



ISO-NEExit: Exploring Pathways for a Utility's Withdrawal from New England's Regional Transmission Organization

On January 15, Commissioner Katie Dykes, head of Connecticut's Department of Energy and Environmental Protection (DEEP), sent a letter to ISO-NE announcing that DEEP “is investigating the potential options for extricating the state from the compulsory forward capacity auctions.”¹ On January 22, DEEP held a technical meeting to examine “the long-run compatibility” of ISO New England’s market rules with Connecticut’s energy policies and goals.² This tension between the state’s clean energy policies and ISO-NE’s FERC-regulated market rules is not unique to Connecticut. State policymakers across the Northeast and Midwest are evaluating options in the wake of recent FERC decisions that increase clean energy deployment costs.³

In this memo, I explore a more drastic measure than Commissioner Dykes suggested in her letter: full withdrawal by a generic New England utility from ISO-NE. Withdrawal frees a utility from RTO rules and would provide the state with greater autonomy to regulate its utilities in a manner that prioritize its power sector goals. But withdrawal would be a step backwards for the region. For fifty years, transmission-owning utilities have shaped New England’s bulk power system to meet their own needs and facilitate regional coordination.⁴ Regional governance, first by the utility-led power pool (NEPOOL) and then by the market-driven ISO, has complemented the transmission buildout and aimed to coherently operate and plan New England’s electric system.

Removing a utility’s transmission assets from ISO-NE’s control would mark a sharp departure from this history. Utility withdrawal raises myriad technical questions about the utility’s post-withdrawal operations and its relationship with ISO-NE and its Market Participants. Answers to these questions should drive any withdrawal decision but are beyond the scope of this memo.

In this memo, I outline the legal path forward for withdrawal. I conclude that withdrawal is legally plausible, but FERC could block withdrawal, and it might be more inclined to do so in response to a protest filed by an ISO-NE transmission owner. I also conclude that joining NYISO following withdrawal may be the simplest means of replacing the coordination and reliability functions currently provided by ISO-NE. Implementing the switch from ISO-NE to NYISO would itself raise numerous economic and engineering questions that I do not attempt to answer.

¹ January 15, 2020 [Letter from Katie Dykes to ISO-NE President and CEO Gordon van Welie](#). See also, Patrick Skahill, “[CT Taking ‘Serious Look’ at Exiting Regional Power Market](#),” *The CT Mirror*, Jan. 16, 2020, (quoting Commissioner Dykes saying that she is “tak[ing] a serious look at the cost and benefits of participating in the ISO New England markets”).

² Connecticut DEEP, [Agenda of January 22, 2020 Technical Meeting](#).

³ See, e.g., New Jersey Board of Public Utilities, [In the Matter of BPU Investigation of Resource Adequacy Alternatives](#), Docket No. E020030203, Mar. 27, 2020 (launching an inquiry into whether the state should order its utilities to procure capacity outside of the PJM capacity construct).

⁴ *New England Power Pool Agreement*, 48 FPC 1477 (1972) (approving NEPOOL agreement despite protests from municipal utilities left out of the pool that federal regulators “fail[ed] to recognize the effects of permitting all the large utilities, legal competitors of each other, to combine all of the generation and all of the transmission in [the region] under an all-encompassing agreement without protecting the rights and opportunities of the small municipal and cooperative systems”).



To withdraw, a utility must file an application with FERC under section 205 of the Federal Power Act.⁵ In evaluating the application, FERC is likely to consider:

1. Whether the utility's proposal satisfies withdrawal provisions in the ISO-NE Tariff and other relevant agreements between ISO-NE and the utility;
2. Whether the utility's proposed transmission arrangements to replace its ISO-NE membership are consistent with or superior to the *pro forma* open-access transmission tariff required by Order No. 888 and subsequent FERC regulations; and
3. whether the withdrawal itself and replacement arrangements are both just, reasonable, and not unduly discriminatory.⁶

FERC has directly addressed utility withdrawals from an RTO/ISO in four proceedings. In 2006, FERC approved a request filed by two Kentucky utilities to withdraw from MISO.⁷ In 2007, FERC approved Duquesne Light's application to conditionally withdraw from PJM upon FERC's approval of the utility's admission into MISO and determination of the applicant's PJM liabilities.⁸ FERC also approved two switches from MISO to PJM: American Transmission Systems (ATSI) in 2009 and Duke in 2010.⁹ I focus on key lessons from FERC's decisions in these proceedings. Note that many of the disputed issues in these proceedings were about liabilities the utilities incurred prior to withdrawal and payments due to the new RTO upon admission. In this memo, I do not address the specific financial implications of a utility's withdrawal.

In addition, if FERC has approved a merger agreement filed by the withdrawing utility FERC is likely to consider under FPA section 203 whether the utility's withdrawal proposal satisfies conditions included in FERC orders approving the merger.¹⁰ Since 2000, FERC has approved mergers involving all privately owned transmission owners participating in ISO-NE. Reviewing each FERC merger order is beyond the scope of this memo.

