

**76 FERC - 101 FERC, 87 FERC ¶¶61,135, Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., Federal Energy Regulatory Commission, (Apr. 30, 1999)**

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Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., Rochester Gas and Electric Corporation and New York Power Pool, Docket Nos. ER97-1523-000 and 001, OA97-470-000 and 002 and EC99-31-000

[61,535]

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Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., Rochester Gas and Electric Corporation and New York Power Pool, Docket Nos. ER97-1523-000 and 001, OA97-470-000 and 002 and EC99-31-000

**Order Denying in Part and Granting in Part Rehearing and Clarification, Rejecting Proposed Settlement and Authorizing Transfer of Jurisdictional Transmission Facilities**

[61,536]

**(Issued April 30, 1999)**

**Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.**

This order addresses the requests for rehearing and clarification of our June 30, 1998 order (June 30 order) <sup>1</sup> conditionally authorizing the establishment of the New York Independent System Operator (New York ISO). In this order, we also reject a settlement related to the governance of the ISO filed pursuant to that order. In addition, with the modifications discussed below, we authorize the transfer of jurisdictional transmission facilities to the New York ISO as requested by the Member Systems of the New York Power Pool (NYPP) (collectively Member Systems or Transmission Providers). <sup>2</sup>

*Background*

The June 30 order conditionally authorized the establishment of an ISO by the Member Systems in order to restructure the wholesale electric industry in the state of New York. The June 30 order found that the proposal submitted by the Member Systems satisfied the 11 ISO principles enunciated in [Order No. 888](#). <sup>3</sup> That order approved the majority of the ISO governance provisions proposed by the Member Systems, including the establishment of the New York State Reliability Council (NYSRC). However, the Commission found that the proposed voting structure for the ISO committees was problematic. Therefore, the Commission ordered the parties to negotiate a modified voting structure. As discussed further below, the parties filed a settlement reflecting a revised voting structure for the ISO committees.

In addition, the June 30 order deferred action concerning the ISO tariff and pricing issues to a later order, which was subsequently issued on January 27, 1999. <sup>4</sup>

Finally, the Commission noted that a Section 203 filing requesting a transfer of jurisdictional transmission facilities to the ISO was necessary before the ISO could begin operations. On February 5, 1999, the Member Systems filed a joint application pursuant to Section 203 of the Federal Power Act (FPA) <sup>5</sup> to transfer certain jurisdictional transmission facilities to the newly formed ISO.

### *The Settlement Agreement*

In conditionally approving the New York ISO, the Commission expressed a concern with the governance structure of the ISO. In pertinent part, the Commission found that the weighted voting structure of the ISO committees would assign excessive voting power to the Member Systems.<sup>6</sup> The Commission directed the Member Systems and all interested parties to negotiate and propose a modified voting structure.

On October 23, 1998, the Member Systems filed a settlement agreement between themselves and eighteen parties addressing the ISO governance concerns raised by the Commission in the June 30 order. Comments were filed by various parties for and against the settlement, as noted below.

The proposed settlement revises the voting structure for three standing committees that perform numerous duties on behalf of the ISO. The three standing committees are: (1) the Management Committee; (2) the Operating Committee; and (3) the Business Issues Committee. A detailed discussion of the responsibilities

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of each committee is contained in the June 30 order.<sup>7</sup>

The proposed settlement maintains the original formula for weighted voting on the Management Committee.

<sup>8</sup> Under the formula, each member of the Management Committee will have a voting share based on that member's level of participation in the electric market. Voting shares are weighted based on industry factors, including the ownership of generation, electric sales, peak load, and ownership of transmission and distribution facilities. A 67 percent vote is still required for action by the Management Committee.

The proposed settlement reduces, however, the cap on the combined transmission provider vote from 60 percent to 55 percent. Consistent with the original formula, any excess voting shares above the cap will be reallocated to all other non-transmission provider members on a pro-rata basis in accordance with their non-adjusted voting strength. The proposed settlement also reduces the cap on an individual party's (and its affiliated entities') voting shares from 25 percent of the total voting shares to no more than 20 percent of the total voting shares. Voting shares exceeding 20 percent will be reallocated to other non-capped members on a pro-rata basis.<sup>9</sup> In addition, the settlement revises Section 2.02 of the ISO Agreement to clearly define what types of residential and environmental non-market participants may participate in the governance of the ISO.

The proposed settlement increases the number of parties on the Operating and Business Issues Committees, respectively, from fourteen to twenty-five members. The proposed settlement discards the previous voting structure<sup>10</sup> and replaces it with a form of sector voting as follows: (1) members representing Transmission Providers will have eight votes; (2) members representing Wholesale Parties will have eight votes; (3) members representing Retail Parties will have eight votes; and (4) a member representing Environmental Parties will have one vote.<sup>11</sup> Seventeen members are necessary for a quorum and seventeen affirmative votes are needed to carry a motion.

Committee members for the four industry groups will be selected as follows:

(1) Each of the eight Transmission Providers shall select a representative to be a member of the Transmission Provider Group. Members within the group will have a term of one-year and may be reappointed. The total number of votes for this group will remain at eight and will not be affected by consolidations or mergers.

(2) Five of the eight members to the Wholesale Parties Group are selected based on a formula that computes the largest wholesale participants in the New York market.<sup>12</sup> The three at-large members are selected by the remaining participants in the group. Members within the group will have a term of one-year and may be reappointed; however, the ISO will recalculate the five largest wholesale market participants every six months. If the recalculation changes the five largest members, not only will the new members be immediately seated but elections will also be immediately held for the three at-large seats.

(3) The eight members of the Retail Parties Group will consist of two members based on size (*i.e.*, the largest based on a combination of load and energy), one at-large representative for residential and small commercial customers, one at-large representative for municipal and cooperative systems, two at-large

energy service company (ESCO) representatives and two at-large representatives for industrial and large commercial customers. Members within the group will have a term of one-year and may be reappointed; however, the ISO will recalculate the largest retail market participants annually.

