

127 FERC ¶ 61,179  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Northeast Utilities Service Company and

Docket No. EL09-20-000

NSTAR Electric Company

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued May 22, 2009)

1. On December 12, 2008, Northeast Utilities Service Company (Northeast) and NSTAR Electric Company (NSTAR) (collectively, Petitioners) filed a request for the Commission to issue a declaratory order approving the structure of a transaction involving a cost-based participant funded transmission project (Project) that includes a long-term bilateral transmission service agreement (Transmission Service Agreement) between H.Q. Energy Services (U.S.) Inc. (HQUS)<sup>1</sup> and the Petitioners. For the reasons discussed below, we grant the petition.

**I. Petition**

2. Hydro-Québec is currently developing over 4,000 MW of new hydro-electric generation in the Province of Québec. This expansion will make significant amounts of surplus hydro-electric power available for export to the United States. The Petitioners and Hydro-Québec TransÉnergie (HQ TransÉnergie) are currently negotiating a joint development agreement for the design, planning and construction of a 1,200 MW high voltage direct current (HVDC) transmission line that will connect Hydro-Québec's system to a yet undetermined point in Southern New Hampshire so the power can be delivered into the backbone of the 345 kV transmission system controlled by ISO New England, Inc. (ISO-NE). Petitioners state that no other entity has expressed interest in the

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<sup>1</sup> HQUS is a wholly-owned subsidiary of Hydro-Québec which is a Crown corporation that is wholly-owned by the Government of Québec.

Project<sup>2</sup> comparable to HQUS'. Petitioners have not indicated whether the Project will include ancillary services.

3. HQ TransÉnergie will construct, finance and own the Canadian portion of the transmission line and the Petitioners will construct, finance and own the portion of the line located in the U.S. The Petitioners will submit the transmission line for ISO-NE section I.3.9 reliability approval to ensure that the transmission line will not adversely affect the reliability or use of the New England transmission system. Further, the Petitioners intend to transfer to ISO-NE operational control of the U.S. portion of the transmission line pursuant to a Transmission Operating Agreement (TOA) to be negotiated with ISO-NE. Under the TOA, ISO-NE will have final authority over planned line outages and will schedule all transactions over the transmission line in accordance with ISO-NE's market rules.

4. According to the Petitioners, the 1,200 MW of firm transmission rights acquired by HQUS under the Transmission Service Agreement will be at negotiated rates capped at a cost-based rate, including a reasonable return on the Petitioners' invested capital.<sup>3</sup> Once executed, the Transmission Service Agreement will be filed with the Commission pursuant to section 205 of the FPA and will be subject to a Commission approved cost-based rate ceiling.<sup>4</sup> Further, the Petitioners state that, because the transmission line is participant funded by HQUS, it will not be included in the rates for transmission service under ISO-NE's Open Access Transmission Tariff (OATT).

5. The Petitioners state that depending on market interest and transfer capabilities, an additional 200 MW of incremental capacity may be made available through an open season under the same rate, terms and conditions as provided for in the Transmission Service Agreement with HQUS. The Petitioners add that the line could be larger than 1,400 MW if ISO-NE were to determine that the firm available transfer capability of the

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<sup>2</sup> Petition at 10. Petitioners state that one entity expressed interest for capacity on the Project for 5 years, but Petitioners considered this speculative because additional investors would be needed for the remaining 15 years, and Petitioners state that they are not willing to go forward with the transaction on that basis. (Petition at n.14.).

<sup>3</sup> HQUS will compensate the Petitioners for constructing, operating, and maintaining the U.S. portion of the transmission line in return for 1,200 MW of firm transmission rights.

<sup>4</sup> The Petitioners state that the transmission line is not intended to be a "merchant" transmission line because they will not seek market-based rate authorization for the services provided over the proposed line.

project line could be higher. If so, they will size the line to the maximum firm available transfer capability that is supported by the marketplace as determined in the open season.<sup>5</sup> The Petitioners intend to solicit comments from interested parties regarding the 200 MW of incremental capacity and will file the details of the proposed open season for Commission approval at the same time that the Transmission Service Agreement is filed. The Petitioners also intend to make any transmission capacity that is not used by HQUS available on an open access basis and commit to making the transmission service available at rates, terms and conditions consistent with Order No. 890.<sup>6</sup>

6. In addition to the Transmission Service Agreement and the joint development agreement, the Petitioners and HQUS are also negotiating a power purchase agreement under which HQUS will sell 1,200 MW of firm power to Petitioners and other interested New England entities for a period of no less than twenty years under HQUS' market-based rate tariff, which is on file with the Commission.<sup>7</sup> The Petitioners claim that HQUS will recover the cost of transmission rights it acquires under the Transmission Service Agreement through the price of power sold under the power purchase agreement and that both agreements are related and should be considered as part of a combined energy and transmission transaction. The Petitioners and HQUS intend that the power sold under the power purchase agreement will be made broadly available to load in New England and that any potential buyers will have at least a twenty-year purchase commitment and must meet reasonable credit requirements. The Petitioners state that they must demonstrate to New England state regulatory authorities that the power purchase agreement represents a fair deal for New England electric customers in order for the transaction to go forward.

7. The Petitioners also anticipate that the term of the power purchase agreement with HQUS will be between 20 and 25 years. However, HQUS will likely be paying for its

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<sup>5</sup> Petition at n.13.

<sup>6</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007) (Order No. 890), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007) (Order No. 890-A), *order on reh'g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), (Order No. 890-B) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009) (collectively, Order No. 890).

<sup>7</sup> HQUS was authorized by the Commission to make market-based sales in Docket Nos. ER97-851-000 and ER97-851-001. *H.Q. Energy Servs. (U.S.) Inc.*, 81 FERC ¶ 61,184 (1997), *reh'g denied*, 82 FERC ¶ 61,234 (1998); *H.Q. Energy Servs. (U.S.) Inc.*, 79 FERC ¶ 61,152 (1997).

transmission capacity rights based on an amortization period of up to 40 years which reflects the anticipated life of the transmission line. Therefore, the Petitioners argue that because HQUS will continue to participant fund the transmission line after the power purchase agreement terminates, HQUS will continue to have the same rights to schedule power over the transmission line after the power purchase agreement terminates.

8. The Petitioners assert that the Project offers several significant benefits to New England and its customers. The Project's anticipated 1,200 MW of low-cost hydro-electric power should help reduce dependence on fossil fuels, increase fuel diversity, and minimize price volatility in New England. The Petitioners argue that to the extent the Project displaces gas-fired generation in New England, greenhouse gas emissions associated with producing electricity will be reduced by an estimated four to six million tons of CO<sub>2</sub> per year during the term of the transaction which will assist in meeting regional environmental goals. The Petitioners assert that the additional power will likely reduce the Locational Marginal Price (LMP) of energy in New England at a time when electricity prices in the region are rising. Finally, Petitioners claim that because the Project will be participant funded, the New England transmission system will be expanded without raising regional transmission rates under ISO-NE's OATT or creating disputes over cost allocation of the Project transmission line.

9. Petitioners argue that its proposal conforms to Commission precedent including Order Nos. 888 and 890 and the Commission Standards of Conduct, Order No. 2004.<sup>8</sup> Petitioners state that in the 1980s most of New England's utilities entered into two long-term firm energy transactions with Hydro-Québec in connection with the development of the Hydro-Québec Phase I and Phase II HVDC tie lines.<sup>9</sup> Petitioners contend that while

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<sup>8</sup> *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); *see Standards of Conduct for Transmission Providers*, Order No. 690, FERC Stats. & Regs. ¶ 31,237, *order on reh'g*, Order No. 690-A, FERC Stats. & Regs. ¶ 31,243 (2007); *see also Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,611 (2007); Notice of Proposed Rulemaking, 73 Fed. Reg. 16,228 (Mar. 27, 2008), FERC Stats. & Regs. ¶ 32,630 (2008) (collectively Order No. 2004).

<sup>9</sup> *See ISO-NE Transmission, Markets & Services Tariff*, section II – OATT, schedule 20A, section 1.2.

that proposal was completed prior to Order Nos. 888 and 890, they assert that the Commission has recognized the benefits from the coordinated development of power supply and transmission planning. For example, Petitioners contend that this Project is similar to generator lead line projects whereby the Commission has approved allocating the transmission rights to generators who pay for the line. Petitioners argue similarities with this Project because it will be connecting the Hydro-Québec system with ISO-NE.

