

125 FERC ¶ 61,187
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

NSTAR Electric Company

v.

Docket No. EL07-81-001

ISO New England Inc.

ORDER DENYING CLARIFICATION AND REHEARING

(Issued November 20, 2008)

1. NSTAR Electric Company requests clarification or, alternatively, rehearing of a September 21, 2007 order denying its complaint against ISO New England, Inc. (ISO-NE) concerning the interrelationship of Hydro Québec Interconnection Capability Credits (capability credits) and capacity imports that may bid into the Forward Capacity Market during the transition period from the current installed capacity market to the Forward Capacity Market.¹ In this order, the Commission denies the request for clarification and rehearing.

I. Background

2. The Hydro Québec Interconnection (HQ Interconnection) is a direct current transmission line that connects Québec, Canada and the New England region. The owners of the HQ Interconnection recover their costs through agreements with sponsoring load-serving entities called Interconnection Rights Holders. The agreements allow Interconnection Rights Holders to use a share of the HQ Interconnection in direct proportion to each holder's financial support. The New England Power Pool (NEPOOL) allocated capability credits to Interconnection Rights Holders in proportion to their individual rights in the form of capability credits. NSTAR is an Interconnection Rights Holder.

¹ *NSTAR Electric Co. v. ISO New England Inc.*, 120 FERC ¶ 61,261 (2007) (September 2007 Order).

3. On June 16, 2006, the Commission approved a contested settlement accepting a proposal by ISO-NE to create the Forward Capacity Market (Settlement).² The Forward Capacity Market Settlement established a transition period prior to the first commitment period of the Forward Capacity Market, scheduled to begin June 1, 2010. The Settlement provided that the HQ Interconnection transfer capability is to be fixed during the transition period at 1,800 MW and the capability credits are to be fixed at 1,200 MW.³ The settlement also stated that during the transition period the difference or delta between these two amounts, 600 MW, “may be used for [Unforced Capacity] over the HQ Interconnection by any supplier that arranges for transmission over the interconnection without reductions in the [capability credits].”⁴ Further, should capacity imports exceed 600 MW during the transition period, the settlement stated that it “will result in reductions in [capability credits] as provided for under current procedures” and “only the remaining [capability credits] will receive payments.”⁵ On September 1, 2006, ISO-NE and NEPOOL made a filing implementing the transition provisions of the Settlement. The Commission accepted the transition provisions on October 31, 2006.⁶

4. On February 15, 2007, ISO-NE filed revisions to Market Rule 1 to implement the Settlement.⁷ In that filing, ISO-NE proposed a tariff provision to be effective after the transition period, i.e., during the subsequent implementation phase, that would reduce capability credits when the capability credits are displaced by actual capacity sales over the HQ Interconnection above the “HQI Excess,” i.e., the total available capacity of the line minus the value of extant capability credits. In an order issued April 16, 2007, we directed ISO-NE, for the implementation phase, to place a cap on the amount of import capacity contracts accepted in the auction over the HQ Interconnection.⁸ We required that cap to equal the HQI Excess, so that if, for example, the capacity of the line was

² *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (June 2006 Order), *order on reh’g*, 117 FERC ¶ 61,133 (2006), *remanded in part, Maine Pub. Utils. Comm’n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (*Maine Commission v. FERC*).

³ Settlement § 11, Part VII.K.

⁴ *Id.*

⁵ *Id.*

⁶ *ISO New England Inc.*, 117 FERC ¶ 61,132 (2006) (October 2006 Order), *order on reh’g*, 119 FERC ¶ 61,044 (2007).

⁷ *See* ISO-NE, February 15, 2007 Filing, Docket No. ER07-546-000.

⁸ *ISO New England, Inc.*, 119 FERC ¶ 61,045, *order on reh’g*, 120 FERC ¶ 61,087 (2007) (April 2007 Order).

