

STATE OF NEW YORK DEPARTMENT OF PUBLIC  
SERVICE

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September 28, 2004

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

Re: Docket No. ER04-1144-000 – New York Independent Systems Operator, Inc.

Dear Secretary Salas:

For filing, please find the Motion to File Answer and Answer of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 474-7687.

Very truly yours,

John C. Graham  
Assistant Counsel

Attachment



NYISO Open Access Transmission Tariff to establish a comprehensive planning process for reliability needs within New York (“tariff amendments”). On August 24, 2004, the Commission issued a Notice of Filing (“Notice”) soliciting comments by September 10, 2004.

In response to the Commission’s Notice, various parties submitted comments, including the NYDPS. In our comments, we supported Commission approval of the tariff amendments as being in the public interest, because the amendments establish an efficient and nondiscriminatory approach to planning for bulk electric power system reliability in New York.

Several parties submitted protests opposing, among other things, the New York State Public Service Commission’s (NYPSC) role in resolving certain technical reliability-related disputes arising under the NYISO’s comprehensive reliability planning process (“CRP process”) set forth in the tariff amendments. These protests raise various legal and policy arguments that such disputes should be resolved by the Commission rather than by the NYPSC. In order to ensure a more complete record, the NYDPS responds to these arguments.

### DISCUSSION

In our initial comments, we explained that reliability-related disputes arising within the CRP process are appropriately heard before the NYPSC because, *inter alia*, the NYPSC’s jurisdiction over electric system reliability empowers it to hear such disputes. Conversely, the Federal Power Act<sup>2</sup> (FPA) provides no direct Commission

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<sup>2</sup> 16 U.S.C. § 791a *et seq.*

authority over or responsibility for reliability. Therefore, existing law points to the NYPSC as being the appropriate forum for hearing reliability-related disputes.

In general, many of the protestors assert that the Commission has authority over reliability matters. Some further argue that the tariff amendments would permit an unlawful delegation of that authority to the NYPSC. Additionally, the protestors provide various policy reasons for rejecting the NYPSC's role in resolving technical reliability-related disputes. None of the protestors' legal or policy arguments concerning the NYPSC's dispute resolution role are supported by existing law. Therefore, the Commission should reject the protestors' arguments.

The New York Municipal Power Agency (NYMPA) cites New York v. FERC<sup>3</sup> and Section 201 (b) of the FPA<sup>4</sup> as providing for Commission jurisdiction over "transmission of power at wholesale or retail."<sup>5</sup> While New York v. FERC addressed Commission jurisdiction over unbundled retail transmission, and § 201 (b) addresses transmission and wholesale sales of electricity, neither of these authorities expressly provide for Commission jurisdiction over reliability. As Chairman Wood testified before the United States Senate, "[t]he explicit authorities granted to the Commission in the area of reliability are very limited."<sup>6</sup> Particularly, the Commission's explicit statutory authority over reliability is limited to determining and ordering adequate and sufficient

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<sup>3</sup> 535 U.S. 1 (2002).

<sup>4</sup> 16 U.S.C. § 824 (b).

<sup>5</sup> Motion to Intervene and Protest of NYMPA ("NYMPA Protest") at 6.

<sup>6</sup> Testimony of Pat Wood, III, Chairman, Federal Energy Regulatory Commission, Before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Government Affairs, United States Senate, at 6 (September 10, 2003) ("Chairman Wood Testimony").

interstate service upon complaint by a State commission,<sup>7</sup> ascertaining that interconnections ordered pursuant to 16 U.S.C. § 824i are physically reliable,<sup>8</sup> and requesting reliability councils or other appropriate persons to examine and report on reliability issues.<sup>9</sup> None of these provisions give the Commission broad authority over reliability in the absence of a State commission complaint.

NYMPA further argues that, according to Commission precedent, the tariff amendments improperly substitute the NYPSC for the Commission in resolving reliability issues.<sup>10</sup> The Commission order which NYMPA cites in support of this proposition, however, indicates exactly the opposite. In Central Hudson Gas & Electric Corp.,<sup>11</sup> the Commission stated that “[a]ny dispute ... concerning a Reliability Rule that affects *not only reliability but also matters subject to the Commission’s jurisdiction* under the FPA ... must be resolved directly by the Commission, and not submitted first to the New York Commission”<sup>12</sup> (emphasis added). The plain language of this sentence clearly sets forth “reliability” as being separate and distinct from “matters subject to the Commission’s jurisdiction.” Therefore, the Commission precedent cited by NYMPA demonstrates the Commission’s recognition that it does not have jurisdiction over reliability disputes.

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<sup>7</sup> FPA § 207 (codified at 16 U.S.C. § 824f).

<sup>8</sup> 16 U.S.C. § 824i (a) (1) (B).

<sup>9</sup> PURPA § 209 (b) (codified at 16 U.S.C. § 824a-2 (b)).

<sup>10</sup> NYMPA Protest at 8.

<sup>11</sup> 83 FERC ¶ 61,352 (1998).

<sup>12</sup> Id. at ¶ 62,412.

Keyspan-Ravenswood, LLC asserts that “projects that will significantly affect the operations of wholesale markets ... are squarely within the Commission’s jurisdiction.”<sup>13</sup> As Chairman Wood stated, however, statutory provisions governing the Commission’s authority over rates, terms and conditions of service “have been construed as governing the commercial aspects of service, instead of reliability aspects.”<sup>14</sup> Thus, the Commission’s wholesale market jurisdiction has not been stretched to include reliability.