(4) The lone representative of the Environmental Parties Group will be selected by environmental parties that are certified by the ISO Board as non-market participants and that have become parties to the ISO agreement. Selection for the environmental representative will be done annually.

#### *Section 203 Filing*

On February 5, 1999, the Member Systems filed a joint application for authorization to convey operational control of designated jurisdictional transmission facilities and to transfer assets to the New York ISO. The application

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requests authorization to: (1) transfer to the ISO operational control over designated portions of the Member Systems' transmission systems (*i.e.*, the transmission facilities listed in Appendix A-1 of the ISO/Transmission Provider Agreement)<sup>13</sup> and (2) transfer to the ISO both physical assets (the control center and related equipment) and deferred assets (which the Member Systems characterize generally as start-up costs incurred by the Member Systems related to the establishment of the New York ISO).<sup>14</sup>

The transmission facilities of the Member Systems subject to the application will be under the direction and control of the ISO to ensure the secure operation of the transmission system. The Member Systems further explain that the ISO will have the authority to approve maintenance schedules for these facilities based on approved criteria. Physical operation and maintenance of the transmission facilities will be provided by the individual Transmission Providers and will not be the responsibility of the ISO.

Additional transmission facilities, as listed in Appendix A-2 of the ISO/Transmission Provider Agreement<sup>15</sup> will not be subject to the control of the ISO. However, ISO notification will be required with respect to these facilities for any planned outages or changes in status of the facility.<sup>16</sup>

As for the physical and deferred assets, the Member Systems state that they will receive reimbursement by the ISO for these assets and note that a mechanism for cost recovery of these assets is included in the ISO Tariff.

The Member Systems state that approval of the application is in the public interest and is necessary to effectuate the transition from the NYPP to the New York ISO.<sup>17</sup> They add that the application should be approved so that the ISO may begin operations to ensure non-discriminatory transmission access, to promote the efficient use of the transmission facilities in New York and to ensure the reliable operation of the Member Systems' transmission systems.

#### *Requests for Rehearing*

Requests for rehearing and/or clarification of the June 30 order were filed by the Member Systems, Sithe/Independence Power Partners (Sithe), Enron Power Marketing, Inc. (Enron), Independent Power Producers of New York (IPPNY) and Municipal Electric Utilities Association of New York State (MEUA). The arguments that these parties raise in their pleadings are discussed below.

#### *Notices of Filings and Interventions*

The proposed settlement in Docket Nos. ER97-1523-000, *et al.* was noticed in the *Federal Register*, 63 *Fed. Reg.* 65,199 (1998), with protests and motions to intervene due on or before December 2, 1998. Motions to intervene were filed by Aquila Power Corporation (Aquila), SEF Industries, Inc. (SEF) and Coral Power, L.L.C. (Coral).

Comments in support of the proposed settlement were filed by Sithe, National Association of Energy Service Companies, New York State Consumer Protection Board, Multiple Intervenors<sup>18</sup> and The E-Cubed Company on behalf of Joint Supporters.<sup>19</sup>

Comments opposing the settlement were filed by Coral, Enron and Williams Energy Company (jointly, Indicated Intervenors), Constellation Power Source, Inc., MEUA, and the Energy Marketers Coalition (EMC).

The Member Systems' Section 203 filing in Docket No. EC99-31-000 was noticed in the *Federal Register*, 64 *Fed. Reg.* 8080 (1999), with protests and motions to intervene due on or before March 8, 1999. A notice of intervention and comments in support of the application were filed by the Public Service Commission of the State of New York (New York Commission). Motions to intervene raising no substantive issues were filed by Coral, Southern Energy Bowline, L.L.C. *et al.* (Southern Energy), Duke Energy Trading and Marketing,

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L.L.C. (DETM), U.S. Generating Company (USGen), the New York ISO, Enron, Cogen Technologies Linden Venture, L.P. (Cogen) and Multiple Intervenors. Sithe filed a motion to intervene and consolidate. Motions to intervene and protest were filed by PECO Energy Company (PECO) and 1st Rochdale Cooperative Group, Ltd. (Rochdale). MEUA filed a motion to intervene out-of-time.

*Discussion*

*Procedural Matters*

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, [18 C.F.R. §385.214](#) (1998), timely, unopposed motions to intervene of Coral, Aquila and SEF in Docket Nos. ER97-1523-000, *et al.* serve to make them parties to that proceeding.

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, [18 C.F.R. §385.214](#) (1998), the notice of intervention of the New York Commission and the timely, unopposed motions to intervene of Southern Energy, DETM, USGen, the New York ISO, Enron, Cogen, Multiple Intervenors, Sithe, PECO and Rochdale in Docket No. EC99-31-000 serve to make them parties to that proceeding. Given the early stage of the proceeding and the absence of undue delay or prejudice, we find good cause to grant the untimely, unopposed motion to intervene of MEUA.

*The Settlement Agreement*

Parties opposed to the proposed settlement (Opposing Commentors) argue that the revised weighting of voting shares continues to vest the Member Systems with control over the most powerful ISO committee--the Management Committee. Opposing Commentors argue that the settlement only cosmetically reduces the caps placed on the aggregate vote of a party (and its affiliates) and the aggregate vote of the Transmission Providers. Opposing Commentors assert that it only takes 34 percent of the vote to block a motion and the Transmission Providers will control 55 percent of the vote.<sup>20</sup> Moreover, they argue that the Transmission Providers could easily join with the generators to pass a measure. Opposing Commentors thus argue that the revised voting structure in the settlement violates the policy the Commission articulated in the California ISO:

[T]he voting structure should be guided by two overriding principles: (1) no one class should be able to block or veto action; and (2) no two classes should together be able to form a sufficient majority to make decisions.<sup>21</sup>

