

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

Long-Term Firm Transmission Rights in)
Organized Electricity Markets) **Docket Nos. RM06-8-000**
)

**REPLY COMMENTS OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to the Commission’s February 2, 2006 Notice of Proposed Rulemaking on *Long-Term Firm Transmission Rights in Organized Electricity Markets*¹ and the March 2, 2006 *Notice of Extension of Time*, the New York Independent System Operator, Inc. (“NYISO”) respectfully submits its reply comments in this proceeding.

In its initial comments, the NYISO noted that new Section 217 of the Federal Power Act (“FPA”) did not require major changes to financial transmission rights in “organized markets” operated by Independent System Operators (“ISOs”) and Regional Transmission Organizations (“RTOs”). To the contrary, the new law specified that financial rights could be the full equivalent of physical rights and that existing ISO/RTO systems should be respected. The NYISO urged the Commission to take a flexible approach and to allow ISO/RTO regions to develop regionally-appropriate responses to the Commission’s initiative. This approach has been endorsed by the New York State Public Service Commission and all but one of the New York market participants that have commented in this proceeding to date.²

¹ 114 FERC ¶ 61,097, Docket Nos. RM06-8-000, AD05-7-000 (Feb. 2, 2006).

² *See, e.g.*, Comments of the Public Service Commission of the State of New York; Comments of Central Hudson Gas & Electric Corp., et al. (New York Transmission Owners); Comments of Coral Power, LLC; Comments of DC Energy, LLC.

Nevertheless, some commenters have misinterpreted Section 217 and claimed that it requires radical changes to successful arrangements.³ Most of these commenters are trade associations, or entities with no direct connection to New York, that are not concerned with the wishes of New York stakeholders, market impacts, or equity. They assert that ISOs/RTOs must adopt physical transmission rights that would be incompatible with their market designs. Some go so far as to collaterally attack previous orders accepting locational marginal pricing. They also ask the Commission to preferentially allocate transmission rights to favored classes of Load Serving Entities (“LSEs”). To the extent that they recognize the inequities that preferences would create, they propose to mitigate them by adopting additional market restrictions. Finally, they argue that new Section 217 somehow requires the Commission to overhaul previously approved transmission planning processes that enjoy consensus regional support.

The Commission should reject these arguments because they have no basis in the law and would result in bad policy. Nothing in the FPA requires the Commission to force the use of physical transmission rights, to discriminate in favor of certain preferred LSEs, or to re-make ISO/RTO planning procedures. All that Section 217(b)(4) requires is that the Commission ensure that transmission planning and expansion processes meet LSEs’ reasonable needs and allow for them to acquire long-term physical or financial transmission rights. Congress neither said nor implied that existing ISO/RTO planning or transmission rights systems are deficient. Similarly, there is no reason to conclude that existing ISO/RTO system planning and financial transmission

³ *See generally, e.g.*, Comments of the American Public Power Association (“APPA”); Comments of the National Rural Electric Cooperative Association (“NRECA”); Comments of the Transmission Access Policy Study Group (“TAPS”); Comments of the Transmission Agency of Northern California (“TANC”).

rights mechanisms need significant change. Indeed, many of the changes proposed by certain commenters would harm markets and treat different market participants unfairly.

I. Reply Comments

A. *Section 217 Does Not Require Radical Changes to Existing Financial Rights Systems*

Certain commenters wrongly read new FPA Section 217 to mandate anti-competitive policy choices that they have long advocated. For example, APPA claims that Section 217(b)(4) stands for the proposition that certain LSEs are to receive a preference in acquiring long-term firm transmission rights.⁴ TAPS and NRECA make similar arguments.⁵ Some commenters also believe that Congress intended to graft incompatible physical rights onto existing financial rights models.⁶

The actual text of FPA Section 217 does not support these interpretations. As the NYISO explained in its initial comments, Section 217 in general -- and Section 217(b)(4) in particular -- indicates that Congress did not intend to significantly disturb successful ISO/RTO processes for auctioning financial transmission rights.⁷ As is discussed in Section A.4, below, the statute clearly allows ISOs/RTOs to use financial rights models. There is also nothing in the statute requiring ISOs/RTOs to offer longer-term rights than they currently provide. In any event, the NYISO has always been willing to consider offering longer-term Transmission Congestion

⁴ See, e.g., APPA Comments at 25-26.