1,800 MW, and 1,400 MW of that capacity was allocated to capability credits granted to the Interconnection Rights Holders, ISO-NE could only accept 400 MW of import capacity contracts in the auction. Thus, as a result of our ruling, the practice followed during the transition period of reducing capability credits for capacity sales above the HQI Excess over the HQ Interconnection would not arise after the end of the transition period.⁹

5. On July 9, 2007, NSTAR filed a complaint stating that sections I.2.2(o) and III.8.3.7.2.1(e) of the ISO-NE tariff implementing the transition rules of the Settlement, as interpreted by ISO-NE, violate the Commission's established policy regarding capability credits. NSTAR also argued that the capacity credit transition rules conflict with the Commission's treatment of capability credits in the Forward Capacity Market implementation phase.

6. The September 2007 Order denied NSTAR's complaint. First, the Commission stated that the complaint is a collateral attack on both the Commission's June 2006 and October 2006 Orders. The Commission also disagreed with NSTAR that the April 2007 Order on the implementation phase of the Settlement superseded the October 2006 Order's acceptance of the section 205 filing that contained the capacity credit provision for the transition period. The Commission further found that NSTAR's proposal was not consistent with the Settlement. Finally, we found that modifying the ISO-NE tariff would require a public interest showing pursuant to the *Mobile-Sierra* doctrine.¹⁰ Nevertheless, the Commission further concluded that, even if NSTAR's complaint was subject to the just and reasonable standard of review, the tariff provision is just and reasonable in the context of the Settlement package.

7. On October 22, 2007, NSTAR requested rehearing of the September 2007 Order. On November 11, 2007, H.Q. Energy Services (U.S.) (HQUS) filed an answer. On November 19, 2007, NSTAR filed a motion for leave to answer and answer to HQUS's answer. The Commission will deny rehearing, as discussed below.

⁹ April 2007 Order, 119 FERC ¶ 61,045 at P 167, *order on reh'g*, 120 FERC ¶ 61,087 at P 77.

¹⁰ See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

II. Discussion

A. Procedural Matters

8. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2008), prohibits an answer to a request for rehearing. Therefore, we will not accept HQUS's or NSTAR's answers.

B. Request for Rehearing

9. NSTAR requests clarification that section III.8.3.7.2.1(e) of the ISO-NE tariff does not require that Interconnection Rights Holders sell their capacity credit entitlements for purposes of accommodating capacity imports over the capacity credit excess. NSTAR states that the Commission found that the tariff provisions for the Forward Capacity Market transition period, specifically section III.8.3.7.2.1(e), permit reductions in capability credits to allow for Unforced Capacity above 600 MW, and does not authorize placing a limit on the Unforced Capacity at 600 MW. However, NSTAR maintains that the Commission did not address when or how a reduction in an Interconnection Rights Holder's capacity credit entitlement can take place or under what conditions a reduction in capability credits is triggered. According to NSTAR, to assume that an Interconnection Rights Holder can be involuntarily stripped of its rightfully owned capability credits when capacity imports exceed the 600 MW threshold is tantamount to an impermissible taking of its ownership rights in its property interest. Conversely, it would be equally unjust for an Interconnection Rights Holder to retain its capability credits while using capacity imported over its share of the interconnection to meet its capacity requirements or for resale.

10. According to NSTAR, the Commission has established that the value of capability credits cannot, either directly or indirectly, be taken from the Interconnection Rights Holders, or socialized among market participants that do not pay for the HQ Interconnection.¹¹ NSTAR asserts that capability credits are essentially property rights (i.e., shares for use of the HQ Interconnection) bestowed upon Interconnection Rights Holders in return for and in direct proportion to each holder's financial contribution to the

¹¹ NSTAR Request for Rehearing at 6, citing *PG&E National Energy Group v. ISO New England Inc.*, 99 FERC ¶ 61,187, *order on reh'g*, 100 FERC ¶ 61,227 (2002); *see also NSTAR Electric and Gas Corp. v. New England Power Pool*, 102 FERC ¶ 61,107 (2003), *order on reh'g*, 103 FERC ¶ 61,093 (2003); *see also* April 2007 Order, at P 168 ("Therefore, the tie benefits associated with the HQ Interconnection (i.e., capacity credits) should be shared by the Interconnection Rights Holders but should not be extended to others that do not share in the HQ Interconnection costs.").

