123 FERC ¶ 61,128
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Central Vermont Public Service Corporation — Docket Nos. ER08-615-000
Green Mountain Power Corporation — ER08-615-001
New England Power Company d/b/a National Grid
Northeast Utilities Service Company
The United Illuminating Company

ORDER REJECTING SCHEDULE 20A TARIFF REVISIONS

(Issued May 6, 2008)

1. On February 29, 2008, Central Vermont Public Service Corporation, Green Mountain Power Corporation, New England Power Company d/b/a National Grid, Northeast Utilities Service Company, and The United Illuminating Company (collectively, the Filing Parties) submitted changes to Schedule 20A of their ISO New England Inc. (ISO-NE) Open Access Transmission Tariffs (OATT) pursuant to section 205 of the Federal Power Act.[1] On March 7, 2008, the Filing Parties amended the filing. In this order, the Commission rejects the proposed revisions, as discussed below.

I. **Background**

2. The Hydro Québec High Voltage Direct Current Transmission Facilities (HQ Tie) interconnects the systems operated by ISO-NE and Hydro Québec TransÉnergie (Hydro Québec). The United States portion of the HQ Tie is owned by four companies that recover their costs for the interconnection from utilities who hold transmission rights on the HQ Tie, i.e., the Interconnection Rights Holders (IRHs).[2] The Canadian portion of

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[1] 16 U.S.C. § 824d (2000).

[2] The four owners of the HQ Tie are New England Electric Transmission Corporation; Vermont Electric Transmission Company; New England Hydro-Transmission Electric Company, Inc.; and New England Hydro-Transmission Corporation. The Filing Parties are IRHs.

the interconnection facilities is owned by Hydro Québec. The nominal transfer capacity of the HQ Tie is approximately 2,000 MW; however, for reasons of reliability, ISO-NE historically has allowed no more than 1,800 MW of capacity to be imported over the facility.

3. In return for the IRHs' financial support of the HQ Tie and the reliability benefit that the HQ Tie provides to New England through access to available generation in Canada, the IRHs—and by extension, their customers—have a right to receive Hydro Québec Interconnection Capability Credits (HQ Capability Credits or HQICCs).[3] Each IRH is allocated a share of HQ Capability Credits approximately equal to its share of the support cost obligation. The IRHs' right to receive HQICCs is provided for under the ISO-NE OATT.

4. For the Power Year 2006/2007 the Commission approved 1,200 MW of HQICCs from March through November and 0 MW from December through February.[4] The Forward Capacity Market (FCM) Settlement Agreement fixes this amount through May 2010.[5] HQICCs historically have been credits against the Installed Capacity (ICAP) requirements of load serving IRHs. The value of HQICCs has been based on the market value of capacity in the ICAP market multiplied by the number of megawatts of HQICCs owned by each IRH. Further, as a transition mechanism to the FCM, the FCM Settlement Agreement provides that during the transition period (December 1, 2006, through

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[3] The HQ Capability Credits reflect the amount of potential resources available from Canada across the HQ Tie. Based upon its evaluation of capacity resources potentially available for sales from Québec, ISO-NE calculates that 1,200 MW of HQICCs are available and provides these credits to the IRHs. *See, e.g.*, *ISO New England Inc.*, 114 FERC ¶ 61,055, at P 5 (2006).

[4] A Power Year is the twelve-month period commencing June 1 and ending May 31.

[5] The FCM Settlement Agreement was accepted in *Devon Power LLC*, 115 FERC ¶ 61,340, *reh'g denied*, 117 FERC ¶ 61,133 (2006). The FCM Settlement Agreement provides that "the total MW Value of HQICCs will be fixed at 1,200 MW March through November and 0 MW December through February." FCM Settlement Agreement § 11.VIII.K.

