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February 14, 2005

Hon. Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, DC 20426

Re: Docket No. ER04-1144-002 – New York Independent System Operator, Inc.

Dear Secretary Salas:

For filing, please find the Motion to File Answer and Answer of the New York State Public Service Commission to the Requests for Rehearing filed in the above-entitled proceeding. Should you have any questions, please feel free to contact me at 518-473-1149.

Sincerely,

Kevin M. Lang
Assistant Counsel

Enclosure

factual evidence, and aid the Commission in its understanding and resolution of the issues.³ Good cause exists to allow this answer because it will contribute to the development of a complete and accurate record and assist the Commission's understanding of and deliberations on this matter. Good cause also exists because the Commission would not otherwise have before it a demonstration of the erroneous statements in the PSEG Companies' Request for Rehearing or an explanation of the NYPSC's role in this important reliability matter.

The Commission did not improperly subdelegate its authority to the NYPSC to resolve reliability-related disputes associated with the Comprehensive Reliability Planning Process (CRPP), the tariff amendments for which were approved in the December 28 Order. Rather, the Commission properly recognized the NYPSC's jurisdiction over reliability and its concurrent jurisdiction over New York State's Transmission Owners (TO) and appropriately left matters associated with reliability to be resolved by the NYPSC. Accordingly, the PSEG Companies' claim of Commission error is without merit and their Request for Rehearing should be denied.

BACKGROUND

On August 20, 2004, the New York Independent System Operator, Inc. (NYISO) filed proposed tariff amendments to create the CRPP to address reliability issues affecting New York State's bulk transmission system. In recognition of the different roles of the

³ See, e.g., Tennessee Gas Pipeline Company, 95 FERC ¶61,096 (2001) (allowing an answer to a request for rehearing to ensure a complete and accurate record); East Tennessee Natural Gas Company, 81 FERC ¶61,219 (1997) (finding good cause to waive Rule 213 and accept an answer to a request for rehearing).

Commission and NYPSC, and of the NYPSC's jurisdiction over reliability and siting, the CRPP provides that disputes regarding the NYISO's reliability determinations would be resolved by the NYPSC, with the NYPSC's decisions subject to judicial review in accordance with New York law. In the December 28 Order, the Commission approved the tariff amendments with some modifications. Pertinent hereto, the Commission required that all disputes within its exclusive jurisdiction be decided by it, with review by the federal courts. With that modification, the Commission determined that the dispute resolution mechanism set forth in the tariff amendments was reasonable and appropriate.⁴ In doing so, it rejected the PSEG Companies' contention the Commission was subdelegating its authority to the NYPSC.

REQUEST FOR REHEARING

The PSEG Companies repeat their assertion that the Commission impermissibly subdelegated its authority to the NYPSC to resolve disputes related to the CRPP.⁵ They contend that the Commission violated provisions of the Federal Power Act and "principles of administrative law" by allowing the NYPSC and the New York judicial system to decide matters related to the reliability of the bulk transmission system in New York.⁶ In essence, the PSEG Companies argue that the FERC has primary jurisdiction

⁴ December 28 Order at ¶19.

⁵ PSEG Companies' Request for Rehearing, *passim*. The Companies made the same argument in their "Intervention, Comments and Protest", filed September 10, 2004, pp. 5-9.

⁶ PSEG Companies' Request for Rehearing, pp. 3, 5-6.

over reliability, and that disputes associated with the CRPP must be resolved by the Commission and the federal courts.

ANSWER

The December 28 Order properly reflects the respective scopes of the Commission's and the NYPSC's jurisdiction over the bulk transmission system and reliability matters. The Order appropriately modifies the tariff amendments to retain Commission jurisdiction over matters that are exclusively within its jurisdiction and to provide for joint or concurrent hearings over matters in which the Commission's and the NYPSC's jurisdictions overlap but in which neither is primary or preemptive. It correctly recognizes that, with respect to matters within the NYPSC's jurisdiction, the proper venue for resolving disputes resides with the NYPSC and the New York State court system.⁷ As to this last matter, and contrary to the PSEG Companies' contentions, the Commission did not violate any provision of federal law or any principle of administrative law, nor did it improperly subdelegate its jurisdiction to the NYPSC.