HQ Interconnection.¹² Accordingly, NSTAR maintains that it should be within the Interconnection Rights Holder's control as to whether it should sell its capability credits to accommodate excess capacity imports or keep its capability credits to engage in transactions over the HQ Interconnection. NSTAR argues that it is inappropriate to place such control over capacity credit ownership rights in the hands of a third-party, ISO-NE, which ISO-NE's interpretation of section III.8.3.7.2.1(e) of the ISO-NE tariff effectively does because it diminishes the value of the contractual rights of the Interconnection Rights Holders that financially support the HQ Interconnection facilities.

11. NSTAR notes that, under its clarification, an Interconnection Rights Holder would not be allowed to limit the actual energy imports over the interconnection that would compete for a share of New England energy sales. It asserts that the transfer capacity would be available on a non-discriminatory basis to third party energy imports and that the only limit would be on capacity imports that provide absolutely no additional reliability benefits. According to NSTAR, native load customers do not benefit from a transfer of capacity rights, capacity importers do, therefore native load customers essentially pay transition payments for all capacity including capability credits. Without expropriation, native load customers also get the benefit of the capacity credit revenues. Allowing third party importers to simply take these revenues without any requisite compensation is unjust, unreasonable, and entirely inconsistent with prior Commission orders and unconstitutional.

12. Therefore, NSTAR asks the Commission to clarify that section III.8.3.7.2.1(e) does not require an Interconnection Rights Holder to relinquish its capacity credit entitlements for purposes of accommodating capacity imports over the capacity credit excess. It simply recognizes that, should an Interconnection Rights Holder decide to sell its capability credits, there is a mechanism in place for avoiding double counting of capacity resources.

13. NSTAR states that if the Commission makes clear that the Interconnection Rights Holder is able to control whether or not its share of the capability credits is eliminated to allow for excess imports, NSTAR will take no further issue with section III.8.3.7.2.1(e) of the ISO-NE tariff. NSTAR emphasizes that this treatment is limited to capacity transfers, but that energy transfers would not at all be limited in this manner.

14. If the Commission declines to grant clarification, NSTAR seeks rehearing of the September 2007 Order. First, NSTAR requests rehearing of the Commission's

¹² *Id.*, citing *PG&E National Energy Group*, 99 FERC ¶ 61,187, at P 28 (2002) (ruling that Interconnection Rights Holders have any exclusive contractual right to capacity credits).

determination that its complaint constitutes a collateral attack on the June 2006 and October 2006 Orders. NSTAR argues that at the time of the Settlement approval and subsequent implementation of the transition period rules, it was not apparent to NSTAR that the proposed transitional tariff language would require capacity credit reductions to allow for capacity imports above the capacity credit excess. Once ISO-NE's interpretation became apparent, NSTAR states that it promptly made clear its intention to address the transition period provision in its intervention filed as part of the Forward Capacity Market implementation rules proceeding. Further, NSTAR maintains that it took steps to remedy its concern through NEPOOL processes.

15. NSTAR argues that the Commission's application of its collateral attack policy is inappropriate in this case, where a party has brought a section 206 complaint challenging the justness and reasonableness of that which was previously approved but no longer provides a just and reasonable outcome. It states that the Commission could not have intended for the notion of collateral attack to thwart the section 206 rights of entities harmed by an unforeseen, negative outcome of a prior Commission determination that was once found to be appropriate at a previous place and time. NSTAR maintains that the section 206 complaint mechanism was designed to provide those negatively affected by behaviors in the market with a means for addressing their concerns and correcting any inequitable results. According to NSTAR, it is common for complaints to arise in circumstances in which the Commission may have previously approved an action as just and reasonable, that later results in unjust and unreasonable behavior due to a variety of subsequent factors, including, but not limited to, changes in market conditions and erroneous applications of or changes in Commission policy.

