

153 FERC ¶ 61,343
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

ISO New England Inc. Participating Transmission
Owners Administrative Committee

Docket No. EL16-19-000

Emera Maine;

Town of Braintree Electric Light Department;

NSTAR Electric Company;

Chicopee Electric Light Department;

Central Maine Power Company;

Maine Electric Power Company (MEPCO);

Connecticut Municipal Electric Energy Cooperative &

Connecticut Transmission Municipal Electric Energy
Cooperative;

The City of Holyoke Gas and Electric Department;

New Hampshire Transmission, LLC;

Green Mountain Power Corporation;

Massachusetts Municipal Wholesale Electric Company;

New England Power Company, d/b/a National Grid;

New Hampshire Electric Cooperative, Inc.;

Eversource Energy Service Company as agent for:

The Connecticut Light and Power Company, Western
Massachusetts Electric Company, and Public Service
Company of New Hampshire;

Town of Hudson Light and Power Department;

Town of Middleborough Gas & Electric Department;

Town of Norwood Municipal Light Department;

Town of Reading Municipal Light Department;

Town of Wallingford (CT) Electric Division;

Taunton Municipal Lighting Plant;

The United Illuminating Company;

Unitil Energy Systems, Inc. and Fitchburg Gas and
Electric Light Company;

Vermont Electric Cooperative, Inc.;

Vermont Electric Power Company, Inc. and

Vermont Transco, LLC;

Vermont Public Power Supply Authority;

Shrewsbury Electric and Cable Operations

ORDER INSTITUTING SECTION 206 PROCEEDING AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 28, 2015)

1. Pursuant to section 206 of the Federal Power Act (FPA),¹ the Commission finds that ISO-New England's (ISO-NE) Transmission, Markets, and Services Tariff (ISO-NE Tariff) is unjust, unreasonable, and unduly discriminatory or preferential. ISO-NE's Tariff lacks adequate transparency and challenge procedures with regard to the formula rates for ISO-NE Participating Transmission Owners (PTOs). In addition, and separate from the aforementioned concern, we find that the ISO-NE PTOs' current Regional Network Service (RNS) and Local Network Service (LNS) formula rates appear to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. The formula rates appear to lack sufficient detail in order to determine how certain costs are derived and recovered in the formula rates. Accordingly, the Commission establishes hearing and settlement judge procedures to develop just and reasonable formula rate protocols to be included in the ISO-NE Tariff and to examine the justness and reasonableness of the RNS and LNS rates. The Commission also establishes a refund effective date.

I. Background

A. ISO-NE's Tariff

2. Under the ISO-NE Tariff, the ISO-NE PTOs recover their transmission revenue requirements through a combination of local and regional rates. The ISO-NE PTOs provide RNS service over their regional high voltage lines pursuant to Attachment F of ISO-NE's Tariff. The rate for RNS is calculated annually using a formula rate for all Pool Transmission Facilities in New England. The ISO-NE PTOs also maintain LNS and point to point transmission rates to recover costs not recovered through the RNS rate pursuant to Schedule 21 of the ISO-NE Tariff. The LNS rates are calculated either on a historical, current, or projected basis determined by each utility under its respective Schedule 21,² while the RNS rate is a single formula that all of the PTOs use to develop their respective RNS revenue requirements that make up the overall RNS rate. The RNS rate is determined on a historical basis using the previous year's costs.

¹ 16 U.S.C. § 824e (2012).

² There are approximately 13 separate LNS rates within the New England region under Schedule 21 of section II of ISO-NE's Tariff. The ISO-NE RNS rate is found in Attachment F of the ISO-NE Tariff.

3. Each year on or before July 31, the ISO-NE PTOs collectively submit to the Commission an annual informational filing update (Annual Update) for Scheduling System Control and Dispatch Service, Through or Out Service, and their respective revenue requirements that go into the RNS formula rate. Attachment F requires that, 45 days before an Annual Update is made with the Commission, the PTOs make available to Transmission Customers and any other interested parties a draft of the proposed filing for review and comment.³ This is accomplished by posting the draft Annual Update on ISO-NE's website. Attachment F also grants ISO-NE discretion to conduct audits of charges under the RNS formula rate, with advisory stakeholder input on the scope of the audit, including any agreed-upon procedures to be used by the auditor.⁴ Some of the ISO-NE PTOs are required by their respective Schedule 21 to submit an annual informational filing with the Commission for their LNS rates.⁵

B. Formula Rate Protocols

4. The Commission has stated with regard to formula rates that “the formula itself is the rate, not the particular components of the formula.”⁶ Thus, periodic adjustments, typically performed on an annual basis, “made in accordance with the Commission-approved formula do not constitute changes in the rate itself and accordingly do not require section 205 filings.”⁷ Because the formula rates for transmission service presently on file with the Commission do not typically require transmission owners to make a section 205 filing to update their annual transmission revenue requirement, the Commission has required safeguards to be in place to ensure that the input data is correct and accurate, that calculations are performed consistently with the formula rate, that the costs to be recovered in the formula rate are reasonable and were prudently incurred, and

³ ISO-NE Tariff, Attachment F, Implementation Rule (9.0.0).

