125 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

NSTAR Electric Company Docket Nos. ER08-627-001 and ER08-627-002

ORDER ON REHEARING AND COMPLIANCE FILING OF SCHEDULE 20A TARIFF REVISIONS

(Issued November 25, 2008)

1. On May 29, 2008, NSTAR Electric Company (NSTAR) filed a request for rehearing of the Commission's order on NSTAR's proposed revisions to Schedule 20A of its ISO New England Inc. (ISO-NE) Open Access Transmission Tariff (OATT).[1] On the same date, NSTAR submitted a compliance filing proposing additional changes to Schedule 20A. In this order, the Commission rejects in part and conditionally accepts in part NSTAR's compliance filing, subject to an additional compliance filing, and the Commission denies rehearing in part and grants rehearing in part, as discussed below.

I. Background

2. The Hydro Québec High Voltage Direct Current Transmission Facilities (Hydro Québec Tie) interconnects the systems operated by ISO-NE and Hydro Québec TransÉnergie (Hydro Québec). The United States portion of the Hydro Québec Tie is owned by four companies that recover their costs for the interconnection from utilities who hold transmission rights on the Hydro Québec Tie, namely, the Interconnection Rights Holders (Rights Holder).[2] The Canadian portion of the interconnection facilities

[1] *NSTAR Elec. Co.*, 123 FERC ¶ 61,094 (2008) (April 29 Order).

[2] The four owners of the Hydro Québec Tie are New England Electric Transmission Corporation; Vermont Electric Transmission Company; New England Hydro-Transmission Electric Company, Inc.; and New England Hydro-Transmission Corporation. NSTAR is a Rights Holder, i.e., it holds transmission rights on the Hydro Québec Tie.

is owned by Hydro Québec. The nominal transfer capacity of the Hydro Québec Tie is approximately 2,000 MW; however, for reasons of reliability, ISO-NE historically has allowed no more than 1,800 MW of capacity to be imported over the facility.

3. In return for the Rights Holders' financial support of the Hydro Québec Tie and the reliability benefit that the Hydro Québec Tie provides to New England through access to available generation in Canada, the Rights Holders—and by extension, their customers—have a right to receive Hydro Québec Interconnection Capability Credits (HQ Capability Credits or HQICCs).[3] Each Rights Holder is allocated a share of HQ Capability Credits approximately equal to its share of the support cost obligation. The Rights Holders' right to receive HQ Capability Credits is provided for under the ISO-NE OATT.

4. Although the Rights Holders were granted a waiver from the requirement to file an OATT for transmission service over the Hydro Québec Tie, the Commission directed those public utility Rights Holders with "control" over Hydro Québec Tie transmission service to include terms and conditions governing access to the Hydro Québec Tie in their individual OATTs.[4] As part of the formation of the regional transmission organization in New England, these rates, terms, and conditions for Hydro Québec Tie transmission service were incorporated into Schedule 20A of the ISO-NE OATT. Schedule 20A sets forth the rates, terms, and conditions for transmission service provided over the United States portion of the Hydro Québec Tie. The Rights Holders that are Schedule 20A Service Providers (SSP), such as NSTAR, have exclusive filing rights under section 205 of the Federal Power Act to make changes to Schedule 20A.[5]

5. On February 29, 2008, NSTAR submitted changes to Schedule 20A that included, among other things, the ability to recover any losses that NSTAR will incur as a result of the Forward Capacity Market (FCM) Settlement Agreement, which reduces the amount

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[3] The HQ Capability Credits reflect the amount of potential resources available from Canada across the Hydro Québec Tie.

[4] *See Northern States Power Co. (Minn.)*, 76 FERC ¶ 61,250, *order on reh'g sub nom. Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,943 (1996).

[5] Sections 3.05 and 11.03(f)(i)(B) of the Transmission Service Administration Agreement provide that each SSP or its permitted designee may revise its Schedule 20A Service Schedule. Transmission Service Administration Agreement §§ 3.05, 11.03(f)(i)(B), *available at* http://www.iso-ne.com/regulatory/toa/phase_I-II_hvdc-tf-_tsaa.pdf.

of HQ Capability Credits over the Hydro Québec Tie.[6] As a result, NSTAR proposed to modify Schedule 20A to provide a new rate mechanism (i.e., relinquishment charge) that compensates NSTAR for the value of HQ Capability Credits that may be lost due to the FCM Settlement Agreement.

