

121 FERC ¶ 61,105  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

ISO New England Inc.

Docket No. ER07-1324-000

ORDER ACCEPTING TARIFF SHEETS FOR FILING

(Issued October 30, 2007)

1. On August 31, 2007, the Filing Parties<sup>1</sup> submitted for filing Schedule 5,<sup>2</sup> which states that ISO-NE will act as the billing and collection agent for the New England States Committee on Electricity (NESCOE), the proposed Regional State Committee (RSC) for the New England region. For the reasons discussed below, we accept Schedule 5 for filing.

**I. Background**

2. In June 2004, the New England Governors<sup>3</sup> petitioned the Commission for a declaratory order establishing NESCOE as New England's RSC, and, *inter alia*, finding that NESCOE may be funded through a regional tariff administered by ISO-NE. Five

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<sup>1</sup> The Filing Parties are: ISO New England Inc. (ISO-NE), the New England Power Pool Participants Committee (NEPOOL), the New England Governors' Conference, Inc. (Governors' Conference), and the Governors of Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont. The Governor of Maine indicated that while he neither endorsed nor opposed the filing, his abstention was not to be interpreted as an objection to the formation of NESCOE.

<sup>2</sup> The Filing Parties propose to add Schedule 5 to section IV.A of ISO-NE's Transmission, Markets, and Services Tariff (Tariff), and to make corresponding changes to the main body of section IV.A.

<sup>3</sup> The Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

months later, ISO-NE proposed adding Schedule 5 to its Tariff, describing it as “a placeholder” that would permit an RSC to “submit, justify, and collect its administrative costs should such a[n] [RSC] be formed.”<sup>4</sup>

3. In December 2004, the Commission rejected Schedule 5 as “unnecessary and premature.”<sup>5</sup> The Commission explained that the New England Governors’ petition for a declaratory order was still pending before the Commission, and that it was inappropriate for the Commission to provide a placeholder for the recovery of costs of an RSC that did not yet exist.<sup>6</sup> Moreover, the Commission stated that it was “unnecessary for ISO-NE to recover any future costs it may incur for a[n] [RSC] under a separate rate schedule,” because “such costs should be included along with other regulatory costs in ISO-NE’s budget.”<sup>7</sup> ISO-NE filed for rehearing.

4. In July 2005, the Commission issued an order that deferred action on the New England Governors’ petition for a declaratory order, pending further stakeholder discussions. The Commission did, however, offer guidance on how a funding mechanism for NESCOE should be structured:

Any cost recovery mechanism . . . should result in a budget establishing reasonable costs. This budget should be transparent and indicate clearly the anticipated, future costs associated with the establishment and operation of NESCOE, identified separately from those of ISO-NE. This would be possible by including NESCOE’s budget as a line item in ISO-NE’s annual filing to recover

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<sup>4</sup> November 1, 2004 Filing of ISO-NE for Recovery of its 2005 Administrative Costs at 9. In October 2003, ISO-NE and seven New England Transmission Owners submitted a filing seeking to establish ISO-NE as New England’s Regional Transmission Organization (RTO), and proposing that an RSC be a part of ISO-NE’s structure. The Commission approved the proposal, subject to conditions in *ISO New England, Inc.*, 106 FERC ¶ 61,280, *order on reh’g and compliance*, 109 FERC ¶ 61,147 (2004), *order on reh’g and compliance*, 110 FERC ¶ 61,111, *order on reh’g and compliance*, 110 FERC ¶ 61,335 (2005), *order on reh’g*, 111 FERC ¶ 61,344 (2005).

<sup>5</sup> *ISO New England Inc.*, 109 FERC ¶ 61,383 at P 46 (2004) (December 2004 Order).

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

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

its administrative costs. Other arrangements may also be acceptable, but we do not believe that a separate schedule is necessary.<sup>8</sup>

5. Also in the July 2005 Order, the Commission denied rehearing of the December 2004 Order. In response to ISO-NE's rehearing request, the Commission reiterated that Schedule 5 was premature, stating that "[b]ecause a funding mechanism for NESCOE has not been deliberated by the participants in New England, there is no certainty that a separate schedule will eventually be agreed upon and utilized."<sup>9</sup> The Commission encouraged the parties to resolve all the issues surrounding NESCOE, stating that it might reconsider its holding "if the parties conclude[d], in the context of a global agreement, that the best manner of presenting NESCOE's budget to the Commission is as a separate schedule within ISO-NE's administrative cost filing."<sup>10</sup>