Opposing Commentors argue that the representation on the Operating and Business Issues Committees is skewed because wholesale marketers are not provided with a stand-alone seat on these committees.<sup>22</sup> They assert that there is no guarantee that a marketer will be one of the five largest wholesale participants or one of the two largest retail participants. Opposing Commentors argue that the formula for calculating the five largest wholesale participants, in fact, works to exclude power marketers because of the installed generating capacity component.<sup>23</sup>

In addition, Opposing Commentors argue that the number of generators in the wholesale class will exceed the number of power marketers thereby assuring that only generators will be elected to the three at-large seats. The exclusion of power marketers as a separate class is especially egregious to the Opposing Commentors in light of the Member Systems retaining eight votes even though their ranks will be reduced through mergers.<sup>24</sup>

Opposing Commentors request that the Commission reject the settlement in its entirety and prescribe a fair and representative governance structure such as that already implemented in the PJM Interconnection.<sup>25</sup>

MEUA argues that the settlement is unreasonable because it ties a party's ability to participate in the ISO governance to that party's execution of the ISO agreement.<sup>26</sup> MEUA is also concerned that several provisions of the ISO agreement may preclude MEUA's members from executing the ISO agreement.

MEUA requests that the Commission reconsider its June 30 order concerning the selection

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criteria for the ISO Board.<sup>27</sup> MEUA notes that the nine members of the ISO Board have already been selected and that the current board members are extremely qualified. However, MEUA contends that the board lacks an individual with transmission dependent utility experience. MEUA requests that the Commission order the ISO Board to elect, as its tenth member and executive director of the ISO, an individual with a transmission dependent utility background. MEUA contends that the PJM and California ISOs have required that a board member with a transmission dependent utility background be selected.

Member Systems filed an answer to the comments opposing the settlement. Member Systems note that the settlement process was facilitated by a settlement judge from the New York State Department of Public Service (NYSDPS) and that the signatories to the settlement represent a wide range of market participants and state agencies responsible for safeguarding the public interest (*i.e.*, NYSDPS, the New York Consumer Protection Board and the New York Department of Economic Development). Member Systems note that the settlement is reasonable in that it balances the interests of all stakeholders with the requirement of ISO independence and the need for expertise in operating the transmission grid.

Member Systems argue that Indicated Intervenor's and MEUA's assertions that they were excluded from the settlement process are incorrect. Member Systems state that several all-party meetings were held and that Indicated Intervenor and MEUA participated in these meetings. Member Systems contend that other participants' failure to agree with Indicated Intervenor's and MEUA's demands does not render the settlement process unfair.

Member Systems contend that weighted voting on the Management Committee provides an appropriate link between a party's actual involvement and investment in the New York market and the weight of a party's vote on the Management Committee. Member Systems argue that their voting share will decline with both generation divestiture and retail access and that with the reduced caps in place, the Member Systems lack the votes to pass a measure. Moreover, Member Systems assert that weighted voting is only one aspect of the balanced voting structure. Member Systems note that the Management Committee is subordinate to the ISO Board and that the settlement breaks the link between weighted voting and representation on the Operating and Business Issue Committees. Member Systems argue that Opposing Commentors overstate the role of the Management Committee and that any action taken by the Management Committee is subject to review by the ISO Board.

Member Systems further argue that the ISO governance structure is consistent with Commission precedent. They claim that the overriding principles adopted in the California ISO do not apply to the Member Systems' proposal. Unlike the California ISO which had an affiliated ISO board (whereby the concern that an industry sector could directly influence the operations of the ISO was paramount), the Member Systems state that their proposal has an unaffiliated board which has clear and direct control over all ISO committees and operations.

Furthermore, Member Systems note that the sector representation on the Operating and Business Issues Committees is balanced between transmission, Wholesale and Retail Parties. Member Systems argue that marketers can be elected to either the five largest wholesale seats or the three at-large wholesale seats. Member Systems note that there were forty power marketers doing business in the New York Power Pool during the first nine months of 1998. Moreover, Member Systems note that the distinction between power marketers and generators is blurring as power marketers acquire generating facilities.

Finally, Member Systems request that the Commission deny the reconsideration sought by MEUA concerning the selection of the tenth board member. Member Systems note that MEUA's request is untimely as a request for rehearing of the June 30 order. Member Systems argue that MEUA participated in the board selection process and that MEUA's parochial interest should not be accorded any significance.

*Commission Response*

## 1. Management Committee

We will reject the Member Systems' revised governance structure for the Management Committee. The weighted voting of the Management Committee continues to vest disproportionate authority in the Transmission Providers. While the cap reductions are a step

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in the right direction, the proposed settlement does not materially differ from the Member Systems' original filing. The Transmission Providers can still block or veto any measure that comes to the Management Committee, by virtue of their controlling 55 percent of the votes (a 34 percent vote is required to block a measure). Moreover, as little as two Transmission Providers could effectively block a measure because the individual Transmission Providers may each have up to 20 percent of the vote.

Furthermore, the prospect of divestiture or retail access does not lessen the Transmission Providers' control over the Management Committee. Under the weighted voting formula, installed capacity accounts for no more than 30 percent of the formula. The balance of industry factors include peak load, energy sales, circuit miles of transmission and distribution facilities, and the revenue requirement of the associated transmission and distribution facilities. These factors account for 60 percent of the formula.<sup>28</sup> Even with generation divestiture and retail access, there is no reason to believe that the Transmission Providers will not continue to compete for load, retain their transmission and distribution assets, and continue to have disproportionate voting shares on the Management Committee.

The Member Systems characterize their proposal as a "two tier" governance structure whereby a stakeholder group (Management Committee) reports to an independent non-stakeholder board (ISO Board). As noted by the Member Systems, under this two-tier governance structure, all decisions made by the stakeholder group (Management Committee) are advisory and the ISO Board has the discretion to decide when and how it will get involved. Furthermore, according to the Member Systems, this structure allows the ISO Board the benefit of not having to review each and every decision of the stakeholder group (Management Committee) if the stakeholders can reach a satisfactory decision. Member Systems contend that this governance model is the one that they have adopted for the New York ISO.<sup>29</sup> We note that, while the Member Systems' proposal is a two tier governance model, as discussed below, we disagree with the Member Systems that their proposal will achieve their stated objectives.

