

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent System Operator, Inc.) **Docket No. EL04-____-000**
)

**EMERGENCY REQUEST FOR WAIVERS AND FOR EXPEDITED ACTION OF
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

The New York Independent System Operator, Inc. (“NYISO”), respectfully requests emergency waivers of tariff provisions that appear to require it to conduct Transmission Congestion Contract (“TCC”) Reconfiguration Auctions¹ on a monthly basis. More specifically, the NYISO seeks the Commission’s permission to cancel the upcoming July Reconfiguration Auction. The NYISO also requests that the Commission issue an order on this request as expeditiously as possible and no later than June 22, 2004. The latest date the NYISO can conduct a Reconfiguration Auction for the month of July is June 23, 2004.

The requested waivers will maximize the NYISO’s ability to address the complex effects of a recently discovered database transcription error on a number of NYISO-administered TCC auctions. Without the waivers, the NYISO may have a tariff obligation to conduct a TCC Reconfiguration Auction starting June 23. It would be premature to hold that auction at a time when the NYISO and its stakeholders are still working to understand fully the consequences of the database transcription error. Conducting the auction now could exacerbate the problems that the error has caused, limit options for remedying it, and undermine the NYISO’s ability to fashion a remedy that enjoys consensus stakeholder support.

¹ Capitalized terms not otherwise defined herein have the meaning specified in Article 2 of the NYISO’s Market Administration and Control Area Services Tariff.

I. Copies of Correspondence

Communications regarding this proceeding should be addressed to:

Robert E. Fernandez, General Counsel and Secretary
Belinda F. Thornton, Director of Regulatory Affairs
New York Independent System Operator, Inc.
290 Washington Avenue Extension
Albany, NY 12203
Tel: (518) 356-7661
Fax: (518) 356-4702
rfernandez@nyiso.com
bthornton@nyiso.com

Arnold H. Quint
Ted J. Murphy
Hunton & Williams LLP
1900 K Street, N.W.
Washington, D.C. 20006
Tel: (202) 955-1588
Fax: (202) 778-2201
aquint@hunton.com
tmurphy@hunton.com

II. Background

A. TCCs and TCC Auctions

TCCs are financial instruments that serve as a hedge against congestion costs in the day-ahead energy market administered by the NYISO. A TCC holder collects the congestion rent associated with transmitting one MWh of energy from a specific point of injection (“POI”) to a specific point of withdrawal (“POW”). The hourly payment is calculated by subtracting the Locational Based Marginal Pricing (“LBMP”) congestion component at the POI from the congestion component at the POW. If the difference is negative, the TCC holder must make a payment instead of receiving one. TCCs do not provide a physical transmission priority but instead allow customers to obtain the equivalent of “physically firm transmission service” under the Commission’s *pro forma* Open Access Transmission Tariff by offsetting their congestion costs.²

² See *Central Hudson Gas & Electric Co., et al.*, 86 FERC ¶ 61,062 at 61,228-33, *Order on Reh’g and Compliance Filing*, 88 FERC ¶ 61,138 at 61,399-61,402 (1999) (describing and generally approving TCC program and auction structure).

TCCs may be created between any two identified points on the New York State Transmission System. The number of TCCs outstanding at any one time should not exceed the amount of installed transmission capacity on the system.

The money used to pay TCC holders' congestion rents comes from NYISO customers who pay hourly congestion charges to the NYISO for energy transactions and bilateral transactions in the day-ahead market. The NYISO distributes these "congestion rents" to TCC holders using allocation formulas set forth in its tariffs. In theory, congestion rent payments to TCC holders should equal the charges collected by the NYISO. In practice, however, various factors can cause the two figures to diverge.

