

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

**Ontario Energy Trading International)
Corporation)**

Docket No. ER02-1021-001

**REQUEST FOR PERMISSION TO INTERVENE OUT OF TIME
AND TO SUBMIT BRIEF AND BRIEF OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rules 212 and 713(d)(2) of the Commission’s Rules of Practice and Procedure,¹ and in response to the Commission’s July 1, 2002 order in this proceeding,² the New York Independent System Operator, Inc. (“NYISO”) hereby requests leave to intervene out-of-time herein and to submit a brief. The NYISO urges the Commission to reject Consumers Energy Company’s (“Consumers”) erroneous claim that the Ontario Independent Electricity Market Operator (“IMO”) does not provide open access transmission service and thus does not mitigate transmission market power in Ontario.³

Consumers’ argument is based on a misunderstanding of the IMO’s market design and transmission rules. Consumers’ position is inconsistent with Commission precedent applicable to other Canadian system operators with power marketing affiliates, especially the Alberta Gridco, which administers an IMO-like system that the Commission has found complies with its open access and transmission market power standards. Consumers’ position also appears to conflict with the Commission’s proposed Standard Market Design (“SMD”). Finally, if the Commission were to accept Consumers’ argument it could impede New York’s ability to import essential electricity supplies from Ontario and undermine the NYISO’s and IMO’s efforts to integrate their markets. The NYISO therefore joins the IMO⁴ in asking that the Commission

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reject Consumers' argument and deny its request for rehearing.

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II. Motion for Permission to Intervene Out-of-Time and to Submit Brief

The NYISO is the independent body responsible for providing open-access transmission service, maintaining reliability, and administering competitive wholesale electricity markets in New York. Ontario and New York are closely linked by 2400 MW of transmission interties and there is extensive trade between them. Imports from Ontario, including both electricity generated within, and electricity wheeled through it, are essential to system reliability and market efficiency in New York. Moreover, the NYISO and the IMO have collaborated extensively to harmonize their markets and to incorporate the IMO into planned future arrangements in the Northeastern United States.⁵

Consumers questions whether the IMO provides open-access transmission service. If the Commission accepts Consumers' arguments it could disrupt New York's access to electricity from Ontario. Finding in Consumers' favor could also set back restructuring in Ontario and reduce the IMO's willingness to collaborate on market development with the NYISO.

Accordingly, the NYISO has a critical interest in this proceeding that cannot be adequately represented by any other party. Furthermore, as the administrator of a system that, like the

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IMO's, does not employ the Order No. 8886 "physical reservation model," the NYISO has a unique perspective to offer. The Commission should therefore allow the NYISO to intervene.

The NYISO recognizes that the Commission normally does not allow interventions in the rehearing phase for reasons of administrative efficiency and finality. These considerations are inapplicable here, however, because the Commission has invited briefs for the express purpose of gaining a better understanding of the open-access issue. Moreover, the NYISO was not aware, and could not have anticipated,⁷ that the open-access issue would arise in this proceeding until the Commission issued its July 1 Order.⁸ The NYISO therefore respectfully requests that the Commission permit it to intervene out of time, and accept its brief.

III. Brief

A. The IMO Provides Open-Access Transmission Service on a Comparable Basis

Consumers argues that the IMO does not provide open-access service, and thus that Ontario Energy did not satisfy the Commission's transmission market power standards, because the IMO refused its request for an express physical reservation of transmission service.⁹ This argument incorrectly presumes that the IMO's financial transmission regime, which does not include a separate physical reservation mechanism, is fundamentally inconsistent with the provision of open-access transmission service.

The truth is that the IMO operates a bid-based, security-constrained single settlement wholesale¹⁰ electricity market, with co-optimized operating reserves markets and financially-based open-access transmission. Under this system, requests for transmission service are an integrated part of market participants' energy bids, which eliminates the need for a separate transmission reservation mechanism. The IMO also administers a financial transmission rights auction market to permit market participants to hedge against price

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differences between Ontario and surrounding markets. This system of implicit transmission reservations and financial transmission hedging rights is fully compatible with open-access. The IMO system permits market participants to make long-term transmission reservations and does not require them to buy energy from, or sell it to, the IMO.¹¹ A similar regime has been used in several other regions and the Commission has indicated that the Notice of Proposed Rulemaking (“NOPR”) on SMD will include financial reservation features.

Like other Canadian system operators that have met the Commission’s transmission market power test, the IMO is subject to provincial laws that compel it to administer its system in a non-discriminatory manner.¹² The province’s *Electricity Act* requires the IMO to provide open access to its grid.¹³ The IMO’s license from the Ontario Energy Board likewise mandates that it “ensure non-discriminatory access” to all of its customers.¹⁴ The IMO’s market rules reflect these legal obligations.¹⁵ Consumers has provided no evidence that the IMO has not complied with these requirements. There is also no reason to believe that Consumers would improperly be denied wheeling service to New York if it complied with the IMO’s rules. Published reports and the NYISO staff’s own observations affirm that open-access is working in Ontario and that the IMO markets are off to a successful start. As the IMO has noted, twenty seven U.S.-based entities have either obtained, or applied, for a wholesale marketer’s license in Ontario and eight of these entities are already active in the IMO markets.¹⁶

B. Commission Precedent Does Not Support Consumers’ Argument

Consumers’ argument that the IMO cannot provide open-access service because it does not adhere to the strict letter of Order No. 888 is inconsistent with Commission precedent. In previous market-based rate decisions involving the marketing affiliates of Canadian transmission providers the Commission has not required that Canadian entities adopt every aspect of Order

