

111 FERC ¶ 61,333
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Northeast Utilities Service Company Docket Nos. ER03-1247-001
ER03-1247-002
ER03-1247-003
ER03-1247-004

ORDER AFFIRMING INITIAL DECISION AND DENYING REHEARING

(Issued June 1, 2005)

1. This order affirms an initial decision issued in this proceeding on December 10, 2004,¹ addressing a contract dispute involving the applicability of a Memorandum of Understanding (MOU) between Northeast Utilities Service Company, on behalf of its affiliated operating companies (Northeast),² and Unitil Power Corporation (Unitil), a transmission customer, to Northeast's superseding Open Access Transmission Tariff No. 10 (OATT or Tariff No. 10) filed under section 205 of the Federal Power Act. This order also denies a pending request for rehearing of the Commission's order, issued on October 22, 2003, that rejected a proposed indemnification provision (having accepted and suspended the rest of Northeast's OATT, to become effective on October 28, 2003, subject to refund).³ This order also accepts a related compliance filing on the indemnification provision. This order provides the parties with a clearer understanding of their responsibilities under the MOU and OATT.

I. Background

2. Northeast's affiliated operating companies own transmission facilities in Connecticut, Massachusetts, and New Hampshire. As relevant here, Unitil is a transmission customer of Northeast.

¹ *Northeast Utilities Service Co.*, 109 FERC ¶ 63,045 (2004) (ID).

² These affiliated operating companies are Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, Holyoke Power and Electric Company, and Holyoke Water Power Company.

³ *Northeast Utilities Service Co.*, 105 FERC ¶ 61,089 (2003).

3. On December 30, 1996, Northeast and Unitil Power Corp. entered into an MOU that transitioned their transmission arrangements from the pre-Order No. 888⁴ framework to a new NEPOOL [New England Power Pool] OATT.⁵ The first paragraph of the MOU requires Unitil “to pay the appropriate [regional network service (RNS)] charge to the RTG/ISO....” The second paragraph of MOU section 9, at issue in this proceeding, provides

Beginning at the conclusion of the five [changed to six] year transition period specified in the NEPOOL [New England Power Pool] Tariff [ended on February 28, 2003]⁶, or any successor agreement, *the Local Network Service (Tariff No. 8) [now Tariff No. 10] agreement will be amended such that Unitil only pays NUSCO [Northeast] for non-pool transmission facilities or direct assignment charges as appropriate.*

4. On August 26, 2003, Northeast filed proposed Tariff No. 10, its first transmission rate filing after the end of the transition period. Northeast asserted that its proposal was similar to the formula used in the NEPOOL OATT and to the rate methodology approved in *Boston Edison Company*.⁷ Unitil filed an intervention and limited protest stating that, while it did not necessarily oppose the formula rate, estimated transmission revenue requirement methodology, or new capital projects, the formula rate filing lacked sufficient information on the operation of the true-up of estimated and actual transmission costs.

5. Because of the apparent inability of the protesting parties to reach a settlement, a Presiding Judge was designated on February 6, 2004. At the prehearing conference held on

⁴ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, *order on reh’g*, Order No. 888-A, FERC Stats & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁵ On January 7, 1997, Northeast filed the MOU in Docket No. ER97-1134-000, along with the LNS service agreement and other contractual revisions. On March 3, 1997, the MOU was accepted by unreported letter order issued pursuant to delegated authority.

⁶ The bracketed date corrects the Presiding Judge’s reference to February 28, 1999, as the end of the transition period.

⁷ 91 FERC ¶ 61,198 (2000).

February 24, 2004, Unitil identified for the first time as an issue for hearing, *i.e.*, whether Northeast's filing violated MOU section 9. On April 23, 2004, Unitil filed direct testimony, which Northeast moved to strike, arguing that aspects of the filing violated the MOU.⁸ The Presiding Judge issued an order on June 10, 2004, denying the motion to strike, affirmed by order issued on August 5, 2004. The Presiding Judge concluded, over Northeast's objections, that while the Commission's hearing order did not expressly set the MOU issue for hearing, it would be administratively more efficient to include the MOU issue in the hearing than to deal with a future Unitil complaint on the same issue. On August 16, 2004, Northeast and Unitil stipulated that the hearing would include the issues of whether Tariff No. 10 violated the MOU and the effective date of any potential relief that the Commission ultimately might grant Unitil based on the MOU.

