133 FERC ¶ 61,229
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc. Docket No. ER11-1918-000

ORDER ACCEPTING UNEXECUTED LARGE GENERATOR INTERCONNECTION AGREEMENT

(Issued December 16, 2010)

1. In this order, the Commission accepts the October 27, 2010 filing by ISO New England Inc. (ISO-NE) and New England Power Company d/b/a National Grid (New England Power) (collectively, the Transmission Parties) of their unexecuted large generator interconnection agreement (LGIA) with Rhode Island Central Genco, LLC (Genco) pursuant to section 205 of the Federal Power Act and Order No. 2003.[1] The Commission accepts the filing effective October 21, 2010, as requested.

I. The LGIA Filing

2. The Transmission Parties state that Genco is constructing a new 50 MW generating facility in Johnston, Rhode Island. This landfill-gas fired facility will interconnect to New England Power's existing transmission system via a new 115kv generator lead line and a three breaker ring bus switchyard. The proposed in-service date for this facility is September 2013.

3. Appendix A of the LGIA identifies the Genco-interconnection related upgrades at issue in this proceeding (Network Upgrades). These Network Upgrades include a new ring bus and transmission line extensions needed to connect the Genco facility to the existing transmission line, upgraded relays for the transmission line, and improvements to

[1] 16 U.S.C. § 824d (2006); *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, FERC Stats & Regs. ¶ 31,171, *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,146 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

neighboring substations. As discussed in Appendix A of the LGIA, some of the upgrades needed to connect the Genco facility were previously included in the ISO-NE regional system plan as part of the New England East-West Solution (NEEWS) project, a transmission expansion project designed to substantially improve reliability in southern New England, that is scheduled to be placed in service during 2012 and 2013.[2] Transmission Parties report that the cost of certain previously planned improvements to the protective relaying on the line to which Genco will interconnect will be allocated regionally.[3]

4. The Transmission Parties state that the LGIA complies with the provisions of the ISO-NE Transmission, Markets and Services Tariff (Tariff) and request that it be accepted as filed, without modification or condition. Nevertheless, the Transmission Parties explain that the LGIA was filed unexecuted because Genco disagrees with the cost allocations for network upgrades established in the agreement[4] and objects to the requirement that it provide financial security for the tax gross-up amount associated with payments or property transfers due to the Genco project. Genco's objections as well as Transmission Parties responses those objections are discussed more fully below.

5. The Transmission Parties request an effective date of October 21, 2010. Transmission Parties relate that the LGIA had originally been filed on October 20, 2010, but was refiled to correct an eTariff filing code. Transmission Parties assert that no party will be adversely affected by the waiver and good cause exists to grant the request because Genco seeks an effective date as soon as possible, to facilitate financing.

[2] The Commission granted, with a modification, an incentive rate request and accepted accompanying tariff revisions related to the NEEWS project in *Northeast Utilities Service Co.*, 125 FERC ¶ 61,183 (2008).

[3] The LGIA, Appendix A (at 93-94) indicates that Genco is responsible for the costs of advancing the NEEWS Project line protection upgrades if necessary to meet Genco's construction schedule.

[4] The ISO-NE Tariff, Schedule 22 (Large Generator Interconnection Procedures) defines network upgrades as "the additions, modifications, and upgrades to the New England Transmission System required at or beyond the Point of Interconnection to accommodate the interconnection of the Large Generating Facility to the Administered Transmission System."

II. Notice of Filings and Responsive Pleadings

6. Notice of the Transmission Parties' filing was published in the *Federal Register*, 78 Fed. Reg. 68,341 (2010), with interventions and protests due on or before November 17, 2010. Genco filed a motion to intervene and protest.

7. In its protest, Genco argues that the cost of the Network Upgrades should be allocated regionally rather than charged to Genco as interconnection costs, because the facilities will benefit the ISO-NE system, and that Genco should not be required to post security to offset the potential tax gross-up risk. Each of the protested issues is discussed below.

