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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.)
)
)
Central Hudson Gas & Electric Corporation)
Consolidated Edison Company of New York, Inc.)
New York State Electric & Gas Corporation)
Niagara Mohawk Power Corporation)
Orange and Rockland Utilities, Inc.)
Rochester Gas and Electric Corporation)
)
Regional Transmission Organizations)

Docket No. RT01-95-000

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REGULATORY COMMISSION

**APPLICATION OF
THE NEW YORK TRANSMISSION OWNERS
FOR CLARIFICATION AND/OR REHEARING**

ORIGINAL

The New York Transmission Owners¹ submit this Application for Clarification and/or Rehearing of the Commission's Order issued on July 12, 2001, "Order on RTO Compliance Filing" ("New York RTO Order")² and the Commission's "Order Initiating Mediation," also issued on July 12, 2001 ("Mediation Order"),³ pursuant to Rule 713 the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2000) and Section 313(a) of the Federal Power Act ("FPA"), 16 U.S.C. § 825I(a).

¹ For purposes of this filing, the New York Transmission Owners include: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, Orange and Rockland Utilities, Inc., the Power Authority of the State of New York, and Niagara Mohawk Power Corporation. The four jurisdictional utilities that are participating in this filing participated in the Joint Member System and NYISO RTO Filing. LIPA filed an intervention in this proceeding on March 7, 2001. NYPA filed an intervention on July 19, 2001.

² New York Independent System Operator, Inc., et al., 96 FERC ¶ 61,059 (2001) ("New York RTO Order").

³ Regional Transmission Organizations, 96 FERC ¶ 61,065 (2001) ("Mediation Order").

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SUMMARY OF POSITION

The New York Transmission Owners endorse and support the Commission's objective of creating a single "common market" for energy and other generation-related services for the Northeastern United States. The New York Transmission Owners further believe that this objective can best – and, indeed, lawfully must – be attained through a voluntary stakeholder process as noted in the Commission Order No. 2000.⁴ The technical issues that must be resolved to facilitate the creation of such a common market are best addressed on a cooperative and voluntary basis subject to the Commission's mediation framework, not by Commission fiat. The New York Transmission Owners are actively participating in the mediation process and are devoting substantial resources, time and effort in this endeavor. The New York Transmission Owners are committed to achieving the Commission's policy objective of one Northeast RTO on a voluntary and consensual basis.⁵

By this filing,⁶ the New York Transmission Owners seek clarification that nothing in the New York RTO Order or the Mediation Order constitutes an order directing the FPA jurisdictional New York Transmission Owners to transfer control of their assets to an as yet unformed RTO to serve the Northeastern United States, or otherwise departs from the

⁴ Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 31,034 (2000) ("Order No. 2000").

⁵ Experience has demonstrated time and again that, when given the opportunity to work cooperatively, market participants are able to design systems that are far superior to any solution that the Commission may impose from the top down. As the Commission is well aware, the existing Northeast ISOs were formed through voluntary, collaborative processes, which involved the participation of all market participants and the respective commissions, and they have worked well. The Commission should once again defer to their voluntary, collaborative efforts in establishing RTOs.

⁶ Because requests for rehearing with respect to these Orders are due today, the New York Transmission Owners are submitting this Request for Clarification and/or Rehearing at this time as we do not yet know the outcome of the Mediation Process, and are compelled to preserve and protect our legal rights.

Commission's previous policy of relying exclusively on voluntary and consensual efforts to form RTOs.⁷

In the event that this clarification of the voluntary nature of the Northeast RTO is denied, the New York Transmission Owners seek rehearing of this change of Commission policy on the grounds that: the Commission has not provided the required explanation for its departure from the policy of voluntary RTO formation it adopted in Order No. 2000; the Commission erred in failing to initiate a notice and rulemaking proceeding; the Commission does not have statutory authority under the FPA to require transmission-owning public utilities to transfer control over their jurisdictional assets to an RTO; and the Commission has made no factual finding or developed a factual record to support any such mandate and, indeed, cannot make any such finding with respect to the New York Transmission Owners.

In addition, the New York Transmission Owners seek rehearing of the Commission's determination: to divest transmission-owning public utilities of their statutorily guaranteed Section 205 rate filing rights; that the NYISO does not satisfy the geographic scope requirements of Order No. 2000 and that a single Northeast RTO must adopt the PJM market design as a platform; that the NYISO does not satisfy the governance requirements of Order No. 2000; that the NYISO does not adequately control parallel path flows with other control areas; that the NYISO does not have adequate operational control of transmission facilities in New York state; and that the NYISO's transmission expansion and interconnection processes do not satisfy the requirements of Order No. 2000.

⁷ LIPA and NYPA are municipalities within the meaning of FPA § 201(e). 16 U.S.C. § 824(e). Moreover, they are created and their powers are delineated under New York state law. As such, the Commission has no authority in any case to require the transfer of control of their transmission assets under Part II of the FPA.

BACKGROUND

In its landmark Order No. 888,⁸ the Commission directed members of existing tight power pools, including the former New York Power Pool, to restructure their operations to promote open access. Order No. 888 at 31,727. To facilitate this restructuring process, Order No. 888 established eleven principles to govern the formation of Independent System Operators (“ISOs”). Order No. 888 at 31,730-32. Following these principles, the New York Transmission Owners proposed, and the Commission approved, the establishment of the New York Independent System Operator, Inc. (“the NYISO”). The NYISO became responsible for the operation of the New York Control Area on December 1, 1999.