## II. Notice

10. Notice of Petitioners' filing was published in the *Federal Register*, 73 Fed. Reg. 79,078 (2008), with interventions and protests due on or before January 12, 2009. On December 19, 2008 New England Independent Transmission Company (New England ITC) filed a motion to extend the comment period to January 26, 2009. On January 8, 2009, the Commission granted the motion. Thirty two entities filed motions to intervene.<sup>10</sup>

11. The following entities filed motions to intervene and protests: Nalcor Energy; Newfoundland and Labrador Hydro; the NRG Companies; Competitive Suppliers;<sup>11</sup> Iberdrola Renewables, Inc.(Iberdrola Renewables); Dynegy Power Marketing, Inc.

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<sup>10</sup> HQ Energy; Calpine Corporation; TransCanada Power Marketing, Ltd.; Bangor Hydro-Electric Company; First Wind Energy, LLC; Vermont Transco LLC; Dominion Resources Services, Inc.; IRH Management Committee; Boston Generating, LLC; Mystic I, LLC; Mystic Development, LLC; Fore River Development, LLC; Central Maine Power Company; New Brunswick Power Generation; Consolidated Edison Solutions Inc. and Consolidated Edison Energy, Inc.; Retail Energy Supply Association; New England Power Pool; Mirant Energy Trading, LLC; Mirant Canal, LLC; Mirant Kendall, LLC; North American Energy Alliance, LLC; Brick Power Holdings, LLC; Vermont Public Power Supply Authority; the NRG Companies including: NRG Power Marketing LLC, Connecticut Jet Power LLC. Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC; Constellation Energy Commodities Group, Inc.; Constellation NewEnergy, Inc.; NextEra Energy Resources, LLC; New Hampshire Electric Cooperative, Inc.; Connecticut Municipal Electric Energy Cooperative; Massachusetts Municipal Wholesale Electric Company; and Energy Management, Inc.

<sup>11</sup> Competitive Suppliers include Electric Power Supply Association, the New England Power Generators Association, Inc., and the Independent Energy Producers of Maine.

(Dynergy); Casco Bay Energy Company (Casco Bay); Bridgeport Energy, LLC; and Indicated New England Generators (Indicated NE Generators).<sup>12</sup>

12. These companies and public entities filed motions to intervene and comment: Cargill Power Markets, Inc. (Cargill); Green Mountain Power Corporation (Green Mountain); New England ITC; Brookfield Energy Marketing Inc. (Brookfield); The United Illuminating Company (United Illuminating); Vermont Department of Public Service; ISO-NE; National Grid USA (National Grid); Connecticut Office of Consumer Counsel; Transmission Developers, Inc. (Transmission Developers); Ridgewood Renewable Power LLC (Ridgewood Renewable); PSEG Companies(PSEG);<sup>13</sup> Direct Energy Services, LLC; and Central Vermont Public Service Corporation (Central Vermont).

13. Notices of intervention were filed by: Maine Public Utilities Commission, Connecticut Department of Public Utility Control (Connecticut PUC), Massachusetts Department of Public Utilities, and the New Hampshire Public Utilities. The Massachusetts Attorney General filed a late notice of intervention, Vermont Transco filed motion to submit comments out-of-time. Pacific Gas and Electric Company, SUEZ Energy Marketing NA, Inc., FirstLight Power Resources Management, LLC, and Cape Light Compact filed late motions to intervene.

14. The Petitioners and HQUS filed answers to the protests and comments. Four entities filed responses to these answers: New England Generators, New England ITC, the Competitive Suppliers and United Illuminating. The Petitioners filed a response to these four answers. The protests, comments and answers are discussed below.

### **III. Discussion**

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

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008) the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2008), the Commission will grant the late-filed motions to intervene, given the movants'

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<sup>12</sup> Indicated New England Generators include NextEra Energy Resources, LLC, Mirant Energy Trading, LLC, Mirant Canal, LLC, Mirant Kendall, LLC and TransCanada Power Marketing Ltd.

<sup>13</sup> The PSEG Companies include Public Service Electric and Gas Company, PSEG Power LLC, PSEG Energy Resources & Trade LLC.

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

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest and answer, unless otherwise ordered by decisional authority. We will accept the answers of the Petitioners, HQUS, New England Generators, New England ITC, the Competitive Suppliers and United Illuminating because they have provided information that assisted us in our decision-making process.

**B. Summary Findings**

17. As discussed below, we approve the proposed structure of the transaction, with the caveat that we will independently review the Transmission Service Agreement and the TOA, and any other jurisdictional rate schedules, when they are submitted to the Commission. We find that Petitioners have adequately addressed protesters' concerns as to whether Petitioners' proposal will result in undue discrimination or is otherwise unjust and unreasonable. We are granting Petitioners' request subject to the Commission finding that the rates, terms and conditions included in the executed Transmission Service Agreement are just, reasonable and not unduly discriminatory or preferential when it is filed with the Commission.<sup>14</sup>

**1. Order No. 890 Issues**

**a. Protests and Comment**

18. Ridgewood Renewable argues that the "underlying approach" of the proposal is that if a company wants to construct and pay for its own private transmission line, the Commission should approve it because new transmission capacity "is always a good thing."<sup>15</sup> It also contends that Commission policy does not provide that because a transmission line is privately funded the line is exempt from Order No. 890<sup>16</sup> and other policies aimed at promoting competition and access to transmission facilities.

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<sup>14</sup> As with any cost-based rate, Petitioners must include the necessary detail to support its cost basis for establishing the cost-based ceiling it has proposed. *See* 18 C.F.R. § 35.13 (2008).

<sup>15</sup> Ridgewood Renewable Preliminary Comments at 5.

<sup>16</sup> *See supra* n.6.

19. United Illuminating agrees with Petitioners that in Order Nos. 717<sup>17</sup> and 890 the Commission recognized the importance of coordinated resource planning. However, United Illuminating contends that the Commission stressed the importance of coordinated resource planning in Order Nos. 717 and 890 to ensure open and non-discriminatory access to transmission facilities. They argue that Petitioners misapply the Commission's emphasis on coordinated resource planning to justify closing access to the proposed HQ-New Hampshire Line to all potential customers but HQUS. Moreover, because only HQUS would have access to the Project for the next twenty years, the proposal is preferential and unduly discriminatory. United Illuminating states that the policy implications of the proposal are so significant that, if the Commission chooses to approve this Project, it should do so through a rulemaking proceeding.<sup>18</sup>

20. Several protesters contend that Petitioners have not sufficiently supported their proposal to circumvent the Commission's Order No. 890 open season requirement. For example, Brookfield states that Petitioners' proposal for a cost-based price ceiling for transmission service is not sufficient justification to avoid an open season. Brookfield argues that the Project violates Order No. 890's policy of providing all interested parties equal opportunity to compete for open access to transmission. Further, Brookfield states that Petitioners failed to address other similar transmission projects that included open seasons in their proposals.<sup>19</sup> Cargill states that, given the high demand for transmission service from Québec into ISO-NE, the Petitioners have not given sufficient explanation as to why only a small portion of the line would be available for an open season. Cargill asserts that the Commission should require the Petitioners to build the additional 200 MW of capacity and to offer a greater percentage of the transmission line's 1,200 MW of capacity in an open season.

21. Competitive Suppliers, with the support of Dynegy, Casco Bay, and Bridgeport, assert that an open season must be employed initially to allocate transmission rights on the Project. They argue that the Commission has addressed the rights that accrue to parties that accept responsibilities for funding a new transmission line.<sup>20</sup> Competitive

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<sup>17</sup> *Standards of Conduct for Transmission Providers*, Order No. 717, 73 Fed. Reg. 63,796 (October 27, 1980), FERC Stats. & Regs. ¶ 31,280 (2008) (Order No. 717).

<sup>18</sup> United Illuminating Comments at 18.

<sup>19</sup> Brookfield Comments at 12, referring specifically to the open seasons proposed for Cross Sound Cable, Seabreeze, Neptune, Montana-Alberta Tie Line, VFT, Chinook, and Zephyr projects.

<sup>20</sup> Citing *Cross Hudson LLC*, 123 FERC ¶ 61,001 (2008). (*Cross Hudson*)

Suppliers point to an inconsistency in the Petitioners' request for waiver of the Commission's open access regulations and their acknowledgement that one of the Petitioners already has received an expression of interest in acquiring capacity rights on the Project from a potential supplier other than HQUS.<sup>21</sup> Competitive Suppliers assert that the proposal is inconsistent with the Commission's waiver policy, which provides that waivers are only granted until a third party requests access.