Before exploring how FERC will review a hypothetical withdrawal application, I clarify why the withdrawal process is focused on transmission and not generation. After all, protests by states of

⁵ Guidance on Regional Transmission Organization and Independent System Operator Filing Requirements under the Federal Power Act, 104 FERC ¶ 61,248 (2003) (determining that for any transfer of control of jurisdictional transmission facilities to or from an RTO/ISO that does not involve transfer of ownership in transmission facilities, the utility must file under section 205).

⁶ *Louisville Gas and Electric Company, et al*, 114 FERC ¶ 61,282 at P 27 (2006); *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 100 (2008) ("Duquesne's RTO withdrawal request is subject to our review and approval under the just and reasonable standard of FPA section 205.")

⁷ See *Louisville Gas and Electric Company, et al*, 114 FERC ¶ 61,282 (2006), *order on reh'g*, 116 FERC ¶ 61,020 (2006), *E.ON U.S., et al.*, 116 FERC ¶ 61,019 (2006).

⁸ *Duquesne Light Co.*, 122 FERC ¶ 61,039 (2008), *order on motion for emergency clarification*, 123 FERC ¶ 61,060 (2008), *order denying reh'g*, 125 FERC ¶ 61,141 (2008).

⁹ *American Transmission Systems Inc., FirstEnergy v. PJM*, 129 FERC ¶ 61,249 (2009), *reh'g denied*, 140 FERC ¶ 61,226 (2012), *aff'd*, *FirstEnergy Service Co. v. FERC*, 758 F.3d 346 (D.C. Cir. 2014). *Duke Energy Ohio, et al.*, 133 FERC ¶ 61,058 (2010), *order on reh'g*, 134 FERC ¶ 61,235 (2011).

¹⁰ *Id.*; *id.* at P 112 (conditioning section 203 approval of applicants' withdrawal on willingness to uphold conditions in FERC's prior merger orders).



recent FERC decisions are primarily about capacity auctions and energy markets and not transmission operations or planning.¹¹

Transmission is the power industry's medium for coordination that enables centralized management of dispersed power plants and efficient balancing of supply and demand across large regions. Historically, investor-owned utilities owned and controlled transmission within their retail service territories, enabling them to suppress competition and exploit their wholesale customers, such as municipal utilities. For example, a transmission-owning utility could prevent a municipal utility that depended on the utility's transmission to deliver power from pursuing alternative sources of supply by imposing onerous terms and conditions on delivery of alternative power or preventing rival generators from connecting to the system. Moreover, each utility could levy its own restrictions on transmission service, creating a patchwork of barriers to entry for potential competitors.

To mitigate utility market power and facilitate the development of competitive power markets, FERC reformed transmission operations, ordering all utilities to provide fair transmission access and encouraging them to turn over control to independent entities. In 1997, New England utilities ceded control of their transmission facilities to ISO-NE, which began to operate the regional network and provide uniform transmission access and market rules to generators and retailers throughout the region. Continued participation of the region's transmission-owning utilities is critical to ISO-NE's existence as a Regional *Transmission* Organization. FERC's focus in a withdrawal proceeding is to ensure that a utility does not regain its market power by withdrawing, retaking control over its transmission assets, and operating them in an anti-competitive manner. The withdrawal process I describe in this memo applies only to transmission owners. Other Market Participants do not need FERC's permission to end their participation in the ISO-NE markets.

For a state concerned about ISO-NE energy and capacity markets, withdrawal is an option for escaping unfavorable rules but it comes with considerable uncertainty. ISO-NE's transmission service is the foundation that supports the region's markets.¹² Key terms in the tariff, which governs transmission service and contains market rules, are premised on ISO-NE's control over the entire regional network.¹³ Under the current tariff (or at least one interpretation of it), a utility's withdrawal would eliminate its obligation to pay for a share of ISO-NE's capacity procurement.¹⁴

But the post-withdrawal rules would necessarily be different from the current rules. At minimum, ISO-NE would have to update key terms, which could affect numerous tariff provisions. It is impossible to predict the scope of rule changes ISO-NE (and stakeholders) might propose in response to

¹¹ That said, New England states have also disagreed with FERC on transmission planning. See *Emera Maine v. FERC*, 852 F.3d 662 (D.C. Cir. 2017) (rejecting state protests to a FERC order that limited the role state officials could play in selecting transmission projects for regional cost allocation).

¹² See ISO-NE Tariff Section II.15.1 Nature of Regional Network Service – Scope of Service: Regional Network Service is the transmission service. . . that allows Network Customers to efficiently and economically utilize their resources and Interchange Transactions to serve their Regional Network Load located in the New England Control Area and any additional load that may be designated pursuant to Section II.4.”

¹³ See, e.g., ISO-NE Tariff, Section I Definitions of New England Control Area (encompassing all six New England states, except for parts of Maine), Coincident Peak Contribution (“Market Participant’s share of the New England Control Area coincident peak demand . . .”).

