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June 19, 2009

**VIA ELECTRONIC FILING
AND OVERNIGHT MAIL**

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

**RE: Petition for Declaratory Order filed by Northeast Utilities Service Company and
NSTAR Electric Company in Docket No. EL09-20.**

Dear Secretary Bose:

In accordance with Rule 713 of the Commission's Rules of Practice and Procedure (18 CFR § 385.713), the New England Power Generators Association, Inc. hereby files its Request for Rehearing of the Order Granting Petition for Declaratory Order issued by the Commission on May 22, 2009, in the above-captioned docket.

Copies of this transmittal letter and pleading are being sent to each person designated on the official service list in the above-captioned docket.

Sincerely,

Christopher P. Sherman
General Counsel
New England Power Generators Association, Inc.

Enclosures (1)

cc. Service List

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

Northeast Utilities Service Company)
NSTAR Electric Company)

Docket No. EL09-20-000

**REQUEST FOR REHEARING OF
NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.**

Pursuant to Section 313(a) of the Federal Power Act (“FPA”), 16 U.S.C. § 8251 (a), and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.713 (2006), the New England Power Generators Association, Inc.¹ hereby requests rehearing of the Order Granting Petition for Declaratory Order issued by the Commission on May 22, 2009.²

I. BACKGROUND

On December 17, 2008, Northeast Utilities Service Company and NSTAR Electric (“NU/NSTAR”) filed a Petition for Declaratory Order (“Petition”) pursuant to Rule 217 that NU/NSTAR may enter into a bilateral transmission services agreement with H.Q. Energy Services, Inc. (“HQUS”) 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. NU/NSTAR state that the exclusive firm service over this new tie would allow HQUS 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

¹ The comments contained in this filing represent the position of The New England Power Generators Association, Inc. as an organization, but not necessarily the position of any particular member(s) with respect to any statement, concept, issue or position expressed herein.

² *Northeast Utilities Service Company and NSTAR Electric Company*, 127 FERC ¶ 61,179 (2009) (“Order”).

Order 890 requirement that all new transmission services be provided on an open access, competitive and non-discriminatory basis.

The Petition set forth a combination of inter-related transactions, including a Transmission Services Agreement (“TSA”) and long-term Power Purchase Agreement (“PPA”) for 1,200 MW of firm system power to be delivered via a new line from Quebec to southern New Hampshire. The proposed TSA would contain unspecified provisions for “risk sharing” between the parties related to completion of the line, such that it remains unclear who would be responsible for the risk of cost overruns, delays and potential stranded costs.

A number of parties, including NEPGA³, intervened, protested and filed comments in the proceeding. The protesting comments consistently maintained that the Petition sought a declaration in direct conflict with the open-access and non-discriminatory transmission requirements established by the Commission, which would ultimately transfer substantial costs and risks onto captive ratepayers and, in doing so, represents a dramatic reversal of federal and state energy policy encouraging the development of competitive energy markets.⁴ Comments further urged that Commission approval be subject to subsequent review of actual rates, terms and conditions pursuant to §205 of the FPA,⁵ and should be subjected to an appropriate level of review under ISO New England’s regional system planning process.⁶

³ See, Motion to Intervene, Protest and Alternative Request for Conditions of the Electric Power Supply Association, the New England Power Generators Association, Inc. and the Independent Energy Producers of Maine in Docket EL09-20 regarding the Petition for Declaratory Order filed by Northeast Utilities Service Company and NSTAR Electric to enter into a bilateral transmission services agreement with H.Q. Energy; Motion for Leave to Answer and Answer in FERC Docket No. EL09-20 - NU/NSTAR's Petition for Declaratory Order.

⁴ See generally, Competitive Suppliers, PSEG, Indicated Generators, NRG and Brookfield Energy Marketing Inc.