22. PSEG also agrees that an open season should be conducted, arguing that the failure to do so contradicts the Commission's Order Nos. 888, 890, and 717, as well as the interconnection provisions of section 202(b) of the FPA.<sup>22</sup> Additionally, PSEG asserts that the Commission has previously restricted waivers of Order Nos. 888 and 890 to transmission facilities that are not part of an integrated network and have not yet received a transmission request. PSEG argues that Petitioners fail to qualify for a waiver on both counts because the Project will be interconnected with and integrated into ISO-NE, and the Project will provide HQUS with interstate transmission service over the line.

23. New England ITC asserts the Petitioners' claim that the Project is participant funded does not alter the need for compliance with the Commission's open access requirements. New England ITC argues that in some respects the Petitioners' proposal resembles a participant-funded network upgrade and that the Petitioners without any justification, seek to redefine the rights to which they would be entitled if they participant fund the Project. New England ITC argues that the Commission has substantial precedents that identify financial transmission rights as the reward to parties who participant-fund network upgrades, and that the allocation of financial transmission rights preclude exclusive rights to use the line and the project is subject to open access.<sup>23</sup>

24. ISO-NE supports the proposed transaction and asserts that Order No. 890 appears to have contemplated this type of arrangement.<sup>24</sup> Moreover, ISO-NE states that the

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<sup>21</sup> See n.14 of the Petition.

<sup>22</sup> 16 U.S.C. 824(a) (2008).

<sup>23</sup> New England ITC Comments at 13, citing *Cleco Power LLC*, 103 ¶ 61,272, at P 52 (2003).

<sup>24</sup> ISO-NE Comments at 5 citing Order No. 890 at PP 543-544 (encouraging the development of 'upgrades and other investments that could reduce congestion or integrate resources') and P 557 ("Transmission Provider and customers cannot be expected to support the construction of new transmission unless they understand who will pay the associated costs.").

proposed transaction is consistent with principles espoused by many New England stakeholders.

**b. Answer**

25. The Petitioners state that their proposal is based on a different paradigm than the typical transmission transaction under Order No. 890 and that it is not inconsistent with the Commission's open access transmission policy. The Petitioners argue that the transmission line will be participant funded and the Commission's policy permits dedicated transmission rights for such projects.<sup>25</sup> The Petitioners contend that the Project is consistent with the *pro forma* OATT policy of making transmission capacity available on a first-come, first-served basis and is consistent with the Commission's functional unbundling requirement, because the agreements and rates for transmission and generation will be distinct and separately stated. The Petitioners state that they do not have vertical market power because they will transfer operating control to ISO-NE, which will operate the system in accordance with Order No. 890, including any requirement to expand their transmission system if directed by ISO-NE to do so.

26. With regard to United Illuminating's request for a rulemaking proceeding, the Petitioners argue that such a rulemaking proceeding is unnecessary because they are not asking the Commission to establish any new rules of general applicability. Petitioners also maintain that they do not understand United Illuminating's opposition to their proposal, because United Illuminating will not be responsible for any costs of the line or power sold under the power purchase agreement unless it so chooses.<sup>26</sup>

**c. Commission Determination**

27. We disagree with the protesters' claim that Petitioners' proposal contravenes the Commission's open access requirements in Order Nos. 888 and 890 and is anticompetitive because all of the available capacity on the line has been allocated

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<sup>25</sup> Petitioners Answer at 14, citing *Regional Transmission Organizations*, 96 FERC ¶ 63,036, at 65,190 (2001) (noting that there may be participant funded facilities constructed in a regional transmission organization that are directly funded by a participant in return for the associated long-term transmission rights); *ISO New England, Inc.*, 109 FERC ¶ 61,252, at P2 (2004) ("If...new transmission facilities are built to benefit particular participants or groups of participants, participant funding – *i.e.* allocation of the costs to that participant or participants – is appropriate for those projects.")

<sup>26</sup> Petitioners' Answer at 22.

exclusively to HQUS without an open season for others to compete. Providing for participant funding of a transmission facility with priority rights to use that facility is fully consistent with long-standing open access policies.<sup>27</sup> The transaction between a transmission customer (HQUS) and Petitioners under which HQUS has agreed to pay 100 percent of the costs for a system expansion in return for usage rights to the new HVDC transmission line does not constitute undue discrimination or preference. Any potential transmission customer has the right to request transmission service expansion from a transmission owning utility and that utility is obligated to make any necessary system expansions and offer service at the higher of an incremental cost or an embedded cost rate to the transmission customer. The fact that the Petitioners have turned over operational control of its existing transmission facilities to ISO-NE, does not relieve the Petitioners of their residual obligations under Order No. 888 to expand its system upon request.<sup>28</sup>

28. Moreover, with regard to the system expansion at issue in this case, Petitioners indicate that they are willing to conduct an open season for an additional 200 MW of incremental capacity on the line under the same terms and conditions agreed to by HQUS, subject to a finding by ISO-NE that this additional capacity will not adversely affect reliability in the region. Petitioners indicate that to date no other entity has

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<sup>27</sup> See *Entergy Services, Inc.*, 115 FERC ¶ 61,095 (2006), *order on reh'g*, 116 FERC ¶ 61,275 (2006), *order on reh'g and clarification*, 119 FERC ¶ 61,013 (2007), *order on reh'g and compliance filing*, 119 FERC ¶ 61,187 (2007), *order on reh'g and clarification*, 122 FERC ¶ 61,216 (2008); *Western Area Power Administration*, 99 FERC ¶ 61,306, *reh'g denied*, 100 FERC ¶ 61,331 (2002), *aff'd sub nom. Public Utilities Comm'n of the State of CA v. FERC* 361 U.S. App. D.C. 302, 367 F.3d 925 (D.C. Cir. 2004) (Western); (approves a transmission project that grants exclusive transmission rights to the funders and no obligation of expansion); *Transbay Cable LLC*, 112 FERC ¶ 61,095, (2005) *order on reh'g* 114 FERC ¶61,031 (2006) (Transbay) (awarding of rights for transmission funding of line); *see generally Aero Energy, LLC*, 115 FERC ¶ 61,128 (2006) (initially awarded transmission rights to party who funded the line).

<sup>28</sup> *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).

expressed a willingness to participate in the Project at the same terms and conditions agreed to by HQUS. Petitioners further assert that they intend to make available any Project capacity not being used by HQUS consistent with the *pro forma* OATT requirements. The Petitioners and HQUS state that, if ISO-NE were to determine that the firm available transfer capability of the Project could be greater than 1,400 MWs, they commit to size the line at the maximum firm available transfer capability that is supported by the marketplace as determined by an open season.<sup>29</sup> Petitioners conclude that they will provide the details of the open season in their Transmission Service Agreement filing.<sup>30</sup>

29. Although we are accepting Petitioners' offer to conduct an open season in the event that ISO-NE determines that the Project should be expanded beyond 1,200 MWs, we disagree with Protesters' claims that an open season is required with regard to cost-based, participant-funded transmission system expansions, such as the one at issue in this proceeding. The Commission has imposed open season requirements when a merchant transmission project developer has proposed providing transmission access at negotiated rates as a way to ensure against undue discrimination, but this is not a merchant project as discussed more fully below. In this case, the transmission expansion project requested by HQUS will be an HVDC line from Canada at a cost-based rate that will require Commission approval in a subsequent section 205 rate filing. Any other potential developer has the same right to request transmission service necessary to interconnect new generation resources to the Petitioners' systems. Under Order No. 888, the Petitioners retain the obligation to undertake any necessary system expansion at the higher of incremental or embedded cost. Thus, there is no undue discrimination.

30. Regarding United Illuminating's argument for a rulemaking proceeding, we agree with Petitioners that such a rulemaking proceeding is unnecessary because we are not establishing any new rules of general applicability.

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<sup>29</sup> Petition at n.13. These commitments must be consistent with Petitioners' obligations regarding expansion under Order Nos. 888 and 890.

<sup>30</sup> The Petitioners state that 200 MW of additional capacity will be participant funded under the same rates, terms and conditions as the HQUS Transmission Service Agreement. Petition at 10-11.