6. In the April 29 Order, the Commission rejected NSTAR's proposed Schedule 20A revisions, accepted its proposed delivery rate revisions, effective March 1, 2008, and conditionally accepted the addition of peak and off-peak pricing subject to a compliance filing. The Commission explained that NSTAR's calculation of its Annual Embedded Transmission Expense that is used in the derivation of its proposed firm delivery rate does not appear to take into account revenue from non-firm local point-to-point service.[7] Accordingly, the Commission directed NSTAR to revise the Annual Embedded Transmission Expense to take into account such revenues since this may lead to over-recovery. The Commission also directed NSTAR to incorporate off-peak revenues into the determination of on-peak rates.

II. Compliance Filing

7. With respect to the Commission directive regarding NSTAR's Annual Embedded Transmission Expense, NSTAR proposes to revise its calculation to take into account revenue from non-firm local point-to-point service as indicated by the under-scored text:

> The Annual Embedded Transmission Expense shall be the sum of NSTAR's cost of service support payments incurred during a month from Vermont Electric Transmission Company (VETCO), New England Electric Transmission Corporation (NEET), New England Hydro Electric Transmission Company (NEH), and New England Hydro Transmission Corporation (NHH), <u>less any revenues received from Non-Firm Local Point-to-Point Service provided under this Schedule 20A-NSTAR,</u> for the 12 months preceding the annual anniversary date of the Transmission Customer's Phase I/II HVDC-TF Service under this schedule.[[8]]

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[6] The FCM Settlement Agreement provides that "the total MW Value of HQICCs will be fixed at 1200 MW March through November and zero MW December through February." FCM Settlement Agreement § 11.VIII.K.

[7] April 29 Order, 123 FERC ¶ 61,094 at P 40.

[8] Compliance Filing at 3 (citing Proposed Schedule 20A-NSTAR, Sub. Second Rev. Sheet No. 974).

8. With respect to the Commission directive to incorporate off-peak revenues into the determination of on-peak rates, NSTAR proposes amending its non-firm Daily and Hourly Service Charges to include the following mechanisms (indicated in the text below). NSTAR states that such revisions are a means to revise the peak rates annually to account for off-peak revenues and refund any identified over-recoveries to its customers.

> Annually, the Company shall recalculate the Daily On-Peak Delivery Rate for the previous year to account for any revenue collected from the Daily Off-Peak Service Charge that resulted in collection of revenues in excess of the Annual Revenue Requirement. Customers that were charged an undiscounted Daily On-Peak Delivery Rate shall receive a refund based upon the revised rate.[[9]]
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> Annually, the Company shall recalculate the Daily On-Peak Delivery Rate for the previous year to account for any revenue collected from the Hourly Off-Peak Service Charge that resulted in collection of revenues in excess of the Annual Revenue Requirement. Customers that were charged an undiscounted Hourly On-Peak Delivery Rate shall receive a refund based upon the revised rate.[[10]]

III. <u>Request for Rehearing and Subsequent Pleadings</u>

9. NSTAR maintains that the Commission erred in concluding that NSTAR voluntarily surrendered the value of its HQ Capability Credits. NSTAR also maintains that the directive in the April 29 Order requiring NSTAR to revise its Annual Embedded Transmission Expense to take into account non-firm revenue is flawed. Further, NSTAR maintains that the directive in the April 29 Order requiring NSTAR to revise its proposed peak rates to take into account non-peak revenue departs from Commission precedent and results in disparate treatment.

10. With respect to surrendering the value of the HQ Capability Credits, NSTAR asserts that it did not participate in the negotiation of the FCM Settlement Agreement, did not engage in "difficult compromises among diverse parties," and did not engage in

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[9] *Id.* at 5 (citing Proposed Schedule 20A-NSTAR, Sub. Second Rev. Sheet No. 973).

[10] *Id.* (citing Proposed Schedule 20A-NSTAR, Sub. Original Sheet No. 973A).

concessions relative to the HQ Capability Credits negotiated by all parties.[11] Rather, NSTAR states that it participated in the Installed Capacity settlement discussions, wherein NSTAR indicated that it would be an opposing party. NSTAR states that, at that point, it was "excluded from all further negotiations that led to [the] March 6, 2006 FCM Settlement Agreement."[12]

11. NSTAR states that third parties cannot conspire to deprive non-parties of valuable contractual rights under the guise of a settlement agreement, particularly where, as here, the non-party has been expressly denied the right to participate in the drafting of the settlement agreement. NSTAR contends that, where a non-party files a rate schedule that is arguably inconsistent with a settlement to which it was not a party, the Commission must assess the section 205 filing on the basis of whether it is just and reasonable, not on the basis of the need to preserve "bargained for" rights in a separate but related settlement.[13] NSTAR contends that it entered into no bargain with respect to HQ Capability Credits and received no *quid pro quo* for the loss of $19 million in contract rights.