⁵ National Grid, Massachusetts Attorney General, Brookfield Energy Marketing Inc. and Competitive Suppliers

⁶ National Grid and Competitive Suppliers

For reasons stated herein, NEPGA respectfully requests that the Commission grant rehearing and deny the NU/NSTAR petition for a declaratory order. Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, NEPGA hereby provides the following statement of issues and specification of errors:

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

1. The Commission did not engage in reasoned decision making when it did not require an open season simply because the transmission service will be cost-based. The Commission's reliance on this characteristic is arbitrary and capricious and fails to distinguish this "cost-based" transmission project from the Commission's longstanding policies on open seasons for new natural gas pipelines. The Project should be subject to competitive offerings through an open-season process in order to assure that all market participants have access to this Project.
2. The Commission did not engage in reasoned decision making by failing to distinguish the Project from merchant lines. The Commission's elevation of form over substance ignores the important policy considerations set forth in its orders in *Chinook Power Transmission, LLC* and *Zephyr Power Transmission, LLC*.⁷
3. The Commission did not engage in reasoned decision making by finding the ISO's OATT mitigates vertical market power. FERC Orders 888, 889 and 890 were put in place to ensure a regulatory open access, non-discriminatory transmission service framework designed to prevent undue discrimination.⁸ The Project denies access to third-party suppliers based upon a simple assertion that that request represents a more attractive commercial arrangement to New England electric consumers. By its very nature, such a denial discriminates against all suppliers, chills future requests for access by additional suppliers, and eradicates any transparency in the use of the transmission system.

⁷ *Chinook Power Transmission, LLC, and Zephyr Power Transmission, LLC* 126 FERC ¶ 61,134 (2009) ("Chinook")

⁸ *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 (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). *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007) (Order No. 890), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007) (Order No. 890-A), *order on reh'g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), (Order No. 890-B) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

III. ARGUMENT

1. The Commission Did Not Engage in Reasoned Decision Making When It Did Not Require an Open Season Simply Because the Transmission Service Will be Cost-based.

The Commission concludes in its Order that there is no undue discrimination in NU/NSTAR's refusal to conduct an open season because the Project is a cost-based, participant-funded transmission system expansion.⁹ The Order lacks the proper analysis and reasoning to establish how the Commission reached that conclusion in a manner that is consistent with its longstanding policies with regard to new gas pipeline transportation projects. In ignoring these long-standing policies, the Commission instead cites to a limited number of discrete cases for its new "cost-based: no open season" policy.¹⁰

In Order No. 2005, Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects, the Commission acknowledged that while there were no regulations specifically requiring open seasons, its policy, "developed through its orders and opinions, is that all new interstate pipeline construction be preceded by a nondiscriminatory "open season" process through which potential shippers may seek and obtain firm capacity rights.¹¹ The fact that NU/NSTAR claim that this electric transmission line will be cost-based¹² is insufficient protection against undue discrimination and preference. In fact, the whole fabric of the Commission's statutory obligations under the Natural Gas Act and Federal Power Act is made up of non-discrimination principles along side a cost-based framework. This Order simply

⁹ Order at P. 29.

¹⁰ Order, footnote 27.

¹¹ See, Order No. 2005, *Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects*, 110 FERC ¶ 61,095 (February 9, 2005) at ¶ 9.

¹² The Commission is forced to accept the Petitioners' assertion that the transmission line will cost-based since it will not review the supporting documents until a future section 205 filing. Order at P. 42.

concludes that because the project will not have negotiated rates there is no undue discrimination.¹³ This is not reasoned decision making.

The Commission concluded in the Order that granting HQUS transmission rights for the entire 1,200 MW capacity of the line as long as it continues to fund the line, rather than making those rights contingent to the length of a PPA, TSA or financing, is consistent with prior policy.¹⁴ The Commission erred in failing to properly consider the market affects of approving a transactional structure that provides NU/NSTAR, or their contractual affiliates, with the option to deliver power beyond the term of the PPA. As stated, HQUS will have the rights, but not the obligation, to deliver power after the proposed twenty-year term of the PPA based upon their own arbitrary amortization of the cost of the line.

This unaccounted for fifteen-year period represents a time in which ratepayers are captive to the potential of out of market resources that can exercise market power and adversely influence the development of new resources. This paradigm ultimately creates a cross-subsidization of market risk to the captive customers of NU/NSTAR under the proposed PPA, and allows NU/NSTAR to chill the development of competitive resources within the New England market that would ultimately benefit their captive customers by advancing competitive market offerings.¹⁵ Accordingly, the Commission erred in not ruling that such a construct is in direct conflict with the open-access and non-discriminatory transmission requirements established by the Commission would ultimately transfer substantial costs and risks onto captive

¹³ Order at P. 29.

¹⁴ Order at P. 67.