6. On September 16, 2004, the Commission issued an order approving an uncontested partial settlement that incorporates the formula rate (tracker) methodology originally filed in Tariff No. 10 and accepted by the Commission.⁹ That settlement's preamble reserved for future decision the issues addressed in this order concerning MOU section 9 and appropriate tariff language for customer indemnification of Northeast.¹⁰

7. As a member of NEPOOL, Northeast's costs of its transmission facilities are to be recovered in accordance with the NEPOOL OATT which governs RNS over pool transmission facilities (PTF)¹¹ and requires each transmission owner to maintain its own

⁸ Exh. UNI-1.

⁹ The settling parties are Northeast, Connecticut Department of Public Utility Control, New Hampshire Public Utilities Commission, and the New Hampshire Office of Consumer Advocate. Unitil, while not a settling party, did not oppose the settlement. *Northeast Utilities Service Co.*, 108 FERC ¶ 61,240 (2004).

¹⁰ The second sentence of the settlement order's first footnote stated that "the MOU-related issue remains to be resolved in the request for rehearing [concerning indemnification] pending in Docket No. ER03-1247-002." Unitil filed a motion for clarification or rehearing of that footnote, which Northeast answered, asking us to clarify that the MOU issue was a hearing issue before the Presiding Judge and was not pending rehearing of the Commission's hearing order. The requested clarification is granted.

¹¹ "PTF" is defined in section 15.1 of the Restated NEPOOL Agreement (RNA) as "transmission facilities owned by participants rated 69 kV or above required to allow energy from significant power sources to move freely on the New England transmission network." PTF also includes any other transmission facilities which the Reliability Committee determines, in accordance with criteria approved by the Participants Committee and subject to review by ISO-New England, Inc. (ISO-NE), should be included in PTF. The costs of

(Continued)

OATT for local network service (LNS) over non-PTF facilities.¹² Thus, Northeast recovers its transmission revenue requirement in two parts: (1) PTF costs pursuant to the RNS rate and (2) non-PTF costs at the LNS rate.

8. As to the RNS rate, under the NEPOOL OATT, each June 1, Unital (and Northeast's other open access transmission customers) pays RTO-NE¹³ revised RNS formula rates that recover the prior year's actual PTF costs based on the prior year's average monthly network load. RTO-NE returns a load ratio share of RNS revenues to Northeast, which, in turn, provides its LNS customers under Tariff No. 10 with a RNS revenue credit against Northeast's total transmission revenue requirement.¹⁴

9. Tariff No. 10 recovers from all LNS customers the transmission revenue requirement remaining after RNS revenue credits are applied. The revenue requirement includes an estimate of Northeast's current year average plant additions.¹⁵ The total estimated transmission revenue requirements in Tariff No.10 are revised each June 1 and are subject to annual true-ups (with surcharges or refunds at the Commission's specified rate of interest). The true-ups are to be completed not later than the next June 1 by which time the current year's actual costs and revenues would be available. Any PTF plant additions included in the current year's additions will be included in the following year's RNS rate and the resulting revenues, when received, will be credited against Tariff No. 10's total transmission revenue requirement. Thus, the customer will ultimately pay PTF costs once, *i.e.*, in the

PTF facilities are recovered from all NEPOOL members, based on the understanding that they serve all NEPOOL members. *See New England Power Pool*, 102 FERC ¶ 61,112 at P 7 (2003).

¹² Transmission facilities rated 69 kV and above that are needed to serve local load or provide no parallel capability to the grid are classified as non-PTF.

¹³ The Commission conditionally approved the establishment of RTO-New England (RTO-NE), as successor to ISO-NE. *ISO New England Inc.*, 106 FERC ¶ 61,280, *reh'g granted in part and partial settlement accepted*, 109 FERC ¶ 61,147 (2004).

¹⁴ The settlement's Attachment H, Methodology for Annual Transmission Revenue Requirements for Transmission Service (other than Category B), is quoted in the Appendix of this order.

¹⁵ Tariff No.10 also provides for the recovery of costs for PTF facilities designated for localized cost recovery (so-called Category B costs), but no Category B costs are included in Northeast's Tariff No. 10 rates.

RNS rate.

10. At the hearing held on August 24, 2004, the parties agreed that it was their presumption at the time the MOU was negotiated that Unitil would not pay PTF costs under a Northeast OATT once the NEPOOL transition period ended. The parties disagreed, however, whether MOU section 9: (1) was a binding, preexisting agreement between the parties; (2) applied to the recovery of or rate design for PTF costs under Tariff No. 10; (3) prohibited Northeast from including current, estimated PTF costs in the transmission revenue requirement used to calculate the Tariff 10 formula rates; and (4) resulted in Unitil's ultimately paying PTF costs under Tariff 10 in addition to LNS rates.

