

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

New York Independent System Operator, Inc. Docket Nos. ER04-1144-002
ER04-1144-003

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued May 6, 2005)

1. In this order, the Commission denies rehearing of its December 28, 2004 Order,¹ which accepted in part and rejected in part the proposed tariff amendments and agreement between the New York Independent System Operator, Inc. (NYISO) and the New York Transmission Owners (NYTOs).² The tariff amendments established a comprehensive planning process (Planning Process) for reliability needs for New York. Also in this order, the Commission accepts NYISO's February 25, 2005 filing submitted in compliance with the Commission's December 28 Order.

¹ *New York Independent System Operator, Inc.*, 109 FERC ¶ 61,372 (2004) (December 28 Order).

² The NYTOs include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Orange and Rockland Utilities, Inc., and Niagara Mohawk Power Corporation, a National Grid Company.

2. PSEG³ requests rehearing of the December 28 Order with respect to the authority of the New York Public Service Commission (New York Commission) over the NYISO comprehensive planning process. The NY Municipals⁴ request rehearing with respect to two issues: the separate rate mechanism to recover transmission-related costs incurred to meet reliability needs and the facilities included in the Planning Process. Calpine Eastern Corporation (Calpine) requests rehearing with respect to the Comprehensive Reliability Plan (CRP), the Unforced Capacity (UCAP) market, and dispute resolution issues. As explained below, we deny rehearing.

I. Background

3. The Planning Process at issue in this proceeding is a formal mechanism by which NYISO, its market participants, and the New York Commission will work together to address long-term planning for reliability.⁵ Under the NYISO plan, reliability needs for the bulk power system will be determined over a ten year planning horizon. The essential steps in the Planning Process include the identification of system needs, the development of proposals for both market-based and regulated solutions, NYISO evaluation of these proposed solutions, and the implementation of regulated solutions by the NYTOs as a backstop when market-based projects do not resolve anticipated reliability deficiencies.

4. NYISO is responsible for evaluating the bulk power system over a ten year horizon and for identifying violations or potential violations of reliability rules that result or could result from inadequate bulk power infrastructure.⁶ The starting base case will represent the New York State power system as reflected in the annual transmission

³ Collectively, PSEG refers to PSEG Power LLC, PSEG Energy Resources & Trade LLC and Public Service Electric and Gas Company.

⁴ The New York Municipals filing this joint request for rehearing are: the Village of Bergen, Freeport Electric Department; Green Island Power Authority; Greenport Municipal Utilities; City of Jamestown Board of Public Utilities; Town of Massena Electric Department; Village of Rockville Centre; Salamanca Board of Public Utilities, Village of Sherburne; City of Sherrill Power & Light; Village of Solvay; and Village of Tupper Lake.

⁵ There will be an additional filing addressing planning for economic reasons (Phase II of NYISO's Planning Process).

⁶ These reliability rules include the operating and planning criteria standards developed by the North American Electric Reliability Council (NERC), the Northeast Power Coordinating Council (NPCC) and the New York State Reliability Council (NYSRC).

reliability assessment conducted under Attachment S of the NYISO Open Access Transmission Tariff (OATT). NYISO will publish the results of this evaluation annually in the Reliability Needs Assessment (RNA). The proposed Planning Process also provides for action beyond the normal planning cycle where NYISO identifies an imminent threat to reliability. The RNA will be reviewed by stakeholders⁷ and voted on by the NYISO Board of Directors. NYISO will evaluate the market-based and regulated solution proposals and present the results in the CRP, which is aimed at matching reliability needs and appropriate market-based and/or regulated solutions.

5. In the December 28 Order, the Commission accepted NYISO's filing, but directed NYISO to make certain modifications. Specifically, we directed NYISO to revise the proposal to treat proposed solutions of non-transmission owners comparably to transmission owners. We also directed NYISO to include language in the agreement that the NYTOs should provide reasonable assistance to parties that are responsible for developing and constructing upgrades approved in the CRP. Additionally, we directed NYISO to make revisions regarding the respective jurisdiction of this Commission and the New York Commission with respect to, among other things, dispute resolution procedures. Last, we directed NYISO to propose and file timetables regarding the implementation of various stages of the RNA and CRP.