May 31, 2010) all installed capacity will receive fixed payments starting at $3.05 per kW-month and increasing to $4.10 per kW-month.[6]

5. Although the IRHs were granted a waiver from the requirement to file an OATT for transmission service over the HQ Tie, the Commission directed those public utility IRHs with "control" over HQ Tie transmission service to include terms and conditions governing access to the HQ Tie in their individual OATTs.[7] As part of the formation of the regional transmission organization in New England, these rates, terms, and conditions for HQ Tie transmission service were incorporated into Schedule 20A of the ISO-NE OATT. Schedule 20A sets forth the rates, terms, and conditions for transmission service provided over the United States portion of the HQ Tie. The IRHs that are Schedule 20A Service Providers (SSP) have exclusive filing rights under section 205 of the Federal Power Act to make changes to Schedule 20A.[8]

II. Filing Parties' Proposal

6. The Filing Parties explain that the Commission has concluded that the FCM Settlement Agreement requires a reduction of HQICCs to the extent that HQ Tie capacity imports exceed 600 MW during the transition period (this 600 MW excess represents the difference between the 1,800 MW capacity and the 1,200 MW of HQICCs).[9] The Filing

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[6] Section VIII.B of the FCM Settlement Agreement provides the following fixed payments for ICAP during each Power Year of the transition period, referred to as the settlement interim payment rates:

December 1, 2006 to May 31, 2007	$3.05/kW-month
June 1, 2007 to May 31, 2008	$3.05/kW-month
June 1, 2008 to May 31, 2009	$3.75/kW-month
June 1, 2009 to May 31, 2010	$4.10/kW-month

[7] *See Northern States Power Co. (Minn.)*, 76 FERC ¶ 61,250, *order on reh'g sub nom. Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,943 (1996).

[8] Sections 3.05 and 11.03(f)(i)(B) of the Transmission Service Administration Agreement provide that each SSP or its permitted designee may revise its Schedule 20A Service Schedule. *ISO New England Inc.*, 111 FERC ¶ 61,244 (2005).

[9] Filing Parties Transmittal Letter at 2-3, 8; *see also NSTAR Elec. Co. v. ISO New England Inc.*, 120 FERC ¶ 61,261 (2007) (Netting Order). ISO-NE computes the reduction in HQICCs as follows. For each IRH, ISO-NE calculates that IRH's megawatt share per month. If an IRH that is an SSP sold a total amount of transmission rights greater than its allocated megawatt share of the 600 MW limit during a given month, that SSP would be subject to an HQICC reduction if the total megawatt amount for all firm

(continued…)

Parties further explain that, as would be anticipated, the increase in the price of installed capacity resulting from implementation of the transition period has increased the demand for transmission service over the HQ Tie.[10] This, in turn, has lead to reductions in the amount of HQICCs allotted to the IRHs.

7. The Filing Parties state that, like all of the IRHs, they use HQICCs to reduce the cost of reliably serving load in their respective service areas. They state that the loss resulting from HQICC reductions translates directly into an increase in the cost to serve customers in New England.[11] The Filing Parties contend that the benefits of the HQ Tie capacity lost by the IRHs and their customers are transferred to the users of the line for transmission service. According to the Filing Parties, such a penalty imposed on the New England customers who support the HQ Tie is unfair and directly contrary to the Commission's policies and to the intent of the FCM Settlement Agreement. The Filing Parties aver that the only way to preserve the Commission's policies and the FCM Settlement Agreement's intent, while at the same time observing the Commission's interpretation of the requirements of the FCM Settlement Agreement during the transition period, is to allow the Filing Parties to modify their Schedule 20A provisions to permit them to recover any losses they suffer as a result of the loss of some or all of their HQ Capability Credits.

8. The Filing Parties assert that such a modification in transmission rates across the HQ Tie to recompense the Filing Parties and their customers for the loss of HQICCs is fully consistent with the FCM Settlement Agreement and with the Netting Order allowing the reduction of HQICCs during the transition period.[12] They state that the FCM Settlement Agreement's treatment of HQICCs during the transition period was intended to prevent double-counting of reliability benefits and capacity resources and argue that no arrangement was made or contemplated in the FCM Settlement Agreement that would limit changes to the transmission rates on the HQ Tie to compensate SSPs and their customers for these losses.

9. The Filing Parties assert the considerations leading the Commission to reject NSTAR Electric Company's (NSTAR) complaint are not at play here, where the issue is

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transmission service over the HQ Tie exceeds the 600 MW HQ Interconnection Excess. The netting function during the transition period is reflected in section III.8.3.7.2.1(e) of the ISO-NE OATT.

[10] *Id.* at 8-9.

[11] *Id.* at 9-10.