8. Transmission Parties filed an answer to the Genco Protest in which they reinforce the positions presented in the Filing Letter. Transmission Parties highlight that Schedule 11 addresses the benefits provided by network upgrades, not those provided by the interconnecting generators. They note that the upgrades were reviewed by the LGIA parties and New England Power Pool (NEPOOL) reliability committee and were found to not be suitable for inclusion in the regional plan; therefore, Transmission Parties conclude that the upgrades cannot become eligible for regional allocation under the Reliability Benefits Upgrades categorization, as suggested by Genco. Furthermore, Transmission Parties cite Commission Orders in which the Commission has declined to require filing of operating protocols, such as the Planning Procedures that it relied on to determine that the upgrades did not provide regional benefits. According to Transmission Parties, these orders support its position that the Planning Procedures need not be filed.[5]

III. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motion to intervene serves to make Genco a party to this proceeding.

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[5] Transmission Parties Answer at 17. In the Answer, Transmission Parties also counter Genco's reliance on certain Commission orders that, according to Genco, require specificity in filed rates. *See* Genco Protest at 13 (citing *Potomac Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,288 (2008), *et al.*). Transmission Parties distinguish the orders because those proceedings involved formula rates for transmission service, not allocation of interconnection construction costs. Transmission Parties Answer at 17 n. 36.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Transmission Parties' answer because it has provided information that assisted us in our decision-making process.

B. Network Upgrade Cost Allocation

11. As explained further below, we agree with Transmission Parties that the cost allocation proposed in the LGIA is just and reasonable and consistent with the terms of the ISO-NE Tariff.

12. Schedule 11, section 5 establishes that ISO-NE will allocate 100 percent of the cost of network upgrades needed to meet operational and reliability criteria to the owners of interconnecting generators that create the need for the upgrades.[6] The Commission also has approved recognizing the benefits of any interconnection-related project that truly provides benefits to the system as a whole by allocating the costs regionally, as is done for reliability enhancement projects under the regional transmission plan.[7]

13. ISO-NE did not find that the Network Upgrades provide benefits to the system as a whole, and Genco has not identified any system-wide benefits other than benefits provided by its generator. Because the necessary showing required by the Tariff for regional cost allocation has not been made, i.e., because the Network Upgrades do not provide system-wide benefits of the type that are considered in the generator interconnection process, we agree that regional cost allocation is not appropriate.

1. System Benefits

a. Transmission Parties' Position

14. Transmission Parties relied on Schedule 11 of the ISO-NE Tariff, which establishes that an interconnection customer is responsible for the costs of network upgrades, to the extent that such costs would not have been incurred "but for" the interconnection.[8] The Transmission Parties assert that the Network Upgrades are

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[6] *See ISO New England, Inc.*, 95 FERC ¶ 61,384, at P 24 (2001) (approving Schedule 11, section 5); *see also ISO New England, Inc.*, 91 FERC ¶ 61,311, at 62,079 (2000).

[7] *New England Power Pool*, 105 FERC ¶ 61,200, at P 43 (2003).

[8] Transmission Parties Filing Letter at 5 (citing ISO-NE Tariff, Schedule 11, § 5).

necessary for the interconnection of Genco's project. Consequently, Transmission Parties allocate the cost of the Network Upgrades to Genco.

15. However, Schedule 11 further states that if "the ISO determines that a particular Generator Interconnection Related Upgrade provides benefits to the system as a whole as well as to particular parties, then the cost of such Upgrade shall be allocated in the same way as Reliability Transmission Upgrades."[9] The Transmission Parties provide the affidavit of Richard Kowalski, ISO-NE Director, Transmission Strategy and Services, who states that, subject to an undisputed exception, the upgrades are not included in the ISO-NE plan, and, according to the project interconnection studies, are not otherwise needed for reliability.[10] Mr. Kowalski cites ISO-NE planning criteria and reports that, other than the improvements to neighboring substations already discussed, none of the upgrades for the project qualify for region-wide allocation and no regional reliability needs are met by the upgrades.[11]

