

August 11, 2004

Via Messenger

Magalie R. Salas, Esq., Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

**Re: ISO New England Inc., *et al.*, Bangor Hydro-Electric Company, *et al.*,
The Consumers of New England v. New England Power Pool, Docket
Nos. RT04-2-___; ER04-116-___; ER04-157-___; EL01-39-___;
Compliance Filing of ISO New England Inc. and the New England
Transmission Owners**

Dear Ms. Salas:

Pursuant to the Commission's order of March 24, 2004, which conditionally approved a proposal to establish a regional transmission organization ("RTO") for New England,¹ ISO New England Inc. (the "ISO") and the New England transmission owners² (together with the ISO, the "Filing Parties") hereby submit this compliance filing. In the RTO Order, the Commission directed the Filing Parties to make a filing addressing the sharing of confidential information with state commissions within 30 days of a Commission order regarding a similar proposal filed by PJM Interconnection, L.L.C.

¹ See Order Granting RTO Status Subject to Fulfillment of Requirements and Establishing Hearing and Settlement Judge Procedures, 106 FERC ¶ 61,280 at P 191 (March 24, 2004) (the "RTO Order").

² The New England transmission owners joining this filing consist of Bangor Hydro-Electric Company; Central Maine Power Company; New England Power Company; Northeast Utilities Service Company on behalf of its operating companies: The 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; NSTAR Electric & Gas Corporation on behalf of its operating affiliates: Boston Edison Company, Commonwealth Electric Company, Canal Electric Company, and Cambridge Electric Light Company; The United Illuminating Company; Vermont Electric Power Company, Inc., Fitchburg Gas and Electric Light Company ("Fitchburg"); and Until Energy Systems, Inc. ("Unutil"). While Unutil and Fitchburg were not parties to the RTO filing made on October 31, 2003, Unutil and Fitchburg have elected to join the other New England transmission owners and the ISO in submitting this compliance filing.

(“PJM”).³ On June 28, 2004, the Commission issued an order addressing the April 29 PJM Proposal,⁴ triggering the 30-day period for this filing. On July 29, 2004, in the above-captioned dockets, the Commission granted the Filing Parties’ request for an extension of the date for filing of this compliance filing, to August 11, 2004.

I. BACKGROUND

A. The RTO Order

In the RTO Order, the Commission responded to concerns raised by the New England Conference of Public Utility Commissioners (“NECPUC”) that the RTO’s Information Policy should be revised to allow state utility commission access to confidential market data.⁵ The Commission stated that:

NECPUC requests revisions to RTO-NE’s Information Policy regarding the information received, created and distributed by market participants and RTO-NE in connection with market settlements, system operations, and planning matters. NECPUC argues that this information should be provided to state regulators in order to facilitate their evaluations of market issues at the state level. NECPUC also asserts that state regulators should be given access to all such materials, including certain confidential information collected by or developed by RTO-NE.⁶

³ See PJM Interconnection, L.L.C., FERC Docket No. ER04-776-000 (filed April 29, 2004) (“PJM Proposal”).

⁴ See Order Accepting Tariff Revisions Subject to Modification, 107 FERC ¶ 61,322 (June 28, 2004) (“June 28 PJM Order”).

⁵ The RTO Information Policy was not submitted by the Commission as part of the Filing Parties’ October 31, 2003 RTO filing and will be submitted to the Commission prior to the Operations Date for the RTO.

⁶ RTO Order at P 190.

The Commission found that NECPUC's concerns were reasonable, but indicated that a proceeding in PJM addressing similar issues should serve as the lead case. Specifically, the Commission stated that:

uniformity in this policy across [the ISO's] neighboring control areas would also serve a useful purpose and should also be considered. Accordingly, because PJM is currently in the process of developing such a policy, we will allow PJM to serve as the lead case in this matter. We will require the Filing Parties to submit a filing within 30 days of the date of our order addressing PJM's policy, including what, if any, variations may be required in that policy as it would apply to RTO-NE.⁷

B. New England Power Pool ("NEPOOL") Information Policy

Under the current NEPOOL arrangements, the rules and guidelines regarding the sharing of confidential information by the ISO are set forth in the NEPOOL Information Policy. Section 2.1 of the NEPOOL Information Policy provides that the following types of information shall be considered confidential information:

(a) Information that (i) is furnished by a Participant (the "Furnishing Participant") to ISO New England, NEPOOL Committees or another Participant, (ii) constitutes trade secrets or commercial or financial information, the disclosure of which would harm the Furnishing Participant or prejudice the position of that Participant in the NEPOOL electricity markets, and (iii) has been designated in writing by the Furnishing Participant as confidential or proprietary either in the document which provided such information, in the transmittal materials accompanying such information, or in a separate document which identifies the information with sufficient specificity and clarity so that the entity receiving such information has been made aware that Furnishing Participant seeks confidential treatment for such information.

