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May 16, 2013

Commissioner Tony Clark

STATEMENT

FEDERAL ENERGY REGULATORY COMMISSION

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

Item No. E-1

Statement of Commissioner Tony Clark on ISO-NE Order No. 1000 Compliance Filing

"In addition to those reasons more fully explained in my previous dissents, I am dissenting from this ISO-New England (ISO-NE) Order No. 1000 compliance filing because of a new wrinkle not present in previous Order No. 1000 filings. Specifically, I do not support the majority's decision to overturn the Mobile-Sierra protection this Commission specifically granted to certain provisions in the ISO-NE 2004 Transmission Operating Agreement (TOA).

"The issues raised are numerous, but suffice it to say I find the Commission's determination troubling in relation to the signals we are sending to the broader regulated community regarding Mobile-Sierra. I have concerns with the Commission too easily exercising its discretion to extend the public interest standard of review to non-contract rates, terms, and conditions. And yet, because the Commission chose to do just that when presented with the request in the 2004 TOA, it now finds itself in the untenable position of having to stretch to find a public interest finding to revoke the previously granted and protected provisions of the TOA.

"To characterize it succinctly, I believe the Commission may have imprudently exercised its discretionary powers to grant the heightened Mobile-Sierra protection in the case of the TOA where it was clear that non-contract rates, terms and conditions were at issue. Now it must demonstrate why revocation of that heightened protection is justified. This is not easily done, and the Commission's decision in this order may establish a precedent whereby there are fluid and weak limiting principles by which Mobile-Sierra protection will be both granted and withdrawn. This undercuts the regulatory certainty that has until now been associated with Mobile-Sierra.

"I am open to an analysis or argument that Rights of First Refusal provisions for economic projects may inhibit competition and thus result in rates that are unjust and unreasonable under the ordinary just and reasonable standard alone. However, there is a larger burden associated with the public interest application of the just and reasonable standard of review.

"The Supreme Court has set a high bar for this Commission to meet, and in my mind if we are to preserve the integrity of the Commission's Mobile-Sierra analysis, we must provide some evidence demonstrating real peril. Instead, the order today has reduced the heightened Mobile-Sierra standard to little more than the ordinary just and reasonable standard that was already used to support Order No. 1000. Where the Commission in TAPS identified a quantifiable amount of harm - \$200 billion or more in stranded costs (that justified modifying contracts after Order No. 888), here the Commission can only opine on the theoretical benefit that may result from having additional participants in the regional transmission planning process.

"The arguments employed by the Commission in revoking the TOA Mobile-Sierra protections are all worthy of debate in the context of public policy, but the Commission lacks a more granular analysis or quantification of the "extraordinary circumstances where the public will be severely harmed." (emphasis added) Without such analysis, I am uncomfortable crossing the public interest threshold.

"For these reasons, I respectfully dissent from this order."