The stakeholder group in this instance--the Management Committee--is dominated by the Member Systems. Because the Member Systems control the majority of the votes on the Management Committee, any decisions rendered by the Management Committee will primarily reflect the views and interests of that one industry segment. Under the Member Systems' proposal, with the lack of independence of the Management Committee, the ISO Board will not be able, as Member Systems wish, to delegate important responsibilities to the Management Committee. In addition, the benefits associated with adopting the consensus decisions of an independent stakeholder group are lost and the ISO Board will be forced into the role of micromanaging the decisions of the Management Committee.

In addition, contrary to the arguments raised by the Member Systems, the importance of the Management Committee is not lessened by the right of other stakeholders to take their concerns directly to the ISO Board. Having the other stakeholders take their concerns directly to the ISO Board should be the exception and not the rule. Indeed, if the ability of stakeholders to take their concerns directly to the ISO Board is what is critical, as Member Systems claim, then there equally would be no need to have any Transmission Providers on the Management Committee because they could still fully protect their interests by appeal to the ISO Board. Article 7 of the ISO Agreement states that the Management Committee is responsible for: (1) supervising the other ISO committees; (2) suspending or otherwise reviewing other committee determinations; and (3) development of ISO operations, procedures, policies and budgets. These responsibilities should not be controlled by just one segment.

Although the revised governance proposal was filed as a settlement, it more accurately represents a compliance filing in accordance with our direction in the June 30 order.<sup>30</sup> In this regard, it is fundamentally no different than the situation we faced in *New England Power Pool*, [86 FERC ¶61,262](#) (1999) (*NEPOOL*), *reh'g pending*, where we rejected a similar proposal.

Consistent with our recent decision in *NEPOOL*, therefore, we direct the Member Systems, within 60 days of the date of this order, to submit a new proposal concerning governance that eliminates the control of the vertically integrated utilities in the NYPP. To aid the parties in formulating this new proposal, we encourage the Member Systems to initiate an alternative dispute resolution process and in

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doing so to consult with the Commission's Dispute Resolution Service.<sup>31</sup>

If, upon review of the new proposal, we find it to be unresponsive to our concerns, we will order the Member Systems to adopt specific governance procedures that will result in the independence necessary for an ISO. An acceptable method may follow the governance model used in the PJM restructuring or, as discussed and modified below, the proposed settlement governance structure for the Operating and Business Issues Committees.

## 2. Operating and Business Issues Committees

We find that, overall, the representation contained in the proposed settlement for the Operating and Business Issues Committees is fair and balanced between the needs of Transmission Providers, suppliers and customers. However, a few modifications are necessary. Under the Member Systems' proposal, each Transmission Provider will elect a member to serve on the Transmission Provider Group. The number of seats in the Transmission Provider Group is eight and would remain at eight even after the merger of ConEd and O&R or any subsequent merger. We find this aspect of the proposed settlement unacceptable. The Member Systems have provided no basis for retaining two seats in the Transmission Provider Group for one corporate entity. Therefore, the Member Systems must either: (1) eliminate a seat from the Transmission Provider Group (after consummation of the ConEd/O&R merger or any subsequent merger); or (2) leave a seat vacant after consummation of a merger pending the possible addition of new members to the Transmission Provider Group.

In addition, the revised governance structure should not permit members of one industry segment (or their affiliates) from belonging to a group of parties participating in the selection of an at-large member of another industry segment.<sup>32</sup> There is no persuasive justification for a party to have a vote in two industry segments.

We note that the Member Systems' original governance model provided for a separate power marketer class on the Operating and Business Issues Committees and we also note that Indicated Intervenor's oppose the exclusion of power marketers as a separate class in the proposed settlement. However, it is premature to rule on Indicated Intervenor's opposition to the proposed Operating and Business Issues Committees governance structure until the Member Systems submit a revised governance proposal, as discussed above.

Finally, we decline MEUA's request that we order the ISO Board to elect as its tenth member an individual with a transmission dependent utility background. MEUA did not timely seek rehearing of the June 30 order's approval of the selection process, and it is too late to do so now.<sup>33</sup> In addition, MEUA does not argue that the selection process was flawed, only that the results of the process were not to MEUA's satisfaction. However, MEUA participated in the selection of the ISO Board and had ample opportunity to express its views. MEUA's request is both an untimely request for rehearing and a belated attempt to impose its self-interests on the ISO Board.

### *Section 203 Filing*

Two intervenors, PECO and Rochdale, filed protests to the Member Systems' Section 203 filing. PECO claims that the Member Systems have failed to provide sufficient detail in the application to satisfy their burden regarding the requested transfer. PECO argues that the proposed division of operational responsibility between the ISO and the Member Systems is unclear, making it impossible to determine whether the ISO will have the necessary control over the interconnected transmission facilities in New York and control over short term grid reliability, as required by ISO principles 4 and 5.

PECO also maintains that the filing provides insufficient information regarding how assets are placed under ISO control. PECO complains that the Member Systems have failed to describe the standards utilized for determining which facilities will be placed under operational control of the ISO (Attachment A facilities) or simply subject to ISO notification (Attachment B facilities). As a result, PECO claims there can be no oversight regarding how assets are added or removed from ISO control. PECO argues that the Commission

should conduct hearings on the issues noted above in addition to conditioning approval of the Section 203 application on a further filing addressing future additions and/or removals of facilities transferred to ISO control.

Rochdale's protest concerns the Member Systems' cost recovery of the costs associated with the deferred assets to be transferred to the ISO by Member Systems. According to Rochdale, the ISO Tariff neither specifies the actual rate and what costs are to be recovered, nor identifies the manner in which the costs will be allocated among new entrants to the ISO markets. Rochdale requests that the Commission condition the approval of the Member Systems'

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Section 203 filing by requiring that Member Systems make a separate filing justifying the costs to be recovered. Rochdale further requests that the Commission determine the justness and reasonableness of the allocation of the start-up costs among the New York ISO participants before such costs may be collected.