¹⁵ Linden VFT, LLC, 119 FERC ¶ 61,066, P. 16, 17

ratepayers and, in doing so, represents a dramatic reversal of federal and state energy policy encouraging the development of competitive energy markets

2. The Commission Did Not Engage in Reasoned Decision Making by Failing to Distinguish the Project from Merchant Lines.

The Commission concludes in its Order that the Project is not a merchant transmission project.¹⁶ The Commission cited the *Chinook* order stating that merchant transmission projects are distinguished from traditional public utilities in that the developers of merchant projects assume all the market risk of a project and have no captive customers from which to recoup the cost of the project.¹⁷ The Commission maintains that the risks of the Project have been shifted from NU/NSTAR to HQUS, which has agreed to participant fund the Project, and thus has full financial responsibility for the Project. In reaching this conclusion, the Commission elevates form over substance.

NEPGA has sufficiently established that, in granting the necessary waivers to Chinook and Zephyr, the Commission relied on a number of distinguishing factors in their proposal that are absent in this Project, and NEPGA highlighted the differences between them and those present in the Project. *First*, unlike the Project, Chinook and Zephyr have no affiliate issues. Although Chinook and Zephyr are affiliated, the projects have no generation affiliate located or doing business in any state in which the respective projects would be located, neither project will interconnect with any existing facilities owned by an affiliate, and they do not anticipate that any affiliate will subscribe capacity on either project.¹⁸ Contrast NU/NSTAR's Project whereby a combination of inter-related transactions would contain unspecified provisions for "risk sharing"

¹⁶ Order at P. 41

¹⁷ *Chinook*.

¹⁸ 126 FERC ¶ 61,134 P4

between the parties related to completion of the line, such that it remains unclear who would be responsible for the risk of cost overruns and delays.

Second, both Chinook and Zephyr have undertaken a significant amount of pre-planning and coordination for projects that are not anticipated to be online until 2014, whereby NU/NSTAR dismiss legitimate questions regarding the ISO-NE regional planning process by claiming that “*to the extent necessary*, the Petitioners will enter into a system impact study with ISO-NE and any affected transmission owner to determine the effect, if any, of the proposed line on the electric grid.”¹⁹

Third, the Chinook and Zephyr proposed lines are completely consistent with open access principles; whereas NU/NSTAR’s Project violates open access principles. Both Chinook and Zephyr employ anchor tenants structures on 50% of the proposed capacity and will be conducting an open season for the remaining 50%. Both the pre-subscription and open season processes that were undertaken to obtain the anchor tenant employed clear criteria for requirements. Furthermore, the anchor tenant precedent agreement will be a model for the subsequent open season customers. Anchors will have 25-year contract terms, and any open season customer willing to commit to this length will receive the same rate and terms as the anchors. The fact that Chinook and Zephyr have employed clear open season rules and consistent bidding guidelines ensures that transmission rights will be allocated in an “open, fair and transparent manner.”²⁰ In stark contrast, NU/NSTAR offer a drastically different subscription methodology by ultimately granting undue preference to a contractual affiliate.

¹⁹ NU/NSTAR’ Answer at 23.

²⁰ 126 FERC ¶ 61,134 at P14-16

Fourth, the proposals in Chinook and Zephyr threaten no market power issues because neither entity has captive customers nor are they located in an RTO whose members will absorb any project costs. Alarmingly, NU/NSTAR will be customers under PPAs with HQUS, effectively placing the costs of the transmission line (constructed and owned by NU/NSTAR) directly on their captive ratepayers.

Accordingly, the Commission erred in not evaluating the proposed transaction under ten criteria it has applied to other merchant transmission facilities. The criteria include: (1) that the merchant transmission facility must assume full market risk; (2) that the service should be provided under the open access transmission tariff (OATT) of the Independent System Operator (ISO) or Regional Transmission Organization (RTO) that operates the merchant transmission facility and that operational control be given to that ISO or RTO; (3) that the merchant transmission facility should create tradable firm secondary transmission rights; (4) that an open season process should be employed to initially allocate transmission rights; (5) that the results of the open season should be posted on the Open Access Same-Time Information System (OASIS) and filed in a report to the Commission; (6) that affiliate concerns should be adequately addressed; (7) that the merchant transmission facility not preclude access to essential facilities by competitors; (8) that the merchant transmission facilities should be subject to market monitoring for market power abuse; (9) that physical energy flows on merchant transmission facilities should be coordinated with, and subject to, reliability requirements of the relevant ISO or RTO; and (10) that merchant transmission facilities should not impair pre-existing property rights to use the transmission grids of inter-connected RTOs or utilities.²¹

²¹ See, *Northeast Utilities Service Co.*, 97 FERC ¶ 61,310 (2002).

