

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Northeast Utilities Service Company

Docket No. ER03-1247-000

ORDER ACCEPTING AND SUSPENDING REVISED OPEN ACCESS
TRANSMISSION TARIFF, AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued October 22, 2003)

1. On August 26, 2003, Northeast Utilities Service Company, on behalf of its affiliates, Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Power Company, Holyoke Water Power Company, and Public Service Company of New Hampshire (collectively, NU or NU Companies), filed a superseding Open Access Transmission Tariff (OATT)¹ to include a \$20.8 million (or 115 percent) rate increase and proposed changes in non-rate terms and conditions. For the reasons discussed below, the Commission will accept, with the exception of the proposed gross negligence indemnification language, and suspend the proposed tariff sheet, make it effective subject to refund, and establish hearing and settlement judge procedures. The Commission's action provides greater certainty of cost recovery of capital expenditures to improve the transmission infrastructure.

I. Rate Filing

Formula Rate

2. NU Companies are proposing a formula rate methodology to replace a stated rate fixed by settlement. The formula rate is designed to ensure recovery of NU's entire transmission revenue requirement, including 80 miles of 345 kV transmission lines for Southwest Connecticut expected to be placed in service in 2004. As members of the New England Power Pool (NEPOOL), transmission service over the regional high voltage lines (pool transmission facilities or PTF) owned by NU is provided pursuant to the NEPOOL OATT that is administered by ISO New England (ISO-NE). The rates for this service (Regional Network Service or RNS) are calculated annually using a formula rate

¹ Northeast Utilities Companies, FERC Electric Tariff No. 10, superseding Tariff No. 9.

for all PTF facilities in New England. Each transmission owner also maintains a Local Network Service (LNS) OATT to recover the costs not recovered through the RNS, particularly the cost of low voltage or radial lines (non-PTF) that are not recovered under the rate for RNS.

3. For rate design purposes, the costs recovered through LNS are divided into two categories. The first category of costs is the NU Companies' total transmission costs that are not recovered through other revenue sources, such as revenues received from NEPOOL for RNS. These costs, referred to as Category A costs, will be recovered from all customers currently receiving or eligible for LNS service under NU Companies' current LNS OATT, exclusive of customers directly connected to PTF. The second category of costs, referred to as Category B costs, is any PTF costs excluded from the regional NEPOOL OATT revenue requirement calculation on the grounds that such costs should not be socialized throughout New England but rather should be treated as localized costs.² Rather than recovering these costs from all RNS customers in NEPOOL or from NU's LNS customers, these localized costs will only be recovered from all load connected to transmission system of the NU company located in the state or area requiring such expenditures. This would constitute a change from NU's current practice of charging the same LNS rate to all of its customers. Before recovering any of these charges, the NU Companies would submit a compliance filing to include service agreements for all customers subject to these Category B charges.

4. To calculate costs that are initially billed to customers, the formula uses historic FERC Form 1 data as the base. Incremental revenue requirements associated with new capital additions that are expected to be in place during the period the rates would be in effect would be added to that base. NU Companies propose to calculate the estimated incremental revenue requirement by multiplying the estimated average capital additions by a carrying cost factor. The resulting revenue requirement would be used for billing purposes for the twelve month period beginning June 1 of each year. After the end of each calendar year, the NU Companies would calculate the Transmission Revenue Requirement for that year. From this amount, the NU companies will subtract revenues that the NU companies received from other sources. As a true-up, the actual costs, and any difference would be refunded or billed to customers taking service during the year.

5. The NU Companies propose to carry over to the formula rate the 11.75 percent rate of return on equity currently in effect in the stated rate. The NU Companies explain that the formula is similar to the formula in NEPOOL's OATT and one that the

² In Docket No. ER03-1141-000, NEPOOL and ISO-NE proposed that the costs of certain upgrades should not receive regional cost support. This would include the higher cost of burying lines underground required by the state siting process.

Commission approved for Boston Edison Company.³ However, NU advises that their formula rate is different, in one aspect. NU's formula rate would allow for recovery of public education and outreach expenses incurred as part of the extensive Connecticut transmission siting process.⁴ NU Companies request that the filing be made effective on October 27, 2003.

Proposed Changes to the Non-Rate Terms and Conditions

6. NU Companies propose a number of changes to the non-rate terms and conditions to reflect the current state of the New England power market and make other changes. For example, references to NEPOOL Market Rule No. 1 have been added to reflect that the adoption of Standard Market Design rules in New England in March 2003.⁵ NU has also made several changes to the billing procedures in order to accommodate the new formula rate. For example, Section 7.3 has been modified to limit both parties ability to challenge bills after more than two years from the issue date of such bills, and Section 7.4 has been added to include customer audit provisions.