In Order No. 2000, the Commission directed all utilities subject to its jurisdiction under the FPA belonging to an ISO to make a filing on or before January 15, 2001, addressing the extent to which that ISO conforms to the minimum characteristics and functions of a Regional Transmission Organization (“RTO”), along with any plans to make that ISO conform and any obstacles to full compliance with the Commission’s RTO requirements. Order No. 2000 at 30,994-95. The Commission made clear, however, that compliance with these requirements was strictly voluntary and that it was not mandating the formation of RTOs:

[W]e believe that a voluntary approach as we have structured it, with guidance and encouragement from the Commission, is most appropriate at this time. Given the rapidly evolving state of the electric industry, we want to allow involved participants the flexibility to develop mutually agreeable regional arrangements with respect to RTO formation and coordination. Further, we want the industry to focus its efforts on the potential benefits of RTO formation and how best to achieve them, rather than on a non-

⁸ Promoting Wholesale Competition through Open Access Non-Discriminatory Transmission Service By Public Utilities: Recovery of Stranded Costs By Public Utilities, Order No. 888, FERC Stats. & Regs., Regulations Preambles 1991-96 ¶ 31,036 (1996) (“Order No. 888”), order on rehearing, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles ¶ 31,048 (1997) (“Order No. 888-A”), order on rehearing, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff’d in part and rev’d in part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000); cert. granted sub nom. New York v. FERC, 121 S.Ct. 1185 (2001).

productive challenge to our legal authority to mandate RTO participation.

Order No. 2000 at 31,033.

In conformance with the requirements of Order No. 2000, the six jurisdictional New York Transmission Owners and the NYISO jointly submitted their Order 2000 Compliance Filing on January 16, 2001 ("the Compliance Filing"). The Compliance Filing was approved by both the NYISO's non-stakeholder Board of Directors and the NYISO's Management Committee, which represents all market participants. The Compliance Filing demonstrated that the NYISO would satisfy all of the Commission's RTO requirements.

On July 12, 2001, the Commission issued the New York RTO Order. In the New York RTO Order, the Commission held that the NYISO does not satisfy the RTO requirements set forth in Order No. 2000, including requirements related to geographic scope, governance and tariff filing, operational control, and transmission expansion. New York RTO Order, slip. op. at 2. In a separate order, the Commission directed the parties in this and other RTO proceedings to participate in a mediation process with a goal of establishing a single, Northeast RTO. Mediation Order, slip op. at 1.

SPECIFICATION OF ERRORS

The Commission erred in the following respects:

- (1) The Commission has not provided the required explanation for its departure from the policy of voluntary RTO formation it adopted in Order No. 2000;
- (2) The Commission erred in failing to initiate a notice and rulemaking proceeding;
- (3) The Commission does not have statutory authority under the FPA to require utilities to participate in RTOs or to turn their assets over to the control of an RTO;

- (4) The Commission has made no factual finding or developed a factual record to support any such mandate and, indeed, cannot make any such finding with respect to the New York Transmission Owners;
- (5) The Commission's determination to divest transmission-owning public utilities of their statutorily guaranteed Section 205 rate filing rights;
- (6) The Commission erred in finding that the NYISO does not satisfy the geographic scope requirements of Order No. 2000 and that a single Northeast RTO must adopt the PJM market design as a platform;
- (7) The Commission erred in finding that the NYISO does not satisfy the governance requirements of Order No. 2000;
- (8) The Commission erred in finding that the NYISO does not adequately control parallel path flows with other control areas;
- (9) The Commission erred in finding that the NYISO does not have adequate operational control of transmission facilities in New York State; and
- (10) The Commission erred in finding that the NYISO's transmission expansion and interconnection process does not satisfy the requirements of Order No. 2000.

ARGUMENT

I. THE COMMISSION SHOULD CONFIRM THAT PARTICIPATION IN AN RTO IS VOLUNTARY

As previously noted, the New York Transmission Owners strongly support the Commission's objective of creating a "common market" for energy and generation-related ancillary services covering the Northeastern United States through consensus and consent. The New York Transmission Owners believe that the Commission's reasons for deciding in Order No. 2000 to pursue this objective through voluntary measures rather than by mandate remain

compelling and are required by law. Accordingly, the New York Transmission Owners respectfully request that the Commission clarify that nothing in the New York RTO Order or the Mediation Order has overruled the Commission's determination in Order No. 2000 that RTO formation will be a voluntary process, and that the jurisdictional New York Transmission Owners are not required by these Orders to transfer control of their transmission facilities to an RTO. The Commission does not have jurisdictional authority over the publicly owned New York Transmission Owners and is precluded, therefore, from ordering them to take any such action, including transferring control of their transmission facilities to an RTO. Additionally, the New York Transmission Owners seek clarification that nothing in the Orders constitutes a reversal of the Commission's approval of the existing NYISO or requires the NYISO to transfer its rights or obligations to an RTO. Any such departure from Order No. 2000 will violate the Administrative Procedure Act, as discussed below.

A. The Commission Is Not Authorized To Mandate Participation In An RTO

The Commission has no authority under the FPA to mandate utility participation in an RTO.⁹ Indeed, none of the provisions of the FPA, individually or collectively, can be read, directly or indirectly, to empower the Commission to take such action. To the contrary, whether read alone or in concert, the provisions of the FPA provide no basis to justify a Commission mandate that the New York Transmission Owners surrender control of their assets to a third party.

