

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Northern Pass Transmission LLC)

Docket No. ER11-2377-000

**PROTEST SUBMITTED ONE DAY OUT-OF-TIME OF THE
NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.**

Pursuant to Rule 211 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure,¹ the New England Power Generators Association, Inc. (“NEPGA”) hereby files this protest one day out-of-time to the Transmission Service Agreement (“TSA”) between Northern Pass Transmission LLC (“Northern Pass”) and H.Q. Hydro Renewable Energy, Inc. (“HQ”) for service over the Northern Pass Transmission Line (“NPT Line”). NEPGA previously submitted a doc-less intervention in this proceeding, and respectfully requests that the Commission accept these late filed comments.

I. BACKGROUND

On December 17, 2008, Northeast Utilities Service Company and NSTAR Electric (“NU/NSTAR” or “Petitioner”) filed a Petition for Declaratory Order (“Petition”) to enter into a bilateral transmission services agreement with H.Q. Energy Services, Inc. (“HQ Energy Services”) for 1,200 MW of firm and exclusive transmission service over a new direct current transmission tie line (“the Project”) connecting New England with the Hydro-Quebec system. In its Petition, NU/NSTAR stated that exclusive firm service would allow HQ Energy Services to sell and deliver firm “system power” from the Hydro-Quebec system to NU/NSTAR and other unnamed wholesale purchasers in New England. NU/NSTAR sought a waiver of the Order 890

¹ 18 C.F.R. § 385.211

requirement that all new transmission services be provided on an open access, competitive and non-discriminatory basis.

The Petition explained that three “core agreements” had to be negotiated to provide access to over 4,000 MW of new hydro-electric generation: (1) a joint development agreement for design, planning and construction of the high voltage direct current (“HVDC”) line; (2) a TSA; and (3) a power purchase agreement under which HQ Energy Services will sell firm power to Petitioners and other New England entities.² With regard to the third core agreement, the Petitioners stated “that they must demonstrate to New England state regulatory authorities that the power purchase agreement represents a fair deal for New England electric customers in order for the transaction to go forward.”³

The proposed TSA was to contain unspecified provisions for “risk sharing” between the parties related to completion of the line; that is, which party would bare the risk of cost overruns, delays and potential stranded costs. In its order granting the Petition,⁴ the Commission found that the rates, terms and conditions included in the executed TSA would be considered when filed with the Commission.⁵ The Commission reasoned that “(a)ny other potential developer has the same right to request transmission service necessary to interconnect new generation resources to the Petitioners’ systems.”⁶

² 129 FERC ¶ 61,279 at PP 2-4.

³ *Id.* at P 5.

⁴ *See Northeast Utilities Service Co. and NSTAR Elec. Co.*, 127 FERC ¶ 61,179, *reh’g denied*, 129 FERC ¶ 61,279 (2009).

⁵ *See* 127 FERC ¶ 61,179 at P 17; *see also* 129 FERC ¶ 61,279 at P 6.

⁶ *See* 127 FERC ¶ 61,179 at P 29; *see also* 129 FERC ¶ 61,279 at P 10.

On December 15, 2010, Northern Pass filed a TSA executed on October 4, 2010, between Northern Pass and HQ for service over the NPT Line. The proposed TSA describes the infrastructure as (1) a 140-mile, 1,200 MW high voltage direct current transmission line from the United States-Canadian border to a converter station to be constructed in the City of Franklin, New Hampshire, (ii) a converter station, and (iii) a 40-mile, radial 345 kV AC transmission line between the Franklin converter station and the Public Service Company of New Hampshire Deerfield substation in the town of Deerfield, New Hampshire. The Transmittal Letter also explains that the third “core agreement” – state-commission review of power purchase agreements between the Petitioners and HQ – will not occur. HQ will instead simply sell power at the Deerfield, New Hampshire node and accept the locational marginal price.⁷

II. CORRESPONDENCE

NEPGA requests that all further correspondence, communications and other documents relating to this docket be served upon the undersigned as follows:

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III. PROTEST

In reviewing the rates, terms and conditions of the TSA, the Commission should remain cognizant that the NPT Line is not a Holy Grail; rather, it is simply a participant funded, radial interconnection tie line. In many ways, this line is no different from other participant funded lengthy radial tie lines interconnecting location-constrained renewable generation to the

⁷ Application at p. 8.

transmission grid found in other regions of the country. These radial facilities, to our knowledge, have received no transmission incentive adders whatsoever, and the Petitioner has failed to justify incentives for the Project.