16. NSTAR states that the Commission cannot suggest that once it has issued an order in a section 205 proceeding that any future challenge is barred by principles of *res judicata*. The very purpose of section 206 is to permit a later challenge to a rate, term, or practice that the Commission has previously found to be just and reasonable. NSTAR admits that the challenge must accept the burden to show that the rate, term, or practice has become unjust and unreasonable, but the challenge itself is not barred by any doctrine of preclusion.

17. NSTAR states that the Commission erred in deciding that different provisions relating to capability credits are appropriate in the transition period and implementation phase. NSTAR argues that the Commission has provided no rationale for why reduction in capability credits is unjust and unreasonable "under all other circumstances to date," but not for the transition period at issue.

18. Further, NSTAR maintains that the Commission has failed to adequately reconcile its contradictory treatment of capability credits during the transition period and implementation phase. Although the Commission found that the Forward Capacity Market transition period and the implementation phase were intended to be "substantially different," NSTAR argues that the relevant discussion in the October 2006 Order has

nothing to do with the treatment of capability credits. Further, NSTAR contends that the Commission provides no rational explanation or link to what “substantial differences” exist that warrant a just and reasonable reduction of capability credits in the transition period and an opposite outcome upon implementation of the Forward Capacity Market. Without providing a rationale justifying its contradictory determination in the instant proceeding as compared to its prior determinations on this same exact issue of capacity credit reductions, it would appear that the Commission has erred in failing to consistently apply its established policy where nothing about the circumstances at hand merits a different outcome.

19. Moreover, NSTAR maintains that, while the Commission approved the transition period capacity credit treatment on the basis that the transition period of the Forward Capacity Market differs substantially from the implementation phase, the Commission fails to recognize that ISO-NE never saw it this way. NSTAR argues that ISO-NE’s original capacity credit proposal for the Forward Capacity Market implementation phase was drafted to be consistent with and carry forward the transition period provisions. According to NSTAR, ISO-NE intended the capacity credit treatment for the transition and implementation phases to be the same; and when it became clear to NSTAR that ISO-NE’s interpretation of its capacity credit provisions would result in impermissible netting, NSTAR filed its protest against ISO-NE’s proposed Forward Capacity Market implementation rules and stated its intent to revisit the transition period rules to correct ISO-NE’s unforeseen interpretation.

20. NSTAR argues that, as a result, the Commission’s April 2007 Order required ISO-NE to revise its proposed implementation rules such that capacity imports would be capped at the capacity credit excess. Accordingly, NSTAR argues that it would follow that, where the Commission has found ISO-NE’s proposed capacity credit treatment in the Forward Capacity Market implementation phase to be unjust and unreasonable, this ruling would naturally flow back and impact the source provision from which the post-Forward Capacity Market provision was derived and intended to mimic – that is, the transition period capacity credit provisions.

21. Finally, NSTAR maintains that the Commission erred in applying the *Mobile-Sierra* public interest standard of review to its complaint. According to NSTAR, the *Mobile-Sierra* doctrine recognizes the principle that a party to a contract can voluntarily surrender its right to make a section 205 or a section 206 filing to change the terms of a bilateral contract. NSTAR argues, however, that the Commission is incorrect that parties to a contract or to a settlement can deprive the section 206 rights of a non-party. NSTAR asserts that it possesses statutory rights under section 206 of the FPA, and those rights entitle it to relief if it shows that an existing rate or practice is unjust or unreasonable.