On its face, Section 202(a) of the FPA expressly limits the Commission's authority to require coordination among utilities to "divid[ing] the country into regional districts for the

⁹ A commission mandate severing the transmission owners' governance and Section 205 rights from their ownership of transmission assets would unreasonably interfere with the transmission owners' ability to protect and preserve their assets and investments, as well as their shareholders and customers' rights. This would effectively constitute a "taking" of the New York Transmission Owners' property.

voluntary interconnection and coordination of facilities for the generation, transmission and sale of electric energy.” 16 U.S.C. § 824a(a) (emphasis added). This provision merely authorizes the Commission to establish geographical boundaries for regional groupings of public utilities.

This interpretation is confirmed by the legislative history underlying this provision:

This section authorizes the Commission to establish regional districts and to encourage the voluntary interconnection and coordination of facilities within and between such districts, but the coordination of facilities is left to the voluntary action of the utilities.

H. R. Rep. No. 74-1318, at 27 (1935).

The courts have consistently followed this clear and unambiguous expression of congressional intent by holding that Section 202(a), while it may express a “policy of promoting interconnections,” withholds from the Commission the power to mandate coordination or interconnection arrangements. See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973) (“The essential thrust of § 202 . . . is to encourage voluntary interconnections of power.”); Central Iowa Power Cooperative v. FERC, 606 F.2d 1156, 1167-68 (D.C. Cir. 1979) (“Notwithstanding the desirability of coordination of electric systems, however, Congress decided to make such coordination voluntary, with limited exceptions.”); Duke Power Co. v. FPC, 401 F.2d 930, 943 (D.C. Cir. 1968) (“We find nothing in [the] language [of Section 202(a)] authorizing the Commission to compel any particular interconnection or technique of coordination.”) (emphasis in original).

The Commission’s ability in Section 202(b) to order physical connection of its transmission facilities also is narrowly circumscribed and offers no basis for the Commission’s actions. In Section 202(b), upon application by a State commission or a public utility, the Commission may require physical connection and the sale or interchange of energy provided,

however, that it must find that no undue burden will be placed upon the utility. In no event does the Commission have authority to require the enlargement of generating facilities or to compel the public utility to sell or exchange power when it would impair its ability to provide adequate service to its customers. 16 U.S.C. § 824(b). The Commission has not even attempted to make a finding that its Orders will not impose an undue burden on the public utilities.

Section 205 also fails to vest the Commission with authority to mandate RTO formation or a transfer of assets or control of those assets to an RTO. 16 U.S.C. 824d. Section 205 affords each public utility with ownership rights in transmission assets the right to design and file rates and enter into contracts governing transmission service to the public over its facilities. The Commission may not dictate the filing of contracts or rates in the first instance; rather, the Commission's role under Section 205 is limited to reviewing the reasonableness of the rates and other terms filed by utilities. The statute and judicial precedent are clear that the Commission may not direct the filing of a rate under Section 205 unless it has found an existing rate to be unlawful. See, e.g., Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 952-53 (D.C. Cir. 1983), cert. denied, 467 U.S. 1241 (1984). The Supreme Court has recognized the balance of this statutory scheme in which the public utility, which has made the investments in the assets, has the right to file to change its rates and the Commission, which is vested with an oversight role, may only modify the rates upon a finding that they are unlawful. United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332, 339 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956). The Supreme Court has further recognized that:

Business reality demands that [public utilities] should not be precluded by law from increasing the prices of their product whenever. . . economically necessary. . .; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible.

United Gas Pipe Line v. Memphis Light, Gas & Water Division, 358 U.S. 103, 113 (1958). In addition, the Supreme Court recognized that the public utility, “like the seller of an unregulated commodity, has the right. . . to change its rates. . . [at] will, unless it has undertaken by contract not to do so” Id.

The Commission also may not circumvent the established limitation on the scope of its jurisdiction under the FPA by relying on its remedial authority under Section 206 of the FPA for several reasons. 16 U.S.C. § 824e. First and foremost, the courts have held that the Commission’s broad rate-setting powers cannot be interpreted to allow it to exercise other powers that Congress expressly withheld from the Commission in other parts of the FPA. See, e.g., Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 514 (1949) (“If possible, all sections of the Act must be reconciled so as to produce a symmetrical whole. We cannot attribute to Congress the intent to grant such far-reaching powers . . . when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power.”) (footnote omitted).

Second, the Commission is clearly precluded from making any such finding of discriminatory conduct by the New York Transmission Owners in this case due to the fact that the New York Transmission Owners have already voluntarily consented to transfer operational control over their transmission assets to an independent entity that the Commission has expressly found is not subject to the domination and control of the New York Transmission Owners.¹⁰ The existing governance structure of the NYISO¹¹ is sufficiently independent of the New York Transmission Owners to preclude as a matter of law any finding that the New York Transmission

¹⁰ Central Hudson Gas & Electric Corp., et al., 88 FERC ¶ 61,229 (1999).

¹¹ The New York Transmission Owners have also requested rehearing of the Commission’s determinations in the New York RTO Order that the NYISO does not satisfy the governance requirements of Order No. 2000.

Owners have operated their transmission facilities in an unduly discriminatory manner since December 1, 1999, for the obvious reason that they no longer have operational control over their transmission assets, nor do they have control over the NYISO transmission tariff.¹² Indeed, the Commission has expressly found the NYISO governance structure can serve as a model for RTOs.

Moreover, the courts have consistently held that the Commission cannot achieve indirectly that which it cannot do directly. National Fuel Gas Supply Corp. v. FERC, 909 F.2d 1519, 1522 (D.C. Cir. 1990); Richmond Power & Light v. FERC, 574 F.2d 610, 620 (D.C. Cir. 1978). Thus, the Commission also lacks indirect authority to justify its actions.

