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January 22, 2002

By Hand

Mark J. Langer, Clerk
United States Court of Appeals
District of Columbia Circuit
United States Court House
333 Constitution Avenue, NW
Room 5423
Washington, D.C. 20001

Re: *New York Independent System Operator, Inc. v. Federal Energy Regulatory Commission*,
Case No. 01-1496

Dear Mr. Langer:

Enclosed for filing by the New York Independent System Operator, Inc. ("NYISO") is an original and four (4) copies of Petitioner's Response to Court's Order to Show Cause.

Respectfully submitted,

Arnold H. Quint

Enclosure

cc (w/enc.): Solicitor, Federal Energy Regulatory Commission
Service List

IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

New York Independent System Operator, Inc.,)	
)	
Petitioner,)	
)	
v.)	Case No. 01-1496
)	
Federal Energy Regulatory Commission,)	
)	
Respondent)	

PETITIONER’S RESPONSE TO COURT’S ORDER TO SHOW CAUSE

Petitioner New York Independent System Operator, Inc. (“NYISO”), by counsel, hereby responds to the Court’s Order of December 20, 2001, that the NYISO show cause why its Petition for Review should not be dismissed for lack of jurisdiction. For the reasons explained below, the Court has jurisdiction over the issues subject to review as a result of the NYISO’s timely Petition for Review. Thus, dismissal of the Petition is appropriate only if the NYISO’s rights of review as to all such issues are preserved. Any order of dismissal should make explicit the preservation of those rights. Alternatively, the Court should stay this proceeding pending the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) ruling on the NYISO’s December 10, 2001, request for rehearing of the Commission Order on Rehearing that is the subject of the pending Petition for Review.

BACKGROUND

The NYISO made a filing on March 27, 2000, under § 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824*d*, to obtain Commission approval for proposed market power mitigation remedies for the prices for certain bulk electric power services sold in the markets administered by the NYISO. The proposed remedies included suspension of the use of market-

based bids for these services until the Commission determines that the relevant markets are workably competitive, and a request for authority to determine the appropriate amounts that should be billed and collected for those services for the period from the beginning of the abuse of market power at issue (January 29, 2000) to the date of the suspension of market-based pricing (March 28, 2000) pursuant to the NYISO's March 27 filing. In a May 31, 2000, order ruling on the NYISO's filing, the Commission suspended market-based pricing authority but denied the request to re-determine prices. *New York Independent System Operator, Inc.*, 91 FERC ¶ 61,218. In response, the NYISO filed a timely Request for Rehearing on June 30, 2000. The Commission issued an Order on Rehearing on November 8, 2001. *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,155 ("Order on Rehearing"). On November 16, 2001, the NYISO filed a timely Petition for Review of the initial and rehearing orders.

In the Order on Rehearing, the Commission denied the NYISO's Request for Rehearing, raised new issues, and based its decision on new grounds not previously relied on by the Commission. Specifically, the Commission based the Order on Rehearing not upon § 205 of the FPA, the section relied on by the initial NYISO filing and cited in the Commission's initial order, but upon asserted limits on the Commission's authority under § 206 of the FPA. Because the Commission's Order on Rehearing relied on new authority, the NYISO filed a request for rehearing of the Order on Rehearing on December 10, 2001, in order to afford the Commission an opportunity "to take corrective action before judicial review, thus possibly rendering the latter unnecessary." *Public Service Com. v. Federal Power Commission*, 284 F.2d 200, 207 (D.C. Cir. 1960).

ARGUMENT

The Court has ordered the NYISO to show cause why its Petition for Review should not be dismissed for lack of jurisdiction, citing *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980, 981 (D.C. Cir. 1993) (*per curiam*), for the proposition that a “pending request for agency reconsideration renders petition for judicial review ‘incurably premature.’”

Section 313 of the FPA provides that a party must seek rehearing of a Commission order before obtaining judicial review, and that a party aggrieved by an order of the Commission may seek judicial review of that order if review is sought within 60 days of the Commission’s order on rehearing. *See* 16 U.S.C. § 825*l*. This Court has held that the FPA requires that an aggrieved person timely file its petition for review and must have raised its objections to a Commission order in a request for rehearing.¹ “These rehearing requirements are express statutory limitations on the jurisdiction of the courts and neither we nor the Commission have authority to relax them.” *Tennessee Gas Pipeline Co. v. FERC*, 871 F. 2d 1099, 1107 (D.C. Cir. 1989), *citing Boston Gas Co. v. FERC*, 575 F.2d 975, 979-80 (1st Cir. 1978). Because the NYISO raised the relevant issues in a request to the Commission for rehearing, and because the Commission’s November 8, 2001, Order on Rehearing denied the NYISO’s Request for Rehearing, the NYISO is aggrieved on substantive issues and is entitled to appellate review of the Commission’s initial and first rehearing orders. The NYISO sought such review by filing its timely Petition for Review.