⁴ *Id.*

⁵ For instance, Central Maine Power submits its annual update by June 30; Emera Maine submits its annual update by June 15; Fitchburg Gas and Electric Company submits its annual update by July 31; Green Mountain Power submits its annual update by January 15; New England Power Company submits its annual update by July 18; and NSTAR submits its annual update by May 31.

⁶ *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,544 (1994).

⁷ *Id.* P 61,545 (citing 16 U.S.C. § 824d (2012) and *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1567-68 (D.C. Cir. 1993)).

that the rates are just and reasonable.⁸ Formula rate protocols are often employed as such a safeguard and can be an effective tool to ensure just and reasonable rates.⁹

5. Indeed, as noted in a series of Commission orders, the reason for including formula rate protocols in formula rates for transmission service is to provide the parties paying such rates specific procedures for notice and review of, and challenges to, the transmission owner's annual updates.¹⁰ To effectively serve that purpose, formula rate protocols should afford adequate transparency to affected customers, state regulators or other interested parties, as well as provide mechanisms for resolving potential disputes.¹¹ In *MISO*, the Commission invoked its FPA section 206 authority to direct the Midcontinent Independent System Operator, Inc.'s (MISO) to revise the formula rate protocols contained in its Open Access Transmission, Energy and Operating Reserve Markets Tariff (MISO Tariff) to address three main issues: (1) scope of participation (i.e., who can exchange information with transmission owners); (2) the transparency of the information exchange (i.e., what information is exchanged); and (3) the ability of customers to challenge transmission owners' implementation of the formula rate as a result of the information exchange (i.e., how the parties may resolve their potential disputes).¹² Subsequently, the Commission directed six utilities in the SPP region to update or file formula rate protocols with the Commission.¹³ Commission Staff has also issued general guidance for electric utilities' annual formula rate updates to address

⁸ *E.g.*, *Idaho Power Co.*, 115 FERC ¶ 61,281, at P 29 (2006); *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,127, at P 9 (2012) (*MISO*); *The Empire Dist. Elec. Co.*, 148 FERC ¶ 61,030, at P 3 (2014) (*Empire District*).

⁹ *Id.*

¹⁰ *See, inter alia*, *MISO*, 139 FERC ¶ 61,127, at P 10; *Empire District*, 148 FERC ¶ 61,030 at P 4.

¹¹ *MISO*, 139 FERC ¶ 61,127 at P 10.

¹² *Id.* P 12.

¹³ *Empire District*, 148 FERC ¶ 61,030; *Louisville Gas and Elec. Co. and Ky. Utils. Co.*, 148 FERC ¶ 61,031 (2014); *UNS Elec., Inc.*, 148 FERC ¶ 61,032 (2014); *Westar Energy, Inc.*, 148 FERC ¶ 61,033 (2014); *Kansas City Power & Light Co.*; *KCP&L Greater Mo. Operations Co.*, 148 FERC ¶ 61,034 (2014); *Black Hills Power, Inc.*, 148 FERC ¶ 61,035 (2014).

common deficiencies that have impeded the ability to review the updates and verify that rates are consistent with the formula.¹⁴

II. Discussion

A. Formula Rate Protocols

6. As stated above and in previous Commission orders, the integrity and transparency of formula rates are critically important to ensuring just and reasonable rates.¹⁵ The Commission has undertaken an analysis of the ISO-NE PTOs' RNS and LNS formula rates and finds that the rates lack adequate safeguards to ensure that the input data is correct and accurate, that calculations are performed consistently with the formula rate, and that the costs to be recovered in the formula rate are reasonable and prudently incurred. Of concern, several of the ISO-NE PTOs that provide LNS are not required to submit Annual Updates.¹⁶ Further, although draft Annual Updates must be posted on ISO-NE's website 45 days prior to being submitted to the Commission and ISO-NE may conduct audits related to the RNS, interested parties are not provided with all the information necessary to understand and evaluate the implementation of the formula rate for either the correctness of inputs and calculations or the reasonableness and prudence of the costs to be recovered in the formula rate. Additionally, there are no challenge provisions to allow interested parties to informally resolve disputes related to the implementation of these formula rates or, in the event disputes are not resolved informally, to bring formal challenges to the Commission without needing to file a formal complaint. We also note, as discussed below, that the formula rates themselves lack sufficient detail to determine how certain costs are derived and recovered in the formula

¹⁴ FERC, *Staff's Guidance on Formula Rate Updates*, July 17, 2014, <https://www.ferc.gov/industries/electric/indus-act/oatt-reform/staff-guidance.pdf>. The Commission posted on its website general guidance for formula rate updates which will aid utilities in the preparation of their annual updates and annual update informational filings in order to avoid common deficiencies.