12. NSTAR avers that the better question is whether the FCM Settlement Agreement expresses an unambiguous intent that the consumers who financially support the Hydro Québec interconnection have agreed to relinquish their contractual rights without compensation. NSTAR states that the original netting provision added to the ISO-NE market rules in 2001 had nothing to do with compensation for lost HQ Capability Credits.[14] While the FCM Settlement Agreement may not have implied any form of compensation, according to NSTAR the settlement agreement did not specify that valuable contractual rights of non-settling parties were to be expropriated without compensation.

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[11] Request for Rehearing at 9 (referring to and quoting April 29 Order, 123 FERC ¶ 61,094 at P 35, 38).

[12] *Id.* at 9.

[13] *Id.* at 10 (citing *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (*Maine Commission*), for the proposition that an agreement binds parties to the agreement, subordinating regulatory rights to the dictates of contract law, but this holding does not extend to depriving non-parties of valuable contractual rights).

[14] *Id.* at 11-13 (discussing filings by H.Q. Energy Services (U.S.), Inc. and ISO-NE, as well as Commission precedent against the principle of "confiscation-by-implication"; *PG&E v. ISO New England Inc.*, 99 FERC ¶ 61,187, at P 27, 29, 36 (2002)).

13. NSTAR disputes that its proposal is a collateral attack on earlier orders that approved the FCM Settlement Agreement.[15] NSTAR contends that these orders are silent with respect to HQ Capability Credits.

14. Lastly, NSTAR contends that there is no substantial evidence in support of the Commission's factual conclusions. For example, NSTAR states that the settlement in principle was silent as to HQ Capability Credits. NSTAR reiterates that, whereas it was active in the proceeding until the development of the settlement in principle, NSTAR was excluded from the proceeding when the provisions addressing the HQ Capability Credits were added.

15. With respect to the directive to revise its Annual Embedded Transmission Expense, NSTAR contends that this directive is based on the Commission's misunderstanding of NSTAR's firm and non-firm delivery rate methodology. NSTAR explains that, in order to collect 100 percent of its support costs, NSTAR must sell all of its firm and all of its non-firm transmission capacity.[16] As firm capacity is sold, non-firm capacity is reduced. NSTAR states that if it reduces the Annual Embedded Transmission Expense by non-firm sales, the overall Annual Embedded Transmission Expense will decrease. While the Commission's directive was based on the assumption of NSTAR's over-recovery, NSTAR contends that the result would be an under-recovery of its HQ Interconnection support costs, assuming that all transmission capacity is sold. According to NSTAR, its proposed methodology for calculating its Annual Embedded Transmission Expense "ensures no more than a 100% collection of its support payments."[17]

16. With respect to the directive to revise its proposed peak rates to take into account non-peak revenue, NSTAR maintains that it followed Commission precedent, and the Commission has provided no legitimate reason for departing from its precedent.[18]

17. On June 13, 2008, H.Q. Energy Services (U.S.), Inc. (HQ Energy) submitted an answer to NSTAR's request for rehearing. HQ Energy posits that the Commission may enforce a settlement on non-settling (contesting) parties provided that certain legal

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[15] *Devon Power LLC*, 115 FERC ¶ 61,340 (June 16, 2006 Order), *order on reh'g*, 117 FERC ¶ 61,133 (2006); *ISO New England Inc.*, 117 FERC ¶ 61,132 (2006) (October 31, 2006 Order).

[16] Request for Rehearing at 18-19.

[17] *Id.* at 19.

[18] *Id.* at 19-21 (citing *United Illuminating Co.*, Docket No. ER08-187-000 (Feb. 8, 2008) (unpublished letter order) (accepting revisions to Schedule 20A-UI)).

considerations are met.[19] HQ Energy states that the Commission has elaborated the principles for such considerations in its *Trailblazer* line of cases.[20] HQ Energy explains that under *Trailblazer* the Commission may approve a contested settlement in four instances. Under the second approach, "[e]ven if some individual aspects of a settlement may be problematic, the Commission may be able to approve a contested settlement as a package on the ground that the overall result of the settlement is just and reasonable."[21] Notwithstanding protests by NSTAR and others, HQ Energy states that the Commission found that there was substantial evidence to approve the FCM Settlement Agreement under the second *Trailblazer* approach. Thus, according to HQ Energy, the FCM Settlement Agreement may be applied to non-settling parties, including NSTAR.