I. THE NYPSC HAS JURISDICTION OVER RELIABILITY

The PSEG Companies' position is premised on the contention that reliability is solely a Commission-jurisdictional matter, and that all issues associated with reliability should therefore be decided by the Commission. This premise is erroneous. Whereas the New York Public Service Law (PSL) provides extensive jurisdiction over reliability to the NYPSC (PSL §§5(2), 25(4), 65(1), 66(2) and 66(5)), the Federal Power Act contains no similar provisions and does not provide the Commission general authority over

⁷ December 28 Order at ¶19.

reliability. Rather, the Commission's jurisdiction over reliability is limited to: determining and ordering adequate and sufficient interstate service upon complaint by a state commission (16 U.S.C. §824f); ascertaining that interconnections ordered pursuant to 16 U.S.C. §824i are physically reliable (16 U.S.C. §824i(a)(1)(B)); and requesting reliability councils or other appropriate persons to examine and report on reliability issues (16 U.S.C. §824a-2(b)).⁸

While the CRPP is an important tool to identify reliability needs and select from among a number of resources to address those needs, the NYISO cannot unilaterally implement the potential CRPP recommendations. To the extent the recommendations entail the construction of new generation or transmission facilities, the developer of such projects, whether a TO or other person, must obtain siting approval from the State of New York.⁹

Accordingly, matters related to the reliability of the New York electric system are within the jurisdiction of the NYPSC, with judicial review of the NYPSC's decisions conducted by the New York State courts pursuant to Article 78 of the New York Civil Practice Law and Rules. Therefore, as a matter of law and policy, it is appropriate for the NYPSC to be the arbiter of reliability-related disputes arising from the CRPP process.

⁸ The Commission's limited jurisdiction in the area of reliability was acknowledged by Chairman Wood in his September 10, 2003 testimony to the Senate Committee on Government Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia.

⁹ Transmission siting is governed by PSL Article VII and decided by the NYPSC; generation siting is governed by provisions of the State Environmental Quality Review Act (New York Environmental Conservation Law Article 8) and local zoning and land use laws.

II. THE DECEMBER 28 ORDER DOES NOT SUBDELEGATE COMMISSION AUTHORITY OR JURISDICTION TO THE NYPSC

The PSEG Companies assert that the Commission cannot subdelegate its authority to a state regulatory agency, and that the Commission has impermissibly done so in this matter. In support of that position, the Companies cite to United States Telecom Assn. v. Federal Communications Commn., 359 F.3d 554 (D.C. Cir. 2004), *cert. denied* ___ U.S. ___, 125 S. Ct. 313 (2004), Assinibone and Sioux Tribes of the Fort Peck Indian Reservation v. The Board of Oil and Gas Conservation of the State of Montana, 792 F.2d 782 (9th Cir. 1986), and Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983). The assertion is without merit, and the cases they rely upon are inapposite.

While the Commission’s ability to subdelegate its authority to the NYPSC is not a clear-cut legal issue,¹⁰ it is not a relevant inquiry in this matter. The tariff amendments and the December 28 Order do not involve subdelegation of the Commission’s authority to the NYPSC, they reflect and are governed by the separate legal principle that an administrative agency’s power is limited to that delegated to it by the appropriate legislative body (*i.e.*, Congress or a state legislature). *Cf.* Manhattan General Equip. Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936) (“The power of an

¹⁰ Compare USTA v. FCC, *supra*, 359 F.3d at 566 (“... federal agency officials ... may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.”) to Assinibone v. Board, *supra*, 792 F.2d at 795 (“... subdelegation of administrative responsibilities to other sovereign entities is not per se improper [citations omitted] ... Limitations on delegation are ‘less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.’ *Mazurie*, 419 U.S. at 556-57; *Southern Pacific*, 700 F.2d at 556.”).

administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress....”); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976) (a federal agency’s rulemaking authority “cannot exceed the power granted the [agency] by Congress”).