#### *Commission Response*

We note that the recovery of the costs described in Rochdale's protest are not before the Commission at this time. Rather, as noted by Member Systems, the ISO Tariff (Rate Schedule 1-Scheduling, System Control and Dispatch Service) already provides as a general matter for the recovery by the ISO of costs associated with the start-up and formation of the ISO.<sup>34</sup> Furthermore, the ISO Tariff provides for an amortized amount to be included in Schedule 1 of the ISO Tariff.<sup>35</sup> However, while the Commission conditionally accepted the ISO Tariff for filing to become effective when the ISO commences operations,<sup>36</sup> the recovery of particular ISO start-up costs was not set for hearing because recovery of particular ISO start-up costs was not included in the ISO Tariff. Therefore, Rochdale is free to raise these concerns when the ISO makes a future Section 205 filing to recover these costs. Accordingly, we will not condition the instant request for Section 203 authorization as requested by Rochdale.

We also reject PECO's request that we hold hearings on the issues raised in its protest. In the June 30 order, the Commission stated that the initial designation of facilities proposed to be under ISO operational control or subject to ISO notification was reasonable.<sup>37</sup> We found that the initial designation of those facilities was consistent with the current operation of the NYPP. In addition, we found that the list of transmission facilities may only be modified by mutual written agreement of the ISO and the owner of the facilities.<sup>38</sup> The ISO also proposed to maintain on its OASIS the current list of transmission facilities subject to ISO control and to ISO notification.<sup>39</sup> Thus PECO's concerns that there is no oversight concerning how transmission facilities are added to or deleted from the list are unfounded.

However, in addition to maintaining a current list of ISO transmission facilities on the ISO's OASIS, we will require the ISO to maintain historical records identifying the time period and the entity having control of the facilities. By maintaining these records, transmission customers (and the Commission) will be able to track the responsibilities of the ISO and the Member Systems.<sup>40</sup>

With the above modifications, the Commission grants the Member Systems' Section 203 request to transfer control of their transmission facilities to the New York ISO.

#### *Rehearing of the June 30 Order*

##### *1. The NYSRC*

Several parties seek rehearing of the Commission's approval of the NYSRC governance structure and clarification of several related points in the June 30 order.<sup>41</sup> Parties argue that the Commission's approval of the NYSRC governance structure violates the Commission's ISO principles concerning independence of the ISO. These parties argue that because the ISO must follow the Reliability Rules established by the NYSRC, the ISO lacks the "primary responsibility" for ensuring the short-term reliability of the grid. In addition, they argue that, absent modification, the governance structure of the NYSRC will permit the Member Systems to dominate the development of Reliability Rules applicable to the New York ISO.<sup>42</sup> Moreover, parties contend that the eight Member Systems will use their majority on the NYSRC executive committee to thwart any effort to modify the existing Reliability Rules. Parties argue that this ability to block

changes to the existing Reliability Rules is particularly egregious because the existing Reliability Rules of the NYPP will become the Reliability Rules of the New York ISO. Parties request that the Commission narrow the scope of authority of the NYSRC and reduce the control of the Member Systems over the NYSRC decision-making process. Parties also request that the Commission make the NYSRC a committee under the ISO in order to alleviate the dominance of the Member Systems on reliability issues.

Member Systems respond that the Commission properly approved the NYSRC as proposed in its filing. Member Systems argue that the NYSRC is a crucial part of the New York restructuring effort and its role is carefully designed to provide assurances that the reliability of the New York bulk power system will

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be maintained. In this regard, Member Systems note that the New York Commission has expressed its strong support for the NYSRC.

Member Systems explain that the NYSRC will not infringe upon the ISO's independence, as the role of the NYSRC is limited in scope and clearly defined. Member Systems state that this role is expressly limited to the adoption of Reliability Rules consistent with standards adopted by the North American Electric Reliability Council (NERC), the Northeast Power Coordinating Council (NPCC), the New York Commission, the Commission and the Nuclear Regulatory Commission. Member Systems further note that if the NYSRC concludes that a Reliability Rule is not being properly implemented by the ISO, its options are limited to resolving the matter directly with the ISO, utilizing a dispute resolution process, or if appropriate, raising the issue with the Commission. Member Systems stress that the NYSRC has no authority to direct any activities of the ISO.

IPPNY, Enron and the Member Systems request clarification concerning review and suspension of Reliability Rules by the ISO. In the June 30 order, the Commission stated, "any existing or new reliability Rule that the New York ISO objects to is subject to immediate suspension by the NYSRC if requested to do so by the New York ISO."<sup>43</sup> The parties note that we later quote the ISO/NYSRC Agreement, which provides that, "[i]f the dispute involves the implementation of a new Reliability Rule or the modification of an existing one, the ISO Board may request that the NYSRC suspend implementation of the rule pending resolution of the dispute by the New York Commission."<sup>44</sup> The parties contend that these two statements are contradictory and the Commission's intent regarding the modification of existing Reliability Rules must be clarified.

In addition, Enron requests that the Commission require, upon consummation of their merger, that ConEd and O&R will be treated as one company for purposes of the governance structure of the NYSRC executive committee and that one of their two seats on the NYSRC executive committee be made available to power marketers and energy service companies.

*Commission Response*

We will deny the requests for rehearing concerning our approval of the NYSRC. Petitioners do not raise any new arguments that would persuade us to depart from our prior findings that the role of the NYSRC is limited in scope and clearly defined.