[12] *Id.* at 10.

not whether HQICCs should be reduced as provided in the FCM Settlement Agreement but whether the Filing Parties and their customers may be compensated for the losses they incur as a result of those reductions.[13] The Filing Parties further assert that such compensation has not been the subject of prior Commission proceedings or orders, so the present filing is not a collateral attack of any kind. Further, the Filing Parties assert that the FCM Settlement Agreement neither provides nor contemplates that such compensation shall not take place. The proposed compensation is thus consistent with the intent and reliance interests of the parties to the FCM Settlement Agreement. In sum, the Filing Parties maintain that the circumstances that led the Commission to allow displacement of HQICCs during the transition period have no bearing on the issue of allowing fair compensation for such reduction for parties that support the HQ Tie.

10. The Filing Parties are proposing to modify the rates for transmission service over the HQ Tie to be equal to the higher of the value of lost HQICCs in that service month or the embedded cost rate for transmission service. The Filing Parties assert this treatment is consistent with Commission pricing policies generally, with the Commission's specific policies with respect to the HQ Tie, with the FCM Settlement Agreement, with economic efficiency considerations, and with rights already provided to most of the IRHs by Schedule 20A.

11. The Filing Parties state that their proposal is consistent with the Commission's pricing policies for transmission services under open access transmission tariffs. They refer to Order No. 888, where the Commission stated that transmission providers subject to the Commission's open access requirements could file rates that include the recovery of lost opportunity costs and other incremental costs of providing transmission service.[14]

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[13] *Id.* at 10-11.

[14] *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).

12. The Filing Parties state that the Commission permits opportunity costs to be recovered under its "higher of" policy in which transmission owners can recover the higher of their embedded or opportunity costs of providing transmission services.[15] According to the Filing Parties, the purpose of this policy is to enable transmission providers at least to recover their incremental cost of providing transmission service so that they are not required to provide service at an economic loss.

13. The Filing Parties state that the value of lost HQICCs is a form of lost opportunity cost under the Commission's transmission pricing policy.[16] The Filing Parties are required to provide transmission service over the HQ Tie under Schedule 20A and therefore are subject to losing the value of the HQICCs because of the netting rules applicable during the transition period. According to the Filing Parties, this is not materially different from the loss of economic benefits from alternative economic purchases and sales, or the costs of redispatch which have been the source of other opportunity cost filings.[17] Indeed, the Filing Parties note that the Commission has recognized that the payments IRHs receive for transmission service may not compensate for the loss of tie benefits.[18]

14. During the transition period, the Filing Parties propose to base the HQICC lost opportunity charge on the price of the transition payments for the relevant Power Year as

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[15] Filing Parties Transmittal Letter at 12 (*citing Penn. Elec. Co.*, 58 FERC ¶ 61,278, at 61,871, *reh'g denied*, 60 FERC ¶61,034, *notice rejecting additional reh'g*, 60 FERC ¶ 61,244 (1992), *aff'd. sub nom. Penn. Elec. Co. v FERC*, 11 F.3d 207 (D.C. Cir. 1993)) . In Order No. 888, the Commission stated that transmission providers proposing to recover opportunity costs must adhere to three requirements: (1) a fully developed formula describing the derivation of opportunity costs must be attached as an appendix to their proposed tariff; (2) proposals must address how they will be consistent with comparability; and (3) all information necessary to calculate and verify opportunity costs must be made available to the transmission customers. *Id.* at 13 n.38 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,740).

[16] *Id.* at 13.

[17] The Filing Parties point out that the Commission has approved opportunity cost rates for redispatch service. *Id.* (*citing Commonwealth Edison Co.*, 83 FERC ¶ 61,145 (1998); *ISO New England Inc.*, 91 FERC ¶ 61,311 (2000); *Southwest Power Pool, Inc.*, 89 FERC ¶ 61,284 (1999) (outage rescheduling); *New England Power Pool*, 99 FERC ¶ 61,324 (2002) (automatic generation control)).

[18] *Id.* at 13-14 (quoting *ISO New England Inc.*, 120 FERC ¶ 61,087, at P 89 (2007)).

set forth in the FCM Settlement Agreement.[19] The Filing Parties state that where ISO-NE reduces the HQICCs of one of the Filing Parties in a given month, each of the transmission customers that reserves and uses service from that SSP for an Uninstalled Capacity (UCAP) Contract or "UCAP Contract equivalent" that month will be assessed, on a *pro rata* (MW share) basis, a lost opportunity charge in lieu of the cost of service based transmission charge that would be applicable in the absence of HQICC reductions. If a Filing Party is not subject to an HQICC reduction in a given month, its transmission customers that month will be charged the cost of service rate set forth in Schedule 20A. Thus, the Filing Parties state, customers will pay only the "higher of" the cost of service rate or the lost opportunity cost.