b. Genco Protest

16. Genco responds that the Network Upgrades, which are needed to interconnect its generation facility, meet the ISO-NE tariff criteria for allocation to all ISO-NE transmission customers. Genco cites ISO-NE's Schedule 11, section 5, quoted above, and claims that the Network Upgrades will provide significant benefits to the transmission grid. Genco asserts that the network upgrades will "provide a new source of renewable energy to the ISO-NE-controlled grid, provide supply diversity, provide high capacity factor renewable energy, increase reliability, foster a more competitive market,

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[9] *See id.* at 6. Under the ISO-NE Tariff, Schedule 12, the cost of Reliability Transmission Upgrades that qualify as Regional Benefit Upgrades is allocated to all ISO-NE transmission customers.

[10] As described in the LGIA, Appendix A, the Network Upgrades include improvements to neighboring substations that were previously planned as part of the NEEWS project. Genco is not being charged for these previously planned expansions, except to expedite construction.

[11] Kowalski Affidavit at 7 (explaining that pursuant to ISO-NE Planning Procedure 4-1, "Cost Responsibility for Transmission Upgrades with Multiple Needs" (Planning Procedure) a generator interconnection related upgrade will be found to provide benefits to the system (1) where an upgrade similar to that required for the interconnection has already been planned and (2) where a reliability need is uncovered during the system impact study).

add additional energy supplies that are located near load centers, reduce the need for imports and associated congestion, and facilitate compliance with renewable portfolio standards."[12]

17. Genco argues that the Network Upgrades meet the criteria for regional cost allocation under Schedule 12 of the Tariff.[13] In asserting that the Network Upgrades meet these criteria, Genco indicates that its project qualifies for inclusion in the Regional System Plan because its project provides low cost, high capacity factor renewable resources to the ISO-NE market.[14]

18. According to Genco, the Network Upgrades will enable ISO-NE to reduce dependence on fossil fuels and provide further benefits by producing renewable energy credits in New England. Genco cites an Environmental Protection Agency (EPA) rulemaking on greenhouse gas emissions and concludes that, without additional renewable energy credits and emission allowances, these EPA regulations could limit generation capacity and energy production and adversely affect grid reliability. Genco concludes that by allowing new, low emission renewable energy to be brought online, the Network Upgrades will enhance the reliability of the grid. Genco cites cases where it claims that the Commission has "properly recognized such benefits" in allocating the cost of network upgrades.[15]

19. Genco contrasts its 50 MW facility, featuring a 90 percent capacity factor, with wind and solar resources, which are variable energy resources. According to Genco, its facility will "greatly improve" the reliability of the grid as an alternative to future variable energy resources, which require backstop generation from fossil-fueled resources. Genco concludes that the presence of its high capacity factor generation will

[12] Genco Protest at 5.

[13] To qualify for regional cost allocation under section B.5 of Schedule 12 of the Tariff, a Reliability Transmission Upgrade must be classified as a Regional Benefit Upgrade, in that it is (i) rated 115 kV or above, (ii) meets non-voltage pool-transmission facilities (PTF) classification criteria, and (iii) is included in the regional system plan.

[14] Genco Protest at 11.

[15] *Id.* at 5, 8 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,109 (2009) (*Midwest ISO I*); *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060 (2009) (*Midwest ISO II*); and *Northeast Texas Electric Coop., Inc.*, 111 FERC ¶ 61,189, at P 28 (2005) (*Northeast Texas*).

facilitate rather than detract from the reliable operation of the system. Genco also touts that its generation will be located near to load as compared to other potential generation sources that may be located remotely from load, such as offshore wind generation.[16]

c. **Commission Determination**

20. We find, with respect to the Network Upgrades, that the proposed allocation provided in the LGIA is just and reasonable. Transmission Parties have allocated to Genco the full cost of the upgrades that would not have been incurred "but for" the interconnection of Genco's generating facility in order to avoid adverse impacts to the transmission system. Moreover, neither Transmission Parties nor Genco have identified any upgrade that is required to address a reliability concern, absent the Genco interconnection. We find this approach to be consistent with the Tariff.[17]