22. NSTAR further disagrees with the Commission that, even without reliance on the public interest standard of review, NSTAR failed to show that the capacity credit provision during the transition period is unjust and unreasonable. According to NSTAR,

the Commission has already found that capacity credit netting provisions are unjust and unreasonable because capacity imports in excess of the difference between total and the capacity credit deprive load of legal rights for which they have paid and requires them to purchase capacity in excess of that otherwise necessary.¹³ NSTAR argues that the circumstances of this case are no different, and neither ISO-NE nor the Commission has provided any bases for why a different outcome is warranted in this case.

23. NSTAR notes that, as of the time it filed for rehearing, this issue was before the United States Court of Appeals for the District of Columbia (D.C. Circuit) in the direct appeal of the Commission's Forward Capacity Market orders. Though unclear from its pleadings, NSTAR appears to maintain that the Commission misapprehended the scope of the *Mobile-Sierra* doctrine, and that the Commission will have the opportunity to reappraise its September 2007 Order, which NSTAR contends is influenced by this misapprehension, in a new light once the court renders a decision. Until that time, NSTAR preserves for review its claim that the Commission erred in holding that parties to a private agreement may deprive a third-party, such as NSTAR, of its statutory rights under section 206 of the FPA.

C. Commission Determination

24. The Commission denies rehearing. First, the proposed transitional tariff language requires capacity credit reductions to allow for capacity imports above the capacity credit excess both when the Settlement was filed and when ISO-NE filed to implement the transition period rules. As we noted in the September 2007 Order, section III.8.3.7.2.1(e) of the ISO-NE tariff, in accordance with section 11, Part VIII.K of the Settlement, specifically allows reductions in capability credits. The Forward Capacity Market Settling Parties clearly intended to retain the status quo with regard to reductions in capability credits during the transition period. The Commission therefore does not need to re-interpret or clarify section III.8.3.7.2.1(e) beyond the plain language expressed therein to "address when or how a reduction in an [Interconnection Rights Holder's] capacity credit entitlement can take place," as NSTAR seeks. In accordance with non-discriminatory open access rules, an Interconnection Rights Holder must make import capacity available to market participants. However, we agree with NSTAR that section III.8.3.7.2.1(e) of the ISO-NE tariff does not require an Interconnection Rights Holder to relinquish its capacity credit entitlements in order to accommodate capacity imports over the capacity credit excess without adequate compensation. Thus, to the extent its transmission rates do not adequately cover opportunity costs relating to a reduction of

¹³ NSTAR Request for Rehearing at 15, citing April 2007 Order, at P 168.

capability credits, NSTAR, as a Schedule 20A Service Provider, can seek full recovery of its costs through a section 205 filing.¹⁴

25. The Commission disagrees with NSTAR that the September 2007 Order misapplied the Commission's collateral attack policy. NSTAR is correct that the Commission did not intend for the notion of collateral attack to thwart the section 206 rights of entities harmed by an unforeseen, negative outcome of a prior Commission determination that was once found to be appropriate at a previous place and time. Nor has the Commission found that once it has issued an order in a section 205 proceeding, any future challenge is barred. While NSTAR is correct that complaints can arise in circumstances where the Commission may have previously approved an action as just and reasonable, which then later results in unjust and unreasonable behavior due a variety of subsequent factors, including, but not limited to, changes in market conditions and erroneous applications of or changes in Commission policy, NSTAR has shown none of these factors to exist. In this case NSTAR did not provide the Commission any evidence of subsequent factors or changed conditions or policy sufficient to change the Settlement, which was approved less than a year before NSTAR's complaint. Further, the Commission made an affirmative finding that NSTAR had not demonstrated that the capacity credit transition provision had become unjust and unreasonable.¹⁵

26. In addition, the Commission found, and continues to believe, that collateral attacks on final orders and relitigation of applicable precedent, especially by parties that were active in the earlier case, thwart the finality and repose that are essential to administrative efficiency, and are therefore strongly discouraged.¹⁶ This is particularly true with respect to the Settlement and the tariff provisions arising from that settlement, given that they represent "difficult compromises among the diverse parties to [the Settlement] proceeding that, if found just and reasonable, should be honored."¹⁷ Further, in the September 2007 Order, the Commission reiterated its finding that it found these provisions, including the provisions related to capability credits in the transition period, just and reasonable and, therefore, honored them.