II. Initial Decision

11. The Presiding Judge agreed with Unitil that MOU section 9 imposed binding obligations on Northeast and Unitil.¹⁶ The Presiding Judge stated that the parties, in agreeing to MOU section 9, intended both to avoid duplicative PTF charges to Unitil under both the NEPOOL Tariff and Northeast's OATT¹⁷ and to defer resolution of the method, *i.e.*, rolled-in or direct assignment, for collecting LNS charges.¹⁸ The Presiding Judge found that MOU section 9 did not address the PTF pricing methodology or the inclusion (or not) of PTF costs in LNS tariff charges.¹⁹ The Presiding Judge agreed with Northeast's reading that Tariff No. 10, which provides for the inclusion of PTF costs in Northeast's transmission revenue requirement, "is not facially inconsistent with MOU Section 9 even if Section 9 is interpreted to constrain [Northeast's] non-PTF pricing methodology."²⁰ The Presiding Judge concluded that, on the record presented, Unitil did not ultimately "pay" PTF costs to Northeast under Tariff No. 10 so as to result in duplicative PTF charges.²¹ Specifically, the Presiding Judge agreed with Northeast that the Tariff No. 10 rates, through corresponding

revenue credits, were designed to fully offset any PTF costs included in the total

¹⁶ ID at P 30-35.

¹⁷ ID at P 26, 46.

¹⁸ ID at P 42.

¹⁹ ID at P 38.

²⁰ ID at P 36.

²¹ ID at P 36-49, 55.

transmission revenue requirement used to calculate those rates.²²

12. The Presiding Judge found that MOU section 9 did not entitle Unitil to an amendment to the LNS service agreement or refunds from the effective date of the rates because Tariff No. 10 did not violate MOU section 9. The Presiding Judge stated that the Tariff No. 10 filing was within Northeast's section 205 filing rights. Accordingly, the Presiding Judge concluded that Unitil is not entitled to any relief based on the contention that MOU section 9 prohibits Northeast from including PTF costs in Tariff No. 10.²³

13. Northeast and Unitil both filed Briefs on Exceptions and Briefs Opposing Exceptions. Unitil continues to assert that MOU section 9 bars Northeast's Tariff No. 10 filing and that Unitil is entitled to relief. Northeast states, however, that if the Commission affirms the initial decision's conclusions that MOU section 9 does not bar the filing of Tariff No. 10 and that Unitil is not entitled to any relief, the Commission need not address its exceptions.²⁴

III. Discussion

²² ID at P 46.

²³ ID at P 36-43.

²⁴ Northeast argued that the Presiding Judge erred in finding: (1) that MOU section 9 creates binding obligations; (2) in his June 10, 2004 order that Unitil's direct testimony on the MOU issue should be admitted into the hearing record, denying Northeast's motion to strike; (3) that Unitil is not required to file a future section 206 complaint to be granted MOU-related relief; (4) that the Presiding Judge's June 10, 2004 order was a proxy for a section 206 complaint filing; and (5) that refunds should be granted from the refund effective date based on the proxy complaint date.

Also mooted by affirmance of the ID would be Unitil's exception that the Presiding Judge erred in using the June 10, 2004 order as a proxy for a section 206 complaint filing (instead of using October 28, 2003, the effective date of Tariff No. 10, or February 24, 2004, the date of the prehearing conference).

A. MOU Section 9

14. The Presiding Judge found that Tariff No. 10 did not violate the MOU.²⁵ Unitil asserts, however, that the Presiding Judge's decision misreads MOU section 9 and, therefore, was erroneous. We disagree. We find that the Presiding Judge properly read MOU section 9, for the reasons he provides in the ID.

15. As the Presiding Judge recognized, there is no dispute that PTF costs are part of Northeast's total transmission revenue requirement in Tariff No. 10.²⁶ But, as Unitil contends, does that circumstance alone, ignoring that this tracker operates in tandem with the crediting of RNS revenues, violate section 9 of the MOU and thus bar the filing? We think not and affirm the ID in this regard. Unitil elevates the form of Tariff No. 10's tracker over its effect. The tracker and the revenue crediting procedures operate together to avoid a double recovery of PTF charges.