21. The Commission agrees with ISO-NE's assessment that the upgrades, with the exception of the protective relay upgrades that are part of the NEEWS project, provide no system-wide benefit, but instead are improvements required to permit the interconnection of Genco's facility. The upgrades were identified in the interconnection process,[18] which examines the impact of a proposed interconnection on the reliability and operation of the ISO-NE transmission system, including a power flow analysis (including thermal and voltage analyses) and short circuit, stability, and system protection analyses.[19] The process identifies any network upgrades that are necessary to accomplish the interconnection and maintain the reliability of the system at the level that would have existed absent the generator interconnection.[20]

22. The ISO-NE Tariff provides that costs that would not have been incurred but for the interconnection are to be allocated to the interconnecting generator. The exception at

[16] *Id.* at 8.

[17] *See New England Power Pool*, 109 FERC ¶ 61,155, at P 84 (2004) (accepting ISO-NE cost allocation provisions in lieu of pro forma LGIA cost allocation provisions and citing history of Schedule 11 cost allocation mechanism), *reh'g denied*, 110 FERC ¶ 61,335 (2005).

[18] Kowalski Affidavit at 5.

[19] ISO-NE Tariff, Schedule 22, Large Generator Interconnection Procedures, § 7.3.

[20] *Id.*, § 8.2.

issue here states that, *if the ISO determines that a particular upgrade provides benefits to the system as a whole*, then the costs shall be allocated in the same way as Reliability Transmission Upgrades.

23. Consistent with the Tariff, Transmission Parties' appropriately focus in this instance on the absence of regional benefits, such as correcting for an identified reliability issue; the exception to ISO-NE's established practice to allocate the cost of upgrades to the interconnecting generator is for upgrades providing benefits to the system as a whole, which should be allocated "in the same way as Reliability Transmission Upgrades."[21] A network upgrade must provide benefits to the system that are comparable to the benefits provided by Reliability Transmission Upgrades to qualify for the same regional cost allocation. The Transmission Parties have shown that that is not the case here. And, while Genco focuses on the benefits its generating facility provides, under the Tariff the relevant inquiry is not what benefits flow from the generating facility but rather what benefits flow from the transmission upgrades, i.e., do the transmission upgrades themselves provide system-wide benefits.[22]

2. Additional Objections

a. Transmission Parties' Position

24. Transmission Parties state that the cost allocation reflected in an LGIA must follow the applicable tariff and assert that Schedule 11 is the applicable provision to determine whether upgrade costs should be allocated regionally. According to Transmission Parties, the purpose of the Schedule 11 exception is to determine whether the upgrade is already listed in or should be added to the regional system plan to address

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[21] Reliability Transmission Upgrades are defined as additions and upgrades, not required by the interconnection of a generator, that are necessary to ensure the continued reliability of the New England transmission system. *See* ISO-NE Tariff, section I.2.2 (definition of Reliability Transmission Upgrades). The definition indicates that the identification of such facilities should take into account load and resource changes, and include upgrades necessary to provide acceptable stability, short circuit and voltage levels, as well as provide adequate thermal capability.

[22] We note that Genco also has not identified any other ISO-NE interconnection agreement featuring the allocation that it seeks for the kinds of costs at issue here. We also note that ISO-NE's Regional Transmission Plan procedures were not intended to supplant or disturb the generator interconnection procedures, including the cost allocation mechanism for generator interconnection related upgrades provided in Schedule 11. *See New England Power Pool*, 109 FERC ¶ 61,252, at P 39-40 (2004).

a regional reliability issue identified in interconnection studies.[23] According to the Transmission Parties, the Planning Procedures implement this purpose. Transmission Parties also contest Genco's reliance on the description of Regional Benefit Upgrade allocation in Schedule 12, section B.2, because the Network Upgrades are not included in the Regional System Plan[24] and the provisions cited make an exception for generator-interconnection related upgrades.

b. Genco Protest

25. Genco objects to ISO-NE's reliance on the Planning Procedures discussed in the Kowalski Affidavit to determine whether a generator interconnection related upgrade provides benefits to the system.[25] Relying on its claim that the Network Upgrades qualify for regional cost allocation under the definition of Regional Benefit Upgrades, Genco asserts that, to the extent that the Planning Procedures indicate a different result, the Tariff language controls.