B. The Commission Has Failed To Make Any Factual Findings, Develop a Factual Record or Provide Any Explanation Of Its Reasons For Overturning Order No. 2000

While the courts have recognized that the Commission is free to depart from its established policies, they have consistently required that the Commission provide a clear explanation of its reasons for the change. See, e.g., Panhandle Eastern Pipe Line Co. v. FERC, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (“As we have repeatedly reminded FERC, if it wishes to depart from its prior policies, it must explain its reasons for its departure.”).

Even if the Commission could use remedial powers denied it by Congress, the Commission cannot exercise its power to remedy undue discrimination under Section 206 until it makes a factual finding sufficient to support a determination that utility actions are in fact unduly discriminatory. See, e.g., FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956). The

¹² Moreover, because a Commission decision requiring that the NYISO be replaced by an RTO would have the effect of abrogating the Commission-approved agreements under which the NYISO presently operates, and because the NYISO agreed in those contracts to limitations on its tariff rate filing rights under Section 205 of the FPA that would be eliminated by the creation of an RTO (which the Commission requires to have exclusive tariff filing authority), the Commission is prohibited by the Mobile-Sierra doctrine from exercising its authority under Section 206 in this fashion. See United Gas Pipe Line Co. v. Mobile Gas Service Co., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

Commission made no such finding in its Order. Accordingly, Section 206 provides no basis to require the New York Transmission Owners to participate in an RTO.

Additionally, an agency must provide an adequate and adequately supported explanation for its findings, conclusions or actions; otherwise, they should be set aside. See 5 U.S.C. § 706(2)(A) (under the Administrative Procedure Act, an agency's actions, findings and conclusions which are arbitrary, capricious, an abuse of discretion or otherwise contrary to law should be set aside).

The New York RTO Order is devoid of any legal or factual basis upon which a decision to effectuate a significant reversal of policy could be based. The Commission's failure to identify a legal basis that would support a change in policy from a voluntary to a mandatory formation of RTOs and its failure to evaluate any relevant technical, physical, technological, operational, regional, reliability, financial, cost/benefit or any other consideration related to such a change in policy would be arbitrary, capricious, an abuse of discretion and contrary to law.

C. The Commission Erred in Failing to Initiate a Notice and Comment Proceeding

Section 553 of the Administrative Procedure Act requires agencies to initiate a notice and comment proceeding prior to promulgating or modifying its regulations. 5 U.S.C. 553 (b),(c). Section 385.1903 of the Commission's Rules of Practice and Procedure also requires the Commission to give notice to the public prior to the adoption of a rule of general applicability. 18 C.F.R. § 385.1903 (2000). To the extent that the instant Orders effect a change in Commission policy, the Commission failed to comply with these regulations. Therefore, the Commission's orders, to the extent they seek to promulgate new, or to modify existing regulations, must be set aside. Should the Commission decide to revise its existing RTO

regulations, parties should be afforded an adequate, advance opportunity for the comment on any such explicit proposal. This is particularly true given the magnitude of the policy change here.

II. THE COMMISSION ERRONEOUSLY REJECTED FUNDAMENTAL ELEMENTS OF THE NEW YORK RTO PROPOSAL WHICH CLEARLY COMPLY WITH ORDER NO. 2000

In the New York RTO Order, the Commission found that the NYISO could not constitute an RTO because it does not meet certain of the specific characteristics in accordance with Order No. 2000. The New York Transmission Owners respectfully submit that the proposed New York RTO does in fact meet these requirements and request that the Commission reconsider and reverse its findings on the following issues.

A. Section 205 Filing Rights

In its Order, the Commission determined that in order to qualify as an RTO, the unaffiliated RTO board of directors must have the sole right to make Section 205 filings related to the RTO tariffs. The Commission erred by divesting transmission owners of their statutorily guaranteed rate filing rights, embodied in Section 205, and their ability to enter into contracts with respect to those rights in accordance with Mobile-Sierra. The New York Transmission Owners maintain that this requirement does not represent reasoned decision-making and contravenes the express provisions of the FPA and longstanding judicial precedent. Therefore, the New York Transmission Owners seek reversal of this determination, which requires them to cede their Section 205 filing rights to the board of directors of an RTO.

Under the statutory framework of the FPA, a utility may agree by contract to restrict its right to make tariff changes under Section 205 and to limit its ability to make tariff change filings under Section 206. This is the fundamental premise of the Mobile-Sierra doctrine, which the courts have repeatedly affirmed over the last half a century. The provisions of the existing

NYISO governance structure and the proposed provisions of the New York RTO filing governing the RTO's rights to make tariff filings under Sections 205 and 206 have been agreed to by the NYISO and the transmission owners, and are protected by the Mobile-Sierra doctrine. Such rights were memorialized in the contracts and agreements by and between the transmission owners and the NYISO, which were filed with, and approved by, the Commission.

As owners of the assets, the transmission owners have a constitutionally protected interest in exercising reasonable control over their assets and in receiving adequate compensation for their investment in property devoted to public use. The FPA binds Section 205 filing rights and obligations with utility asset ownership. The New York RTO Order violates this statutory scheme by granting exclusive rate filing rights to the board of directors of an entity that does not own the assets and has no statutory or fiduciary responsibility to the owners of the assets.