The PSEG Companies assert that the NYPSC’s dispute resolution role would constitute an unlawful delegation of Commission authority.<sup>15</sup> As we explained in our Comments in Support, the NYPSC’s authority to hear such disputes is found in New York State law; therefore, there is no need for any Commission delegation. Moreover, the Commission cannot delegate authority that it does not possess.<sup>16</sup>

Various protestors urge that the Commission should hear reliability-related disputes because this would promote regional reliability<sup>17</sup> and coordination with neighboring independent system operators.<sup>18</sup> These policy arguments, however, do not reflect the current state of federal law. The Commission cannot extend its jurisdiction solely on the basis of its own policy.

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<sup>13</sup> Motion to Intervene and Comments of Keyspan-Ravenswood, LLC at 4.

<sup>14</sup> Chairman Wood Testimony at 5-6.

<sup>15</sup> Intervention, Comments and Protest of the PSEG Companies (“PSEG Protest”) at 6.

<sup>16</sup> In our Comments in Support filed September 10, 2004 in the instant proceeding, we pointed out that the NYPSC is empowered by New York State law to order electric system enhancements to assure reliability. We also noted that the Commission has no direct authority over reliability of the electric transmission grid in the absence of new federal legislation, and therefore cannot resolve reliability-related disputes. See Comments in Support of the NYDPS at 5-6.

<sup>17</sup> NYMPA Protest at 9.

<sup>18</sup> PSEG Protest at 7.

Finally, PJM Interconnection, L.L.C. (PJM) expresses concerns that NYPSC resolution of reliability disputes would cause the NYISO's role in the CRP process to "fall short of the degree of independence that is needed for a successful regional planning function."<sup>19</sup> Pursuant to the tariff amendments, the NYPSC will resolve technical disputes relating to final conclusions of the NYISO that a project is necessary to remedy a particular reliability need, as well as disputes concerning whether a proposed solution will meet an identified reliability need.<sup>20</sup> Specifically, PJM complains that "decisions made by the NYISO Board can be appealed to and subsequently overturned by the NYPSC."<sup>21</sup> The NYISO's independence, however, would not suffer any greater harm through review of its decisions by state regulators or courts than through review by federal regulators or courts. Additionally, PJM complains that because the CRP process "does not indicate whether the NYISO can actually choose among proposed regulated alternatives ... there is no identification of a final authority, except in the case of action by the NYPSC."<sup>22</sup> The NYISO's reliance on the NYPSC's choice of reliability-related projects recognizes that the NYISO does not have authority to order construction of a particular project. Such reliance also recognizes the NYPSC's responsibilities to assure reliability of the State's electric system, and that the State's siting authority ultimately will determine which project is to be built.<sup>23</sup> Moreover, any NYPSC review conducted prior to siting may result in a less contentious formal siting process. This would tend to

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<sup>19</sup> Comments of PJM Interconnection, L.L.C. ("PJM Comments") at 3.

<sup>20</sup> See tariff amendments at §§ 5.3, 8.3.

<sup>21</sup> PJM Comments at 3.

<sup>22</sup> Id. at 10.

<sup>23</sup> N.Y. Pub. Serv. Law §§ 5 (2), 25 (4), 65 (1), 66 (2, 5), 120-130.

expedite the ultimate goal of the CRP process, which is to site and construct reliability projects. As PJM's arguments are either unfounded or are unsupported by existing law, the Commission should reject them.

More fundamentally, PJM asserts that "while regional planning processes need not be identical, they must be compatible across regional seams" and should be "based on consistent tenets."<sup>24</sup> However, PJM fails to explain what it means by "compatible." We assume that PJM is suggesting that all independent system operator (ISO) planning processes should be similar. Likewise, PJM fails to explain how the proposed NYISO planning process would create seams with PJM.<sup>25</sup> In any event, we believe that ISOs should endeavor to mitigate seams. There are two key facts, however, which set NYISO apart from PJM. First, NYISO is a single-state ISO. As such, unlike PJM, it need not be concerned about subjecting its planning process to multiple and potentially conflicting state commission decisions. Second, unlike PJM, NYISO's member utilities are no longer vertically integrated. Thus, for example, NYISO's planning process does not need to overcome any potential incentives for transmission owners to resist new transmission projects that would compete with their own affiliated generators, as may be the case in PJM's territory. Therefore, different planning processes may be justified in the face of divergent structural environments.

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<sup>24</sup> PJM Comments at 2.

<sup>25</sup> The Northeastern ISO-RTO Planning Coordination Protocol, which is close to finalization, will address regional planning seams issues between the NYISO, PJM and the ISO-NE. The NYISO's role in determining upgrades necessary to ensure reliability, promoting efficient operations and meeting economic objectives when engaged in regional planning with surrounding control areas is unconstrained by the NYPSC's limited involvement in dispute resolution. Solutions proposed at a regional level will remain subject to siting proceedings held by the involved states. The NYPSC's role in dispute resolution will resolve certain issues in advance of New York State siting proceedings.

CONCLUSION

The Commission should grant the Motion and consider this Answer in its decision-making process. Furthermore, the Commission should approve the NYISO's August 20, 2004 filing.

Respectfully submitted,

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of the State of New York  
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Dated: September 28, 2004  
Albany, New York

CERTIFICATE OF SERVICE

I, Ellen L. Jeffers, do hereby certify that I will serve on September 28, 2004 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.

Date: September 28, 2004  
Albany, New York

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Ellen L. Jeffers