7. In light of generator-owner bankruptcies reported over the last two years, Section 11 has been revised to clarify and strengthen the NU Companies' creditworthiness requirements, requiring an unconditional and irrevocable letter of credit from an institution rated "A" or better by S&P or "A3" or better by Moody's as security.

8. NU Companies also propose various changes in non-rate terms and conditions to reflect current Commission policies. NU Companies contend that the following changes are consistent with or superior to the Commission's pro forma tariff:

(A) Section 10.2 has been modified to reflect a change in Commission policy adopted in the Commission's Wholesale Power Market Platform White Paper, allowing the application of the gross negligence standard to transmission providers for indemnification purposes;

(B) Section 13.7 has been modified to conform to the penalty rates of other New England transmission owners for exceeding reserved capacity (200 percent of the standard rate); and

³Citing Boston Edison Company, 91 FERC ¶ 61,198 (2000) (BECO Methodology).

⁴ NU states that this would not include any lobbying expenses.

⁵New England Power Pool and ISO New England, Inc., 100 FERC ¶ 61,287, order on reh'g, 101 FERC ¶ 61,334 (2002), order on reh'g, 103 FERC ¶ 61,304 (2003) (NEPOOL).

(C) Section 17.3 has been modified to require a three month deposit for reserving capacity for firm point-to-point service to be consistent with the requirements of the NEPOOL OATT.

II. Notice of Filing, Interventions and Protests.

9. Notice of NU Companies' filing was published in the Federal Register, 68 Fed. Reg. 53,154 (2003), with protests and interventions due on or before September 16, 2003.

10. On September 16, 2003, New Hampshire Electric Cooperative, Inc. filed a motion to intervene, raising no substantive issues. Also on September 16, 2003, motions to intervene and protests or comments were filed by the Attorney General for the State of Connecticut (CTAG), Connecticut Industrial Energy Consumers (CIEC), Connecticut Municipal Electric Energy Cooperative (CMEEC), the New Hampshire Public Utilities Commission (NHPUC), Massachusetts Municipal Wholesale Electric Company (MMWEC), Unitol Power Corp. and Unitol Energy Systems, Inc. (collectively, Unitol Companies), and the Western Massachusetts Industrial Customers Group (WMICG). On September 17, 2003, the Connecticut Department of Public Utility Control (CT DPUC) filed a motion to intervene out of time and protest. On September 30, 2003, the New Hampshire Office of Consumer Advocate (NHOCA) filed a motion to intervene out of time and statement of position.

11. The majority of protestors protest NU Companies use of a formula rate that allows an automatic flow-through of future projected costs without the review of prudence of the costs (such as regional costs rejected by ISO-NE) or reasonableness of the estimates. They argue that approval of the formula rate is the same as writing NU Companies a blank check for transmission expenditures, without Commission review. The NHPUC contends that NU's filing fails to fulfill the just and reasonable standard required by Section 205 of the Federal Power Act.⁶ MMWEC argues that construction costs to relieve congestion in Connecticut are no reason to initiate a formula rate, because the Commission has already determined that these costs will be collected through the NEPOOL OATT.⁷

12. CIEC contends that approval of NU Companies' transmission cost allocation proposal would represent an "end run" around the NEPOOL stakeholder process, which resulted in the NEPOOL Participant Committee's transmission cost allocation proposal (TCA Proposal) that is currently pending before the Commission in Docket No. ER03-1141-000, in disregard of the will of the majority of NEPOOL participants.

⁶ 16 U.S.C. § 824d (2000).

⁷ Citing NEPOOL, 101 FERC ¶ 61,344 at P 36 (2002).

13. All protestors complain that NU Companies' existing 11.75 percent return on common equity is too high because NU Companies' risks on their transmission assets have gone down since 1996. For example, the CTAG claims that transmission operations under a Commission approved regional OATT guarantees recovery of the investment from load serving entities. Other protestors argue that the proposed formula methodology reduces NU's risks and they cite to alleged new, low-risk provisions in Tariff No. 10. Protestors also contend that the discounted cash flow (DCF) analysis supporting NU Companies claimed return is flawed, particularly their selected group of proxy companies. To support their claim that NU's existing 11.75 percent return is excessive, several protestors cite to the Commission's recent acceptance of a 10.88 percent return for the generating assets operated by both NRG, Inc. and PPL in Connecticut.⁸

14. The NHPUC and WMICG argue that infrastructure costs for southwestern Connecticut, including education and outreach costs, and other non-PTF transmission costs should be charged only to those customers who benefit from such facilities, as opposed to an alleged misallocation of these costs to all LNS customers.