As recognized in Order No. 2000, in the case of the NYISO, the transmission owners retained their statutorily granted Section 205 rate filing rights. In addition, the NYISO was granted independent filing authority under Section 205 of the Federal Power Act, within the framework of its shared governance structure:¹³

[in] the New York ISO . . . decisionmaking is explicitly shared by a non-stakeholder Board of Directors and stakeholder Management Committee. Modification of the ISO tariffs under the FPA requires approval of the ISO Board and the Management Committee. If they fail to agree on a modification, either the Board or the Management Committee may make a filing under FPA section 206. See Central Hudson Gas & Electric Corp., et al., 88 FERC ¶ 61,138 (1999).

Order 2000, at 31,073 n.329.

¹³ The New York Transmission Owners have filed a petition in the United States Court of Appeals for the District of Columbia Circuit challenging the determinations in Order No. 2000 and 2000-A that an RTO must have exclusive FPA Section 205 rights to file rates and other terms for the provision of transmission service. The New York Transmission Owners preserve and incorporate those arguments herein by reference.

The New York Transmission Owners submit that it is contrary to the FPA for the Commission to vest exclusive Section 205 filing control in the board of directors of an entity, the RTO, that does not own the transmission assets. To the extent that the Commission's decision would deny transmission owners their FPA and constitutionally granted Section 205 filing authority and strip them of their contractually bargained-for rights to protect their assets and investors' capital and to ensure full cost recovery, without any reasoned analysis or explanation and in total disregard of resultant consequences, the Commission's decision constitutes reversible error.

B. Geographic Scope¹⁴

The New York Transmission Owners support the Commission's policy objective of forming a single RTO for the Northeast. As noted, the New York Transmission Owners are actively participating in the Northeast RTO mediation process to achieve that objective on a consensual and voluntary basis. Based on the record in this proceeding, however, the Commission erred in finding that the proposed New York RTO does not satisfy the geographic scope requirements embodied in RTO Characteristic No. 2 of Order No. 2000. In Order No. 2000, the Commission determined that an RTO must serve a region of "sufficient scope and configuration to permit [it] to maintain reliability, effectively perform its required functions, and support efficient and non-discriminatory power markets." 18 C.F.R. § 35.34j(2). The Commission was clear, however, that it was not "proposing a 'cookie cutter' organizational format for regional transmission institutions or the establishment of fixed or specific regional boundaries under Section 202(a) of the FPA." Order No. 2000 at 30,994. The Commission expressed support for strong cooperative agreements with neighboring RTOs to create a

¹⁴ Central Hudson does not join in this Section II(B).

"seamless trading area," or participation "in a group of RTOs with either hierarchical control or a system of very close coordination," which would obviate the need to form large RTOs in order to eliminate the seams issues. Id. at 31,083. The Commission's vision of a voluntary, collaborative, innovative and flexible approaches to RTO formation permeates Order No. 2000.

The New York RTO Order stands in stark contrast to the well-reasoned and sound determinations in Order No. 2000. Ignoring the multi-faceted aspects of compliance with Order No. 2000's geographic scope and regional configuration requirements, in the New York RTO Order, the Commission summarily reversed course and issued a regulatory fiat to prescribe the geographical scope and boundaries to establish one Northeast RTO. The New York RTO Order states that the NYISO:

must work with its neighbors and trading partners to form a single, fully-integrated RTO with a single set of market rules and one market design in the Northeast.

New York RTO Order, slip op. at 13.

Notably, the record does not support such a radical departure from longstanding Commission policy and Order No. 2000. To the contrary, the record establishes that interregional trade and coordination have been underway for decades in the Northeast. Consistent with Order No. 2000, the parties in the Northeast have been working through open, voluntary and collaborative processes to facilitate increased trading and coordination in the region. Additionally, the parties, including the New York Transmission Owners, have participated in the proceeding established by the Commission in Docket No. PL01-5 for the express purpose of addressing issues related to interregional coordination. With respect to the Northeast, the great majority of parties urged the Commission to approve each of the Northeast RTO proposals and to allow the parties to continue to work on interregional coordination issues

on a voluntary basis. The Commission appears to have ignored the record developed in that proceeding.

While the Commission may be dissatisfied with progress in achieving an efficient and effective common market in the Northeast, that does not justify a decision by the Commission to impose the market rules and software of one ISO on the others, as it has attempted to do by selecting PJM as the “platform” upon which to achieve one, single Northeast RTO. Complex variations are required to accommodate the significant differences in market designs among the Northeast ISOs. Due to the complex nature of New York’s physical system, which requires the application of a special set of reliability rules and local reliability rules, the NYISO market design and software specifications are not only desirable, but are required to securely dispatch the system and to ensure that reliability is maintained. Furthermore, the boundaries of the Northeast ISOs are not arbitrary, but reflect the physical infrastructure and interconnections of the power pools that preceded them. These physical characteristics cannot simply be ignored, but must be carefully addressed as the integration of the Northeast markets goes forward. Equally important is that the RTO’s Northeast market incorporate the best market design features from among the ISOs, and this process should be guided by the experience of each of the ISOs. The Orders do not adequately address these crucial issues.

The Commission chose to ignore its previous finding that the NYISO was in compliance with Order No. 888’s requirement that “[t]he portion of the transmission grid operated by a single ISO should be as large as possible.”¹⁵ Order No. 888 at 31,731. Additionally, the Commission disregarded evidence that the New York RTO, as the successor to the NYISO, is

¹⁵ The NYISO controls the entire high-voltage transmission system in New York State, which has a population of approximately 19 million people, a 1999 peak load of 30,311 MW and approximately 35,000 MW of generating capacity.

capable of maintaining reliability and fostering robust, efficient and effective competitive markets, in accordance with Order No. 2000.