Likewise, these other participant funded radial facilities have remained subject to third party requests for interconnection and transmission service. In contrast, the Petitioner and other supporting parties fail to justify waiver of the Commission's long standing open access requirements if any of the capacity on the NPT Line remains unused.⁸ Indeed, there is no basis for excluding the NPT Line from open access requirements over the next 40 years. Neither Northern Pass nor HQ should have the benefit of continuing reliance on the Commission's declaratory order, which was premised in part upon facts that are no longer present (e.g., the existence of long-term power purchase agreements). Moreover, under the newly proposed structure, closer scrutiny of future HQ sales may well be appropriate.⁹

⁸ As the Petitioners explained in the underlying declaratory order: "The Massachusetts Attorney General ("Mass. AG") states that '[i]t is timely for the Commission to consider allowing exemptions from open access transmission requirements where combined power supply and transmission agreements may enable load serving entities to lower the total delivered cost of power to their ratepayers.'" Answer to Comments and Protests of Petitioners, Docket No. EL09-20-000, at p. 6 and note 9 (Feb. 10, 2009).

⁹ We note that under the newly proposed structure, it will be important for the ISO-NE market monitor and the Commission to monitor HQ power sales. As initially proposed, HQ intended to recover both the costs of the NPT Line and energy costs (presumably associated with HQ's construction of 4,000 MW of the new hydro capacity) through the power purchase agreements. One can only speculate that these all-in costs were too high to support state approval of a power purchase agreement. Now all such costs must be recovered through the market. In 1993, the Supreme Court held in *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), that selling at a low price cannot be an act of monopolization—cannot constitute predatory pricing—unless the price is below an appropriate measure of cost and the evidence shows that there is a dangerous probability that the firm engaged in predation can recoup its investment in below-cost pricing. Under the proposed structure, long-term monitoring of HQ's power sales may well be appropriate.

Actual cost overruns for various transmission projects in New England have ranged between 1.4 and 2.0 times the original cost estimate. Assuming the final cost of the NPT Line reflects such overruns, based on the current \$1.1 billion estimate, final NPT Line costs could range from \$1.54 billion to \$2.2 billion. Assuming such overruns occur, and assuming further a 20% annual carrying charge, that HQ delivers power in all hours during the year, and a 5% outage rate, HQ's transmission costs alone could range from approximately \$31/MWh to \$44/MWh. Were HQ only to sell power during peak hours (6x16), the NPT Line transmission costs could range from approximately \$54/MWh to \$77/MWh. All such costs would have to be recovered through market sales.

A. *The Provision for Sales of Unused Capacity is Inconsistent with Commission Precedent*

The NPT Line consists of (i) a 140-mile HVDC line, (ii) a converter station, and (iii) a 40-mile radial, 345 kV AC line.¹⁰ Northern Pass proposes that HQ will have firm transmission service (north-to-south or south-to north) for up to 1,200 MW, and non-firm transmission service for any incidental transmission capacity above the Contract Capacity amount. TSA, §§ 7.1.1 and 7.1.2. The TSA further provides that Northern Pass “shall have no [other] obligation to provide transmission service under this Agreement.” TSA, § 7.1.3. Instead, only HQ can determine whether third party transmission service is permissible. Article 10 of the TSA provides that: “If and to the extent Purchaser [HQ] determines from time to time, *and in its sole discretion*, that the transmission capacity available over the NPT Line exceeds Purchaser’s needs, Purchaser shall then offer to resell such unused capacity to third parties in accordance with Applicable Law as may then be in effect....” TSA, § 10.1 (emphasis added).