For example, transmission facility outages that are not accounted for at the time that TCCs are created can result in TCCs being awarded in excess of the system's actual capacity. When this occurs there may not be enough congestion rent collected in the Day-Ahead Market to "fully fund" all of the outstanding TCCs. In these situations, the NYISO tariffs provide that New York's transmission-owning public utilities ("Transmission Owners") must support the TCCs by covering any congestion rent shortfalls. The tariffs include formulas for allocating shortfalls among the Transmission Owners. By the same token, if congestion charges exceed congestion rents, the resulting congestion rent surplus will be distributed among the Transmission Owners. Shortfalls and surpluses are debited and credited to each Transmission Owner's Transmission Service Charge ("TSC")³ on a monthly basis so that shortfall costs are, in most cases, passed on to the Transmission Owners' customers while surpluses reduce the TSC that customers must pay.

³ In the case of the New York Power Authority, surpluses and shortfalls are passed through to the New York Power Authority Transmission Adjustment Charge ("NTAC"). For convenience, all references to the TSC should be understood as also referring to the NTAC.

Because TCCs in New York are fully funded, transmission customers may use them to completely hedge their congestion risks since they can secure a TCC revenue stream that will perfectly offset any congestion costs they may incur between a specified POI and POW.⁴

TCCs are available through direct sales by the Transmission Owners, which take place over the NYISO OASIS, and through NYISO-administered auctions. Two kinds of auctions are provided for by the NYISO tariffs. “Centralized Auctions,” referred to as “Initial Auctions” in the tariffs, are held prior to the start of the Summer and Winter Capability Periods and are used to auction off TCCs with durations of six months or longer. “Reconfiguration Auctions” are held monthly and are limited to TCCs of one month’s duration. They provide market participants with an opportunity to “purchase and sell short-term TCCs” and to “capture short-term changes in transmission Capacity.”⁵ All revenues generated by the Centralized Auctions are paid to the Transmission Owners and used to reduce their TSC revenue requirements.

B. Persistent Rent Congestion Shortfalls and the Discovery of the TCC Contracts Database Transcription Error

The NYISO and its stakeholders have long been aware of a pattern of significant and persistent congestion rent shortfalls in the New York markets. The NYISO and its consultants have worked diligently to get to the bottom of the problem. Over time, several causes have been identified, and several fixes instituted.

Notably, the Commission has approved changes in the methodology used to allocate congestion rent shortfalls among the Transmission Owners intended to give them more efficient

⁴ TCCs may also be purchased through the auctions, or traded in secondary transactions, by market participants that are not using them for speculative purposes and/or are not participating in the NYISO-administered energy markets.

⁵ See NYISO Open Access Transmission Tariff, Attachment M at § 8.5; NYISO Market Administration and Control Area Services Tariff, Attachment B at Part IV, § 8.5.

incentives to avoid line outages that can give rise to shortfalls.⁶ In addition, the Commission recently approved a series of tariff revisions designed to reduce the magnitude of shortfalls by enabling the NYISO to sell a set of TCCs in each Centralized Auction that better matches the amount of transmission capacity that is actually expected to be available in the Day-Ahead Market.⁷ These revisions focused on reducing shortfalls associated with transmission facility outages because the NYISO, its advisors, and its stakeholders believed that they were the primary cause of the problem. The tariff revisions appear to have succeeded in reducing the shortfalls but have not eliminated them.

Recently, a NYISO consultant working to improve the implementation of the congestion rent shortfall reduction procedures discovered a TCC contracts database transcription error that has substantially contributed to congestion rent shortfalls. The database transcription error occurred during the Summer of 2002 at a time when the NYISO staff was reviewing the TCC contracts database and correcting other errors that had prevented the NYISO from using that database when setting up TCC auctions. The error involved a failure to classify a single 912 MW transmission contract into New York City as reserved by a Transmission Owner in the form of a “grandfathered” TCC and therefore unavailable for release in TCC auctions. The 912 MW was erroneously released into the auctions for sale as TCCs while simultaneously being classified as a grandfathered TCC, thereby overselling the actual transmission capacity available on the system. Although the grandfathered TCC involved a POI at Indian Point 3 and a POW in New York City, that constrained interface is involved in virtually all TCCs into New York City.