The record clearly establishes that "the NYISO encompasses a 'contiguous geographic area,' a 'highly interconnected portion of the grid' that has been operated in an integrated manner for decades, and an existing control area, *i.e.*, the New York Control Area." See Compliance Filing, at 18. The record also is unequivocal that the NYISO has proven to be of sufficient size to properly manage transmission congestion, has eliminated pancaked rates over a large area, has effectively operated a statewide OASIS system, has made accurate and reliable Available Transmission Capability ("ATC") calculations, and within the present scope, has fostered robust markets and acted to effectively deter the exercise of market power. Each of these features were deemed essential elements in satisfying the scope and regional configuration requirements, and the evidence is clear that the New York RTO has met and will meet these requirements in the future.

C. Governance

The Commission erred by departing from its Order No. 2000 decision not to impose specific requirements on RTO governing boards:

In the Final Rule, we have decided not to impose any specific requirements on RTO governing boards other than the general requirement that they must satisfy the overall principle that their decisionmaking process should be independent of any market participant or class of participants. We have opted not to impose more detailed governance requirements for three reasons. First, we anticipate that RTOs will take many different forms that reflect the needs and different starting points of each region. We expect to see proposals from ISOs, transcos and hybrids Second . . . , [a] governance model that works for an ISO may not be appropriate for transcos or other types of for-profit transmission enterprises. . . . Third, even among the ISOs, there are different models of governance Given the variety of governance forms that exist or are proposed for ISOs and the limited experience with these different approaches, the Commission believes that it is premature to conclude that one form of governance is clearly superior to all other forms in every situation.

Order No. 2000 at 31,073.

Contrary to the Commission's unsubstantiated assertions in the New York RTO Order, the governance proposal is consistent with the requirements set forth in Order No. 2000. The Commission erred in finding the governance proposal in the compliance filing does not satisfy Order No. 2000's independence requirement.

The NYISO's Commission-approved governance structure and sector-voting rules were the products of an open, extensive stakeholder process and three Commission orders. The governance structure was negotiated with input from all interested market participants, the New York Public Service Commission and the Commission. In addition to meeting the governance requirements of Order No.888, the Commission determined in Order No. 2000 that the NYISO's governance structure could be used as a model for governance of an RTO that is an ISO:

What the Commission has approved for ISO forms of governance can be used as models for governance of RTOs that are ISOs. Nothing in this Rule prohibits the types of independent governance structures we have approved to date.

Id. at 31,232.

In describing the various ISO governance structures, including that of the NYISO, the Commission acknowledged that the independence of the ISOs was assured and that no individual or class of market participants nor any committee could exercise undue influence over the ISO's decision-making process:

All of the ISOs approved to date, except [California], have a two-tier form of governance wherein a non-stakeholder board at the top generally has final decision-making authority on most issues. Below this board are advisory groups or committees comprised of stakeholders that provide advice and may share some decision-making authority. With regard to the second-tier, the Commission has required that no one constituency in any group or committee be allowed to dominate the recommendation or decision-making process over the objection of the other classes, and that no one class holds veto power over the will of the remaining classes.

Id. at 31,232.

The Commission further acknowledged the shared decisionmaking process in New

York:

[in] the New York ISO . . . decisionmaking is explicitly shared by a non-stakeholder Board of Directors and stakeholder Management Committee. Modification of the ISO tariffs under the FPA requires approval of the ISO Board and the Management Committee. If they fail to agree on a modification, either the Board or the Management Committee may make a filing under FPA section 206. See Central Hudson Gas & Electric Corp., et al., 88 FERC ¶ 61,138 (1999).

Id. at 31,073 n.329.

The NYISO governance structure has afforded all NYISO market participants a vital stakeholder role in the development of competitive markets in New York, without impinging on the independence of the NYISO. The record establishes that the Commission-approved NYISO governance structure is working and should be allowed to continue to evolve, as appropriate, through voluntary and collaborative efforts. There is no record evidence to support reversal of the Commission's previous findings that the NYISO governance structure meets the Order No. 2000 independence requirement or that RTO committees should be relegated to a purely advisory role.

As Order No. 2000 recognizes, the NYISO's decision-making process is independent of control by any market participant or class of market participants. Similarly, the New York RTO proposal, which builds upon the NYISO model, ensures that no individual market participant, or single market participant class, can wield undue influence over the RTO's decisions. All actions by a NYISO committee are subject to review by the NYISO Board. A committee action may be appealed by any market participant or a member of the NYISO staff, or may be considered by the NYISO Board on its own motion. A committee action may be suspended by the NYISO Board pending review by the Board. Responsibilities for day-to-day operations and staff supervision are vested in the NYISO President, who is a voting member of the NYISO Board.

However, the involvement by market participants in the NYISO's governance structure is consistent with the requirements set forth in Order No. 2000 and is entirely appropriate given their financial and legal interests in the activities of the NYISO.

D. Parallel Path Flow

In Order No. 2000, the Commission adopted its proposal in the NOPR that the RTO must have measures in place to address parallel path flow issues in its region on the date of initial operation. The Commission also adopted three years as an adequate time period for implementation of measures to address parallel path flow issues between regions. Order No. 2000 at 31,130.