## 2. Merchant Transmission

### a. Protests

31. A common theme in a number of the protests is that the Petitioners have proposed a merchant transmission project that does not meet the Commission's criteria for approval. For example, New England ITC asserts that regardless of Petitioners' claim, the Project is a merchant transmission facility and should be analyzed according to the "ten safeguards" applied by the Commission to merchant transmission projects.<sup>31</sup> New England ITC states that despite the Petitioners' attempt to characterize the proposal as a participant funded transmission line with negotiated rates and not market-based rates, their description of the Project is not correct. According to New England ITC, "the use of negotiated rates applied through a bilateral contract is in essence the same as market based rates (for this scenario)."<sup>32</sup> New England ITC asserts that by classifying this Project otherwise, Petitioners are attempting to avoid Commission policy for competition as well as ISO-NE's planning process.

32. PSEG and New England ITC also assert that the Project will be a merchant transmission facility because the developers propose to assume all the risks of the Project in exchange for the profits made from the sale of service on the line.<sup>33</sup> New England ITC claims that this same concept formed the basis of the merchant proposals in *TransÉnergie*<sup>34</sup> and *Neptune*,<sup>35</sup> where these project developers assumed the entire risk of the projects and the investors' profits were dependent upon willing buyers of the transmission rights at rates that recovered the projects' costs and earned any return on their investment. New England ITC argues that to the extent the Petitioners' Project differs from other merchant transmission projects, the Commission has the authority to reject those parts that it finds unnecessary or fails to satisfy the criteria.<sup>36</sup>

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<sup>31</sup> New England ITC Protest at 17 – 20, citing *Northeast Utilities Service Co.*, 97 FERC ¶ 61,026 (2001); *Northeast Utilities Service Co.*, 98 FERC ¶ 61,310 (2002); *Sea Breeze*, 112 FERC ¶ 61,295 (2005); *Linden VFT, LLC* 119 FERC ¶ 61,066 (2007).

<sup>32</sup> *Id.* at 8.

<sup>33</sup> PSEG Comments at 9; New England ITC Comments at 9.

<sup>34</sup> *TransÉnergie U.S., Ltd.*, 91 FERC ¶ 61,230 (2000) (*TransÉnergie*).

<sup>35</sup> *Neptune Reg'l Transmission Sys., LLC*, 96 FERC ¶ 61,147 (2001) (*Neptune*), *order on reh'g*, 96 FERC ¶ 61,326, *order on reh'g*, 103 FERC ¶ 61,213 (2008).

<sup>36</sup> New England ITC Comments at 12.

33. Cargill rejects Petitioners' claim that this Project is akin to a generator lead line. Cargill asserts that the line would be part of ISO-NE's integrated grid and could also be used to deliver power from other generation facilities, which would, by definition, make this something other than a generator lead line.<sup>37</sup> Several protesters assert that Petitioners' reliance on *Cross Hudson*<sup>38</sup> is misplaced in that *Cross Hudson* was a generator lead line and this Project is not. Specifically, Competitive Suppliers argue that *Cross Hudson* was not part of an integrated grid, and that the Commission stated that if any electric energy being transmitted on the line comes from a source other than Bergen 2, it would reevaluate the project's rates.<sup>39</sup> Competitive Suppliers also contend that in *Cross Hudson* the associated generator was financially dependent on the project, but in this case there is no associated generator dependent on this Project. Indicated NE Generators also argue that this proposal is not a generator lead line because, as Petitioners state, the line will be used for both importing power from and exporting power to Québec.<sup>40</sup> Cargill also argues that this Project differs from a classic anchor-shipper model because: (1) HQUS will purchase all of the capacity proposed by the Project rather than a portion of the capacity; and (2) other anchor-shipper transmission lines would be used to enable the construction of otherwise infeasible renewable energy projects, while these hydroelectric projects will be built regardless of whether the Project is constructed.<sup>41</sup>

34. Further, while Petitioners claim that the Project is not a merchant line, protesters disagree. Protesters assert that the Project is similar to other merchant transmission projects and as such must include an open season. For example, Iberdrola Renewables states that, even though the rates negotiated between the parties to the Transmission Service Agreement may have some relationship to the project's costs, this is not sufficient to excuse the Petitioners from the Commission's open season requirements associated with merchant transmission projects.

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<sup>37</sup> Cargill Comments at 8.

<sup>38</sup> *Cross Hudson*, 123 FERC ¶ 61,001 (2008).

<sup>39</sup> Competitive Suppliers Protest at 8, citing *Cross Hudson*, 123 FERC ¶ 61,001 at P 22.

<sup>40</sup> Indicated NE Generators Protest at 23.

<sup>41</sup> Cargill Comments at 9, 10.

35. PSEG contends that Petitioners' proposal is similar to *Neptune*,<sup>42</sup> where the Commission denied Neptune's proposal to secure 30 percent of its transmission capacity through negotiated agreements. United Illuminating further points out that the Commission has similarly required Northeast Utilities to fulfill the open season requirement to charge negotiated rates for a merchant transmission line between New York and ISO-NE. According to United Illuminating, the circumstances here are no different.<sup>43</sup>

36. Several Protesters disagree with Petitioners' claim that this Project is analogous to the Phase I/II Transactions. These Protesters assert that those transactions are thirty years old, predate Order Nos. 888 and 890, would not comply with current Commission requirements, and currently offer transmission service pursuant to rate schedules in the ISO-NE OATT.<sup>44</sup> Brookfield Energy contends that the transmission rights offered in Phase I/II were only offered to the supplier for the term of the power purchase agreement and afterwards, the utility owners made those transmission rights available to competing suppliers on an open access basis. Under Petitioners' proposal, HQUS would have exclusive access to the transmission rights beyond the term of the power purchase agreements. Indicated NE Generators assert that, unlike the Petitioners' proposal, the Phase I/II proposal offered transmission rights to all New England Utilities that were interested in sharing the cost of the line.

37. Indicated NE Generators also assert that contrary to the Petitioners' arguments, the Cross-Sound Cable project is clearly distinguishable from Petitioners' Project, because the Cross-Sound Cable project is a merchant line with market-based rates, is not owned by the monopoly service provider and it is not assured a certain return. Additionally protesters claim that the Cross-Sound Cable also serves a market where the capacity products are not unbundled from the monopoly service providers. By contrast, here the monopoly service providers are all government authorities or municipalities.<sup>45</sup>

38. Finally, Indicated NE Generators also state that the Commission's holdings in *California Independent System Operator Corporation*<sup>46</sup> do not support the Petitioners'

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<sup>42</sup> *Neptune*, 96 FERC at P 61,634.

<sup>43</sup> United Illuminating Comments at 13.

<sup>44</sup> Brookfield Marketing Comments at 7; Indicated NE Generators Comments at 19.

<sup>45</sup> Indicated NE Generators Comments at 20.

<sup>46</sup> *Cal. Indep. Sys. Operator Corp.*, 120 FERC ¶ 61,244 (2007) (*CAISO*).

Project. They assert that in *CAISO*, the Commission recognized that no one generator could bear the cost of the transmission project, and that the Commission's own policies were a barrier to needed infrastructure. Furthermore, the Commission also found that the mechanism used in that case would help foster competition, which Indicated NE Generators assert would not be the case here.

**b. Answers**

39. The Petitioners reiterate that the Project is not a merchant transmission facility because the transmission capacity will not be sold at market-based rates. The Petitioners request Commission flexibility in approving the proposal even though it involves a bilateral agreement with unique rates, terms and conditions, rather than involving a conforming Transmission Service Agreement under ISO-NE's OATT.<sup>47</sup> The Petitioners argue that the parties need to preserve flexibility to include negotiated rate provisions and other risk sharing provisions in the Transmission Service Agreement to facilitate completion of the transaction under difficult financial conditions by providing the necessary long-term financial commitments for construction of the line. The Petitioners note that because the Transmission Service Agreement will be filed pursuant to section 205, the Commission will have the opportunity to ensure that the rates, terms and conditions are just and reasonable. The Petitioners contend that "The Commission has expressly recognized the utility of models where participants fund projects in return for dedicated transmission rights."<sup>48</sup>

40. HQUS states that the magnitude and complexity of this transaction make bilateral negotiations the most efficient and effective route for moving this Project forward. HQUS argues that the process is reasonable because it is pro-competitive and involves three arm's length parties coming together to negotiate incremental supplies for the market. HQUS contends that the proposal should be allowed to proceed as requested arguing that open seasons are only one method for allocating capacity in new transmission and other methods such as first-come/first served are just as reasonable and non-discriminatory.<sup>49</sup>

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<sup>47</sup> Petitioners Answer at 20.

