative Committee contends that the findings the Commission made in Order No. 1000 are insufficient with respect to the *Mobile-Sierra* doctrine. It explains, the Commission “made generic findings in Order No. 1000 under the just and reasonable standard,” but *Mobile-Sierra* requires “a different level of review” for executed contracts.²⁹¹ Here, the Commission must take into account substantial evidence regarding consumer benefits of the current process and the adverse effects of changing it. “[S]peculation about potential opportunities presented by the NEPOOL alternative,” without more, “is insufficient to overcome the *Mobile-Sierra* presumption.”²⁹²

151. With respect to Southern New England States’ claim that ISO-NE could have included changes to the Attachment K planning process that are consistent with the

²⁸⁶ *Id.* (quoting *Ariz. Corps.Comm’n v. FERC*, 397 F.3d 952, 955-56 (D.C. Cir. 2005)).

²⁸⁷ PTO Administrative Committee Answer at 9-13.

²⁸⁸ *Id.* at 16-17.

²⁸⁹ *Id.* at 17.

²⁹⁰ *Id.* at 18.

²⁹¹ *Id.* at 19, 20, 21-22.

²⁹² *Id.* at 26; *see also id.* at 29 (maintaining that “[n]o party has offered studies, analyses, or other specific evidence that customers will benefit”).

NEPOOL proposal without having to overcome a *Mobile-Sierra* burden, the Administrative Committee responds that this argument ignores TOA section 11.04(d), which states that both ISO-NE and the Participating Transmission Owners are prohibited from making and filing any changes to the OATT that are inconsistent with the provisions of the TOA. And to the Massachusetts Attorney General's averment that Schedule 3.09(a) does not contain a right to build, the PTO Administrative Committee answers that "[t]he parties to the TOA agree on its meaning. Neither ISO-NE nor the [Participating Transmission Owners] contend that the agreement they negotiated means anything other than what it says."²⁹³

152. In its January 18, 2013 answer, ISO-NE states that the negotiation of the TOA involved extensive efforts and was essential to the formation of ISO-NE. In response to the argument that Schedule 3.09(a) does not contain a right of first refusal or a right to build, ISO-NE states that the Schedule contains a right to build and, even more, an obligation to build that cannot be refused. ISO-NE avers that "the *right* to build upgrades was the *quid pro quo* for the *obligation* to build."²⁹⁴ Further, with respect to the argument that the Commission did not fully understand the purpose and function of the right of first refusal provision, ISO-NE maintains *inter alia* that such argument does not take into account language by the Commission that indicates it was aware of this right of first refusal and that the "no adverse impact" condition was related to the section 3.09 planning process and not to the right to build *per se*.²⁹⁵ ISO-NE also answers that neither the provisions themselves nor the Commission's order limits *Mobile-Sierra* treatment to the right to build *local* projects.

153. ISO-NE addresses Public Systems' argument that the right to build, like the obligation to build, is conditional, i.e., "[s]ubject to the requirements of applicable law, governmental regulations and approvals," and that Order No. 1000 is "applicable law."²⁹⁶ ISO-NE labels this reasoning as "an end run around" the grant of *Mobile-Sierra* treatment.

154. ISO-NE argues that the TOA is an arms-length negotiated agreement between ISO-NE and the Participating Transmission Owners; there is no commonality of interest because ISO-NE is "obviously not an incumbent transmission owner, nor does it have

²⁹³ *Id.* at 28.

²⁹⁴ ISO-NE January 18, 2003 Answer at 24, 26.

²⁹⁵ *Id.* at 28.

²⁹⁶ *Id.* at 29 (quoting TOA, Schedule 3.09(a), § 1.1(a)).

any interest in excluding competitors because it has none.”²⁹⁷ According to ISO-NE, the TOA is essentially akin to a requirements contract where ISO-NE can procure its requirements from the Participating Transmission Owners in exchange for the Participating Transmission Owners agreeing to fulfill all of ISO-NE’s requirements. Denying general applicability, ISO-NE states that the TOA governs only the relationship between ISO-NE and the Participating Transmission Owners. In the alternative, ISO-NE states that even if the TOA were a contract of general applicability, the Commission exercised its discretion to grant the agreement *Mobile-Sierra* treatment.

155. With respect to LS Power’s position that the *Mobile-Sierra* treatment may apply to the right of first refusal but not to any adjustment to the regional cost allocation methodology, ISO-NE maintains that Order No. 1000 does not require a demonstration of *Mobile-Sierra* coverage of regional cost allocation rights. In any case, ISO-NE asserts that the TOA does in fact provide *Mobile-Sierra* protection for the Participating Transmission Owners’ right to file regional cost allocation for transmission upgrades (in section 3.04(b)).²⁹⁸

156. Arguments that the Commission has already satisfied the burden of overcoming *Mobile-Sierra* protection of Schedule 3.09(a) in Order No. 1000 are, in ISO-NE’s view, legally incorrect and at odds with the Commission’s statement to the contrary.²⁹⁹ Moreover, ISO-NE states that the stakeholder vote, noted by some protesters, is in no way relevant to the Commission’s *Mobile-Sierra* deliberations as to whether the TOA should be abrogated.³⁰⁰

157. In its answer, New Hampshire Transmission states that the Filing Parties fail to establish that the TOA is entitled to *Mobile-Sierra* protection. It first states that the right of first refusal is not a contract rate to which *Mobile-Sierra* treatment automatically applies. Rather, it contends that “the TOA is an agreement among public utilities unilaterally decreeing the rates, terms and conditions upon which third parties will (or, to be more accurate, will not) be permitted to compete to build transmission.”³⁰¹ Next,

²⁹⁷ *Id.* at 31-32; *see also id.* at 33-34.

²⁹⁸ *Id.* at 37.

²⁹⁹ *Id.* at 39 (quoting Order No. 1000-A, 139 FERC ¶ 61,132 at P 388, stating, “We continue to find that the record in this rulemaking proceeding is not sufficient to address the specific issues raised regarding individual agreements.”).

³⁰⁰ *Id.* at 41.

³⁰¹ New Hampshire Transmission Answer at 6.

New Hampshire Transmission contends that the Commission did not exercise its discretion to treat the right of first refusal provision as a contract rate, entitled to *Mobile-Sierra* protection.³⁰² But even assuming that the right of first refusal provisions are entitled to *Mobile-Sierra* treatment, New Hampshire Transmission avers that the public interest standard is met, alluding to “blatant discrimination.”³⁰³ It posits that the generic findings of Order No. 1000 are entirely relevant, and the stakeholder vote confirms that the parties to the TOA, ISO-NE and the Participating Transmission Owners, “would use *Mobile-Sierra* to protect their purely private interests against the interests of the public.”³⁰⁴

158. New Hampshire Transmission also takes issue with ISO-NE’s claims of a successful transmission development process, and avers that a competitive process would allow nonincumbents to bring both technological and financial innovation to transmission projects. And it points out that the Filing Parties’ proposal to retain a right of first refusal for reliability projects needed in less than five years is unjustified and inconsistent with Order No. 1000.³⁰⁵ Moreover, it asserts that the Filing Parties nowhere have demonstrated why a competitive process must take at least 12-24 months.³⁰⁶

159. ISO-NE responds to New Hampshire Transmission, in its limited March 7, 2013 answer. While contract rates must be afforded *Mobile-Sierra* protection, ISO-NE states that the Commission also may grant such protection to other agreements. ISO-NE asserts that “[New Hampshire Transmission’s] arguments to the contrary may be put aside as irrelevant because the Commission granted the key provisions of the TOA contract *Mobile-Sierra* protection.”³⁰⁷ ISO-NE contends that it has demonstrated from the plain language of the pertinent Commission orders that discretion was applied and *Mobile-*

³⁰² *Id.* at 9 (quoting PTO Administrative Committee’s apparently inconsistent position: “[T]he Commission does not have the right to decide, when a contract is first filed, whether *Mobile-Sierra* applies.”).

³⁰³ *Id.* at 10.

³⁰⁴ *Id.* at 12.

³⁰⁵ *Id.* at 18 (footnote omitted).

³⁰⁶ *Id.*; *see also id.* at 19 (stating that there is no basis for assumption that nonincumbent developers will not be able design, engineer, permit, and construct a reliability upgrade as quickly as an incumbent).

³⁰⁷ ISO-NE March 7, 2013 Answer at 2.

Sierra protection was granted.³⁰⁸ With respect to the public interest showing, ISO-NE states that, to modify provisions protected by the *Mobile-Sierra* doctrine, the Commission must demonstrate that the language is contrary to the public interest and harms the consuming public; this demonstration is necessarily fact-specific.³⁰⁹ Finally, ISO-NE maintains that the evidence it submitted provides significant and detailed support that the current planning process identifies the most cost-effective solution.³¹⁰

(d) Commission Determination

160. We start by addressing whether *Mobile-Sierra* protection automatically applies to the provisions that the Filing Parties contend include a federal right of first refusal. We conclude that it does not. Next, we address the Commission's action in the 2004 TOA Order and the 2004 TOA Rehearing Order with respect to the standard of review applicable to these provisions. Finally, because the Commission previously held that a "public interest" finding would be necessary to modify these provisions, we address arguments that the Commission should make such a finding here.

161. In Order No. 1000, the Commission declined to address arguments that transmission owners agreements were protected under *Mobile-Sierra*. The Commission concluded that the record in the rulemaking proceeding was not sufficient to evaluate these arguments and that they could be better addressed at the compliance stage.³¹¹ In Order No. 1000-A, the Commission reiterated that "a public utility transmission provider that considers its contract to be protected by a *Mobile-Sierra* provision may present its arguments as part of its compliance filing."³¹² Drawing on these statements, the Filing Parties present several such arguments in their compliance filing.

162. As a threshold matter, the fact that a federal right of first refusal is contained in a contract does not automatically establish that the contract is entitled to a *Mobile-Sierra* presumption. The *Mobile-Sierra* presumption applies to a contract only if the contract has certain characteristics that justify the presumption.

³⁰⁸ *Id.* at 2, 7 ("It is beyond question that the Commission in fact exercised its discretion.").

³⁰⁹ *Id.* at 3, 9-10.

³¹⁰ *Id.* at 3; *see id.* at 11-12.

³¹¹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 292.

³¹² Order No. 1000-A, 139 FERC ¶ 61,132 at P 389.

163. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the instrument 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; the latter constitute tariff rates, terms, or conditions to which the *Mobile-Sierra* presumption does not apply, although the Commission may exercise its discretion to apply the heightened *Mobile-Sierra* standard.³¹³

164. In some instances, the jurisdictional provisions of a contract may be classified in their entirety as including either contract rates, terms, and conditions that are subject to a *Mobile-Sierra* presumption or tariff rates, terms, and conditions to which the *Mobile-Sierra* presumption does not apply. On one hand, all such provisions in bilateral power sales contracts freely negotiated at arm's length between sophisticated parties generally would establish contract rates and would come within the presumption.³¹⁴ On the other hand, where the terms of an agreement would, if approved, be incorporated into the service agreements of all present and future customers, those terms are properly classified as tariff rates and the *Mobile-Sierra* presumption would not apply.³¹⁵

165. By contrast, the ISO-NE TOA cannot be classified in its entirety as containing contract rates or tariff rates. As discussed further below, we find that, for two separate but reinforcing reasons, the TOA provisions that the Filing Parties contend include a federal right of first refusal do not include contract rates to which *Mobile-Sierra*

³¹³ See *New England Power Generators Ass'n, Inc. v. FERC*, No. 11-1422, at 10-12 (D.C. Cir. Feb. 15, 2013).

³¹⁴ See generally *Morgan Stanley*, 554 U.S. 527.

³¹⁵ *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014, at P 17 (2011) (holding that the *Mobile-Sierra* presumption does not apply to a settlement agreement “[b]ecause the terms of the Settlement, if approved, will be incorporated into the service agreements of all present and future shippers. . . .”); see also *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at P 19 (2011); *Petal Gas Storage, L.L.C.*, 135 FERC ¶ 61,152, at P 12 (2011); *Southern LNG Co., LLC*, 135 FERC ¶ 61,153, at P 19 (2011) (each finding that *Mobile-Sierra* presumption does not apply to offer of settlement which incorporates into each shipper's service agreement rates, terms, and conditions that are generally applicable “to all present and future customers”).

protection would apply automatically. Other provisions of the TOA may be properly classified as including contract rates. Given the breadth and complexity of the TOA, we find that it is neither practical nor necessary to evaluate whether the preponderance of its provisions include tariff rates or contract rates. Rather, we find that determining the standard of review that should apply to specific provisions of the TOA is an appropriate way to recognize the distinctions among its provisions.

166. We find that section 3.09 and Schedule 3.09(a) of the ISO-NE TOA are prescriptions of general applicability rather than negotiated rate provisions that are necessarily entitled to a *Mobile-Sierra* presumption. We note that in its most recent statement on the *Mobile-Sierra* doctrine, the U.S. Supreme Court acknowledged the potential distinction between “prescriptions of generally applicability” and “contractually negotiated rates.”³¹⁶ Where the language of an agreement establishes rules that delimit, qualify, or restrict the ability of any other potential competitor to engage in the subject activity, that language creates generally applicable requirements.

167. This conclusion is bolstered by the fact that any new Participating Transmission Owner would have to accept these provisions as-is, with limited room for negotiation. Amending the TOA requires action by a sixty-five percent majority of current ISO-NE Participating Transmission Owners (i.e., parties to the TOA),³¹⁷ substantially inhibiting the ability of a new transmission owner to negotiate a change to these provisions. As a result, 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.

168. We also find that the *Mobile-Sierra* presumption does not apply to the TOA provisions that the Filing Parties contend include a federal right of first refusal because those provisions arose in circumstances that do not provide the assurance of justness and reasonableness on which the *Mobile-Sierra* presumption rests.³¹⁸

³¹⁶ *NRG*, 130 S. Ct. at 701. The Court made this statement even as it held that the *Mobile-Sierra* presumption “is not limited to challenges to contract rates brought by contracting parties. It applies, as well, to challenges initiated by third parties.” *Id.*

³¹⁷ TOA § 11.04(a)(iii)(B)(1).

³¹⁸ See *Morgan Stanley*, 554 U.S. at 554 (stating that “the premise on which the *Mobile-Sierra* presumption rests” is “that the contracts are the product of fair, arm’s length negotiations.”). Arm’s-length bargaining serves an important role in confirming that the transaction price reflects fair market value.

169. Specifically, those provisions arose in a negotiation aimed at protecting a common interest among competing Participating Transmission Owners. Unlike circumstances in which the Commission can presume that the resulting rate is the product of negotiations between parties with competing interests, the negotiation that led to the provisions at issue here was primarily among parties with the same interest, namely, protecting themselves from competition in transmission development. We do not attribute that common interest to ISO-NE. Nonetheless, while extensive negotiations may have preceded development of the provisions in question, we find that because of the common

interests among the ISO-NE Participating Transmission Owners, the negotiations do not bear the hallmarks necessary for the *Mobile-Sierra* presumption.³¹⁹

170. The Commission has recognized a similar point in other contexts that is relevant here. For instance, the Commission has observed that “the self-interest of two merger partners converge sufficiently, even before they complete the merger, to compromise the market discipline inherent in arm’s-length bargaining that serves as the primary protection against reciprocal dealing.”³²⁰ The Commission’s policy on market-based rates incorporates similar principles.³²¹

171. We note that our conclusion that section 3.09 and Schedule 3.09(a) of the ISO-NE TOA do not include contract rates to which *Mobile-Sierra* treatment necessarily applies is consistent with the 2004 TOA Orders. In those orders, the Commission accorded

³¹⁹ We also note 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.

³²⁰ *Delmarva Power & Light Co.*, 76 FERC ¶ 61,331, at 62,582 (1996) (quoting *Cinergy, Inc.*, 74 FERC ¶ 61,281, at 61,900 (1996)).

³²¹ See, e.g., 18 C.F.R. § 35.36(a)(9)(iii) (2012) (making possible absence of arm’s-length bargaining a potential ground for finding that it is necessary or appropriate in the public interest to treat entities as affiliates for purposes of the Commission’s market-based rate regulations); see also *Central Maine Power Co.*, 85 FERC ¶ 61,272 (1998) (accepting implementing agreements as just and reasonable where the rates, terms and conditions in the agreements were determined through a competitive bidding process and subsequent arm’s-length negotiations where neither party could exercise market power).

Mobile-Sierra protection to some sections of the TOA but not others. The Commission explained that it had “authority to review (and reject) [the incumbent transmission owners’] *Mobile-Sierra* requests under our just and reasonable standard.”³²² Indeed, rather than being entitled to a presumption of justness and reasonableness, the Commission initially stated that the applicants had not “carried their burden in showing” that the protection they requested was appropriate.³²³ Thus, the Commission has never treated the ISO-NE TOA as if it is entitled to *Mobile-Sierra* protection.

172. While section 3.09 and Schedule 3.09(a) of the TOA are 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 or deny *Mobile-Sierra* treatment for specific TOA provisions. The Commission explained 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.” Conducting this balancing analysis, the Commission accorded *Mobile-Sierra* protection to the provision at issue here on the grounds that “this provision will have no adverse impact on third parties or the New England market.”³²⁴ Therefore, we turn next to whether these provisions severely harm the public interest.³²⁵ We conclude that they do.

173. As an initial matter, we find 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. While generic *Mobile-Sierra* findings are “appropriate only in rare circumstances,” they are permissible when, as with the elimination of federal rights of first refusal in Order No. 1000, Commission action “affect[s] an entire class of contracts in an identical manner.”³²⁶ In such situations,

³²² 2004 TOA Rehearing Order, 109 FERC ¶ 61,147 at P 72.

³²³ 2004 TOA Order, 106 FERC ¶ 61,280 at P 126.

³²⁴ 2004 TOA Rehearing Order, 109 FERC ¶ 61,147 at PP 73, 78.

³²⁵ *Morgan Stanley*, 554 U.S. at 550-51 (internal citations omitted) (explaining that “the FPA intended to reserve the Commission’s contract-abrogation power for those extraordinary circumstances where the public will be severely harmed.”).

³²⁶ *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 710 D.C. Cir. 2000) (*TAPS*).

“nothing in the *Mobile-Sierra* doctrine [] prohibit[s] [the Commission] from responding with a public interest finding applicable to all contracts of that class.”³²⁷

174. In Order No. 1000, the Commission affected an entire class of contracts in an identical manner by requiring the elimination of federal rights of first refusal in all Commission-jurisdictional agreements. We conclude that, had it so elected, it would have been permissible for the Commission to make a generic public interest finding regarding federal rights of first refusal in Order No. 1000.³²⁸ We further conclude that the reasons the Commission gave in Order No. 1000 for eliminating federal rights of first refusal are legally sufficient to make a public interest finding. Therefore, we find that the Commission can now, in this proceeding, rely on its findings in Order No. 1000 to make a public interest finding.

175. In *Mobile-Sierra* cases involving bilateral power sales contracts, like *Sierra* and *Morgan Stanley*, the “intervening circumstances [prompting reexamination of the contract] are unique to the relationship between contracting parties,” such that the *Mobile-Sierra* doctrine bars the Commission from using its authority in a manner that relieves one party of its “improvident bargain.”³²⁹ On the other hand, 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

³²⁷ *Id.*

³²⁸ While the Commission determined it was more appropriate to address the standard of review applicable to the ISO-NE TOA on compliance rather than in Order No. 1000, it never questioned its authority to make public interest findings in generic proceedings. Instead, the Commission declined to make specific findings about the TOA because it was an individual contract and, in contrast to cases where it generically reformed whole classes of contracts, it “generally do[es] not interpret an individual contract in a generic rulemaking.” Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 292. The Commission further explained that deferring the issue to compliance was consistent with the limited record that had been developed to that point. *Id.* The Commission exercised its discretion to afford parties in New England more process by deferring the issue to compliance where a fuller record could be developed. “The Commission, like other agencies, is generally master of its own calendar and procedures.” *Stowers Oil & Gas Co.*, 27 FERC ¶ 61,001, at 61,001 (1984) (citation omitted).

³²⁹ *TAPS*, 225 F.3d at 710.

limit or to proscribe contractual arrangements that contravene the relevant public interests.”³³⁰ In this regard, the *Mobile-Sierra* doctrine “in no way impairs the regulatory powers of the Commission, for . . . contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest.”³³¹ Instead, the doctrine requires that in a rulemaking the Commission must make a “particularized” showing 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.”³³²

176. The Commission made such a showing in Order No. 888,³³³ where it discussed at length the significant changes that had occurred in the electric industry³³⁴ and responded by requiring incumbent public utilities to provide open access to their transmission systems. In light of this reform, which the court described as “fundamentally chang[ing] the regulatory environment in which utilities operate,”³³⁵ the Commission determined that it had to make generic public interest findings regarding stranded costs and the prospective standard of review for existing requirements contracts.

177. First, the Commission found that it was in the public interest to permit public utilities to add stranded cost amendments to their contracts if they could demonstrate a reasonable expectation of continued service.³³⁶ Order No. 888 required incumbent public utilities to provide transmission service to anyone buying or selling power in interstate

³³⁰ *Permian Basin*, 390 U.S. at 784.

³³¹ *Mobile*, 350 U.S. at 344.

³³² *Texaco*, 148 F.3d at 1097.

³³³ *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 (1996), *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), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

³³⁴ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,638-45.

³³⁵ *TAPS*, 225 F.3d at 711.

³³⁶ Order 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,394-95.

commerce on the same terms and conditions that they apply to themselves. While this reform removed barriers to a competitive wholesale electric market by placing alternative power suppliers and incumbent public utilities on the same footing, the prospect of customers leaving incumbent public utilities for alternative power suppliers created the possibility that incumbents would be left with stranded costs.

178. The Commission explained that unrecoverable stranded costs could impair utilities access to capital markets, which could lead them to lose more customers, which could worsen their financial situation further and threaten their ability to provide reliable service.³³⁷ The Commission also found that allowing customers to leave a utility without paying their share of the costs would shift those costs to other customers that did not have alternative power sources.³³⁸

179. Second, the Commission found that it was in the public interest to allow wholesale requirements customers to modify the standard of review for changes to existing contracts by replacing the requirement for a public interest finding with the requirement that the agreement be shown to be unjust and unreasonable.³³⁹ The Commission explained that these contracts were entered into at a time when “transmission providers exercised monopoly control over access to their transmission facilities,” and “competitive changes that have occurred (and are continuing to occur) in the industry may render their contracts to be no longer in the public interest or just and reasonable.”³⁴⁰

180. On appeal, parties challenged both the Commission’s authority to make generic public interest findings and the sufficiency of the legal reasoning behind those findings. The court found that while generic public interest findings are “appropriate only in rare circumstances,” they can be appropriate “where, as here, [the Commission] implements a generic change in the industry.”³⁴¹ With respect to the sufficiency of the Commission’s reasoning, the court held that “[j]ust as [generic] change can support a generic public interest finding, [a] generic [public interest] finding can be supported by generic industry-

³³⁷ See Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,811.

³³⁸ *Id.* at 31,811.

³³⁹ The Commission defined “existing contracts” as contracts executed on or before July 11, 1994. Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,664.

³⁴⁰ Order 888-A, FERC Stats. & Regs. at 30,193.

³⁴¹ *TAPS*, 225 F.3d at 711.

wide evidence.”³⁴² The court found that the Commission had provided such evidence in its estimates of the effects of stranded costs and in its reliance on statements in the record from representatives of the financial community explaining that stranded costs could harm a utility’s ability to attract capital. Notably, the court also found that the Commission could support a public interest finding by its prediction that the failure to permit recovery of stranded costs would create an undue burden for remaining customers.³⁴³

181. Similarly, the court found that the Commission could support its generic public interest finding requiring prospective modification of the standard of review applicable to wholesale requirements contracts on the grounds that they were entered into in a monopolistic regulatory regime, and that changes in the regime through the introduction of competition justified a public interest finding that supported contract modification.³⁴⁴ The court explained that:

Order 888 rests on the very premise that by denying competitors access to their transmission lines, utilities engaged in undue discrimination. Confined to purchasing power from their local utilities, customers suffered from this lack of access. In the natural gas restructuring, we affirmed FERC's decision to allow customers to seek to modify their sales contracts because those contracts “necessarily reflect the pipelines' monopoly power.” The same reasons call for affirming FERC's decision here. In addition, as FERC has explained, the harm to third parties (i.e., customers of the wholesale requirements customers) that may result from adherence to uneconomical contracts further justifies its conclusion.³⁴⁵

182. The Commission’s experience with Order No. 888 is instructive here for at least three reasons. First, in both Order No. 888 and Order No. 1000 the Commission acted

³⁴² *Id.*

³⁴³ *Id.* at 711-12 (citing *Mich. Consol. Gas Co. v. FERC*, 883 F.2d 117, 124 (D.C. Cir. 1989) (holding that “[m]aking ... predictions is clearly within the Commission’s expertise and will be upheld if rationally based on record evidence.”)).

³⁴⁴ *Id.* at 712.

³⁴⁵ *Id.* (internal citations omitted).

to remove barriers to competition. Just as the open access reforms of Order No. 888 were intended “to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation’s electricity consumers,”³⁴⁶ the elimination of federal rights of first refusal in Order No. 1000 was intended to benefit customers by fostering competition in transmission development. Like the reforms in Order No. 888, 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 highly regulated and affecting all utilities in a similar way.”³⁴⁷

183. Second, just as in Order No. 888 the Commission explained how the monopolistic regime that existed prior to open access affected the fairness of existing power contracts, requiring prospective modifications to the applicable standard of review, in Order No. 1000 the Commission explained 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.”³⁴⁸ As we have explained above, this economic self-interest is reflected in the ISO-NE TOA, which protects a common interest among transmission owners in excluding competition. Therefore, just as it was appropriate in Order No. 888 to modify prospectively the standard of review applicable to wholesale requirements contracts on the grounds that they reflected incumbents’ monopoly power, it is appropriate here to make a public interest finding on the grounds that the federal right of first refusal in the ISO-NE TOA likewise reflects monopoly power. In this regard, the Commission explained in Order No. 1000 that its actions there were a direct outgrowth of its reforms in Order No. 890, which, in turn, were an outgrowth of the reforms in Order No. 888.³⁴⁹ In short, the requirement to eliminate rights of first refusal supports a competitive regulatory regime, much like those earlier efforts that justified the modification of contracts under a public interest standard.

184. Third, in Order No. 1000 the Commission made predictions and generic evidentiary findings with regard to federal rights of first refusal that are similar to the

³⁴⁶ Order No. 888, FERC Stats. & Regs. at 31,632-33.

³⁴⁷ *TAPS*, 225 F.3d at 711.

³⁴⁸ *Id.* P 256.

³⁴⁹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 15-21.

predictions and generic findings that it relied on to make a public interest finding in Order No. 888.

185. For example, the Commission explained 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.³⁵⁰ The Commission noted that “[s]ignificant expansion of the transmission grid will be required under any future electric industry scenario,”³⁵¹ 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.”³⁵² The Commission further observed that “the existing transmission system was not built to accommodate this shifting generation fleet,”³⁵³ and that although an increasing number of nonincumbent transmission developers have expressed interest in developing transmission facilities, incumbents have no economic incentive to allow them to compete.³⁵⁴

186. In light of these changing circumstances, the Commission concluded in Order No. 1000 that generic action was necessary to fulfill its statutory responsibilities. Emphasizing the importance of both the issues presented and the reforms adopted in Order No. 1000, the Commission stated that it is “critical that the Commission act now to address deficiencies to ensure that more efficient or cost-effective investments are made as the industry addresses its challenges.”³⁵⁵ Similarly, the Commission stated that it “need not, and should not, wait for systemic problems to undermine transmission planning before it acts,” adding that it “must act promptly to establish the rules and processes necessary to allow public utility transmission providers to ensure planning of

³⁵⁰ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 44.

³⁵¹ *Id.* P 29 (quoting U.S. Department of Energy, *20% Wind Energy by 2030*, at 93 (July 2008)); *see also id.* PP 26-28 & accompanying notes.

³⁵² *Id.* P 45.

³⁵³ *Id.*

³⁵⁴ *Id.* P 256.

³⁵⁵ *Id.* P 46.

and investment in the right transmission facilities as the industry moves forward to address the many challenges it faces.”³⁵⁶

187. The Commission also explained the particularized manner in which federal rights of first refusal harm the public interest and how their removal mitigates the harm.³⁵⁷ For example, the Commission explained that because federal rights of first refusal reflect the economic self-interest of incumbent transmission providers and prevent new entrants from developing transmission facilities, new entrants are either barred from the planning process altogether or deterred from submitting proposals by the threat of losing the rights to their project.³⁵⁸ This lack of competition harms customers by discouraging new entrants from submitting proposals that may be a more efficient or cost-effective solution to a region’s needs.³⁵⁹

188. As the Commission explained, the requirements adopted in Order No. 1000, including the elimination of federal rights of first refusal, comprise a “package of reforms” intended to mitigate these consequences.³⁶⁰ Addressing the interaction among the components of Order No. 1000, the Commission explained, that “[c]ombined with the cost allocation and other reforms adopted in this Final Rule, implementation of th[e] framework to remove federal rights of first refusal will address disincentives that may be impeding participation by nonincumbent transmission developers in the regional transmission planning process.”³⁶¹ The Commission explained that the various specific

³⁵⁶ *Id.* P 50.