16. The Presiding Judge concluded that Tariff No. 10 does not require Unitil to ultimately pay for other than LNS charges. Unitil, however, contends that the RNS revenue credit may not fully offset all PTF costs collected in Tariff No. 10 and that payment of certain PTF costs, *i.e.*, Category B PTF costs, would violate the MOU. We agree with the Presiding Judge's conclusion that the revenue credits should offset all PTF costs collected under Tariff No. 10's formula rate, so that Unitil does not pay duplicative PTF costs.²⁷ As the Presiding Judge observed, any residual PTF costs are offset when the RNS revenue credit takes them into account in the following year.²⁸ As there are no Category B PTF costs included in Northwest's Tariff No. 10, it is premature to address whether in a future rate proceeding the MOU would preclude such costs. Accordingly, as further discussed below in response to Northeast's specific exceptions, we find that Northeast's filing is not inconsistent with the MOU because Unitil does not ultimately pay PTF costs under Tariff No. 10. Since the filing of Tariff No. 10 thus was not prohibited by the MOU, Northeast was entitled to file Tariff No. 10. Unitil is not entitled to an amendment of the LNS service agreement to prohibit PTF charges, rejection of the Tariff No. 10 filing, or refunds. Unitil's exceptions are denied.

17. The Presiding Judge also determined that there was no record support for Unitil's

²⁵ ID at P 36-47.

²⁶ ID at P 46.

²⁷ ID at P 44-47.

²⁸ ID at 47.

hypothetical scenario that a loss of current load could result in Unitil's payment of PTF.²⁹ Unitil nonetheless contends, relying on Northeast's witness,³⁰ that Tariff No. 10 would result in the payment of PTF should RNS revenues (and credits) decline due to a reduction in load, leaving an RNS revenue shortfall that cannot be made-up since there is no NEPOOL RNS true-up mechanism.

18. If actual current load transmitted is less than design load, RTO-NE and, in turn, Northeast will underrecover PTF costs. However, the variation between the load used in designing rates (i.e., billing determinants) and the actual load can work both ways. As Northeast explains, if actual current load is greater than load used to design the RNS rate, Northeast will overrecover the prior year's PTF costs, and customers would benefit from receiving increased RNS revenue credits that would offset some of the current year's RNS costs collected under Tariff No. 10.³¹ We believe this variance (positive or negative) is typical of any rates that use projected billing determinants and is not one for which the Commission requires correction. Unitil's exception is therefore denied.

19. The Presiding Judge also found immaterial the time-value of Unitil's money "advanced" under Tariff No. 10 for the current year's PTF costs.³² Unitil contends, however, that it pays for PTF because NEPOOL procedures, as explained by Northeast's witness,³³ do not include a true-up reconciliation mechanism with interest on the RNS revenue credit, which it may not receive for over a year. But, as the Presiding Judge properly noted, the time-value argument works both ways – with an equal likelihood that in other years in a declining cost environment Unitil will benefit because the RNS revenue credit will more than offset the current year's PTF costs collected under Tariff No. 10.³⁴ Even if the Presiding Judge's argument is not considered, there is no mention of time value either in the MOU or in Tariff 10. This issue is beyond the scope of this proceeding, and Unitil's exception is denied. This finding is without prejudice to Unitil's right to seek a change in Tariff 10 in a future proceeding.

20. Unitil also asserts that MOU section 9's permitting only the collection of non-PTF or

²⁹ ID at P 47 n.18.

³⁰ Tr. 91 (lines 17-25) and 92 (lines 1-3).

³¹ Northeast's Brief Opposing Exceptions at 17.

³² ID at P 47 n.18.

³³ Tr. 91 (line 13-14); Exh. NU-15.

³⁴ ID at P 47 n.18, referencing Exh. NU-15.

direct assignment costs is unalterable. We disagree. MOU section 9 does not restrict Northeast's right, stated in Tariff No. 10 (section 9), "to unilaterally make application to the Commission for a change in rates ... under Section 205 of the Federal Power Act...." Also, Section 2 of Unitil's 1997 Network Integration Transmission Service (LNS) service agreement required Northeast to provide LNS under Tariff No. 8, "as [it] may be revised from time to time." Similarly, section 4 of the service agreement requires Unitil "to take and pay for Network Integration Transmission Service [LNS] in accordance with the provisions of the Tariff and this Service Agreement."

21. As found, above, Tariff No. 10 does not violate the MOU or change the nature of the service provided under the LNS service agreement. Tariff No. 10 also does not result in double recovery of PTF costs. We reject Unitil's assertion that the MOU somehow exempts it from PTF charges. Moreover, sections 2 and 4 of the LNS service agreement incorporate Tariff No. 10 as the latest revision to Northeast's LNS OATT, and under section 4 Unitil continues to be responsible to "take and pay" for LNS service. Tariff No. 10's rate change is consistent with the service agreement. This exception is denied.