<sup>48</sup> Petitioners Answer at 14, *supra* n.25.

<sup>49</sup> HQUS Response at 9, 10.

**c. Commission Determination**

41. In response to the protesters' arguments that the Project is a merchant transmission project, the Commission disagrees and finds that the Project is not a merchant transmission project. As we noted in the recent *Chinook* order, merchant transmission projects are distinguished from traditional public utilities in that the developers of merchant projects assume all the market risk of a project and have no captive customers from which to recoup the cost of the project.<sup>50</sup> Here, the risks of the Project have been shifted from the Petitioners to HQUS, which has agreed to participant fund the Project, and thus has full financial responsibility for the Project. The Petitioners, which operate in retail access states, indicate that they have no captive customers. Also, the costs of the Project will ultimately be recovered from any party that purchases power under the power purchase agreement. We therefore find protesters' arguments regarding merchant transmission projects, including their arguments regarding open season requirements, to be misplaced, as is their reliance upon Commission precedent such as *TransEnergie* and *Neptune* involving merchant transmission projects. This is a cost-based participant funded transmission project that the Petitioners are undertaking at the request of HQUS who has agreed to participant fund the project.

42. Petitioners will file the necessary supporting cost documents in a future section 205 rate case, which the Commission will review to ensure that the proposed cost-based rate is just, reasonable, and not unduly discriminatory or preferential. We recognize that Petitioners want to preserve flexibility to include negotiated rate provisions and other risk sharing provisions in the Transmission Service Agreement that is ultimately filed, but the burden will be upon Petitioners to demonstrate that any such flexible terms and conditions are not unduly discriminatory or preferential at the time they make that filing. Because HQUS has agreed to participant fund the transmission expansion, the Project costs will not be included in the rates for transmission service under the ISO-NE OATT and other transmission ratepayers will be held harmless from the costs of the expansion.

43. We reject the claim that the Project is similar to *Cross-Hudson or Cross Sound Cable*. The Commission approved negotiated, non-cost based rates in those cases finding that the projects were merchant transmission projects. The Commission finds that any reliance by either the Petitioners or the protestors on these cases is misplaced because we are approving the structure of the Project, which is a participant funded project and not a

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<sup>50</sup> *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (*Chinook*).

merchant transmission project. Thus the transmission capacity charges will be priced based on the cost of the line. Similarly, we find our holding in *CAISO*<sup>51</sup> is distinguishable from our finding in this case. In *CAISO*, the Commission waived certain Order No. 2003 default generator interconnection policies. This proceeding does not involve a generator interconnection.

### **3. Bundled Rates**

#### **a. Protests**

44. Several commenters argue that because Petitioners are planning on bundling the transmission and generation rates, it will be impossible to determine if the Project is in fact participant funded as the Petitioners claim.<sup>52</sup> For example, Indicated NE Generators assert that the Petitioners are proposing a series of related agreements that rebundle transmission and generation, which will prevent alternative suppliers from competing for the load that HQUS will have “locked up” already. They also argue that because Northeast and NSTAR will rely on their ratepayers to fund this Project, it will not truly be participant-funded. Moreover, because Northeast and NSTAR, will be purchasing the power through rebundled rates, they will be passing on the risk of this Project to their captive customers.<sup>53</sup> Indicated NE Generators also argue that the Commission’s Standards of Conduct do not address or authorize this type of arrangement. They claim that Order No. 2004 did not modify the restrictions regarding unbundling, as Petitioners imply.<sup>54</sup>

#### **b. Answer**

45. The Petitioners state that the proposed transaction does not violate the Commission’s functional unbundling requirements, because the agreements and rates for transmission and generation will be distinct and separately stated.<sup>55</sup> The Petitioners also state that the rates, terms and conditions of the power purchase agreement will be filed

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<sup>51</sup> *CAISO*, 120 FERC ¶ 61,244.

<sup>52</sup> Commenters include Competitive Suppliers at 8, 12, Indicated NE Generators at 10-15, and PSEG at 6, 7.

<sup>53</sup> Indicated NE Generators Protest at 13.

<sup>54</sup> *Id.* at 15, 16.

<sup>55</sup> Petitioners Answer at 15, 16.

and reviewed by the Commission and relevant state regulatory authorities who will ensure that New England customers are getting a “fair deal.” The Petitioners argue that the power purchase agreement will occur under HQUS’ market-based rate authority, and will be subject to the Commission’s applicable reporting requirements. Thus, there is no need for the Petitioners to file further information regarding the power purchase agreement.<sup>56</sup>

**c. Commission Determination**

46. In order for a transmission provider to meet the Commission’s functional unbundling requirements, rates for generation, transmission, and ancillary services must be separately stated. The Petitioners have indicated that the rates for transmission services and power purchases with respect to the Project will be separately stated,<sup>57</sup> and the Commission will require that they do so. It is true that HQUS (but not the Petitioners) is combining renewable hydropower generation costs (that will be sold at market rates) with the costs that HQUS will incur to participant-fund the new transmission line that needs to be built in order to deliver its hydropower resource to New England customers. However, that does not constitute of violation of the functional unbundling requirement of Order Nos. 888 and 890, because the rates for the transmission service and the power sales will be separately stated.

47. Further, the Petitioners will charge a cost-based transmission rate, and HQUS is agreeing to participant fund the costs of building the transmission line, which will hold other transmission customers in New England harmless from the transmission expansion costs. Such “rebundling” of transmission and generation occurs anytime a generator purchases long term transmission service to sell power. However, there are no “rebundling” concerns regarding the Petitioners because the transmission service and the cost-based rates charged will be provided for under the Transmission Service Agreement to be filed with the Commission, and any power purchases will separately occur under HQUS’ Commission-approved market-based rate tariff.

48. Accordingly, the Commission finds that with the separately stated rates, the proposed transaction complies with the unbundling requirements of Order No. 888. We also find that no additional information regarding the power purchase agreement or Transmission Service Agreement is needed at this time. The Transmission Service Agreement is required to be filed with the Commission under section 205. Also, the power sales from HQUS will be made pursuant to a Commission-approved market-based

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<sup>56</sup> *Id.* at 27, 28.

<sup>57</sup> Petitioners have not stated whether ancillary services will be included.

rate schedule, which requires quarterly reporting of contracts and transactions.<sup>58</sup> No rates may be charged for jurisdictional services absent Commission approval.

49. Finally we reject both the Petitioners' and Indicated NE Generators' reliance on the Standards of Conduct. The Standards are not germane to the issues before us at this time, as we are asked only to approve the structure of the transaction. Any allegation regarding possible violations of the Commission's Standards of Conduct may be raised subsequently at the appropriate time. Further, the state commissions have filed comments in support of the structure of the proposed Project, noting that they will have the opportunity to review the impact of the transaction to ensure that the ratepayers are protected.<sup>59</sup>

#### **4. Vertical Market Power, Affiliate Abuse Concerns and Need for Request for Proposal (RFP)**

##### **a. Protests**

50. Nalcor Energy and Newfoundland and Labrador Hydro contend that the participation of transmission owners and their affiliated generation and load-serving operations in various elements of this transaction raises the potential for vertical market power, through preferential treatment of affiliated operations. "Here, there is no question that the proposed transaction brings together transmission-owning utilities in a joint transmission project that facilitates a specific purchase and sale of electricity at wholesale involving affiliated subsidiaries of the transmission-owning utilities."<sup>60</sup> They believe that without more detailed explanation to dispel these concerns, measures that mitigate potential vertical market power must be a condition of any Commission approval, and that an open season to solicit participants is an appropriate means of doing this. Similarly, Ridgewood Renewable Power asserts that this Project will amount to one

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<sup>58</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008).

<sup>59</sup> Connecticut PUC and Connecticut Office of Consumer Counsel Comments at 3.