15. The Filing Parties state it should be noted that application of the Commission's "higher of" pricing policy by adopting the Filing Parties' proposal ensures that the HQ Tie capacity will be allocated efficiently to its highest valued use. They explain that a customer can be expected to buy transmission service only when the customer projects that the combined capacity and energy value of its own use of the HQ Tie exceeds the market value associated with the HQICCs. Requiring the IRHs to sell transmission service on terms that deny them compensation for the lost HQICCs would price transmission service inefficiently and would amount to a taking of the Filing Parties' property without just compensation. As the Commission's pricing policy recognizes, transmission service providers in a mandatory access regime should be permitted to recover no less than the actual incremental cost of providing transmission service, which includes the costs associated with the loss of alternative opportunities to use the transmission system.[20]

16. The Filing Parties state that they are transmission/distribution providers to most of the load in New England. The value of the HQICCs is currently shared by these utilities

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[19] As a precaution, the Filing Parties also include a post-transition period capacity payment rate equal to the applicable Zone FCM rate. Hydro Québec has sought judicial review of the Commission's orders relating to this matter. *See ISO New England Inc.*, 119 FERC ¶ 61,045, *order on reh'g*, 120 FERC ¶ 61,087 (2007). In light of the pendency of that proceeding, the Filing Parties have included language in the lost opportunity provision that would allow that provision to be used, if necessary, after May 1, 2010. In particular, they propose that the capacity payment rate used in the lost opportunity cost formula will equal the applicable Zone FCM rate. Filing Parties Transmittal Letter at 14 n.42.

[20] *See, e.g.*, *Penn. Elec. Co.*, 58 FERC ¶ 61,278, at 61,871, *reh'g denied*, 60 FERC ¶ 61,034, *notice rejecting additional reh'g*, 60 FERC ¶ 61,244 (1992), *aff'd. sub nom. Penn. Elec. Co. v. FERC*, 11 F.3d 207 (D.C. Cir. 1993); *see also Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937 (1993).

with this load, so the dollar benefit of the reliability enhancement is shared broadly across New England. The Filing Parties argue that if the SSPs are required to sell transmission service in a manner that forces them to transfer the value of the HQICCs to point-to-point transmission customers, the value of the HQICCs will be conscripted by a few market participants, or perhaps be captured almost exclusively by Hydro Québec if the transmission access rules on the Québec side of the HQ Tie do not permit fair and open competition. Moreover, because HQICCs have the same value as ICAP in the FCM, the revenue loss to the SSPs and their customers will be significantly higher than any gain as a result of the increased transmission reservations over the HQ Tie. The Filing Parties maintain that the intent of the FCM Settlement Agreement was to protect New England customers, and it did not contemplate transferring large amounts of the benefits paid for by these customers to Canadian utility companies without compensation. Thus, the Filing Parties maintain that Commission approval of the proposal presented in this filing is consistent with the FCM Settlement Agreement; lacking such approval, the intent of the FCM Settlement Agreement will be violated.

17. The Filing Parties explain that, under the Commission's pricing policy, opportunity costs are normally capped at the incremental cost of expansion in order to prevent transmission providers from artificially limiting the availability of transmission capacity. They maintain that in this case, the incremental cost cap should not apply because the HQ expansion issue is being discussed in the ISO-NE regional planning process and because it would take many years to complete such a project, and there would be no economic basis for applying the incremental cost cap during the period of construction.

18. In the event that the Commission disagrees with this conclusion, the Filing Parties have submitted an estimate of the incremental cost of expanding the HQ Tie. The basis for calculating this estimate is explained in the affidavit of Edward M. Kremzier (Attachment 2 to the filing). The estimated incremental cost ranges from $4.77 to $12.50 per kW/month.

III. <u>Notice and Responsive Pleadings</u>

19. Notice of the filing was published in the *Federal Register*, 73 Fed. Reg. 13,878 (2008), with answers and interventions due on or before March 21, 2008, and subsequently (for the March 7, 2008 amended filing) notice was published in the *Federal Register*, 73 Fed. Reg. 14,465 (2008), with answers and interventions due on or before March 28, 2008.