³⁵⁷ *Texaco*, 148 F.3d at 1097 (explaining that the Commission must demonstrate “the manner in which the contract harms the public interest and [] the extent to which abrogation or reformation mitigates the contract’s deleterious effect.”).

³⁵⁸ *See* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 3 (“Nonincumbent transmission developers seeking to invest in transmission can be discouraged from doing so as a result of federal rights of first refusal in tariffs and agreements subject to the Commission’s jurisdiction.”).

³⁵⁹ *Id.* P 256. Additionally, we note that representatives of the states directly affected, the Massachusetts Attorney General, NESCOE, and Southern New England States, argue that the Commission can and should make a public interest finding based on the effect the federal right of first refusal has on customers.

³⁶⁰ *Id.* P 2.

³⁶¹ *Id.* P 320.

reforms adopted in Order No. 1000, including the removal of the federal right of first refusal,

work together to ensure an opportunity for more transmission projects to be considered in the transmission planning process on an equitable basis and increase the likelihood that those transmission facilities selected in a regional transmission plan for purposes of cost allocation are the more efficient or cost-effective solutions available.^{362]}

Thus, the Commission found that the removal of such barriers 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. This finding is the foundation for our conclusion that protecting the public interest requires removal from the TOA of the provisions at issue here.

189. While Order No. 888 is a particularly notable example, the Commission has made public interest findings in other types of cases. For instance, 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,³⁶³ as required under Commission Order No. 636.³⁶⁴ 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

³⁶² *Id.* P 11.

³⁶³ *Texaco*, 148 F.3d 1091.

³⁶⁴ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (*United Distribution*), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

market,’” and “‘would be particularly anti-competitive’ because it would harm [the pipeline’s] main competitor”³⁶⁵

190. The Commission finding upheld in *Texaco* as satisfying the public interest standard parallels our finding here in its reasoning.³⁶⁶ In *Texaco*, the court reviewed the Commission’s decision in *Mojave Pipeline*, which itself rested on Order No. 636. In *Mojave Pipeline*, the Commission found that in Order No. 636 the Commission had “‘indicated that it was adopting regulations to ensure that all gas supplies are moved to market on even terms, as well as to promote competition among gas sellers and to ensure consumers access to adequate supplies of clean and abundant gas at reasonable prices.’”³⁶⁷ The Commission then explained that it had adopted regulations to require pipelines to recover their transportation costs under a straight fixed-variable method for assigning fixed costs. It stated that pipelines have differing amounts of fixed costs in their usage charges, and differing levels of fixed costs in pipeline usage charges can hinder competition between gas sellers at the wellhead. The Commission concluded that its reasons for adopting this policy applied as much to the pipeline seeking to retain modified fixed-variable rates as to other pipelines because differing usage charges distort competition, and if the pipeline retained a mixed fixed-variable rate design, “‘the competitive distortion which we have tried to prevent will occur.’”³⁶⁸

191. We see no material distinction between the Commission’s conclusion in *Mojave Pipeline* that failure to implement straight fixed-variable rates in the contract at hand would adversely affect competition for the reasons set forth in Order No. 636 and our finding here that failure to eliminate the right of first refusal in the ISO-NE TOA would adversely affect transmission development for the reasons given in Order No. 1000. The Commission stated in Order No. 1000 that

granting incumbent transmission providers a federal right of first refusal . . . effectively restricts the universe of transmission developers offering potential solutions for

³⁶⁵ *Texaco*, 148 F.3d at 1097 (quoting *Mojave Pipeline Co.*, 62 FERC ¶ 61,195, at 62,365-66 (1993) (*Mojave Pipeline*)).

³⁶⁶ We note that while the Commission described its finding as satisfying the just and reasonable standard, *Mojave Pipeline*, 62 FERC at 62,365, the court found that the Commission’s finding satisfied the public interest standard. *Texaco*, 148 F.3d at 1097.

³⁶⁷ *Mojave Pipeline*, 62 FERC at 62,365.

³⁶⁸ *Id.*

consideration in the regional transmission planning process. This is unjust and unreasonable because it may result in the failure to consider more efficient or cost-effective solutions to

regional needs and, in turn, the inclusion of higher-cost solutions in the regional transmission plan.^{369]}

192. The Commission also stated that federal rights of first refusal “deprive customers of the benefits of competition in transmission development, and associated potential savings,” and that in eliminating such provisions, the Commission was “focused on the effect that federal rights of first refusal in Commission-approved tariffs and agreements have on competition and in turn the rates for jurisdictional transmission services.”³⁷⁰

193. In *United Distribution*, the court reached similar conclusions about the Commission’s ability to rely on enhanced competition to make a public interest finding. In that case, the court affirmed the Commission’s public interest finding requiring elimination of pipeline contracts that bundled gas and transportation service—an action the Commission justified on the grounds that bundling had an anticompetitive effect.³⁷¹ The court found this action to be an exercise of the Commission’s “plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests.”³⁷² The court cited *Wisconsin Gas Co. v. FERC*³⁷³ as precedent for this finding. There, the court affirmed the Commission’s public interest finding in Order No. 380 that “minimum bill” provisions in existing contracts were “unjust and unreasonable” under section 5 of the NGA. The court upheld the decision to eliminate the minimum bill from the contracts, against the claim that such a remedy “unlawfully alter[ed] the terms

³⁶⁹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 284.

³⁷⁰ *Id.* P 285.

³⁷¹ *United Distribution*, 88 F.3d at 1126.

³⁷² *Id.* at 1131 (quoting *Permian Basin*, 390 U.S. at 784).

³⁷³ 770 F.2d 1144 (D.C.Cir.1985), *cert. denied*, 476 U.S. 1114 (1986) (*Wisconsin Gas*).

of existing contracts,” on the ground that “section 5 gives the Commission authority to alter terms of any existing contract found to be ‘unjust’ or ‘unreasonable.’ ”³⁷⁴

194. In making a public interest finding in this case, we also take 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.”³⁷⁵ 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.”³⁷⁶

195. As discussed above, some existing incumbent transmission owners disagree with the Commission’s finding that removing barriers to participation by nonincumbent transmission developers in regional transmission planning processes is essential to meeting the demands of changing circumstances facing the electric industry. Their arguments would preserve these barriers by continuing to exclude potential competitors from developing cost-based transmission facilities. However, their arguments implicitly acknowledge that a federal right of first refusal has a direct and substantial impact on third parties, including customers and any potential competitor to an existing incumbent transmission owner. This impact on third parties further supports our conclusion that protecting the public interest requires removal from the TOA of the provisions that the Filing Parties contend include a federal right of first refusal.³⁷⁷

196. Finally, some commenters point to the Commission’s finding in the 2004 TOA Orders that the federal right of first refusal in the TOA will not adversely impact third parties as an impediment to making a public interest finding now. We disagree. The Supreme Court has found, in a similar *Mobile-Sierra* context, that the Commission is permitted to adapt its rules and policies in light of changing circumstances.

197. In *Permian Basin*, petitioners on appeal faulted the Commission for abrogating contracts and declaring escalation clauses in existing contracts unenforceable. Petitioners

³⁷⁴ *Wisconsin Gas*, 770 F.2d at 1153 n.9.

³⁷⁵ *NRG*, 130 S. Ct at 700.

³⁷⁶ *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993).

³⁷⁷ *See, e.g., Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686, 691 (1st Cir. 1995) (finding, “the *Mobile-Sierra* doctrine allows FERC to modify the terms of a private contract when third parties are threatened by possible ‘undu[e] discrimination’ or the imposition of an ‘excessive burden’”) (citations omitted) (alterations by the court).

noted that seven years earlier, the Commission declined to declare escalation clauses in existing contracts unenforceable because doing so would have many negative consequences. Petitioners argued that seven years later the Commission committed the error it had previously avoided. For its part, the Commission argued that it had actually required a different reform than what it had previously declined to adopt. The Court found that the exact nature of the change required by the Commission did not matter because the Commission was allowed to change its mind:

Nor may its order properly be set aside merely because the Commission has on an earlier occasion reached another result; administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances.^[378]

198. Like the court in *Permian Basin*, we find that the Commission must be permitted to “adapt [its] rules and policies to the demands of changing circumstances.” As we have explained above, changes in the electric industry driving the demand for new transmission, coupled with the advent of nonincumbent transmission developers, led the Commission to reexamine the effect of federal rights of first refusal on customers and nonincumbent transmission developers.

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

(a) **Filing Parties’ Filing**

199. As discussed above, the Filing Parties state that the *Mobile-Sierra* doctrine protects the right granted in the TOA to Participating Transmission Owners to build Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades.³⁷⁹ However, in the OATT provisions proffered under the Secondary Version, which will apply absent *Mobile-Sierra* protection for the incumbent transmission owners’ right to build, the Filing Parties provide a regional transmission planning process based on competing submissions for identified reliability needs where the year of the project need is more than five years from the completion of the relevant needs assessment study and for all market efficiency needs.

³⁷⁸ *Permian Basin*, 390 U.S. at 784.

³⁷⁹ Filing Parties Transmittal at 18-21.

200. Under the secondary proposal, where the solution to a needs assessment would likely be a Market Efficiency Transmission Upgrade, or where the forecasted year of need for a solution that is likely to be a Reliability Transmission Upgrade is more than five years from the completion of a needs assessment, ISO-NE would conduct a solution-based two-stage competition, as described in new section 4.3 of Attachment K. First, ISO-NE will issue a public notice with respect to each needs assessment that falls within the scope of this process that invites Qualified Sponsors³⁸⁰ to submit Phase One Proposals for solutions to the identified needs.

201. Qualified Sponsors would have the opportunity to submit Phase One Proposals. If more than one Phase One Proposal is submitted in response to ISO-NE's public notice, ISO-NE will conduct a preliminary review of the Phase One Proposals to determine whether each proposal: (i) provides sufficient data under the information requirements discussed below; (ii) appears to satisfy the needs described in the needs assessment; (iii) is technically practicable and indicates possession of, or an approach to acquiring, the necessary rights-of-way, property and facilities that will make the proposal reasonably feasible in the required timeframe; and (iv) is eligible to be constructed only by the Participating Transmission Owner under Schedule 3.09(a) of the TOA because the project is an upgrade to existing facilities or not eligible for regional cost allocation.³⁸¹ Following ISO-NE's preliminary review of the proposed projects, ISO-NE will post on its website the list of Phase One Proposals that meet the criteria of section 4.3(b).³⁸² With input from the Planning Advisory Committee, ISO-NE "may exclude projects from consideration under Phase Two based on a determination that the project is not competitive with other projects that have been submitted in terms of cost, electrical performance, future system expandability, or feasibility."³⁸³

³⁸⁰ To become a Qualified Sponsor, an entity must fulfill the qualification criteria in section 4B of Attachment K. The Filing Parties state that the qualification criteria are the same whether the type of project to be sponsored is for public policy, reliability, or market efficiency needs. Filing Parties Transmittal at 58 n.179.

³⁸¹ ISO-NE, OATT, Attachment K, § 4.3(d) (Regional System Planning Process) (Secondary Version).

³⁸² Section 4.3 details the information required for Phase One proposals. ISO-NE, OATT, Attachment K, § 4.3(b) (Regional System Planning Process) (Secondary Version).

³⁸³ *Id.* § 4.3(f) (Regional System Planning Process) (Secondary Version).

202. In Phase Two, ISO-NE will work with Qualified Sponsors and the affected Participating Transmission Owners to evaluate and further develop the listed projects to create a Phase Two Solution for each needs assessment. ISO-NE will identify and select the preferred Phase Two Solutions (with an overview of why the solution is preferred) by a posting on its website.³⁸⁴ The Filing Parties propose that these Phase Two Solution(s) “will 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” and include that solution in its regional system plan.³⁸⁵

203. The Filing Parties also propose revisions to Schedule 3.09(a) of the TOA to clarify that Participating Transmission Owners have an obligation to build, and that Participating Transmission Owners are required, individually or jointly, to submit Phase One Proposals consistent with this obligation. Specifically, the Filing Parties propose to add the following underlined language related to New Transmission Facilities³⁸⁶ and Transmission Upgrades:

The following provisions shall apply to any New Transmission Facility or Transmission Upgrade designated in the ISO System Plan other than a Merchant Transmission Facility except as provided in Section 1.3 of this Schedule:

(a) (i) Subject to the requirements of applicable law, government regulations and approvals, including requirements to obtain any necessary federal, state or local siting, construction and operating permits; the availability of required financing; the ability to acquire necessary rights-of-way; and satisfaction of the other conditions set forth in this Section 1.1, each[Participating Transmission Owner] shall have the obligation to own and construct (or cause to be

³⁸⁴ *Id.* § 4.3(f) to (i) (Secondary Version).

³⁸⁵ *Id.* § 4.3(g), (i) (Regional System Planning Process) (Secondary Version).

³⁸⁶ New Transmission Facility is defined in Schedule 1.01 of the TOA as “Any new transmission facility constructed within the New England Transmission System that goes into commercial operation after the Operations Date.” Operations Date is defined in Article X, § 10.01(a)(ii) of the TOA (Secondary Version) as “the date on which the ISO and the Initial Participating Transmission Owners unanimously agree to place this Agreement, the ISO OATT, and related agreements and documents into effect.”

constructed) any New Transmission Facility or Transmission Upgrade that is designated in the ISO System Plan as necessary and appropriate for system reliability or economic efficiency unless a Qualified Transmission Project Sponsor other than the applicable [Participating Transmission Owner] has been designated by the ISO to construct a New Transmission Facility in accordance with Attachment K to the ISO OATT and consistent with this Schedule 3.09(a); provided that each [Participating Transmission Owner] will retain an obligation to provide a backstop solution in the event a Qualified Transmission Project Sponsor is unable to complete a system reliability or economic efficiency project on a timely basis.³⁸⁷

204. The Filing Parties also propose to add language to Schedule 3.09(a) of the TOA that would grant the Participating Transmission Owner the right to own and construct a New Transmission Facility or Transmission Upgrade in certain situations. Specifically, the Filing Parties propose to add the following underlined language:

(a) (i) Subject to the requirements.... each [Participating Transmission Owner] shall have the obligation to develop unless a Qualified Transmission Project Sponsor other than the applicable [Participating Transmission Owner] has been designated by the ISO to construct a New Transmission Facility in accordance with Attachment K to the ISO OATT and consistent with this Schedule 3.09(a); provided that each [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.

(ii) If requested by NESCOE or by any State(s) that have expressed an interest in considering transmission options to address public policy requirements in accordance with Attachment K to the OATT, a [Participating Transmission Owner] shall provide a written notice setting forth: (A) a proposed scope for developing a stage one proposal for a Public Policy Project; and (B) a good faith estimate of the costs of preparing such a stage one proposal. The

³⁸⁷ TOA, Schedule 3.09, § 1.1 (a)(i).

[Participating Transmission Owner] shall prepare such a stage one proposal if directed to proceed by NESCOE or the requesting State(s). The [Participating Transmission Owner] shall also modify the scope for developing a stage one proposal for a Public Policy Project if requested by NESCOE or the requesting State(s). If a [Participating Transmission Owner] is directed to prepare a stage one proposal in accordance with this Section 1.1(a)(ii), and the [Participating Transmission Owner] determines that the costs for developing the requested proposal are reasonably likely to exceed the good faith cost estimate in the [Participating Transmission Owner]'s scoping notice by more than 25 percent, the [Participating Transmission Owner] shall provide NESCOE or the requesting State(s) with a revised good faith estimate of the costs of preparing such a proposal. [Participating Transmission Owner]s that are requested by NESCOE or by the states to submit a stage one proposal shall be entitled to recover, pursuant to rates and appropriate financial arrangements set forth in the ISO OATT and this Agreement, their prudently incurred costs associated therewith. [Participating Transmission Owner]s whose proposed Public Policy Projects advance to stage two in accordance with the ISO OATT shall be entitled to recover, pursuant to rates and appropriate financial arrangements set forth in the OATT and this Agreement all prudently incurred costs associated with developing a stage two solution.

(iii) The [Participating Transmission Owner] may enter into appropriate contracts to fulfill any obligations associated with the ownership and construction of such New Transmission Facilities or Transmission Upgrades.

(b) Each [Participating Transmission Owner] . . . shall have the right to own and construct (or cause to be constructed) any New Transmission Facility or Transmission Upgrade located within or connected to its existing electric system that includes one or more of the following characteristics:

(i) the costs of which will be allocated only to the local customers of the [Participating Transmission Owner];

(ii) such New Transmission Facility or Transmission Upgrade involves upgrades to existing transmission or distribution facilities of a [Participating Transmission Owner]. For

purposes of this subpart (ii), an upgrade to an existing transmission or distribution facility of a [Participating Transmission Owner] shall include any improvement to, addition to, or replacement of a part of, an existing transmission or distribution facility of a [Participating Transmission Owner], including any upgrade that requires the expansion of a [Participating Transmission Owner]'s existing right-of-way; 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] consists of required upgrades to existing substations of a [Participating Transmission Owner] to which the proposed Qualified Transmission Project 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; and provided further that any such upgrades to existing substations or facilities shall be constructed and owned by the [Participating Transmission Owner(s)] that own the affected substation(s) or facilities.

(iii) with respect to any New Transmission Facility or Transmission Upgrade that is to meet reliability requirements, the forecast date of need identified by ISO-NE in the needs assessment made under Attachment K to the ISO OATT is five years or less from the date that the ISO identifies such need in the needs assessment process. This right shall not affect any rights that an entity may have to construct a Merchant Transmission Facility in response to a need identified by the ISO in the ISO Planning Process.

(c) (i) Each [Participating Transmission Owner]'s assumption of an obligation to develop proposals for New Transmission Facilities or Transmission Upgrades or to build New Transmission Facilities and Transmission Upgrades under Section 1.1(a) shall be subject to the right of such [Participating Transmission Owner] to recover, pursuant to appropriate financial arrangements and tariffs or contracts, all prudently incurred costs associated with the development of such proposals or the construction and ownership of a New Transmission Facility or Transmission Upgrade that has been included in the ISO System Plan, plus a return on invested

equity and other capital.

(f) 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 [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.[³⁸⁸]

(g) The [Participating Transmission Owner](s) shall not have an obligation to construct any specific project proposed by a Qualified Transmission Project Sponsor and selected in the ISO System Plan if that Qualified Transmission Project Sponsor abandons the proposed project. To the extent a Qualified Transmission Project Sponsor abandons a proposed project selected in the ISO System Plan to address current or projected reliability needs on the existing electric system of one of more [Participating Transmission Owner](s), the affected [Participating Transmission Owners] shall work with the ISO in accordance with the terms of this Agreement, to develop a backstop solution to the current or projected reliability needs and, to the extent required by Applicable Law, shall submit a mitigation plan to [North American Electric reliability Corporation (NERC)]. The pro forma Non-Incumbent Transmission Developer Operating Agreement in the ISO OATT shall include a provision [indemnifying the](sic) holding all affected [Participating Transmission Owners] harmless from any and all liability, including but not limited to liability for penalties assessed by NERC or FERC, resulting from a Qualified Transmission

³⁸⁸ TOA, Schedule 3.09(f) (Secondary Version).

Project Sponsor's failure to timely complete a reliability project in response to a reliability need identified in the Regional System Plan that the Qualified Transmission Project Sponsor's project was chosen in the Regional System Plan to resolve.

The Filing Parties state that such language is consistent with the guidance of Order Nos. 1000 and 1000-A, since neither the submission of a project by a Qualified Sponsor, nor ISO-NE's selection of such a project would alter a Participating Transmission Owner's use and control of an existing right-of-way.

205. With respect to Reliability Transmission Upgrades, the Filing Parties also propose to modify section 4.1(h) of Attachment K and Schedule 3.09(b)(iii) of the TOA³⁸⁹ to provide that, where the forecast year of need is five years or less from the completion of a needs assessment, ISO-NE would continue to utilize the existing Solution Studies process.³⁹⁰ The Filing Parties state that such projects would be developed as they are today, by the existing Participating Transmission Owner. Explaining this exception, the Filing Parties state that even when ISO-NE and the Participating Transmission Owners are able to work quickly, the time needed to engineer and move a project through siting and construction, including relatively simple projects, is often around five years; more complex reliability projects often take more years than that. Consequently, the Filing Parties believe that five years is a reasonable threshold. They further state that, because reliability is a critical function for the RTO and Participating Transmission Owners, and failure to maintain reliability can result in large economic losses and an increased threat to public health and safety, it is not acceptable to delay projects by one to two years for additional proceedings before beginning the siting process. Therefore, the Filing Parties believe that employment of the five-year reliability window is consistent with or superior to the principles and compliance approach set forth in Order No. 1000 regarding the right of first refusal.

206. The Filing Parties also propose to clarify section 2.1 of the TOA to ensure that Participating Transmission Owners have no obligation to provide support to any Qualified Sponsor to facilitate the development of any Qualified Sponsor's project

³⁸⁹ *Id.*, Schedule 3.09(b)(iii) (Secondary Version).

³⁹⁰ If the solution to the needs assessment would likely be a Market Efficiency Transmission Upgrade, then ISO-NE would conduct a solution process based on a two-stage competition, as described in a new Section 4.3 of Attachment K, Filing Parties Transmittal at 67. We accept the Filing Parties' proposal (Secondary Version) with respect to Market Efficiency Transmission Upgrades.

proposal, but that Participating Transmission Owners are not excused from complying with any other applicable provisions of the ISO-NE OATT or the TOA, including any requirement to provide planning support to ISO-NE, NESCOE, or any state.³⁹¹

(b) Protests/Comments

207. Certain parties assert that the Filing Parties are proposing, in essence, to maintain a federal right of first refusal in ISO-NE's OATT for five years. Additionally, these parties assert that this provision is inconsistent with Order No. 1000's requirement that the regional transmission planning process must 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.³⁹²

208. As part of its alternative proposal, NEPOOL supports opening up all types of transmission identified as needed in the regional system plan to a competitive process, which includes both incumbent transmission owners and nonincumbent transmission developers. The NEPOOL proposal seeks to remove the five-year right of first refusal from the OATT and, instead proposes a three-year exception, to be applicable only in those cases where transmission is needed to address an urgent reliability need.³⁹³

NEPOOL explains that the three-year exception is an attempt at a compromise between the NEPOOL stakeholders' preferences for competitive markets in wholesale electricity and the Filing Parties' proposal that limits competition in New England.

209. The NEPOOL proposal includes additional prerequisite conditions in order for ISO-NE not to solicit competitive proposals for solutions to address needs where the year of need is less than three years from the completion date of a needs assessment. ISO-NE would be required to determine and document that not having the new transmission project in-service by the year of need would require special operating procedures to be developed and implemented until such time as said new reliability transmission solution is placed in-service, where the cost of implementing and administering such special operating procedures is likely to cause the region to incur incremental costs exceeding \$1 million. NEPOOL states that examples of transmission projects that shall be assumed not to require more than three years to permit and construct include but are not limited to transmission lines shorter than five miles in length, new substations or switching stations,

³⁹¹ Filing Parties Transmittal at 57-58.

³⁹² Public Systems Protest at 15-17; Southern New England States Protest at 26-28.

³⁹³ NEPOOL Comments at 16-17.

new substations designed to accommodate new Capacitor Banks, STATCOM or DVAR devices, or other similar substations or switching stations. The proposal provides that in instances where the year of need is less than three years from the completion date of a needs assessment report, and if either of these prerequisite conditions is not met, ISO-NE will solicit competitive proposals from all the Participating Transmission Owners and nonincumbent transmission developers.³⁹⁴

210. New Hampshire Transmission states that the Filing Parties' claim that competition occurs in the current transmission planning process is unsupported. Instead, New Hampshire Transmission argues that allowing competition between transmission developers at the outset could lead to entirely different levels of cost savings. Additionally, New Hampshire Transmission argues that the elimination of the right of first refusal will allow new entrants with diverse expertise to offer varying solutions during the study group process. New Hampshire Transmission states that leaving all projects to incumbent transmission owners precludes the benefits a competitive transmission process would provide to the region because, even if the nonincumbent transmission developer does not present the winning solution, its participation in the competitive process puts pressure on incumbent transmission owners to actively pursue the most cost-effective solutions.³⁹⁵

211. New Hampshire Transmission also states that nonincumbent transmission developers have the same opportunity with regard to the state and local siting process as incumbent transmission owners. New Hampshire Transmission states that there are countless examples of generation projects by nonincumbent developers that have successfully sited their projects, without the benefit of having a long history of relationships with local authorities. New Hampshire Transmission argues that new market participants can bring their own skills and expertise to the process and are often free of any ill will or poor reputation that local service providers may have engendered with communities or regulators.³⁹⁶

212. NESCOE states that, despite the New England region's demonstrated ability to plan, site, cost-allocate, and build transmission to meet reliability needs, the Commission should require, to the extent consistent with the requirements of reliability, that the regional planning process incorporate meaningful opportunities for competition in the

³⁹⁴ *Id.* at 9 n.16.

³⁹⁵ New Hampshire Transmission Protest at 20-21.

³⁹⁶ *Id.* at 21-22.

development and construction of transmission projects.³⁹⁷ NESCOE believes that the Filing Parties' proposal does not go far enough to increase competition in transmission development with respect to Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades.³⁹⁸ NESCOE argues that such competition will benefit ratepayers by encouraging efficient transmission developers to participate in the market, while facilitating cost discipline for incumbent transmission owners.³⁹⁹ NESCOE states that a competitive process may encourage some transmission developers to propose projects without insisting on the necessity of ratepayer-funded financial incentives. Additionally, NESCOE argues that competitive processes are consistent with the New England States' view that reliability is a top priority. NESCOE believes that increasing the competitive dynamic in transmission development would both benefit ratepayers and be in the public interest.⁴⁰⁰

213. Public Systems state that the Filing Parties are concerned that consideration of competing proposals will not result in more cost-effective solutions and argue, in effect, that monopoly control of transmission is more cost-effective for consumers. Public Systems acknowledge, however, that the Commission has already rejected the claim that eliminating a right of first refusal will destroy a regional planning process. Indeed, Order No. 1000 does not dictate who must be selected to construct needed projects, but rather provides for a more competitive process that allows nonincumbent transmission developers to potentially provide a more cost-effective solution that meets regional needs.⁴⁰¹

214. Southern New England States argue that retaining a federal right of first refusal will almost inevitably result in increased costs to ratepayers because incumbent transmission owners have an economic incentive not to permit new entrants to compete to build transmission projects, even if those new entrants could do so more efficiently and cost-effectively.⁴⁰² Southern New England States also assert that retention of the right of first refusal will result in relatively few projects being built in New England by new

³⁹⁷ NESCOE Protest at 14.

³⁹⁸ *Id.* at 37.

³⁹⁹ *Id.* at 14.

⁴⁰⁰ *Id.* at 15-16.

⁴⁰¹ Public Systems Protest at 16.

⁴⁰² Southern New England States Protest at 26-27.

transmission developers. Citing a recent analysis performed by New Hampshire Transmission that studied planning in the Greater Boston area, Southern New England States argue that this study demonstrates that if a five-year planning horizon is employed in New England and the right of first refusal retained, none of the approximately 48 projects in the current regional system plan for the Greater Boston area would be open for solicitation of competitive bids.⁴⁰³ In contrast, Southern New England States notes that, if the federal rights of first refusal were to be removed, the potential would exist for solicitation of competitive proposals for all qualifying new transmission projects in New England. Moreover, Southern New England States remind the Commission that competition is already limited due to Order No. 1000's finding that transmission providers need not eliminate federal rights of first refusal for the following projects: (1) new transmission facilities that are located solely within an incumbent transmission owner's retail distribution service territory or footprint that are not selected in a regional transmission plan for purposes of regional costs allocation; (2) upgrades to an incumbent transmission owner's own transmission facilities; and (3) transmission facilities associated with an incumbent transmission owner's use and control of its existing rights-of-way under state law.⁴⁰⁴

215. LS Power avers that the Filing Parties' assertion that Order No. 1000 will remove the benefits of open collaboration is unsupported.⁴⁰⁵ LS Power takes issue with the Participating Transmission Owners' argument that the current New England process already incorporates competition. First, LS Power states that the premise that competition in construction and procurement is the area "where it is most likely to reduce costs and ensure superior results" is incorrect.⁴⁰⁶ LS Power agrees that construction and procurement are areas where competition may reduce costs but alleges that there are many others, "the most significant of which is the carrying costs for these hugely expensive projects, including return on equity."⁴⁰⁷ Second, LS Power finds flaws with the Filing Parties' assertion that Order No. 1000 requires replacement of the existing

⁴⁰³ *Id.* at 29 (Southern New England States Protest at 29 & n.90 (citing Memorandum from Matt Valle, President, New Hampshire Transmission, LLC, to Calvin Bowie, Chairman, Participants Committee (Sept. 26, 2012))).