<sup>60</sup> Nalcor Protest at 8-10.

company having exclusive access to markets, and that access could limit competition and market access for others.<sup>61</sup>

51. Iberdrola Renewables argues that Petitioners have failed to address the affiliate abuse concerns inherent in their proposal; i.e. the Petitioners and the transmission-owning affiliate of HQUS, HQ TransÉnergie, are working together to develop this Project. Iberdrola Renewables contends that the Commission has generally favored separating the development of new generation from the planning of transmission system. Iberdrola Renewables acknowledges the need for an “anchor shipper” in order to finance a new project, but states it is concerned about affiliate abuse because HQUS will have control over the entire capacity of the line.<sup>62</sup> Central Vermont states that while generally it supports the proposal, it is concerned that HQUS could give undue preference to HQUS’ power purchasers. Thus, Central Vermont requests that the Commission reserve judgment on the specific terms and conditions of the Transmission Service Agreement and the power sales agreements until the details of those transactions are provided in a subsequent filing with the Commission.<sup>63</sup>

52. Indicated NE Generators assert that Petitioners imply that they will be the purchasers of HQUS’ power. Because this purchase will take place at negotiated rates and involves no competitive offers from other suppliers, what starts as an unbundled relationship will effectively become a bundled agreement with Northeast and NSTAR favoring the power they purchase from HQUS over any possible competing suppliers.<sup>64</sup> New England ITC argues that if Petitioners were to conduct a request for proposal process (RFP), both open season and affiliate abuse concerns would be addressed because the Commission has found that an RFP can be consistent with the open season criteria for merchant transmission projects.<sup>65</sup> United Illuminating argues that the

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<sup>61</sup> Ridgewood Preliminary Comments at 3, 4.

<sup>62</sup> Iberdrola Protest at 4, 5.

<sup>63</sup> Central Vermont Comments at 1, 7.

<sup>64</sup> Indicated NE Generators Protest at 19.

<sup>65</sup> New England ITC Comments at 20, citing *Conjunction LLC*, 108 FERC ¶ 61,090, at P 13 (2004).

Commission has rejected this type of bilateral transmission contract because it can result in unduly preferential access to transmission capacity.<sup>66</sup>

**b. Answer**

53. The Petitioners state that the proposed transaction does not involve any affiliate transactions because HQUS is not affiliated with either Petitioner and that the transaction was conducted at arms' length. Further, the Petitioners state that they do not have captive customers because of retail choice and, therefore, the potential for affiliate abuse does not exist. HQUS states that vertical market power concerns are unfounded, because HQUS and Hydro-Québec Production are physically and functionally separated from TransÉnergie, the entity building the transmission capacity on the Québec side. Further, HQUS notes that TransÉnergie has a code of conduct and an approved OATT for evaluating transmission requests in a non-discriminatory manner. Petitioners note that Hydro-Québec Production was the first party to request 1,200 MWs of transmission service on the Québec portion of the Project to the U.S. border<sup>67</sup> and thus has service priority on the Québec side.

**c. Commission Determination**

54. The Commission finds that Hydro-Québec, HQUS and its subsidiaries are not affiliated with the Petitioners and, therefore, the possibility of affiliate abuse does not exist. Regarding concerns of vertical market power, a minimum requirement for the possession of vertical market power is the ability to control more than one stage of production, in this case, generation and transmission. However, the Petitioners are ceding control of the Project to ISO-NE. Therefore, the Petitioners will not be able to use the transmission system, a downstream asset, to control or manipulate generation. Therefore, we find that Petitioners' ceding control of the U.S. portion of the line to ISO-NE mitigates vertical market power.

55. In addition, Petitioners have stated that HQUS will sell electricity to them and other interested parties pursuant to HQUS' Commission-approved market-based rate tariff.<sup>68</sup> HQUS confirms Petitioners' representation and also offers that it will commit in the Transmission Service Agreement to making unused capacity available to third parties

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<sup>66</sup> United Illuminating Comments at 11, 12 citing *Neptune*, 96 FERC ¶ 61,147 at 61,634.

<sup>67</sup> Petition at 21, 22.

<sup>68</sup> Petition at 5, 6.

pursuant to Order No. 890. The Commission requires that, as a condition of being able to sell electricity under this tariff, HQUS must periodically demonstrate that it possesses no horizontal or vertical market power.<sup>69</sup>

56. Finally, United Illuminating's comparison of the Commission's rejection of the bilateral contracts proposed in *Neptune* is misplaced. *Neptune* was a merchant project with market-based rates. As we have previously discussed, this project is not a merchant project but is participant-funded, and transmission capacity will be priced at cost-based rates.

## 5. ISO-NE's Regional Planning Process

### a. Protests

57. Several protesters question why Petitioners have chosen to work outside of ISO-NE's normal regional transmission planning processes. For example, Cargill asserts that Order No. 717<sup>70</sup> does not justify Petitioners' ignoring the ISO-NE planning process. Brookfield states that even if the Project is not a merchant line, Petitioners have failed to show why the Project should not be treated as an elective transmission upgrade under ISO-NE's tariff. United Illuminating lays out the process provided by the ISO-NE tariff for obtaining additional transmission service, including System Impact Study provisions that could be pursued by HQUS, and it asserts that this process would also indicate if additional facilities are necessary to accommodate the additional transmission service. United Illuminating concludes that the existing ISO-NE OATT process is adequate to serve HQUS' service needs and that Petitioners did not explain why the Project cannot be completed within the ISO-NE regional planning process and the ISO-NE OATT.<sup>71</sup>

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<sup>69</sup> "Through regularly scheduled updated market power analyses . . . the Commission is better able to evaluate the ongoing reasonableness of . . . sellers' charges and to provide for an ongoing assessment of their ability to exercise market power." *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at 40,005, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008).

<sup>70</sup> Order No. 717 amends regulations adopted on an interim basis in Order No. 690, in order to make them clearer and to refocus the rules on the areas where there is the greatest potential for abuse.

<sup>71</sup> United Illuminating Comments at 4.

58. Brookfield argues that, contrary to Petitioners' assertions, the Commission's most recent views on transmission policy are found in Order No. 890, which lays out nine planning principles to ensure that transmission services are provided on a just, reasonable and not unduly discriminatory or preferential basis. Brookfield asserts that the Petitioners' proposal fails to address the first five principles: coordination, openness, transparency, information exchange, and comparability. Brookfield further maintains that it is premature to claim that this proposal fits within ISO-NE's regional plans, because ISO-NE is currently considering Petitioners' proposal, along with several others.<sup>72</sup>

59. National Grid states that while it generally supports the Project, it must be subject to appropriate review by ISO-NE to ensure it will not adversely affect reliability. Moreover, bypassing the Regional System Planning Process would tend to undermine the Commission's policies for transparency in the transmission planning process and deprive stakeholders of the opportunity to review the proposed interconnection.<sup>73</sup> It also contends that participant funding should be required for any AC transmission reinforcements necessary to accommodate the proposed interconnection, because it is not clear that such reinforcements would benefit all transmission load customers in the region.<sup>74</sup> PSEG also argues that the Project must undergo review by ISO-NE, asserting that other studies have shown that large imports of power from Canada can negatively affect PJM's and NYISO's systems. PSEG also raises concerns about who will pay for these impacts.<sup>75</sup>

60. ISO-NE explains that the Project will be fully vetted through its planning process. ISO-NE agrees with the Petitioners that this Project will increase fuel diversity and reduce supply risks and price volatility. ISO-NE states that the line would not be considered an elective network upgrade because it is not a pool transmission facility. Therefore, ISO-NE argues that because the Project's transmission line would not fit under existing OATT provisions, Petitioners' proposal for participant funding is a logical option.

61. ISO-NE argues that the proposed bilateral transaction would not be workable for transmission projects within ISO-NE because service within ISO-NE is not offered on a

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<sup>72</sup> Brookfield Comments at 6.

<sup>73</sup> National Grid Comments at 8.

<sup>74</sup> PSEG Comments at 13.