⁶ See Letter Order, Docket No. ER04-54-000 (Dec. 15, 2003) (conditionally accepting proposed changes to congestion rent shortfall allocation methodology); Letter Order, Docket No. ER04-54-001 (Feb. 26, 2004) (accepting the NYISO’s compliance filing).

⁷ See *New York Independent System Operator, Inc.*, 106 FERC ¶ 61,095 (2004).

Once this error was integrated into the auction software model, it flowed through to subsequent auctions, including the Spring 2004 Centralized Auction, which covers the current Capability Period. The error eluded detection in subsequent investigations of the congestion rent shortfall problem because it was deeply embedded in a database that was thought to have been corrected in 2002. The error tends to create congestion rent shortfalls because the congestion charges collected by the NYISO are required to support an extra 912 MW of TCCs. Because TCC capacity into New York City is fungible once it is released into a Centralized Auction, it is impossible to say which holders of TCCs involving the affected interface hold extra TCCs.

Most of the TCCs affected by the error in earlier Centralized Auctions have expired and the congestion rent shortfalls associated with their creation can be calculated. The “live” TCCs affected by the error include one year TCCs sold in the Autumn 2003 Centralized Auction and the six month and one year TCCs sold in the Spring 2004 Centralized Auction. It will be impossible to know, or even reliably anticipate, the extent to which the error will increase congestion rent shortfalls until the end of the current Capability Period because congestion charges are dependent on so many unpredictable variables, *e.g.*, the weather, transmission outages, *etc.*

C. The NYISO’s Response To Date

Immediately upon learning of the TCC database transcription error, the NYISO staff informed the NYISO’s Chief Executive Officer (“CEO”) and Board of Directors. The CEO initiated an internal investigation to evaluate the error’s past and current impacts, ascertain whether any other errors have occurred, and implement procedures to ensure that no similar error will occur in the future. This work is ongoing. The Board has also decided to initiate an independent review which is expected to begin shortly. At the same time, outside consultants

and outside counsel have begun working with NYISO staff on these issues, and on examining possible options for correcting or mitigating the error in the current Capability Period. Steps have been taken to correct the database transcription error so that it will not affect future auctions.

The NYISO also concluded that it was essential to fully disclose the error to all stakeholders, including state and federal regulators, and to involve them in fashioning an appropriate response. The NYISO has met several times with Commission staff and with the New York State Public Service Commission staff to inform them of the error and to update them on potential remedies. The NYISO has held two special meetings with all of its stakeholders, and separate meetings with groups of Transmission Owners and TCC holders to discuss the issues. It has also had one-on-one discussions with individual stakeholders who wanted to bring specific concerns to its attention. Subject to limitations in its Code of Conduct on disclosing confidential information,⁸ the NYISO will continue to disclose both the nature of the error and potential remedies with all stakeholders to the greatest extent possible.

The NYISO's first goal is to create a plan for addressing the effects of the error in the current capability period that will have consensus stakeholder support and submit it to the Commission for its approval. The NYISO is exploring a broad range of options and soliciting additional suggestions from stakeholders, but is not seeking a Commission ruling, or any Commission guidance, regarding them at this time. The NYISO anticipates making a separate filing, in a new docket, to propose a preferred option in the next few weeks.

Once the NYISO has instituted a plan for the current Capability Period it will turn its attention to analyzing and addressing the error's effects on earlier Capability Periods.

⁸ See Attachment F of the NYISO's Open Access Transmission Tariff.

III. Canceling the July Reconfiguration Auction Will Avoid Inadvertently Creating New Problems and Maximize the Chances of a Successful Solution

A number of provisions in the NYISO's Open Access Transmission Tariff ("OATT") and Market Administration and Control Area Services Tariff ("Services Tariff") appear to require that the NYISO hold a TCC Reconfiguration Auction by the end of the month. For example the tariffs' definitions of "Reconfiguration Auctions" suggest that they must be held monthly. There are several other references which imply that the NYISO is bound to conduct month-ahead Reconfiguration Auctions on a monthly basis.