II. Requests for Rehearing

6. PSEG, the NY Municipals and Calpine filed timely requests for rehearing.

7. PSEG states that the Commission improperly delegated its authority to the New York Commission in the December 28 Order. PSEG states that, while the modifications the Commission required to NYISO's proposal regarding jurisdiction are laudable, they do not go far enough. Specifically, PSEG states that the dispute resolution procedures adopted would permit the New York Commission to make determinations regarding the NYISO tariff that could not be considered by the Commission. PSEG states that that tariff would authorize the review of matters arising under the tariff to be ultimately determined by New York state courts if some aspect of the dispute implicates a state interest. PSEG states that, in the event of disputes regarding determinations made by NYISO or the New York Commission, the Commission should be given authority to review those decisions as the entity with ultimate adjudicatory responsibilities, with parties thereafter having recourse to Federal court. PSEG adds that it is not reasonable to expect the New York Commission to have the same national or regional perspective that

⁷ The draft RNA will be submitted to the Transmission Planning and Advisory Subcommittee and Electric System Planning Working Group for review and comment. The RNA will be voted on by the Operating Committee and then the Management Committee.

the Commission would have in resolving tariff disputes; PSEG explains that the New York Commission “could make decisions that are deleterious to the development of markets or the improvement of seams problems between NYISO and other areas.”⁸

8. The NY Municipals state that the Commission should not have accepted the separate rate mechanism to recover transmission related costs incurred to meet reliability needs without ensuring that the charge will not result in an over recovery of costs.⁹ The NY Municipals state that the Commission’s finding, which stated that parties are free to seek relief for concerns regarding over-recovery by filing a complaint with the Commission pursuant to section 206 of the Federal Power Act (FPA), was an error by the Commission because concerns had already been raised. The NY Municipals state:

Without an examination of whether the existing transmission rates are recovering more than the TOs’ cost to serve, it is impossible to determine whether some of those revenues should be dedicated to new projects to enhance the transmission system owned by the TOs, instead of allowing them to charge new rates that may result in extraordinary windfall profits.^[10]

The NY Municipals state that Commission precedent is clear that *ad hoc* and piecemeal ratemaking should be avoided. The NY Municipals, in their rehearing request, assert that the Commission failed to address the concerns raised in their initial protest that accepting a separate rate mechanism will result in unjust and unreasonable duplicate charges.

9. The NY Municipals also maintain that the Planning Process should encompass all facilities over which NYISO provides service, whereas the December 28 Order does not require the Planning Process to include bulk power facilities rated under 115kV.¹¹ The NY Municipals state that NYISO should have ultimate responsibility, and the CRP is deficient because it fails to encompass all of the facilities over which service is provided under the NYISO OATT.

⁸ See December 28 Order, 109 FERC ¶ 61,372 at P 18-19.

⁹ See *id.* at P 28-29.

¹⁰ NY Municipals’ Rehearing Request at 5.

¹¹ See December 28 Order, 109 FERC ¶ 61,372 at P 48.

10. Calpine's request for rehearing states that the Commission failed to adequately respond to its concerns regarding the operation of the CRP process.¹² Specifically, Calpine states that the Commission did not offer an explanation as to why it does not believe Calpine's argument that the CRP process will allow loads to rely on capacity service before they have committed to such a purchase, which will in turn discourage bilateral purchase activity necessary to provide capacity to meet those future needs. Calpine states that "the absence of an adequate forward signal for load purchases will by default lead to over-reliance on regulated backstop resources to meet reliability needs rather than market solutions."¹³

11. Calpine also states that Commission guidance is needed on the assumptions of what resources should be reflected in the CRP report's base case and ultimately on all of the details that go into selecting resources, i.e., the assumptions that underlie the CRP report's base case. In particular, Calpine states that if the CRP relies on uncertain resources, such as a generation project which is not yet committed, when publishing the reliability plan, the reliability need will be understated and in turn result in complacency among load rather than provide load with incentives to pursue more realistic forward capacity purchases. Calpine states that a proposed plant might have necessary permits and an approved interconnection study, but without financing there is a large degree of uncertainty as to whether and when the new plant might be built. Calpine also states that "even though a plant may be in existence now, that does not mean that it will still be in operation when the future reliability need arises absent a contractual commitment to do so."¹⁴

12. Calpine states that the CRP's backstop solution imposes a regulatory intervention without previously affording the market a real chance to solve the problem and consequently will undermine the entire basis for the demand curve pricing of capacity.

13. Calpine also argues that Commission guidance concerning the CRP process should not be replaced with dispute resolution procedures. Calpine maintains that the December 28 Order left uncertainty over which disputes are within the New York Commission's jurisdiction and which disputes are within the Commission's jurisdiction.