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

point-to-point basis or pursuant to a bilateral power supply arrangement. ISO-NE claims that it is prepared to undertake the studies and review processes specified in Section I.3.9 of its tariff to ensure the transmission line will not adversely affect reliability or operations. ISO-NE asserts that it should play a key role in ensuring a transparent decision-making process for the southern terminus of the line to ensure that the entire region does not need to support any network upgrades resulting from the Project.<sup>76</sup>

**b. Answer**

62. The Petitioners state that concerns that it is bypassing the ISO-NE planning process are unfounded. They state that ISO-NE will not have to evaluate the need or the economic benefits of the Project because it is participant-funded and the costs will not be included in rates for transmission service under ISO-NE's OATT. The Petitioners state that the Project will, however, be vetted through ISO-NE's stakeholder process. They also state that to the extent necessary, they will conduct a System Impact Study in coordination with ISO-NE and other affected transmission owners to determine any effects the proposed line may have on the regional transmission grid. The Petitioners state that ISO-NE has determined that the transmission line is not an elective upgrade and is not considered a pool transmission facility and, thus does not fit under any existing OATT provisions. The Petitioners also confirm that they will assume responsibility for the costs of the Project, including any network upgrades to the existing ISO-NE transmission system that are solely required to accommodate the line. They state that any needed network upgrades to the AC transmission system independent of the proposed Project should be made pursuant to ISO-NE's OATT.<sup>77</sup>

**c. Commission Determination**

63. The Commission accepts ISO-NE's and Petitioners' statements that the Project will be thoroughly vetted through the ISO-NE's stakeholder planning process. Under its regional system planning process, ISO-NE will be responsible for determining, in consultation with interested parties, whether any reliability transmission upgrades are needed to interconnect the Project to the regional AC transmission system. The Petitioners will be responsible for the costs of the Project as well as any network upgrades to the existing ISO-NE transmission system that are needed to accommodate the line. The Commission also accepts Petitioners' representations that it will submit a Transmission Operating Agreement to ISO-NE for its approval and that the Project will undergo ISO-NE's section I.3.9 reliability review process to ensure that it does not cause

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<sup>76</sup> ISO-NE Comments at 8.

<sup>77</sup> Petitioners' Answer at 24, 25.

any adverse effects to system reliability.<sup>78</sup> Because ISO-NE commits to playing a key role in reviewing the effects of the project and ensuring that the reliability review process is transparent vis-à-vis the U.S. portion of the line, the Commission finds that this oversight will address any potential that other parties would be required to pay for facilities to accommodate the interconnection of the transmission line.

**6. Rights to Unused Capacity and Capacity Rights After Contract Termination**

**a. Protest and Comments**

64. Indicated NE Generators request that the Petitioners clarify how scheduling will be conducted to accommodate competitive supply and demand on both sides of the international border. They are concerned that HQUS will have scheduling rights for more than the twenty to twenty-five year term of the power purchase agreement because the line will be amortized over a longer time period.<sup>79</sup> Nalcor Energy and Newfoundland and Labrador Hydro state that unused capacity must be made available in a complete, open, and robust secondary market and that Petitioners should be required to explain how this will be done prior to Commission approval. Nalcor Energy explains that the Petitioners have stated only that they intend to make unused capacity available but have provided no details as to how that would be implemented. In addition, Nalcor Energy asserts that the Commission should recognize that the Transmission Service Agreement may have unique provisions governing scheduling rights.<sup>80</sup>

65. National Grid states that any order approving the Project should be conditioned upon the Petitioners making available unused capacity under the Commission's open access requirements.<sup>81</sup>

**b. Answer**

66. The Petitioners commit to making any unused capacity available consistent with the requirements of Order No. 890. The Petitioners also state that the Transmission Service Agreement will include a provision stating that secondary transmission service

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<sup>78</sup> FERC Electric Tariff No. 3, General Terms and Conditions, Section I.3.9.

<sup>79</sup> Indicated NE Generators Protest at 32, 33.

<sup>80</sup> Nalcor Energy Comments at 10, 11.

<sup>81</sup> National Grid Comments at 7.

will be available to other parties at the same rates, terms and conditions as HQUS.<sup>82</sup> In response to concerns that it will continue to have rights to 1,200 MW of firm transmission service after the end of the initial term of the power purchase agreement, HQUS states that there is no reason, financial, equitable or legal, why an entity responsible for the transmission line's existence and still paying for the line should not have capacity rights on the line.<sup>83</sup>

**c. Commission Determination**

67. We find that it is not inconsistent with our policy to grant HQUS transmission rights for the entire 1,200 MW capacity of the line as long as it continues to fund the line.<sup>84</sup> In the past, we approved a cost-based transmission project wherein the transmission rights were not tied to the length of any other agreement, such as financing or a Transmission Service Agreement.<sup>85</sup> We will fully resolve the question of the appropriate length of transmission rights in Petitioners' future section 205 filing. We note that the Petitioners must make available any unused Project transmission capacity pursuant to the requirements of Order No. 890.

**7. Recovery of Potential Abandoned Plant Costs**

**a. Protest and Comments**

68. National Grid requests that the Commission find that the Petitioners are not eligible to collect abandoned plant costs "for the construction of participant-funded transmission facilities designed to benefit only a subset of power purchases in New England."<sup>86</sup>

**b. Answer**

69. In response to National Grid's concern, the Petitioners state that under their existing TOA with ISO-NE, they do not take the position that they are entitled to recover prudently incurred abandoned plant costs if ISO-NE removes a project from a Regional

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<sup>82</sup> Petitioners' Response at 29.

<sup>83</sup> HQUS Response at 6.

<sup>84</sup> *See supra* note 27.

<sup>85</sup> *Id.*

<sup>86</sup> National Grid Comments at 11.

System Plan after directing that the project moves forward, but they reserve the right to file for recovery of these costs, including as an incentive under Order No. 679.<sup>87</sup> The Petitioners also argue that the Commission has no reason to prejudge the Order No. 679 issue in this case, but any such request, if made, would be part of the future section 205 filing of the Transmission Service Agreement.<sup>88</sup>

**c. Commission Determination**

70. Petitioners have not requested a determination that abandoned plant costs could be recovered, and we will therefore reject as premature National Grid's argument against the potential recovery of abandonment costs. As the Petitioners correctly note, they must make a separate request or filing with the Commission to recover any future abandonment cost. We will address this issue as necessary at that time.

**8. Lack of Sufficient Data to Support the Filing**

**a. Protest and Comments**

71. Several commenters and protesters note that the proposal lacks detail. Those opposed to the Project view the missing information as undermining the Commission's ability to make a determination of the proposal. Commenters in favor of the proposal state that the Commission should limit its approval to the very narrow question put before it by the Petitioners.

72. As an example, Brookfield states that the Commission cannot fully evaluate the impact of the Project without further detail about: (1) what impact this Project will have on ratepayers; (2) what impact this Project will have on competing suppliers in terms of line capacity and any potential upgrade; (3) where the line will interconnect and what impact that will have on the ISO-NE-wide grid; (4) what alternatives there are to the proposed import of hydropower from Québec; and (5) what impact these imports will have on the wholesale market.<sup>89</sup> Direct Energy Services requests that the Commission require Petitioners to detail how and to whom the power procured and transmitted over the Project ultimately would be sold, and to provide more information on why this

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<sup>87</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

<sup>88</sup> Petitioners' Response at 26.

<sup>89</sup> Brookfield Comments at 13-19.

Project cannot conform to Order No. 890.<sup>90</sup> Indicated NE Generators state that details as to the rates, terms, and conditions of the various agreements that will differ from the Commission's *pro forma* OATT is needed to evaluate Petitioners proposal. Indicated NE Generators also assert that the Petition lacks detailed information about the terms and conditions of various agreements that will be involved in the operation of the proposed transmission line, including the Transmission Service Agreement and the power purchase agreements. Petitioners have not provided details as to the process by which interested parties might obtain power from HQUS or the terms under which that power might be sold. According to Indicated NE Generators, significant operational details, such as how the power will flow and how scheduling will be conducted, are also missing.<sup>91</sup>

73. Green Mountain Power supports construction of additional transmission facilities that could be used to import power from Québec, but expresses concern about the need for details concerning the proposed Transmission Service Agreement: (1) how will the rates, terms and conditions differ from the Commission's *pro forma* OATT; (2) how the proposed risk sharing arrangements will operate; or (3) how the unique provisions governing scheduling rights will be implemented. Therefore, Green Mountain Power advises the Commission to approve the petition as narrowly presented and addressing only the structure of the transaction.<sup>92</sup> National Grid states that it supports the proposal only if the Commission requires that all subsequent rates, terms and conditions are reviewed.<sup>93</sup>

74. The Connecticut PUC and Connecticut OCC also filed comments in support of the proposed transactional structure but state that, at this time, they take no position as to the particular rates, terms, and conditions of service that will be embodied in the contracts contemplated by the Petitioners.<sup>94</sup> The Massachusetts Attorney General also filed comments supporting importing more hydropower from Québec into New England but only if it results in reducing the total delivered cost of power to consumers. He states that at this time the Commission can only approve the proposal in principle because more

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<sup>90</sup> Direct Energy Comments at 4, 5.

<sup>91</sup> Indicated NE Generators at 32 – 34.

<sup>92</sup> Green Mountain Power at 6, 7.

<sup>93</sup> National Grid Comments at 7.