26. Genco argues that a "generic" determination made under the Planning Procedures "would be unjust and unreasonable and would unlawfully cede the Commission's statutory duties to ISO-NE."[26] Genco objects to an interpretation of the Tariff that would permit ISO-NE to determine, without regulatory oversight, through its System Impact Study and Regional System Planning Process which network upgrades provide benefits to the system and which do not. Genco argues that such a situation would be inconsistent with the Commission's transparency policies.[27]

c. Commission Determination

27. We disagree with Genco's suggestion that ISO-NE acted improperly by relying on its Planning Procedures or that such procedures are inconsistent with its Tariff. The exception in Schedule 11 states that ISO-NE must determine whether a particular upgrade provides benefits to the system as a whole as opposed to benefitting particular parties. We find that the Planning Procedures are an appropriate means to make such a

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[23] Transmission Parties Filing Letter at 10.

[24] *Id.* at 9 (noting the exception of the upgrades related to the NEEWS expansion).

[25] Genco Protest at 12 (stating that the tariff controls, not business practice manuals or planning procedures).

[26] *Id.* at 13.

[27] *Id.* at 13-14.

determination. Because ISO-NE did not identify system-wide benefits in this case, the LGIA at issue here properly allocates the cost of the Network Upgrades to Genco consistent with the ISO-NE Tariff.

28. We also reject Genco's claims that reliance on the ISO-NE Planning Procedures permits an improper delegation of our regulatory responsibilities or is contrary to our transparency policies. Genco cites no factor in this proceeding that interferes with the Commission's ability to meet its obligation to review the filed LGIA and determine whether the resulting rate is just and reasonable.[28] In Order No. 2003, the Commission established the interconnection study process reflected in the Large Generator Interconnection Procedures.[29] Based on those procedures, including the filing of the unexecuted LGIA, Genco has had ample opportunity to review studies providing the basis for ISO-NE's cost allocations and otherwise pursue its interests in this proceeding, including by seeking Commission review. Genco has simply failed to persuade us, based on the evidence before us and the provisions of the ISO-NE Tariff, that its proposed allocation of the cost of the Network Upgrades system-wide is an appropriate allocation.

3. <u>Rolled-in Pricing Precedent</u>

a. <u>Transmission Parties' Position</u>

29. Transmission Parties object to Genco's reliance on various orders addressing cost allocations in Midwest ISO, because those orders address factors that are not present in this proceeding and because the language of the ISO-NE tariff differs from that in the Midwest ISO tariff. Transmission Parties cite as an example the holding in one of the orders stating "[i]t is well established that there can be more than one just and reasonable rate; various just and reasonable cost allocation schemes each have their own strengths and weaknesses."[30] Transmission Parties cite this language as confirming that it is appropriate for the two ISOs to allocate costs through different methodologies and that here the terms of the ISO-NE tariff – leading to an allocation of the costs at issue to Genco – should govern.

30. Transmission Parties assert that to the extent that Genco seeks to modify ISO-NE's cost allocation methodology, it cannot do so in a protest of an unexecuted

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[28] *Accord Milford Power Company, LLC*, 112 FERC ¶ 61,154, at P 18 (2005).

[29] Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 240.