As explained above, the Commission does not have broad, general jurisdiction over reliability.¹¹ Therefore, it could not, and did not, subdelegate any such jurisdiction to the NYPSC. That is, the language regarding the NYPSC’s role in the tariff amendments and the December 28 Order does not constitute a subdelegation, it is nothing more than a statement of fact.¹² Proof of this contention is shown by the Commission’s modification of the tariff amendments to require that all disputes exclusively involving the Commission’s jurisdiction be handled by the Commission and the statement in the Order that the scope of the NYPSC’s role is limited to addressing matters within its jurisdiction.¹³

¹¹ The Commission specifically acknowledged the dichotomy of its and the NYPSC’s jurisdictional authority in the December 28 Order at ¶18.

¹² By way of analogy, the Commission does not create jurisdiction over locally-set property taxes by approving rates for a TO that include a component for property taxes on the TO’s facilities. Similarly, in considering a license for a hydroelectric facility adjacent to a national forest, reference by the Commission to the Forest Service’s management plan for the forest or the imposition of a requirement that the developer comply with the management plan to avoid impacts of the project on the forest does not give the Commission jurisdiction over the forest or the management plan.

¹³ December 28 Order at ¶19.

For these reasons, the USTA v. FCC decision is neither analogous to nor determinative of this matter. In that case, the Court held that the Federal Communications Commission (FCC) subdelegated to the state regulatory commissions the FCC's express responsibility under 47 U.S.C. §251(d)(2) to determine whether any telecommunications network elements are impaired. The Court found that the FCC cannot delegate its responsibilities to the states absent specific statutory authorization, and that Congress did not so authorize the FCC. In contrast, in this case, the Commission is not subdelegating its authority to the NYPSC. That is, since the Commission's statutory authority over reliability is limited, and because it cannot *sua sponte* expand its jurisdiction by enacting rules governing reliability,¹⁴ its rulemaking authority does not broadly encompass reliability issues. Therefore, it cannot and did not create general or expansive jurisdiction over reliability issues by approving a tariff that discusses a framework to be used by a third party (the NYISO) to examine and assess such issues. Correspondingly, it cannot and did not subdelegate authority that it does not have.

The PSEG Companies' claim that the December 28 Order is inconsistent with the "accountability" requirements discussed in USTA v. FCC, 359 F.3d at 565-566, because it will result in the NYPSC interpreting a federal tariff is without merit.¹⁵ In the December 28 Order, the Commission modified the tariff amendments to provide that disputes on matters within its jurisdiction, which would include tariff interpretation, be decided by it, not the NYPSC, with redress to the federal courts, not the New York State

¹⁴ Manhattan General v. IRS, *supra*; Ernst & Ernst v. Hochfelder, *supra*.

¹⁵ PSEG Companies' Request for Rehearing, p. 7.

courts.¹⁶ Thus, the Commission will be accountable for all matters related to interpretation of the tariff. The NYPSC's role is limited to deciding disputes related to whether a reliability need has been properly identified and whether a recommendation emanating from the CRPP will meet an identified reliability need—both of which are matters that have traditionally been, and continue to be, subject to the NYPSC's jurisdiction, and both of which are separate from interpretation of the tariff.

Assinibone v. Board does not support the PSEG Companies' position, either. That case relates to trust and fiduciary obligations of the federal government to the affected Indian Tribes, and the delegation at issue was of the government's fiduciary obligations to the Tribes. The case did not involve regulatory responsibilities such as are at issue, and this matter does not involve private rights that are in any way similar to those of the Indian Tribes.¹⁷ Sierra Club v. Corps of Engineers similarly lacks relevance in that it dealt with specific requirements imposed on the Corps of Engineers by the National Environmental Protection Act associated with federal approval for a construction project. Here, the Federal Power Act imposes no specific requirements on the Commission, and the disputes that are to be decided by the NYPSC would not require Commission approval.