¹⁵ See, *inter alia*, *MISO*, 139 FERC ¶ 61,127 at 10; *Empire District.*, 148 FERC ¶ 61,030 at P 4.

¹⁶ The current PTOs that provide LNS under Schedule 21 of the ISO-NE Tariff that are currently not required to make annual informational filings of their formula rates with the Commission are: Connecticut Transmission Municipal Electric Energy Cooperative; New Hampshire Transmission, LLC; Eversource Energy; Until Energy Systems, Inc.; United Illuminating Company; Vermont Electric Cooperative; and Vermont Transco, LLC.

rates,¹⁷ and we have concerns involving the timing and synchronization between the RNS and LNS formula rates.

7. Accordingly, we find that the ISO-NE Tariff lacks adequate transparency and challenge procedures with regard to the formula rate for ISO-NE PTOs and that the ISO-NE Tariff is therefore unjust, unreasonable, unduly discriminatory or preferential. Consistent with Commission precedent, we find that formula rate protocols are an appropriate mechanism to address these concerns. Accordingly, we will establish hearing and settlement judge procedures to examine these issues and to determine just and reasonable formula rate protocols. Parties should present evidence and argument regarding the procedures by which customers and other interested parties can (a) evaluate the inputs that the PTOs are providing to the rate formulas, (b) exchange information with the PTOs as to those inputs, and (c) if necessary, formally challenge the PTOs with regard to those inputs. Additionally, the PTOs should provide information as to the ways in which the LNS and RNS rates interact, to ensure that LNS and RNS rates are synchronized so that ISO-NE PTOs are not recovering the same costs through both the LNS and RNS, and customers are receiving appropriate refunds when necessary. Further, as part of that proceeding, we strongly encourage parties to consider the Commission precedent discussed above, regarding the development of effective formula rate protocols.¹⁸

B. Justness and Reasonableness of the Formula Rates

8. Separate from our concerns as to the formula rate protocols, we find that the ISO-NE PTOs' current RNS and LNS formula rates appear to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. The formula rates appear to lack sufficient detail in order to determine how certain costs are derived and recovered in the formula rates. For example, the RNS and LNS formula rates exclude the derivation of several components such as post-employment benefits other than pension costs (PBOPs),

¹⁷ See *infra* PP 12-13.

¹⁸ *The Empire Dist. Elec. Co.*, 148 FERC ¶ 61,030 (2014); *Louisville Gas and Elec. Co. and Ky. Utils. Co.*, 148 FERC ¶ 61,031 (2014); *UNS Elec., Inc.*, 148 FERC ¶ 61,032 (2014); *Westar Energy, Inc.*, 148 FERC ¶ 61,033 (2014); *Kansas City Power & Light Co; KCP&L Greater Mo. Operations Co.*, 148 FERC ¶ 61,034 (2014); *Black Hills Power, Inc.*, 148 FERC ¶ 61,035 (2014); and *MISO*, 139 FERC ¶ 61,127, *order on investigation*, 143 FERC ¶ 61,149 (2013), *order on reh'g*, 146 FERC ¶ 61,209 (2014), *order on compliance*, 146 FERC ¶ 61,212 (2014). See also, FERC, *Staff's Guidance on Formula Rate Updates*, July 17, 2014, <https://www.ferc.gov/industries/electric/indus-act/oatt-reform/staff-guidance.pdf>.

depreciation rates, and asset retirement obligations, nor are these components stated.¹⁹ In addition, because the RNS and LNS formula rates cover different time periods for service, include different line item calculations, are a hybrid of historical and forward-looking costs, and are not filed together, our preliminary analysis indicates that the timing and synchronization of the RNS and LNS rates are not reconcilable through the filing of formula rate protocols alone, which could result in an over-recovery of costs.