¹⁴ ISO-NE's tariff sets each Market Participant's share based on its contribution to the New England Control Area's coincident peak demand. ISO-NE Tariff, Section III.13.7.5.2 – Calculation of Capacity Load Obligation and Zonal Capacity Obligation.



withdrawal. Withdrawal should not be seen as a singular act but rather a multi-year negotiation among the utility, ISO-NE, and Market Participants about the region's future that culminates in a new relationship between ISO-NE and the utility.¹⁵

Finally, utilities and not generators are the appropriate target for a state's concern because the state has considerable regulatory authority over transmission-owning utilities. Although a state may not have legal authority to compel a utility to withdraw its FERC-jurisdictional transmission assets from ISO-NE,¹⁶ it has considerable leverage over utilities through its authority over retail rates and distribution facilities. A state has no such leverage over generators selling at wholesale.

In the remainder of this memo, I explore the factors that FERC is likely to consider in reviewing a utility's withdrawal application.

1. Withdrawing under ISO-NE's Tariff and Other Relevant Agreements

Conclusion: Every two years each transmission-owning utility has the option not to renew its participation in ISO-NE. The withdrawing utility must provide notice and work with ISO-NE on a transition plan. The utility's withdrawal is not contingent on FERC's approval of the plan.

Each Participating Transmission Owner (PTO) has signed a Transmission Operating Agreement (TOA) with ISO-NE.¹⁷ As the name suggests, the 85-page Agreement (plus 62 pages of "Schedules") transfers "Operating Authority" from a utility to the ISO over designated facilities subject to the specified terms and conditions. I am not aware of any other ISO-NE governing document or agreement that sets terms and conditions for a utility's withdrawal.¹⁸

Article X of the TOA provides that a PTO may withdraw at the end of the any Term by providing not less than 180 days prior notice. Each Term ends on February 1 of even-numbered years.¹⁹

A PTO may withdraw during a Term if:

- there is an ISO "event of default," as defined by Article X;
- FERC issues an order or a federal court decides a case affecting the rights of PTOs, jeopardizing transmission cost recovery, or reversing FERC's policy of encouraging RTO membership;
- the PTO has formed an independent transmission company (ITC); or
- FERC authorizes the PTO to join another RTO/ISO in connection with a merger with an entity other than another PTO.

¹⁵ In 2006 NEPOOL hypothesized that developing and finalizing a plan associated with the withdrawal of two Maine utilities would likely take two to three years. NEPOOL Comments, Maine Public Utilities Commission Docket 2006-364, Nov. 8, 2006.

¹⁶ It is plausible that a court would hold such an order to be preempted by the Federal Power Act.

¹⁷ ISO-NE Transmission Operating Agreement.

¹⁸ See Maine Public Utilities Commission, Interim Report about continued participation in ISO-NE, Maine PUC Docket No. 2006-364, Jan. 16, 2007 (concluding that only the TOA sets terms and conditions for a utility's withdrawal); Maine Public Utilities Commission v. FERC, 454 F.3d 278, 282–287 (D.C. Cir. 2006) (discussing TOA withdrawal provisions).

¹⁹ The TOA states that the Initial Term commences on the "Operations Date" when PTOs and the ISO agreed to commence operations. FERC authorized ISO-NE to begin operations as an RTO on February 1, 2005. *ISO New England, et al.*, 110 FERC ¶ 61,111 (2005). Following the TOA's initial term of five years, each subsequent term is two years.



Because a Term is only two years, a utility's simplest path for withdrawal is to provide notice 180 days prior to the end of a Term (August 4 of an odd-numbered year). For brevity, I do not summarize the seven "events of default" that would allow withdrawal during the Term. I briefly discuss formation of an ITC in the next section.

The utility's withdrawal is effective no later than one year after it provides notice.²⁰ Prior to the effective date, the utility must work with ISO-NE on a "plan under which Operating Authority shall be transferred from the ISO to another entity."²¹ The planning process could take several years.²² The plan must be approved by all PTOs, ISO-NE, and the withdrawing utility. If there are disputes about the plan, any of those parties may submit the matter to FERC for resolution.²³

The withdrawing utility must file an application to withdraw under FPA section 205²⁴ that demonstrates it has "satisf[ie]d the terms of the applicant's contractual obligations as they relate to RTO withdrawal."²⁵ To satisfy the TOA, the utility can point to the agreed-upon plan, which will likely require FERC's approval, or note that a disputed plan is pending before FERC.

Under Article X, the withdrawing utility is responsible for "all financial obligations incurred and payments applicable to the time period prior to the Termination Date."²⁶ I do not identify the relevant financial obligations.²⁷

2. Replacing ISO-NE's Operational Control with a FERC-approved Tariff

Conclusion: Switching to NYISO appears to be a plausible option, assuming there is sufficient transmission capacity between the withdrawing utility and New York. Creating a new RTO/ISO is feasible but might be an expensive option with uncertain benefits. Operating outside of an RTO/ISO raises numerous questions about who would perform operational and reliability functions.

The TOA requires the withdrawing utility to file the replacement transmission tariff that will become effective following withdrawal from ISO-NE. Under FERC precedent, the replacement tariff must be consistent with or superior to the *pro forma* open-access transmission tariff.²⁸ In prior proceedings, FERC approved proposals to switch RTOs and to operate outside of an RTO. I examine each of these options and also explore the authority of a New England state to create a new RTO/ISO for the withdrawing utility to join.