6. Following the July 2005 Order, the Filing Parties engaged in extensive stakeholder discussions concerning NESCOE. At the conclusion of these discussions, the Filing Parties prepared a Term Sheet summarizing NESCOE's key features, including its proposed funding mechanism, and describing the compromises that had emerged through the consultative process. This Term Sheet was presented for a vote at the September 2006 NEPOOL Participants Committee meeting, where it was approved by 81.59 percent of the vote. Subsequently, the Term Sheet was unanimously approved by the New England Governors,<sup>11</sup> and presented to the NEPOOL Business and Finance Subcommittee, which approved it with slight revisions. Finally, in July 2007, the NEPOOL Participants Committee approved Schedule 5 (and corresponding changes to the main body of section IV.A) by 81.32 percent of the vote.

7. Also following the July 2005 Order, the Commission approved PJM Interconnection, L.L.C.'s (PJM) proposal to fund the Organization of PJM States, Inc. (OPSI), an RSC for the PJM region.<sup>12</sup> The Commission held that OPSI was a reasonable business expense that would allow PJM to more effectively and efficiently coordinate its interactions with the 14 regulatory commissions in the PJM region.<sup>13</sup> The Commission

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<sup>8</sup> *The Governors of: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont*, 112 FERC ¶ 61,049 at P 40 (2005) (July 2005 Order).

<sup>9</sup> July 2005 Order, 112 FERC ¶ 61,049 at P 41.

<sup>10</sup> *Id.* at P 42.

<sup>11</sup> The Governor of Maine did not vote.

<sup>12</sup> *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,292 (2005) (*PJM*).

<sup>13</sup> *Id.* at P 39.

found that without an organization like OPSI, PJM would have to interact with the state agencies on a less efficient one-on-one-basis, and that OPSI would therefore mitigate regulatory costs, uncertainties, and delays.<sup>14</sup> Moreover, the Commission observed that PJM's funding proposal had broad support among stakeholders, including the recommendation of the PJM Finance Committee and the support of 85 percent of PJM's membership.<sup>15</sup> Finally, the Commission noted that PJM's funding proposal contained safeguards against the recovery of excessive costs by giving PJM and stakeholders the opportunity to review OPSI's budget.<sup>16</sup>

## II. Description of Filing

8. The Filing Parties state that NESCOE will be formed in accordance with the Term Sheet, which is the product of a thorough and fully inclusive stakeholder process. Moreover, the Filing Parties state that the Term Sheet reflects a comprehensive RSC proposal, including Schedule 5, designed by using *PJM* as a guide.

9. Schedule 5 states that ISO-NE will act as NESCOE's billing and collection agent by recovering amounts reflected in the annual NESCOE budget. Schedule 5 requires that NESCOE develop an annual budget and present it to ISO-NE in final form, with cost justification and supporting documentation, no later than October 20 for the following calendar year. Schedule 5 prohibits NESCOE from exceeding its budget in any given calendar year and specifies that it is subject to true up. Schedule 5 further states that ISO-NE will calculate the Schedule 5 rate and submit the NESCOE-provided materials and any revised tariff sheets to the Commission separately, but contemporaneously, with ISO-NE's annual filing to recover its other administrative expenses.

10. The Filing Parties request that the Commission accept Schedule 5 effective October 31, 2007. The Filing Parties state that they will submit NESCOE's budget for Commission approval on October 31, but that no charges will be assessed until the later of either January 1, 2008 or 30 days after NESCOE submits formal notice to the Commission regarding adoption or execution of a Certificate of Incorporation, by-laws, a code of conduct, a Memorandum of Understanding (MOU) setting out ISO-NE and NESCOE's respective responsibilities, and an annual NESCOE operating budget for the first full calendar year of operations and estimated budgets for the first five years of operation.

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

<sup>15</sup> *Id.* at P 32.

<sup>16</sup> *Id.* at P 35, 36.

11. The Filing Parties state that Schedule 5 and the Term Sheet are predicated on Maine continuing to be a member of ISO-NE and NESCOE, and on the continuation of Commission jurisdiction over Installed Capacity Requirements. The Filing Parties state that they would have to reevaluate NESCOE should these circumstances change.