20. On March 7, 2008, ISO-NE filed a motion to intervene. On March 20, 2008, Vermont Department of Public Service and New England Conference of Public Utilities Commissioners, Inc. filed motions to intervene. On the same date, NSTAR filed a motion to intervene and comments.

21. On March 21, 2008, the Maine Public Utilities Commission (Maine PUC) submitted a notice of intervention, and PPL EnergyPlus, LLC filed a motion to intervene. On the same date, Brookfield Energy Marketing Inc. (Brookfield) and Hydro Québec filed motions to intervene and protests; the IRH Management Committee filed a motion to intervene and comments.

22. On April 7, 2008, the Filing Parties and the IRH Management Committee filed answers to the protests.

23. Hydro Québec asserts the effect of the Filing Parties' proposed rate increase would be to eliminate generation capacity importers' ability to recover the value of their capacity sales above 600 MW on the HQ Tie.[21] Generation capacity still would have value (determined in advance in the FCM Settlement Agreement during the FCM transition period), but all of that value would automatically be transferred to the IRHs. Thus, Hydro Québec argues there would be no reason for capacity importers like Hydro Québec to continue to offer capacity imports above 600 MW on the HQ Tie during the FCM transition period. Hydro Québec asserts this result is contrary to the FCM Settlement Agreement and the Netting Order and should be rejected. Hydro Québec states the FCM Settlement Agreement unambiguously requires the netting of HQICCs during the FCM transition period. It provides that capacity imports above 600 MW "*will result in reductions in HQICCs as provided for under current procedures*."[22]

24. Hydro Québec states the calculation and allotment of HQICCs has a long and contentious history.[23] The FCM Settlement Agreement sought to avoid all such controversy during the FCM transition period by carrying forward the existing treatment

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[21] Hydro Québec filed its protest in the instant docket and in Docket No. ER08-627-000 in response to a similar filing by NSTAR.

[22] FCM Settlement Agreement § 11, Part VIII.K. (emphasis added).

[23] Hydro Québec Protest at 7 (*citing PG&E Nat'l Energy Group, et al. v. ISO New England Inc.*, 99 FERC ¶ 61,187, *on reh'g*, 100 FERC ¶ 61, 227 (2002); *NSTAR Elec. & Gas Corp., et al. v. New England Power Pool*, 102 FERC ¶ 61,107, *on reh'g*, 103 FERC ¶ 61,093; *New England Power Pool*, 104 FERC ¶ 61,204 (2003); *New England Power Pool*, 106 FERC ¶ 61,185 (2004); *New England Power Pool*, 111 FERC ¶ 61,132 (2005). During negotiations of the FCM Settlement Agreement, the Commission issued an order approving HQICC values for the 2006/2007 Power Year. *ISO New England Inc.*, 114 FERC ¶ 61,055 (2006). In that order, the Commission directed ISO-NE "to file supporting studies and details no later than October 2, 2006," in the event that "the parties [were] unable to agree" on HQICC values for the 2007/2008 Power Year. *Id.* P 16).

of HQICCs in the FCM transition period through May 31, 2010; namely, to permit capacity imports up to 1,800 MW on the HQ Interconnection and reduce HQICCs when imports exceeded 600 MW. Hydro Québec asserts that until the end of the FCM transition period, the IRHs only have a right to *net* HQICCs.[24] Hydro Québec argues this was the treatment before the FCM Settlement Agreement, it was the treatment carried forward by the FCM Settlement Agreement during the FCM transition period, and it was the treatment upheld by the Commission in the Netting Order.

25. Hydro Québec asserts that the instant rate filings (i.e., in this docket and in Docket No. ER08-627-000) insinuate that the reduction of HQICCs is a new occurrence.[25] Hydro Québec states they likewise repeat a misleading claim that "the Commission has firmly, directly and repeatedly rejected every effort of ISO-NE and NEPOOL to derogate, either directly or indirectly, the value of HQICCs."[26] Hydro Québec argues these statements are inaccurate and misleading. Netting—reducing HQICCs as capacity imports exceed 600 MW on the HQ Tie—has long been permitted and upheld by the Commission, as recently as in the Netting Order. Thus, according to Hydro Québec, no current rights of NSTAR are being "expropriated."