²⁰ TOA, sec. 10.01(e). In the Duquesne proceeding, the PJM tariff specified that withdrawal would not be effective until FERC approved the replacement transmission tariff. *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 31 n.33 (2008). The TOA does not contain any such condition and instead specifies that no withdrawing PTO shall be required to remain a party to the agreement for longer than one year after providing notice.

²¹ *Id.*

²² See *infra* note 15.

²³ TOA, sec. 10.01(e).

²⁴ 104 FERC ¶ 61,248 (2003).

²⁵ *MISO and Duquesne Light Co.*, 124 FERC ¶ 61,219 at P 13 (2008) (This phrase appears in subsequent orders on utility withdrawal).

²⁶ TOA, sec. 10.01(g).

²⁷ The Maine PUC concluded in 2007 that the withdrawing utility would be required to honor its interconnection agreements, pay bills issued by the ISO prior to the termination date, pay amounts due under the formula rate OATT for the fiscal year, including amounts due for regional transmission upgrades. See Maine PUC Interim Report, *supra* note 18.

²⁸ *Louisville Gas and Electric Company, et al*, 114 FERC ¶ 61,282 at P 27 (2006).

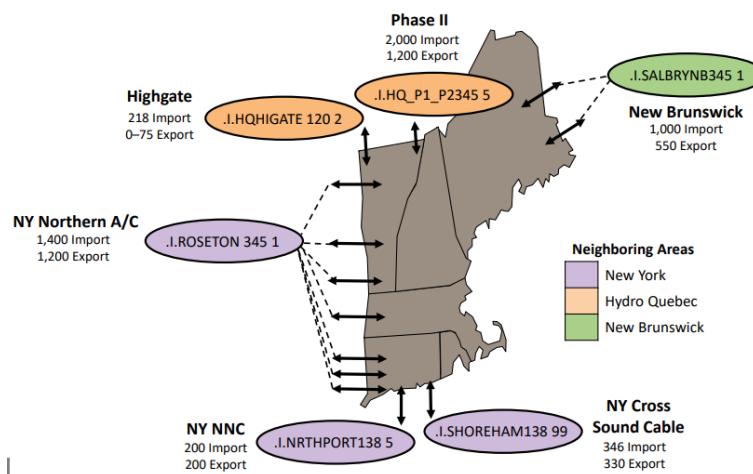


Switching from ISO-NE to Another RTO/ISO

In general, FERC would conclude that switching from ISO-NE to another RTO/ISO is a suitable replacement arrangement. For a switch to be viable, the new RTO (which would then include the withdrawing utility's transmission assets) must meet FERC's guidelines about geographic scope, which consider whether RTO boundaries "encompass one contiguous geographic area."²⁹ In the prior proceedings where the withdrawing utility switched RTOs, the geographic scope of the new RTO was not an issue. Each withdrawing utility was on the PJM-MISO border and contiguous with both RTOs.³⁰

It is unclear whether FERC would approve an RTO expansion that results in non-contiguous territory.³¹ Where FERC has approved such expansions, there was significant transmission capacity between the RTO and its new utility member.³² The two relevant proceedings (about ComEd and Entergy) facilitated addition of utilities that had not previously been RTO members. Here, there would not be any expansion in overall RTO/ISO membership, and FERC might be reluctant to approve arrangements that result in non-contiguous RTO/ISO territories.

At a superficial level, NYISO appears to be best situated to add a withdrawing New England utility. Its service territory is contiguous to three New England states (and separated by water from Rhode Island), and it is the only RTO/ISO with direct transmission connections to ISO-NE.³³



²⁹ FERC, Order No. 2000: Regional Transmission Organizations, 89 FERC ¶ 61,285, at pgs. 247, 249; 18 CFR § 35.34(j)(2) (an RTO region "must be of sufficient scope . . . to permit the RTO to maintain reliability, effectively perform its required functions, and support efficient and non-discriminatory power markets.").

³⁰ Duquesne, whose service territory is in western Pennsylvania along the Ohio border, filed its application in 2007 when MISO included Ohio utilities. In 2009, ATSI proposed to switch its Ohio assets from MISO to PJM, whose territory then included all or nearly all of Pennsylvania. Duke's 2010 switch from MISO to PJM transferred assets in Ohio and Kentucky, areas that were then adjacent to PJM territory.

³¹ *MISO, et al.*, 126 FERC ¶ 61,139 at P 61 (2009) (stating that for an RTO "to be most effective, the operator should have control over all transmission facilities within a large geographic area, and this consideration could preclude a noncontiguous region, or a region with 'holes'").

³² See *PJM Interconnection*, 106 FERC ¶ 61,253 at P 27 (2004) (approving ComEd's integration into PJM where PJM was assigned 500 MW firm transmission rights between PJM and ComEd's control area); *Southwest Power Pool v. FERC*, 736 F.3d 994, 995-96 (D.C. Cir. 2013) (explaining that Entergy's integration into MISO relied on the utility's transmission connections to the Southwest Power Pool).