### **III. Notice of Filing and Responsive Pleadings**

12. Notice of the Filing Parties' filing was published in the *Federal Register*,<sup>17</sup> with comments and interventions due on or before September 21, 2007. The NRG Companies<sup>18</sup> and the Northeast Utilities Companies<sup>19</sup> filed timely motions to intervene. The Connecticut Department of Public Utility Control and the Vermont Department of Public Service filed notices of intervention. The Massachusetts Department of Public Utilities filed a motion to intervene out-of-time and comments supporting the filing. The New England Conference of Public Utility Commissioners (NECPUC) filed a motion to intervene and comments supporting the filing. Public Entities<sup>20</sup> and the Municipal Electric Association of Massachusetts (MEAM) filed motions to intervene and comments protesting the filing. ISO-NE and the Governors' Conference filed a joint answer to the protests. NEPOOL filed a separate answer to the protests.

#### **A. Comments Supporting the Filing**

13. NECPUC and the Massachusetts Department of Public Utilities argue that NESCOE will be of significant value to New England because it will add resources and expertise to regional consideration of resource adequacy and system planning and expansion issues. Accordingly, they urge the Commission to accept Schedule 5.

14. NECPUC states that the funding that will flow through Schedule 5 will provide resources needed to permit the New England states to more fully and effectively

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<sup>17</sup> 72 Fed. Reg. 54,251 (2007).

<sup>18</sup> The NRG Companies are: NRG Power Marketing Inc., Connecticut Jet Power LLC, Devon Power, LLC, Middletown Power, LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC.

<sup>19</sup> The Northeast Utilities Companies are: The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, Holyoke Water Power Company, and Holyoke Power and Electric Company.

<sup>20</sup> Public Entities consist of: Massachusetts Municipal Wholesale Electric Company, Braintree Electric Light Department, Reading Municipal Light Department, Taunton Municipal Lighting Plant, Wellesley Municipal Light Plant, Concord Municipal Light Plant, and Hingham Municipal Lighting Plant.

participate in regional discussions concerning the management, improvement, and further development of the region's electric system. NECPUC further claims that NESCOE will augment existing efforts and enable added consideration of environmental, economic-development, and other considerations typically beyond that of traditional regulation.

**B. Comments Opposing the Filing**

15. Public Entities argue that the Commission should reject Schedule 5 for two reasons. First, Public Entities argue that Schedule 5 is premature because it establishes a funding mechanism for an RSC that does not yet exist, that has uncertain jurisdiction, that lacks basic organizational and operational documents, and that lacks the unqualified support of the Governor of Maine.<sup>21</sup> Second, Public Entities assert that the Filing Parties have failed to show that NESCOE's budget is a reasonable business expense that ISO-NE should recover under its Tariff.

16. Public Entities contend that Schedule 5 is premature because NESCOE has not yet been—and may never be—created. Public Entities claim that the Commission has made clear in the December 2004 and July 2005 Orders that it will not approve Schedule 5 until NESCOE actually exists. Public Entities acknowledge that the Commission qualified its rejection of Schedule 5 in the July 2005 Order by indicating its willingness to reconsider if stakeholder discussions resulted in support for Schedule 5 “in the context of a global agreement” resolving all issues surrounding NESCOE; however, Public Entities claim that such an agreement has not yet been reached.<sup>22</sup>

17. Public Entities acknowledge that there is support for NESCOE's Term Sheet, but contend that the Filing Parties have considerable substantive work to do before NESCOE comes into existence. Public Entities point out, for example, that the Filing Parties have not yet drafted any of NESCOE's basic organizational or operational documents, including its Certificate of Incorporation, by-laws, or code of conduct. In contrast, Public Entities states that these documents accompanied PJM's proposal to fund OPSI.<sup>23</sup> Moreover, Public Entities observe that NESCOE and ISO-NE have yet to draft an MOU setting out their respective responsibilities. In Public Entities' view, the Commission cannot determine whether Schedule 5 is just and reasonable without clearly understanding the responsibilities ISO-NE and NESCOE will have toward each other.

18. Finally, Public Entities argue that there is too much uncertainty to permit the Commission to make an informed judgment about Schedule 5. Public Entities note that

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<sup>21</sup> Public Entities' Protest at 3.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.* at n.4.

there is lingering uncertainty over NESCOE's structure and jurisdiction, and that the Filing Parties have made Schedule 5 and the Term Sheet contingent on the continued existence of the regulatory regime currently in place in New England, which has been contested, and on Maine's continued participation in ISO-NE and NESCOE, which is in doubt.