18. Furthermore, HQ Energy clarifies that *Maine Commission* upheld the Commission's approval of the FCM Settlement Agreement, though the court carved out a narrow exception related to the *Mobile-Sierra* doctrine.[22] HQ Energy states that the D.C. Circuit Court of Appeals found that the doctrine's heightened "public interest" standard of review could not be applied to non-contracting parties challenging a contract. HQ Energy states that the court thus rejected the application of a *Mobile-Sierra* provision in the FCM Settlement Agreement to non-settling parties. According to HQ Energy, the court did not find, however, that settlements as a whole could no longer be applied to non-settling parties, which would have been a departure from the Supreme Court's decision in *Mobil Oil* and related precedent.

19. On June 27, 2008, NSTAR responded to HQ Energy's answer. NSTAR asserts that, contrary to HQ Energy's claims, NSTAR does not object to being bound to the terms of the FCM Settlement Agreement. Rather, NSTAR states that it objects to the taking of its HQ Capability Credits without due compensation. NSTAR avers that the Fifth Amendment of the U.S. Constitution provides that the government shall not take private property without due compensation. According to NSTAR, the issue in this case is not whether the Commission can apply the FCM Settlement Agreement to NSTAR but what is the appropriate compensation for the property taken by the government.

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[19] HQ Energy Answer at 2 (citing *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 314 (1974)).

[20] *See Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999).

[21] HQ Energy Answer at 2 (quoting *Trailblazer*, 85 FERC at 62,342).

[22] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

IV. Discussion

A. Procedural Matters

20. Rules 213(a)(2) and 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), 713(d)(1) (2008), prohibit an answer to a request for rehearing unless otherwise ordered by the decisional authority. We will accept the answers from HQ Energy and NSTAR because they have provided information that assisted us in our decision-making process.

B. Commission Determination

21. The Commission finds that NSTAR has complied in part with the directives of the April 29 Order. The Commission will accept NSTAR's proposed peak and off-peak tariff revisions, subject to an additional compliance filing. Upon further review, however, the Commission will grant in part NSTAR's request for rehearing and therefore will not accept NSTAR's proposed revisions to its Annual Embedded Transmission Expense, as discussed below.

1. Annual Embedded Transmission Expense

22. The Commission accepts NSTAR's explanation on rehearing that its current Annual Embedded Transmission Expense and Delivery Rate design will not lead to over-recovery. As NSTAR clarifies, multiplying the $2.665/kW-month rate by 298 megawatts/month, times 12 months, equals NSTAR's $9.5 million revenue requirement. Therefore, we will not accept the related tariff revisions NSTAR submitted in its May 29, 2008 compliance filing and instead will accept the originally proposed Annual Embedded Transmission Expense rates effective March 1, 2008.

2. Off-peak Revenues and the Determination of On-peak Rates

23. The Commission finds that, although NSTAR's May 29, 2008 proposed revisions to its peak and off-peak pricing tariff revisions would ensure that NSTAR does not over-recover its revenue requirement, these proposed revisions do not go far enough to ensure that transmission customers do not bear the risk of excess capacity on the Hydro Québec Tie. In its compliance filing NSTAR proposes to credit revenues collected from the off-peak service charge only to the extent that such revenues are in excess of the Annual Revenue Requirement. Instead, NSTAR should credit *all* revenues from off-peak service to the on-peak revenue requirement. This will ensure that NSTAR, rather than its transmission customers, appropriately bears the risk of under-utilization of the Hydro Québec Tie. Therefore, we direct NSTAR to modify its proposal by removing the phrase

"that resulted in collection of revenues in excess of the Annual Revenue Requirement," on Sheet Nos. 973 & 973-A, within 30 days of the date of this order.[23]

3. Request for Rehearing

24. In its rehearing request, NSTAR maintains that the Commission errs by concluding that NSTAR voluntarily surrendered the value of its HQ Capability Credits. NSTAR, however, does not provide any newly persuasive information or arguments concerning the relinquishment rate issues.

25. At the outset, NSTAR acknowledges that it is bound by the FCM Settlement Agreement. In its answer, NSTAR states that it "*does not* object to being bound to the terms of the Forward Capacity Market ('FCM') Settlement."[24] Moreover, "NSTAR recognize[d] the right of the Commission to approve contested settlements and to apply terms thereof to non-settling parties if certain conditions are met."[25] As we discussed in the April 29 Order, the Commission continues to

> recognize that under Schedule 20A NSTAR has the right to file to recover lost opportunity costs; however, we do not consider NSTAR's proposed relinquishment charge to be just and reasonable because that charge would nullify the concessions negotiated by all parties in FCM Settlement Agreement. NSTAR's proposal would, in effect, modify the FCM Settlement Agreement.[26]

Furthermore, the Commission reiterates that

> [t]he plain language of the FCM Settlement Agreement clearly implies a reduction in the financial value of those HQICCs reduced through netting. Contrary to their statements, NSTAR has not shown the "intent" of the settlement to be otherwise. In a broad and complex filing of the magnitude of the FCM Settlement Agreement which includes an intricate financial balance, the potential reduction of HQICCs was among the various negotiated trade-offs.