³³ ISO-NE Internal Market Monitor, 2018 Annual Markets Report, Section 5: External Transactions.



Assuming there is sufficient transmission capacity connecting the withdrawing utility and its new RTO/ISO, there are nonetheless likely to be contested issues at FERC about the RTO switch. Presumably, parties will have different views about payments required under the two RTO tariffs. In past proceedings, ATSI requested that it pay only for MISO regional transmission projects in the year that it proposed switching from MISO to PJM.³⁴ In the Duquesne proceeding, the utility proposed to time its withdrawal to coincide with the end of PJM's fiscal year, but FERC nonetheless ordered an additional filing to address PJM transmission charges.³⁵ The major issue in the Duke proceeding was its plan for satisfying its capacity obligations in PJM.³⁶ Undoubtedly, any New England utility switching RTOs would evaluate the transmission, capacity, administrative, and other charges it will have to pay upon entering the new RTO. I do not attempt to tally these expenses.

Operating Outside of an RTO/ISO

This option raises numerous challenges.

In 2006, FERC approved withdrawal of two vertically integrated utilities from MISO and the utilities' plan to delegate certain transmission operation, planning, and reliability functions to the Southwest Power Pool and the Tennessee Valley Authority (TVA).³⁷ A New England utility might partially replicate this model by splitting itself into a federally regulated Independent Transmission Company (ITC)³⁸ and state-regulated distribution company or maintaining an integrated structure. Under either scenario, the utility could delegate transmission functions to third parties, just as the Kentucky utilities did when they left MISO. However, unlike the Kentucky utilities at issue in the 2006 FERC order, New England utilities are not vertically integrated and would need to purchase nearly all of their energy from third parties.

A threshold question, which would have to be addressed in the transfer plan agreed to by PTOs, would be the relationship between the utility and ISO-NE following withdrawal. In addition to administering FERC-regulated energy, capacity, and ancillary services markets, ISO-NE serves as the NERC-approved Reliability Coordinator, Balancing Authority, Transmission Operator, Transmission Service Provider, Planning Coordinator, Resource Planner, Reserve Sharing Group, and Transmission Planner.³⁹ If ISO-NE is unwilling to perform these functions under a post-withdrawal agreement, the utility would need to identify a third party to assume these responsibilities. That third party might be able to administer a FERC-regulated energy market.⁴⁰

³⁴ ATSI, 129 FERC ¶ 61,249 (2009).

³⁵ *Duquesne Light Co.*, 122 FERC ¶ 61,039 at PP 5, 23 (2008).

³⁶ *Duke Energy Ohio, et al.*, 133 FERC ¶ 61,058 at PP 81–120 (2010) (approving Duke's plan to use the Fixed Resource Requirement (FRR) option for two and half years until the company's "full participation in PJM's capacity market").

³⁷ *Louisville Gas and Electric Company, et al.*, 114 FERC ¶ 61,282 (2006).

³⁸ Attachment M to the ISO-NE Tariff establishes a framework for the relationship between an ITC and ISO-NE. This framework is not applicable to a withdrawal scenario because the framework is premised on a PTO or several PTOs forming an ITC and remaining ISO-NE participants.

³⁹ ISO-NE, Corroborating Evidence Interpretations and Compliance Guidance for NPCC Compliance Audits of NERC Reliability Standards.

⁴⁰ See Comment of Central Maine Power, Maine Public Utilities Commission Docket 2006-364, Mar. 30, 2007, at 8 (suggesting that if the utility leaves ISO-NE and forms an ITC, the Reliability Coordinator might be able to administer an energy market).



To provide energy to its ratepayers, the withdrawing utility could sign power purchase agreements (PPA) with generators. Neither the state nor the utility could compel any generator to sign a PPA. Generators that are ISO-NE Market Participants must be dispatched by ISO-NE.⁴¹ Any generator that cleared a prior ISO-NE capacity auction must participate in the day-ahead and/or real-time energy markets.⁴² These requirements would not preclude a generator from signing a PPA with the utility.

Under some currently effective PPAs, utilities that purchase energy from renewable energy facilities resell that energy through the ISO-NE markets.⁴³ Whether the utility would be able to take advantage of ISO-NE's capability to absorb large amounts of renewable energy will depend on the post-withdrawal arrangements between the utility and ISO-NE. The utility could also import energy from ISO-NE, which routinely exchanges energy with neighboring control areas in New York, Quebec, and New Brunswick.⁴⁴ Again, feasibility of this option is contingent on the terms and conditions in the post-withdrawal agreement between ISO-NE and the utility.

The withdrawing utility would need to replace ISO-NE's provision of ancillary services that maintain network stability.⁴⁵ Presumably, the Reliability Coordinator would determine the amount of ancillary services needed.⁴⁶ Whether that entity could also develop a procurement program would depend on who that entity is and what generators might be able to participate.

In sum, operating outside of an RTO/ISO would rely on third parties providing numerous transmission services and generators that currently sell through ISO-NE signing PPAs or switching to a new market. Because it's not clear who these entities might be, I can only speculate on the feasibility of this post-withdrawal option.