19. Second, Public Entities argue that the Filing Parties have failed to show that NESCOE's budget is a reasonable business expense appropriately recovered through ISO-NE's Tariff. Public Entities assert that the costs to be recovered under Schedule 5 are not costs that ISO-NE seeks to recover for purchasing services from NESCOE; rather, they are costs incurred by NESCOE, which NESCOE seeks to recover by passing them through ISO-NE's Tariff. As such, Public Entities claim that ISO-NE will not vouch for these costs and that ISO-NE does not need to collect these costs to provide service to its customers.

20. Public Entities argue that *PJM* does not stand for the generic proposition that all RSCs are reasonable business expenses for all RTOs.<sup>24</sup> Rather, Public Entities argue that the Commission held that OPSI was a reasonable business expense of PJM because OPSI was the only central point of contact through which PJM could interact with its member states, and that as such, OPSI would mitigate regulatory costs, uncertainties, and delays that otherwise would go unmitigated.

21. Public Entities distinguish the situation in New England. According to Public Entities, New England already has bodies that act as central points of contact and perform functions similar to those the Filing Parties envision for NESCOE. Public Entities explain that New England already has NECPUC and the Power Planning Committee of the New England Governors' Conference (PPC). Based on the similar mandates of NECPUC, the PPC, and NESCOE, Public Entities contend that NESCOE adds no significant incremental benefit to New England and its ratepayers; rather Public Entities assert, and MEAM generally agrees, that there is a significant threat of inefficiency and duplication of efforts since NECPUC and the PPC will continue to exist after NESCOE is formed.<sup>25</sup>

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<sup>24</sup> *Id.* at 12-13.

<sup>25</sup> Public Entities also argue, and MEAM generally agrees, that the unique activities envisioned for NESCOE, specifically state-level political judgments and public policy balancing activities, represent a class of matters that the Commission has consistently held are not subject to cost recovery through charges applicable under wholesale transmission tariffs, and should instead be the subject of cost recovery under state-supervised tariffs.

22. In the alternative, Public Entities request that the Commission deny the Filing Parties' request for an October 31, 2007 effective date. Public Entities recognize that the Filing Parties want Schedule 5 to be effective October 31 so they can submit NESCOE's budget with ISO-NE's annual administrative budget filing. Public Entities argue, however, that it wastes both the Commission's and the parties' resources to permit the Filing Parties to submit NESCOE's budget before NESCOE actually exists. Moreover, Public Entities speculate that more significant problems could arise. Public Entities are unsure of how any protests to NESCOE's budget would be addressed if the budget is filed before NESCOE exists, and ISO-NE chooses not to take the responsibility of defending it.

23. Finally, Public Entities are concerned that, as filed, Schedule 5 does not reflect the requirement in the NESCOE Term Sheet that NESCOE may only recover amounts actually spent by NESCOE, subject to the limits approved by the Commission in NESCOE's budget. Public Entities argue that this requirement should be incorporated expressly in Schedule 5.

24. MEAM also raises a separation of powers concern, arguing that if Massachusetts chooses to participate in NESCOE, it should do so through a deliberative legislative process whereby elected representatives determine "the public worth" of the enterprise, not "through an unnecessary back door assessment on Massachusetts electric ratepayers."<sup>26</sup>

### C. Answers

25. In their joint answer, ISO-NE and the Governors' Conference argue that circumstances have changed since the July 2005 Order. Specifically, ISO-NE and the Governors' Conference state that, in contrast to the facts at the time of the December 2004 and July 2005 Orders, "broad agreement among NEPOOL participants to fund NESCOE now exists."<sup>27</sup> ISO-NE and the Governors' Conference also point out that the Commission accepted an RTO organizational structure for ISO-NE that contemplated an RSC, even though an RSC did not yet exist.

26. ISO-NE and the Governors' Conference reject Public Entities' argument that NESCOE's organizational and operational documents must be completed before the Commission accepts Schedule 5. ISO-NE and the Governors' Conference argue that while these documents are important, the Commission does not need them to determine whether Schedule 5 is just and reasonable. Moreover, ISO-NE and the Governors' Conference argue that the Commission did not attach special importance to such

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<sup>26</sup> MEAM Protest at 2-3.