⁷ RTO Order at P 191.

(b) Information that (i) is furnished by ISO New England to a Participant or a NEPOOL Committee, (ii) constitutes trade secrets or commercial or financial information the disclosure of which would have an adverse effect on the ability of ISO New England to perform its responsibilities under the ISO Agreement, and (iii) has been designated in writing by ISO New England as confidential or proprietary either in the document which provided such information, in transmittal materials accompanying such information, or in a separate document which identifies the information with sufficient specificity and clarity so that the entity receiving such information has been made aware that ISO New England seeks confidential treatment for such information. In addition, information relating to the job status or performance or terms of employment of any ISO New England employee shall be Confidential Information.

(c) Information that (i) is furnished by a non-Participant that takes part in a demand response program operated by ISO New England (a "DR Information Provider") to ISO New England, NEPOOL Committees or any Participant in connection with the demand response program, (ii) constitutes trade secrets or commercial or financial information, the disclosure of which would harm the DR Information Provider or prejudice the position of the DR Information Provider in the demand response program, and (iii) has been designated in writing by the DR Information provider as confidential or proprietary either in the document which provided such information, in the transmittal materials accompanying such information, or in a separate document that identifies the information with sufficient specificity and clarity so that the entity receiving such information has been made aware that the DR Information Provider seeks confidential treatment for such information.

(d) Any report, compilation or communication produced by ISO New England or a NEPOOL Committee that contains information described in Clause (a), (b) or (c) above and allows for the specific identification of the Furnishing Entity or the DR Information Provider.⁸

⁸ Confidential information does not include information that (1) is or becomes generally available to the public without any party violating any obligation of secrecy relating to the information

(continued...)

Unless specifically permitted by the NEPOOL Information Policy, the ISO may not disclose confidential information provided to the ISO by its market participants. Section 3.1(a) of the NEPOOL Information Policy provides that the ISO must refer requests for confidential information to the market participant that furnished such information to the ISO (the “Furnishing Participant”) and that the ISO may not release requested confidential information unless (i) the ISO is directed to do so by the Furnishing Participant or (ii) the ISO is ordered to do so by a court or regulatory agency with jurisdiction over such matters. Notwithstanding the above limitation, Section 3.1(a) provides that “upon request of a regulatory agency, other than FERC or its staff, having appropriate jurisdiction and subject to an appropriate confidentiality order entered under such agency’s procedures sufficient to preserve the confidential nature of the information submitted, and with advance notice to the Furnishing Participant, ISO New England may submit *Confidential Information* to such agency.”⁹

C. PJM Proposal

The PJM Proposal is based on the following general principles: (i) state commissions should have access to confidential data, (ii) appropriate protections must ensure the confidentiality of information, (iii) PJM members should know when their

(...continued)

disclosed, or (2) is received by a NEPOOL participant in good faith from a third party who discloses such information on a non-confidential basis without violating any obligation of secrecy relating to the information disclosed, or (3) is defined as “Public Information,” in Section 3 of the NEPOOL Information Policy, or (4) can be shown by the recipient's prior records to have been already known to the recipient other than through disclosure by a third party which would not be subject to exclusion based on (2) above.

⁹ Emphasis in original.

data is being shared, (iv) the Commission should resolve disputes, and (v) flexibility should be built into the procedures. The PJM Proposal consists of the following three documents: (x) a non-disclosure agreement between PJM and each person authorized to receive confidential information, (y) a certification by the state commissions for the benefit of PJM and its members setting forth the terms for use and protection of confidential information and identifying persons authorized to receive such information, and (z) amendments to the PJM Operating Agreement necessary to implement such information sharing provisions.