In the New York RTO Order, the Commission found that the "NYISO [has addressed] the issue of parallel path flows internal to its control area." New York RTO Order, slip. op. at 24. However, despite the NYISO's expressed commitment to address interregional parallel path flows by 2004 and the litany of efforts underway to address and handle inter-control area parallel path flows, which were both acknowledged in the New York RTO Order, the Commission found that the NYISO "failed to address how parallel path flows would be internalized within the Northeast and neighboring regions, and therefore has not satisfied this Function's requirements." New York RTO Order, slip. op. at 24. Accordingly, the Commission directed the NYISO to address this issue in the mediation discussions.

Once again, the Commission's Order reverses Order No. 2000 without adequate explanation or analysis. Parties were afforded three years to address this issue, and the Commission recited numerous examples of how the NYISO was working to address this issue. The Commission's rejection of the NYISO's compliance with RTO Function No. 3 was

therefore improper, and the reversal of Order No. 2000 was arbitrary, capricious and contrary to reasoned decision-making.

E. Operational Control of Transmission Facilities

The Commission found that, in certain respects, the NYISO's proposal does not fully meet the Commission's requirements for this RTO characteristic. In particular, the Commission cited the ability of transmission owners to re-assert operational control during emergency periods; the need to explain why, if applicable, certain transmission facilities or transmission-related facilities are excluded from its operational authority; and the need to ensure that the New York RTO controls at start-up all facilities necessary to provide transmission service. New York RTO Order, slip op. at 15.

The Commission's findings reflect a misunderstanding of the New York RTO proposal. In accordance with Order No. 2000, the proposed New York RTO possesses operational authority for all transmission facilities under its control, is the security coordinator for the entire New York Control Area ("NYCA") and has exclusive right to schedule transmission service in the NYCA. The ISO/TO Agreement and the ISO Agreement specify that the NYISO shall have day-to-day operational control over the transmission facilities that are under its control.¹⁶ Additionally, the NYISO has authority under the OATT to schedule transmission service over transmission facilities that are not under its operational control.¹⁷

The Commission has previously reviewed and approved the nature and extent of the facilities placed under the control of the NYISO.¹⁸ Specifically, the Commission rejected claims

¹⁶ ISO/TO Agreement at § 2.01; ISO Agreement at §§ 2.01, 6.02. *See also* ISO/TO Agreement at 2 (third Whereas paragraph). LIPA is also required to coordinate its operations with the NYISO's operations.

¹⁷ ISO/TO Agreement at §§ 2.02, 2.03, 2.05, 2.09 and 3.01.

¹⁸ Central Hudson Gas & Electric Corp., et al., 88 FERC ¶ 61,138 (1999).

that all transmission facilities must be under the sole control of the NYISO. The Commission determined, rather, that facilities that could not be subject to the sole operational control of the NYISO due to technical reasons should be under the functional control of the NYISO. In accordance with the New York RTO proposal, each transmission owner must also comply with a request from the NYISO to take action with respect to the coordination of the operation of its local transmission facilities, because the operation of those facilities cannot compromise the NYISO's provision of safe and reliable service. Finally, the Commission also has approved the ability of the transmission owners to retain certain limited rights to re-assert control over NYISO-controlled transmission facilities in emergency situations. Id.

Each of these elements, which are embodied in the New York RTO proposal, are consistent with Order No. 2000's "operational authority" requirement, are consistent with maintaining reliability, and do not provide any market participant with an unfair competitive advantage. The NYISO's commitment to prepare a public report that assesses whether any division of operational authority hinders the RTO in providing reliable, non-discriminatory and efficiently priced transmission service also is consistent with Order No. 2000. There is no basis to support a finding that the proposed New York RTO lacks the requisite operational authority over transmission facilities.

F. Transmission Expansion and Planning

The New York Transmission Owners request that the Commission clarify that any RTO-mandated interconnections or transmission expansions will be consistent with the statutory rights of the transmission owner under FPA Sections 210-212; or, alternatively, grant rehearing on the

(..continued)

grounds that the New York RTO Order is inconsistent with the statutory rights set out in FPA Sections 210-212 governing interconnection and transmission expansion.¹⁹

Order No. 2000 afforded RTOs considerable flexibility in designing a planning and expansion process and adopted a longer phased-in period to 2004 to meet this requirement. In the New York RTO Order, the Commission rejected the proposed New York RTO's transmission expansion proposal. Among other things, the Commission stated that the proposal does not appear to grant the RTO the ability to propose transmission upgrades, but only to review stakeholder committee proposals (which include transmission owners). New York RTO Order, slip op. at 40. This statement reflects a misunderstanding of the NYISO transmission expansion proposal, which would provide the RTO Board with final decision making authority over the transmission expansion plan.

With respect to the tariff's interconnection procedures, the Commission contends that the NYISO, not the transmission owners, should be responsible for processing interconnection requests. New York RTO Order, slip op. at 19. The Commission also states the proposal's "cost recovery principles seem to give the transmission owner the ultimate decision-making ability to carry out transmission upgrades" because it appears to "condition transmission expansion upon the satisfaction of transmission owners with, among other things, an agreeable return on investment." New York RTO Order, slip op. at 40.