Creating a New ISO or Similar Entity

FERC's ISO Principles do not expressly prohibit a single-utility ISO, although there are no single-utility ISOs and the concept is in tension with FERC's guidance on ISOs.⁴⁷ If FERC is unwilling to approve a single-utility ISO, it might nonetheless be open to similar arrangements. FERC's guidance on third-party transmission providers – ISOs, RTOs, and "Independent Transmission Providers" (which FERC proposed but never finalized) – emphasizes that the entity must be "independent" of market

⁴¹ NEPOOL Comments, Maine Public Utilities Commission Docket 2006-364, Nov. 8, 2006; ISO-NE Market Participant Service Agreement, sec. 4.4.,

⁴² ISO-NE website, Energy Market Offer Requirements.

⁴³ See, e.g., Massachusetts DPU, Petition of NSTAR Electric Company for approval of a long-term contract to purchase wind power and renewable energy certificates, Docket No. 11-06, Aug. 19, 2019, at 65 (approving the utility's plan to sign PPAs with renewable developers and resell the energy through the ISO-NE markets).

⁴⁴ ISO-NE Internal Market Monitor, 2018 Annual Markets Report, Section 5: External Transactions.

⁴⁵ See FERC, *pro forma* Open Access Transmission Tariff, sec. 3 (requiring the Transmission Provider to provide or offer to arrange with the local Control Area operator scheduling, system control and dispatch, and reactive supply and voltage control and requiring the Transmission Provider to offer to provide or offer to arrange with the local Control Area regulation and frequency response, energy imbalance, and operating reserves).

⁴⁶ See Comment of Central Maine Power, Maine Public Utilities Commission Docket 2006-364, Mar. 30, 2007, at 9–10.

⁴⁷ For instance, FERC counseled that the "portion of the transmission grid operated by a single ISO should be as large as possible." FERC, Order No. 888-A, Mar. 4, 1997, pg. 222. In its Standard Market Design proposal, FERC remarked that "Order No. 888 also encouraged the formation of ISOs not only to bring all the transmission systems in a region under common rules, but also under unified operation." Standard Market Design NOPR, 67 Fed. Reg. 55,452, 55465 (Aug. 29, 2002).



participants.⁴⁸ So long as a new New England transmission entity has no financial ties to the withdrawing utility and is governed by non-utility personnel, FERC might approve its transmission tariff and other governing agreements, even if it doesn't meet FERC's ISO guidelines.

A New England state could create a new ISO (or similar entity). Of the seven RTO/ISOs, two were created by state law: California ISO (CAISO) and the Electric Reliability Council of Texas (ERCOT).⁴⁹ Under federal court and FERC precedent, a state may play an ongoing role in ISO governance, but FERC has exclusive authority over its operations. In practical terms, a New England state could appoint the new ISO's board members and executives,⁵⁰ but would not be able to veto ISO decisions or set market rules.⁵¹ That said, a state might be able to reduce the risk of FERC imposing a mandatory capacity market by setting up its own resource adequacy mechanism. FERC recently rejected a request to impose a mandatory capacity mechanism on the CAISO in part because state regulators oversee various capacity procurement programs.⁵²

Alternatively, anyone can initiate the creation of an ISO (or similar entity) by creating a non-profit corporation.⁵³ Of course, setting up an organization that FERC might approve as a transmission operator would be resource-intensive. The organization would need a state-of-the-art control center,⁵⁴ experienced personnel, and a FERC-approved tariff. ISO-NE essentially evolved from NEPOOL in the mid-1990s. NEPOOL staff transitioned into the ISO, which hired a new governing board and corporate management.⁵⁵ It seems implausible that ISO-NE would drive the creation of a new New England ISO. Operating an ISO is also expensive — the annual budgets of NYISO and ISO-NE are \$150 to \$200 million, with about half of each budget paying for salaries and benefits.⁵⁶

⁴⁸ Federal Energy Regulatory Commission, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities, 61 Fed. Reg. 21,540, 21,596 (May 10, 1996) (Order No. 888); FERC, Order No. 2000: Regional Transmission Organizations, at pg. 79 (1999); Standard Market Design NOPR, 67 Fed. Reg. 55,452, 55470 (Aug. 29, 2002).

⁴⁹ ERCOT is not regulated by FERC because it is not synchronously connected across state lines. A new New England RTO/ISO would be regulated by FERC.

⁵⁰ *California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) (holding that FERC did not have authority to require CAISO to replace its board with a board chosen through procedures dictated by FERC); California ISO Board Selection Policy, Nov. 2018.

⁵¹ The California Legislature created an Oversight Board to hear appeals of ISO Board decisions. FERC determined that the Oversight Board would “detract from the independence” of the ISO and rejected filings that included the appeal process. *Pacific Gas & Elec., et al.*, 81 FERC ¶ 61,112, 61,452–53 (1997).

⁵² *CXA La Paloma*, 165 FERC 61,148 at P 70 (2018), *reh'g denied*, 169 FERC ¶ 61,045 at P 44 (2019).