[30] Transmission Parties Filing Letter at 10-11 (citing *Midwest ISO II*, 129 FERC ¶ 61,060 at P 49).

interconnection agreement filed under section 205, but instead must do so pursuant to a section 206 complaint.[31]

b. Genco Protest

31. Genco, citing *Southern California Edison Company*, claims that the Commission held there that "the cost of facilities over which an ISO provides transmission service must be spread among network users, if they are integrated network facilities."[32] Genco describes the order as finding that the costs of certain facility upgrades qualified for rolled-in pricing, because the facilities were integrated with an ISO-controlled substation and provided reliability benefits, by isolating the grid from faults. Genco concludes that similarly the costs of the upgrades in this proceeding must be allocated to ISO-NE's customers.

32. Genco also cites the test established in *Mansfield Municipal Electric Dept. v. New England Power Co.* and claims its facilities meet the *Mansfield* test to determine whether they are integrated.[33] Genco characterizes the Mansfield test as presenting five factors, and that a facility meeting any one of the factors warrants system-wide allocation. Genco states:

> Critically, if there is a positive response to any one of the five factors, the facilities in question are deemed to be integrated, and the costs of the upgrades must be allocated to Transmission Customers.[34]

33. Genco also cites *Northeast Texas Electric Cooperative, Inc.* as an order where the Commission held that the roll-in of costs is required "when any degree of integration has been shown."[35] Genco concludes that because the facilities in question meet the *Mansfield* test, and thus are properly determined to be network facilities, requiring Genco

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[31] *Id*. at 12 (citing cases).

[32] Genco Protest at 14 (citing *Southern California Edison Company*, 117 FERC ¶ 61,103 (2006)).

[33] *Mansfield Municipal Electric Dept. v. New England Power Co.*, 97 FERC ¶ 61,134 (2001), *reh'g denied*, 98 FERC ¶ 61,115 (2002) (*Mansfield*).

[34] Genco Protest at 16-17.

[35] *Northeast Texas*, 108 FERC ¶ 61,084, at P 51, *reh'g denied*, 111 FERC ¶ 61,189, at P 6 (2005).

to bear the entire cost of the upgrades without reimbursement would be unjust, unreasonable, and contrary to Commission policy.

c. Commission Determination

34. We disagree that these cases warrant a different result in this proceeding. First, ISO-NE is proposing to allocate the costs of upgrades necessary to interconnect a new generator, consistent with the Commission's policies established in Order No. 2003. That is a very different situation from the facts presented by the cases relied on by Genco, which did not involve such a circumstance.

35. We likewise disagree that *Mansfield* warrants a different result in this proceeding. *Mansfield* involved a significantly different factual setting and legal context. The facilities at issue in *Mansfield* were not generator facilities that sought an interconnection to an ISO, but rather radial lines owned by New England Power that linked several municipalities to the pool transmission facilities of the NEPOOL; at issue was the proper charge for transmission service New England Power provided to the municipalities over these radial facilities.[36] The municipalities objected to paying Local Network Service (LNS) rate, which was based on New England Power's transmission service costs. The municipalities also paid, but did not protest, the tariff's Regional Network Service (RNS) rate. Both the RNS and the LNS rates were rolled-in rates, but the municipalities only objected to payment of the LNS rate. They instead argued that they should be directly assigned only the costs of the radial lines, based on their assertions that the lines were radial in nature; that energy flowed over the line only in one direction; that New England Power served only the municipalities on the lines; that the lines did not provide capability or reliability benefits to other customers; and whether an outage on the lines would affect the transmission system.

36. In contrast, here, ISO-NE is proposing to allocate the costs of the network facilities to the interconnecting generator, consistent with the Commission's policies established in Order No. 2003 and the ISO-NE Tariff, not to a specific customer group under its transmission rates. In other words, *Mansfield* is a rate case establishing the proper transmission service rate for radial facilities, unlike the case before us that involves a determination of cost responsibility for the network upgrades necessary to reliably interconnect the generator to the transmission grid.

[36] *Northeast Texas*, 108 FERC ¶ 61,084, likewise involved whether the cost of network upgrades could be directly assigned to customers whose delivery points were near the upgrades, and did not address generator responsibility for interconnection-related network upgrades.