The TSA improperly conscribes future third party transmission rights in contravention to the Commission’s order on the underlying Petition and the Commission’s long standing policies under the Federal Power Act (“FPA”). As the Commission found, “the Petitioners [NU and NSTAR] must make available any unused Project transmission capacity pursuant to the requirements of Order No. 890.”¹¹ The TSA does not propose to do so. Rather, Northern Pass

On top of the transmission costs, HQ would also have to recover energy and ancillary services costs. These high fixed costs lead to at least a potential for predatory pricing concerns if the NPT Line goes forward, particularly given that capacity in the ISO-NE system is already more than 5,000 MW above ISO-NE’s Installed Capacity Requirement. Below cost sales could potentially improperly force out competitors, giving HQ the ability to later recoup its losses through higher priced market sales.

¹⁰ Transmittal Letter, pp. 18-19. We note that the 40-mile, 345 kV line was not part of the underlying Petition.

¹¹ 127 FERC ¶ 61,127 at P 67.

and HQ, like the Sagebrush Partnership in *Aero Energy LLC*,¹² effectively claim a right to allow existing transmission capacity to lie fallow until HQ, in this case, needs to use it. However, as the Commission reasoned in *Aero Energy*:

[Sagebrush and the Sagebrush Partners'] intention to reserve transmission capacity they are not using is antithetical to the statutory purpose. When it enacted [FPA] section 211, Congress provided for the use of all transmission capacity. What FPA section 211 does *not* contemplate is precisely what Sagebrush and Sagebrush Partners want to do here; that is, allow transmission capacity on the Sagebrush Line to go unused until they need it.¹³

In this proceeding, Northern Pass and HQ propose the exact same outcome. Should the NPT Line not be used by HQ, only HQ – at its sole discretion – could determine whether a third party might use the NPT Line, and absolves the owners of Northern Pass from any requirements.

An initial waiver of the Order No. 890 open access transmission tariff (“OATT”) requirements does not mean that such a waiver should continue for 40 years. Rather, the Commission should treat Northern Pass as it does other transmission owners with OATT waivers: within 60 days following the receipt of a request for interconnection or transmission service, Northern Pass should be required to file an OATT (e.g., a Local Network Service tariff) to provide for service to third parties. Further, the Commission should clarify that, in accordance with *Aero Energy* and the Commission declaratory order in the underlying proceeding, HQ cannot retain its firm transmission rights over Northern Pass if such transmission capacity goes unused, as to do so would contravene FPA section 211.

¹² 115 FERC ¶ 61,128 (Proposed Order), *order on modification*, 116 FERC ¶ 61,149 (2006), *reh'g denied*, 120 FERC ¶ 61,188 (2007) (“*Aero Energy*”).

¹³ 116 FERC ¶ 61,149 at P 26.

B. The Commission Should Require the Removal of TSA Provisions that Provide for Potential Regional Cost Recovery of the 40-Mile, Radial AC Line

NEPGA objects to Northern Pass's and HQ's proposal to treat the 40-mile radial 345 kV line as a pool transmission facility ("PTF") by ISO-NE and included in rolled-in regional rates. *See* TSA, § 8.6(b). Given that the radial transmission project is participant funded, as ISO-NE found, and the Commission agreed, the project – be it the HVDC or AC portion – “would *not* be considered an elective network upgrade or a pool transmission facility (PTF) and would therefore *not* fit under existing ISO-NE OATT provisions.”(emphasis added)¹⁴

While TSA provisions provide an optionality for HQ to request roll-in of a portion of the NPT Line costs into the Pool-Supported PTF, the ISO-NE OATT, Schedule 12 at item B(2) and the ISO-NE Tariff definition of Pool-Supported PTF very clearly state that this option does not exist:

2. Elective Transmission Upgrades:

The cost for all Elective Transmission Upgrades shall not be included in the Pool-Supported PTF costs recoverable under this OATT, but shall be allocated solely to the entity or entities volunteering to make and pay for such Elective Transmission Upgrades.” (emphasis added) [ISO-NE OATT, Schedule 12]

Pool Supported PTF is defined as: (i) PTF first placed in service prior to January 1, 2000; (ii) Generator Interconnection Related Upgrades with respect to Category A and B projects (as defined in Schedule 11), but only to the extent not paid for by the interconnecting Generator Owner; and (iii) other PTF upgrades, but only to the extent the costs therefore are determined to be Pool Supported PTF in accordance with Schedule 12. (emphasis added) [ISO-NE Tariff Section I, definitions]

¹⁴ 129 FERC ¶ 61,279 at P 48 and n.51. *See also Southern California Edison Co.*, 112 FERC ¶ 61,014 at PP 40, 42 (2005) (“*Antelope Order*”) (“Interconnection facilities are sole use facilities that primarily benefit a single customer.... [O]ur precedent has been that it would be improper to shift the costs of such facilities from the interconnection customers to all users of the transmission grid. In addition, SCE has neither shown that all users of the CAISO-Controlled grid will receive the benefits of these facilities nor how Segment 3 will provide benefits to the grid”).