⁴⁰⁴ *Id.* at 29-30 nn.90-92 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at PP 423, 426, 319).

⁴⁰⁵ LS Power Protest at 13.

⁴⁰⁶ *Id.* at 8 (citing Filing Parties Transmittal at 26).

⁴⁰⁷ *Id.*

process with one “in which competing developers must develop more detailed proposals and are likely to team up with their own preferred construction and engineering firms when they prepare their competing solutions.”⁴⁰⁸ LS Power states that Order No. 1000 has no such requirement; instead, the Commission provided regions with the flexibility to determine a process that would comply with the Order No. 1000 requirements.⁴⁰⁹ Third, LS Power argues against the Filing Parties’ assertion that the Order No. 1000 process will add additional costs. LS Power states that any such costs to ISO-NE can be recovered from the participants in the competitive process. Additionally, LS Power states that the savings from the competitive process will, most likely, off-set any additional costs.⁴¹⁰ Thus, LS Power states that the Filing Parties’ assertion that it would be required to select the sub-optimal solution is false.⁴¹¹

216. LS Power argues that as long as ISO-NE institutes a non-discriminatory process to determine the party that will construct and own the ISO-NE-determined project, the process is compliant with Order No. 1000. While dividing all existing and future transmission projects among the six current companies, and excluding all others, may reduce disputes, LS Power points out that disputes are not caused simply by competition; rather, disputes are caused by having a faulty process that leaves stakeholders questioning why decisions were made and wondering if improper motives played a role in those decisions.⁴¹²

217. LS Power states that the Filing Parties’ position that incumbent transmission owners should retain an exclusive right to build because of state siting considerations is flawed. LS Power recognizes that siting is generally the most difficult aspect of transmission development. LS Power argues that it has confidence in state siting authorities and their ability to determine whether a line is needed and the appropriate siting, regardless of whether an incumbent or a nonincumbent transmission developer will own the line.⁴¹³

⁴⁰⁸ *See id.* at 9 (quoting Filing Parties Transmittal at 26).

⁴⁰⁹ *Id.* (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 259).

⁴¹⁰ *Id.* at 14.

⁴¹¹ *Id.* (citing Filing Parties Transmittal at 21-22).

⁴¹² *Id.* at 14-15.

⁴¹³ *Id.* at 15.

218. LS Power further states that the Participating Transmission Owners' approach also eliminates the potential to address the reliability needs with something other than a transmission solution. Selecting an arbitrary need-by date as the deciding factor as to whether or not a project is assigned by default to the Participating Transmission Owner is inappropriate and should be rejected.⁴¹⁴ LS Power's position is that setting any blanket, arbitrary exclusivity period is inappropriate; a more appropriate approach would be to address near-term needs on a case-by-case basis.⁴¹⁵

219. LS Power contends that the proposed rights-of-way language contradicts Order No. 1000, which made clear that the use and control of incumbent-owned rights-of-way is a matter of state law.⁴¹⁶ LS Power states that this language is "an attempt to handcuff the state siting process, or to interpret state law regarding the use of rights-of-way, or to restrict the terms of such use or the use of eminent domain authority in New England."⁴¹⁷ LS Power contends that the proposed language is not required by Order No. 1000, and it has the potential to create a barrier to entry in the evaluation of projects.⁴¹⁸

(c) Answers

220. In its January 18, 2013 answer, ISO-NE states that the five-year exception for reliability projects is not only reasonable but is also justified by data and analysis provided in the compliance filing.⁴¹⁹ ISO-NE states that it is unusual for the time from needs assessment to in-service date for any transmission project to span less than five years. Instead, ISO-NE states that it is the NEPOOL proposal allowing for a three-year exception that is unsupported. ISO-NE argues that the NEPOOL proposal seeks to impose delays through a dueling projects process on a variety of reliability projects, and that such delays might cost the region up to \$1 million due to the need to implement special operating procedures.⁴²⁰ ISO-NE argues that the exclusions attached to the three-

⁴¹⁴ *Id.* at 18.

⁴¹⁵ *Id.* at 19.

⁴¹⁶ *Id.* at 24 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 427).

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ ISO-NE January 18, 2013 Answer at 75; *see also* Rourke Test. at 18-19; *id.*, Attachment 1.

⁴²⁰ *Id.* at 75-76.

year exception are also ill-conceived because they are unworkable and vague. Further, ISO-NE argues that LS Power's comments stating that there should be no exceptions made with regard to reliability needs are extreme. ISO-NE requests that the Commission reject all of these proposals because they are inconsistent with the Commission's mission to protect reliability and enforce reliability standards.⁴²¹

221. In their response, the PTO Administrative Committee notes that, although several protesters have suggested that allowing third party participation in the construction of reliability projects would allow more efficient projects to be brought forward in the planning process, they have provided no evidence or examples.⁴²²

222. With respect to the five-year exception for reliability projects, the PTO Administrative Committee states that the Filing Parties' proposal reflects the unique circumstances affecting transmission planning in the New England region. The PTO Administrative Committee states that the inclusion of the Rourke and PTO Administrative Committee Testimony prove that the five-year exception is factually supported, unlike the NEPOOL proposal. Further, the PTO Administrative Committee states that it is the most judicious approach to reliability planning.⁴²³ The PTO Administrative Committee argues that the NEPOOL proposal's conditional three-year exception would lead to uncertainty and disputes in addressing clear and pressing near-term reliability needs. The PTO Administrative Committee states that a clear cut criterion is preferable in order to allow the system planner to focus on the priority of near-term system reliability instead of arbitrary prerequisites that would lead to delays.⁴²⁴

223. In its answer, New Hampshire Transmission argues that the Filing Parties' proposal does not ensure that needed transmission solutions are being implemented in the most efficient and cost-effective manner possible. In fact, New Hampshire Transmission argues that maintaining the right of first refusal does not provide the transmission owners with any upfront price discipline that would come from allowing nonincumbents transmission developers to compete. New Hampshire Transmission states that the current process has placed little, if any, pressure on transmission owners to control cost overruns or to propose the most cost-effective solutions.⁴²⁵ Contradicting the Filing Parties'

⁴²¹ *Id.* at 77.

⁴²² PTO Administrative Committee Answer at 4.

⁴²³ *Id.* at 37-38.

⁴²⁴ *Id.* at 40-41.

⁴²⁵ New Hampshire Transmission Answer at 13-14.

claims that there is no evidence that competitive transmission solutions would reduce the costs of the region's transmission build-out, New Hampshire Transmission cites to Order No. 1000, which states that the existence of a right of first refusal can, by limiting the number of potential transmission solutions, result in unjust and unreasonable transmission rates.⁴²⁶ Additionally, New Hampshire Transmission avers that maintaining the right of first refusal will deprive nonincumbent transmission developers of a reason to propose alternative solutions.⁴²⁷

224. New Hampshire Transmission also states that incumbent transmission owners should not automatically be trusted to build transmission in the most cost-effective manner. Indeed, New Hampshire Transmission points to a number of examples in which projects have been built by nonincumbent transmission developers that were novel in their approach, using both technical and pricing innovations.⁴²⁸ New Hampshire Transmission states that nonincumbent transmission developers have expressed a willingness to deviate from the traditional cost-of-service model that would use cost containment mechanisms along the lines of mechanisms used in some state jurisdictions.⁴²⁹

225. New Hampshire Transmission also notes that the Filing Parties' assumption that nonincumbent transmission developers will not be able to design, engineer, permit, and construct a reliability upgrade as quickly as an incumbent transmission owner lacks any factual basis. New Hampshire Transmission states that there is actual evidence that suggests nonincumbent transmission developers can develop major projects on expedited schedules.⁴³⁰

⁴²⁶ *Id.* at 15 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 11, explaining that the rejection of a right of first refusal was justified based on an expectation that “[t]he presence of multiple transmission developers would lower costs to customers”).

⁴²⁷ *Id.*

⁴²⁸ For example, New Hampshire Transmission cites Lone Star Transmission's work in Texas and Cross Sound Cable's Neptune Transmission project as projects that used technical and pricing innovations, respectively. *See* New Hampshire Transmission Answer at 16.

⁴²⁹ *Id.* at 17.

⁴³⁰ *Id.* at 19.

226. Finally, New Hampshire Transmission states that the Commission should not tolerate the transmission owners' threats to not collaborate in a competitive transmission process. The transmission owners are required to comply with the requirements of Order No. 1000 and cannot simply threaten to withhold information needed to safely and reliably interconnect nonincumbent transmission projects to their transmission systems. New Hampshire Transmission states that ISO-NE and nonincumbent transmission developers are entitled to the same degree of cooperation by transmission owners as the transmission owners give ISO-NE and each other currently. To allow transmission owners to withhold information relevant to performing long-term system planning studies to determine need and reliability solutions, New Hampshire Transmission argues, would threaten reliability.⁴³¹

(d) **Commission Determination**

(1) **Existing Federal Right of First Refusal**

227. We find that the Filing Parties partially comply with the requirements of Order No. 1000 regarding the removal of a federal right of first refusal, as discussed below. Consistent with Order No. 1000's directives, the Filing Parties have revised certain existing language in the TOA to remove references to a federal right of first refusal. However, we require the Filing Parties to remove certain proposed exceptions related to rights-of-way. We also require the Filing Parties to revise their proposal to assign certain new transmission facilities and transmission upgrades needed to meet reliability requirements to the Participating Transmission Owner.

(2) **Exceptions to the Requirement to Eliminate a Federal Right of First Refusal**

228. We find that the proposed revisions partially comply with the requirements of Order No. 1000. Therefore, we find that the Filing Parties' proposed revisions comply, subject to further amendment, as discussed below.

229. The Filing Parties propose to add new sections (b) and (f) to Schedule 3.09(a) of the TOA that would preserve the Participating Transmission Owner's rights to: (1) build an upgrade to an 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 local

⁴³¹ *Id.* at 19-20.

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.⁴³² We find that the Filing Parties' proposed exceptions to the requirement to eliminate the federal right of first refusal partially comply with the exceptions set forth in Order No. 1000.

230. Regarding the first proposed exception for upgrades, we note that Order No. 1000 does not remove or limit any right an incumbent transmission owner may have to build, own and recover costs for upgrades to the transmission facilities owned by an incumbent.⁴³³ We find that the Filing Parties' proposal to define as an upgrade "any improvement to, addition to, or replacement of a part of, an existing transmission or distribution facility of a [transmission owner]" such that it is not subject to Order No. 1000's requirement to remove a federal right of first refusal is consistent with the definition of the term "upgrade" in Order No. 1000-A.⁴³⁴ However, we find that the Filing Parties' proposal to classify as an "upgrade" to be built by a transmission owner any Transmission Facility "that requires expansion of a [transmission owner's] existing right-of-way" is not consistent with the definition of "upgrade" as clarified in Order No. 1000-A, and as such, we direct ISO-NE to remove this proposed language in the compliance filing we direct here.

231. In addition, the Filing Parties propose that the regional system planning provisions of the ISO-NE OATT shall include statements that the submission of a transmission project or its selection for inclusion in the regional system plan shall not alter a transmission owner's use and control of an existing right-of-way and that no transmission owner shall be required to relinquish any of its rights-of-way. Specifically,

(f) 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

⁴³²TOA, Schedule 3.09(a), §§ (b), (f) (Secondary Version).

⁴³³ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319.

⁴³⁴ In Order No. 1000-A, the Commission clarified 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.

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.⁴³⁵

The Filing Parties also propose similar statements in the OATT:

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 RSP Project List shall 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 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 [transmission owner's] to relinquish any of its rights-of-way in order to permit a Qualified Transmission Project Sponsor to develop, construct or own a project.⁴³⁶

We find that these exceptions are not permitted by Order No. 1000, and, as such, we direct the Filing Parties to remove the proposed language throughout the ISO-NE OATT and TOA. The Commission acknowledged in Order No. 1000 that its reforms “are not intended to alter an incumbent transmission provider’s use and control of its existing rights-of-way[,]” that Order No. 1000 does not “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[,]” and that the “retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way.”⁴³⁷ However, the Commission did not find that as part of its compliance filing, a public utility transmission provider may add a federal right of first refusal for a new transmission facility based on an existing right-of-way. Therefore, we

⁴³⁵ TOA, Schedule 3.09(f) (Secondary Version).

⁴³⁶ ISO-NE, OATT, Attachment K, § 4.3(a) (Secondary Version).

⁴³⁷ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319.

direct ISO-NE to file, within 120 days of the date of issuance of this order, a further compliance filing revising the proposed tariff language to remove the proposed language related to rights-of-way in sections (b) and (f) of Schedule 3.09(a) and section 4.3(a) of Attachment K.

232. However, we note that while rights-of-way may not be used to automatically exclude proposals to develop more efficient or cost-effective transmission solutions to regional transmission needs, it is not necessarily impermissible to consider rights-of-way at appropriate points in the regional transmission planning process. It would be appropriate for ISO-NE to consider whether an entity has existing rights-of-way as well as whether the entity has experience or ability to acquire rights-of-way as part of the process for evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation.

233. Finally, we find that the Filing Parties' proposal to preserve the Participating Transmission Owner's rights to develop a local 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 complies with Order No. 1000. The requirement to eliminate a federal right of first refusal does not apply to local transmission facilities, which are defined 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."⁴³⁸

234. Accordingly, we direct the Filing Parties to file, within 120 days of the date of issuance of this order, a further compliance filing that removes the proposed language related to rights-of-way in sections (b) and (f) of Schedule 3.09(a).

(3) **"Time-Based" Federal Right of First Refusal**

235. We find that the Filing Parties' proposal to assign certain New Transmission Facilities and Transmission Upgrades needed to meet reliability requirements to the transmission owner partially complies with the directives of Order No. 1000. As part of this proposed process, ISO-NE generally will rely on a competitive solicitation process to evaluate and select new transmission projects in the regional transmission plan for the purposes of cost allocation. Where the forecast year of need for a reliability-related project is five years or less from the completion of a needs assessment, the Filing Parties propose that the existing transmission owner will develop the needed transmission facility. We recognize that in certain instances time constraints may not allow for the

⁴³⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 63.

open solicitation of reliability-related transmission projects without risking reliability to the system. As such, we agree with the Filing Parties that there may be instances in which it may not be feasible to hold a competitive solicitation process to solve a reliability violation. Thus, to avoid delays in the development of transmission facilities needed to resolve a time-sensitive reliability criteria violation, we find that it is just and reasonable to include a class of reliability-related transmission projects that are exempt from the competitive solicitation.

236. However, we also find that such an exception should only be used in certain limited circumstances. Therefore, we adopt the following five criteria, which we believe will place reasonable bounds on ISO-NE's discretion to determine whether there is sufficient time to permit competition to develop reliability projects and, as a result, will ensure that an exception from the requirement to eliminate a federal right of first refusal for reliability projects will be used in limited circumstances. First, the reliability project must be needed in three years or less to solve reliability criteria violations. Second, 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. 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 an 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 reliability need and an explanation of why that 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 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.

237. Regarding the first criterion, we note that the Filing Parties have not sufficiently supported the proposed five-year period to assign development of a reliability project to

the Participating Transmission Owner. We do not find Mr. Rourke's testimony on the five-year period persuasive. Mr. Rourke's testimony speaks in generalities—"around five years."⁴³⁹ The PTO Administrative Committee Testimony similarly refers to "a general rule of thumb."⁴⁴⁰ While both Mr. Rourke and the PTO Administrative Committee Testimony provide lists of transmission projects that required more than five years to bring into service from start to finish, neither provides sufficient context as to whether those 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. In addition, 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 removal of the right of first refusal. Thus, 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.

238. Instead, we find that, on balance, a three-year threshold for assigning a reliability project to a Participating Transmission Owner is just and reasonable. 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 its basic 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.⁴⁴¹ The Commission therefore 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.⁴⁴² The more transmission projects that an

⁴³⁹ Rourke Test. at 18-19.

⁴⁴⁰ Transmission Owner Test. at 39.

⁴⁴¹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 254 (citing *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 31,682 (1996); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 524), 256.

⁴⁴² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 253, 263.

exception for reliability projects covers, the longer such barriers are maintained against potential competitive transmission solutions proposed by nonincumbent transmission developers. Additionally, as LS Power notes, “[t]here are many other new and emerging technologies that may be available to address transmission needs on a shorter timeline than five years.”⁴⁴³

239. 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.⁴⁴⁴ When balancing these goals of Order No. 1000, we find that limiting this exception to those reliability projects needed in three years or less to solve a reliability violation strikes a reasonable balance. We note that NEPOOL submitted an alternative proposal under which ISO-NE will assign the development of Reliability Transmission Upgrades that are needed within three years from the completion of the needs assessment to the Participating Transmission Owner, which received significantly more support in the stakeholder process than the five-year threshold proposed by the Filing Parties. Moreover, a three-year threshold is consistent with the threshold recently approved in PJM.⁴⁴⁵

240. We clarify that even where the Filing Parties propose to assign a transmission project selected in the regional transmission plan for the purposes of cost allocation to a Participating Transmission Owner in accord with the “time-based” transmission project proposal process, any such Participating Transmission Owner must have been certified by ISO-NE as qualified to submit a project proposal under the qualification criteria discussed further below. This additional process comports with the requirement of Order No. 1000 that all entities, both incumbent and nonincumbent transmission developers, be subject to a determination as to their eligibility to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation.

241. Accordingly, we direct the Filing Parties to file, within 120 days of the date of issuance of this order, a further compliance filing to include the following: (1) revisions to clarify that the 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, as explained above; and (2) a demonstration of how ISO-NE’s process for assigning such transmission projects to the Participating Transmission

⁴⁴³ LS Power Protest at 18.

⁴⁴⁴ See Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 263.

⁴⁴⁵ *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at PP 247-255 (2013).

Owner complies with criteria two through five, discussed above; or, if such a demonstration is not possible, revisions to comply with those criteria.

b. Qualification Criteria

242. Order No. 1000 requires each public utility transmission provider to revise its OATT to demonstrate that the regional transmission planning process in which it participates has established 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, whether that entity is an incumbent transmission provider or a nonincumbent transmission developer.⁴⁴⁶ Appropriate qualification criteria must be fair and not unreasonably stringent when applied to either the incumbent transmission provider or nonincumbent transmission developer.⁴⁴⁷ These criteria must not be unduly discriminatory or preferential and must provide each potential transmission developer the opportunity to demonstrate that it has the necessary financial resources and technical expertise to develop, construct, own, operate, and maintain transmission facilities.⁴⁴⁸

243. The qualification criteria should also allow for the possibility that an existing public utility transmission provider already satisfies the criteria.⁴⁴⁹ There must be procedures in place for timely notifying transmission developers of whether they satisfy the region's qualification criteria and opportunities to remedy any deficiencies.⁴⁵⁰ In addition, the qualification criteria should not be applied to an entity proposing a transmission project for consideration in the regional transmission planning process if that entity does not intend to develop the proposed transmission project.⁴⁵¹

244. The Commission clarified in Order No. 1000-A that it would be an impermissible barrier to entry to require, as part of the qualification criteria, that a transmission developer demonstrate that it has, or can obtain, state approvals necessary to operate in a

⁴⁴⁶ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 225, 323.

⁴⁴⁷ *Id.* P 324.

⁴⁴⁸ *Id.* P 323.

⁴⁴⁹ *Id.* P 324.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* P 324 n.304; Order No. 1000-A, 139 FERC ¶ 61,132 at n.520.

state, including state public utility status and the right to eminent domain, to be eligible to propose a transmission facility.⁴⁵²

i. Filing Parties' Filing

245. The Filing Parties state that the qualification criteria are the same for sponsoring reliability, market efficiency, and public policy transmission projects.⁴⁵³ The Filing Parties state that ISO-NE will periodically evaluate applications by potential transmission developers, and that ISO-NE will inform the Qualified Sponsors as to whether the application is complete, or identify any deficiencies and will post a list of the Phase One Proposals that meet the criteria on its website.

246. To be qualified, entities (other than a transmission owner or a Commission-approved independent transmission company that has an existing operating agreement with ISO-NE) must provide certain information. Such information is related to:

- (i) current and expected capabilities of the applicant to finance, license, and construct a Reliability Transmission Upgrade, Market Efficiency Transmission Upgrade or Public Policy Transmission Upgrade and operate and maintain it for the life of the project;
- (ii) financial resources of the applicant;
- (iii) technical and engineering qualifications and experience of the applicant;
- (iv) if applicable, the previous record of the applicant regarding construction and maintenance of transmission facilities;
- (v) demonstrated capability of the applicant to adhere to construction, maintenance and operating Good Utility Practices, including the capability to respond to outages;
- (vi) ability of the applicant to comply with all applicable reliability standards;
- (vii) legal status of the applicant;
- (viii) extent to which the applicant satisfies state legal or regulatory requirements for siting, constructing, owning, and operating transmission projects;
- (ix) experience of the applicant and its team in acquiring rights-of-way, and the authority to acquire rights-of-way by eminent domain, if necessary, that would facilitate approval and construction;
- (x) demonstrated ability of the applicant to meet development and completion schedules; and
- (xi) demonstrated ability of the applicant to assume liability for major losses resulting from failure of facilities.

247. The Filing Parties aver that these criteria were developed with stakeholder input, are not unduly discriminatory or preferential, and provide each potential developer the opportunity to demonstrate that it has the necessary financial resources and technical

⁴⁵² Order No. 1000-A, 139 FERC ¶ 61,132 at P 441.

⁴⁵³ Filing Parties Transmittal at 58 n.179.

expertise. They further state that the criteria are fair and not unreasonably stringent when applied to either incumbents or nonincumbent transmission developers.⁴⁵⁴

248. The Filing Parties explain that ISO-NE will review each application for completeness and will notify each applicant within 30 calendar days of receipt as to whether the application is complete or has identified deficiencies. Once the application is complete, ISO-NE will determine whether the applicant is physically, technically, legally, and financially capable of constructing a Reliability Transmission Upgrade, Market Efficiency Transmission Upgrade or Public Policy Transmission Upgrade in a timely and competent manner, and operating and maintaining the facility consistent with Good Utility Practice and applicable reliability criteria for the life of the project.

249. Further, ISO-NE requires that a “non-[transmission owner] entity determined by the ISO to meet all of these criteria will, upon its execution of the [Nonincumbent] Transmission Developer Operating Agreement (in the form specified in Attachment O of the OATT) and the Market Participant Service Agreement, be deemed a Qualified Transmission Project Sponsor” eligible to propose projects in the competitive solicitation process. The Filing Parties state that, if ISO-NE determines that the entity is capable, ISO-NE designates the entity a Qualified Sponsor. ISO-NE will post and maintain on its website a list of Qualified Sponsors.

250. The Filing Parties also propose a Nonincumbent Transmission Developer Operating Agreement (NTDOA), which is designed to be entered into between ISO-NE and an entity immediately following the entity’s qualification as a Qualified Sponsor. The NTDOA is designed to govern the relationship between ISO-NE and the Qualified Sponsor (here referred to as a nonincumbent transmission developer) during the period from its qualification as a Qualified Sponsor through its submission of a Phase One Proposal and a Phase Two Solution, if any, through the listing (if any) of the nonincumbent transmission developer’s project in the Regional System Plan Project List, up until the point at which the project goes into service. At that point, the nonincumbent transmission developer will join the existing TOA as an additional transmission owner, and its NTDOA will automatically terminate.⁴⁵⁵

ii. Protests/Comments

251. LS Power states that if the goals of Order No. 1000 are to be achieved, the regional transmission planning process must send a clear message to all viable

⁴⁵⁴ *Id.* at 59.

⁴⁵⁵ *Id.* at 60-61 (discussing key provisions of the NTDOA).

prospective transmission developers—incumbent and nonincumbent alike—that their ideas are sought; that they should invest their time, effort, and money to submit projects into the regional planning process; and that if they have the best, most efficient, or cost-effective idea, they will be selected to construct, own, and operate the proposed transmission facilities.⁴⁵⁶ If the planning process or the planning entity appears to favor incumbent transmission owners, or is required to favor them by the rules under which it operates, LS Power argues that Order No. 1000’s goal of fostering the best ideas and best projects will not be met because not everyone will participate.⁴⁵⁷ Further, LS Power states that nothing in Order No. 1000 forces ISO-NE to select a sub-optimal solution; Order No. 1000 contemplates that the most efficient or cost-effective transmission project may not be proposed by any transmission developer.⁴⁵⁸ In LS Power’s view, ISO-NE may identify the project under such circumstances, provided ISO-NE has a non-discriminatory process in place to determine which party will construct and own the project.⁴⁵⁹

252. LS Power states that the Filing Parties’ proposed OATT revisions maintain different treatment of Participating Transmission Owners and nonincumbent transmission developers and, therefore, do not comply with Order No. 1000.⁴⁶⁰ LS Power states that, notwithstanding the latitude the Commission gave each region to determine appropriate qualification criteria, certain qualification criteria proposed by the Filing Parties fail to meet the Commission’s requirements that the criteria cannot be unduly discriminatory or preferential.⁴⁶¹

253. LS Power also takes issue with the Filing Parties’ proposed qualification criterion to establish that a prospective transmission developer could finance, license, and construct a project “for the life of the project.” LS Power considers this requirement vague and believes the term, “for the life of the project,” cannot be valued in any reasonable manner. LS Power states that it would be impossible for ISO-NE to determine whether a transmission developer, incumbent or nonincumbent, has the capability or capacity to operate and maintain the facilities for the next 30 or 40 years

⁴⁵⁶ LS Power Protest at 3-4.

⁴⁵⁷ *Id.* at 6.

⁴⁵⁸ *Id.* at 14 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 336).

⁴⁵⁹ *Id.*

⁴⁶⁰ *See id.* at 1.

⁴⁶¹ *Id.* at 19-20.

(the average life span of a transmission project). LS Power argues that the Filing Parties neither offer an explanation as to how ISO-NE will make such a determination regarding a transmission developer's capability, nor how ISO-NE would be capable of offering such an explanation.⁴⁶² Additionally, in section 4B.2 of Attachment K, regarding the information to be submitted by an entity seeking to become a Qualified Sponsor, the Filing Parties are including the following requirements: subsection (vii), "the legal status of the applicant," and subsection (viii), "the extent to which the applicant satisfies state legal or regulatory requirements for siting, constructing, owning and operating transmission projects." LS Power asserts that these criteria contravene Order No. 1000-A's directive that "it would be an impermissible barrier to entry to require . . . that a transmission developer demonstrate that it either has, or can obtain, state approvals necessary to operate in a state, including state public utility status or the right of eminent domain, to be eligible to propose a transmission facility."⁴⁶³

254. LS Power states that the Filing Parties' proposal that nonincumbent transmission developers provide their previous records regarding construction and maintenance of transmission facilities is inappropriate and discriminatory unless applied to incumbent transmission developers as well. LS Power points to the Filing Parties' position that Participating Transmission Owners simply "shall be deemed to be a" qualified developer, as per Order No. 1000, without further clarification.⁴⁶⁴ LS Power states that, unless ISO-NE can establish that it has the full construction and maintenance record of each Participating Transmission Owner and weighs that record before automatically determining those Participating Transmission Owners are "qualified," applying this requirement to nonincumbent transmission developers is inappropriate.⁴⁶⁵

255. LS Power also objects to the qualification criterion requiring an entity to demonstrate an "[a]bility . . . to assume liability for major losses resulting from failure of facilities,"⁴⁶⁶ arguing that this requirement also is vague. LS Power states that it is unclear what the required showing would be or how the evaluation would be conducted. According to LS Power, if the intent is simply to require a certain level of insurance or

⁴⁶² *Id.* at 20.

⁴⁶³ *Id.* at 22 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 441).

⁴⁶⁴ *Id.* at 21 (citing Filing Parties Transmittal at 59 and Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 324).

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 22 (citing Filing Parties Transmittal at 59).

other assurance, then the Filing Parties should include that requirement as a milestone requirement after selection. Further, LS Power states that the Filing Parties should identify the existing tariff or other provisions that establish comparable requirements on the Participating Transmission Owners.⁴⁶⁷

256. LS Power states that, once selected for the construction and ownership of a project, it does not object to having a generic contractual arrangement governing the development of such projects. LS Power maintains that, in any case, such a contractual arrangement cannot be more onerous than the contractual arrangement that Participating Transmission Owners either have signed or are required to sign under the process, since, presumably, the OATT requirements would apply equally to all transmission developers.⁴⁶⁸ LS Power points out that currently the TOA does not require Participating Transmission Owners to “hold harmless” other Participating Transmission Owners if the transmission project they are constructing is delayed, yet section 9.01 of Filing Parties’ proposed NTDOA has such a requirement for nonincumbent transmission developers.⁴⁶⁹ LS Power argues that this open-ended liability provision may leave nonincumbent transmission developers unable to finance their projects. Therefore, LS Power argues that, to the extent that the Commission allows the NTDOA, section 9.01 should be struck in its entirety.⁴⁷⁰ LS Power also objects to the requirement that a nonincumbent sign the TOA as an “additional transmission owner” once its project goes into service. LS Power argues that this designation places nonincumbent transmission developers in a different position than the Participating Transmission Owners and accords nonincumbent transmission developers different rights.⁴⁷¹

257. NESCOE argues that section 2.1 of Schedule 3.09(a), which states that transmission owners have no obligation to provide support to a Qualified Sponsor, should be rejected because it appears to be “facially contrary” to the general principle of cooperation underlying Order No. 1000.⁴⁷² NESCOE is concerned that this provision

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 25.