Before it knew about the database transcription error the NYISO had scheduled a Reconfiguration Auction for July TCCs on June 14, 2004. Once it had identified the error the NYISO postponed the auction until June 23, 2004 in order to have more time to determine its implications and explain them to stakeholders. June 23 is the latest date that the Reconfiguration Auction can begin if it is to be completed in June.

Based on the current state of its investigations, its work on possible remedies, and its continuing discussions with stakeholders, the NYISO's judgment is that the July Reconfiguration Auction should be cancelled. Even though the issues have been clarified substantially since the NYISO discovered the error, there is still a significant danger that uncertainty will deter many TCC holders from participating on June 23.⁹ This greatly limits the value of the reconfiguration process. It also introduces a risk that the auction will produce results that would not be produced by an efficient competitive bidding process, such as extreme positive or negative TCC prices, or

⁹ Moreover, because the NYISO has made this filing it is likely that many market participants would not be prepared to participate in the auction if the Commission were to require it to be held on June 23.

somehow be gamed. Such an outcome would create new problems and complicate the NYISO's efforts to develop a solution going forward.

In the same vein, holding a Reconfiguration Auction at this point could make it harder to implement remedial options that are currently under review. The NYISO's efforts to forge a consensus response to the error are at a sensitive stage. Diverse, and conflicting interests are at stake. At this juncture the NYISO does not believe that it would be appropriate to take any step that might make it impossible to pursue any potentially viable solution. Such an action could also alienate stakeholders whose favored solution was preempted and disrupt future discussions. The NYISO does not believe that the limited benefits that might come from holding a Reconfiguration Auction at this time warrant taking these risks.

Going ahead with the auction at this time would also require the NYISO, and the Commission, to resolve a complicated tariff interpretation issue in a highly compressed time frame. If the NYISO were to hold the auction it would have to either leave the database transcription error in place or correct it by dropping 912 MW of extra transmission capacity from the auction model. The right answer is less obvious than it may seem. Arguably, the tariffs require a Reconfiguration Auction to accept as a given previously awarded TCCs,¹⁰ although the tariffs do not specifically address erroneously awarded TCCs. Nevertheless, that would tend to favor an outcome in which the NYISO would not correct the database transcription error in order to start the Reconfiguration Auction with a feasible auction model.

¹⁰ See OATT Attachment M at § 8.5; Services Tariff Attachment B at Part IV, § 8.5 (“Any Primary Holder of a TCC, including a purchaser of a TCC in an Auction that has not sold that TCC and a Transmission Owner that is the Primary Owner of an ETCNL TCC or RCRR TCC, may offer that TCC for sale in a Reconfiguration Auction.”). It is open to interpretation whether this requires the Reconfiguration Auction to accept all outstanding TCCs.

Correcting the error for the Reconfiguration Auction would make the auction model start in a significantly infeasible position because the number of outstanding TCCs would exceed modeled transmission capacity by 912 MW into New York City. Such a starting point would drive the auction software to accept bids for negative TCCs at any price in order to find a feasible solution. The price of such negative TCCs cannot be determined in advance and could substantially exacerbate the problem in the short-term and make resolution in the long-run far more difficult. Because resolving this kind of issue given the short time remaining between now and June 22 is not likely, canceling the auction is a better option.

Finally, the NYISO does not believe that canceling the July Reconfiguration Auction is likely to result in material harm to stakeholders. Reconfiguration Auctions normally provide a useful opportunity for TCC holders to adjust their positions and acquire short-term TCCs. In this case, however, continuing uncertainty concerning the database transcription error and possible remedies, along with the announcement of the NYISO's proposal to cancel the auction, can be expected to greatly diminish the auction's utility. In addition, it appears that many TCC holders will be able to make any necessary adjustments through bilateral transactions.

The NYISO has considered the unique situation with respect to Long Island. It is ordinarily impossible to acquire six month, or longer duration, TCCs into Long Island, or between two points on Long Island, through Centralized Auctions. All of the relevant capacity is held in the form of grandfathered TCCs and is rarely, if ever released.