¹⁶ December 28 Order at ¶19.

¹⁷ It is also noteworthy that the Assinibone case does not even support the Companies' delegation arguments. The Ninth Circuit noted that “[c]ourts have previously held that subdelegation of administrative responsibilities to other sovereign entities *is not per se improper*. [citations omitted, emphasis added]” 792 F.2d at 795.

Finally, while not explicitly stated, a fair reading of the PSEG Companies' arguments indicates that the Companies contend that only the Commission can decide reliability-related disputes arising from the Reliability Needs Assessment or the CRPP. Given the foregoing discussion of the differences in the scope of the Commission's and the NYPSC's jurisdiction over reliability, that contention lacks merit.

III. THE PSEG COMPANIES' POLICY-BASED OBJECTION TO THE NYPSC'S INVOLVEMENT LACKS MERIT

In their Request for Rehearing, as in their "Intervention, Comments and Protest," filed September 10, 2004, the PSEG Companies assert that it is inappropriate for the NYPSC to have a decision-making role in the CRPP because of its alleged "parochial interests" that could lead it to "make decisions that are deleterious to the development of markets or the improvement of seams problems between [the NYISO's control area] and other areas."¹⁸ This contention is both factually erroneous and irrelevant.

First, it cannot be disputed that the NYPSC has been at the forefront of promoting competition at both the wholesale and retail levels. The NYPSC encouraged the electric utilities to divest their generating assets to avoid vertical market power problems, has worked closely with the NYISO, the TOs, and other market participants to foster open access and eliminate impediments to competition, and has undertaken numerous initiatives (*e.g.*, unbundling, marketer incentives) to promote retail competition and encourage energy service companies to do business in New York State. The NYPSC has also worked with its sister regulatory agencies and the independent system operators in

¹⁸ PSEG Companies' Initial Comments and Protest, p. 8 and Request for Rehearing, p. 9.

the Northeast, Mid-Atlantic, and Midwest states to address seams problems between the various control areas. Therefore, the PSEG Companies' allegation that the NYPSC could act in a manner that is "deleterious" to competition lacks factual support and is without merit.

Second, the claim is founded in policy, not law, and it does not establish Commission jurisdiction over reliability or form a basis for preventing the NYPSC from exercising its jurisdictional role. That is, the policy of promoting the development of the regional markets and eliminating seams problems, while supported by the NYPSC, does not give rise to Commission jurisdiction over reliability or the siting of generation or transmission facilities. The Commission's jurisdiction is based on the Federal Power Act, and there are no provisions in that Act that permit the Commission to expand its jurisdiction to ensure that its policies are achieved. *See, e.g., Manhattan General v. IRS, supra.*

Third, as a matter of law and policy, it is appropriate that the entity with decision-making authority over the issue and over the actual solution to be selected be the arbiter of disputes related to the issue and the panoply of potential solutions. Additionally, NYPSC review of the potential options prior to the submission by a developer of an application for siting approval may result in a more expeditious and less contentious formal siting process. Inasmuch as the overall purpose of the CRPP is to identify and address reliability needs, the approved process is more likely, in comparison to the process the PSEG Companies prefer, to achieve the desired goal and preserve the reliability of New York's bulk transmission system. The Commission properly endorsed

this position in the December 28 Order, and no legitimate reason has been presented to revisit or revise the Commission's determination.

CONCLUSION

For the foregoing reasons, the NYPSC urges the Commission to reject the PSEG Companies' Request for Rehearing.

Respectfully submitted,

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Dated: February 14, 2005
Albany, New York

CERTIFICATE OF SERVICE

I, Mariea Young, do hereby certify that I will serve on February 14, 2005 the foregoing Motion to File Answer and Answer of the New York State Public Service Commission by depositing a copy thereof, first class postage prepaid, in the United States mail, properly addressed to each of the parties of record, indicated on the official service list compiled by the Secretary in this proceeding.

Dated: February 14, 2005
Albany, New York

Mariea Young