¹² *See id.* at P 33.

¹³ Calpine Rehearing Request at 5.

¹⁴ *See* December 28 Order, 109 FERC ¶ 61,372 at P 33.

14. In addition, Calpine states that planning assumptions in the CRP are inconsistent with the way the UCAP market is structured.¹⁵ Calpine states:

the timing for market support of generation under the NYISO UCAP market design does not match the planning assumptions expected in the CRP reliability analysis, and neither the CRP, nor UCAP market appear to provide any other timely incentive for load serving entities to commit to purchases from generator developers to avoid the need for a regulated backstop solution.^{16]}

Calpine maintains that allowing load to defer commitment to capacity purchases, as the current UCAP market design allows, diminishes interest among load serving entities in entering into a sufficiently forward contract, and CRP base case assumptions which exceed the reality of committed capacity levels in future periods will hide this problem.

15. Lastly, Calpine states that the December 28 Order noted, but did not respond to, Calpine's contention that NYISO should have the obligation to attempt to cure market inadequacies on a real time basis rather than simply monitoring the progress of market-based solutions as proposed.¹⁷ Calpine maintains that waiting for market-based reliability solutions increases the risk that the only choice will be a higher cost regulatory backstop.

16. Answers to the rehearing requests were filed by NYISO, the New York Commission and the NYTOs.

III. Compliance Filing, Notice and Responsive Pleadings

17. NYISO's February 25, 2005 compliance filing responds to the Commission's directive in the December 28 Order to: (1) address the parts of the proposed tariff that the Commission rejected,¹⁸ (2) revise the proposed agreement between NYISO and the

¹⁵ See *id.* at P 31, 34.

¹⁶ Calpine Rehearing Request at 14-15.

¹⁷ See December 28 Order, 109 FERC ¶ 61,372 at P 32.

¹⁸ NYISO proposes to modify sections 5.3 and 8.3 of Attachment Y of NYISO's OATT to clarify that the provisions apply only in disputes that fall solely within the state agency's jurisdiction. NYISO also proposes changes to section 12 that underscore the Commission's role in adjudicating disputes that fall within its exclusive jurisdiction and make clear that a joint or concurrent hearing may be available in cases where federal and state jurisdictions overlap. Additionally, NYISO's filing addresses the finding in the December 28 Order that the originally proposed tariff language raised the possibility of

NYTOs on the Planning Process,¹⁹ and (3) to provide a timetable for implementation of various stages of the RNA and CRP.²⁰

18. Notice of NYISO's February 25, 2005 compliance filing was published in the *Federal Register*, 70 Fed. Reg. 11,229 (2005), with interventions or protests due on or before March 18, 2005. The NYTOs filed comments in support of NYISO's filing.

IV. Discussion

19. We will deny the requests for rehearing of our December 28 Order of PSEG, the NY Municipals and Calpine. We also will accept NYISO's February 25 compliance filing.

A. Procedural Matters

20. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2004), prohibits an answer to a rehearing request. Therefore we will not accept the answers of NYISO, the New York Commission, and the NYTOs.

B. Commission Determination

1. Commission Jurisdiction

21. The December 28 Order properly reflects the respective scopes of this Commission's and the New York Commission's jurisdiction; there was no delegation of authority. Rather, our December 28 Order recognized the New York Commission's

undue discrimination because it required non-transmission owners to submit their proposed solutions to the staff of the New York Commission for review, while solutions sponsored by NYTOs were submitted directly to NYISO. To resolve this issue, NYISO proposes to eliminate any mandatory state review and revise section 6.1(b) to state that any party may seek the state's review of a proposal, at its option.

¹⁹ NYISO proposes to modify section 2.02 to address the NYTOs' obligation to provide reasonable assistance to the parties who are responsible for constructing solutions that have been approved through the Planning Process.