B. Presiding Judge's Authority to Address MOU Section 9

22. In orders issued on June 10 and August 5, 2004, denying Northeast's motion to strike Unitil's testimony, the Presiding Judge included the MOU section 9 issue in the hearing in the interest of administrative efficiency (even though he stated that the MOU section 9 issue had not been expressly set for hearing).³⁵ The Presiding Judge asks the Commission to confirm his authority to have included the MOU issue in the hearing.³⁶

23. The hearing order did not expressly identify the MOU section 9 issue as an issue before the Commission, lacking any protest on that ground. The Presiding Judge nonetheless reasonably exercised his discretion as the designated presiding officer to consider that issue for reasons of administrative efficiency. Also, the issue is reasonably connected to other issues raised. The Presiding Judge's authority exercised in his June 10 and August 5 orders to consider Unitil's testimony on the MOU section 9 issue is confirmed.

C. OATT Indemnification Provision

³⁵ ID at P 6-11.

³⁶ ID at P 27, 28, relying on 18 C.F.R. §§ 385.504(b), 385.702(a) (2004).

24. Section 10.2 of Northeast's predecessor OATT (Tariff No. 9) provided that the transmission customer agrees to indemnify Northeast for third party claims for injury, death or property damage "arising out of or resulting from the NU Companies' performance of its obligations under this Tariff on behalf of the Transmission Customer *except in cases of negligence* or intentional wrongdoing by the NU Companies." Original Sheet No. 31 of Tariff No. 10 proposed to revise the tariff to except Northeast's *gross* negligence from the customer's obligation to indemnify, effectively expanding the scope of the indemnification obligation to include ordinary negligence. Relying on Commission precedent rejecting a gross negligence exception,³⁷ the Commission in Ordering Paragraph (A) of its hearing order rejected the proposed gross negligence exception and required Northeast to refile section 10.2 without the word "gross."³⁸

25. On November 12, 2003, Northeast filed a compliance filing in Docket No. ER03-1247-001 that deleted the "gross" negligence exception to a customer's indemnification obligation and reserved its right to seek rehearing on that issue. On November 21, 2003, Northeast filed for rehearing, asserting that the Commission's White Paper³⁹ allowing the application of a gross negligence exception should be applied to indemnification against third party claims in the post-Order No. 888 environment as well as to liability against customer claims. Northeast contends that the proper allocation of risks makes appropriate customer indemnity for Northeast's ordinary negligence. Northeast also contends that a gross negligence exception should apply for transmission service because, in *Standardizing Generator Interconnection Agreements and Procedures*,⁴⁰ the Commission applied that standard to interconnection customers and the risks associated with transmission service are greater than those associated with interconnection service.

26. The Commission's policy for transmission customer indemnification of a

³⁷ See, e.g., *Cambridge Electric Light Co.*, 95 FERC ¶ 61,339 at 62,279-80 (2001), *reh'g granted in part on other grounds*, 96 FERC 61,205 (2001); *Central Hudson Gas & Electric Corp.*, 86 FERC ¶ 61,062 at 61,210 (1999), *reh'g granted in part on other grounds and compliance filing conditionally accepted*, 88 FERC ¶ 61,138 at 61,384 (1999).

³⁸ *Northeast Utilities Service Co.*, 105 FERC ¶ 61,089 at P 26, Ordering Paragraph (A) (2005).

³⁹ *Remedying Undue Discrimination through Open Access Transmission Service and Standard Market Design, Notice of White Paper* (Docket No. RM01-12-000 Apr. 28, 2003).

⁴⁰ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 636 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at p. 31,162 (2004) (LGIA Article 18.1 with gross negligence exception).

transmission owner for third party claims was stated in Order No. 888 and reaffirmed in Order 888-A. In Order No. 888, the Commission stated

We have limited the indemnification portion of the provision so that it is now only the transmission customer who indemnifies the transmission provider from the claims of third parties. The customer is taking service from the transmission provider and may appropriately be asked to bear the risks of third-party suits arising from the provision of service to the customer under the tariff. We find that this new indemnification provision would be too strict if it required customers to indemnify transmission providers even in cases where the transmission provider is negligent. [citation omitted] Accordingly, the revised provision provides that the customer will not be required to indemnify the transmission provider in the case of negligence or intentional wrongdoing by the transmission provider.⁴¹

27. A broader customer indemnification obligation that would include ordinary negligence would not give any incentive to the transmission provider to avoid negligent actions. Northeast points us to no specific case involving an indemnity between a transmission owner and its customer in which the Commission has allowed a gross negligence exception. Indeed, the precedent, cited *supra* footnote 37, is consistent with the approach taken in Order No. 888.