We note that, as with the Management Committee, above, the Transmission Providers hold the majority of the votes on the NYSRC Executive Committee. While we reject the proposed weighted voting for the Management Committee, we will not grant rehearing of the voting structure of the NYSRC Executive Committee. Unlike the Management Committee, the NYSRC is outside of the ISO organization and the ISO does not delegate any of its responsibilities to the NYSRC. In addition, the NYSRC's role is clearly defined and limited in scope to the issuance of Reliability Rules. Thus, the NYSRC is unable to affect the day-to-day operations of the ISO. This is in stark contrast to the role of the Management Committee, above, which is significantly broader and has a direct impact on all aspects of the ISO's operations and procedures.

Moreover, the June 30 order appears to have created some confusion concerning the ISO's ability to suspend existing Reliability Rules. With the clarifications discussed below, we continue to believe that there are ample safeguards in place to ensure that the New York ISO may reliably operate the New York State power system (NYSPS) without undue influence by the NYSRC and the Member Systems.

The June 30 order specifically provided that the ISO should be permitted to suspend Local Reliability Rules; Local Reliability Rules are developed by the Member Systems, not by the NYSRC. However, as noted

by IPPNY, Enron, and the Member Systems, the June 30 order, without discussion, also found that “any existing or new Reliability Rule that the New York ISO objects to is subject to immediate suspension by the NYSRC if requested to do so by the New York ISO.”<sup>45</sup>

We clarify that the ISO may not suspend existing Reliability Rules. If the ISO were to disagree with an existing Reliability Rule and suspend operation of that rule, the reliability of the transmission grid could be jeopardized pending the resolution of the dispute between the ISO and the NYSRC. The operating procedures of the ISO will be based upon the existing Reliability Rules; thus, the suspension of an existing Reliability Rule could leave a void in the ISO’s operating procedures.

The ISO may invoke dispute resolution procedures in the event it determines that an existing Reliability Rule is unnecessary or should be modified.<sup>46</sup> If the ISO and the NYSRC cannot reach agreement on the disputed

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Reliability Rule, the dispute is subject to dispute resolution by the New York Commission and appeal to this Commission. Furthermore, matters subject to the Commission’s jurisdiction under the FPA must be resolved directly by the Commission.<sup>47</sup> Therefore, there are ample safeguards in place whereby the ISO may seek the modification or removal of a Reliability Rule without using the NYSRC executive committee.

In addition, the ISO’s ability to suspend modifications to an existing Reliability Rule or a new Reliability Rule negates the concerns raised by IPPNY, Sithe and Enron that the Member Systems will be able to dominate the governance of the NYSRC. Even if Member Systems vote as a block on the NYSRC executive committee, they would still need the vote of another party to pass a new Reliability Rule or a modification to an existing one. The ISO, in turn, may suspend implementation of the Reliability Rule if it disputes the rule. Therefore, the ISO provides a critical check to the size of the Member Systems’ vote on the NYSRC executive committee.

However, we will grant the clarification sought by Enron concerning the number of seats assigned to ConEd and O&R on the NYSRC executive committee. As previously discussed, after the merger of ConEd and O&R is consummated, there is no reason that one corporate entity should have two votes on any committee under the ISO. The Member Systems are directed to amend their filing to reduce the number of Transmission Provider votes on the NYSRC executive committee from eight to seven upon consummation of the merger of ConEd and O&R.<sup>48</sup> In addition, the Member Systems should amend the language of the NYSRC Agreement to provide that any subsequent merger or consolidation by the Transmission Providers will reduce the number of Transmission Provider seats on the NYSRC executive committee.

We will not, at this time, direct the Member Systems to require that the vacant seat be assigned to a power marketer or any other specific industry group. We simply urge the Member Systems, in revising the language of the NYSRC Agreement, to be as diverse as possible in filling the vacant seats created through mergers and consolidations of the Transmission Providers.

Lastly, IPPNY’s request for clarification concerning the procedures to be used in selecting the non-utility members of the NYSRC executive committee is moot. Member Systems respond that the objection raised by IPPNY has been resolved within the New York collaborative processes and need not be addressed by the Commission.

#### *2. Telemetering Information*

Member Systems state that further clarification is required regarding the Commission’s directive requiring development of a timetable and plan of action to transfer the receipt of telemetering information to the ISO. Member Systems state that this directive may be read to imply that the Transmission Providers eventually will be denied access to such data. Member Systems state that it is necessary for the Transmission Providers to continue to receive the telemetering information after the ISO is in operation to ensure the reliable operation of the NYSPS in the event the ISO’s ability to control the system is interrupted. Thus, Member Systems state that the plan to be developed jointly by the Member Systems and the ISO with respect to the transfer of telemetering information to the ISO need not prohibit the simultaneous receipt of such information by the Transmission Providers.

### *Commission Response*

The ISO will act as the NERC defined control area operator for the NYSPS.<sup>49</sup> As previously directed, the plan of action will eventually shift the information obtained by the Member Systems to the ISO. However, we will clarify that the Member Systems may receive whatever telemetering information the ISO determines is necessary to maintain the reliability of their local control centers.<sup>50</sup>

### *3. Other Matters*

The Member Systems request rehearing of the June 30 order concerning the rejection of their proposed weighted voting structure. We will deny their request for rehearing consistent with our discussion of the settlement above.

IPPNY, Sithe and Enron request that the Commission clarify its order directing the parties to negotiate a modified voting proposal. We find this issue moot in light of our earlier discussion of the settlement.

In addition, we note that MEUA's request for rehearing raises issues which were not addressed in the June 30 order. These matters,

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which concern the ISO tariff and service agreements, were deferred to the January 27 order. MEUA's concerns are more properly addressed in the context of rehearing of that order.

Sithe also requests that the Commission direct the Member Systems to include two specific transmission lines in the list of transmission facilities under the control of the ISO. The Member Systems respond that the failure to include these lines was merely an oversight and that the revisions to Appendix A-1 will be submitted with other revisions to the Member Systems' filing. We note that Sithe's request was addressed in the Member Systems' joint request for Section 203 authorization. Therefore, Sithe's request is now moot.