²⁰ The timetable NYISO submitted in its compliance filing indicates that the RNA will be completed over an eight month period, with up to four months allowed for detailed review of the final product by Market Participants as well as the public. The solicitation and evaluation of proposals for solutions will take place over the next several month period, with a second period allotted for Market Participant discussions. NYISO states that it expects the entire process to extend over approximately eighteen months.

statutory charge to maintain reliability in New York, which gives rise to their role in NYISO's transmission planning process. But we also stated that "matters within our jurisdiction may also arise in the transmission planning process, particularly the ratemaking treatment that would be given to transmission facilities built pursuant to the planning process."²¹ Thus, in addressing the issue of jurisdiction, we stated:

we will accept the dispute resolution process at the state level, contained in sections 5.3 and 8.3 of the proposed Planning Process tariff amendment, for matters that are not within this Commission's exclusive jurisdiction. To the extent that disputes regarding matters over which all the participating commissions have jurisdiction and responsibility for action, the Commission will entertain a request from the New York Commission or the parties for a joint or concurrent hearing to resolve the dispute, consistent with our regulations. We direct NYISO to amend sections 5.3 and 8.3 accordingly. Further, we direct NYISO to amend sections 5.3 and 8.3 of the Planning Process to provide that only disputes within the New York Commission's jurisdiction may be subject to judicial review in the courts of the State of New York, since matters within our jurisdiction under the Federal Power Act may only be appealed to a Circuit Court of Appeals of the United States.²²

22. PSEG argues that dispute resolution procedures in the Planning Process permit the New York Commission to make determinations regarding matters arising under a Commission tariff. However, as we stated in the December 28 Order, in the event of overlapping jurisdiction, in the first instance the Commission will consider requests for a joint or concurrent hearing to resolve the dispute. Further, we required that the dispute resolution provisions in the Planning Process be revised to provide that matters within our jurisdiction may only be appealed to Federal courts. Thus, the Commission has not subdelegated its responsibilities to anyone, let alone a state commission. The Commission, in short, has not relinquished its statutory responsibility to consider matters properly before it.

23. Regarding Calpine's statement that the December 28 Order left uncertainty as to which disputes are with the New York Commission's jurisdiction and which disputes are within this Commission's jurisdiction, we decline at this time to list and address all foreseeable disputes that may arise under the Planning Process. Indeed, in the abstract, it likely would be impossible to list and discuss all such disputes. Instead, the Commission will consider such disputes as they arise on a case-by-case basis; the Commission has the

²¹ December 28 Order, 109 FERC ¶ 61,372 at P 18.

²² *Id.* at P 19 (footnote omitted).

discretion to proceed in this manner, rather than try to spell out here and now how it would deal with any and all disputes that may arise in the future.²³

2. Cost Recovery

24. The Commission denies the NY Municipals' request for rehearing on the subject of a separate rate mechanism. Under that rate mechanism, a NYTO may make a filing under section 205 of the FPA addressing only transmission-related costs incurred to meet a reliability need included in the CRP. Where there are concerns about over recovery of costs due to the recovery of those same costs in existing rates, relief is more appropriately available under section 206 of the FPA. We will not revise this approach on rehearing; this approach is a reasonable one for addressing the possibility that other existing rates not at issue in the section 205 filing are excessive, and we add that the proposal accepted by the Commission resulted from stakeholder meetings and received a 68 percent majority vote from the Management Committee. To this we also add that, at the time a transmission owner makes such a section 205 filing, the Commission does have the option of instituting a section 206 investigation of the existing rates on its own motion in order to harmonize newly submitted and pre-existing rates. We also add that the Commission would prefer to see a formula rate mechanism in place that would both avoid separate rates for certain transmission upgrade costs as well as avoid contested proceedings directed at determining appropriate overall cost recovery.

3. Lower Voltage Facilities

25. We decline to require that the scope of the Planning Process be expanded to cover lower-voltage, *i.e.*, below 115kV, transmission facilities. The Planning Process was vetted through stakeholder processes without objection to its proposed scope and the decision to apply the Planning Process only to bulk power transmission facilities was based upon long-standing New York practices.

26. Since the explicit purpose of NYISO's Planning Process is to secure reliability in the New York control area, we agree that NYISO should focus on those power transmission facilities that are monitored via the rules established by the reliability organizations, NERC, NPCC and NYSRC, and that are classified as bulk power transmission facilities. Reliability criteria, and not just the NYISO OATT, should be the most important determinant of whether a particular transmission line is included in the Planning Process. Should the classification of particular facilities change in the future due, for example, to changed power flows, new reliability standards or other factors, NYISO should properly reflect these changes in the Planning Process. Presently, though,

²³ *E.g.*, *Niagara Mohawk Power Corp. v Huntley Power LLC*, 105 FERC ¶ 61,321 at P 7 (2003); *cf.* *AEP Power Marketing, Inc.*, 108 FERC ¶ 61,026 at P 187 (2004) (Commission can act in case-specific adjudications, rather than in generic proceedings).

we do not see sufficient evidence to suggest that any such change has occurred that would make expanding the scope of the Planning Process to include facilities rated at less than 115kV appropriate.