⁵³ ISO-NE's Second Restated Certificate of Incorporation and bylaws are available on its website.

⁵⁴ NERC defines Control Center as “one or more facilities hosting operating personnel that monitor and control the Bulk Electric System (BES) in real-time to perform the reliability tasks, including their associated data centers, of: 1) a Reliability Coordinator, 2) a Balancing Authority, 3) a Transmission Operator for transmission Facilities at two or more locations, or 4) a Generator Operator for generation Facilities at two or more locations.” https://www.nerc.com/files/glossary_of_terms.pdf.

⁵⁵ 1996 NEPOOL Annual Report at 3–4.

⁵⁶ NYISO Budget; ISO-NE budget.



3. FERC's Just and Reasonable Determinations and Response to Utility Protests

Conclusion: In considering whether withdrawal is just and reasonable FERC is likely to weigh negative effects withdrawal might have on ISO-NE against maintaining its longstanding policy that RTO membership is voluntary. A protest filed by another utility may provide FERC with a vehicle for rejecting the withdrawal request while preserving its RTO membership policy.

FERC must find that withdrawal from ISO-NE and the replacement tariff are both just and reasonable.⁵⁷ I discuss complexities associated with the replacement tariff above. In this section, I examine what factors FERC will consider in determining whether a utility's withdrawal from ISO-NE is just and reasonable and speculate how FERC might respond to a protest of the withdrawal filed by another utility.

To conclude that a utility's withdrawal from ISO-NE is just and reasonable, FERC will evaluate whether withdrawal will "impair [ISO-NE's] ability to perform RTO functions and its ability to continue to meet the minimum characteristics and functions of an RTO."⁵⁸ FERC's review is likely to consider whether ISO-NE's territory will continue to encompass the appropriate "scope" under FERC's RTO guidelines. FERC has explained that "sufficient scope is important for an RTO . . . to support efficient and nondiscriminatory power markets," and that the "benefits of RTOs can be best achieved if there is one transmission operator in the region" with "control over all transmission facilities within a large geographic area."⁵⁹

Based on this standard, FERC might find that a utility's withdrawal, particularly one that creates a hole in ISO-NE's territory, undermines the "the competitive, efficiency, reliability, and other benefits" of the RTO.⁶⁰ In addition, a utility's withdrawal might endanger the fifty year history of transmission coordination in the New England region and threaten benefits associated with ISO-NE being the sole transmission operator in the region.

FERC will also consider the "adverse effects on remaining [ISO-NE] members."⁶¹ It is plausible that a utility's withdrawal will cause transmission owners and Market Participants to incur numerous costs, and it might also raise the ongoing costs of operating the regional network. FERC may account for these costs in its determination of whether withdrawal is just and reasonable, but it is not compelled

⁵⁷ Note that FERC has referred to its evaluation of a utility's withdrawal application as a "three-prong test" that does not include a just and reasonable determination about withdrawal. See *Duke Energy Ohio, et al.*, 133 FERC ¶ 61,058 at PP 14 and 47 (2010). But FERC also requires utilities file withdrawal requests under section 205 and has said that it will determine whether withdrawal meets and just and reasonable standard. See *supra* notes 5 and 6. In withdrawal proceedings, protesters argue that the utility's withdrawal would not be just and reasonable. See *Duke Energy Ohio, et al.*, 133 FERC ¶ 61,058 at PP 20–45.

⁵⁸ *MISO, et al.*, 126 FERC ¶ 61,139 at P 62 (2009); *ISO New England, et al.*, 109 FERC ¶ 61,147 at P 41 (2004); *Louisville Gas and Electric Company, et al.*, 114 FERC ¶ 61,282 at P 28 (2006).

⁵⁹ *MISO, et al.*, 126 FERC ¶ 61,139 at P 61 (2009).

⁶⁰ *Id.* at P 61.

⁶¹ *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 128.



to reject withdrawal due to these costs.⁶² FERC is also not required to consider whether the withdrawing utility itself economically benefits from withdrawal.⁶³

FERC is likely to consider its long-standing policy that RTO/ISO membership is voluntary.⁶⁴ If FERC were to block withdrawal due to factors the utility could not cure in a subsequent application, its decision would effectively make RTO membership mandatory for the applicant utility. Depending on the evidence in the record, FERC may be left with two unattractive options: 1) approve withdrawal and jeopardize the benefits of regional coordination through ISO-NE or 2) overturn its policy about RTO membership in order to save ISO-NE. I cannot predict which option FERC would choose. FERC may have a third choice if ISO-NE or an ISO-NE utility protests the withdrawal.

TOA section 10.01(f) provides that a utility's withdrawal is not effective if ISO-NE or an ISO-NE utility "demonstrates that the requested [] withdrawal is contrary to the public interest under the *Mobile-Sierra* Doctrine." This provision of the TOA could allow FERC to reject the withdrawal request while maintaining its policy that RTO membership is voluntary. Although granting the protest would lock the utility into ISO-NE, FERC would point to this provision and claim that its decision is consistent with the TOA voluntarily agreed to by all ISO-NE utilities.⁶⁵ FERC could argue that RTO membership remains voluntary and that rejecting the withdrawal request in this case honors the voluntary agreements signed by all ISO-NE utilities.