⁴⁶⁹ *Id.* at 26

⁴⁷⁰ *Id.* at 25.

⁴⁷¹ *Id.* at 25-26; *see also id.* at 21 (contending inquiries into nonincumbent transmission developer’s legal status as a qualification criterion are inappropriate).

⁴⁷² NESCOE Comments at 59. Section 2.1 reads:

would not facilitate cooperation and the sharing of information that could benefit the transmission planning process. Additionally, NESCOE believes that the proposed provision should be rejected because it is substantive but cannot be reconciled with any compliance directive in Order No. 1000. NESCOE understands that some degree of protection over certain information may be warranted; however, NESCOE believes that a blanket prohibition from providing any support or data is unwarranted and extreme. NESCOE argues that the planning goals of Order No. 1000 will be undermined if the transmission owners are not obligated to share critical information with regional transmission customers and/or distribution customers.⁴⁷³

258. NESCOE argues that section 4B.2(ix) of Attachment K of the Filing Parties' proposal which requires entities seeking to become Qualified Sponsors to demonstrate their experience "in acquiring rights of way, and the authority to acquire rights of way by eminent domain, if necessary, that would facilitate approval and construction" should also be rejected. NESCOE states that this proposal is inconsistent with Order No. 1000's stated preference for developing competition; in particular, no entity has eminent domain rights in every state, and further, "rights of way" are entirely a state issue. Moreover, NESCOE argues that the Commission only required that the nonincumbent transmission developer be able to "demonstrate that it has the necessary financial resources and the technical expertise to develop, construct, own, operate and maintain transmission facilities"⁴⁷⁴ with respect to the qualification criteria. The Filing Parties' proposal regarding section 4B.2(ix) of Attachment K, NESCOE argues, exceeds the Commission's directive, resulting in an unduly discriminatory impact on nonincumbent transmission developers. Additionally, NESCOE argues that it is an overly-restrictive requirement that should not be included as a prerequisite for qualifying as a Qualified Sponsor, and,

Each [Transmission Owner] shall support the planning process as described in the ISO OATT and any interregional planning coordination. As requested by the ISO, such support may include conducting any necessary studies, including system impact studies and facilities studies for the [Transmission Owner's] Transmission Facilities, assisting in the performance of such studies or any additional studies, and supplying any information and data reasonably required to prepare a[n] ISO System Plan or to perform transmission enhancement and expansion studies.

⁴⁷³ *Id.* at 60-61.

⁴⁷⁴ *Id.* at 61 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 323).

therefore, the Commission should reject the proposed revisions to sections 1.4 and 2.1 of Schedule 3.09(a) of the TOA, and section 4B.2(ix) of Attachment K.⁴⁷⁵

iii. Answer

259. In its January 18 answer, ISO-NE states that the Commission should reject LS Power's protest regarding certain provisions of section 4B.2 of Attachment K, because Order No. 1000 provides broad flexibility in formulating criteria with which an entity must comply in order to be deemed a qualified transmission developer.⁴⁷⁶ With respect to section 4B.2(iv), ISO-NE explains that Order No. 1000 permits it to deem Participating Transmission Owners to be qualified transmission developers. These same entities have significant obligations under the TOA and have more than demonstrated that they have the capital, organizations, and resources to design, construct, and maintain complicated power system facilities in New England. ISO-NE argues that new entities are not similarly situated; therefore, ISO-NE's request for support of these capabilities where the future integrity of the region's power system is at issue is reasonable.⁴⁷⁷

260. However, ISO-NE agrees with LS Power that certain provisions of section 4B.2(vi), (vii) and (viii) regarding an applicant's legal status and right-of-way acquisition and other authority are not appropriate as factors for review in determining whether a developer may qualify as a Qualified Sponsor. ISO-NE agrees that it is appropriate to revise these criteria on compliance, as directed by the Commission.⁴⁷⁸

261. ISO-NE also states that LS Power's objection to the NTDOA is unsubstantiated and should be rejected. ISO-NE argues that the NTDOA is needed during the period before the nonincumbent transmission developer becomes a transmission owner, as a signatory to the TOA, so that there are no misunderstandings about the obligations of the transmission developer and ISO-NE before undertaking the project. ISO-NE also states that the Commission should disregard LS Power's concern that any contractual agreement between nonincumbent transmission developers and ISO-NE not be more onerous than agreements with Participating Transmission Owners, because the NTDOA is modeled on the TOA executed with Participating Transmission Owners. Finally, ISO-

⁴⁷⁵ *Id.* at 61-62.

⁴⁷⁶ ISO-NE January 18, 2013 Answer at 78 (citing Order No. 1000, FERC Stats. and Regs. ¶ 31,323 at P 324).

⁴⁷⁷ *Id.* at 79-80.

⁴⁷⁸ *Id.* at 79.

NE responds to LS Power's concern that nonincumbent transmission developers having "additional [transmission owner]" status in the TOA is somehow inferior. On the contrary, ISO-NE states that an "additional [transmission owner]" has all of the rights of the original transmission owners, and other entities (including municipal utilities) have joined as "additional transmission owners" without experiencing "second-class" status.⁴⁷⁹

262. In its answer, the PTO Administrative Committee states that the provisions in section 4B.2 require nonincumbent transmission developers to provide ISO-NE with only a fraction of the information available to ISO-NE with respect to other transmission owners. The PTO Administrative Committee explains that the Participating Transmission Owners, unlike nonincumbent transmission developers, have extensive obligations under the TOA to provide a wide range of information to ISO-NE upon request.⁴⁸⁰

263. The PTO Administrative Committee answer also addresses LS Power's concerns regarding certain qualification criteria, i.e., providing the previous record of the project sponsor and demonstrating the ability of the applicant to assume liability for major financial losses.⁴⁸¹ The PTO Administrative Committee states that ISO-NE already has a substantial record on the prior performance of existing transmission owners in developing transmission projects and their ability to assume liability for losses. In addition, the PTO Administrative Committee argues that the TOA obligates transmission owners to provide a wide range of information to ISO-NE upon request; nonincumbent transmission developers have no such obligations.⁴⁸²

264. The PTO Administrative Committee disagrees with LS Power's objection to the hold harmless provision; instead, the PTO Administrative Committee believes it is appropriate. The PTO Administrative Committee states that the provision is a response to the adverse impacts of delays in meeting reliability needs, a concern also expressed by the Commission in Order No. 1000.⁴⁸³ Contrary to the assertions of LS Power, the PTO

⁴⁷⁹ *Id.* at 79-81.

⁴⁸⁰ PTO Administrative Committee Answer at 34-35; *see also, e.g.*, TOA § 11.09.

⁴⁸¹ PTO Administrative Committee Answer at 34 (citing LS Power Protest at 20, 21).

⁴⁸² *Id.* at 34-35.

⁴⁸³ *Id.* at 35 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 7, 263, 329).

Administrative Committee explains that it is not discriminatory to require a nonincumbent transmission developer to assume different contractual obligations to ensure that the transmission system remains reliable while their project is under construction because once a transmission project is placed into service, a nonincumbent transmission developer will be a party to the TOA, will presumably become a NERC-registered entity, and will be subject to various requirements to ensure the reliability of the transmission system is maintained. The PTO Administrative Committee also mentions that this provision was not controversial during the Order No. 1000 stakeholder process.⁴⁸⁴

265. The PTO Administrative Committee states that LS Power's concern that the TOA discriminates against "additional transmission owners" and affords nonincumbent transmission developers different rights is beyond the scope of this proceeding.⁴⁸⁵

266. In response to NESCOE's opposition to the clarification provided in section 2.1 of Schedule 3.09(a) of the TOA that does not obligate transmission owners to provide support to any Qualified Sponsors in facilitating the development of any transmission project, the PTO Administrative Committee disputes NESCOE's claim that it is outside the scope of the proceeding, and argue that the need to define the relationship between the existing transmission owners and nonincumbent transmission developers is created by Order No. 1000. The PTO Administrative Committee explains that section 2.1 clarifies that the transmission owners will provide information and assistance to ISO-NE, NESCOE, and the New England states in accordance with the TOA and the ISO-NE OATT; it will also provide information to other parties in accordance with their responsibilities under the NERC functional model. The PTO Administrative Committee states that section 2.1 realizes the collaboration envisioned by Order No. 1000.⁴⁸⁶

iv. Commission Determination

267. We addressed the Filing Parties' proposed exceptions for the use and control of an existing right-of-way above in the section dealing with the exceptions to the requirement to eliminate the federal right of first refusal.⁴⁸⁷ We now turn to the Filing Parties' proposed qualification criteria provisions for prospective transmission developers, which

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 36.

⁴⁸⁶ *Id.* at 36-37.

⁴⁸⁷ *See supra* PP 210-219.

include some proposed qualification criteria addressing acquiring rights-of-way, among other items, that must be removed. We find that the qualification criteria provisions in the Filing Parties' filing partially comply with the requirements of Order No. 1000. Generally, the financial and technical qualification criteria that the Filing Parties have established are fair and not unreasonably stringent.⁴⁸⁸ We also find that the qualification criteria must be applied to both Participating Transmission Owners and independent transmission companies and nonincumbent transmission developers alike. Thus, we require the Filing Parties to submit a further compliance filing, as discussed below.

268. We find to be inconsistent with Order No. 1000-A the Filing Parties' proposed qualification criteria to consider (1) the extent to which a prospective transmission developer satisfies state legal or regulatory requirements for siting, constructing, owning, and operating transmission projects and (2) the experience of a prospective transmission developer and its team in acquiring rights-of-way, and the authority to acquire rights-of-way by eminent domain, if necessary, that would facilitate approval and construction.⁴⁸⁹ In Order No. 1000-A, the Commission clarified that "it would be an impermissible barrier to entry, to require, as part of the qualification criteria, that a transmission developer demonstrate that it either has, or can obtain state approvals necessary to operate in a state, including state public utility status or the right of eminent domain, to be eligible to propose a transmission facility."⁴⁹⁰ Therefore, on compliance, we direct the Filing Parties to remove these qualification criteria from ISO-NE's OATT. We note, however, 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.⁴⁹¹

⁴⁸⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 324 (stating that qualification criteria should be "fair and not unreasonably stringent").

⁴⁸⁹ *See supra* P 210.

⁴⁹⁰ Order No. 1000-A, 139 FERC ¶ 61,132 at P 441.

⁴⁹¹ Considering "the extent to which a prospective transmission developer satisfies state legal or regulatory requirements for siting, constructing, owning, and operating transmission projects" during the process for evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation does not mean that ISO-NE may automatically exclude a transmission developer's proposed

(continued...)

269. For the same reason, we also require the Filing Parties to revise the ISO-NE OATT to remove the reference in the first criterion to the current and expected capabilities of the entity to “license” a proposed solution, because this aspect of the qualification criteria could act as a barrier to entry. We further note that, with regard to the requirement in section 4B.2(vii) of Attachment K that an entity provide information as to its “legal status,” the Filing Parties do not make clear the nature of the “legal status” to which this section is referring. We therefore require the Filing Parties to make a compliance filing within 120 days of this order either clarifying this term (while being mindful of the directives of Order No. 1000-A as to unreasonable barriers), or to remove this qualification criterion.

270. In addition, we conclude that the Filing Parties’ proposal does not apply the qualification criteria to the Participating Transmission Owners and certain independent transmission companies on a not unduly discriminatory basis. Although Order No. 1000 states that qualification criteria should allow for the possibility that an existing public utility transmission provider already satisfies the criteria,⁴⁹² this does not mean that ISO-NE can exempt Participating Transmission Owners from having to meet the qualification criteria. Appropriate qualification criteria must be fair and not unreasonably stringent when applied to either the Participating Transmission Owner or nonincumbent transmission developer.⁴⁹³ These criteria must not be unduly discriminatory or preferential and must provide each potential transmission developer the opportunity to demonstrate that it has the necessary financial resources and technical expertise to develop, construct, own, operate, and maintain transmission facilities.⁴⁹⁴ The Filing Parties, however, fail to explain their conclusion that Participating Transmission Owners and certain independent transmission companies already satisfy the qualification criteria that will apply to the nonincumbent transmission developers. As LS Power notes in its protest, while incumbent transmission owners already build local projects, it is possible

project because such developer has not met all of the state legal or regulatory requirements for siting, constructing, owning, and operating transmission projects. *See, also, PJM*, 142 FERC ¶ 61,214 at P 232 (explaining that “it is not necessarily impermissible to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process” and that public utility transmission providers may “take into consideration the particular strengths of either an incumbent transmission provider or a nonincumbent transmission developer during its evaluation.”).

⁴⁹² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 324.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* P 323.

that an incumbent transmission owner may not be technically or financially capable of building a regional transmission project that spans several states.⁴⁹⁵ Accordingly, we direct the Filing Parties to file, within 120 days of the date of issuance of this order, a further compliance filing that provides fair and not unreasonably stringent qualification criteria for Participating Transmission Owners, independent transmission companies, and nonincumbent transmission developers.

271. We also find that it is unclear what is intended by the 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. The Filing Parties have failed to explain how a prospective transmission developer would demonstrate such ability. Because it is unclear, we are unable to accept the Filing Parties' proposal in this regard and we therefore direct the Filing Parties in the further compliance filing to explain why this additional provision is necessary and not unduly discriminatory when transmission developers are already required to demonstrate their financial resources or remove this financial qualification criterion from ISO-NE's OATT.

272. Further, section 2.1 of Schedule 3.09(a) of the TOA governs the transmission owners obligation to provide to ISO-NE regional planning support, including studies, such as system impact studies and facilities studies, and "supplying any information reasonably required to prepare an ISO System Plan or perform transmission enhancement and expansion studies." The Filing Parties further add to this section, "Notwithstanding the above, the [transmission owners] shall have no obligation to provide support to any Qualified Transmission Project Sponsor or facilitate the development of any transmission project proposal of such Qualified Transmission Project Sponsor, provided that this [s]ection 2.1 shall not excuse the [transmission owners] from complying with any other applicable provision of the ISO OATT or this Agreement, including any requirement to provide planning support to the ISO, NESCOE, or any state."⁴⁹⁶ It is not clear, however, whether this language exempts the transmission owners from providing information necessary to perform system impact studies and feasibility studies on nonincumbent developer projects that may be proposed to interconnect with the Participating Transmission Owner's system. Accordingly, we direct the Filing Parties in the further compliance filing discussed below to clarify that the Participating Transmission Owners must provide the information necessary to perform such studies.

⁴⁹⁵ LS Power Protest at 20.

⁴⁹⁶ TOA, Schedule 3.09(a), § 2.1.

273. We disagree with LS Power that the ability of an incumbent or nonincumbent transmission developer to operate and maintain facilities for the life of the facilities is an inappropriate qualification criterion. We find that it is reasonable that ISO-NE, in evaluating the qualifications of a transmission developer, 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.

274. However, ISO-NE does not explain when it will inform the entity whether it is qualified and thus is eligible to propose a transmission project for selection in the regional transmission plan. Accordingly, we direct the Filing Parties to file a further compliance filing that explains when ISO-NE will inform an entity that it is qualified, under section 4B of Attachment K, to submit a transmission project for selection in the regional transmission plan for purposes of cost allocation.

275. ISO-NE requires that a nonincumbent transmission developer execute the *pro forma* NTDOA before it is eligible to propose transmission projects in the competitive solicitation process. We accept the proposed NTDOA except for section 9.01, the hold harmless section, which we find, as proposed, to be vague and overly broad. Section 9.01 states that:

[nonincumbent transmission developer] will indemnify and hold harmless all affected [transmission owners] from any and all liability, including but not limited to liability for penalties assessed by NERC or FERC, resulting from the [nonincumbent transmission developer's] failure to timely complete reliability project in response to a reliability need identified in the Regional System Plan that the [nonincumbent transmission developer's] project was chosen in the Regional System Plan to resolve.

276. In support of section 9.01 of the NTDOA, the Filing Parties argue that section 9.01 is “a reasonable response to the adverse impacts of delays in meeting reliability needs” and add that the Commission expressed a similar concern in Order No. 1000.⁴⁹⁷ In Order No. 1000 the Commission recognized that “delays in the development of [transmission facilities selected in a regional transmission plan for purposes of cost allocation] could adversely affect the ability of the incumbent transmission provider to meet its reliability needs or service obligations.”⁴⁹⁸ However, the Commission addressed this concern by

⁴⁹⁷ Filing Parties Transmittal at 61.

⁴⁹⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 263.

requiring “public utility transmission providers to amend their OATTs 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 of alternative solutions, including those that the incumbent transmission owner proposes, to ensure the incumbent can meet its reliability needs or service obligations.”⁴⁹⁹ In addition, in Order No. 1000-A, the Commission stated that it

will not subject a Registered Entity⁵⁵⁸ 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.^{500]}

Taken together, these 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 and NERC penalties.

277. However, to the extent that the Participating Transmission Owners desire additional protection through a hold harmless section in the NTDOA, we find that, as proposed, section 9.01 is vague and overly broad. Specifically, we find that requiring nonincumbent transmission developers to hold harmless “all affected [transmission owners]” is vague and overly broad because there is no way to determine, from reading the NTDOA, who “affected [transmission owners]” are. In addition, this hold harmless obligation “results from the [nonincumbent transmission developer]’s failure to timely complete a reliability project in response to a reliability need identified in the [r]egional [s]ystem [p]lan that the [nonincumbent transmission developer]’s project was chosen in

⁴⁹⁹ *Id.*

⁵⁰⁰ Order No. 1000-A, 139 FERC ¶ 61,132 at P 481; *see also id.* at P 481 n.558 (“We use the term Registered Entity to refer [to] an owner, operator, or user of the Bulk Power System, or the entity registered as its designee for the purpose of compliance, that is included in the NERC Compliance Registry.” *See* North American Electric Reliability Corporation, Compliance Monitoring and Enforcement Program, Rules of Procedures, app. 4C (effective Jan. 31, 2012), *available at* http://www.nerc.com/files/Appendix_4C_CMEP_20120131.pdf).

the [r]egional [s]ystem [p]lan to resolve.” We find that the phrases “reliability project” and “failure to timely complete” are vague as there is nothing in the NTDOA that defines a reliability project or how to determine whether a reliability project is timely completed. For instance, there is nothing in the NTDOA that provides for a milestone schedule that the nonincumbent transmission developer and ISO-NE have agreed to that would allow both parties and incumbent transmission developers to know when a nonincumbent transmission developer has failed to “timely complete” a “reliability project.”

278. Finally, section 9.01 of the NTDOA can be read to require a nonincumbent transmission developer to hold harmless a Participating Transmission Owner from its own acts of ordinary negligence as well as gross negligence and intentional acts. As the Commission has previously discussed, a hold harmless provision must strike a balance between protecting the indemnified party and ensuring that the indemnified party has an incentive to avoid negligent acts.⁵⁰¹ In *Northeast Utilities Service Company*, the Commission explained that “[a] broader customer indemnification obligation that would include ordinary negligence would not give any incentive to the transmission provider to avoid negligent actions.”⁵⁰² The Commission also noted, however, that a broader indemnification obligation was appropriate in the case of interconnection service because interconnection is not only more risky than other transmission but also because the indemnity provision is expressly bilateral.⁵⁰³ As proposed, section 9.01 of the NTDOA is unreasonable because it requires a nonincumbent transmission developer to hold harmless “affected [transmission owners]” from not only gross negligence and intentional acts, but also ordinary negligence. Accordingly, we reject section 9.01 of the NTDOA as vague and overly broad and require the Filing Parties in a further compliance filing to remove or revise section 9.01 of the NTDOA. We further note that the Filing Parties propose to add section 1.1(g) of Schedule 3.09(a) of the TOA to reflect the proposed hold harmless

⁵⁰¹ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at PP 636, 639 (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). In Order No. 2003, the Commission included an indemnity clause in the Large Generator Interconnection Agreement. The Commission explained that the indemnity clause should “provide protection for acts of ordinary negligence, but not for acts of gross negligence or intentional wrongdoing.” *Id.* P 636.

⁵⁰² *Northeast Utilities Service Company*, 111 FERC ¶ 61,333, at P 27 (2005).

⁵⁰³ *Id.* at 28.

provision in the NTDOA. Consistent with our determination here, we also require the Filing Parties either to remove or revise the proposed section 1.1(g) of Schedule 3.09(a) of the TOA.

279. Further, the NTDOA contains dispute resolution procedures which require that “[a]ny other dispute that is not resolved through good-faith negotiations may, by a Party or any market participant, be submitted for resolution by FERC or a court agency with jurisdiction over the dispute *upon the conclusion of such negotiations.*”⁵⁰⁴ The dispute resolution provisions provide for two exceptions to the requirement to enter into dispute resolution: (1) “a Party or market participant identifies exigent circumstances reasonably requiring expedited resolution of the dispute by FERC” or (2) “the provisions of [the NTDOA] otherwise provide a Party the right to submit a dispute directly to FERC for resolution.”⁵⁰⁵

280. The Commission has previously explained that it does not object to a public utility’s efforts to resolve matters before resorting to a section 206 complaint, and, in fact, Order No. 890 required transmission providers to develop a process to manage disputes that arise from their transmission planning processes.⁵⁰⁶ However, the Commission also stated that regardless of the dispute resolution process adopted by a public utility transmission provider, affected parties would retain any rights they may have under FPA section 206 to file complaints with the Commission.⁵⁰⁷ In other proceedings, the Commission has required utilities to change protocols that limit parties’ and the Commission’s rights to initiate a section 206 proceeding.⁵⁰⁸ The dispute resolution language of the NTDOA appears to require a nonincumbent transmission developer to waive its rights to initiate a section 206 proceeding, without first engaging in good-faith negotiations, in order for the nonincumbent transmission developer to be eligible to propose projects in the competitive solicitation process. The dispute resolution provisions also appear to restrict a nonincumbent transmission developer’s section 206 rights unless “the provisions of this Agreement otherwise provide a Party the right.”⁵⁰⁹

⁵⁰⁴ ISO-NE, OATT, Attachment O, § 11.12 (Secondary Version).

⁵⁰⁵ ISO-NE, OATT, Attachment O, § 11.12 (Secondary Version).

⁵⁰⁶ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 501.

⁵⁰⁷ See *VEPCO*, 123 FERC ¶ 61,098 at P 45.

⁵⁰⁸ *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 (2009); *PPL Elec. Utils. Corp.*, 125 FERC ¶ 61,121 (2008).

⁵⁰⁹ ISO-NE, OATT, Attachment O, § 11.12 (Secondary Version).

Further, the dispute resolution provisions allow parties to initiate a section 206 proceeding in “exigent circumstances.” Consistent with our precedent described above, we find that the NTDOA cannot restrict a party’s right to file a complaint with the Commission under section 206 of the FPA. Therefore, we direct the Filing Parties to remove the provisions of the NTDOA that restrict such rights, including the “exigent circumstances” language discussed above, and add a provision clarifying that nothing in the NTDOA shall restrict the rights of any party to file a complaint with the Commission under relevant provisions of the FPA.

281. We also disagree with LS Power’s protest of the term “additional transmission owner” as a designation for nonincumbent transmission developers that sign the TOA, and its arguments that the designation places nonincumbent transmission developers in a different position than the Participating Transmission Owners and accords nonincumbent transmission developers different rights.⁵¹⁰ Instead, we find that the status of “additional transmission owner” accords the same rights as those of the original transmission owners. As ISO-NE states in its January 18, 2013 Answer, other entities, including municipal utilities have joined as “additional transmission owners” without experiencing second-class status.⁵¹¹ We agree with ISO-NE that the status of “additional transmission owner” does not accord different rights from those of other transmission owners, but rather reflects when a transmission developer signed the TOA.⁵¹²

282. Accordingly, we direct the Filing Parties to submit, within 120 days of the date of issuance of this order, a further compliance filing addressing the following directives, as discussed above. First, we direct the Filing Parties to remove the proposed qualification criteria that would require a prospective transmission developer to demonstrate: (1) the extent to which a prospective transmission developer satisfies state legal or regulatory requirements for siting, constructing, owning, and operating transmission projects; (2) the experience of a prospective transmission developer and its team in acquiring rights-of-way, and the authority to acquire rights-of-way by eminent domain, if necessary, that would facilitate approval and construction; and (3) the current and expected capabilities of the entity to “license” a proposed solution. We also require the Filing Parties to clarify the use of the term “legal status” in the qualification criteria that requires an entity provide information as to its legal status, or to remove this qualification criterion. Moreover, we direct the Filing Parties to explain why their proposal that a prospective

⁵¹⁰ See LS Power Protest at 26.

⁵¹¹ See ISO-NE January 18, 2013 Answer at 81.

⁵¹² See TOA § 11.05 (Additional Participating Transmission Owners).

transmission developer must demonstrate its ability to assume liability for major losses resulting from any failure of transmission facilities is necessary and not unduly discriminatory when transmission developers are already required to demonstrate their financial resources or remove this financial qualification criterion from ISO-NE's OATT. We require the Filing Parties to revise the qualification criteria and provide qualification criteria that are fair and not unreasonably stringent for Participating Transmission Owners, independent transmission companies, and nonincumbent transmission developers. In addition, we direct the Filing Parties to revise the ISO-NE OATT to explain when ISO-NE will inform an entity that it is qualified, under section 4B of Attachment K, to submit a transmission project for selection in the regional transmission plan for purposes of cost allocation. We also direct the Filing Parties to remove or revise section 9.01 of the NTDOA and to include a provision in the *pro forma* NTDOA clarifying that nothing in the NTDOA shall restrict the rights of any party to file a complaint with the Commission under relevant provisions of the FPA. Finally, we direct the Filing Parties to clarify that the Participating Transmission Owners must provide the information necessary to perform system impact studies and feasibility studies on nonincumbent developer projects that may be proposed to interconnect with the Participating Transmission Owners' systems.

c. Information Requirements

283. Order No. 1000 requires that each public utility transmission provider revise its OATT to identify the information that a prospective transmission developer must submit in support of a transmission project the developer proposes in the regional transmission planning process.⁵¹³ The public utility transmission provider must identify this information in 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.⁵¹⁴ The information requirements must not be so cumbersome that they effectively prohibit transmission developers from proposing transmission projects, yet not be so relaxed that they allow for relatively unsupported proposals.⁵¹⁵ They may require, for example, relevant engineering studies and cost analyses and may request other reports or information from the transmission developer

⁵¹³ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 325.

⁵¹⁴ *Id.* P 326.

⁵¹⁵ *Id.*

that are needed to facilitate evaluation of the transmission project in the regional transmission planning process.⁵¹⁶

284. Each public utility transmission provider must also revise its OATT to identify the date by which information in support of a transmission project must be submitted to be considered in a given transmission planning cycle.⁵¹⁷ Each transmission planning region may determine for itself what deadline is appropriate and may use rolling or flexible dates to reflect the iterative nature of their regional transmission planning process.⁵¹⁸

i. Filing Parties' Filing

285. With respect to Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades, the Filing Parties propose a two-phase approach to solicit and evaluate proposals.⁵¹⁹ The Filing Parties state that, after ISO-NE issues the public notice inviting proposals, Qualified Sponsors would have 60 days to respond. The Filing Parties state that section 4.3(b) of Attachment K specifies the information required to be supplied by Qualified Sponsors for Phase One Proposals. They explain that this information includes a: (i) detailed description of the proposed solution, including an identification of the proposed route for the solution and technical details of the project; (ii) detailed explanation of how the proposed solution addresses the identified need; (iii) feasibility studies, as requested by ISO-NE, to demonstrate how the proposed solution would address the identified need; (iv) proposed schedule for development and completion of the proposed solution; (v) right, title, and interest in rights-of-way, substations, and other property or facilities, if any, that would contribute to the proposed solution or the means and timeframe by which such would be obtained; (vi) list of affected existing transmission system facilities that the transmission owner or Qualified Sponsor believes will require modification as part of the proposals; and (vii) estimated lifecycle cost of the proposed solution, including an itemization of the components of the cost estimate.⁵²⁰

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* P 325.

⁵¹⁸ *Id.* P 327.

⁵¹⁹ The Filing Parties use the terms Phase One and Phase Two for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades; they use Stage One and Stage Two for Public Policy Transmission Upgrades, discussed below.

⁵²⁰ The language of section 4.3(b) (Secondary Version) refers to “the [Transmission Owner] *or* [Qualified Sponsor]” (§ 4.3(b)(vi), emphasis added), thus suggesting that transmission owners and Qualified Sponsors are separate categories.

(continued...)