⁵ See, e.g., NRECA Comments at 15; TAPS Comments at 25-26.

⁶ See, e.g., TANC Comments at 7-8.

⁷ See NYISO Initial Comments at 5-7.

Contracts (“TCCs”) to the extent that its stakeholders desire them.⁸ The assertion that physical rights must be grafted onto financial rights mechanisms is belied by the plain language of the statute. Section 217(c) expressly grandfathers existing ISO/RTO financial rights auction mechanisms that were in effect prior to January 1, 2005.⁹ This includes the NYISO’s financial rights-based TCC model. Accordingly, the law is clear that Congress did not intend to require dramatic changes to existing ISO/RTO processes.

B. Section 217 Does Not Require the Commission to Give Discriminatory Preferences to Certain Favored Classes of LSEs

Certain commenters suggest that the language of Section 217(b)(4) requires the Commission to provide LSEs that have entered into long-term contracts to meet their native load obligations with a discriminatory preference in obtaining long-term firm transmission rights, such as by assigning them rights for free that less favored market participants would have to pay for.¹⁰ This position is incorrect as a matter of law. Nothing in the language of Section 217(b)(4) supports this interpretation. The provision states only that:

The Commission shall exercise the authority of the Commission under this Act in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load serving entities, and enables load-

⁸ *See id.* at 6-7, 16-18.

⁹ As the NYISO stated in its initial comments, the fact that Section 217(c) applies to Section 217(b)(1)-(3), but not expressly to Section 217(b)(4), is of no moment. Section 217(b)(4) is a general policy command that does not rule out the use of financial rights models. Section 217(c), on the other hand, is a specific limitation on the Commission’s authority. Under the relevant canons of statutory construction, a general command cannot trump a specific command. *See* NYISO Initial Comments at n.11.

¹⁰ *See, e.g.,* APPA Comments at 25-27, 28 (asserting, in its discussions of Proposed Guidelines 5 and 6, that Section 217(b)(4) gives a preference to LSEs with service obligations).

serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis....¹¹

Thus, Congress has only required that the Commission ensure that transmission system planning and expansion procedures accommodate LSEs' reasonable needs, including by enabling them to secure "long-term" transmission rights. Nothing in Section 217 supports an interpretation that the "reasonable needs" of LSEs can only be met through direct allocations of rights to certain classes of LSEs to the detriment of others. Read together with Section 217(c), Section 217(b)(4) recognizes that existing ISO/RTO planning and financial rights systems can be sufficient to satisfy LSEs' reasonable needs.

Moreover, interpreting Section 217 to grant preferences to certain classes of LSEs would contradict Section 206 of the Federal Power Act, as well as Commission precedent and policy against undue discrimination and preferences in a competitive marketplace. The Energy Policy Act of 2005 builds on the Commission's fundamental statutory responsibility to prevent undue preferences and to ensure that discrimination in the provision of jurisdictional services are prohibited.¹² The Commission has recognized this guiding principle of its authority in Order No. 888¹³ and subsequent issuances. In Order No. 888, for instance, the Commission concluded:

¹¹ FPA § 217(b)(4).

¹² *See, e.g.*, FPA §§ 205, 206.

¹³ *Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regulations Preambles January 1991 - June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996 - December 2000 ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Study Policy Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

The Commission has a mandate under sections 205 and 206 of the FPA to ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. We must determine whether any rule, regulation, practice or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and must prevent those contracts and practices that do not meet this standard.¹⁴

More recently, in the pending Notice of Inquiry (“NOI”) on “888 reform” in Docket No. RM05-25-000, the Commission stated that its “goal continues to be to prevent undue discrimination and preference in the provision of transmission service.”¹⁵ The NOI also noted that “the incentive and opportunity for undue discrimination continues to exist” since the time it issued Order No. 888.¹⁶ Accordingly, the Commission should reject suggestions that it should discriminate in favor of existing LSEs to the detriment of new market entrants.

In addition, as the NYISO has previously explained, such discrimination would also be inequitable and would undermine existing market designs that allocate transmission rights through non-discriminatory means.¹⁷ Some commenters have taken the position that inequities, and financial windfalls to favored LSEs, could be avoided by limiting the resale of long-term firm transmission rights in secondary markets to prevent “gaming.”¹⁸ This would be a needlessly

¹⁴ Order No. 888 at 31,669.