The PJM Proposal provides a formal process through which the state commissions can request confidential information. Such requests must be made in writing, but the PJM Proposal envisions and allows for situations in which confidential information could be disclosed orally in discussions with state commission personnel as a means of helping determine whether the state commission needs access to further confidential information. PJM members affected by such requests must be notified by PJM, and those members have a right to challenge such requests. In addition, under the PJM Proposal, the signatories to the non-disclosure agreements and the state certification, including the state commissions and their employees receiving such data, will agree to utilize the Commission as the forum for resolution of disputes regarding the release of confidential information. Finally, in the event that a state commission elects not to participate in the PJM's information sharing process, nothing in the PJM Proposal is intended to interfere with a state commission's ability to obtain information under existing legal processes, or to supersede existing provisions regarding PJM's responsibilities for protecting confidential information.

II. IMPLEMENTATION OF A SIMILAR PROPOSAL IN NEW ENGLAND

A. Differences from the NEPOOL Information Policy

As noted above, the NEPOOL Information Policy prohibits the ISO from disclosing confidential information to state commissions unless (i) the ISO is authorized to release the confidential information by the Furnishing Participant, (ii) the ISO has been ordered to release the confidential information by an agency with jurisdiction over such matters or (iii) such information is released to a state commission subject to an appropriate confidentiality order entered under such agency's procedures sufficient to preserve the confidential nature of the information submitted, and with advance notice to the Furnishing Participant. The information sharing provisions in the PJM Proposal establish a more streamlined method for the release of confidential information to state commissions that would alleviate the need for those state commissions to invoke more time-consuming legal processes. This information sharing process could complement the existing provisions of the NEPOOL Information Policy regarding the sharing of information with state commissions. Thus, the Filing Parties believe that, with certain modifications discussed below, the PJM Proposal may be reconciled with the NEPOOL Information Policy and implemented in New England.

B. The Scope Of Confidential Information Covered Must Be More Precisely Defined.

The Filing Parties believe that the PJM provisions do not adequately define the scope of confidential materials that could be provided to state utility commissions. The PJM Proposal seems to indicate that the proposal would apply to any information that would be considered non-public or confidential. While the intent of the new provisions

seems to be to provide confidential market data to state commissions, the language proposed by PJM might be construed to apply to other confidential information that an ISO or RTO should not be compelled to disclose to state commissions, such as draft versions of reports and analyses, internal ISO documents not related to market data, and legally privileged information.

The ISO raised these concerns in its response to the PJM filing. In the PJM Order, the Commission stated that PJM's definition of confidential information is adequate, but noted that "if ISO-NE believes that a further definition of the term 'confidential information' is needed, the Commission can address that issue when ISO-NE makes a filing related to sharing confidential information with state commissions."¹⁰ The ISO notes that the Commission did state, however, that "[t]he purpose of PJM's proposal is to provide access to non-public or confidential market data to state commissions to enable them to carry out their regulatory functions."¹¹ This expression of the scope of confidential information covered comports with the ISO's concerns, and the formal filing will indicate that other information, including, but not limited to, draft versions of reports and analyses, internal ISO and RTO documents not related to market data, and legally privileged information is not covered. This is consistent with the definition of "Confidential Information" contained in the NEPOOL Information Policy currently in effect in New England.

¹⁰ June 28 PJM Order at P 18.

¹¹ June 28 PJM Order at P 18.

C. Potential Modifications Raised By NECPUC

In addition to the modification discussed above, the ISO notes that several additional modifications have been raised with the ISO by NECPUC concerning the confidentiality agreements that set forth the terms and conditions for the sharing of confidential market data with state commissions by the ISO. First, NECPUC states that having the non-disclosure agreement signed by one authorized person from each state commission will be sufficient, rather than requiring each person that will have access to confidential market information to sign the non-disclosure agreement. Such authorized persons will be specified on the certification from the applicable state commission (the “Authorized State Commission”) to the ISO, and therefore, disclosure will be limited to a defined number of persons known to the ISO. The Filing Parties support this modification, provided that (i) the non-disclosure agreement specifies that the person signing the non-disclosure agreement is authorized to bind all members of the Authorized State Commission; (ii) disclosures of confidential information are limited to those authorized persons who require the information in order to carry out the regulatory functions of the Authorized State Commission; and (iii) the non-disclosure agreement contains a provision making the Authorized State Commission responsible for breaches by any of its employees or other representatives.