¹⁴ ISO New England Inc., Open Access Transmission Tariff, Section II, Schedule 20A, "Point-To-Point Service Over the Phase I/II HVDC Transmission Facilities (Phase I/II HVDC-TF Service)." The Commission notes that, on February 29, 2008, NSTAR submitted changes to Schedule 20A of its ISO-NE OATT pursuant to section 205 of the Federal Power Act. These changes were rejected. *NSTAR Electric Co.*, 123 FERC ¶ 61,094 (2008), *reh'g pending*.

¹⁵ September 2007 Order, 120 FERC ¶ 61,261 at P 41.

¹⁶ *Id.* P 33.

¹⁷ June 2006 Order, 115 FERC ¶ 61,340 at P 66.

27. NSTAR is further incorrect that the Commission did not provide an explanation of the differences between the provisions relating to the transition period and implementation phase of the Forward Capacity Market. First, the Commission found that the Settlement contained two distinct time periods – the transition period and the implementation phase.¹⁸ Different rules pertain to each and ISO-NE submitted separate tariff filings for each. Further, as discussed below, the Commission found that the text of the two provisions, as proposed by ISO-NE, are different and lead to different outcomes.¹⁹

28. NSTAR provides no support for its contention that ISO-NE intended the capacity credit treatment for the transition period and implementation phase to be the same. Had ISO-NE intended to treat capability credits the same in the transition period and implementation phase, it would have applied the same provision to each period. But it did not. The Commission noted in the September 2007 Order that the two provisions

¹⁸ As noted in the September 2007 Order, the Settlement distinguishes between the transition period and the subsequent implementation phase, providing different rate treatments for the two different periods. It is appropriate, and consistent with Commission precedent, for the Settlement to distinguish between two different periods, and for the Commission to approve the distinction. Transition mechanisms of one form or another are an accepted practice in the face of industry and regulatory changes. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 699-700, 704 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *accord, e.g., PJM Interconnection, LLC*, 119 FERC ¶ 61,318, at P 85 (2007); *California Independent System Operator Corp.*, 119 FERC ¶ 61,076, at P 19 (2007); *Midwest Independent Transmission System Operator, Inc.*, 104 FERC ¶ 61,105, at P 49-50, *order on reh'g*, 105 FERC ¶ 61,212, at P 38, 43 (2003). Indeed, Order No. 888's stranded cost recovery provisions were just such a transition mechanism. *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, at 61,789-90, 61,794 (1996), *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 relevant 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). Thus, the Settlement can and does include such mechanisms. *ISO New England Inc.*, 119 FERC ¶ 61,044 (2007).

¹⁹ September 2007 Order, 120 FERC ¶ 61,261 at P 35.

contained distinct language.²⁰ Section III.8.3.7.2.1(e) of the ISO-NE tariff, which is applicable to the transition period and which NSTAR seeks to modify, states, in pertinent part (emphasis added):

The remaining 600 MW of transmission may be used for [Unforced Capacity] over the [HQ Interconnection] by any Market Participant that arranges for transmission over the interconnection without reductions in the Hydro Quebec Interconnection Capability Credits. [Unforced Capacity] above 600 MW may be transmitted only in those months when the Hydro Quebec Interconnection Capability Credits are 1,200 MW and *will result* in a like reduction in the total Hydro Quebec Interconnection Capability Credits available for the holders of those credits.