According to the Filing Parties, the information is designed to provide sufficient detail to enable ISO-NE to assess whether the proposal meets the identified need, and that the information requirements are fair and not so cumbersome as to effectively prohibit proposals, and are not so relaxed as to allow relatively unsupported proposals.⁵²¹

286. Upon receipt of Phase One Proposals, ISO-NE will perform a preliminary feasibility review of the proposals to determine whether the proposed solution provides sufficient data of sufficient quality to satisfy section 4.3(b) and appears to satisfy the needs described in the needs assessment.⁵²² ISO-NE also will examine whether the proposed solution is technically practicable and indicates possession of, or an approach to acquiring, the necessary rights-of-way, property and facilities that will make the proposal reasonably feasible in the required timeframe. Finally, ISO-NE will determine whether the proposed solution is eligible to be constructed only by an existing transmission owner in accordance with Schedule 3.09(a) of the TOA because the proposed solution is an upgrade to existing transmission owner facilities, or because the costs of the proposed solution are not eligible for regional cost allocation under the OATT and will be allocated only to the local customers of a transmission owner.⁵²³ The Filing Parties state that, if ISO-NE identifies minor informational deficiencies, it will notify the sponsor and provide

However, the Secondary Version of Attachment K also states that the definition of Qualified Sponsor is at section 4B.2; that section, in turn, sets forth the information that an entity must provide to become a Qualified Sponsor and states that an incumbent Transmission Owner or Commission-approved independent transmission company that has an existing operating agreement with ISO-NE “shall be deemed” to be a Qualified Sponsor. As noted above, the Commission is requiring the Filing Parties to make a further compliance filing to revise their qualification criteria to provide fair and not unreasonably stringent qualification criteria for incumbent transmission owners, independent transmission companies, and nonincumbent transmission developers.

⁵²¹ Filing Parties Transmittal at 68 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 7, 227, 325).

⁵²² ISO-NE, OATT, Attachment K, § 4.3(d) (Secondary Version). If the sole Phase One Proposal has been submitted by Transmission Developer(s) and is proposed to be located within or connected to it/their existing electric system, then ISO-NE shall proceed under section 4.2(b)-(e) of Attachment K rather than pursuant to the procedures in the remainder of section 4.3. *Id.*

⁵²³ Filing Parties Transmittal at 69.

a cure opportunity.⁵²⁴ Transmission developers will also provide ISO-NE with additional information upon request. ISO-NE will provide to the PTO Administrative Committee, and post on the ISO-NE website, a listing of compliant Phase One Proposals. A meeting of that committee will follow to solicit stakeholder input on the listing and the listed proposals.

287. For Public Policy Transmission Upgrades, the Filing Parties also propose an iterative, two-stage approach. The Filing Parties state that section 4A.5 of Attachment K specifies the information required to be supplied by Qualified Sponsors for Stage One Proposals. These information requirements for Stage One Proposals for Public Policy Transmission Upgrades are the same as the information requirements for Phase One Proposals for Reliability and Market Efficiency Transmission Upgrades except that the Filing Parties propose an additional informational requirement. Specifically, Qualified Sponsors must provide any other information or supporting documentation required to address the matrix provided by NESCOE in accordance with section 4A.4.

288. Upon receipt of Stage One Proposals, ISO-NE will perform a preliminary feasibility review of the proposals to determine whether the proposed solution provides sufficient data of sufficient quality to satisfy section 4A.5(a) and appears to satisfy the NESCOE-identified needs driven by public policy requirements.⁵²⁵ ISO-NE also will examine whether the proposed solution is technically practicable and indicates possession of, or an approach to acquiring, the necessary rights-of-way, property and facilities that will make the proposal reasonably feasible in the required timeframe. Finally, ISO-NE will determine whether the proposed solution is eligible to be constructed only by an existing transmission owner in accordance with Schedule 3.09(a) of the TOA because the proposed solution is an upgrade to existing transmission owner facilities, or because the costs of the proposed solution are not eligible for regional cost allocation under the OATT and will be allocated only to the local customers of a transmission owner. The Filing Parties state that, if ISO-NE identifies minor informational deficiencies, it will notify the sponsor and provide a cure opportunity. At ISO-NE's request, transmission developers must provide ISO-NE with additional information reasonably necessary for ISO-NE's evaluation of the proposed solution. ISO-NE will provide NESCOE and the Planning Advisory Committee with, and post on the ISO-NE website, a list of Stage One Proposals that meet the criteria of section 4A.5(c).

⁵²⁴ However, section 4.3(b) provides that ISO-NE may reject submittals which are insufficient or not adequately supported. ISO-NE, OATT, Attachment K, § 4.3(b) (Secondary Version).

⁵²⁵ *Id.* § 4A.5(c) (Secondary Version).

ii. Protests/Comments

289. Regarding the information requirements for Stage One Proposals for Public Policy Transmission Upgrades, the Massachusetts Attorney General requests that the Commission direct the Filing Parties to add a description of information required in an initial proposal to develop transmission.⁵²⁶

290. In addition, NEPOOL proposes that in section 4A.5(a) of Attachment K, “Information Required for Stage One Proposals,” at subsection (ii), where the Filing Parties are requiring “a detailed explanation of how the proposed solution addresses the identified need,” the Filing Parties should require additional information, namely, “a detailed explanation of how the proposed solution addresses the identified *state or federal public policy need, as well as a description of any reliability project listed in the Regional System Plan Project Listing as a “Proposed” or “Planned” project, the need for which may be satisfied by the proposed public policy solution*” (emphasis added).⁵²⁷ NESCOE and Southern New England States support this proposal and assert that the states should have the opportunity to specify the information they need to determine what project proponents should include in proposals.⁵²⁸

iii. Commission Determination

291. We find that the provisions in the Filing Parties’ filing dealing with information requirements for submitting Phase One Proposals for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades and Stage One Proposals for Public Policy Transmission Upgrades partially comply with the requirements of Order No. 1000. The Filing Parties’ proposed information requirements identify the information that a transmission developer must submit regarding its proposed Reliability Transmission Upgrade, Market Efficiency Transmission Upgrade or Public Policy Transmission Upgrade in sufficient detail to allow ISO-NE to evaluate a proposed transmission project on a basis comparable to other transmission projects that are proposed for selection in the regional transmission plan for purposes of cost allocation. We find that the Filing Parties’ proposed information requirements strike a reasonable balance between being not so cumbersome that they effectively prohibit transmission developers from proposing transmission projects, yet not so relaxed that they allow for relatively unsupported proposals.

⁵²⁶ Massachusetts Attorney General Comments at 24.

⁵²⁷ NEPOOL Comments at 37.

⁵²⁸ NESCOE Protest at 30-31; Southern New England States Protest at 60.

292. However, we find that the Filing Parties' proposal to require a prospective transmission developer to provide the following information for proposed Reliability Transmission Upgrades, Market Efficiency Transmission Upgrades, and Public Policy Transmission Upgrades does not comply with Order No. 1000: (iii) feasibility studies, as requested by ISO-NE, to demonstrate how the proposed transmission solution will address the identified need; and (vi) a list of affected existing transmission system facilities that the transmission owner or Qualified Sponsor believes will require modification as part of its proposal.⁵²⁹ We find that requiring a prospective transmission developer to perform such studies in order to have its proposed transmission project evaluated in the regional transmission planning process is overly burdensome. We conclude that such detailed studies are more appropriately performed in the regional transmission planning process to determine whether or not to select a proposed transmission project in the regional transmission plan for purposes of cost allocation. The information requirements should permit a transmission developer to submit any studies and analysis it performed to support its proposed transmission project, but should not require studies and analyses that only incumbent transmission owners are likely to have sufficient information to complete. Instead, 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. Consequently, we direct the Filing Parties to remove these information requirements for Reliability Transmission Upgrades, Market Efficiency Transmission Upgrades and Public Policy Transmission Upgrades from ISO-NE's OATT.

293. The Commission rejects NEPOOL's suggestions as to changes to the information that parties must provide for Stage One Proposals in section 4A.5(a) of Attachment K. The Commission finds that the information requirements for Stage One Proposals for Public Policy Transmission Upgrades, as modified above, are just and reasonable. As the Commission has stated in other cases, "there may be more than one just and reasonable [filing], and in determining whether to accept [a utility's] filing, the Commission must only determine that [that utility's] proposed solution is just and reasonable, not that it is superior to other possible solutions."⁵³⁰ Nonetheless, we recognize that NEPOOL's proposed modifications may provide benefits to all parties, and we encourage the Filing Parties and all market participants to continue to negotiate potential improvements to the public policy transmission planning process.

⁵²⁹ ISO-NE, OATT, Attachment K, §§ 4.3(b), 4A.5(a) (Secondary Version).

⁵³⁰ *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157, at P 77 (2009).

294. Accordingly, we direct ISO-NE to file, within 120 days of the date of issuance of this order, a further compliance filing that removes the following information requirements for Reliability Transmission Upgrades, Market Efficiency Transmission Upgrades and Public Policy Transmission Upgrades: (iii) feasibility studies, as requested by ISO-NE, to demonstrate how the proposed solution will address the identified need; and (vi) a list of affected existing transmission system facilities that the transmission owner or Qualified Sponsor believes will require modification as part of its proposal.

d. Evaluation Process for Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation

295. Order No. 1000 requires each public utility transmission provider to amend its OATT to describe a transparent and not unduly discriminatory process for evaluating whether to select⁵³¹ a proposed transmission facility in the regional transmission plan for purposes of cost allocation.⁵³² Public utility transmission providers should both explain and justify the nondiscriminatory evaluation process proposed in their compliance filings.⁵³³

296. The evaluation process must ensure transparency and provide the opportunity for stakeholder coordination.⁵³⁴ The public utility transmission providers in a transmission planning region must use the same process to evaluate a new transmission facility proposed by a nonincumbent transmission developer as it does for a transmission facility proposed by an incumbent transmission developer.⁵³⁵ When cost estimates are part of the selection criteria, the regional transmission planning process must scrutinize costs in the same manner whether the transmission project is sponsored by an incumbent or nonincumbent transmission developer.⁵³⁶ The evaluation process must culminate in a

⁵³¹ The selection process is discussed in paragraphs 118-119 of this order.

⁵³² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 452.

⁵³³ Order No. 1000-A, 139 FERC ¶ 61,132 at P 268.

⁵³⁴ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 454.

⁵³⁵ Order No. 1000-A, 139 FERC ¶ 61,132 at P 454.

⁵³⁶ *Id.* P 455.

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.⁵³⁷

i. Filing Parties' Filing

(a) Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades

297. Pursuant to section 4.1 of Attachment K, ISO-NE will, in coordination with the transmission owners and Planning Advisory Committee, perform needs assessments of the adequacy of the ISO-NE transmission system, analyzing whether it (1) meets applicable reliability standards, (2) has adequate transfer capability to support local, regional, and interregional reliability, (3) supports the efficient operation of the wholesale electric markets, and (4) is sufficient to integrate new resources and loads on an aggregate or regional basis, and otherwise examining various aspects of its performance and capability.⁵³⁸ ISO-NE will report the results of each needs assessment to the Planning Advisory Committee and post them to its website. Each needs assessment will identify high-level functional requirements and characteristics for regulated transmission solutions and market responses that can meet the needs described in the assessment.⁵³⁹ ISO-NE will then issue a public notice with respect to each needs assessment for which a Phase One Proposals will be accepted, indicating that Qualified Sponsors may submit such proposals to address the identified needs.⁵⁴⁰

298. For Reliability Transmission Upgrades or Market Efficiency Transmission Upgrades proposed by Qualified Sponsors, if the sole Phase One Proposal in response to a given needs assessment has been submitted by a transmission owner(s) proposing a project that would be located within or connected to its existing electric system, ISO-NE will, pursuant to section 4.2(b)-(e) of Attachment K of its OATT, rely on its existing process for evaluating and developing regulated transmission solutions. First, ISO-NE, in coordination with the transmission owner who submitted the Phase One Proposal and

⁵³⁷ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 267.

⁵³⁸ ISO-NE, OATT, Attachment K, § 4.1 (Regional System Planning Process) (Secondary Version).

⁵³⁹ *Id.* § 4.1(h) (Regional System Planning Process) (Secondary Version).

⁵⁴⁰ *Id.* § 4.3(a) (Regional System Planning Process) (Secondary Version).

other interested or affected stakeholders, will evaluate whether the proposed transmission solution meets the system needs identified in the Needs Assessment. Through this study, ISO-NE will identify the most cost-effective and reliable solution to the identified needs, which may differ from the transmission solution proposed by the transmission owner.⁵⁴¹ ISO-NE will provide notice of the initiation and scope, and report the results, of such a study to the Planning Advisory Committee.⁵⁴² After receiving feedback from the Planning Advisory Committee, ISO-NE will identify the preferred solution, inform the appropriate transmission owners of such identification in writing, and include the preferred solution (with an overview of why the solution is preferred) in the regional system plan and/or Regional System Plan Project List.⁵⁴³

299. If more than one Phase One Proposal is submitted in response to ISO-NE's public notice, ISO-NE reviews the Phase One Proposals to determine whether: (i) the proposed solution provides sufficient data under the information requirements discussed below; (ii) appears to satisfy the needs described in the needs assessment; (iii) is technically practicable and indicates possession of, or an approach to acquiring, the necessary rights-of-way, property and facilities that will make the proposal reasonably feasible in the required timeframe; and (iv) whether the project is eligible to be constructed only by the Participating Transmission Owner under Schedule 3.09(a) of the TOA because the project is an upgrade to existing facilities or not eligible for regional cost allocation.⁵⁴⁴ ISO-NE will then post on its website, and provide the Planning Advisory Committee with, a listing of the Phase One Proposals that include all of the information required pursuant to the Filing Parties' proposed information requirements. ISO-NE will then solicit stakeholder input on the list of Phase One Proposals, as well as the proposals themselves, through a Planning Advisory Committee meeting. With this input, ISO-NE may exclude Phase One Proposal projects from consideration in Phase Two based on a determination that the project is not competitive with other projects that have been submitted in terms of cost, electrical performance, future system expandability, or feasibility.⁵⁴⁵

⁵⁴¹ *Id.* § 4.2(b) (Regional System Planning Process) (Secondary Version).

⁵⁴² *Id.* § 4.2(c) & (e) (Regional System Planning Process) (Secondary Version).

⁵⁴³ *Id.* § 4.2(e) (Regional System Planning Process) (Secondary Version).

⁵⁴⁴ *Id.* § 4.3(d) (Regional System Planning Process) (Secondary Version).

⁵⁴⁵ *Id.* § 4.3(f) (Regional System Planning Process) (Secondary Version).

300. In Phase Two, ISO-NE would work with transmission developers of listed projects and with affected transmission owners to evaluate and further develop the listed projects to create a Phase Two Solution for each needs assessment. From all of the Phase Two Solutions, ISO-NE “will 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.”⁵⁴⁶ Thereafter, ISO-NE will report the preliminary preferred Phase Two Solution, together with explanatory materials, to the Planning Advisory Committee for stakeholder input.⁵⁴⁷ Pursuant to section 4.3(i), ISO-NE would, after receiving input from the Planning Advisory Committee, identify the preferred Phase Two Solution (with an overview of why the solution is preferred) by a posting on its website. ISO-NE would notify the pertinent Qualified Sponsor and include the project in the regional system plan and/or the Regional System Plan Project List as a Reliability Transmission Upgrade or Market Efficiency Transmission Upgrade, as appropriate.⁵⁴⁸

301. With respect to evaluating the cost of a proposed project, the Filing Parties state that the existing solutions study process, set forth in section 4.2 of Attachment K, evaluates the overall cost (possibly including a net present value analysis and life cycle analysis) and performance of the proposed set of viable alternatives to determine which amongst them is the most appropriate and cost-effective solution. The Filing Parties state that this cost analysis is done consistent with Attachment D to Planning Procedure No. 4.⁵⁴⁹ Specifically, proposed transmission solutions are compared at “a more detailed level for cost, consistent with Attachment D to ISO Planning Procedure No. 4, and other development factors.”⁵⁵⁰ The Filing Parties do not propose to change these procedures.

⁵⁴⁶ *Id.* § 4.3(g), 4.3(i) (Regional System Planning Process) (Secondary Version).

⁵⁴⁷ *Id.* § 4.3(g) (Regional System Planning Process) (Secondary Version).

⁵⁴⁸ *Id.* § 4.3(i) (Regional System Planning Process) (Secondary Version).

⁵⁴⁹ Rourke Test. at 9-10. Attachment D to ISO Planning Procedure No. 4 provides consistent cost engineering terms and definitions and a standardized approach to cost estimating in the region. It is *available at* http://www.iso-ne.com/rules_proceeds/isone_plan/pp04_0/index.html.

⁵⁵⁰ Rourke Test. at 10.

(b) **Public Policy Transmission Upgrades**

302. The Filing Parties state that at NESCOE's request, ISO-NE will initiate and conduct a Public Policy Transmission Study to identify high level solutions to address identified transmission needs driven by public policy requirements. The Filing Parties explain that ISO-NE will determine the scope, parameters and assumptions of the Public Policy Transmission Study with input from the Planning Advisory Committee and will post the results of the Public Policy Transmission Study on ISO-NE's website and hold a meeting of the Planning Advisory Committee to solicit input on the scope of possible transmission solutions which may be used as the basis for a competitive Stage One solicitation. Within 90 days of receipt of the results of a Public Policy Transmission Study or any follow-on study to evaluate possible transmission solutions, the Filing Parties state that NESCOE may 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, along with a non-binding matrix of key desirable features of each such option.

303. In Stage One of the Filing Parties' proposal, ISO-NE will invite submissions of transmission proposals from Qualified Sponsors. The Filing Parties state that ISO-NE will conduct a preliminary review and examine whether each proposal (i) provides sufficient data of sufficient quality to satisfy the information requirements for Public Policy Transmission Upgrades; (ii) appears to satisfy the NESCOE-identified needs driven by public policy requirements; (iii) is technically practicable and indicates possession of, or an approach to acquiring, the necessary rights-of-way, property and facilities that will make the proposal reasonably feasible in the required timeframe; and (iv) is eligible to be constructed only by an existing transmission owner in accordance with Schedule 3.09(a) of the TOA because the proposed solution is an upgrade to existing transmission owner facilities or because the costs of the proposed solution are not eligible for regional cost allocation under the OATT and will be allocated only to the local customers of a transmission owner.⁵⁵¹ The Filing Parties state that this last criterion is necessary to ensure that the transmission project is eligible to be constructed by a nonincumbent transmission developer.⁵⁵² The Filing Parties state that, within 120 days after ISO-NE holds a Planning Advisory Committee meeting to receive input on the Stage One Proposals that meet these required criteria, NESCOE may submit to ISO-NE a

⁵⁵¹ ISO-NE, OATT, Attachment K, § 4A.5(c) (Secondary Version).

⁵⁵² Filing Parties Transmittal at 54.

list of projects that one or more of the states would like to have further developed in a Stage Two study phase.⁵⁵³

304. The Filing Parties indicate that, in Stage Two, ISO-NE will work with the Qualified Sponsors of listed projects and with affected transmission owners to evaluate and further develop the projects into Stage Two Solutions. ISO-NE will provide analysis to the Planning Advisory Committee regarding the performance of each solution. ISO-NE will report the preliminary preferred Stage Two Solution(s) that NESCOE identifies, along with ISO-NE's view as to whether the preferred solution(s) also satisfies identified reliability needs, to NESCOE and the Planning Advisory Committee and will seek stakeholder input on these solutions.⁵⁵⁴ Within 12 months from ISO-NE's report regarding the reliability benefits of any preliminary preferred solutions, the Filing Parties state that either NESCOE or public utility regulators may provide a Public Policy Transmittal to ISO-NE.⁵⁵⁵ The Filing Parties explain that the Public Policy Transmittal triggers ISO-NE to place the public policy project into the regional system plan as a Public Policy Transmission Upgrade.⁵⁵⁶

ii. Protests/Comments

305. Arguing against approval of the Primary Version, LS Power maintains that the Filing Parties' proposal for the evaluation and selection of a transmission project for purposes of cost allocation is a "less optimal" design because it was designed to circumvent the requirements of Order No. 1000.⁵⁵⁷ LS Power argues that the assertion that ISO-NE's existing process "ensures that all potential solutions will be openly

⁵⁵³ Filing Parties Transmittal at 55-56.

⁵⁵⁴ ISO-NE, OATT, Attachment K, § 4A.7 (Regional System Planning Process) (Secondary Version).

⁵⁵⁵ The Public Policy Transmittal is a written document sent by NESCOE, or jointly by all of the participating states' utility regulatory authorities, to ISO-NE that indicates which of the New England states support inclusion of a particular Public Policy Transmission Upgrade in the Regional System Plan and provides each state's final decision concerning such proposed Public Policy Transmission Upgrade and associated cost allocation as set forth in such state's regulatory authority decisions that is to be utilized for the project costs. ISO-NE, OATT, § I.2.2 (Definitions) (Secondary Version).

⁵⁵⁶ Filing Parties Transmittal at 56.

⁵⁵⁷ See LS Power Protest at 9.

considered” is based on the faulty assumption that the existing transmission owners and ISO-NE can come up with all potential solutions. However, LS Power states, in the absence of competition, many ideas likely neither were, nor will be, submitted.⁵⁵⁸

iii. Answer

306. In its answer, ISO-NE states that requiring it to evaluate the various benefits of a project to determine which planning process should apply is not required by Order No. 1000 and is also unworkable.⁵⁵⁹

iv. Commission Determination

307. We find that the provisions in the Filing Parties’ filing dealing with the evaluation of proposed Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades partially comply with the requirements of Order No. 1000. We find that the provisions in the Filing Parties’ filing dealing with the evaluation of proposed Public Policy Transmission Upgrades do not comply with the requirements of Order No. 1000. Accordingly, we direct the Filing Parties to submit, within 120 days of the date of issuance of this order, a further compliance filing, as discussed below.

(a) Evaluation of Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades

308. The Filing Parties’ propose that if the sole Phase One Proposal for a Reliability Transmission Upgrade and Market Efficiency Transmission Upgrade in response to a given needs assessment has been submitted by a transmission owner(s) proposing a project that would be located within or connected to its existing electric system, ISO-NE will, pursuant to section 4.2(b)-(e) of Attachment K of its OATT, rely on its existing process for evaluating and developing regulated transmission solutions.⁵⁶⁰ Under its existing process, ISO-NE will conduct solutions studies that “may identify the most cost-effective and reliable solutions” for addressing the needs identified in the needs

⁵⁵⁸ *Id.* at 12-13.

⁵⁵⁹ ISO-NE January 18, 2013 Answer at 67-68.

⁵⁶⁰ ISO Planning Procedure No. 4, *available at* http://www.iso-ne.com/rules_proceeds/isone_plan/pp04_0/index.html.

assessment.⁵⁶¹ We find that this proposal, under which there will be no competitive solutions process for such transmission upgrades, complies with the requirements of Order No. 1000, subject to the compliance requirement set forth above that the Filing Parties 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 (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”) in a further compliance filing to be submitted within 120 days of the date of issuance of this order.⁵⁶² Both incumbent transmission developers and nonincumbent transmission developers will have had an opportunity to submit Phase One Proposals, and if only one proposal is submitted, it is reasonable for ISO-NE to use its existing process for evaluating and developing regulated transmission solutions. Through this process, ISO-NE “may identify the most cost-effective and reliable solutions for addressing the needs identified in the [n]eeds [a]ssessment to the identified needs.”⁵⁶³

309. Moreover, under the Filing Parties’ proposed evaluation process, ISO-NE, in coordination with the transmission owner who submitted the Phase One Proposal and other interested or affected stakeholders, will evaluate whether the proposed transmission solution meets the system needs identified in the needs assessment and identify transmission projects to address the needs.⁵⁶⁴ Moreover, ISO-NE will identify the preferred solution after receiving feedback from the Planning Advisory Committee.⁵⁶⁵ Thus, the Filing Parties’ proposal ensures transparency and provides the opportunity for stakeholder coordination, as required by Order No. 1000.⁵⁶⁶ When ISO-NE identifies the preferred transmission solution, it will include that transmission solution, along with an overview of why the transmission solution is preferred, in the regional system plan and/or Regional System Plan Project List,⁵⁶⁷ meeting Order No. 1000’s requirement that the

⁵⁶¹ ISO-NE, OATT, Attachment K, § 4.2(b) (Regional System Planning Process) (Secondary Version).

⁵⁶² *See supra* P 66.

⁵⁶³ ISO-NE, OATT, Attachment K, § 4.2(b) (Regional System Planning Process) (Secondary Version).

⁵⁶⁴ *Id.* § 4.2(b) (Regional System Planning Process) (Secondary Version).

⁵⁶⁵ *Id.* § 4.2(e) (Regional System Planning Process) (Secondary Version).

⁵⁶⁶ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 454.

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.⁵⁶⁸

310. The Filing Parties proposed process to evaluate, when more than one Phase One Proposal is submitted, Phase One Proposals for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades and Phase Two Solutions complies with certain requirements of Order No. 1000. First, the Filing Parties propose that under these circumstances, the same evaluation process will apply to all Phase One Proposals and Phase Two Solutions, respectively. We therefore find that the proposal complies with Order No. 1000's requirement that "the public utility transmission providers in a transmission planning region must use the same process to evaluate a new transmission facility proposed by a nonincumbent transmission developer as it does for a transmission facility proposed by an incumbent transmission developer."⁵⁶⁹ Moreover, the Filing Parties propose that ISO-NE will solicit stakeholder input in the Planning Advisory Committee on both the list of Phase One Proposals and the proposals themselves,⁵⁷⁰ as well as on preliminary preferred Phase Two Solutions.⁵⁷¹ Thus, we find that the proposal complies with Order No. 1000's requirement that the evaluation process ensure transparency and provide the opportunity for stakeholder coordination.⁵⁷²

311. The Filing Parties propose that ISO-NE may exclude Phase One Proposal projects from consideration in Phase Two based on a determination that the transmission project is not competitive with other transmission projects that have been submitted in terms of

⁵⁶⁷ ISO-NE, OATT, Attachment K, § 4.2(e) (Regional System Planning Process) (Secondary Version).

⁵⁶⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 267.

⁵⁶⁹ Order No. 1000-A, 139 FERC ¶ 61,132 at P 454.

⁵⁷⁰ ISO-NE, OATT, Attachment K, § 4.3(f) (Regional System Planning Process) (Secondary Version).

⁵⁷¹ *Id.* § 4.3(g) (Regional System Planning Process) (Secondary Version).

⁵⁷² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 454.

cost, electrical performance, future system expandability, or feasibility.⁵⁷³ Similarly, the Filing Parties propose that ISO-NE “will 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.”⁵⁷⁴ With regard to cost, we read ISO-NE’s filing as providing that ISO-NE will conduct this analysis consistent with its existing practices for evaluating cost in the solutions study process, thereby ensuring a standardized approach to cost estimation, consistent with Order No. 1000’s requirement that “when cost estimates are part of the selection criteria, the regional transmission planning process must scrutinize costs in the same manner whether the transmission project is sponsored by an incumbent or nonincumbent transmission developer.”⁵⁷⁵ We find that these evaluation criteria comply with Order No. 1000’s requirement to consider the “relative efficiency and cost-effectiveness of [a proposed transmission] solution.”⁵⁷⁶

312. Finally, the Filing Parties propose that ISO-NE will identify the preferred Phase Two Solution (with an overview of why the solution is preferred) by a posting on its website,⁵⁷⁷ satisfying Order No. 1000’s requirement that 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.⁵⁷⁸ However, the Filing Parties have not met this requirement with respect to their proposal to exclude Phase One Proposals from consideration in Phase Two based on a determination that the transmission project is not competitive with other transmission projects that have been submitted in terms of cost, electrical performance, future system expandability, or feasibility. While the Filing Parties propose that ISO-NE will solicit stakeholder input on the list of Phase One Proposals, as well as the proposals themselves, through a Planning Advisory Committee

⁵⁷³ ISO-NE, OATT, Attachment K, § 4.3(f) (Regional System Planning Process) (Secondary Version).

⁵⁷⁴ *Id.* § 4.3(g), 4.3(i) (Regional System Planning Process) (Secondary Version).

⁵⁷⁵ Order No. 1000-A, 139 FERC ¶ 61,132 at P 455.

⁵⁷⁶ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 331 n.307.

⁵⁷⁷ ISO-NE, OATT, Attachment K, § 4.3(i) (Regional System Planning Process) (Secondary Version).

⁵⁷⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 267.

meeting, the Filing Parties do not propose that ISO-NE make available information about why a Phase One Proposal has been excluded from consideration in Phase Two such that stakeholders can understand why that determination was made. Accordingly, we direct the Filing Parties to submit a compliance filing within 120 days of the date of issuance of this order that revises Phase One of the proposed evaluation process to culminate in a determination that is sufficiently detailed for stakeholders to understand why a particular Phase One Proposal was excluded from consideration in Phase Two.