TSA Sections 8.6(b), (c), (e) and (f) are inconsistent with the ISO-NE Tariff provisions applicable to all other Elective Upgrade investments. Under the ISO-NE Tariff, there is only one choice: Elective Transmission Upgrade costs are never rolled into Pool-Supported PTF costs and are allocated “to the entity or entities volunteering to make and pay for such Elective Transmission Upgrades.” In return, the entity volunteering to make such payments receive the financial transmission rights created by such upgrades. The Commission therefore should require Northern Pass to modify these sections of the TSA to be compliant with the ISO-NE Tariff.

C. The Commission Should Reject the Proposed Incentive Rate Treatment for the NPT Line

Northern Pass consists of both a radial HVDC and a radial AC line. Yet, Northern Pass witness Dr. William Avera proposes an adder of 50 basis points for RTO participation and a new transmission incentive adder of 164 basis points. In addition, Mr. James A. Muntz proposes an additional adder that would reflect Northern Pass’ use of advanced transmission technologies, ranging from 46 to 146 basis points. Transmittal Letter at 37.

As a general matter in ISO-NE, the Commission previously rejected a proposal by the Transmission Owners for 50 and 100 basis point adders for Local Network Service (“LNS”) facilities, but accepted the 50 and 100 basis point adders for Regional Network Service. Northern Pass is participant-funded and will not be included in Regional Network Service.¹⁵ At best, its radial facilities (that is, the Northern Pass system) comprise what equates to LNS facilities because, as previously explained, the radial facilities are not PTF under existing ISO-

¹⁵ See *Bangor Hydro-Electric Co.*, 122 FERC ¶ 61,038 at P 2 and n.6 (2008).

NE OATT provisions.¹⁶ Moreover, the Commission in another RTO region previously considered incentive rate treatment for what at one point was a radial line only *after* it was redesigned as a network facility.¹⁷

Neither Northern Pass, Dr. Avera nor Mr. Muntz explain why the Commission's prior determination to provide incentives for only Regional Network Service facilities should be overturned in this proceeding, nor do they distinguish their proposal from *Southern California Edison Company*. Rather, to do so, would open the door for utilities to seek incentive rate treatment for any radial, non-network transmission line, *e.g.*, radial tie lines that solely interconnect locationally-constrained renewable generation to the regional network transmission system. Indeed, it would be easy to apply almost all of the supporting rationale provided by Northern Pass and its witnesses to radial transmission lines built to connect such locationally constrained generation. Accordingly, the Commission should reject the proposed incentive rate treatment.

D. Prior Knowledge by NU and NSTAR of their Preferred Reliability Upgrades may have Improperly Affected TSA Negotiations

Introduction of 1200 MW of power into a single location on the New England grid will without doubt necessitate major AC upgrades to the PTF. The costs of such upgrades should be clearly allocated to the proponents of this new interconnection – and not transmission ratepayers as a whole. Yet this particular transaction poses significant risk of cross-subsidization by captive

¹⁶ 129 FERC ¶ 61,279 at P 48 and n.51.

¹⁷ *Southern California Edison Co.*, 121 FERC ¶ 61,168 at P 74 (2007) (the [radial, Segment 3] project has now been redesigned to be a network facility and now qualifies for rolled in rate treatment under Commission policy. Further, the full project has been approved by the CAISO's transmission planning process. As such, SCE's request for this incentive for Segment 3 does not constitute a collateral attack on the Commission's prior ruling in the *Antelope Order*." See *supra* note 14).