Capacity into Long Island is also almost never available through monthly Reconfiguration Auctions. While market participants might want to try to use a June 23 Reconfiguration Auction to hedge transactions into Long Island they would be very unlikely to succeed, and would thus be unlikely to be materially harmed if the auction were cancelled. The

chances that such TCCs would become available in a flawed auction that attracts little participation, and that may produce dysfunctional results, are very low. Capacity between points on Long Island is made available in the Reconfiguration Auctions more often but there are relatively few transactions between such points. Any harm that may be caused by the cancellation of the June 23 auction with respect to TCCs on Long Island is unlikely to be material, especially given the uncertainty and the likelihood that auction participation will be limited. The NYISO therefore believes that the possibility of what would, at worst, appear to be non-material harm does not justify foregoing the many benefits, described above, of canceling the June 23 auction.

IV. Emergency Request for Tariff Waivers

For the reasons set forth above, and in light of the extraordinary circumstances present here, the NYISO requests that the Commission exercise its discretion¹¹ to grant one-time waivers of all tariff provisions that arguably require it to hold a Reconfiguration Auction by the end of the month. Specifically, the NYISO requests waivers of the language in Section 1.37.1 of its OATT, in Sections 2.0, 8.5, and 9.2 of Attachment M to its OATT, in Section 2.155a of its Services Tariff, and in Sections 2.0, 8.5, and 9.2 of Part IV of Attachment B to its Services Tariff. The NYISO believes that these are the only relevant tariff provisions, but, out of an abundance of caution, also asks that the Commission grant a one-time waiver of any other tariff provision that it believes should be waived in order for the NYISO to lawfully cancel the July Reconfiguration Auction.

¹¹ The Commission has previously waived tariff provisions when circumstances, including equitable considerations, warranted. *See, e.g., New York Independent System Operator, Inc.*, 104 FERC ¶ 61,214 (2004); *H.Q. Energy Services (U.S.), Inc. v. New York Independent System Operator, Inc.*, 97 FERC ¶ 61,218 at 61,694 (2001); *reh'g denied*, 100 FERC ¶ 61,028 (2002). *See also Wisvest-Connecticut, LLC v. ISO New England Inc.*, 101 FERC ¶ 61,372 (2002).

In earlier cases, the Commission has focused on a variety of factors when determining whether it is appropriate to grant tariff waivers to help alleviate the effects of an error. Among other things, it has considered whether: (i) the underlying error was made in good faith; (ii) the waiver is of limited scope; (iii) a concrete problem needs to be remedied; and (iv) the waiver will not have undesirable consequences, such as harming third parties.¹²

All of these factors are present in this case. The underlying error was inadvertent, was made in the course of correcting other errors, brought no benefit to the NYISO, and is being addressed by the NYISO in the manner it believes will best serve the public interest. The scope of the requested waivers is limited to what is needed to give the NYISO clear authority to cancel a Reconfiguration Auction that has the potential to compound existing problems. This is a discrete, and tangible, problem that would clearly be resolved if the waiver requests were granted. Moreover, as was noted above, given the circumstances, granting the waivers is unlikely to harm third parties, and should, at worst, cause non-material harm. The Commission should therefore expeditiously grant the requested waivers.

V. Emergency Request for Expedited Commission Action

The NYISO respectfully asks that the Commission take expedited action and grant the requested waivers no later than June 22, 2004. Prompt action is essential so that stakeholders can know with certainty that there will not be a July Reconfiguration Auction and can begin to plan accordingly as soon as possible. It will also relieve the NYISO from any obligation to conduct a Reconfiguration Auction the scope of which raises difficult issues at the current time.

¹² See, e.g., *Wisvest-Connecticut*, 101 FERC at 62,551 (noting that error was “an inadvertent mishap”). See also *Great Lakes Gas Transmission Limited Partnership*, 102 FERC ¶ 61,331 (2003); *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330 (2003); *Northern Border Pipeline Co.*, 76 FERC ¶ 61,141 (1996).