(b) Public Policy Transmission Upgrades

313. As we noted in Part IV.B.1.c and Part IV.B1.d.i.d.3 above, we find that the Filing Parties' proposed evaluation process for Public Policy Transmission Upgrades does not comply with the requirements of Order No. 1000. The Filing Parties' proposal provides that ISO-NE will (1) will conduct a preliminary review and examine whether each proposal (i) provides sufficient data of sufficient quality to satisfy the information requirements for Public Policy Transmission Upgrades; (ii) appears to satisfy the NESCOE-identified needs driven by public policy requirements; (iii) is technically practicable and indicates possession of, or an approach to acquiring, the necessary rights-of-way, property and facilities that will make the proposal reasonably feasible in the required timeframe; and (iv) is eligible to be constructed only by an existing transmission owner in accordance with Schedule 3.09(a) of the TOA because the proposed solution is an upgrade to existing transmission owner facilities or because the costs of the proposed solution are not eligible for regional cost allocation under the OATT and will be allocated only to the local customers of a transmission owner;⁵⁷⁹ and (2) provide analysis to the Planning Advisory Committee regarding the performance of each solution, along with ISO-NE's view as to whether the preferred solution(s) also satisfies identified reliability needs.⁵⁸⁰ However, Filing Parties also propose that NESCOE, not the public utility transmission providers in the transmission planning region, will (1) determine which, if any, high level solutions to identified transmission needs driven by public policy requirements the states are interested in exploring through the submission of Stage One Proposals, (2) identify which, if any, Stage One Proposal projects that one or more of the states would like to have further developed in a Stage Two study phase, and (3) select a Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation when NESCOE, or the participating states' utility regulatory authorities jointly, submit a Public Policy Transmittal to ISO-NE.

⁵⁷⁹ ISO-NE, OATT, Attachment K, § 4A.5(c) (Secondary Version).

⁵⁸⁰ *Id.* § 4A.7 (Regional System Planning Process) (Secondary Version).

314. Given NESCOE's role in the proposed evaluation process, the Filing Parties do not explain how this process will provide transparency for stakeholders seeking to understand and provide input in the evaluation of whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation that provides for stakeholder coordination or otherwise culminates in a determination that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected. Moreover, as discussed above in Part IV.B.1.d.i.d.3, the Filing Parties do not propose to evaluate transmission solutions to identified transmission needs driven by public policy requirements to determine whether they are the more efficient or cost-effective solutions, as required by Order No. 1000, but instead propose to evaluate only those transmission solutions to identified transmission needs driven by public policy requirements that NESCOE indicates it would like ISO-NE to study further. Finally, as discussed above in Part IV.B.1.c and Part IV.B.1.d.i.d.4, because the 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, the Filing Parties' proposed evaluation process fails 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.⁵⁸¹

315. Accordingly, we direct the Filing Parties to submit, within 120 days of the date of issuance of this order, 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.⁵⁸² As required by Order No. 1000, this evaluation process must ensure transparency and provide the opportunity for stakeholder coordination⁵⁸³ and 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.⁵⁸⁴ In addition, we reiterate that

⁵⁸¹ See *supra* PP 67, 118-119.

⁵⁸² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 452.

⁵⁸³ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 454.

⁵⁸⁴ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 267.

the process for evaluating whether to select a transmission facility in the regional transmission plan for purposes of cost allocation must consider “the relative efficiency and cost-effectiveness of [any proposed transmission] solution.”⁵⁸⁵ As directed above in Part IV.B.1.d.i.d, 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,⁵⁸⁶ and must provide for the public utility transmission providers in the ISO-NE transmission planning region to 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.⁵⁸⁷

e. **Reevaluation Process for Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation**

316. Each public utility transmission provider must amend its OATT 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 of alternative transmission solutions, including those that the incumbent transmission provider proposes, to ensure the incumbent transmission provider can meet its reliability needs or service obligations.⁵⁸⁸ 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.⁵⁸⁹

⁵⁸⁵ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 331 n.307.

⁵⁸⁶ *See supra* PP 116-117.

⁵⁸⁷ *See supra* PP 118-119.

⁵⁸⁸ *Id.* PP 263, 329; Order No. 1000-A, 139 FERC ¶ 61,132 at P 477.

⁵⁸⁹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 329.

i. Filing Parties' Filing

317. The Filing Parties have existing processes in place for the reevaluation of 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 of other possible transmission solutions, including those that the Participating Transmission Owner proposes, to ensure the Participating Transmission Owner can meet its reliability needs or service obligations.⁵⁹⁰ Specifically, section 3.1 of Attachment K states:

[T]he ISO shall develop and maintain a [Regional System Plan] Project List, a cumulative listing of proposed regulated transmission solutions classified, to the extent known, as Reliability Transmission Upgrades,⁵⁹¹ and Public Policy Transmission Upgrades. The RSP shall also provide reasons for any new regulated transmission solutions or Transmission Upgrades included in the RSP Project List, any change in status of a regulated transmission solution or Transmission Upgrade in the RSP Project List, or any removal of regulated transmission solutions or Transmission Upgrades from the RSP Project List that are known as of that time.

318. The Filing Parties propose additional changes to accommodate Qualified Sponsors. For Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades, once a Qualified Sponsor's project is selected in Phase Two, it has 30 business days to submit to ISO-NE (and update periodically) a milestone schedule indicating dates by which applications for siting and other necessary approvals would be submitted. Once siting and other approvals have been obtained, the Qualified Sponsor must provide to ISO-NE, within 30 business days, a schedule of dates by which typical project construction phases would be completed. The Filing Parties further state that if ISO-NE finds, after consultation with the Qualified Sponsor, that the sponsor is failing to pursue approvals or construction in a reasonably diligent fashion, or that the sponsor is unable to proceed with the project due to forces beyond its reasonable control, ISO-NE will prepare

⁵⁹⁰ *Id.* PP 263, 329; Order No. 1000-A, 139 FERC ¶ 61,132 at P 477.

⁵⁹¹ Reliability Transmission Upgrades are those upgrades necessary to ensure the continued reliability of the New England Transmission System based on applicable reliability standards. ISO-NE, OATT, Attachment K, § II.A (Secondary Version).

a report including a proposed course of action. ISO-NE will then file its report with the Commission.⁵⁹²

319. Furthermore, the Filing Parties propose that transmission owners shall work with ISO-NE to develop a backstop solution to the current or projected reliability needs. Specifically, in the event that a Qualified Sponsor other than a Participating Transmission Owner is designated by ISO-NE to construct a New Transmission Facility, in accordance with Attachment K to the ISO-NE OATT, but that Qualified Sponsor is unable to complete a reliability or economic efficiency project on a timely basis, “each PTO will retain an obligation to provide a backstop solution.” The Filing Parties further propose that “[t]o the extent a [Qualified Sponsor] abandons a proposed project selected . . . to address current or projected reliability needs on the existing electric system of one of more PTO(s), the affected PTOs shall work with the ISO in accordance with the terms of this Agreement, to develop a backstop solution to the current or projected reliability needs and, to the extent required by Applicable Law, shall submit a mitigation plan to NERC.”⁵⁹³

320. For Public Policy Transmission Upgrades, once a Qualified Sponsor’s project is approved by the participating states through NESCOE to be included as a Stage Two Solution, it has 30 business days to submit to ISO-NE (and update periodically) a milestone schedule indicating dates by which applications for siting and other necessary approvals would be submitted. Once siting and other approvals have been obtained, the Qualified Sponsor must provide to ISO-NE, within 30 business days, a schedule of dates by which typical project construction phases would be completed. The Filing Parties further state that if ISO-NE finds, after consultation with the Qualified Sponsor, that the sponsor is failing to pursue approvals or construction in a reasonably diligent fashion, or that the sponsor is unable to proceed with the project due to forces beyond its reasonable control, ISO-NE will prepare a report including a proposed course of action. ISO-NE will then file its report with the Commission.⁵⁹⁴

ii. Protests/Comments

321. No party filed a protest or comment on this issue.

⁵⁹² *Id.* § 4.3(j) (Regional System Planning Process) (6.0.0) (Secondary Version).

⁵⁹³ TOA, Schedule 3.09(a), § 1.1(g) (Secondary Version).

⁵⁹⁴ ISO-NE, OATT, Attachment K, § 4A.9(b) (Regional System Planning Process) (Secondary Version).

iii. Commission Determination

322. We find that the provisions in the Filing Parties' filing dealing with the reevaluation of proposed transmission projects partially comply with the requirements of Order No. 1000. If an evaluation of alternatives is needed, the regional transmission planning process must allow the Participating Transmission Owner 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.⁵⁹⁵ ISO-NE meets this requirement because 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, the Participating Transmission Owners have an obligation to work with ISO-NE and develop a backstop solution. In addition, we note that section 4A.9(b) and section 4.3(j) of Attachment K describes the criteria that ISO-NE will use to assess the continued viability of projects, including status of final permits, and construction phases.⁵⁹⁶ However, the proposed OATT revisions do not provide for evaluation of other alternatives. Thus, it is unclear whether ISO-NE will rely on the transmission project prepared by the Participating Transmission Owner, or whether ISO-NE may pursue other options, such as retaining the transmission project or considering alternative solutions. Accordingly, we direct the Filing Parties to file, within 120 days of the date of this order, OATT revisions that 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.

323. Additionally, the Filing Parties are proposing to revise Schedule 3.09(a), § 1.1 (a)(i) of the TOA. Under the existing language in this section of the TOA, each transmission owner has the obligation to own and construct new transmission facilities designated in the system plan as necessary and appropriate for system reliability or economic efficiency. The Filing Parties propose to revise this language to provide that, if a Qualified Sponsor other than that transmission owner has been designated by ISO-NE to construct a new transmission facility, the obligation does not attach to the transmission owner unless the Qualified Sponsor is unable to complete such project on a timely basis.⁵⁹⁷ We accept this proposed revision to the TOA. As an initial matter, the existing language in the TOA already obligates transmission owners to construct certain non-

⁵⁹⁵ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 329.

⁵⁹⁶ ISO-NE, OATT, Attachment K, § 4.3(j) (Secondary Version).

⁵⁹⁷ TOA, Schedule 3.09(a), § 1.1.

reliability projects in some instances. The Filing Parties' proposed revisions reflect the fact that, consistent 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 such projects. Under the existing language in the TOA, the Participating Transmission Owner will retain the obligation to build those projects if the designated Qualified Sponsor cannot do so. In Order No. 1000, the Commission recognized that there may be circumstances when an incumbent transmission owner is called upon to complete a transmission project that it did not sponsor or has an obligation to build a transmission project that is selected in the regional transmission plan for purposes of cost allocation but has not been sponsored by another transmission developer.⁵⁹⁸

f. **Cost Allocation for Transmission Projects Selected in the Regional Transmission Plan for Purposes of Cost Allocation**

324. Order No. 1000 requires each public utility transmission provider to participate in a regional transmission planning process that provides that a nonincumbent transmission developer has an opportunity comparable to that of an incumbent transmission developer to allocate the cost of a transmission facility through a regional cost allocation method or methods.⁵⁹⁹ A nonincumbent transmission developer must have the same eligibility as an incumbent transmission developer to use a regional cost allocation method or methods for any sponsored transmission facility selected in the regional transmission plan for purposes of cost allocation.⁶⁰⁰ If a transmission project is selected in a regional transmission plan for purposes of cost allocation, Order No. 1000 requires that the transmission developer of that transmission facility (whether incumbent or nonincumbent) must be able to rely on the relevant cost allocation method or methods within the region should it move forward with its transmission project.⁶⁰¹

325. Order No. 1000 specifies that the regional transmission planning process could use a non-discriminatory competitive bidding process as the mechanism to ensure that all projects are eligible to be considered for selection in the regional transmission plan for purposes of cost allocation.⁶⁰² A region may use or retain an existing mechanism that

⁵⁹⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 267.

⁵⁹⁹ *Id.* P 332.

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.* P 339.

⁶⁰² *Id.* P 336.

relies on a competitive solicitation to identify preferred solutions to regional transmission needs, and such an existing process may require little or no modification to comply with the framework adopted in Order No. 1000.⁶⁰³ The regional transmission planning process could allow the sponsor of a transmission project selected in the regional transmission plan for purposes of cost allocation to use the regional cost allocation method associated with the transmission project.⁶⁰⁴ If it uses a sponsorship model, the regional transmission planning process would also need to have a fair and not unduly discriminatory mechanism to grant to an incumbent transmission provider 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.⁶⁰⁵

i. Filing Parties' Filing

326. With respect to Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades, the Filing Parties explain that, once ISO-NE selects the project that offers the best combination of electric performance, cost, future system expandability, and feasibility to meet the need in the required timeframe, it will notify the pertinent Qualified Sponsor and include the project in the regional system plan and/or its Project List, as appropriate. The Filing Parties further state that, because the costs for these types of upgrades are allocated regionally, their proposal meets Order No. 1000's requirement that any nonincumbent transmission developer of a transmission facility selected in the regional transmission plan have an opportunity comparable to that of an incumbent transmission developer to allocate the cost of such transmission facility through a regional cost allocation method or methods.⁶⁰⁶ Similarly, if a Public Policy Transmission Upgrade is included in the regional system plan, the project will be eligible

⁶⁰³ *Id.* P 321.

⁶⁰⁴ *Id.* P 336.

⁶⁰⁵ *Id.*

⁶⁰⁶ Filing Parties Transmittal at 70.

to use the regional cost allocation method.⁶⁰⁷ The Filing Parties state that the process established in the Secondary Version does not envision “unsponsored projects.”⁶⁰⁸

327. To govern the relationship between ISO-NE and a nonincumbent transmission developer, as discussed above, the Filing Parties propose to enter into a NTDOA following a nonincumbent transmission developer’s qualification as a Qualified Sponsor. The Filing Parties state that any projects submitted by a nonincumbent transmission developer that are ultimately included in the Regional System Plan Project List will be added to Schedules 2.01(a) and (b) of the NTDOA, as appropriate.⁶⁰⁹ The Filing Parties additionally state that if a nonincumbent transmission developer wishes to file with the Commission for recovery of proposal/solution costs pursuant to sections 4.3 or 4A of Attachment K for rates to recover its costs of construction work in process, and for rates to recover a transmission facility’s costs once placed in service, section 3.04 is included in the NTDOA. Section 3.04 provides that opportunity (subject to coordination with ISO-NE), and requires such rate filings to be made as a nonincumbent transmission developer-specific schedule under ISO-NE OATT Schedule 13 or 14, as applicable.⁶¹⁰

⁶⁰⁷ *Id.* at 56. As discussed further below, we are directing the Filing Parties to submit a regional cost allocation method for Public Policy Transmission Upgrades that complies with the cost allocation principles of Order No. 1000.

⁶⁰⁸ *Id.* at 67-68 n.194.

⁶⁰⁹ *Id.* at 60.

⁶¹⁰ *Id.* at 60-61. The proposed NTDOA, Attachment O to TOA, section 3.04, reads:

3.04 Application Authority.

(a) [Nonincumbent transmission developer] shall have the authority to submit filings under Section 205 of the Federal Power Act to establish and to revise (pursuant to [a Nonincumbent Transmission Developer] rate schedule filed under Schedule 13 or 14, as applicable, of the ISO OATT):

(i) charges for costs permitted to be recovered under Sections 4.3 and 4A of Attachment K to the ISO OATT;

(ii) once its project is listed as “Proposed” in the [Regional System Plan] Project List, charges for the costs of Commission-approved construction work in process; and

(continued...)

Once a nonincumbent transmission developer's project is placed in service, the nonincumbent transmission developer becomes a transmission owner, and the NTDOA terminates.⁶¹¹

ii. Protests

328. No party filed a protest or comment on this issue.

iii. Commission Determination

329. We find that the provisions in the Filing Parties' filing dealing with cost allocation for nonincumbent sponsored projects partially comply with the requirements of Order No. 1000. As required by Order No. 1000, the Secondary Version ensures that a nonincumbent transmission developer has an opportunity to allocate the cost of a transmission facility selected in the regional transmission plan through a regional cost allocation method or methods. Specifically, as explained by the Filing Parties, any entity may use the regional cost allocation method for Regional Transmission Upgrades, Market Efficiency Transmission Upgrades, or Public Policy Transmission Upgrades that it has proposed and that are included in the regional system plan. Additionally, the Filing Parties have proposed to allow a nonincumbent transmission developer, through the NTDOA, to begin recovering the costs of a transmission project, including construction work in progress, prior to that project being placed in service. We find that, by allowing nonincumbent transmission developers to use the regional cost allocation methods, the Filing Parties' proposal complies with Order No. 1000's requirement that a nonincumbent transmission developer must have "an opportunity comparable to that of an incumbent transmission developer to allocate the cost of such transmission facility."⁶¹²

330. With respect to Order No. 1000's requirement that the regional transmission planning process must also have a fair and not unduly discriminatory mechanism to grant to an incumbent transmission owner or nonincumbent transmission developer the right to

(iii) once its project is listed as "Proposed" in the [Regional System Plan] Project List, any rates, charges, terms or conditions for transmission services that are based solely on the revenue requirements of the Transmission Facilities (including Transmission Facilities leased to [Nonincumbent Transmission Developer] or to which [Nonincumbent Transmission Developer] has contractual entitlements).

⁶¹¹ Filing Parties Transmittal at 61.

⁶¹² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 332.

use the regional cost allocation method for unsponsored transmission facilities selected in the regional transmission plan for purposes of cost allocation,⁶¹³ the Filing Parties state that the proposed process does not envision unsponsored projects. However, as explained by the Filing Parties, the Planning Advisory Committee provides an open forum in which all stakeholders can review work performed by ISO-NE and the transmission owners and “suggest additional work or a different direction.”⁶¹⁴ While the Filing Parties doubt that a superior project would be proposed through this process,⁶¹⁵ it is possible that an entity other than a Qualified Sponsor could, through this process, propose a new project that is selected in the regional transmission plan for purposes of cost allocation, and that project would be considered unsponsored. Accordingly, we direct the Filing Parties to submit, within 120 days of the date of issuance of this order, a compliance filing that ensures that there is a fair and not unduly discriminatory mechanism to grant a Participating Transmission Owner or nonincumbent transmission developer the right to use the regional cost allocation method for such projects.

3. Cost Allocation

331. Order No. 1000 requires each public utility transmission provider to have in place a method, or set of methods, for allocating the costs of new transmission facilities selected in the regional transmission plan for purposes of cost allocation.⁶¹⁶ Each public utility transmission provider must show on compliance that its regional cost allocation method or methods are just and reasonable and not unduly discriminatory or preferential by demonstrating that each method satisfies six regional cost allocation principles described in Order No. 1000.⁶¹⁷ The Commission took a principles-based approach because it recognized that regional differences may warrant distinctions in cost allocation methods among transmission planning regions.⁶¹⁸ In addition, Order No. 1000 permits participant funding, but not as a regional or interregional cost allocation method.⁶¹⁹

⁶¹³ *Id.* P 336.

⁶¹⁴ Filing Parties Transmittal at 23.

⁶¹⁵ *Id.* at 24.

⁶¹⁶ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 558.

⁶¹⁷ *Id.* P 603.

⁶¹⁸ *Id.* P 604.

⁶¹⁹ *Id.* P 723.

332. If a public utility transmission provider is in an RTO or ISO, Order No. 1000 requires that the regional cost allocation method or methods be set forth in the RTO or ISO OATT. In a non-RTO/ISO transmission planning region, each public utility transmission provider located within the region must set forth in its OATT the same language regarding the cost allocation method or methods that is used in its transmission planning region.⁶²⁰ Each public utility transmission provider must have a regional cost allocation method for any transmission facility selected in a regional transmission plan for purposes of cost allocation.⁶²¹

333. Regional Cost Allocation Principle 1 specifies that the cost of transmission facilities must 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. Cost allocation methods must clearly and definitively specify the benefits and the class of beneficiaries.⁶²² In determining the beneficiaries of transmission facilities, a regional transmission planning process may consider benefits including, but not limited to, the extent to which transmission facilities, individually or in the aggregate, provide for maintaining reliability and sharing reserves, production cost savings and congestion relief, and/or meeting public policy requirements.⁶²³ Regional Cost Allocation Principle 1 precludes an allocation where the benefits received are trivial in relation to the costs to be borne.⁶²⁴

334. Order No. 1000 does not prescribe a particular definition of “benefits” or “beneficiaries.”⁶²⁵ The Commission stated in Order No. 1000-A that while Order No. 1000 does not define benefits and beneficiaries, it does require the public utility transmission providers in each transmission planning region to be definite about benefits and beneficiaries for purposes of their cost allocation methods.⁶²⁶ In addition, for a cost allocation method or methods to be accepted by the Commission as Order

⁶²⁰ *Id.* P 558.

⁶²¹ *Id.* P 690.

⁶²² Order No. 1000-A, 139 FERC ¶ 61,132 at P 678.

⁶²³ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 622.

⁶²⁴ *Id.* P 639.

⁶²⁵ *Id.* P 624.

⁶²⁶ Order No. 1000-A, 139 FERC ¶ 61,132 at P 679.

No. 1000-compliant, they will have to specify clearly and definitively the benefits and the class of beneficiaries.⁶²⁷ A benefit used by public utility transmission providers in a regional cost allocation method or methods must be an identifiable benefit, and the transmission facility cost allocated must be roughly commensurate with that benefit.⁶²⁸ Each regional transmission planning process must provide entities who will receive regional or interregional cost allocation an understanding of the identified benefits on which the cost allocation is based.⁶²⁹ The public utility transmission providers in a transmission planning region may propose a cost allocation method that considers the benefits and costs of a group of new transmission facilities, although there is no requirement to do so.⁶³⁰

335. The regional transmission plan must include a clear cost allocation method or methods that identify beneficiaries for each of the transmission facilities selected in a regional transmission plan for purposes of cost allocation.⁶³¹ Order No. 1000-A stated that public utility transmission providers in each transmission planning region, in consultation with their stakeholders, may consider proposals to allocate costs directly to generators as beneficiaries that could be subject to regional or interregional cost allocation, but any such allocation must not be inconsistent with the generator interconnection process under Order No. 2003.⁶³²

336. Regional Cost Allocation Principle 2 specifies that those 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.⁶³³ All cost allocation methods must provide for allocation of the entire prudently incurred cost of a transmission project to prevent stranded costs.⁶³⁴ To the extent that public utility

⁶²⁷ *Id.* P 678.

⁶²⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 625.

⁶²⁹ Order No. 1000-A, 139 FERC ¶ 61,132 at P 746.

⁶³⁰ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 627, 641.

⁶³¹ *Id.* P 11; Order No. 1000-A, 139 FERC ¶ 61,132 at P 585.

⁶³² Order No. 1000-A, 139 FERC ¶ 61,132 at P 680.

⁶³³ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 637.

⁶³⁴ *Id.* P 640.

transmission providers propose a cost allocation method or methods that consider the benefits and costs of a group of new transmission facilities and adequately support their proposal, Regional Cost Allocation Principle 2 would not require a showing that every individual transmission facility in the group of transmission facilities provides benefits to every beneficiary allocated a share of costs of that group of transmission facilities.⁶³⁵

337. The Commission clarified in Order No. 1000-A that public utility transmission providers may rely on scenario analyses in the preparation of a regional transmission plan and the selection of new transmission facilities in the regional transmission plan for purposes of cost allocation. Regional Cost Allocation Principle 2 would be satisfied if a project or group of projects is shown to have benefits in one or more of the transmission planning scenarios identified by public utility transmission providers in their Commission-approved Order No. 1000-compliant cost allocation methods.⁶³⁶ The Commission clarified in Order No. 1000-B that it did not intend to remove the “likely future scenarios” concept from transmission planning and that likely future scenarios can be an important factor in public utility transmission providers’ consideration of transmission projects and in the identification of beneficiaries consistent with the cost causation principle.⁶³⁷

338. 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. Public utility transmission providers may choose to use such a threshold to account for uncertainty in the calculation of benefits and costs. If adopted, 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.⁶³⁸

339. Regional Cost Allocation Principle 4 specifies that the allocation method for the cost of a transmission facility selected in a regional transmission plan for purposes of cost allocation must allocate costs solely within that transmission planning region unless another entity outside the region or another transmission planning region voluntarily

⁶³⁵ *Id.* P 641.

⁶³⁶ Order No. 1000-A, 139 FERC ¶ 61,132 at P 690.

⁶³⁷ Order No. 1000-B, 141 FERC ¶ 61,044 at P 72.

⁶³⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 646.

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 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.⁶³⁹

340. 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.⁶⁴⁰

341. 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, such as transmission facilities needed for reliability, congestion relief, or to achieve public policy requirements.⁶⁴¹ If the public utility transmission providers choose to have a different cost allocation method for each type of transmission facility, there can be only one cost allocation method for each type.⁶⁴² In addition, if public utility transmission providers choose to propose a different cost allocation method or methods for different types of transmission facilities, each method would have to be determined in advance for each type of facility.⁶⁴³ A regional cost allocation method for one type of regional transmission facility or for all regional transmission facilities may include voting requirements for identified beneficiaries to vote on proposed transmission facilities.⁶⁴⁴ However, the public utility transmission providers in a region may not designate a type of transmission facility that has no regional cost allocation method applied to it.⁶⁴⁵

⁶³⁹ *Id.* P 657.

⁶⁴⁰ *Id.* P 668.

⁶⁴¹ *Id.* P 685.

⁶⁴² *Id.* P 686; *see also id.* P 560.

⁶⁴³ *Id.* P 560.

⁶⁴⁴ *Id.* P 689.

⁶⁴⁵ *Id.* P 690.

a. **Cost Allocation Associated with Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades**

i. **Filing Parties' Filing**

(a) **Cost Allocation For Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades**

342. The Filing Parties state that the current transmission cost allocation methodology for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades is set forth in Schedule 12 of the ISO-NE OATT.⁶⁴⁶ Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades that are rated 115 kV or above and that meet the non-voltage criteria for Pool Transmission Facilities are classified as Pool Transmission Facilities. These facilities are generally considered regional transmission facilities (Regional Benefit Upgrades). The costs of such facilities are allocated to network transmission load across the entire ISO-NE region, based on load-ratio share.⁶⁴⁷

343. Facilities that do not meet the criteria specified for Pool Transmission Facilities are non-Pool Transmission Facilities, and are considered local transmission facilities (Local Benefit Upgrades). Additionally, transmission facilities that meet the 115 kV voltage criterion but that are needed to serve local load only, generator leads, and transmission facilities that interconnect non-Pool Transmission Facilities to Pool Transmission Facilities are excluded from the definition of Pool Transmission Facilities. Further, under Schedules 12 and 12C, ISO-NE “localizes” costs for Regional Benefit Upgrades to the extent they exceed the reasonable regional requirements for upgrades. The costs of Local Benefit Upgrades are directly allocated to local beneficiaries.⁶⁴⁸ The Filing Parties state that the Commission has found that the existing tariff provisions met the cost allocation principles of Order No. 890.⁶⁴⁹

344. The Filing Parties also state that their filing complies with Order No. 1000's six Regional Cost Allocation Principles, as follows.

⁶⁴⁶ Filing Parties Transmittal at 42.

⁶⁴⁷ Transmission Owner Test. at 48-49.

⁶⁴⁸ Filing Parties Transmittal at 42-43.

⁶⁴⁹ *Id.* at 42 (citing 890 Compliance Order, 123 FERC ¶ 61,161 at P 90).

345. With respect to Regional Cost Allocation Principle 1, the Filing Parties state that the Commission has confirmed in its Order No. 890 compliance orders, and prior orders cited therein, that the cost allocation method for Regional Benefit Upgrades allocates costs in a manner that is commensurate with benefits. They state that the Pool Transmission Facilities system has long been recognized as the “highway” benefitting the entire region, and thus, the existing cost allocation complies with Regional Cost Allocation Principle 1.⁶⁵⁰

346. Regarding Regional Cost Allocation Principle 2, the Filing Parties state that through the existing New England planning process, Regional Benefit Upgrades have been identified as having region-wide benefits, and thus the associated cost allocation conforms to Regional Cost Allocation Principle 2. They further state that the localized cost process, described above, ensures that any Pool Transmission Facilities costs designed primarily to have a local benefit are not allocated to all regional customers.⁶⁵¹

347. The Filing Parties state that the ISO-NE OATT conforms to Regional Cost Allocation Principle 3 because the method applied in New England uses benefit to cost analysis only in identifying Market Efficiency Transmission Upgrades. In that regard, ISO-NE OATT Attachment N (at section II.B) states that proposed Market Efficiency Transmission Upgrades “shall be identified by the ISO where the net present value of the net reduction in total cost to supply the system load, as determined by the ISO, exceeds the net present value of the carrying cost of the identified transmission upgrade.” Accordingly, Filing Parties state that the benefit-cost ratio falls below the 1.25 ratio.⁶⁵²

348. With respect to Regional Cost Allocation Principle 4, the Filing Parties state that the ISO-NE OATT conforms to this principle, as there is no provision that allocates the costs of projects built on the New England transmission system to other control areas.⁶⁵³

349. The Filing Parties state that the ISO-NE OATT complies with the transparency requirements set forth in Regional Cost Allocation Principle 5 and Regional Cost Allocation Principle 6, as the cost allocation method for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades contained in Section 5 of Schedule 12 is self-explanatory. They further note that the means by which such

⁶⁵⁰ *Id.* at 44 (citing 890 Compliance Order, 123 FERC ¶ 61,161 at PP 84-91).

⁶⁵¹ *Id.*

⁶⁵² *Id.* at 44-45.