<sup>27</sup> Joint Answer of ISO-NE and the Governors' Conference at 3 (Joint Answer).

documents when approving PJM's request for a mechanism to fund OPSI. Similarly, ISO-NE and the Governors' Conference reject the argument that the Commission must wait for ISO-NE and NESCOE to develop an MOU before having enough information to evaluate Schedule 5. ISO-NE and the Governors' Conference state that the NESCOE Term Sheet, which the Filing Parties submitted with Schedule 5, fully explains how ISO-NE and NESCOE will relate to each other. In any event, ISO-NE and the Governors' Conference state that NESCOE's organizational and operational documents are currently being developed, and are targeted to be completed by January 1, 2008.<sup>28</sup>

27. ISO-NE and the Governors' Conference reject Public Entities' assertion that there is too much uncertainty surrounding NESCOE. ISO-NE and the Governors' Conference state that Maine will be a member of NESCOE. ISO-NE and the Governors' Conference claim that it would be premature for the Commission to reject Schedule 5 because Maine or any other state might eventually decide to withdraw from NESCOE. Similarly, ISO-NE and the Governors' Conference state that it would be premature to reject NESCOE based on the possibility that the existing regulatory structure in New England might change.

28. ISO-NE and the Governors' Conference also dispute Public Entities claim that the amount collected under Schedule 5 will not constitute a reasonable business expense for ISO-NE. ISO-NE and the Governors' Conference claim that Public Entities misapprehend the instant filing to the extent they imply that the Commission's decision to accept Schedule 5 rests on a showing that NESCOE's actual budget is just and reasonable. ISO-NE and the Governors' Conference argue that because Schedule 5 is merely a funding mechanism, NESCOE's actual budget is irrelevant to this proceeding.<sup>29</sup>

29. However, ISO-NE and the Governors' Conference recognize that the Commission has ruled that any NESCOE cost recovery mechanism must result in a budget establishing reasonable costs, and that this budget should be transparent and indicate clearly NESCOE's anticipated future costs, identified separately from those of ISO-NE. As such, ISO-NE and the Governors' Conference point out that NESCOE's expenses are capped at \$1.4 million per year for its first two years and \$2.2 million per year for its third through fifth years.<sup>30</sup> Similarly, ISO-NE and the Governors' Conference claim that there exist adequate safeguards in the framework for developing NESCOE's budget to ensure that opportunities to ensure expenditures under Schedule 5 will be just and reasonable.

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<sup>28</sup> *Id.* at 5.

<sup>29</sup> ISO-NE and the Governors' Conference state that NESCOE's budget will be the subject of a filing at the end of October. *Id.* at 7.

<sup>30</sup> *Id.* at 8.

30. ISO-NE and the Governors' Conference also reject Public Entities' claim that *PJM* is distinguishable from the instant case because NECPUC and the PPC already serve as points of contact in New England. ISO-NE and the Governors' Conference argue that the New England states have made a collective judgment that it is necessary to have a focused and reliably financed organization with a staff dedicated specifically to regional transmission planning and reliability issues, that this decision was vetted with NEPOOL members, and that therefore the decision to facilitate NESCOE's funding through Schedule 5 was a prudent, considered business decision. According to ISO-NE and the Governors' Conference, this considered business decision should be determinative, regardless of whether some other vehicle for facilitating coordination with the states might also be reasonable.

31. Finally, ISO-NE and the Governors' Conference reject MEAM's claim that ISO-NE cannot fund NESCOE's activities because those activities should be funded by taxpayers. ISO-NE and the Governors' Conference assert that the Commission effectively rejected this argument when it allowed *PJM* to fund OPSI. ISO-NE and the Governors' Conference further argue that had ISO-NE chosen to coordinate with the states through NECPUC rather than NESCOE, the fact that NECPUC is currently funded by the states would not prevent the Filing Parties from filing a tariff, like the tariff approved in *PJM*, to fund NECPUC.

32. In its answer, NEPOOL claims that there is a need for greater coordination among the New England states in order to promote well-informed participation on matters relating to resource adequacy and system planning and expansion. NEPOOL states that interested entities explored the possibility of augmenting NECPUC, but concluded that such enhanced input would best be achieved through NESCOE.