#### *The Commission orders:*

- (A) The motion to intervene out-of-time by MEUA in Docket No. EC99-31-000 is hereby granted.
  - (B) The Member Systems' settlement on governance issues is hereby rejected, as discussed in the body of this order.
  - (C) The Member Systems are hereby directed to submit a new proposal concerning governance within 60 days of the date of this order, as discussed in the body of this order.
  - (D) The requests for rehearing and clarification are hereby granted in part and denied in part, as discussed in the body of this order.
  - (E) The Member Systems are hereby directed to amend the filing and the NYSRC Agreement, as discussed herein.
  - (F) The Member Systems' Section 203 application is hereby approved, as modified, as discussed in the body of this order.
  - (G) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, services, accounts, valuation, estimates or determinations of cost, or any other matter whatsoever now pending or which may come before the Commission.
  - (H) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.
  - (I) The Commission retains authority under Section 203(b) of the FPA to issue supplemental orders as appropriate.
  - (J) Member Systems shall advise the Commission within 10 days of the date the transfer is completed.
- Commissioner Bailey, *dissented in part* with a separate statement attached.

**Vicky A. BAILEY**, Commissioner, Bailey, *dissenting in part*

I write separately to express my dissenting opinion with one of the Commission's decisions in today's order--to reject a proposed settlement related to the governance of the New York Independent System Operator (ISO).

This issue is difficult to analyze and resolve. The question of independence of an ISO or other form of regional structure does not lend itself to easy or categorical rules or formulations. The Commission necessarily must be assured--on a filing-specific, case-by-case basis--that an ISO presented for the Commission's approval is independent of the exercise of control by transmission providers. Here, the Commission decides that the Management Committee of the New York ISO, despite negotiated changes to its governance structure, remains dominated by transmission providers.

I recognize the facial similarity of today's action with that in another recent order, in which the Commission rejected revised governance procedures applicable to the New England Power Pool (NEPOOL).<sup>1</sup> Nevertheless, I perceive important distinctions. Here, unlike the situation in NEPOOL, transmission providers cannot band together to direct action by the Management Committee--their voting share is capped at 55%, with action by the Management Committee requiring a 67% vote. (In contrast, in *NEPOOL*, the eight largest vertically-integrated utilities would have exercised a 69% voting share, with action by the Management Committee requiring only a 66% vote.) Moreover, the filing proffered in the instant case represents the collective judgment of a Commission-approved ISO, rather than a centralized power pool. And the New York ISO filing has the backing of the State of New York through various governmental bodies--its Department of Public Service, Department of Economic Development, and Consumer Protection Board.

In the June 30, 1998 order in this proceeding, in which the Commission found problematic the voting structure for the ISO committees, the Commission explicitly directed the parties to negotiate and propose a modified voting structure: "[W]e believe that it is better for the affected parties to reach a consensus on revised governance procedures than for us to impose a solution at this time." 86 FERC at p. 62,409.

The New York ISO has done exactly what the Commission directed it to do--it negotiated a consensus document that addresses the Commission's concern for the governance of the ISO committees. As the ISO indicates in its filing,

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the settlement was executed by a broad spectrum of interested parties, including: transmission owners, transmission-dependent generators, energy service companies, industrial and large commercial users, environmental organizations, New York state agencies responsible for protecting the interests of residential and small commercial users and for promoting economic development, and the New York Department of Public Service. (Indeed, the New York Department offered the services of one of its administrative law judges to facilitate negotiations among the parties on ISO governance.)

Nevertheless, today's order rejects the settlement, to the extent it applies to the voting structure of the Management Committee. For support, it notes simply that the settlement "more accurately represents a compliance filing" in response to the June 30, 1998 order. Slip op. at 13. This characterization is technically accurate, but not cogent for purposes of decision-making. In addition, the order notes that the settlement "is opposed by a number of participants." Slip op. at 13 n.30. I presume this statement refers to the interventions of a group of power marketers and a group of municipal customers that oppose the revised weighting of voting shares in the Management Committee.

I am reluctant to upset a settlement (especially one directed by the Commission) merely because it did not win the unanimous consent of all participants. In this regard, the order notes a factual dispute among the parties. The Member Systems argue that the settlement process was an inclusive one, and that no category of participants was excluded from the process. The opposing intervenors suggest that their participation in the settlement process, while perhaps not flat-out barred, was discouraged. In these circumstances, I am inclined to give the benefit of the doubt to the ISO and the supporting state agencies, which vouch for the integrity of the settlement process.

Moreover, in rejecting the settlement, I am concerned that the Commission is not particularly receptive to flexibility or innovation in the design and administration of ISO governing and voting structures. I know from today's order and earlier orders that the "sector voting" model approved in earlier PJM and California ISO orders is acceptable. Indeed, today's order approves a form of sector voting for the governance of the Operating and Business Issues Committee.

But where the settlement diverges from sector voting, the Commission announces its dissent. I understand that the ISO Board would like to delegate, on occasion, some of its responsibilities to the Management

Committee. But I do not understand why the Commission, if comfortable with the independence of the Board, necessarily must be just as assured and just as probing with the independence of the ISO's advisory committees. In my judgment, the Commission need not be so probing where, as here, ISO efforts to ensure the independence of its governing structure are the result of a fair and inclusive settlement process.

For all of these reasons, I **dissent** from the decision to reject the settlement to the extent it applies to the governing structure of the ISO Management Committee.

## -- Footnotes --

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<b>Footnotes</b>
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- 1 *Central Hudson Gas & Electric Corp., et al.*, [83 FERC ¶61,352](#) (1998).
- 2 The seven public utility Member Systems at the time of the original filing were Central Hudson Gas & Electric Corporation (Central Hudson), Consolidated Edison Company of New York, Inc. (ConEd), Long Island Lighting Company (LILCO), New York State Electric & Gas Corporation (NYSEG), Niagara Mohawk Power Corporation (Niagara Mohawk), Orange and Rockland Utilities, Inc. (O&R), and Rochester Gas and Electric Corporation (Rochester G&E). Since the filing of Docket No. ER97-1523-000, LILCO's transmission facilities were acquired by LIPA (which is not a public utility) and LIPA is now a party to the proceeding. *Long Island Lighting Company*, [82 FERC ¶61,129](#) (1998). The eighth Member System, the New York Power Authority, is not a public utility.  
  