⁶⁵³ *Id.* at 45.

upgrades are identified in the regional system planning process is described in detail in Attachment N to the OATT.⁶⁵⁴

(b) **Allocation and Recovery of Study Costs
Related to Reliability Transmission
Upgrades and Market Efficiency
Transmission Upgrades**

350. With respect to Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades, pre-qualified entities may submit high-level project submissions to address identified reliability or market efficiency needs (i.e., Phase One Proposals). For identified reliability needs, Participating Transmission Owners would retain their backstop planning obligation and would be required to submit Phase One Proposals.⁶⁵⁵ The Participating Transmission Owners may recover the costs of preparing backstop solutions in accordance with the mechanisms reflected in the OATT and the terms of the TOA.⁶⁵⁶

351. ISO-NE selects the best project relative to the Phase One Proposals to proceed to Phase Two development. A nonincumbent transmission developer whose project is selected to proceed to Phase Two may recover its prudently incurred costs associated with developing a Phase Two Solution pursuant to proposed Schedule 14 of the ISO-NE OATT.⁶⁵⁷ Transmission Owners may recover such costs pursuant to rates and appropriate financial arrangements set forth in the OATT.⁶⁵⁸

⁶⁵⁴ *Id.* at 45-46.

⁶⁵⁵ *Id.* at 7.

⁶⁵⁶ ISO-NE, OATT, Attachment K, § 4.3(a) (Secondary Version).

⁶⁵⁷ Proposed Schedule 14 of the ISO-NE OATT, at § 2.1 in the Secondary Version, reads: “[A] Non-Incumbent Transmission Developer shall submit a filing with the Commission pursuant to § 205 of the Federal Power Act requesting approval of the actual Phase Two Solution costs and the period of time over which the costs are to be recovered.”

⁶⁵⁸ Filing Parties Transmittal at 70.

ii. **Commission Determination**

352. We find that the Filing Parties' filing partially complies with the Regional Cost Allocation Principles of Order No. 1000 with respect to the Filing Parties' proposed regional cost allocation method for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades. While the Filing Parties' regional cost allocation method for such transmission facilities complies with Regional Cost Allocation Principles 1, 2, 3, 5, and 6, we direct the 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.⁶⁵⁹

(a) **Cost Allocation for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades**

353. We find that ISO-NE's existing cost allocation method for Regional Benefit Upgrades (i.e., Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades that are rated 115 kV or above and that meet the non-voltage criteria to qualify as Pool Transmission Facilities) partially complies with the Regional Cost Allocation Principles of Order No. 1000.

⁶⁵⁹ 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.

354. As discussed above, only Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades that meet certain criteria (i.e., have a rating of 115 kV or above and satisfy the non-voltage criteria to qualify as Pool Transmission Facilities) are eligible for regional cost allocation under Schedule 12 as Regional Benefit Upgrades. The costs of such upgrades are allocated to all load within the New England region on a load-ratio share basis. When the Commission initially accepted ISO-NE's cost allocation method, it found that the criteria for classification as a Regional Benefit Upgrade "ensure that only needed upgrades that provide a region-wide benefit will be paid for by regional network service customers."⁶⁶⁰ In examining ISO-NE's cost allocation method for compliance with Order No. 1000, we find that the Regional Benefit Upgrade criteria included in the ISO-NE OATT continue to distinguish between transmission projects that provide benefits throughout the New England region and transmission projects that provide only localized benefits. The New England grid continues to be highly integrated, and a needed reliability or economic transmission facility on one part of New England's grid provides diffuse network benefits to other parts of the grid, both immediately and as benefits change over time. We also note that the criteria for a Regional Benefit Upgrade reflect ISO-NE's regional system planning process; specifically, the regional system planning process addresses the needs of the Pool Transmission Facilities, while the local system planning process addresses the needs of the non-Pool Transmission Facilities.⁶⁶¹ Thus, we conclude that by allocating the costs of Regional Benefit Upgrades, which provide benefits throughout the New England region, on a load-ratio share basis to all load within the New England region, ISO-NE's regional cost allocation method for Regional Benefit Upgrades allocates the costs of such upgrades in a manner that is at least roughly commensurate with the estimated benefits consistent with Regional Cost Allocation Principle 1.

355. For the reasons discussed above, we find that ISO-NE's cost allocation method for Regional Benefit Upgrades also meets Regional Cost Allocation Principle 2. In order to be eligible for regional cost allocation, a transmission facility must meet both voltage criteria and the non-voltage criteria to qualify as a Pool Transmission Facilities; thus, the cost allocation method ensures that the costs of transmission upgrades that are rated 115 kV or above but primarily serve local load are not allocated pursuant to the regional cost allocation method. Further protecting entities from being allocated the costs of a transmission facility from which they do not benefit, ISO-NE explains that, even if a transmission facility is classified as a Regional Benefit Upgrade, ISO-NE locally allocates costs that exceed the reasonable regional requirements for the facility. Thus,

⁶⁶⁰ *New England Power Pool*, 105 FERC ¶ 61,300, at P 26 (2003).

⁶⁶¹ *See* Transmission Owner Test. at 48-49.

ISO-NE's regional cost allocation method reasonably ensures that those who receive no benefit from transmission facilities, either in a present or in a likely future scenario, are not involuntarily allocated any of the costs of those transmission facilities.

356. We also find that ISO-NE's cost allocation method for Regional Benefit Upgrades is consistent with Regional Cost Allocation Principle 3. ISO-NE does not use a benefit to cost threshold for Reliability Transmission Upgrades; Market Efficiency Transmission Upgrades are identified where the net present value of the benefit (the net reduction in total costs to supply the system load) exceeds the net present value of the cost (the carrying cost of the identified transmission upgrade). This is equivalent to a ratio of 1.0, which is below the maximum threshold established by Order No. 1000.

357. With respect to Regional Cost Allocation Principle 4, the Filing Parties state that ISO-NE's cost allocation method for Regional Benefit Upgrades does not allocate the costs of transmission facilities built on the New England transmission system to other control areas. However, Regional Cost Allocation Principle 4 also requires that the regional transmission planning process must identify consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation on other transmission planning regions, such as upgrades that may be required in another region.⁶⁶² The Filing Parties do not address whether ISO-NE will identify the consequences of such a facility for other transmission planning regions, as required by Order No. 1000.⁶⁶³ The Filing Parties also do not address whether the New England region has agreed to bear the costs associated with any required upgrades in another transmission planning region or, if so, how such costs will be allocated within the New England region. Accordingly, we require Filing Parties to submit, within 120 days of the issuance date of this order, a further compliance filing that revises the ISO-NE OATT to provide for identification of the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation. The Filing Parties must also address in the further compliance filing whether the New England region has agreed to bear the costs associated with any required upgrades in another transmission planning region and, if so, how such costs will be allocated under the ISO-NE regional cost allocation method on other transmission planning regions.

358. 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 Regional Benefit Upgrades. We further find that the Filing Parties'

⁶⁶² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 657.

⁶⁶³ *Id.*

proposal satisfies Regional Cost Allocation Principle 6. We note that it is reasonable for the Filing Parties to establish one cost allocation method for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades, and a separate method for Public Policy Transmission Upgrades, although they are not required to do so.

(b) **Allocation and Recovery of Study Costs Related to Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades**

359. The Filing Parties propose that, for Reliability Transmission Upgrades and Market Efficiency Transmission Upgrades, any transmission developer who proceeds to the Phase Two process may recover its prudently incurred development costs. Transmission developers will generally be responsible for Phase One development costs, although the Participating Transmission Owner can recover any costs prudently incurred to develop a reliability backstop project. We find the Filing Parties' proposal to be just and reasonable and compliant with Order No. 1000. In the case of Phase One Proposals to address reliability needs, Participating Transmission Owners are not similarly situated to nonincumbent transmission developers because, in order to maintain reliability, ISO-NE *requires* that a Participating Transmission Owner develop a Phase One Proposal, while nonincumbent transmission developers have the choice of whether or not to develop such a proposal. Therefore, it is reasonable for a Participating Transmission Owner to recover the costs of developing a Phase One Proposal when it is required to develop that proposal under the ISO-NE OATT.

b. **Cost Allocation Associated with Public Policy Transmission Upgrades**

i. **Filing Parties' Summary**

(a) **Cost Allocation for Public Policy Transmission Upgrades**

360. As discussed above, the Filing Parties propose that some or all of the New England states can request that a Public Policy Transmission Upgrade be included in the regional system plan by submitting a written Public Policy Transmittal to ISO-NE, either through their public utility regulating commissions or through NESCOE. That transmittal must describe the project, the states that are supporting the project, and the elected cost allocation treatment.⁶⁶⁴

⁶⁶⁴ Filing Parties Transmittal at 56, 63.

361. A Public Policy Transmission Upgrade may utilize either an allocation specified by the participating states, or a default cost allocation. The default cost allocation is defined in the OATT to be the load-ratio share of the states supporting the project. The Filing Parties assert that the default option provides a pre-set cost allocation that reflects the relative use of the New England bulk electric system among the participating states.⁶⁶⁵

362. The Filing Parties also state that Public Policy Transmission Upgrades may be fact-specific as to benefits, and that, alternatively, the process allows for the identification of a project-specific cost allocation agreed to among the participating states. The Filing Parties note that this option is available to the states today through their ability to negotiate the cost allocation to be used for an elective project, which is subject to Commission review and approval as a Commission-jurisdictional rate. Similarly, in the case of a Public Policy Transmission Upgrade, an agreed-to cost allocation would be filed by the applicable transmission owner(s), or by a Qualified Sponsor, with the Commission for review and approval on a case-by-case basis. The Filing Parties state that, because the public policy transmission planning process is based on voluntary actions by the states, and no state is required to participate in a particular upgrade, the proposed cost allocation mechanism by its nature avoids any involuntary allocation of costs to those receiving no benefit under present or likely future scenarios, in compliance Order No. 1000.⁶⁶⁶

363. With respect to the costs of Local Public Policy Transmission Upgrades, the Filing Parties note that such costs will be allocated in accordance with the existing cost allocation method for all non-Pool Transmission Facilities as set forth in Schedule 21 to the ISO-NE OATT.⁶⁶⁷

(b) **Allocation and Recovery of Study Costs
Related to Public Policy Transmission
Upgrades**

364. The Filing Parties note that the public policy transmission planning process begins with a Public Policy Study conducted by ISO-NE. The Filing Parties state that this work benefits the entire region by exploring costs and benefits of high-level project scenarios,

⁶⁶⁵ *Id.* at 64.

⁶⁶⁶ *Id.* (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 219).

⁶⁶⁷ *Id.* at 65.

and thus, the cost of these initial studies will be allocated across the region as part of ISO-NE's operating expenses.⁶⁶⁸

365. The Filing Parties state that, for Public Policy Transmission Upgrades, Stage One Proposal development costs will generally be the responsibility of transmission developers. However, when NESCOE, a state, or a regulatory authority asks a transmission owner or other Qualified Sponsor to submit a Stage One Proposal, the proponent may recover its prudently incurred Stage One Proposal development costs from the network load of the requesting state. To recover these costs, a nonincumbent Qualified Sponsor will make a rate filing with the Commission under the proposed Schedule 13.⁶⁶⁹ If the Qualified Sponsor is a transmission owner in New England, it is expected that such costs will be recovered through existing formula rates in the ISO-NE OATT or through project-specific rate schedules where appropriate.⁶⁷⁰

366. According to the Filing Parties, all Qualified Sponsors whose projects are listed by NESCOE for inclusion in the Stage Two process shall be entitled to recover "pursuant to rates and appropriate financial arrangements set forth in the OATT and, [as] applicable, the TOA and NTDOA, all prudently incurred costs associated with developing a Stage Two Solution."⁶⁷¹ These costs are to be recovered from the states that communicate through NESCOE their desire for a given project to move to the Stage Two Solutions phase of the process. The Filing Parties state that if a state does not initially "opt-in" to join another state or group of states in making this Stage Two request, but later decides to participate as a sponsoring state for the project, the OATT provides that the study costs will be reallocated by ISO-NE and the state that has opted in to support the project will be charged its respective load-ratio share of the Qualified Sponsors' development costs. As with Stage One Proposal development costs, Qualified Sponsors that are not transmission owners may recover such costs through the proposed Schedule 13, and Qualified Sponsors that are existing transmission owners are expected to recover such

⁶⁶⁸ *Id.* at 62. The Filing Parties note that this proposal is similar to the treatment of costs incurred through the economic study process.

⁶⁶⁹ *Id.*; *see also* ISO-NE, OATT, Schedule 13, § 2.1 (Secondary Version) ("[A] Non-Incumbent Transmission Developer shall submit a filing with the Commission pursuant to Section 205 of the Federal Power Act requesting approval of the actual Stage One Proposal or Stage Two Solution costs and the period of time over which the costs are to be recovered.").

⁶⁷⁰ Filing Parties Transmittal at 62.

⁶⁷¹ *Id.* (citing ISO-NE, OATT, Attachment K, § 4.A.6 (Secondary Version)).

costs through existing formula rates in ISO-NE OATT or through project-specific rate schedules where appropriate.⁶⁷²

367. Filing Parties state that NESCOE may request Qualified Sponsors to provide cost estimates for Stage Two Solution development costs before NESCOE makes a determination regarding which, if any, Stage One Proposals should move forward for further development. Once it has provided an estimate, a Qualified Sponsor that is then selected to further develop its project under Stage Two Solutions must provide a revised estimate to ISO-NE and NESCOE if it expects that its costs will exceed its original cost estimate by 25 percent. NESCOE may inform ISO-NE whether the sponsoring states accept the revised estimate, and if they do not, then ISO-NE shall promptly advise the project sponsor to stop work. The Qualified Sponsor shall be entitled to recover its actual, prudent costs incurred up to that point. If NESCOE communicates that the revised estimate is acceptable or makes no communication within the required timeframe, then the Qualified Sponsor may continue work consistent with the revised estimate.

368. Additionally, Filing Parties state that, where a transmission owner is acting in its planning entity role and supporting the RTO in the development of any upgrades or modifications of existing transmission owner facilities to facilitate the development of a project proposed by any other Qualified Sponsor, that transmission owner will be entitled to recover its prudently incurred costs associated with that supporting activity.⁶⁷³

ii. Protests/Comments

369. In their protests and comments, parties primarily focus on the Filing Parties' proposed cost allocation method for Public Policy Transmission Upgrades. For example, while NEPOOL supports the Filing Parties' proposal to allow each of the New England states to opt into the selection and financial support of a proposed solution, NEPOOL submitted an alternative proposal, which includes several modifications related to cost allocation for Public Policy Transmission Upgrades. Specifically, NEPOOL proposal provides that consumer-owned utilities be permitted 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. For states that choose to opt-in as a supporter of a Public Policy Transmission Upgrade at a later date, the NEPOOL proposes that costs be allocated to that state in accordance with the cost

⁶⁷² *Id.* at 63.

⁶⁷³ *Id.*

allocation mechanism specified in the Public Policy Transmittal.⁶⁷⁴ In addition, the NEPOOL proposal provides that, if any portion of a Public Policy Transmission Upgrade is determined to also meet a reliability need, the costs associated with that portion of the upgrade shall be paid on the same basis as a Reliability Transmission Upgrade.

370. The NEPOOL proposal also requires Qualified Sponsors to provide ISO-NE, NESCOE, and the supporting states, a revised estimate of the cost to complete the work, if actual costs of a study reach 90 percent of the estimated costs. If one or more of the supporting states do not accept the revised estimate, NESCOE shall either notify ISO-NE that the Qualified Sponsor should stop work, or provide a revised cost allocation mechanism for the states that continue to support the project. Further, the NEPOOL proposal includes a provision that requires, at the request of NESCOE, transmission owners to provide NESCOE with documentation supporting all costs the transmission owner is seeking to recover related to a Public Policy Transmission Study.⁶⁷⁵ Similarly, if a Qualified Sponsor has been directed to submit a Stage One Proposal, and thus is eligible to recover prudently incurred costs from the regional network load of the state(s) that made the request, the NEPOOL proposal requires the transmission owner to provide NESCOE with documentation that supports all costs for which recovery is being sought, at the request of NESCOE or the state(s) that made the request directly.⁶⁷⁶

371. With respect to projects that have been approved, the NEPOOL proposal states that cost recovery for such projects shall be limited by the cost recovery mechanism negotiated between the opting-in states and the applicable Qualified Sponsor.⁶⁷⁷ Finally, if an approved Public Policy Transmission Upgrade is removed from the Regional System Plan Project List, the NEPOOL proposal would remove provisions that allow the entity responsible for construction to recover a reasonable return on investment at existing Commission-approved return on equity levels.⁶⁷⁸

⁶⁷⁴ NEPOOL Comments, Attachment 1 (NEPOOL Proposed Attachment K Redlines), § 4A.9(c) (NEPOOL Proposed Attachment K).

⁶⁷⁵ See NEPOOL Proposed Attachment K, § 4A.4.

⁶⁷⁶ See *id.* § 4A.6.

⁶⁷⁷ *Id.* § 4A.9(a).

⁶⁷⁸ *Id.* § 4A.9(d).

372. A number of parties support the NEPOOL proposal, highlighting various aspects of the proposal that they support.⁶⁷⁹ For example, NESCOE states that it supports the Filing Parties' proposed public policy process, with certain modifications proposed by NEPOOL, because it (1) recognizes the states' central role with respect to identifying the public policies that ISO-NE would consider in the planning process; (2) acknowledges that only the states will determine whether and how each state will ultimately satisfy their respective state public policy objectives; and (3) allows each state to decide for itself whether the benefits of a proposed project that prevails in a competitive process outweighs the costs from the perspective of that state's policies and ratepayers pursuant to that state's analysis of its laws and policies. NESCOE believes that the proposed process is consistent with Order No. 1000 principles which provide that there shall be no involuntary cost allocation associated with any project designed to advance public policy objectives, particularly when those projects are, fundamentally, voluntary in nature.⁶⁸⁰ Finally, NESCOE asserts that, should the Commission reject the proposed cost allocation method, the states are likely to pursue processes other than Order No. 1000 regional planning to consider means to advance state public policies.⁶⁸¹

373. Similarly, Southern New England States support the NEPOOL proposal, and in particular, the central role of the states in the identification of public policy requirements, potential transmission projects for inclusion in the regional system plan, and the method for allocating the costs of those projects. According to Southern New England States, the NEPOOL proposal ensures that any public policy-driven transmission projects in New England will be those that the states agree provide sufficient benefits to consumers as to merit the cost of development. Southern New England States assert that any modifications or steps which minimize the role of the states may result in a public policy mechanism that the states will avoid in favor of alternative processes already available to the states to achieve their public policy objectives.⁶⁸²

374. Southern New England States support allowing participating states a central role in deciding how the costs of any selected transmission projects driven by public policy

⁶⁷⁹ See, e.g., NESCOE Protest at 17; Southern New England States Protest at 57-58; Public Systems Protest at 2; Connecticut Department of Energy and Environmental Protection Comments at 3-4; New Hampshire Transmission Comments at 4-5; LS Power Protest at 2; PSEG Comments at 6.

⁶⁸⁰ NESCOE Protest at 18-19.

⁶⁸¹ *Id.* at 19.

⁶⁸² Southern New England States Protest at 57-58.

requirements are to be allocated before the default cost allocation method is employed because public policy projects are not driven by just engineering or economic analyses, but reflect the goals, aspirations, and concerns of the policymakers in the region. Southern New England States argue that attainment of a public policy objective may result in construction of resources and facilities that are more costly than facilities built to address reliability or economic need; however, a state may determine that the benefits to its ratepayers and citizens outweigh the costs, i.e., reduction in greenhouse gases. Ultimately, Southern New England States believe that the decision as to whether a particular public policy or a particular project driven by public policy requirements advances a state's interest in a manner that justifies the associated costs for its consumers lies with the state.⁶⁸³

375. Public Systems also support the NEPOOL proposal and states that it is particularly interested in the provision that allows consumer-owned entities to determine whether they wish to fund Public Policy Transmission Upgrades, asserting that there are several reasons why the Commission should adopt this provision as just and reasonable. To begin with, Public Systems assert that it would violate cost-causation principles to charge consumer-owned entities for projects driven by public policy requirements that do not apply to them under state or federal law. Public Systems explain that state and federal law treats consumer-owned utilities differently from investor-owned utilities because consumer-owned utilities are directly responsible to, and can be trusted to act voluntarily in the best interests of, their retail ratepayers. Public Systems state that the Filing Parties proposal is not explicit in allowing consumer-owned utilities to opt-out of Public Policy Transmission Upgrades; thus, Public Systems support the NEPOOL proposal because it explicitly allows consumer-owned utilities to opt-out of paying for such transmission facilities instead of deferring the issue to future filings.⁶⁸⁴

376. A number of parties also support the cost containment measures proposed in the NEPOOL proposal.⁶⁸⁵ NESCOE and Southern New England States assert that the states' ability to control costs is critical, and this will determine whether one or more states use the public policy process to bring projects to fruition.

377. Other parties request that the Commission reject portions of both the Filing Parties' proposal and the NEPOOL proposal, which allow for states to opt-out of cost

⁶⁸³ *Id.* at 58-59.

⁶⁸⁴ Public Systems Protest at 29-33.

⁶⁸⁵ *See, e.g.*, NESCOE Comments at 29-37; Southern New England States Protest at 63; Massachusetts Attorney General Protest at 24.

allocation for Public Policy Transmission Upgrades.⁶⁸⁶ The Maine Commission objects to the fact that the determination of what, if any, public policy should be the subject of regional transmission planning is left entirely to each state on an ad hoc basis.⁶⁸⁷ The Maine Commission asserts that the Filing Parties' proposal to allow states to voluntarily opt-in to specific Public Policy Transmission Upgrades is essentially participant funding.⁶⁸⁸ The Maine Commission states that this proposal does not meet the principles of Order No. 1000 that require (1) costs to be roughly commensurate with benefits, and (2) the cost allocation method for determining benefits and beneficiaries be transparent with respect to regional transmission needs driven by public policy requirements.⁶⁸⁹ Further, the Maine Commission argues that the proposed opt-in approach creates a free rider problem. Specifically, the Maine Commission interprets Order No. 1000 to require an objective and transparent cost allocation mechanism for a transmission project that would satisfy public policy requirements: transmission developers would propose transmission facilities in the regional transmission process and would receive due consideration and study without creating a free rider problem where beneficiaries wait for voluntary funding by others.⁶⁹⁰

378. Joint Parties argue that the Filing Parties' compliance filing lays out a largely acceptable process for identifying public policy needs and planning transmission to meet such needs. However, Joint Parties find the compliance filing's lack of an approach for allocating the costs associated with Public Policy Transmission Upgrades fails to meet the standards of Order No. 1000 and diminishes the likelihood that any Public Policy Transmission Upgrades that result from the proposed process will be built.⁶⁹¹ Joint Parties assert that, by providing the states with the option to participate in a project and incur its associated costs, the Filing Parties' filing grants each state a form of veto power

⁶⁸⁶ See, e.g., Maine Commission Protest at 2, 4; Joint Parties Protest at 7-8; AWEA Comments at 26.

⁶⁸⁷ Maine Commission Protest at 1-2, 6-7.

⁶⁸⁸ *Id.* at 7.

⁶⁸⁹ *Id.* at 4.

⁶⁹⁰ *Id.* at 8; see also Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 720.

⁶⁹¹ Joint Parties Protest at 8-9.

over individual projects that can prevent projects that are regionally beneficial and cost-effective from being pursued in favor of the interests of an individual state.⁶⁹²

379. Likewise, AWEA argues that the Filing Parties' proposal fails to provide a clear *ex ante* cost allocation methodology for transmission projects driven by public policy requirements that will ensure more efficient and cost-effective transmission solutions are identified and pursued.⁶⁹³ AWEA states that Order No. 1000 requires that projects proposed solely to address identified needs driven by public policy "must be eligible for selection in a regional transmission plan for purposes of cost allocation and must not be designated as a type of transmission facility for which the cost allocation method must be determined only on a project-specific basis."⁶⁹⁴ Therefore, AWEA supports the amendment included in the NEPOOL alternative proposal that would require regionalization of any portion of a transmission upgrade for public policy requirements that is also identified as meeting a system reliability need.

380. Additionally, LS Power supports a process by which Stage One development costs are the responsibility of the transmission developer. LS Power argues that the Filing Parties' proposal that allows a transmission owner or other Qualified Sponsor to recover prudently incurred Stage One Proposal costs from the network load of the requesting state is inappropriate.⁶⁹⁵ LS Power believes that a one-off payment provision, such as has been proposed, should not be part of a federal tariff. Instead, payment should be arranged between a state requesting the project and its preferred transmission developer that proposes the project. LS Power states that developers should bear their own costs for developing proposals; an entity that wants to collect payment from ratepayers, directly or indirectly, should do so outside the Commission-approved regional cost allocation process and work within their own jurisdictional framework.⁶⁹⁶

iii. Answers

381. The PTO Administrative Committee states that the transmission planning process for public policy requirements included in their compliance filing was intended as a trial

⁶⁹² *Id.* at 19.

⁶⁹³ AWEA Comments at 2-3.

⁶⁹⁴ *Id.* at 27 (citing Order No. 1000 FERC Stats. & Regs. ¶ 31,323 at P 690).

⁶⁹⁵ LS Power Protest at 23 (citing Filing Parties Transmittal at 62).

⁶⁹⁶ *Id.*

effort to promote consensus with the New England States. The PTO Administrative Committee believes the proposal to address transmission needs driven by public policy within its compliance filing minimally meets the requirements of Order No. 1000, but the PTO Administrative Committee encourages the Commission to give full consideration to the concerns raised by the Maine Commission and others. The PTO Administrative Committee is sympathetic to the concerns that the Filing Parties' proposed public policy planning process could (1) lead to an *ad hoc* state-by-state consideration of public policy requirements rather than the truly regional transmission planning process envisioned by Order No. 1000, which could then result in (2) free rider issues that arise with participant funded cost allocation methods. The PTO Administrative Committee states that it is prepared to work with the Maine Commission and other interested parties to enhance the public policy transmission planning process in New England after the new process is implemented.⁶⁹⁷

382. The PTO Administrative Committee also argues that the other cost allocation issues raised by commenters and protesters, such as giving consumer-owned transmission customers a right to opt-out of bearing costs, and placing state regulators in the role of deciding whether transmission costs can be recovered through tariff rates, are contrary to the cost allocation requirements of Order No. 1000.⁶⁹⁸ The PTO Administrative Committee states that the opt-in/opt-out proposal is a form of participant funding that not only creates a free rider problem, but is also prohibited by Order No. 1000. The PTO Administrative Committee asserts that in the context of public policy transmission planning, some states believe that it is within their jurisdiction to determine which transmission costs can be passed through transmission rates under the ISO-NE OATT.⁶⁹⁹ However, the PTO Administrative Committee notes that the Commission has exclusive jurisdiction over all interstate transmission facilities, therefore, the Commission should resist efforts to transfer control over the regional planning process from ISO-NE to the states.⁷⁰⁰

383. With respect to the added language in sections 4A.4 and 4A.6 of the NEPOOL proposal that requires transmission developers to provide NESCOE with documentation of the Stage One and Stage Two costs for which cost recovery is sought, the PTO Administrative Committee argues that these provisions place NESCOE in the role of

⁶⁹⁷ PTO Administrative Committee Answer at 6-7, 43-44.

⁶⁹⁸ *Id.* at 45-47.

⁶⁹⁹ *Id.* at 51.

⁷⁰⁰ *See id.* (citing *City of New Orleans v. FERC*, 67 F.3d 947, 954 (1995)).

transmission cost regulator. The PTO Administrative Committee also states that the required information is already provided in informational filings mandated by New England's Commission-approved formula rates under the ISO-NE OATT. Therefore, the PTO Administrative Committee states that there is no basis in Order No. 1000 or under the FPA to compel a public utility to provide cost support to state regulators on transmission costs beyond the requirements of the rate on file with the Commission.⁷⁰¹

384. In its January 18, 2013 answer, ISO-NE disagrees with the opt-out provision for individual consumer-owned utilities included in the NEPOOL proposal. NEPOOL argued that the municipal entities may not have the same public policy requirements as the rest of a state.⁷⁰² ISO-NE states it supported exclusion of the consumer-owned opt-out provision for several reasons: (1) the customer decides that the policy does not apply and has the power to opt-out; (2) the term "consumer-owned utilities" is vague (i.e., entities that are registered as individual network load customers often include municipal systems, but municipals may be bundled with other customers and not separately registered); and (3) municipal entities can in some cases constitute a significant portion of a state's network load, and their opting out would raise the amounts of a project to be funded by remaining ratepayers. ISO-NE states that in the event that the default cost allocation is not used, a state or states can explain to the Commission in the required rate filing for a given project why a specific type of entity should be excluded from the regional transmission rate for a specific project.⁷⁰³

385. In response to AWEA's protest, ISO-NE states that changes to the cost allocation mechanism that propose to have Public Policy Transmission Upgrades funded in part as reliability projects conflates two different processes and is not required by Order No. 1000. ISO-NE argues that AWEA's argument conflates processes that are separate for a reason: the public policy transmission planning process is by its nature, elective and may not identify the most cost-effective means of solving a reliability issue.⁷⁰⁴

386. ISO-NE also disagrees with LS Power's comments regarding the Stage One Proposal costs. ISO-NE states that this argument seems to reflect a misunderstanding of the roles of an RTO versus that of state agencies. ISO-NE states that RTOs have metering and settlement structures in place to recover costs from a given group, while

⁷⁰¹ *Id.* at 52-53.