3. The Commission Did Not Engage in Reasoned Decision Making by Finding the ISO's OATT Mitigates Vertical Market Power.

The Commission concluded in its Order that “Hydro-Québec, HQUS and its subsidiaries are not affiliated with the NU/NSTAR and, therefore, the possibility of affiliate abuse does not exist.”²² The Commission held that NU/NSTAR ceding control of the U.S. portion of the line to ISO-NE mitigates vertical market power because they will not be able to use the transmission system to control or manipulate generation.²³ The question is what type of “control” the ISO will have over this line? The line will be fully contracted. The terms and conditions have already been agreed upon. The line will be a HVDC line connecting directly to Hydro-Québec. The Petitioners will decide on any capacity expansion and it will be on “the same terms and conditions agreed to by HQUS.”²⁴

Even the ISO admits that the line will not be a pool transmission facility and does not fit under existing OATT provisions.²⁵ The ISO in its comments admits that this type of arrangement would not work if the line was internal to the ISO’s footprint. Specifically, it points out that:

The ISO also notes that this structure described in the Petition would not be workable for transmission projects internal to New England because service over the internal New England regional transmission system is not offered on a point-to-point basis, or with preferential use by signatories of new bilateral power supply arrangements. Instead, transmission is “scheduled” as a byproduct of the use of security-constrained economic dispatch pursuant to the results produced by the New England energy markets.²⁶

²² Order at P. 54

²³ *Id.*

²⁴ Order at P. 28.

²⁵ Order at P. 60.

²⁶ ISO Comments at p 6-7.

Before the Commission can conclude the ISO's OATT mitigates vertical market power, it must consider the significant differences of this Project to the pool transmission facilities that the ISO does actually control.

The Commission's holding failed to properly consider the bundled nature of the transaction anticipated by NU/NSTAR, and the vertical market power that will be conveyed.²⁷ In a circular fashion, the PPA will establish a market-based price for delivered power at the southern terminus of the line, and HQUS will recover the cost of the TSA through the price of the power under the PPA. NU/NSTAR themselves identify the transactional structure as "a combined transmission investment and wholesale power transaction,"²⁸ thus, it will be impossible to adequately distinguish the cost associated with the transmission component from those associated with the interrelated power supply in a manner that properly protects captive customers.

²⁷ In analyzing HQUS' market based rate authority, the Commission should include a market power test within the Québec footprint as was recently ordered with regards to New Brunswick Power. *See, Integrys Energy Services, Inc. v. New Brunswick Power Generation Corporation*, 127 FERC ¶ 61,232 (2009); The New Brunswick System Operator balancing authority area is a unique balancing authority area that includes portions of both Canada and the United States. Although New Brunswick's generation is located exclusively outside of the United States, it is directly interconnected to ISO New England and to northern Maine. As a result, the New Brunswick System Operator balancing authority area is a relevant geographic market for which New Brunswick Power must demonstrate, through a horizontal market power analysis, that it does not possess market power in order to have market-based rate authority.

²⁸ Petition at ¶ 18

IV. CONCLUSION

For the foregoing reasons, NEPGA respectfully requests that the Commission issue an order on rehearing denying the NU/NSTAR petition for a declaratory order approving the structure of the Project.



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Association, Inc.
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June 19, 2009

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

Northeast Utilities Service Company)
NSTAR Electric Company)

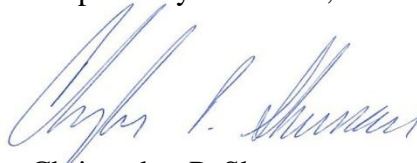
Docket No. EL09-20-000

CERTIFICATE OF SERVICE

Pursuant to the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served a copy of the foregoing document on all persons designated on the official service list compiled by the Secretary in this proceeding.

Dated at Boston, Massachusetts on this 19th day of June 2009.

Respectfully submitted,



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