15. CEIC contends that NU's formula rate differs from the formula rate that was approved for Boston Edison Company. CEIC contends that NU's \$20.8 million rate increase is greater than the rate increase approved for Boston Edison and that it also requires NU to file full Period I and Period II data.⁹ In addition, CEIC notes that NU failed to address whether the proposed formula considers the terms of the 1996 settlement.

16. The CT DPUC and CTAG protest NU Companies' request to recover costs for explaining reliability benefits and cost savings features of their construction proposal through public information sessions and educational outreach programs. The CT DPUC contends that public ad campaigns designed to get local residents to support a project and lobbying efforts to get political support should not be recoverable. The CTAG opposes their recovery because they are not required by the Connecticut siting process.

17. The CMEEC complains that the formula relies on selective data (projected capital additions and depreciation) but does not provide for a proper matching of costs, loads and revenues.¹⁰

⁸ See Docket No. ER03-563-002.

⁹ Citing 18 C.F.R. § 35.13(d) (1), (2) (2003).

¹⁰ Citing *Southwestern Public Service Company v. FERC*, 952 F.2d 555 (D.C. Cir. 1992).

18. The CMEEC also protests various aspects of NU Companies' proposed billing and auditing procedures. In specific, CMEEC complains that twenty four months is too short a period for determining errors or the pass-through of improper costs.¹¹ CMEEC also complains that the limited amount of time that records are kept limits customer access to records for auditing purposes.

19. Unutil Companies protest the filing to the extent that it lacks sufficient information to determine the impact of the changes on their own transmission charges, including monthly statements showing how the estimated and actual costs compare and the status of capital additions. Unutil Companies complain that NU's OATT fails to clarify that any refunds resulting from the annual true-up must include interest pursuant to the Commission's regulations.¹² Unutil Companies also request that the Commission establish a technical conference.

20. The NHPUC contends that NU Companies have not supported their proposed new "gross negligence" limitation on liabilities for transmission failures caused by their negligence.

Answer

21. On October 3, 2003, NU filed an answer to the protests. NU agrees that interest pursuant to the Commission's regulations should apply to any over-collections under the formula rate and agrees to include a provision in its tariff to this end. However, NU urges the Commission to reject the other arguments presented by the intervenors. In the event that the Commission determines that an evidentiary hearing is required, NU requests that it be limited in scope to rate of return and any specifically identified issue raised by the intervenors that the Commission determines involves a material issue of fact and where they proffered evidence that it warrants a hearing. In addition, with respect to the proposed "gross negligence" standard reflected in the White Paper, NU Companies state that "transmission owners that belong to ISOs" should not be liable for any damages arising out of ordinary negligence, and that NU Companies' have "reflected that approach in their [proposed] Tariff."

¹¹ Citing Florida Municipal Power Agency v. Florida Power and Light Company, 74 FERC ¶ 61,006 (1996).

¹² 18 C.F.R. § 35.19a (2003).

III. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene make the entities that filed them parties to this proceeding. We will grant the requests for late intervention of CT DPUC and NHOCA, given their interests, the early stage of the proceeding, and because intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹³ prohibits the filing of answers to protests unless otherwise permitted by the decisional authority. We find good cause in this proceeding to allow NU Companies answer because it provides information that aids us in our understanding and resolution of the issues.

B. Discussion

23. We find that use of a formula rate for transmission service is consistent with other regional rates in New England and will allow NU Companies greater certainty for cost recovery of capital expenditures to improve the transmission infrastructure. Moreover, the estimates included in the formula are subject to an annual true-up to reflect actual costs and to customer audit. We also find that NU Companies' Period I and Period II statements, as filed, substantially complies with our filing requirements.

24. Separately, the Commission has previously allowed the costs of a defined set of upgrades to be spread, in certain circumstances, among customers throughout New England. However, this assignment of costs may not extend to all project costs. In this regard, Tariff No. 10 complements the NEPOOL OATT because it provides for the cost recovery of regional transmission facilities that ISO-NE determines that the costs thereof should be recovered locally (Category B costs).¹⁴ NU nevertheless recognizes that the Category B cost recovery provisions are subject to the outcome of the Transmission Cost Allocation (TCA) proposal filed in Docket No. ER03-1141-000 and the ISO-NE RTO filing.

25. With respect to expenses incurred for recovery of public education and outreach expenses, we generally allow recovery in wholesale transmission rates of expenses to educate the public on matters of reliability and quality of service resulting from the construction of grid upgrades. We find that in this instance, such public education and outreach expenses are localized expenses (Category B costs) since the amount of

¹³ 18 C.F.R. § 385.213(a)(2) (2003).