4. Base Case Assumptions

27. We are not persuaded by Calpine's argument that the Commission has abdicated its responsibility with regard to the assumptions used in the CRP report's base case. Reliability standards established by NERC, NPCC, and NYSRC as well as state and local siting and environmental regulations all impact the selection of specific generation resources. Therefore, as a general matter, we find it inappropriate for the Commission to try to substitute its judgment for the judgment of these institutions.

28. We also disagree with Calpine on the issue of exclusion of planned but uncommitted generation resources. Based on Calpine's logic, in order to be considered, a generator would need to secure a long-term contract for its capacity even before the generator obtains a permit of public convenience and necessity, receives interconnection rights or otherwise establishes itself as a feasible resource. This would not only create an unduly discriminatory bias in favor of existing committed generators (*e.g.*, Calpine's generators) and create an overly pessimistic base case, but could also create obstacles for new generation entry. This would, in turn, have an unintended effect on availability of market-based solutions and force NYISO to rely more heavily and perhaps almost exclusively on transmission and regulated backstop solutions to fill reliability needs, which would be inconsistent with Calpine's stated preference for market-based over regulatory backstop solutions. Although there can be no absolute certainty regarding availability of a particular generator over the 10-year planning horizon, we believe that NYISO's assumptions regarding uncommitted resources are reasonable. We also note that these assumptions are similar to those used in the neighboring Northeastern RTOs. Since the Planning Process is designed to identify reliability needs over a 10-year planning horizon and to ensure that both market-based and regulated backstop solutions to reliability needs are reviewed in parallel, we believe that generating resources will have sufficient incentives to enter the market. Thus, contrary to Calpine's claims, we find that, in addition to creating incentives for new generation entry, NYISO's approach to long-term planning is consistent with and complimentary to the UCAP market, which focuses only on short-term needs.

5. Market-Based Responses

29. Calpine's arguments presuppose that the CRP will not elicit market-based solutions. Calpine's arguments in this regard are speculative, and the Commission will not require rule changes based on Calpine's speculation concerning the current state of the NYISO markets and a problem that has not yet arisen. We do not agree that the CRP discourages market-based solutions. The Planning Process provides time for market-based solutions. In any event, the Commission will not require NYISO to resolve such a

problem prior to the conclusion of the period of time reserved for the development and review of market-based responses. If, as time passes, Calpine still believes that the CRP, in practice, does not provide adequate opportunities for market-based responses to identified reliability needs, at that time, it may file a complaint with the Commission. However, NYISO should identify the obstacles preventing the development of market solutions and include this analysis in NYISO's annual state-of-the-grid report.

The Commission orders:

(A) The requests for rehearing are hereby denied, to the extent discussed in the body of this order.

(B) NYISO's compliance filing is hereby accepted, as discussed in the body of this order.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System
Operator, Inc.

Docket Nos. ER04-1144-002
ER04-1144-003

(Issued May 6, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

I would grant PSEG's request for rehearing of the December 28 order with respect to the authority of the New York Commission over the NYISO's comprehensive planning process. I agree with PSEG's contention that the Commission improperly delegated its authority to the New York Commission in the December 28 order.¹ The order does not persuasively rebut this contention.

Despite the Commission's insistence that "there was no delegation of authority,"² the order authorizes dispute resolution procedures that permit the New York Commission to make determinations regarding the NYISO tariff without Commission consideration. While matters concerning "overlapping" state and federal jurisdiction may be referred to the Commission for joint or concurrent hearing to resolve disputes, the order does not require that such matters must be referred to the Commission. Thus, while the Commission's order provides the possibility of joint or concurrent hearings for resolution of these "mixed" jurisdictional disputes, there is no certainty the Commission will be asked to take a role in these matters. If not, the New York Commission will resolve disputes involving mixed federal and state jurisdiction, and parties would be barred from appealing the decisions of the New York Commission to the Commission. In my view, this process constitutes an improper delegation of the Commission's authority under the FPA.

Accordingly, I dissent from the portion of the order denying PSEG's request for rehearing.

Joseph T. Kelliher

¹ *New York Independent System Operator, Inc.*, 109 FERC ¶ 61,372 at 62,707-08 (2004).

² Order at P 21.