26. Hydro Québec states the plain intent of the FCM Settlement Agreement was to preserve this *status quo* with respect to netting. In arguing that Filing Parties' proposal is consistent with the FCM Settlement Agreement, however, Hydro Québec points out that the Filing Parties instead assert that the intent of the settlement "was to protect New England customers."[27] The FCM Settlement Agreement, however, includes specific provisions that expressly preserve the *status quo* reduction of HQICCs during a brief transition period—that was the understanding on which the settling parties relied.

27. Hydro Québec explains that another essential part of the treatment of HQICCs carried forward during the FCM transition period is that sellers of capacity imports are

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[24] *Id.* (citing "HQ Phase I/II Interconnection Capability Credit Procedures and Requirements," approved by the IRH Management Committee on May 30, 2007 (setting forth the IRHs' internal procedures for reducing HQICCs during the 2007/2008 Power Year, the first full year of the FCM Transition), at http://www.iso-ne.com/markets/othrmkts_data/inst_cap/icap/hqicc_reduction_doc_clean_py07-08_05302007.doc).

[25] *Id.* at 8 (citing NSTAR Filing at 5; *see also* Filing Parties Transmittal Letter at 2. Both omit the fact that HQICCs were netted prior to the FCM Settlement).

[26] *Id.* (citing NSTAR Filing at 7; *see also* Filing Parties Transmittal Letter at 7).

[27] *Id.* (citing to Filing Parties Transmittal Letter at 15).

paid for their capacity. Otherwise, there would be no reason for sellers to care about importing capacity into New England, and certainly no reason for them to insist upon an FCM Settlement Agreement provision preserving the reduction of HQICCs during the FCM transition period. The unstated but obvious intent of the FCM Settlement Agreement was that sellers of capacity imports would be paid.

28. Hydro Québec asserts the proposed rates would have the effect of eliminating netting. Hydro Québec states that if they go into effect, sellers would have to forward all of their revenues for capacity imports above 600 MW to the SSPs. In effect, sellers would no longer be paid for their capacity imports above 600 MW, which eliminates any rationale for selling capacity above 600 MW. Hydro Québec states there is no point to selling a product if the seller knows that it will not be paid for it. This is particularly true here, where sellers would have to purchase transmission service from the SSPs, and then turn around and sell generation capacity for free; or in other words, to pay for transmission to give away generation capacity to New England.[28]

29. Hydro Québec explains that while the Filing Parties are not explicitly seeking to eliminate the reduction of HQICCs during the FCM transition period in this proceeding, NSTAR is doing so on rehearing in Docket No. EL07-81-000; granting the rate increase proposed in this filing would accomplish the same objective.[29] Hydro Québec asserts that the proposal would eliminate any rationale for selling capacity above 600 MW and thus fundamentally change the FCM Settlement Agreement's negotiated bargain to preserve the *status quo* during the FCM transition period. Moreover, Hydro Québec states that this issue has already been decided.[30] Hydro Québec states that past practice and decisions permitting capacity imports to reduce HQICCs obviously assumed that sellers would be paid for their capacity imports. Hydro Québec further states that capacity importers fought hard and won the right in the FCM Settlement Agreement to continue to sell generation capacity above 600 MW over the HQ Tie.[31]

30. Hydro Québec also states there is no justification to change the rate treatment of HQICCs midway through the FCM transition period, which ends on May 31, 2010. The

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[28] *Id.* at 9. NSTAR actually proposes to charge capacity importers for both the transmission capacity *and* the revenues for "generation-like" service.

[29] *Id.* at 9-10.

[30] *Id.* at 10. "To be clear, if the Commission had granted NSTAR's complaint (which the SSPs supported, and the Commission rejected in the Netting Order), the rate increases at issue here would never have been made." *Id.* at 10 n.21.

[31] *Id.* at 11 (citing FCM Settlement, § 11, Part VIII.K).

Commission has ruled that, beginning on June 1, 2010, the netting of HQICCs will be prohibited.[32] The Commission previously has held that the FCM transition period and the period of time commencing with the FCM have distinct rules.[33] Hydro Québec explains it has lock-step rates for generation capacity, which have been known since the FCM Settlement Agreement was being negotiated, yet the Filing Parties only now make this rate increase filing, midway through the FCM transition period. Hydro Québec asserts that capacity importers, meanwhile, have relied on the written rules of the FCM transition period—including payment for capacity imports—in securing long-term transmission reservations and otherwise making commercial arrangements for the remaining duration of the FCM transition period, and all of these commercial arrangements for the remainder of the FCM transition period will be affected by the new rates.