<sup>94</sup> Connecticut Office of Consumer Counsel Comments at 2; Connecticut DPUC and Office of Consumer Counsel at 2, 4.

information is needed to determine if the proposed Project is in the public interest.<sup>95</sup> Finally, the Vermont DPS believes the proposed transaction is creative and could be a model for future transactions. However, it is concerned about the details of the power purchase agreement, including whether Vermont load serving entities will have an opportunity to purchase power made available by this line. Vermont DPS also expresses concern that there be no undue preference in the purchase of power from HQUS.<sup>96</sup>

**b. Answer**

75. Petitioners and HQUS state that the Protesters' claim that the filing lacks sufficient information regarding the power purchase agreement is without merit. They assert that they are still negotiating the terms and conditions of both the Transmission Service Agreement and the power purchase agreement, and once executed they will make the necessary section 205 filings with the Commission.<sup>97</sup> HQUS explains that under the power purchase agreement, buyers will most likely have to file the contracts with their respective state utility commissions for prior review; therefore, any state regulatory concerns will be addressed at that time.<sup>98</sup> The Petitioners also state that concerns regarding whether the power sold will be competitively priced relative to other resources is not relevant to this proceeding because the power sold by HQUS will be at market-based rates and subject to market forces. Load serving entities will either buy or not buy the power offered by HQUS, depending upon how competitive HQUS' power is vis-à-vis alternative power sources.<sup>99</sup>

**c. Commission Determination**

76. The Commission agrees with HQUS and the Petitioners that the Commission does not require additional information in order to approve the petition. As the Petitioners state, when required, they will make the appropriate section 205 filings that will include cost support in compliance with Part 35 of the Commission's Regulations.<sup>100</sup> Accordingly, we reject as premature Protesters' requests for additional information

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<sup>95</sup> Massachusetts Attorney General at 6.

<sup>96</sup> Vermont DPS Comments at 3.

<sup>97</sup> Petitioners' Response at 27; HQUS Response at 8.

<sup>98</sup> HQUS Response at 8.

<sup>99</sup> Petitioners' Response at 28.

<sup>100</sup> See 18 C.F.R. § 35.13 (2008).

concerning the Transmission Service Agreement. Similarly, we will reject Protesters request for additional information regarding the power purchase agreement because the power sales under that agreement will be provided under HQUS' Commission-approved market-based sales tariff, and HQUS will be required to comply with all relevant reporting requirements. We remind the Petitioners that they will be required to file, when appropriate, the Transmission Service Agreement and the TOA. We emphasize that the Petitioners must file any other agreements related to the Project not otherwise discussed in the Petition that involve jurisdictional services.

**9. Monopsony Power and Impact on the Forward Capacity Market**

**a. Protests**

77. Indicated NE Generators and NRG argue that the Project will foster monopsony market power and undermine competitive markets in New England. This concern is based in part on the excess capacity found to exist in the ISO-NE's forward capacity market.<sup>101</sup> Indicated NE Generators and NRG Companies assert that adding such a large amount of capacity will artificially suppress prices in the ISO-NE forward capacity market, because they would be placed in the bid stack as price-takers. If the Project is uneconomic, relative to ISO-NE's current forward capacity market, Petitioners should not be allowed to enter the market and suppress prices. Indicated NE Generators also question the benefits of power imported from Québec and whether it will be favorable compared to alternatives and this cannot be determined without knowing the price at which the power will be made available and the price of the alternatives. Indicated NE Generators state that the power purchase agreement will have a term of at least twenty years, yet Petitioners did not even speculate on what price other suppliers would offer for a twenty year purchase agreement.

78. In addition to questioning the need for this capacity, NRG expresses the concern that the Project could undermine the proper functioning of the New England forward capacity market, because the proposal contains no competitive procurement process,

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<sup>101</sup> Both Indicated NE Generators and NRG point to the results of the Forward Capacity Auction for June 2010 through May 2012, which indicate a significant excess of capacity in New England. They explain that ISO-NE reported the excess capacity in the first forward capacity market was 2,047 MW, citing Letter from ISO New England in Docket No. ER08-633-000 (March 3, 2008). They also cite Letter from ISO New England filed in Docket No. ER09-467-000 (December 23, 2008) that reported excess capacity in the second Forward Capacity Auction was 4,744 MW. Indicated NE Generators Protest at 26, 27 and 18 n.42. NRG Protest at 4 n.4.

there is no guarantee that the additional capacity is economic, and the existing forward capacity market rules are not sufficient to protect against the anti-competitive effects of uneconomic entry.<sup>102</sup> This view is echoed by Indicated NE Generators: “[I]t nonetheless is beyond debate that the price of capacity in a competitive market such as New England should not be subject to manipulation by large load-serving entities that can exercise monopsony power, be it intentional or not.”<sup>103</sup>

79. NRG Companies request that the Commission review the proposal to ensure it is not anti-competitive, asserting that large net-buyers such as Northeast and NSTAR have an incentive to depress capacity market prices. Further, they argue that Petitioners should be required to clarify how their proposal will avoid having anti-competitive effects on the forward capacity market. Finally, NRG states that the Commission should: (1) direct ISO-NE and its stakeholders to review existing forward capacity market rules and make revisions as necessary to avoid a long-term price collapse, and (2) clarify that new capacity delivered via this Project is not guaranteed to be allowed to participate in the forward capacity market until there is a thorough review of its competitive effects.<sup>104</sup>

**b. Answer**

80. The Petitioners state that the Protesters’ arguments regarding monopsony power and criticisms of ISO-NE’s existing forward capacity market rules are outside the scope of this proceeding and should be dismissed. The Petitioners state that the forward capacity market design envisions that load will be able to meet capacity obligations through bilateral contracts. The Petitioners state that the Project will be subject to existing market mitigation rules, and that any concerns over those rules should be addressed in the ISO-NE stakeholder process. The Petitioners also contend that NRG’s and Indicated NE Generators’ assertion that the existing forward capacity market rules are inadequate represents an improper collateral attack on the Commission’s prior orders.<sup>105</sup> Petitioners conclude that their proposal is pro-competitive because it will

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<sup>102</sup> NRG Protest at 4 – 6.

<sup>103</sup> Indicated NE Generators Protest at 28.

<sup>104</sup> NRG Protest at 8.

<sup>105</sup> Petitioners’ Response at 11-12 (citing *ISO New England Inc.* 122 FERC ¶ 61,018, at P 4 (2008), *Devon Power LLC*, 115 FERC ¶ 61,340, at P 109 (2006), *order on reh’g*, 117 FERC ¶ 61,133 (2006), *NSTAR Electric Co. v. ISO New England Inc.* 125 FERC ¶ 61,187, at P 26 (2008), *ISO New England Inc.*, 123 FERC ¶ 61,290, at P 16 (2008)).

increase supply in New England's wholesale power market and, in turn, may reduce market prices and benefit customers.

**c. Commission Determination**

81. We agree with Petitioners that the issues raised by Indicated NE Generators and NRG concerning the adequacy of the existing forward capacity rules are beyond the scope of this proceeding. Furthermore, any concerns regarding the forward capacity market rules are best addressed in the ISO-NE stakeholder process.

The Commission orders:

NSTAR and Northeast's petition for a declaratory order approving the structure of the proposed transaction, as discussed in the body of this order, is hereby granted.

By the Commission. Commissioner Moeller concurring with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Northeast Utilities Service Company

Docket No. EL09-20-000

NSTAR Electric Company

(Issued May 22, 2009)

MOELLER, Commissioner, *concurring*:

This case presents a unique situation that calls for a unique response. Clarifying what this request is, and what it is not, is necessary to provide clear signals to potential developers and users of future transmission infrastructure. Each transmission project that comes before the Commission must independently satisfy our requirements with respect to non-discriminatory open access, market power and rate structure.

As the order explains, this proposal is not a merchant line given that the transmission rates charged will be subject to cost-based regulation. Additionally, this order finds that the proposed structure of the transaction does not violate the open access foundation of Order No. 888 and our subsequent determinations in Order. 890. While some parties to this proceeding argue that the proposed structure of the transmission project conflicts with our open-access and non-discriminatory transmission requirements, the parties have not clearly demonstrated how the Petitioners' request interferes with our existing requirements or Commission policy. At present, the Petitioners only seek approval of the basic structure of the transaction described in their filing and I find no compelling basis on which to deny their request.

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Philip D. Moeller  
Commissioner