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[23] This is consistent with the crediting of all revenues from non-firm peak and off-peak rates in United Illuminating's Schedule 20A.

[24] NSTAR Answer at 2 (emphasis in original).

[25] *Id*.

[26] April 29 Order, 123 FERC ¶ 61,094 at P 38.

> Initiating compensation mid-stream in the transition period would negate considerable efforts and understandings of settling parties and we will not now approve terms that were not included in the FCM Settlement Agreement as negotiated.[27]

26. In the order accepting the FCM Settlement Agreement,[28] the Commission exercised its broad authority and discretion under Rule 602(h) of its regulations[29] to address contested settlement agreements.[30] Applying the *Trailblazer* approaches for evaluating contested settlement agreements,[31] the Commission found that the FCM Settlement Agreement was consistent with the public interest.[32] The Commission also found that the FCM Settlement Agreement provides necessary solutions to resolve deficiencies in New England's installed capacity market.[33] The Commission stated that the FCM Settlement Agreement incorporates the primary components of two alternatives proposed by state entities. The Commission concluded that the FCM Settlement Agreement resolves all of the outstanding issues in a difficult, contentious and lengthy matter.[34] Under *Trailblazer*'s second approach, the Commission found that the FCM Settlement Agreement produces an overall result that is just and reasonable.[35]

27. In *Maine Commission*, the court rejected the application of a *Mobile-Sierra* public interest standard in the FCM Settlement Agreement to a non-settling party who may later seek to challenge the reasonableness of a rate, term, or condition agreed to in the settlement agreement and approved by the Commission. NSTAR does not contest a rate, term, or condition agreed to in the settlement agreement and approved by the

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[27] *Id.*

[28] *Devon Power LLC*, 115 FERC ¶ 61,340, *reh'g denied*, 117 FERC ¶ 61,133 (2006).

[29] 18 C.F.R. § 385.602(h) (2008).

[30] *Devon Power*, 115 FERC ¶ 61,340 at P 58.

[31] *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999).

[32] *Devon Power*, 115 FERC ¶ 61,340 at P 62.

[33] *Id.* P 64.

[34] *Id.* P 66.

[35] *Id.* P 68-73.

Commission. Rather, NSTAR argues that the FCM Settlement Agreement does not prevent NSTAR from being compensated for lost value of its HQ Capability Credits. As quoted above, we agree that NSTAR has the right to file to recover lost opportunity costs. Further, in its answer NSTAR states that it does not object to being bound to the terms of the FCM Settlement Agreement. Accordingly, we find that the court's holding in *Maine Commission* is not applicable in this case.

28. The Commission continues to find the relinquishment charge to be inconsistent with the Commission approved FCM Settlement Agreement and FCM transition period rules,[36] because NSTAR's proposal effectively dismantles negotiated trade-offs in that settlement agreement. In addition, we find that NSTAR's proposal amounts to an over-reaching that would nullify the concessions negotiated in that settlement agreement.[37] With respect to a taking without compensation, we reiterate that under Schedule 20A NSTAR has the right to submit a proposal to recover lost opportunity costs,[38] but we note that NSTAR's proposal must be structured in a manner that is consistent with and does not undermine the FCM Settlement Agreement.

29. Accordingly, we again conclude that granting NSTAR's proposed relinquishment charge would nullify the concessions negotiated by all parties in FCM Settlement Agreement.

<u>The Commission orders</u>:

(A) NSTAR's revisions proposed in its May 29, 2008 compliance filing relating to its Annual Embedded Transmission Expense and Delivery Rate are hereby rejected, and NSTAR's originally proposed Annual Embedded Transmission Expense and Delivery Rate is hereby accepted, effective March 1, 2008, as discussed in the body of this order.

(B) NSTAR's proposed peak and off-peak pricing tariff revisions are hereby conditionally accepted, effective March 1, 2008, subject to a further compliance filing within 30 days of the date of this order.

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[36] We incorporate by reference the discussion in the April 29 Order, 123 FERC ¶ 61,094 at P 35.

[37] April 29 Order, 123 FERC ¶ 61,094 at P 38; *see id.* P 36-38.

[38] *Id.* P 38.

(C) NSTAR's request for rehearing is hereby denied in part and granted in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.