Utilities cannot be required to expand their systems or provide physical interconnections unless the proposed activities are found by the Commission to meet the FPA's statutory

¹⁹ 16 U.S.C. §§ 824I-k. The New York Transmission Owners have filed a petition in the United States Court of Appeals for the District of Columbia Circuit asserting that the Commission erred in Order No. 2000 in failing to recognize and affirm the transmission owners' statutory rights in connection with transmission expansions or interconnections under the RTO structure. The New York Transmission Owners preserve and incorporate those arguments herein by reference.

requirements of Sections 210, 211 and 212. Notably, these include, but are not limited to, the requirements that: (1) the Commission must find that the proposed activities are in the public interest; and (2) the Commission must find, in accordance with Section 210 (interconnection)²⁰ and Section 211 (mandatory wheeling/enlargement of facilities),²¹ that the cost recovery requirements of Section 212²² have been met before the application can be approved. 16 U.S.C. §§ 824i-j.

The legislative history of both Sections 211 and 212 provide helpful clarification and insight. The legislative history of Section 211 provides that the amendments to that section do “not give the [Commission] the authority, on its own motion, to order transmission and the enlargement of transmission facilities; [Commission]-ordered transmission is to occur only in direct response to the request of a third party, and only to the extent of that request.” 138 Cong. Rec. S.17,617 (1992) (Statement of Sen. Walkup). The Commission must “consider all the relevant circumstances before determining whether to require transmission services.” *Id.* The Commission must also “consider the impact of the requested wheeling on the customers of the

²⁰ The Commission may issue an order requiring the physical interconnection of facilities if it: (1) provides the requisite notice; (2) affords an opportunity for an evidentiary hearing; and (3) determines that such order is (a) in the public interest; and (b) would (i) encourage overall conservation of energy or capital; (ii) optimize the efficiency of use of facilities and resources, or (iii) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies; and (c) meets the requirements of Section 212. 16 U.S.C. § 824l(b)-(c).

²¹ Section 211 also circumscribes the Commission’s authority to issue an order requiring the expansion of transmission capacity. Among other things, Section 211 requires the Commission: (a) to issue an order “if it finds that such order meets the requirements of [Section 212], and would otherwise be in the public interest”; (b) not to issue an order under Section 210 or 211 “if, after giving consideration to consistently applied regional or national reliability standards, guidelines, or criteria, the Commission finds that such order would unreasonably impair the continued reliability of electric systems affected by the order”; and (c) not to issue an order “which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy – (A) required to be provided to such applicant pursuant to a contract during such period, or (B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission” *Id.* §824j(a)-(c).

²² Section 212(a) provides that any such order “shall ensure that, to the extent practicable, costs incurred in providing . . . such services, are recovered from the applicant for such order and not from a transmitting utility’s existing wholesale, retail, and transmission customers.” *Id.* § 824k(a).

utility, the reliable functioning of the electric system in general, the customers now receiving transmission services, and the similar consequences to interconnected utilities and their customers.” Id. The legislative history also is clear that “[n]ew FPA Section 211(b) denies the [Commission] authority to mandate wheeling if it fails to make a finding that a wheeling order would not ‘unreasonably impair the continued reliability’ of affected utilities.” Id. The legislative history of Section 212(a) clarifies that this section was intended to “ensure that transmitting utilities and their customers do not subsidize the provision of the transmission services for others and that transmitting utilities are fully compensated for use of their transmission system.” Id. at S. 17,613 (statements of Senator Johnston during Senate debate). In addition, the Senate record also clearly states that “the transmission customer must pay its own way and the third party transmission services will NOT be subsidized by native load customers under any circumstances.” Id. at S 17,619 (emphasis in original).

These sections of the FPA set forth the conditions that must be met prior to the Commission’s issuance an order directing transmission owners to expand their systems or to provide interconnections. Indeed, it is unlawful for the Commission to delegate or vest an RTO with the responsibility to direct transmission owners to expand their systems or to provide interconnections in the absence of a finding by the Commission that such activities comply with the statutory requirements of Sections 210-212. The Commission also is precluded from avoiding the requirements of Sections 210-212 via its rulemaking authority. The courts have consistently held that the Commission cannot achieve indirectly that which it cannot do directly. National Fuel Gas Supply Corp. v. FERC, 909 F.2d 1519, 1522 (D.C. Cir. 1990); Richmond Power & Light v. FERC, 574 F.2d 610, 620 (D.C. Cir. 1978).

The Commission should clarify that the RTO must adhere to the requirements of FPA Sections 210-212 whenever the RTO requests a transmission owner to build facilities or to interconnect generation. If any party disagrees with the RTO's decision (concerning cost recovery or other terms and conditions), the Commission must determine that the RTO directive is consistent with, and the Commission must adhere to, the statutory requirements prior to the effectiveness any directive related thereto. Such a process would protect the rights of both transmission owners and customers.

In the event the Commission does not clarify its order, as discussed above, the New York Transmission Owners seek rehearing of these issues. The Commission cannot abdicate its statutory responsibilities to make the determinations required by FPA Sections 210-212, nor can it delegate to an RTO the Commission's regulatory authority under the FPA. Order No. 2000 does not, and cannot, alter the statutory rights of transmission owners under the FPA. Thus, these rights must be enforced, and it was arbitrary, capricious and unlawful to find otherwise. City of Dothan v. FERC, 684 F.2d 159, 164 (D.C. Cir. 1982).

WHEREFORE, in view of the foregoing, the Member Systems respectfully request clarification and/or rehearing of the Commission's July 12, 2001 Order in this proceeding.

Respectfully submitted,



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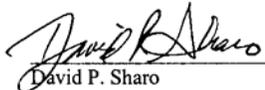
Counsel to the Members of the Transmission
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Dated: August 13, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Washington, D.C. this 13th day of August , 2001.

A handwritten signature in black ink, appearing to read "David P. Sharo", written over a horizontal line.

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