37. Second, *Mansfield* and the other cases cited do not stand for the general proposition suggested by Genco, that if a particular transmission facility is integrated the costs of the facility must be rolled into the system rate, i.e., allocated system-wide.[37] Otherwise, the Commission would not have issued Order No. 2003 and approved the Large Generator Interconnection Procedures and tariff provisions permitting an ISO or RTO to allocate all interconnection related upgrade costs to an interconnecting generator.[38]

38. Third, we agree with Transmission Parties that, to the extent that Genco cites precedent involving other regions with different tariff language and that do not seek to allocate such costs to the interconnecting generator, such precedent is not controlling in ISO-NE.

C. Tax-Gross Up

1. Transmission Parties' Position

39. The ISO-NE Tariff, Schedule 11, section 5 provides that the cost of upgrades for a "Category C" project, such as Genco's, must be paid by the generator owner, including direct interconnection transmission costs and tax-gross up amounts, to the extent that such costs would not have been incurred but for the interconnection.[39] Transmission Parties emphasize that the ISO-NE tariff contains different terms from the pro forma LGIA and permits an interconnecting transmission owner, in this case New England Power, to require financial security in an amount equal to the current tax liability that results from payments or property transfers made by the interconnection customer, here Genco, in connection with both interconnection facilities and network upgrades.[40]

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[37] *Mansfield* analyzed whether the specific radial lines used by the protesting municipalities should be charged New England Power's LNS rate or a direct assignment charge based on their specific characteristics.

[38] *See* Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 691 (affirming that in an ISO or RTO has greater flexibility to propose a customized policy to fit its circumstances and need not necessarily adhere to the Commission's *pro forma* pricing policies, which would otherwise require interconnection customers to be reimbursed for the costs of network upgrades).

[39] Category C projects are those for which the generator owner committed to pay for upgrade costs on or after June 22, 1999.

[40] Transmission Parties Filing Letter at 12-13.

40. Furthermore, Transmission Parties state that the Commission expressly allowed transmission providers to require financial security from the interconnecting customer even if the customer obtains a private letter ruling.[41] Transmission Parties state that the Commission concluded in Order No. 2003-A that it would not be appropriate to reduce the security amount based on a private letter ruling, because such a ruling does not reduce the risk that the payments may become taxable if the Internal Revenue Service (IRS) changes its policy or a subsequent taxable event occurs. Transmission Parties assert that New England Power has consistently required financial security for its current tax liability under the ISO-NE LGIA, even if a private letter ruling has been obtained, to protect its shareholders and other customers from the cost consequences that could result from a change in IRS policy or a subsequent taxable event. Transmission Parties assert that there are no special facts or circumstances in this case that would lead New England Power to treat Genco differently.

2. <u>Genco Protest</u>

41. Genco asserts that it is unjust and unreasonable to require an interconnection customer like Genco to provide financial security for the gross-up amount associated with the theoretical tax liability that would been incurred on payments when an interconnection customer is able to obtain a private letter ruling from the IRS; such a private letter ruling would hold that a payment or property transfer made by the interconnection customer to the transmission owner is a non-taxable event, and thus no additional amounts should be owed.

42. Genco acknowledges that the Commission permits utilities to require financial security for the gross-up amount. However, Genco notes that article 5.17.3 of ISO-NE's *pro forma* LGIA does not mandate that financial security for the gross-up amount be provided in all instances.[42] Based on these facts, Genco concludes that requiring it to provide $3 million in financial security to cover a purely theoretical tax liability that has, in its view, no realistic possibility of coming to fruition, as ISO-NE and National Grid propose to do, is "futile" and "needlessly raise[s] the cost of developing renewable energy projects and associated transmission."[43]

43. Genco indicates that the ISO-NE Tariff does not specify the financial security to be accepted, and proposes that an IRS private letter ruling should be treated as adequate

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[41] *Id*. at 12 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 343-44).