¹⁴ Exhibit NU-4 at 10 (Testimony of Richard A. Soderman).

education and outreach expenses required may vary substantially by state or location. In addition, these costs should receive the same rate treatment as other Southwest Connecticut costs.¹⁵ We also note that Tariff No. 10, Section 34.2, allows for the recovery of any Category B costs only after filed Service Agreements covering these localized expenses are approved by the Commission.

26. With respect to NHPUC's protest of NU Companies' proposed new language on indemnification, which would adopt a "gross negligence" standard for indemnification, we will reject this proposed language as unsupported on the record before us.¹⁶ We find that NU Companies have confused liability with indemnification. NU Companies, in their transmittal letter and accompanying testimony,¹⁷ as well as in their answer discussed above, cite to the White Paper, and argue that all transmission owners participating in an ISO or RTO should be entitled to a gross negligence standard, but the White Paper addresses liability and not indemnification. Accordingly, we will reject NU Companies' proposed change, and NU Companies are directed to revise their indemnification language to remove the proposed change.

27. Several intervenors have raised concerns regarding the vagueness or lack of clarity of certain components of the formula. We expect these issues to be addressed in the hearing and settlement judge procedures ordered below. We also expect that the appropriateness of recovering certain regional PTF costs under the LNS rate design will likewise be addressed in the hearing and settlement judge procedures ordered below.

28. With respect to those issues raised by the intervenors that are not addressed above, we will set those issues for hearing: use of estimated costs, loads, and revenues in the formula; provisions for customer audit and dispute rights; return on equity; provisions for filing and audit requirements; provisions for Commission review; review of RNS charges that are rejected by ISO-NE; billing procedure; the breakdown of capital costs placed in service by project and by PTF status; and Transmission Revenue Credits.

29. However, the issues in this proceeding may be suitable for resolution through settlement. Therefore, in order to allow the parties an opportunity to resolve these

¹⁵See supra, note 5. We note that the determination of that portion of Southwest Connecticut costs to be socialized is ongoing.

¹⁶See, e.g., Cambridge Electric Light Co., 95 FERC ¶ 61,339 at 62,279-80 (2001), order on reh'g, 96 FERC ¶ 61,205 (2001); accord Central Hudson Gas & Electric Corp., 86 FERC ¶ 61,062 at 61,210, order on reh'g, 88 FERC ¶ 61,138 at 61,384 (1999), order on reh'g, 90 FERC ¶ 61,045 (2000).

¹⁷Transmittal Letter at 6; Testimony of John J. Flynn at 6.

matters amicably without an evidentiary hearing, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁸ If the parties desire, they may, by mutual agreement, request a specific judge as a settlement judge in this proceeding; otherwise, the Chief Administrative Law Judge will select a judge for this purpose.¹⁹ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order 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 trial type evidentiary hearing by assigning the case to a presiding judge.

C. Suspension, Hearing and Settlement Judge Procedures

30. Our preliminary analysis of NU Companies filing indicates that it has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept it for filing, with the exception of the proposed gross negligence indemnification language, which we will reject, suspend it and make it effective subject to refund, and set it for hearing. In West Texas Utilities Company, 18 FERC & 61,189 (1982), we explained that where our preliminary examination indicates that proposed rates may be unjust and unreasonable, but may not be substantially excessive, as defined in West Texas, we would generally impose a one-day suspension. Here, our examination suggests that the rates may not yield substantially excessive revenues. (The rate increase is largely attributable to the inclusion of current transmission costs that have not been updated since 1996 and the projected transmission expansion. We also note that the proposed formula rate continues the current 11.75 percent return on equity.) Therefore, we will suspend the proposed revisions for one day, to be effective October 28, 2003, subject to refund. We also will set them for hearing and settlement judge procedures as ordered below.

The Commission orders:

(A) NU's filing is hereby accepted for filing, with the exception of the gross negligence indemnification language, which is hereby rejected, and suspended for one day, to become effective October 28, 2003, subject to refund. NU Companies shall file a

¹⁸18 C.F.R ' 385.603 (2003).

¹⁹ 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 days of the date of this order. The Commission's website contains a listing of the Commission's judges and a summary of their background and experience (www.ferc.gov - click on Office of Administrative Law Judges).

revised indemnification provision consistent with the discussion in the body of this order within 21 days of the date of this order.

(B) 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 Reorganization Act and the Federal Power Act, particularly sections 205 and 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), a public hearing shall be held concerning the justness and reasonableness of NU's filing as discussed in the body of this order. However, the hearing will be held in abeyance while the parties attempt to settle, as provided in paragraphs (C)-(E) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. ' 385.603 (2002), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge within 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.

(D) Within 60 days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission 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 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(E) If the 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 convene a conference in this proceeding to be held within approximately 15 days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such 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)

Linda Mitry,
Acting Secretary.