9. Further, the RNS formula rate defines the inputs and allocation factors to be used by every PTO for calculating its annual revenue requirement. However, because the ISO-NE PTOs formula rates are written out in words and not a mathematical formula, our preliminary analysis indicates that the ISO-NE PTOs may have different interpretations of the single RNS formula applicable to all the PTOs. The Commission's policy requires that all of the formula calculations be incorporated into rate schedules so that public utilities cannot unilaterally revise the calculations at their discretion.²⁰ Further, formula rates must be stated with sufficient specificity, clarity, and transparency so as to be understandable and reviewable by those affected by them and by the Commission.²¹

¹⁹ PBOP accounts are typically amounts that are amortized over a set period of time much like depreciation or decommissioning expenses. A modification in the amortization without Commission scrutiny can result in over-recovery or intergenerational inequities. Commission policy requires depreciation rates and PBOPs to be stated even if the utility operates under a formula rate. See *Maine Yankee Atomic Power Company*, 43 FERC ¶ 61,453, at 61,923 (1988) (*Maine Yankee*) (requiring specificity in the calculation of formula rate, as it appears in the form of a rate schedule). See also *Midwest Independent Transmission System Operator, Inc.*, 101 FERC ¶ 61,221 (2002), *reh'g denied*, 103 FERC ¶ 61,035 (2003); *Midwest Independent System Operator, Inc.*, 108 FERC ¶ 61,235 (2004); *Duquesne Light Co.*, 118 FERC ¶ 61,087 (2007); *Westar Energy, Inc.*, 122 FERC ¶ 61,268 (2008).

²⁰ *American Electric Power Service Corporation*, 120 FERC ¶ 61,205 (2007); *Duquesne Light Company*, 118 FERC ¶ 61,087 (2007).

²¹ *NorAm Gas Transmission Co.*, 77 FERC ¶ 61,011, at 61,037 (1996) (“a formula, stated with such clarity that a third party can easily calculate the rate charged”); *Maine Yankee Atomic Power Co.*, 43 FERC ¶ 61,453, at 61,923 (1988) (requiring specificity in the calculation of formula rate, as it appears in the form of a rate schedule); *Duquesne Light Co.*, 118 FERC ¶ 61,087, at P 78 (2007) (“Commission policy requires that a formula rate clearly state the formula used to achieve the rate”).

10. Based upon the foregoing, we are instituting an investigation in this proceeding under FPA section 206 into the justness and reasonableness of the ISO-NE PTOs' RNS and LNS formula rates. The rates raise issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in a separate proceeding providing for hearing and settlement judge procedures. Accordingly, the hearing and settlement judge procedures established herein should also address the just and reasonableness of ISO-NE PTOs' current RNS and LNS formula rates.

11. While we are setting the justness and reasonableness of the ISO-NE PTOs' current RNS and LNS formula rates and the development of formula rate protocols for the RNS and LNS formula rates for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding, otherwise the Chief Judge will select a judge for this purpose.²³ The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

12. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than the date of publication of the notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months after the publication date.²⁴ Consistent with our general policy of providing maximum protection to customers, we will set the refund effective date at the earliest

²² 18 C.F.R. § 385.603 (2015).

²³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

²⁴ 16 U.S.C. § 824e(b) (2012).

date possible, which will be the date the notice of the initiation of the investigation in this docket is published in the *Federal Register*.²⁵

13. Section 206(b) of the FPA also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision.²⁶

14. Any entity desiring to participate in Docket No. EL16-19-000, must file a notice of intervention or a motion to intervene, as appropriate, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), within 30 days of publication of notice in the *Federal Register* of the Commission's initiation of a section 206 proceeding in Docket No. EL16-19-000.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), the Commission hereby institutes a proceeding in Docket No. EL16-19-000 concerning the justness and reasonableness of the ISO-NE PTOs' RNS and LNS formula rates and to develop formula rate protocols for the RNS and LNS formula rates, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(B) Any entity desiring to participate in Docket No. EL16-19-000 as ordered above, must file a notice of intervention or a motion to intervene, as appropriate, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), within 30 days of publication of notice in the

²⁵ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989). We, however, note that section 206 of the FPA confers the Commission with discretion and does not require that the Commission order refunds in every instance. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121, at P 154 (2009).

²⁶ 16 U.S.C. § 824e(b) (2012).

Federal Register of the Commission's initiation of section 206 proceeding in Docket No. EL16-19-000.

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of section 206 proceeding in Docket No. EL16-19-000, regarding the justness and reasonableness of ISO-NE PTOs' current RNS and LNS formula rates and to develop formula rate protocols for the RNS and LNS formula rates.

(D) The refund effective date established pursuant to section 206(b) of the FPA will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (C) above.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2015), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in Docket No. EL16-19-000 within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(F) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(G) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in Docket No. EL16-19-000 regarding the justness and reasonableness of the ISO-NE PTOs' current RNS and LNS formula rates and to develop formula rate protocols for the RNS and LNS formula rates, in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the

purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.