⁷⁰² ISO-NE January 18, 2013 Answer at 65-66.

⁷⁰³ *Id.* at 66.

⁷⁰⁴ *Id.* at 66-67.

state entities do not. Therefore, ISO-NE argues that the revision that states requesting proposals pay the Qualified Sponsor from which the states request a project is neither practical nor required and should be rejected.⁷⁰⁵

387. NESCOE believes it would be inappropriate for the Commission to give weight to the arguments expressed by AWEA and the Maine Commission that were provided for the first time in their Commission-filed comments⁷⁰⁶ since these entities provide arguments outside of the regional stakeholder process during which such entities either did not object or they did not offer alternatives to proposals discussed during regional stakeholder processes.⁷⁰⁷ NESCOE states the Maine Commission's suggestion that the proposed cost allocation method for Public Policy Transmission Upgrades has resulted in a tariff arrangement-induced impasse in the region that Order No. 1000 seeks to address is confounding. NESCOE notes the joint work being undertaken by the six New England states irrespective of Order No. 1000 and the current ISO-NE OATT via the states' agreement to implement coordinated competitive renewable power procurement.⁷⁰⁸

388. NESCOE also states the Commission should reject arguments that provisions granting New England states the ability to opt-in to Public Policy Transmission Upgrades (1) would constitute participant funding, (2) will result in "free ridership," (3) will give states a "veto" over Public Policy Transmission Upgrades, or (4) are not fully transparent or fully specified in the tariff.⁷⁰⁹ NESCOE states that the compliance filing, as modified by the NEPOOL proposal, will result in a fully open and transparent process because there will be opportunities for meaningful participation at the Planning Advisory Committee stages, as well as the first and second stages of the public policy transmission study process. NESCOE also argues that the decision to opt-in to a transmission project designed to meet state public policy requirements will result in a fully noticed, public process before each regulatory agency.⁷¹⁰

⁷⁰⁵ *Id.* at 71.

⁷⁰⁶ NESCOE is referring to the comments filed by AWEA and the Protest filed by the Maine Commission. *See* NESCOE Answer at 5-8.

⁷⁰⁷ *Id.* at 7-8.

⁷⁰⁸ *Id.* at 5 n.13.

⁷⁰⁹ *Id.* at 9.

⁷¹⁰ *Id.* at 20-21.

iv. **Commission Determination**

389. We find that the Filing Parties' proposed regional cost allocation method for Public Policy Transmission Upgrades does not comply with the Regional Cost Allocation Principles of Order No. 1000, although we find that the proposed cost allocation method is an acceptable, complementary mechanism for allocating the costs of such transmission facilities. Accordingly, as discussed further below, we direct Filing Parties to submit, within 120 days of the date of issuance of this order, a further compliance filing providing a cost allocation method for transmission facilities selected in the regional transmission plan for purposes of cost allocation to address transmission needs driven by public policy requirements that satisfies the Regional Cost Allocation Principles of Order No. 1000.

(a) **Cost Allocation for Public Policy Transmission Upgrades**

390. Order No. 1000 requires public utility transmission providers in a transmission planning region to consider transmission needs driven by public policy requirements. However, Order No. 1000 allows public utility transmission providers to decide how to implement this requirement, either through a separate transmission planning process that leads to a separate class of transmission projects related to public policy requirements or through a process that identifies and evaluates all transmission needs, whether driven by public policy requirements, reliability criteria or economic considerations.⁷¹¹ If the public utility transmission providers in a transmission planning region propose a separate category of transmission projects that resolve transmission needs driven by public policy requirements that are selected in the regional transmission plan for purposes of cost allocation, then the public utility transmission providers also must propose a method for allocating the costs of those transmission projects that complies with the cost allocation principles of Order No. 1000.⁷¹² As discussed above, the Filing Parties propose to consider transmission needs driven by public policy requirements through a planning process that is separate from the process it uses to identify reliability and economic needs, and accordingly, the Filing Parties have proposed a separate cost allocation

⁷¹¹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 220.

⁷¹² *Id.* P 558 (“We require that a public utility transmission provider have in place a method, or set of methods, for allocating the costs of new transmission facilities selected in the regional transmission plan for purposes of cost allocation.”); *see also id.* P 560.

method for transmission projects that resolve transmission needs driven by public policy requirements.⁷¹³

391. We find that the Filing Parties' proposed cost allocation method for Public Policy Transmission Upgrades is not compliant with Order No. 1000 because it violates several key principles. ISO-NE's cost allocation proposal for Public Policy Transmission Upgrades is akin to having participant funding as the regional cost allocation method,⁷¹⁴ as each state can unilaterally decide that it in fact does not benefit from a proposed transmission project and "opt-out" of cost allocation for that project. Once one state decides to opt-out, the remaining states must then agree to reallocate the costs that would have been allocated to beneficiaries in the state that opted out. Additionally, because states that may potentially receive benefits from a particular Public Policy Transmission Upgrade can nonetheless opt-out of cost allocation for that project, certain beneficiaries of a transmission project may not be allocated a portion of the costs of that project, violating the requirement of Regional Cost Allocation Principle 1 that costs be allocated in a manner that is at least roughly commensurate with estimated benefits.

392. Moreover, we agree with the Maine Commission's arguments regarding the creation of a free rider problem, and AWEA's assertion that the Filing Parties' filing lacks a clearly defined *ex ante* cost allocation approach 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 has previously accepted cost allocation methods that allow parties to negotiate cost assignments on a project-specific basis before applying a default mechanism;⁷¹⁵ however, under the Filing Parties' proposal, even the default cost

⁷¹³ As discussed above, we are directing the Filing Parties to submit a compliance filing that includes a public policy planning process in which ISO-NE selects the more cost-effective or efficient transmission project to address a transmission need driven by public policy requirements. To the extent that the Filing Parties choose to use a process which does not separate reliability, economic and public policy planning, there would be no need to have a separate cost allocation method for transmission projects that resolve transmission needs driven by public policy requirements.

⁷¹⁴ 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.

⁷¹⁵ See, e.g., *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059 (2013).

allocation method is not an *ex ante* method because it permits states to opt-out of cost allocation for a particular transmission project. Thus, 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. This lack of transparency may create uncertainty for both prospective transmission developers and stakeholders about how the costs of a proposed transmission project will be allocated, violating Order No. 1000's requirement that the regional cost allocation method or set of methods must be an *ex ante* method developed in advance of particular transmission facilities being proposed.⁷¹⁶

393. For the reasons discussed above, we cannot accept the Filing Parties' proposed cost allocation method for Public Policy Transmission Upgrades as an Order No. 1000-compliant method. Therefore, we direct Filing Parties to submit a compliance filing, within 120 days of the date of this order, which includes a cost allocation method for Public Policy Transmission Upgrades that meets the regional cost allocation principles of Order No. 1000. Nevertheless, we find that the proposed cost allocation method is an acceptable, complementary option to an Order No. 1000 compliant cost allocation method. Order No. 1000 did not prevent market participants from negotiating alternative cost-sharing arrangements voluntarily and separately from the regional cost allocation method or set of methods, including participant funding of transmission facilities not selected in the regional transmission plan for purposes of cost allocation. Accordingly, we will not direct the Filing Parties to remove the proposed cost allocation method from the ISO-NE OATT when it submits an Order No. 1000-compliant cost allocation method for Public Policy Transmission Upgrades, if the Filing Parties choose to retain it as an optional cost-sharing arrangement.

394. Because the cost allocation method proposed by the Filing Parties is not an acceptable Order No. 1000-compliant method, we 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. We note that, if states utilize the proposed project-specific method, consumer-owned utilities may negotiate their cost assignments. On compliance, we expect the Filing Parties to submit an Order No. 1000-compliant method. That filing

⁷¹⁶ See, e.g., Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 499 (“We agree with many commenters that the lack of a 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.”).

must explain, among other things, 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 (Regional Cost Allocation Principle 2).

395. We find that the Filing Parties' proposal for a load-ratio share cost allocation mechanism for states that opt-in to a project after the Stage One Proposal or Stage Two Solutions stage is just and reasonable, if the Filing Parties choose to retain the cost allocation mechanism as an optional cost-sharing arrangement. As the Filing Parties explain, if a state does not initially "opt-in" to join another state or group of states in making the stage two request, but later decides to participate as a sponsoring state for the project, the OATT provides that the study costs will be reallocated by ISO-NE and the state that has opted in to support the project will be charged its respective load-ratio share of the Qualified Sponsors' development costs. Further, we note that the Commission found in Order No. 1000 that market participants may negotiate alternative cost sharing arrangements.⁷¹⁷ Accordingly, ISO-NE market participants are free to pursue other cost-sharing arrangements outside of the ISO-NE OATT.

396. We disagree with commenters, and we will not require the Filing Parties, as NEPOOL suggests, to submit on compliance a cost allocation method for Public Policy Transmission Upgrades that accounts for reliability benefits. Order No. 1000 permitted public utility transmission providers to consider transmission needs driven by public policy requirements separately from transmission solutions addressing reliability needs or economic considerations.⁷¹⁸ However, ISO-NE and its stakeholders may explore enhancements to improve the regional transmission planning process.

397. Regarding the Filing Parties' proposal for assigning the costs of Local Public Policy Transmission Upgrades, we note that Order No. 1000 required public utility transmission providers to amend their tariffs to add procedures for the consideration of transmission needs driven by public policy requirements in their local planning processes, but was silent on the issue of how public utility transmission providers should assign the costs of local public policy projects. We find that adding provisions to address how the costs of new local public policy projects would be assigned is integral to the Filing Parties' compliance filing and therefore appropriate to address in an Order No. 1000 compliance filing. The Filing Parties propose to allocate the costs of any Local Public Policy Transmission Upgrades in accordance with ISO-NE's existing cost allocation

⁷¹⁷ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 561.

⁷¹⁸ *Id.* P 220.

method for non-Pool Transmission Facilities. We find that this proposal reasonably distinguishes between public policy projects that provide benefits throughout the New England region and public policy projects that provide primarily localized benefits, and accordingly, we accept the Filing Parties' proposal.

(b) **Allocation and Recovery of Study Costs Related to Public Policy Transmission Upgrades**

398. While the Commission declined to address cost recovery in Order No. 1000, the Commission did note that, to the extent that cost recovery provisions are considered in connection with a cost allocation method or methods for a regional transmission facility, public utility transmission providers may include cost recovery in their compliance filings.⁷¹⁹ Here, the Filing Parties provide for cost recovery for a Public Policy Transmission Upgrade that has been included on the Regional System Plan Project List at the request of NESCOE or the states, as well as cost recovery for the associated study costs. While, as discussed above, we do not find the Filing Parties' proposal to be compliant with Order No. 1000, we are accepting it as an appropriate complementary option, and we will accordingly analyze the proposed cost recovery provisions. 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. Rather, we find the cost recovery terms submitted by ISO-NE are just and reasonable. Additionally, the Filing Parties' proposal does allow 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.

399. We also accept the Filing Parties' proposed language in section 4A.9(d) of Attachment K allowing a Public Policy Transmission Upgrade that is removed from the Regional System Plan Project List to be reimbursed for any costs prudently incurred in the planning, designing, engineering, siting, permitting, procuring, and construction of that Public Policy Transmission Upgrade, including Commission-approved Return on Equity (ROE) levels, subject to the Commission's policy on cost recovery for abandoned plant.⁷²⁰ We do not agree with NEPOOL's proposed Attachment K that would remove

⁷¹⁹ *Id.* P 616.

⁷²⁰ Commission policy on recovery of abandoned plant through a formula rate mechanism requires that the utility demonstrate the costs were prudently-incurred, and are not permitted to be passed through without initial Commission review of the particular losses through a section 205 filing. *See South Carolina Generating Co., Inc.*,

(continued...)

language from the OATT providing for discontinued projects to receive a reasonable return on investment at the Commission-approved return on equity.⁷²¹ We find that the proposal to recover project costs is just and reasonable, and similar to previously-approved language in section 3.6 of Attachment K.⁷²²

400. With respect to study costs, the Filing Parties propose that transmission developers will generally be responsible for Stage One Proposal development costs, with the caveat that, if a 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. Filing Parties also propose that any transmission developer who proceeds to the Stage Two process may recover its development costs. We accept the Filing Parties' proposal. We find that it is appropriate that a transmission developer who has been specifically requested to develop a solution be permitted to recover all prudently incurred study costs. Moreover, we find that the Filing Parties' proposal treats nonincumbent transmission developers in a just and reasonable and not unduly discriminatory manner by allowing them to recover all prudently incurred development costs if a transmission project proceeds to Stage Two, as well as to recover Stage One

32 FERC ¶ 61,224 (1985); *Trans-Allegheny Interstate Line Co.* 119 FERC 61,219, at P 55 (2007); *Commonwealth Edison Co.*, 119 FERC ¶ 61,238 (2007); *Am. Elec. Power Serv. Corp.*, 120 FERC ¶ 61,205, at PP 35-37 (2007); *Tall Grass Transmission, LLC and Prairie Wind Transmission, LLC*, 125 FERC ¶ 61,248 (2008); *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, at P 166, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007); *Atlantic Grid Operations A LLC*, 135 FERC ¶ 61,144, at P 118 (2011).

⁷²¹ See NEPOOL Proposed Attachment K, § 4A.9(d).

⁷²² See ISO-NE, OATT, Attachment K, § 3.6(c) ("If a regulated transmission solution or Transmission Upgrade is removed from the RSP Project List by the ISO, the entity responsible for the construction of the regulated transmission solution or Transmission Upgrade shall be reimbursed for any costs prudently incurred or prudently committed to be incurred (plus a reasonable return on investment at existing Commission-approved ROE levels) in connection with the planning, designing, engineering, siting, permitting, procuring and other preparation for construction, and/or construction of the regulated transmission solution or Transmission Upgrade proposed for removal from the RSP Project List.").

Proposal development costs when directed to propose a transmission project by NESCOE, a state, or regulatory agency.

401. We also accept the Filing Parties' proposal that the costs of conducting a Public Policy Study be allocated across the region as part of ISO-NE's operating expenses. The Filing Parties note that this is how ISO-NE treats costs incurred in its economic study process. We note that, in Order No. 890, the Commission stated that the cost of a defined number of high priority studies to address congestion and/or the integration of new resources or loads would be recovered as part of the overall *pro forma* OATT cost of service.⁷²³ The Commission explained that this cost recovery mechanism is comparable and nondiscriminatory because the transmission provider already has the ability to include in its *pro forma* OATT rates the cost of service associated with studies performed on behalf of its native load customers.⁷²⁴

402. We will not accept the provisions set forth in the NEPOOL proposal that would require the 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. The public policy process proposed by the Filing Parties already allows for participation by NESCOE and the states at numerous points. For example, NESCOE and the states take a leading role in identifying public policies that may drive the need for transmission projects and in determining which transmission needs should be studied by ISO-NE.⁷²⁵ For Stage Two Solutions, the Filing Parties' proposal already allows NESCOE to request an estimate of study costs from the Qualified Sponsor, as well as requires the Qualified Sponsor to notify NESCOE and the states if it expects actual costs to exceed expected costs by 25 percent.⁷²⁶ Thus, we find that the provisions set forth in the NEPOOL proposal are unnecessary.

403. Nor will we adopt the provisions included in the NEPOOL proposal that would require a Qualified Sponsor to notify NESCOE and the states when the actual costs of a study reach 90 percent of the estimated costs. We conclude that the Filing Parties'

⁷²³ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 547.

⁷²⁴ *Id.* P 547 n.324.

⁷²⁵ *See, e.g.*, NEPOOL Proposed Attachment K, § 4A.1 (NESCOE Requests for Public Policy Transmission Studies); *id.* § 4A.3 (Conduct of Public Policy Transmission Studies; Stakeholder Input); *id.* § 4A.4 (Response to Follow-On Phase of Public Policy Transmission Studies).

⁷²⁶ *See id.* § 4A.5(f) (Stage Two Cost Estimate Requests).

proposal, which requires the Qualified Sponsor to notify NESCOE and the states when there is an expectation that actual study costs will exceed estimated study costs by 25 percent, is just and reasonable. Initial study cost estimates provided by the Qualified Sponsor are precisely that—estimates. Unanticipated costs may arise as the Qualified Sponsor conducts its study, and the Filing Parties’ proposal provides adequate flexibility and transparency in accounting for such costs.

The Commission orders:

(A) Filing Parties’ compliance filing is hereby accepted, as modified, subject to a further compliance filing, as discussed in the body of this order.

(B) Filing Parties are hereby directed to submit a further compliance filing, within 120 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Moeller and Commissioner Clark are dissenting with separate statements attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendices

Appendix A: Abbreviated Names of Intervenors

The following tables contain the abbreviated names of intervenors that are used in the Order on PJM Parties' Filings.

Intervenors

**ISO-NE October 25, 2012 Filing
Docket Nos. ER13-193-000 and ER13-196-000**

Abbreviation	Intervenor(s)
AWEA	American Wind Energy Association and Renewable Energy New England, Inc. ⁷²⁷
Belmont	Belmont Municipal Light Department
CT DEEP	Connecticut Department of Energy and Environmental Protection
CT Consumer Counsel	Connecticut Office of Consumer Counsel
CLF	Conservation Law Foundation
Eastern MA	Eastern Massachusetts Consumer-Owned Systems
Exelon	Exelon Corporation
Iberdrola	Iberdrola Renewables, LLC
Joint Movants	ENE, the National Consumer Law Center, the Natural Resources Defense

⁷²⁷ Renewable Energy New England, Inc. requested to withdraw from the proceeding on January 10, 2013.

	Council, and The Sustainable FERC Project
LIPA	Long Island Power Authority
LS Power	LS Power Transmission, LLC and LS Power Transmission Holdings, LLC
Maine Public Advocate	Maine Public Advocate Office
Maine Commission	Maine Public Utilities Commission
Public Systems	Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc.
Massachusetts Attorney General	Massachusetts Office of the Attorney General
NRECA*	National Rural Electric Cooperative Association
NEPOOL PC	New England Power Pool Participants Committee
NESCOE	New England States Committee on Electricity
New Hampshire Commission*	New Hampshire Public Utilities Commission
New Hampshire Transmission	New Hampshire Transmission, LLC
New Hampshire Consumer Advocate	New Hampshire Consumer Advocate
NRG	NRG Companies
Poweroptions	Poweroptions Inc.
PSEG	PSEG Companies
Southern New England States	Department of Public Utilities of the Commonwealth of Massachusetts, the

Rhode Island Public Utilities
Commission and the Connecticut Public
Utilities Regulatory Authority

Transource Energy

Transource Energy, LLC

Vermont Commission*

Vermont Public Service Board

* late intervention

Appendix B: Abbreviated Names of Initial Commenters

The following tables contain the abbreviated names of initial commenters that are used in the Order on PJM Parties' Filings.

Initial Commenters

ISO-NE October 25, 2012 Filing
Docket Nos. ER13-193-000 and ER13-196-000

Abbreviation	Commenter(s)
AWEA*	American Wind Energy Association and Renewable Energy New England, Inc.
Belmont	Belmont Municipal Light Department
Connecticut DEEP	Connecticut Department of Energy and Environmental Protection
Eastern Massachusetts Consumer-Owned Systems+	Eastern Massachusetts Consumer-Owned Systems
Joint Movants+	ENE, the National Consumer Law Center, the Natural Resources Defense Council, and The Sustainable FERC Project
Joint Parties	Conservation Law Foundation, Natural Resource Defense Council, and the Sustainable FERC Project
LS Power+ ⁷²⁸	LS Power Transmission, LLC and LS Power Transmission Holdings, LLC
Maine Commission+	Maine Public Utilities Commission

⁷²⁸ LS Power filed a supplemental protest on the *Mobile-Sierra* issue on December 11, 2012.

Massachusetts Attorney General+	Massachusetts Office of the Attorney General
NEPOOL	New England Power Pool Participants Committee ⁷²⁹
NESCOE+	New England States Committee on Electricity
New Hampshire Transmission+	New Hampshire Transmission, LLC
PSEG	PSEG Companies
Public Systems+	Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc.
Southern New England States+	Department of Public Utilities of the Commonwealth of Massachusetts, the Rhode Island Public Utilities Commission and the Connecticut Public Utilities Regulatory Authority

* late comments

+ protests

⁷²⁹ The transmission owners who voted in favor of the filing are: Bangor Hydro-Electric Company; NSTAR Electric & Gas Corporation; Central Maine Power Company; Maine Electric Power Corporation; New England Power Company d/b/a National Grid; Northeast Utilities Service Company on behalf of its affiliates: The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, Holyoke Power and Electric Company and Holyoke Water Power Company; The United Illuminating Company; Vermont Electric Power Company, Inc.; and Vermont Transco, LLC.

Appendix C: Abbreviated Names of Reply Commenters

The following tables contain the abbreviated names of reply commenters that are used in the Order on ISO-NE's filings.

Reply Commenters

ISO-NE October 25, 2012 Filing **Docket Nos. ER13-193-000 and ER-13-196-000**

Abbreviation	Commenters(s)
Joint Movants ⁷³⁰	ENE, the National Consumer Law Center, the National Resources Defense Council, and The Sustainable FERC Project
ISO-NE ⁷³¹	ISO-New England
NESCOE and Five New England States ⁷³²	The New England States Committee on Electricity, the Department of Public Utilities of the Commonwealth of Massachusetts, the Rhode Island Public Utilities Commission, the Connecticut Public Utilities Regulatory Authority, the Commissioner of the Connecticut Department of Energy and Environmental Protection, the State of New Hampshire Public Utilities Commission, the Vermont Public Service Board, and the Vermont Public Service Department

⁷³⁰ ENE filed an answer on February 20, 2013.

⁷³¹ ISO-NE filed answers on January 18, 2013 and March 7, 2013.

⁷³² NESCOE and Five New England States filed an answer on January 8, 2013.

New Hampshire Transmission⁷³³

New Hampshire Transmission, LLC

PTO Administrative Committee

Participating Transmission Owners Administrative Committee (the filing was also submitted on behalf of Bangor Hydro-Electric Company; Central Maine Power Company; Maine Electric Power Corporation; New England Power Company d/b/a National Grid; 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; the United Illuminating Company; Vermont Electric Power Company, Inc.; and Vermont Trans, LLC. These PTOs are also referred to in this filing as the New England Transmission Owners (NETO))

⁷³³ New Hampshire Transmission filed an answer on February 9, 2013.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.,

Docket Nos. ER13-193-000
ER13-196-000

Bangor Hydro-Electric Company; NSTAR Electric & Gas Corporation; Central Maine Power Company; Maine Electric Power Corporation; New England Power Company d/b/a National Grid; Northeast Utilities Service Company on behalf of its affiliates: The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, Holyoke Power and Electric Company and Holyoke Water Power Company; The United Illuminating Company; Vermont Electric Power Company, Inc.; and Vermont Transco, LLC

(Issued May 16, 2013)

MOELLER, Commissioner, *dissenting*:

Every few years this Commission engages a new generic theory on how rates can become more just and reasonable. Today we are implementing Order No. 1000, and a theory that transmission plans will be better if the planners of the grid can compete for the right to own the projects that they propose. While this theory should be encouraged, we must respect that contracts are the underpinnings of every transaction in this industry, and contracts require certainty in both the near and long term.

The majority acknowledges that in 2004 the Commission approved the Filing Parties' request to protect certain provisions of the Transmission Owners' Agreement under a *Mobile-Sierra* public interest finding.¹ However, the majority believes the generic reasoning provided in Order No. 1000 is legally sufficient to make a public interest finding in New England. Unlike the majority, I do not find that the continued effectiveness of these provisions now harms the public interest to such a degree that justifies invalidating them, nor do I find that the majority has made a particularized showing of the manner in which the contract harms the public interest in this region.² While Order No. 1000's goal to foster competition in transmission development is both important and appreciated, protecting the sanctity of the contracts is even more paramount.

¹ *ISO New England, Inc.*, 109 FERC ¶ 61,147 at P 78 (2004).

² *Texaco Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998).

Ultimately, like Commissioner Clark, I do not see how severe harm will result from a failure to adopt theories underlying Order No. 1000, as ISO-NE offers just and reasonable rates despite not having already adopted those theories. The failure to adopt certain components of Order No. 1000 does not threaten the solvency of ISO-NE, and consumers are not in danger of extraordinary rate increases. While the public interest should protect these contractual arrangements, it sadly does not in this instance.

Accordingly, I respectfully dissent.

Philip D. Moeller

Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.,

Docket Nos. ER13-193-000
ER13-196-000

Bangor Hydro-Electric Company; NSTAR Electric & Gas Corporation; Central Maine Power Company; Maine Electric Power Corporation; New England Power Company d/b/a National Grid; Northeast Utilities Service Company on behalf of its affiliates: The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, Holyoke Power and Electric Company and Holyoke Water Power Company; The United Illuminating Company; Vermont Electric Power Company, Inc.; and Vermont Transco, LLC

(Issued May 16, 2013)

CLARK, Commissioner, *dissenting*:

In addition to those reasons more fully explained in my previous dissents,¹ I am dissenting from this ISO-New England (ISO-NE) Order No. 1000 compliance filing because of a new wrinkle not present in previous Order No. 1000 filings. Specifically, I do not support the majority's decision to overturn the *Mobile-Sierra* protection this Commission specifically granted to certain provisions in the ISO-NE 2004 Transmission Operating Agreement (TOA).²

The issues raised are numerous, but suffice it to say I find the Commission's determination troubling in relation to the signals we are sending to the broader regulated community regarding *Mobile-Sierra*. I have concerns with the Commission too easily exercising its discretion to extend the public interest standard of review to non-contract rates, terms, and conditions.³ And yet, because the Commission chose to do just that

¹ *PJM Interconnection L.L.C.*, 142 FERC ¶ 61,214 (2013) (Clark, Comm'r, dissenting); *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 (2013) (Clark, Comm'r, dissenting).

² *ISO New England, Inc.*, 109 FERC ¶ 61,147, at P 78 (2004).

³ For further analysis, see the dissent and concurrences of Commissioner Norris in *Devon Power LLC*, 134 FERC ¶ 61,208 (2011) (Norris, Comm'r, dissenting in part); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011) (Norris, Comm'r,

(continued...)

Docket No. ER13-193-000 et al.

when presented with the request in the 2004 TOA, it now finds itself in the untenable position of having to stretch to find a public interest finding to revoke the previously granted and protected provisions of the TOA.

To characterize it succinctly, I believe the Commission may have imprudently exercised its discretionary powers to grant the heightened *Mobile-Sierra* protection in the case of the TOA where it was clear that non-contract rates, terms and conditions were at issue. Now it must demonstrate why revocation of that heightened protection is justified. This is not easily done, and the Commission's decision in this order may establish a precedent whereby there are fluid and weak limiting principles by which *Mobile-Sierra* protection will be both granted and withdrawn. This undercuts the regulatory certainty that has until now been associated with *Mobile-Sierra*.

I am open to an analysis or argument that Rights of First Refusal provisions for economic projects may inhibit competition and thus result in rates that are unjust and unreasonable under the ordinary just and reasonable standard alone. However, there is a larger burden associated with the public interest application of the just and reasonable standard of review.

The Supreme Court has set a high bar for this Commission to meet, and in my mind if we are to preserve the integrity of the Commission's *Mobile-Sierra* analysis, we must provide some evidence demonstrating real peril. Instead, the order today has reduced the heightened *Mobile-Sierra* standard to little more than the ordinary just and reasonable standard that was already used to support Order No. 1000. Where the Commission in *TAPS* identified a quantifiable amount of harm – \$200 billion or more in stranded costs (that justified modifying contracts after Order No. 888),⁴ here the Commission can only opine on the theoretical benefit that may result from having additional participants in the regional transmission planning process.

The arguments employed by the Commission in revoking the TOA *Mobile-Sierra* protections are all worthy of debate in the context of public policy, but the Commission lacks a more granular analysis or quantification of the “*extraordinary*” circumstances

concurring); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105 (2011) (Norris, Comm'r, concurring); *Petal Gas Storage, L.L.C.*, 135 FERC ¶ 61,152 (2011) (Norris, Comm'r, concurring).

⁴ See *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 711 (D.C. Cir. 2000) (*TAPS*) (“FERC has produced such evidence” and “[t]he record contains estimates of stranded costs amounting to \$200 billion or more. See Stranded Cost NOPR, ¶ 32,507 at 32,866”).

Docket No. ER13-193-000 et al.

where the public will be *severely* harmed.”⁵ (emphasis added) Without such analysis, I am uncomfortable crossing the public interest threshold.

For these reasons, I respectfully dissent from this order.

Tony Clark
Commissioner

⁵ See *Morgan Stanley Capital Grp., Inc., v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 550-51 (2008).