transmission customers. Under the ISO-NE OATT, essentially all transmission upgrades that ISO-NE determines are needed for reliability (and not committed as part of any participant funded interconnections or Elective Upgrades) are classified as Reliability Upgrades and rolled into regional rates. As part of the ISO-NE Regional System Plan and Planning Advisory Committee (“PAC”) processes, NU and NSTAR recently announced a set of major transmission upgrades in the immediate vicinity of the proposed interconnection and made the case that such upgrades are necessary for reliability – independent of the Northern Pass¹⁸ (the “Reliability Upgrades”). Specifically, at the December 16, 2010 Planning Advisory Committee meeting, NU and NSTAR revealed the preferred Reliability Upgrades to address North Shore/Boston Massachusetts reliability needs, a new 345kV line from Scobie, New Hampshire to Tewksbury, Massachusetts, together with related upgrades. While these facilities may indeed address reliability problems, it is obvious that this particular solution will also substantially facilitate the Northern Pass interconnection. The proposed Reliability Upgrades provide unambiguous, substantial value to HQ, Northern Pass and their affiliates. This raises two major issues:

First, although this market information was not known by other developers before December 16, 2010, knowledge of the proposal may have benefited the Northern Pass TSA negotiations, as well as HQ’s valuation of and willingness to pay a premium ROE under the TSA. While all other developers learned that this set of Reliability Upgrades would be the preferred alternative at the December 16th PAC meeting, the absence of open season and presence of 12 months of exclusive negotiations with a single developer on a deal that financially rewards NU and NSTAR (through a premium ROE) raises concerns that the Northern Pass

¹⁸ A CEII (password protected) version of the presentation to the December Planning Advisory Committee announcing these upgrades is available at http://www.iso-ne.com/committees/comm_wkgrps/prtcpnts_comm/pac/ceii/mtrls/2010/dec162010/greater_boston.pdf.

discussions may have shared privileged information on these Reliability Upgrades. Obviously, an open season would have prevented these concerns. However, absent an open season on the NPT Line, the Commission must address whether the resulting transmission service offering in these circumstances remains just and reasonable, or whether an investigation of these circumstances is necessary to assure that no developer was advantaged or harmed by this series of events. Competitive markets and open access require transparency.

The second concern is cost allocation. While it may be possible that the proposed Reliability Upgrades are indeed the best and least expensive way to address local reliability problems, it is far from clear that this is the case completely independent of the NPT Line. The timing of the announcements is, if nothing else, very disconcerting (the PAC announcement coming only one day after the Northern Pass filing at the Commission). The Scobie-Tewksbury 345 kV line has been discussed for over 20 years – it was proposed and rejected by the Massachusetts Siting Council in the early 1980s. It seems an amazing coincidence that reliability needs now make that line necessary, *just in time* to facilitate the NPT Line.

We believe that it is an important principal that transmission ratepayers not subsidize this proposal. NEPGA requests that the Commission direct ISO-NE to provide an exceptionally high level of scrutiny to any determinations that the Scobie-Tewksbury line and related Reliability Upgrades are truly necessary, and that they represent the best, least-cost solutions to local problems *independent of Northern Pass*. To the extent NU or NSTAR proposes any regionally-socialized PTF transmission that also provide economic benefits to affiliates of Northern Pass, the Commission should direct that the costs of such economic benefits be allocated to benefiting transmission owner and not to the region as a whole.

IV. MOTION TO SUBMIT PROTEST OUT-OF-TIME

Pursuant to Rule 214(d) of the Rules of Practice and Procedure of the Commission, 18 C.F.R. § 385.214(d), NEPGA submits that good cause exists to grant its Protest out-of-time. NEPGA will not prejudice any party nor disrupt the proceeding in any way. Furthermore, as stated in the previously submitted intervention, NEPGA has a direct and substantial interest in the instant proceeding that cannot be adequately represented by any other party.

V. CONCLUSION

WHEREFORE, NEPGA respectfully requests that the Commission direct Northern Pass and HQ to modify the TSA for reasons set forth herein.

Respectfully submitted,

**NEW ENGLAND POWER GENERATORS
ASSOCIATION, INC.**

/s/ Angela O'Connor

By: Angela O'Connor
Its: President

Dated: January 6, 2011

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that on this day, I emailed or mailed, postage prepaid, a copy of the foregoing document to all parties on the official service list.

Dated at Washington, D.C. this 6th day of January, 2011.

/s/ Angela O'Connor