[42] Genco Protest at 18 (citing the ISO-NE pro forma LGIA, article 5.17).

[43] *Id.* at 18-19.

financial security for the gross-up amount. Genco claims that a private letter ruling is effectively treated as such by other ISOs, such as the California Independent Transmission System Operator.[44] Genco states:

> Where a [private letter ruling] is obtained from the IRS without any fraud or misrepresentation and is relied upon by the entities involved, it cannot be retroactively revoked absent "very rare or unusual circumstances.[")] The reliability of the [private letter ruling] also cannot be adversely affected by the subsequent issuance of new IRS regulations.[45]

44. Genco also states that New England Power concedes that, even without a private letter ruling, no tax would currently be due because Genco has structured its affairs, including a long-term power purchase agreement, consistent with IRS safe harbor rules. Genco claims that, with the added confidence provided by a private letter ruling, New England Power has no current reason to demand additional security.

45. Genco claims that, should circumstances change so as to give reasonable cause to question the taxable status of the transaction, then, at that time, security could be provided as a condition for continued transmission service. Genco cites, as a possible change in circumstance, termination of the power purchase agreement without similar substitute arrangements that fit within the IRS safe harbor rules.

3. Commission Determination

46. Schedule 11, section 5 of the ISO-NE Tariff provides, for a project such as Genco's, that the generator pay all interconnection-related upgrade costs, "including all Direct Interconnection Transmission Costs and any applicable tax gross-up amounts." Similarly, the ISO-NE *pro forma* LGIA, article 5.17 states, "Interconnecting Transmission Owner may require Interconnection Customer to provide security . . . in an amount equal to the cost consequences of any current tax liability under this article 5.17." Thus, article 5.17 anticipates that the generator owner shall pay tax gross up amounts, such as those at issue in this proceeding.

47. Furthermore, Order No. 2003-A squarely addressed this issue. In Order No. 2003-A, the Commission deleted a provision in the Order No. 2003 *pro forma* LGIA stating that an interconnection customer's security obligations for tax liability would be reduced

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[44] *Id.* at 19.

[45] *Id.* (citations omitted).

by a favorable IRS private letter ruling on tax liability.[46] Because Genco's attempt to seek a ruling that is inconsistent with Order No. 2003-A is a collateral attack on our holding in that order, as well as our prior orders accepting the ISO-NE *pro forma* LGIA, we reject Genco's protest.[47]

48. Moreover, in Order No. 2003-B, the Commission rejected requests for rehearing of its determination in Order No. 2003-A on tax gross up amounts, stating:

> Order No. 2003-A explained that the security for tax liability in LGIA article 5.17.3 protects the Transmission Provider against the possibility that the IRS will change its policy or that there will be a subsequent taxable event. A private letter ruling from the IRS does not address these risks. While the ruling may show that the IRS does not currently consider these payments taxable, the risk remains that the IRS may change its policy or there will be a subsequent taxable event.[48]

49. Thus, the Commission has previously considered Genco's concerns but has determined that, while a private letter ruling may demonstrate a lack of current liability, security may still be held against the future risk. Since Genco has provided no other basis on which to contest the Transmission Parties' security requirement, we reject the protest and affirm the LGIA on this issue.

D. Conclusion

50. We will, in light of our findings above, accept the proposed LGIA, to become effective October 21, 2010, as requested.[49]

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[46] *See* Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 344.

[47] *See, e.g., New England Power Pool*, 109 FERC ¶ 61,155 at P 79-80 (citing Order No. 2003-A).

[48] Order No. 2003-B, FERC Stats & Regs. ¶ 31,171 at P 97.

[49] *See Prior Notice Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993), *clarified*, 65 FERC ¶ 61,081 (1993) (providing for waiver of notice for a service agreement under an umbrella tariff filed within 30 days after service commences).

The Commission orders:

The proposed LGIA is hereby accepted for filing, to become effective October 21, 2010, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.