33. NEPOOL claims that NESCOE will directly further many of ISO-NE's objectives, including: (a) the reliable operation of the New England Control Area; (b) the development and support of open, non-discriminatory, competitive, and unbundled, markets for energy, capacity, and ancillary services; and (c) the promotion of informed participation and ongoing market improvements. NEPOOL argues that because NESCOE will further ISO-NE's objectives, NESCOE's expenses are reasonable business expenses of ISO-NE. NEPOOL further argues that Schedule 5 is a reasonable mechanism for recovering these expenses.

34. NEPOOL agrees with ISO-NE and the Governors' Conference that adequate safeguards exist to ensure that NESCOE's budget will be just and reasonable. NEPOOL states that NESCOE's costs will be reflected in annual filings with the Commission that will be subject, pursuant to the Term Sheet, to annual review and consideration by all interested entities within the Commission-approved Participant Processes. Moreover, NEPOOL states that, as set forth in the Term Sheet, NESCOE must present an operating budget each year in consultation with NEPOOL, the PTO Administrative Committee and ISO-NE. NEPOOL further observes that this presentation must be during the budget

cycle that ISO-NE currently uses to prepare its annual filing to recover its administrative expenses, and it must be within the boundaries of the then-approved five year budget framework. NEPOOL states that NESCOE's scope of services are defined and limited by the Term Sheet, and that opportunities for expansion are limited.<sup>31</sup> Finally, NEPOOL states that the Term Sheet provides for independent audit and review rights if ISO-NE or NEPOOL identify a significant concern in the activities and spending by NESCOE.

35. NEPOOL argues the NESCOE's budget is not before the Commission in this proceeding. NEPOOL states that interested entities will have the opportunity to consider and challenge NESCOE's budget when it is filed, and that in this proceeding, the Commission is only asked to accept NESCOE's funding mechanism.

36. Finally, NEPOOL argues that Schedule 5 is not premature. NEPOOL contends that this filing presents the Commission with the opportunity to indicate its position with respect to the principles set forth in the Term Sheet, and that this indication will result in the Filing Parties making material progress towards establishing NESCOE. Specifically, NEPOOL claims that Commission acceptance of Schedule 5 will assist NESCOE's organizers in searching for an executive director, senior staff, and professional assistants, and will be valuable to them in considering issues concerning administrative office space and other administrative infrastructure. NEPOOL further asserts that Commission acceptance of Schedule 5 now will inform the parties of the scope of issues that must be included in the filing that is contemplated following consideration and vote on NESCOE's proposed 2008 budget.

#### **IV. Discussion**

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

37. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>32</sup> the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>33</sup> the Commission will grant the Massachusetts Department of Public Utilities' motion to intervene out-of-time given its

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<sup>31</sup> The scope of NESCOE activities can only be expanded beyond resource adequacy and system planning and expansion with the unanimous approval of the six states and the Commission, following notice to and consultation with stakeholders of any such proposed change.

<sup>32</sup> 18 C.F.R. § 385.214 (2007).

<sup>33</sup> *Id.* § 385.214(d).

interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

38. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,<sup>34</sup> prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept ISO-NE and the Governors' Conference joint answer and NEPOOL's answer because they have provided us information that assisted us in our decision-making process.

### **B. Schedule 5**

39. We find Schedule 5 to be a just and reasonable mechanism for collecting NESCOE's costs. Accordingly, we accept Schedule 5 for filing.

40. Public Entities argue that Schedule 5 is premature because NESCOE has yet to be formed. Moreover, Public Entities claim that the Commission has made clear that it will not accept Schedule 5 until NESCOE actually exists. We disagree. Although the Commission rejected Schedule 5 as premature in the December 2004 and July 2005 Orders, neither order definitively foreclosed the possibility that the Commission would accept Schedule 5 before NESCOE formally came into existence. Rather, in both orders, the Commission's rejection of Schedule 5 was predicated on then-existing factual circumstances which made Schedule 5 premature at the time of those orders.

41. For example, in the December 2004 Order, the Commission specifically tied its rejection of Schedule 5 to the fact that, at the time, the New England Governors' petition for a declaratory order was pending before the Commission.<sup>35</sup> Moreover, at the time of the December 2004 Order, most of the parties had not reached a consensus regarding Schedule 5 or NESCOE. And in the July 2005 Order, the Commission upheld its finding that Schedule 5 was premature, but did so "[b]ecause a funding mechanism for NESCOE ha[d] not been deliberated by the participants in New England."<sup>36</sup> The Commission specifically highlighted the contingent nature of its decision, specifying that it was rejecting Schedule 5 "at this time."<sup>37</sup> Thus, in both cases, the Commission's rejection of Schedule 5 as premature was contingent on specific facts that existed at the time.