It's not clear to me how FERC might apply the *Mobile-Sierra* standard to a utility's request to withdraw from ISO-NE. FERC typically applies the *Mobile-Sierra* standard to contract modifications.⁶⁶ The Supreme Court has summarized that "under the *Mobile-Sierra* presumption, setting aside a

⁶² *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 134 ("since RTO withdrawal is expressly permitted under the TO Agreement, parties were on notice that withdrawal was a possibility and that, in the event of withdrawal, they might need to enter into other transmission agreements and incur other costs.").

⁶³ *Louisville Gas and Electric Company, et al.*, 114 FERC ¶ 61,282 at P 29 (2006); *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 133 ("because RTO participation is voluntary, an entity proposing to withdraw need not demonstrate that the costs of remaining a member of the RTO are less than the benefits of withdrawing"); *Duke Energy Ohio, et al.*, 133 FERC ¶ 61,058 at P 47 (2010).

⁶⁴ *Id.*

⁶⁵ In fact, sec. 10.01(f) of the TOA was hotly contested. In 2004, the New England utilities asked FERC to approve a withdrawal provision in the TOA that would have established a "bifurcated review — *Mobile-Sierra* review of the withdrawal decision and full Section 205 review of the substitute tariff." Reply Brief of Transmission Owners, D.C. Circuit Court Docket 05-10001, Feb. 23, 2006. This scheme, according to the utilities, was designed "to protect against an arbitrary exercise of FERC authority in the future" (*id.*) that would seek to "undermine the New England TOs' withdrawal rights." Compliance Filing Attachment G, Docket No. RT04-2-002, Jun. 22, 2004, at note 9. In other words, utilities sought *Mobile-Sierra* protection for their own ability to unilaterally withdraw from ISO-NE. FERC rejected the proposed section 10.01(f), and determined that only a challenge filed by a party to the TOA would be subject to the heightened *Mobile-Sierra* standard while FERC's review of a withdrawal request would be under the ordinary just and reasonable standard. *ISO New England, et al.*, 109 FERC ¶ 61,147 at P 40 (2004), *aff'd*, *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 282–287 (D.C. Cir. 2006). In effect, FERC approved utilities' request for *Mobile-Sierra* protections from each other (and ISO-NE). Utilities agreed to the final wording of section 10.01(f) in the sense that they signed the TOA despite the changes that FERC ordered.

⁶⁶ See, e.g., *Texaco Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998) ("the 'public interest' that permits FERC to modify private contracts is different from and more exacting than the 'public interest' that FERC seeks to serve when it promulgates its rules, [meaning that] "more is required to justify regulatory intervention in a private contract than a simple reference to the policies served by a particular rule.").



contract rate requires a finding of ‘unequivocal public necessity’ or ‘extraordinary circumstances.’”⁶⁷ FERC’s “contract-abrogation power [is only] for *those extraordinary circumstances where the public will be severely harmed.*”⁶⁸

The Order No. 1000 compliance proceeding may provide guidance. ISO-NE utilities protested FERC’s requirement that transmission providers eliminate rights-of-first-refusal (ROFR) for incumbent transmission owners, arguing that the ROFR in the ISO-NE tariff is protected by *Mobile-Sierra* and that FERC lacked sufficient evidence to overcome that protection.⁶⁹ On the latter issue, FERC relied on “economic and competition theory” to conclude that the ROFR severely harms the public interest, and is therefore not saved by *Mobile-Sierra* protection.⁷⁰ Reviewing FERC’s decision, the D.C. Circuit swiftly rejected utilities’ argument that FERC needed empirical data to overcome *Mobile-Sierra*.⁷¹ Here, FERC might conclude based on theoretical benefits of regional coordination that a utility’s withdrawal would severely harm the public interest.

Conclusion

Withdrawal from ISO-NE is a legally plausible option for a utility seeking to escape from unfavorable market rules but its costs and benefits are highly uncertain. Any value the utility and its ratepayers might derive from withdrawal would depend in part on any changes ISO-NE and its stakeholders propose to the tariff in response to withdrawal. To replace ISO-NE transmission and reliability services, the utility might explore whether joining NYISO is feasible option and would otherwise need to rely on unidentifiable third parties to provide transmission functions. In addition, FERC could block withdrawal and may be more inclined to do so if ISO-NE or a New England utility protests withdrawal.

⁶⁷ *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 554 U.S. 527, 550 (2008) (citations omitted).

⁶⁸ *Id.* at 551.

⁶⁹ *ISO New England*, 143 FERC ¶ 61,150 at PP 133–139 (2013), *reh’g denied*, 150 FERC ¶ 61,209 (2015), *aff’d* *Emera Maine v. FERC*, 854 F.3d 662 (D.C. Cir. 2017).

⁷⁰ *Emera Maine v. FERC*, 854 F.3d 662, 671 (D.C. Cir. 2017).

⁷¹ *Id.*