¹⁵ *Preventing Undue Discrimination and Preference in Transmission Services*, Notice of Inquiry, Docket No. RM05-25-000, at 9 (Sept. 16, 2005).

¹⁶ *Id.* at 12.

¹⁷ The NYPSC also recognized this crucial point. Specifically, the NYPSC observed that granting a preference would be “inconsistent with the existing allocation of the rights in the New York market, which attempts to allocate those rights in a non-discriminatory fashion.” NYPSC Comments at 7.

¹⁸ *See, e.g.*, APPA Comments at 18; TAPS Comments at 30.

draconian solution to a problem that will only exist to the extent that the Commission adopts a policy of discriminatory preferences. Existing auction-based financial rights systems already provide certainty to rights holders without discrimination and without suppressing trading in secondary markets. Moreover, the NYISO TCC market design permits the offering of financial rights for longer durations if that is what is desired by its stakeholders. There is no need to take the discriminatory and anti-competitive approach that certain commenters recommend.

C. Section 217(b)(4) Does Not Require ISOs/RTOs to Adopt Physical Transmission Rights

Some commenters also suggest that the Commission must either make existing financial rights more like physical rights or even institute complete physical rights regimes.¹⁹ In its initial comments, the NYISO urged that the Commission reject a “hybrid” financial rights/physical rights model,²⁰ because physical rights are incompatible with the New York locational marginal pricing-based market, and will not reiterate that argument here. Again, Section 217(b)(4) expressly states that long-term firm transmission rights could be financial rights, and Section 217(c) grandfathered existing financial rights models.

Moreover, the Commission should recognize that the NYISO’s position on retaining existing financial rights systems is not based on abstract market design principles. Financial rights models can bring as much certainty as physical rights while allowing for a fuller and more efficient utilization of transmission capacity. Advocates of preferential physical rights are asking the Commission to give them special transmission benefits while simultaneously reducing the amount of transmission capacity available to other market participants. This outcome is neither

¹⁹ See generally TANC Comments.

²⁰ See NYISO Initial Comments at 24-25.

required by law nor good policy. In contrast, the NYISO's Commission-approved tariffs explicitly provide that additional transmission capacity will become available to the marketplace as historic physical contracts expire.

D. Section 217(b)(4) Does Not Require the Commission to Revisit Existing ISO/RTO Transmission Planning Processes

Some commenters believe that Section 217(b)(4) should be interpreted as mandating the overhaul of existing ISO/RTO transmission planning and expansion processes.²¹ This interpretation should be rejected. The FPA states only that the Commission must exercise its authority under the FPA “in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to secure firm transmission rights...”²² The statute does not require, or even suggest, that existing and approved ISO/RTO transmission planning processes must be revamped. It should be noted that the NYISO OATT contains provisions to allow a market participant to request firm transmission service and to provide long-term TCC's to owners of transmission expansion facilities. The NYISO planning process will incorporate such expansions into any subsequent analyses.

In any event, it would be bad policy to require changes to ISO/RTO transmission planning processes. With respect to New York, the Commission has approved a robust and transparent planning process that calls for stakeholder participation and input.²³ The NYISO's Comprehensive Reliability Planning Process (“CRPP”) is undertaking its first comprehensive

²¹ See, e.g., NRECA Comments at 19-21.

²² FPA § 217(b)(4).

²³ See *New York Independent System Operator, Inc.*, 109 FERC ¶ 61,372 (2004), *order on reh'g and compliance filing*, 111 FERC ¶ 61,182 (2005).

review of the reliability needs of the New York bulk power system. Making wholesale changes to this nascent process would be premature and unnecessary. The NYISO issued its first Reliability Needs Assessment in December 2005 and expects to present it to its governance committees and Board of Directors its first Comprehensive Reliability Plan this summer. So far, the NYISO's planning process has worked well and no party has presented any reason to change it.

II. Conclusion

The Commission should recognize that some commenters have advocated unreasonable interpretations of Section 217(b)(4) that go well beyond the plain language of that provision. In crafting a final rule, the Commission should look at the statutory provisions consistent congressional intent as expressed in the clear language of the statute.

Respectfully submitted,

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