For ease of reading, however, we shall refer to all eight together as Member Systems or Transmission Providers.
- 3 See *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](#), 61 *Fed. Reg.* 21,540, *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶31,036 (1996), *order on reh'g*, [Order No. 888-A](#), 62 *Fed. Reg.* 12,274 (1997), *FERC Statutes and Regulations* ¶31,048 (1997), *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).
- 4 *Central Hudson Gas & Electric Corp., et al.*, [86 FERC ¶61,062](#) (1999) (January 27 order), *reh'g pending*.
- 5 [16 U.S.C. §824](#) b (1994).
- 6 [83 FERC at p. 62,409](#).

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- 7 *Id.* at p. 62,408.
- 8 See Section 7.04 of the ISO Agreement.
- 9 A reallocation of the voting shares cannot leave a party with more than a 20 percent share.
- 10 See [83 FERC at p. 62,408](#).
- 11 A member in one industry group (or its affiliate) may belong to a group of parties that serves as an at-large member in the same or another industry sector group.
- 12 The formula is based on a party's sales in the New York market and the amount of installed generating capacity committed to the New York market.

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- 13 Attachment A of the joint application.
- 14 Descriptions of the physical assets and deferred assets to be transferred to the ISO are included in the application as Attachments E and F. Transfers of, for example, accounts receivable are not Section 203 transfers, see, e.g., *LG&E-Westmoreland Rensselaer*, [86 FERC ¶61,190](#) at p. 61,668, n.14 (1999), and to the extent the Member Systems' application would encompass such transfers, we dismiss it as

unnecessary. However, insofar as the deferred assets, in particular, include jurisdictional transmission facilities, the transfer of such assets is properly before us.

- 15 Attachment B of the joint application.
- 16 Member Systems clarify that the transfer of LILCO's facilities from Appendix A to Appendix B is due to legal requirements associated with LIPA's issuance of tax-exempt debt and its related acquisition of LILCO.
- 17 As we noted in the June 30 order, when the transition is completed, NYPP's functions will be performed by the ISO and the NYPP will cease to exist.
- 18 Multiple Intervenors are an unincorporated association of large commercial and industrial energy consumers that operate facilities throughout New York.
- 19 Joint Supporters are a voluntary association of competitive suppliers and consumers that have been active in New York's electric, gas and energy services markets.

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- 20 EMC notes that just two of the eight Transmission Providers could block a vote by virtue of their 40 percent aggregate vote (two Transmission Providers capped at their respective 20 percent single party caps). EMC comments at 10-11.
- 21 *Pacific Gas and Electric Co.*, 77 FERC ¶61,204, at p. 61,817 (1996), *order on reh'g*, [81 FERC ¶61,122](#) (1997).
- 22 This is a change from the previous filing under which power marketers were recognized as a separate and distinct interest group. Indicated Intervenors comments at 7.
- 23 See *supra* note 12.
- 24 EMC notes that the Transmission Providers are the only class that permits each member to exercise an individual vote while the other sectors are diluted through the use of at-large voting. EMC comments at 13-14.
- 25 See *PJM Interconnection, et al.*, [81 FERC ¶61,257](#) (1997), *order on reh'g*, [82 FERC ¶61,047](#) (1998) (*PJM*).
- 26 MEUA comments at 5-7.

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- 27 The ISO Board of Directors (ISO Board) will consist of ten members which will have no affiliation with any market participant. While the ISO Board will not be affiliated with any market participant, the members must possess a cross-section of skills and experience (e.g., electric utility management, experience in Commission electric regulatory affairs, corporate finance, public policy, consumer advocacy, environmental affairs, business management and information systems). Once appointed, the initial nine directors of the ISO Board will select the Executive Director of the ISO, who will serve as the tenth member of the ISO Board.

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- 28 The remaining 10 percent of the formula is based on the number of members in the ISO.
- 29 Member Systems request for rehearing at 3-5.
- 30 As noted, the proposed settlement filed by the Member Systems is opposed by a number of market participants.

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- 31 We encourage the Member Systems to contact the Director of the Commission's Dispute Resolution Service, Richard L. Miles, at (202) 208-0702.
- 32 See Section 4.2(E) of the settlement agreement.
- 33 See [16 U.S.C. §825](#) | (1994).

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- 34 Member Systems' Application at 12.

- 35 ISO Tariff at Original Sheet No. 80.  
36 See *supra* note 5.  
37 [83 FERC at p. 62,414](#).  
38 ISO/Transmission Provider Agreement, Section 2.01.  
39 *Id.*  
40 See *PJM*, [81 FERC at p. 62,268](#).  
41 Enron, Sithe, and IPPNY.  
42 The NYSRC executive committee consists of thirteen members, eight of which are the Member Systems. Nine affirmative votes are required to pass a measure.

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- 43 [83 FERC at p. 62,412](#).  
44 *Id.* at p. 62,413.  
45 *Id.* at p. 62,412.  
46 ISO/NYSRC Agreement, Section 5.3.

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- 47 [83 FERC at p. 62,412](#).  
48 While we provided the Member Systems with two options concerning these seats on the Operating and Business Issues Committees, that option was to maintain the balance amongst the three sectors. There is no balance to maintain on the NYSRC.  
49 ISO Agreement at Section 6.01.  
50 Any information received by the Transmission Providers is subject to the code of conduct requirements imposed by the Commission in the June 30 order. See [83 FERC at p. 62,414](#).

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- 1 *New England Power Pool*, [86 FERC ¶61,262](#) (1999).