31. Hydro Québec asserts the lost opportunity costs theory of the SSPs seems to be that they are somehow entitled at all times to 1,200 MW of HQICCs, and that when they sell transmission to third parties and HQICCs are reduced through netting, the SSPs lose the value of the reduction. Thus, according to Hydro Québec, the SSPs argue that this is a lost opportunity for which they must be compensated under the Commission's transmission pricing policies.[34] Hydro Québec contends that this "so-called" lost opportunity cost is neither legitimate nor verifiable; Hydro Québec distinguishes the type of "lost opportunity" from the types of opportunities for which the Commission has permitted opportunity cost pricing in the past.[35]

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[32] *Id.* at 14 (*citing ISO New England Inc.*, 119 FERC ¶ 61,045, at P 167-68 (2007), *on reh'g*, 120 FERC ¶ 61,087, at P 88-92 (2007)).

[33] *Id.* (quoting Netting Order, 120 FERC ¶ 61,261 at P 35).

[34] Hydro Québec points out that the Commission has allowed opportunity cost, "or" pricing, when the lost opportunity claimed is both legitimate and verifiable. *Id.* at 16 (*citing Northeast Utils. Serv. Co.*, 62 FERC ¶ 61,294 (1993), *order on reh'g*, 83 FERC ¶ 61,124 (1998); *Penn. Elec. Co.*, 58 FERC ¶ 61,278, at 61,871, *reh'g denied*, 60 FERC ¶ 61,034 (1992), *aff'd. sub nom. Penn. Elec. Co. v. FERC*, 11 F.3d 207 (D.C. Cir. 1993). *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats & Regs. ¶ 31,261 (2007)).

[35] Hydro Québec Protest at 17.

IV. Discussion

A. Procedural Matters

32. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

33. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the Filing Parties' answers and will, therefore, reject them.

B. Commission Determination

34. The Commission rejects the Filing Parties' proposed rates. The FCM Settlement Agreement specifically allows netting during the transition period and does not imply any form of compensation. Therefore, the Commission must interpret this to be a deliberate outcome of the negotiations and we conclude that further compensation during the transition period is not warranted under the terms of the settlement.

35. At the outset, the filing is a collateral attack on the Commission's June 16 and October 31, 2006 Orders, which approved the FCM Settlement Agreement and implemented the FCM transition period rules.[36] The Filing Parties had the opportunity to raise its concern with the provision regarding HQICCs both when it was filed as a part of the FCM Settlement Agreement and when ISO-NE made its section 205 filing implementing the transition period rules. The Commission notes that the Filing Parties participated in the FCM Settlement Agreement proceeding, but did not raise any concern with regard to HQICCs. Further, we note that the Filing Parties did not participate in the transition period rules proceeding in which the Commission conducted its review of the HQICC transition period rules under section 205 of the FPA. Moreover, the Filing Parties present no materially changed circumstances that would merit a revisiting of either of these Commission orders. Collateral attacks on final orders and relitigation of applicable precedent, especially by parties that were active in the earlier case, thwart the finality and repose that are essential to administrative efficiency, and are therefore

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[36] *Devon Power LLC*, 115 FERC ¶ 61,340 (June 16, 2006 Order), *order on reh'g*, 117 FERC ¶ 61,133 (2006); *ISO New England Inc.*, 117 FERC ¶ 61,132 (2006) (October 31, 2006 Order).

strongly discouraged.[37] The Commission finds this particularly true with respect to the FCM Settlement Agreement and the tariff provisions arising from that settlement, given that they represent "difficult compromises among the diverse parties to [the FCM Settlement Agreement] proceeding that, if found just and reasonable, should be honored."[38] The Commission found these provisions, including the provisions related to HQICCs in the transition period, just and reasonable and, therefore, will honor them.

36. In any event, we find that the Filing Parties' proposal put forth here is inconsistent with the FCM Settlement Agreement. As we stated in the Netting Order, the FCM Settlement Agreement contained two distinct time periods—the transition period and the implementation phase—and different rules pertain to each.[39] Section III.8.3.7.2.1(e) of the ISO-NE OATT, which is applicable to the transition period and which the Filing Parties seek to modify, specifically allows reductions in HQICCs (emphasis added):

> The remaining 600 MW of transmission may be used for UCAP over the Phase I/II HVDC-TF interconnection by any Market Participant that arranges for transmission over the interconnection without reductions in the Hydro Quebec Interconnection Capability Credits. UCAP above 600 MW may be transmitted only in those months when the Hydro Quebec Interconnection Capability Credits are 1,200 MW and *will result in a like reduction in the total Hydro Quebec Interconnection Capability Credits* available for the holders of those credits.