29. In contrast, section 11, part III.B.3.b of the Settlement, which is applicable to the implementation phase states, in pertinent part:

The total amount of accepted Import Bids over the [HQ Interconnection] plus approved [capability credits] cannot exceed the approved [HQ Interconnection] transfer limit. If the accepted Import Bids exceed the difference between the approved [HQ Interconnection] transfer limit and the approved MW of [capability credits] (the “HQI Excess”), the capacity requirement for those [Interconnection Rights Holders] or their designees that sold their transmission rights for the subject period will be increased by the difference between the total amount of accepted Import Bids and the HQI Excess. These capacity requirement increases will be allocated among the Interconnection Rights Holder or their designees in a manner to be determined by the [Interconnection Rights Holders].

30. The Commission therefore found that, for the two separate time periods, two separate and different provisions apply.²¹ The Commission specifically found that the wording of the two provisions produced different results: whereas section III.8.3.7.2.1(e) of the ISO-NE tariff specifically permits the remaining 600 MW of transmission to be used for Unforced Capacity, section 11, part III.B.3.b allows reduction of capability credits only “if” capacity sold exceeds the excess capacity. Had ISO-NE intended for

²⁰ *Id.* P 35.

²¹ *Id.*

capability credits to be treated the same for the transition period and implementation phase, the provisions would have been the same.

31. NSTAR maintains that the Commission required ISO-NE to revise its proposed implementation rules such that capacity imports would be capped at the capacity credit excess. That is not entirely correct. As stated in the September 2007 Order, our directive in the April 2007 Order did not disrupt the Settlement package, which remained just and reasonable. Nor did it change the text of the capacity credit provision in the implementation phase, which was not found to be unjust and unreasonable. In fact, the Commission specifically provided that the capacity credit provision for the implementation phase would remain in place and the Commission's determination did not change the Settlement. We specifically stated that:

Until and unless the Commission changes its ruling, [the provision relating to capability credits in the implementation phase] will remain theoretical. Nevertheless, *it will remain in place* and will take effect if the Commission should change its ruling with regard to capacity contracts accepted in the auction. Thus, it is inaccurate to state that the Commission's ruling changes, or is contrary to, section 11, Part III.G.D.b.^[22]

32. The provision relating to capability credits in the transition period specifically permits the remaining 600 MW of transmission to be used for Unforced Capacity, whereas the provision pertaining to the implementation phase is permissive in nature, allowing reduction of capability credits only "if" capacity sold exceeds the excess capacity. While the Commission did not need to disrupt the Settlement or the tariff pages filed by ISO-NE to reach the conclusion NSTAR sought for the implementation phase, the Commission would have been required to modify the Settlement and the Commission-approved ISO-NE tariff to grant NSTAR's complaint. As stated previously, the Commission continues to believe that different treatment is appropriate for the two time periods based on the language of the Settlement.

33. Finally, the Commission need not address the issue of whether to apply the *Mobile-Sierra* public interest standard of review to NSTAR's complaint. In the September 2007 Order, the Commission analyzed NSTAR's complaint pursuant to both the *Mobile-Sierra* public interest standard of review and the just and reasonable standard of review. In that order, we found not only that NSTAR failed under the public interest standard of review, but also that NSTAR failed to show that the capacity credit treatment for the transition period should be changed pursuant to the just and reasonable standard of review. In the September 2007 Order, the Commission explicitly found that "NSTAR

²² *ISO New England Inc.*, 120 FERC ¶ 61,087, at P 90 (2007).

has not demonstrated that the HQICC transition provision has become unjust and unreasonable.”²³ NSTAR has still not provided the Commission with evidence demonstrating that the capacity credit transition provision has become unjust and unreasonable. Therefore, we conclude that the request for rehearing on this point is moot.

The Commission orders:

NSTAR’s request for clarification and rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²³ September 2007 Order at P 41. *See also* June 2006 Order, 115 FERC ¶ 61,340 at P 2 (“In this order, we accept the proposed Settlement Agreement, finding that as a package, it presents a just and reasonable outcome for this proceeding consistent with the public interest.”); *Maine Commission v. FERC*, 520 F.3d 464 (upholding the Commission’s acceptance of the Settlement Agreement).