Second, NECPUC requests that the Commission, in its order approving information sharing provisions for New England, find that certain market information, such as bid data (that is less than six-months old), generator specific outage information and fuel supply contract information, constitutes confidential market data warranting protection from disclosure. Such a finding may give certain state commissions, such as

the Vermont Public Service Board, a clearer basis under state law to maintain the confidentiality of the information, and will obviate the need for those commissions to issue a protective order and execute a separate non-disclosure agreement each time confidential information is requested. Third, NECPUC suggests that the provisions of the non-disclosure agreement relating to the destruction or return of confidential materials should be modified to accommodate limitations in state laws, which may prohibit state commissions from returning or destroying the confidential materials. The Filing Parties believe that these modifications could be reasonable if properly formulated. Such modifications would be consistent with the general need to ensure that the provisions of the RTO's Information Policy relating to the sharing of confidential data with state commissions take into account all applicable state laws governing the terms under which state commissions can maintain the confidentiality of trade secrets and other confidential information.

Fourth, NECPUC recommends that, because state commissions will be acting in accordance with Commission orders regarding confidentiality, the non-disclosure agreement should be modified to specify the Authorized State Commission's responsibility to defend against disclosure. That responsibility would include informing the reviewing court that the Commission has found the material at issue to be confidential, explaining to the court the process for obtaining the material and advising the court of the state commission's obligation not to disclose the confidential information. In addition, the state commission would be free to raise other defenses or to conclude that they are better raised by other interested parties. The Filing Parties take no position as to this issue.

III. STAKEHOLDER PROCESS

The Filing Parties agree that the PJM Proposal is a valuable template for the development of a proposal for sharing confidential market data with state commissions in New England. As contemplated by the Commission in the RTO Order, this filing simply discusses possible modifications to the PJM Proposal that the Filing Parties believe may be required to create an effective information sharing plan for New England, including concerns raised by NECPUC regarding the implementation of a similar plan in New England.

In addition to its discussions with NECPUC representatives, the ISO has engaged in discussions with members of the NEPOOL Markets Committee regarding the PJM Proposal and the adoption of a similar information sharing mechanism in New England. Further, the ISO has been reviewing the PJM Proposal internally and considering modifications to the NEPOOL Information Policy that could be incorporated into the Information Policy for the New England RTO in order to implement the PJM information sharing provisions. The ISO expects to present such modifications for full stakeholder review and a vote in September.¹² The Filing Parties plan to make a formal filing pursuant to Section 205 of the Federal Power Act to implement these provisions as part of the RTO's Information Policy when that policy is filed with the Commission, incorporating both stakeholder input and any guidance from the Commission, resulting from the instant filing, which the Commission may provide prior to a formal filing in September.

¹² The Filing Parties reserve the right to raise other issues in the stakeholder process.

Honorable Magalie R. Salas

August 11, 2004

Page 12 of 14

IV. CONCLUSION

The Filing Parties respectfully request that the Commission accept this filing in compliance with its directives in the RTO Order. A proposed notice of filing and diskette are enclosed.

Respectfully submitted,

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

ISO New England Inc., et al.

Docket Nos. RT04-2-____
ER04-116-____

Bangor Hydro-Electric Company, et al.

Docket No. ER04-157-____

The Consumers of New England v. New
England Power Pool

Docket No. EL01-39-____

NOTICE OF FILING

(_____)

Take notice that on August 11, 2004, ISO New England Inc and the New England Transmission Owners submitted a report in compliance with the March 24, 2004 order of the Federal Energy Regulatory Commission, 106 FERC ¶ 61,280 (2004) regarding the sharing of confidential information with state commissions.

Copies of said filing have been served upon all parties to this proceeding, upon all NEPOOL Participants (electronically), non-Participant Transmission Customers, and the governors and regulatory agencies of the six New England states.

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's web site at <http://www.ferc.gov>, using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll-free at (866)208-3676, or for TTY, contact (202)502-8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Comment date: _____

Magalie R. Salas
Secretary

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding, and upon all NEPOOL Participants (electronically), non-Participant Transmission Customers, and the governors and regulatory agencies of the six New England states.

Dated at Washington, D.C. this 11th day of August, 2004.

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