42. In the July 2005 Order, the Commission further underscored the conditional nature of its rejection of Schedule 5 by inviting the parties to develop a "global agreement"

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<sup>34</sup> *Id.* § 385.213(a)(2).

<sup>35</sup> December 2004 Order, 109 FERC ¶ 61,383 at P 46.

<sup>36</sup> July 2005 Order, 112 FERC ¶ 61,049 at P 41.

<sup>37</sup> *Id.*

resolving the issues surrounding NESCOE, and expressing its willingness to reconsider its holding if support for Schedule 5 emerged in the context of this agreement.<sup>38</sup>

43. Following the July 2005 Order, the Filing Parties engaged in extensive stakeholder discussions designed to address several different objections to NESCOE. These discussions resulted in the Term Sheet, which establishes a framework for NESCOE, and incorporates compromises on key issues, including Schedule 5. Both the Term Sheet generally and Schedule 5 particularly have received broad support among stakeholders. The Term Sheet was approved by 81.59 percent of the vote at the September 2006 NEPOOL Participants Committee meeting. Schedule 5 received the support of the NEPOOL Business and Finance Subcommittee, and in July 2007, was approved by 81.32 percent of the vote at the NEPOOL Participants Committee Meeting. In *PJM*, the Commission stressed that OPSI's funding mechanism had broad support among stakeholders, including the recommendation of the PJM Finance Committee and the support of 85 percent of PJM's membership.<sup>39</sup>

44. As stated above, the Commission indicated its willingness to reconsider its holding on Schedule 5 if the parties supported it in the context of a global agreement concerning NESCOE. Moreover, the circumstances that prompted the Commission to affirm that Schedule 5 was premature at the time of the July 2005 Order, namely, the fact that "a funding mechanism for NESCOE ha[d] not been deliberated by the participants in New England," no longer exist following the extensive stakeholder discussions conducted by the Filing Parties and the broad support that both the Term Sheet and Schedule 5 enjoy. Accordingly, we conclude that the parties have reached the type of global agreement envisioned by the July 2005 Order, and achieved the type of consensus present in *PJM*. As such, consistent with the July 2005 Order and *PJM*, we find that Schedule 5 is no longer premature.

45. We also disagree with Public Entities' assertion that the Commission should reject Schedule 5 because the Filing Parties have not finished drafting the organizational and operational documents or the MOU between NESCOE and ISO-NE. We agree with ISO-NE and the Governors' Conference that while these documents are important, the Term Sheet has provided us with sufficient information to make a determination on Schedule 5.

46. We also reject the argument that there is too much uncertainty surrounding Schedule 5 to permit the Commission to accept it at this time. Contrary to Public Entities' argument, Maine has committed to be a member of NESCOE. The possibility that Maine or any other state will withdraw from NESCOE, or that the existing regulatory

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<sup>38</sup> *Id.* at P 42.

<sup>39</sup> *PJM*, 113 FERC ¶ 61,292 at P 32.

regime in New England will change, are not barriers to our accepting Schedule 5 at this time. These possibilities would exist even if the Commission waited to accept Schedule 5 until long after NESCOE had been established. Reduced to its basic elements, Public Entities' argument amounts to an assertion that the Commission cannot act if there is a possibility of changed circumstances. We reject this principle, as it would effectively paralyze all regulatory action.

47. Similarly, we disagree with Public Entities about the import of the Filing Parties' assertion that changed circumstances will prompt them to reconsider NESCOE. Public Entities make too much of this statement. There is nothing extraordinary about parties indicating that they will consider invoking their rights to challenge potentially unjust and unreasonable situations arising through changed circumstances, or that they might seek to remedy these situations by proposing a new tariff filing.