Granting this request will not prejudice stakeholders because they have already been informed of the NYISO's plan to seek the waivers requested herein. There was only a single objection to this proposal. Stakeholders will have ample opportunity to comment on the appropriate form of resolution as the NYISO works to develop a consensus solution.

VI. Emergency Request for Waiver of Paper Service Requirements

The NYISO respectfully requests a waiver of the requirements of 18 C.F.R. § 385.2010. The NYISO is electronically serving a copy of this filing on the official representative of each of its customers, on each participant in its stakeholder committees, on the New York State Public Service Commission, and on the electric utility regulatory agencies of New Jersey and Pennsylvania. In addition, the complete filing has been posted on the NYISO's website at www.nyiso.com. The NYISO will make a paper copy available to any interested party that requests one.

Good cause exists to grant this waiver because it is urgent that the Commission be able to act quickly. Use of electronic service will get copies to all stakeholders faster than any other method. Furthermore, the NYISO has now used electronic service methods several times. There have been no complaints from stakeholders and it is the NYISO's understanding that many prefer electronic service. Under the circumstances, there is no cause for concern that stakeholders will be prejudiced by electronic service.

VI. Federal Register Notice

Finally, in the event that the Commission deems it necessary, the NYISO has provided a form of *Federal Register* Notice herewith.

The NYISO does not believe that the Commission is required to issue a Notice, or provide an opportunity for comments, in response to this filing.¹³ Interested stakeholders have been informed of the filing, and will be sent electronic copies immediately after it is received by the Commission. The waivers requested herein are of limited scope and should benefit all stakeholders by extending the time for developing a consensus solution to the database transcription error. Establishing a notice period and waiting to see if comments are filed could unnecessarily delay Commission action beyond June 22, 2004.

In the alternative, if the Commission opts to establish a notice period, the NYISO respectfully requests that the Commission require that comments be filed early enough to allow the Commission to issue of an order by June 22, 2004.

WHEREFORE, the Commission should promptly grant the waivers requested above.

Respectfully submitted,

NEW YORK INDEPENDENT
SYSTEM OPERATOR, INC.

By: /s/ Ted J. Murphy
Counsel

Arnold H. Quint
Ted J. Murphy
Hunton & Williams LLP
1900 K Street, N.W.
Washington, D.C. 20006
Of Counsel
June 17, 2004

¹³ The NYISO does not believe that 18 C.F.R. § 2.1 of the Commission's regulations require it to issue a notice in response to this filing. The NYISO has submitted the notice attached to this request out of an abundance and not "for publication" within the meaning of Section 2.1(a)(xi)(K).

cc: Daniel L. Larcamp, Director Office of Markets, Tariffs and Rates, Room 8A-01,
Tel. (202) 502-6700
Alice M. Fernandez, Director Office of Markets, Tariffs and Rates -- East
Division, Room 71-31, Tel. (202) 502-8284
Robert E. Pease, Deputy Director of Division of Investigations and Enforcement, Office
of Market Oversight and Enforcement, Room 5A-03, Tel. (202) 502-8131
Michael A. Bardee, Lead Counsel for Markets, Tariffs and Rates, Room 101-09,
Tel. (202) 502-8068

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket No. EL04-____-000

NOTICE OF FILING

(June 17, 2004)

Take notice that on June 17, 2004, the New York Independent System Operator, Inc. (NYISO) filed an emergency request for waivers of several tariff provisions and for expedited Commission action. The requested waivers would support the NYISO's ability to cancel a Transmission Congestion Contract Reconfiguration Auction currently scheduled for June 23, 2004.

NYISO states that it has electronically served a copy of this filing on the official representative of each of its customers, on each participant in its stakeholder committees, on the New York State Public Service Commission, and on the electric utility regulatory agencies of New Jersey and Pennsylvania.

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's web site at <http://www.ferc.gov>, using the eLibrary (FERRIS) link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll-free at (866)208-3676, or for TTY, contact (202)502-8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Comment Date:

Magalie R. Salas
Secretary