28. In Order No. 2003, the Commission, however, did depart from the policy of Order No. 888 in the case of interconnection service and allowed a gross negligence exception in *pro forma* LGIA section 18.1 in order to further limit the provider's liability. But, in doing so, in Order No. 2003, the Commission explained that interconnection was different and more risky than other transmission, warranting a different standard, and also use of the transmission standard when dealing with interconnections might inappropriately increase interconnection costs again warranting a different standard.⁴² In addition, in Order No. 2003, the indemnity provision is expressly bilateral. Unlike Order No. 888, in which the transmission customer indemnifies the transmission provider, in Order No. 2003 the interconnecting generator and the transmission provider each indemnifies the other from all damages to third parties arising under the LGIA from conduct on behalf of the indemnifying party, except in cases of gross negligence. Given that, in contrast to the *pro forma* open access transmission tariff, the indemnification provision in the *pro forma* LGIA is bilateral, it is reasonable permit a gross negligence standard in the case of an interconnection.

⁴¹ Order No. 888, FERC Stats. & Regs., ¶ 31,036 at 31,765.

⁴² Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 636 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at p. 31,162.

However, for the reasons set out above, we decline to approve a gross negligence standard as a part of Northeast's open access transmission tariff.

29. Northeast also asserts that a gross negligence exception is appropriate because Northeast should have the same level of protection from litigation in its LNS OATT with its customers that the RTO and its transmission owners have in their collective RNS OATT. In our orders approving RTO status for New England, however, the Commission adopted the transmission owners' cross-indemnification proposal in their Transmission Operating Agreement, that the transmission owners and RTO-NE would be responsible for all third party liabilities attributable to their own acts or omissions, including ordinary negligence.⁴³ Under the tariff language accepted in that proceeding, Northeast, as a participating transmission owner, agreed to indemnify and hold harmless RTO-NE from an indemnifiable loss due to Northeast's "acts or omissions that give rise to such Indemnifiable Loss."⁴⁴ The quoted language would include ordinary negligence.

30. Northeast's request for rehearing is denied, and the pending compliance filing is accepted.

The Commission orders:

(A) The initial decision is hereby affirmed, as discussed in the body of this order.

(B) Northeast's request for rehearing of the hearing order, issued October 22, 2003, is hereby denied, as discussed in the body of this order.

(C) Northeast's compliance filing concerning revised OATT indemnification language is hereby accepted, as discussed in the body of this order.

(D) Unitil's request for clarification of the order approving uncontested partial

⁴³ *ISO New England, Inc.*, 106 FERC ¶ 61,280 at P 225-30, *reh'g denied in relevant part*, 109 FERC ¶ 61,147 at P 188-91 (2004).

⁴⁴ Transmission Operating Agreement Article IX (section 9.01(a)).

settlement, issued September 16, 2004, is granted, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.

Northeast's Attachment H*Annual Transmission Revenue Requirements for Transmission ServiceAttachment H Methodology

This formula sets forth the method that the NU Companies' will use to determine their annual Total Transmission Revenue Requirements. The Transmission Revenue Requirements reflect the NU Companies' total cost to own, operate and maintain the transmission facilities used for providing Open Access Transmission Service to transmission customers under this Tariff. The Transmission Revenue Requirements will be an annual formula rate calculation, effective for an initial term commencing on the effective date established by FERC and ending on May 31 of the following year. The calculation will be based on the previous calendar year's FERC Form 1 data, with an estimate of the NU Companies' current year average plant additions. Plant additions will be multiplied by a fixed charge carrying cost and updated thereafter each June 1 based on actual costs from the Service Year. The true-up information will be based on actual data, in lieu of allocated data if specifically identified in the FERC Form 1. For a capital addition whose cost exceeds \$20 million, the NU companies will make rate base adjustments to estimates and in the true-up process to represent the estimated and actual in-service dates for the capital addition. Specifically, the NU companies will adjust for transmission plant, accumulated depreciation and accumulated deferred taxes.

Tariff No. 10's First Revised (Settlement) Sheet No. 162 (Category A rolled-in costs).