48. We also find that NESCOE is a reasonable business expense properly collected under ISO-NE's Tariff. We disagree with Public Entities' assertion that *PJM* rested on the fact OPSI was the only single point of contact for the 14-state PJM control area. Although the Commission did cite this fact, it also relied on OPSI's potential to bring unique policy perspectives to the region, the funding mechanism's broad support, and its safeguards against excessive recovery.<sup>40</sup>

49. Public Entities argue that NESCOE will not bring unique policy perspectives to the region. Instead, Public Entities claim that NESCOE will duplicate NECPUC's and the PPC's efforts. However, NECPUC itself claims that NESCOE will provide resources needed to permit the New England states to more fully and effectively participate in regional discussions concerning the management, improvement, and further development of the region's electric system. NECPUC also states that NESCOE will augment existing efforts and enable consideration of factors typically beyond that of traditional regulation. Moreover, as NEPOOL, ISO-NE, and the Governors' Conference indicate, stakeholders have engaged in a long process of deliberation over whether creating NESCOE was preferable to augmenting an existing agency. As in *PJM*, the parties' conclusion that NESCOE is the best method to achieve their goals has broad support.

50. We will not challenge NECPUC's determination that NESCOE is better equipped to provide the additional resources the Filing Parties claim are necessary in New England. Moreover, we agree with NEPOOL that NESCOE will be furthering ISO-NE's objectives, and that safeguards similar to those in *PJM* are built into Schedule 5 and the Term Sheet. Accordingly, consistent with *PJM*, we find that NESCOE is a reasonable business expense of ISO-NE.

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<sup>40</sup> *Id.* at P 33-36.

51. We note that only Schedule 5, NESCOE's funding mechanism, is before the Commission in this proceeding. Public Entities and other parties will have the opportunity to consider, and if necessary, oppose NESCOE's budget when it is filed. We remind the Filing Parties that the Commission made clear in the July 2005 Order that NESCOE's budget must consist of reasonable costs, and should be transparent and indicate clearly NESCOE's anticipated future costs, identified separately from those of ISO-NE. Furthermore, the Commission emphasized similar principles in *PJM*.<sup>41</sup> Accordingly, the Filing Parties should consider these principles in crafting NESCOE's budget, which should only contain costs that are just, reasonable, and prudently incurred.<sup>42</sup>

52. We also disagree with Public Entities' claim that Schedule 5, as filed, does not reflect the requirement that NESCOE may recover only amounts actually spent by NESCOE, subject to the limits approved by the Commission in NESCOE's budget. Contrary to Public Entities' assertion, Schedule 5 expressly states that "NESCOE shall not exceed its budget in any given calendar year" and makes NESCOE's expenses subject to true-up.<sup>43</sup>

53. We are also not persuaded by MEAM's argument that Commission approval of Schedule 5 raises a state separation of powers issue. In any event, we disagree with the premise that the Commission should interject itself into state constitutional issues by attempting to define the boundaries of authority between different branches of state governments. Such issues are more appropriately directed to state courts.

54. To the extent that MEAM's argument implies that the Commission is without authority to approve Schedule 5, we note that the Commission already determined in *PJM* that it has the authority to approve funding mechanisms for RSCs.<sup>44</sup> MEAM has presented no arguments prompting us to reconsider this decision. In *PJM*, the Commission held that it had the authority to approve a funding mechanism for OPSI. The Commission noted that PJM, an RTO with Commission-approved rates, made a filing under section 205 of the Federal Power Act<sup>45</sup> seeking recovery for the costs of OPSI, a reasonable business expense. Here, ISO-NE, an RTO with Commission-approved rates, has joined the other Filing Parties in making a similar filing.

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<sup>41</sup> *Id.* at P 35-36.

<sup>42</sup> We note that OPSI had an initial budget of \$425,000.

<sup>43</sup> Filing Parties' filing, Attachment A.

<sup>44</sup> *See PJM*, 113 FERC ¶ 61,292 at P 39.

<sup>45</sup> 16 U.S.C. § 824d(a) (2000).

55. Finally, we will accept Schedule 5 for filing, effective October 31, 2007, as requested. Public Entities' procedural concerns with respect to protests of NESCOE's budget are outside the scope of this proceeding. The issue in this proceeding is whether Schedule 5, which is merely a funding mechanism, is just and reasonable. Public Entities' procedural concerns are relevant to the submission of NESCOE's actual budget, which is not at issue here.

56. Therefore, we accept the filing and grant the Filing Parties' request for an October 31, 2007 effective date.

The Commission orders:

The Commission hereby accepts the Filing Parties tariff sheets for filing, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Acting Deputy Secretary.