[37] *See*, *e.g.*, *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 112 FERC ¶ 61,117, at P 12 (2005).

[38] June 16, 2006 Order, 115 FERC ¶ 61,340 at P 66.

[39] There is nothing inherently inappropriate in the FCM Settlement Agreement's doing so, or in the Commission's allowing so. Transition mechanisms of one form or another are an accepted practice in the face of industry and regulatory changes. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 699-700, 704 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *accord*, *e.g.*, *PJM Interconnection, LLC*, 119 FERC ¶ 61,318, at P 85 (2007); *Cal. Indep. Sys. Operator Corp*., 119 FERC ¶ 61,076, at P 19 (2007); *Midwest Indep. Transmission Sys. Operator, Inc*., 104 FERC ¶ 61,105, at P 49-50, *order on reh'g*, 105 FERC ¶ 61,212, at P 38, 43 (2003). The FCM Settlement Agreement includes such mechanisms. *See ISO New England Inc*., 119 FERC ¶ 61,044 (2007).

In contrast, section 11, part III.B.3.b of the FCM Settlement Agreement, which is applicable to the implementation phase, expressly limits imports over the HQ Tie and thereby prevents netting of HQICCs:

> The total amount of accepted Import Bids over the Phase I/II tie plus approved HQICCs cannot exceed the approved Phase I/II transfer limit. If the accepted Import Bids exceed the difference between the approved Phase I/II transfer limit and the approved MW of HQICCs (the "HQI Excess"), the capacity requirement for those [Interconnection Rights Holders] or their designees that sold their transmission rights for the subject period will be increased by the difference between the total amount of accepted Import Bids and the HQI Excess. These capacity requirement increases will be allocated among the IRH or their designees in a manner to be determined by the [Interconnection Rights Holders].

Thus, for the two separate time periods, two separate and different provisions are applicable. Indeed, both ISO-NE and the Commission have stated that the transition period and the later implementation phase are intended to be substantially different.[40]

37. We agree with Hydro Québec that the Filing Parties' proposal could have the effect of limiting imports in excess of 600 MW over the HQ Tie during the transition period, albeit through a revised transmission rate rather than through an explicit tariff provision limiting these imports. In the Netting Order, we expressly rejected NSTAR's proposal to restrict the netting of HQICCs during the transition period. While the instant filing proposes a different mechanism to preserve the value of the HQICCs during the transition period, our reasoning for denial—that the instant proposal would overturn the HQICC netting provisions of the FCM Settlement Agreement—is the same as in the Netting Order.

38. We recognize that under Schedule 20A the Filing Parties have the right to file to recover lost opportunity costs; however, we do not consider the Filing Parties proposal to be just and reasonable because it would nullify the concessions negotiated by all parties in the FCM Settlement Agreement.[41] Their proposal would, in effect, modify the FCM

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[40] *See* October 31, 2006 Order, 117 FERC ¶ 61,132 at P 43.

[41] Currently, some of the Filing Parties have provisions in their Schedule 20As that allow for the recovery of lost opportunity costs. *See, e.g.*, ISO-NE OATT, Schedule 20A-NU, App. B, § 3, Original Sheet No. 1074. However, none of the existing rate

(continued…)

Settlement Agreement. The plain language of the FCM Settlement Agreement clearly implies a reduction in the financial value of those HQICCs reduced through netting. Contrary to their statements, the Filing Parties have not shown the "intent" of the settlement to be otherwise. In a broad and complex filing of the magnitude of the FCM Settlement Agreement which includes an intricate financial balance, the potential reduction of HQICCs was among the various negotiated trade-offs. Initiating compensation mid-stream in the transition period would negate considerable efforts and understandings of settling parties and we will not now approve terms that were not included in the FCM Settlement Agreement as negotiated.

The Commission orders:

The Filing Parties' proposed revisions to Schedule 20A of their ISO-NE OATT are hereby rejected, as discussed in the body of the order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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schedule provisions include the detailed formula methodology for calculating lost tie benefits associated with HQICCs.