¹ Under the FPA, “[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.” FPA § 313(b).

The Commission has in the past asserted that a prior final order is not subject to appellate review as a result of a party's timely filing of a petition for review with respect to a subsequent but related final order that is reviewable. In *Newark, New Castle & Seaford v. FERC*, 763 F.2d 533, 540 (3d. Cir. 1985), the Commission argued that the court "should not permit [petitioners] to 'boot-strap' their untimely petition into a timely one on the basis of [a denial of rehearing of an order on rehearing]." The court in *Newark* stated that the "Commission argues that this [FPA § 313(b)] language requires parties to petition for review of each order in which the Commission completes its rehearing of a particular issue." *Id.* at 541. By filing the pending petition within 60 days of the Commission's first denial of rehearing, the NYISO has precluded the Commission from making any such attack on the NYISO's rights of review here.

In addition, NYISO's timely petition for review obviates any need for it to show that an earlier order is closely related to a second order and thus subject to review on a petition that is within the 60-day period only as to the second order. Courts have permitted petitioners to raise issues contained in prior orders in challenging subsequent orders if the issues are found to be "inextricably linked." See *Batavia, Naperville, etc. v. FERC*, 672 F.2d 64, 72, n. 15 (dictum) (D.C. Cir. 1982). See also *Kansas Cities v. FERC*, 723 F. 2d 82 (D.C. Cir. 1983); *National Fuel Gas Supply v. FERC*, 811 F.2d 1563 (1987), *cert. denied*, 108 S. Ct. 200. The pending Petition for Review avoids any need to prove in a later appeal that the issues raised in the December 10, 2001, request for rehearing of the Commission Order on Rehearing are "inextricably linked" to those raised in the June 30, 2000, Request for Rehearing.

Filing the Petition for Review was arguably necessary to preserve the NYISO's rights of review and to counter the potential challenges to those rights described above, because the opinion in *Tennessee Gas Pipeline*, 9 F.3d 980, does not describe the relationship between the

petitioner's first and second rehearing requests, and indicates that as the second rehearing request "was *not* required by statute," the petitioner had a choice between further proceedings at FERC or before this Court. *Id.* at 981. Here, the NYISO's second rehearing request was necessary in order for the Commission to review new issues arising for the first time in its Order on Rehearing.

Nonetheless, the result in *Tennessee Gas Pipeline* should certainly apply here, for the reasons elucidated in *Newark*. There, the Third Circuit stated that the FPA "appears to permit petitions for rehearing of orders on rehearing. The statute is silent, however, as to the effect of such a petition on the timeliness requirement in § 313(b)." *Newark*, 763 F.2d at 540. After a careful analysis, the Third Circuit rejected the Commission's contention that the right to appeal an original order that was the subject of two serial requests for rehearing must be made within 60 days of the initial denial of rehearing as to issues raised in the first rehearing request, but not raised in a second rehearing request. Citing the policy of fostering judicial economy, avoiding piecemeal consideration of orders, and the prospect of the filing of protracted petitions, the court held that

the 60-day period under § 313(b) is tolled while the Commission considers a timely petition for rehearing of an issue addressed in an earlier order on rehearing, and that timely petition from the second order on rehearing will allow a party to raise all the issues that could have been raised in a timely petition for review of the first order.

Id. at 545. Thus, in *Newark*, appeal of an initial order was found to be timely where the petition was filed within 60 days of the Commission's denial of a second rehearing application, but 199 days after the first order denying a request for rehearing of the initial order.

The reasoning of *Newark* is compelling and should be adopted by this Court, particularly as the NYISO has here timely preserved its rights by filing a petition for review of the

Commission's first Order on Rehearing within 60 days. Therefore, any dismissal of the pending petition should be without prejudice to NYISO's ability to seek review on a later petition of any issues that would now be subject to review. In light of the arguable uncertainty left by *Tennessee Gas Pipeline*, any order of dismissal should clarify that all issues subject to review on the pending Petition are preserved for review should the NYISO seek timely review of the Commission's order on the NYISO's pending request for rehearing of the Order on Rehearing. Alternatively, if necessary to preserve the NYISO's rights of review, the pending proceeding should be stayed pending the Commission's ruling on the NYISO's request for rehearing of the Order on Rehearing.

Respectfully submitted,

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Dated: January 22, 2002

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petitioner's Response to Court's Order to Show Cause by first class mail, postage prepaid to the counsel listed below. I have also served the foregoing document by hand delivery on the Solicitor at the Federal Energy Regulatory Commission.

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