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No. 888. Instead, the Commission has stated that it will use the same “general standards” that it employs when evaluating whether U.S. entities can exercise transmission market power but would “consider a variety of approaches when dealing with the market power of foreign utility affiliates of United States marketers.”¹⁷ The Commission has therefore found that other Canadian systems have adequately mitigated their transmission market power even though they depart from certain Order No. 888 rules. In particular, the Commission has held that Alberta’s Gridco,¹⁸ which like the IMO was an ISO-type entity that administered a centralized energy market, provided comparable open-access transmission service even though it did not adopt a physical reservation model or the Order No. 888 tariff.¹⁹ The IMO’s market system, and its integrated financial transmission reservation system, are every bit as open as those used in Alberta and are clearly more advanced than the systems employed by other Canadian system operators that have previously met the Commission’s test.²⁰ Indeed, the IMO markets are more advanced, more competitive and more similar to those that the Commission hopes to create across the United States. The Commission should therefore find that the IMO system, at a minimum, complies with the “general standards” the Commission has applied in other cases and hold that transmission market power has been sufficiently mitigated in the province.

In addition, the Commission has previously held that bid-based market systems with integrated financial transmission reservation mechanisms and financial congestion hedging rights can be consistent with or superior to the Order No. 888 standard.²¹ Given that the Commission has come to this conclusion with respect to Commission-jurisdictional transmission providers, it should be willing to make the same finding with respect to the IMO, a Canadian entity that is subject to less stringent review.

Finally, the Commission should reject Consumers’ insinuation that the IMO does not

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provide open-access service because its Board of Directors is appointed by the provincial government. Although the Commission has held that transmission providers with state-selected Boards do not satisfy Order No. 2000's independence requirement, or comply with Order No. 888's Independent System Operator principles,²² the IMO is not required to meet these standards. It need only provide open-access service in a manner comparable to that prescribed under Order No. 888. The Commission has already found that a number of state-owned Canadian utilities provide comparable open-access service.²³ It should make the same finding with respect to the IMO.

C. **The IMO's Transmission Regime Is Consistent with the Model that Apparently Will Be Included in the Standard Market Design**

As was noted above, the IMO's financial reservation system is fundamentally similar²⁴ to the model that the NYISO has used since 1999 and to the "Network Access Service" model that the Commission has signaled will be a major part of SMD. Consumers' attack on the IMO's market design is thus an attack on any market design that differs from Order No. 888's physical reservation model, including SMD. Thus, a Commission finding that the IMO does not provide open-access because it departs from Order No. 888, would conflict with the Commission's goal of moving beyond Order No. 888 "physical" market design components that are not compatible with locational marginal pricing and other financially-based features of SMD.

D. **If Consumers' Prevails, Essential Supplies to New York Could Be Interrupted and NYISO-IMO Market Development Efforts Could Be Disrupted**

If the Commission grants Consumers' rehearing request it could impede New York's ability to import electricity from Ontario. A finding that the IMO does not provide open-access service, and thus that unmitigated transmission market power exists in Ontario, would mean that neither Ontario Energy nor Ontario Power Generation ("OPG") could make market-based sales

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to the United States. Because OPG owns approximately ninety percent of Ontario's generating capacity, the result would be that virtually all of Ontario's supply would have a strong incentive to avoid selling into New York. This would be true even when New York prices were extremely high, since Ontario supply could only charge a cost-based rate. Given the magnitude of transactions between New York and Ontario, the consequences of such a change could be severe during capacity shortages or emergencies.

In addition, if the Commission declares the IMO's existing bid-based transmission reservation system to be incompatible with the systems required in the United States it would, at a minimum, strongly discourage Ontario from continuing its market development efforts with the NYISO. It could even subvert the entire restructuring process in Ontario by preventing Ontario generation from accessing U.S. markets and by raising Canadian sovereignty concerns. Either outcome would be very harmful to New York.

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IV. Conclusion

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc., asks that the Commission: (i) grant its request for permission to intervene out-of-time; (ii) reject Consumers Energy Company's erroneous claim that the Ontario Independent Electricity Market Operator does not provide open access transmission service on a comparable basis for wheeling through and out of the Ontario markets; and (iii) deny Consumers' request for rehearing.

Respectfully submitted,
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July 31, 2002

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each party designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.2010 (2001).

Dated at Washington, D.C. this 31st day of July 2002.

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18 C.F.R. §§ 385.212 and 713(d)(2).

1 *Ontario Energy Trading International Corporation*, 100 FERC ¶ 61,016 (2002).

2 The NYISO takes no position on the question of whether the Ontario Energy
International Trading Corporation (“Ontario Energy”) should be considered an IMO affiliate.

3 *See Submission of the Independent Electricity Market Operator In Respect of the
Commission’s Requests for Reply Briefs and Supporting Documents (“IMO Brief”)*, Docket No.
ER02-1021-000 (July 30, 2002).

4 *See, e.g., IMO Of Ontario, ISO-NE and NYISO Complete Planning and Market
Agreement* [<http://www.nyiso.com/topics/articles/index.html>].

5 *Promoting Wholesale Competition Through Open Access Non-discriminatory
Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and
Transmitting Utilities, Order No. 888*, FERC Stats. & Regs. [Regs. Preambles 1991-1996] ¶
31,036 (1996), *Order No. 888-A, on reh’g*, FERC Stats. & Regs. [Regs. Preambles 1996-2000] ¶
31,048 (1997), *Order No. 888-B, on reh’g*, 81 FERC ¶ 61,248 (1997), *Order No. 888-C, on reh’g*
, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part, Transmission Access Policy Study Group v.
FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d, New York v. FERC*, 122 S. Ct. 1012 (Mar. 4, 2002).

6 As the Commission’s July 1 Order notes, even Ontario Energy’s original application
addressed the open access issue in a very “limited fashion.” *Ontario Energy Trading
International Corp.*, 100 FERC ¶ 61,016, *slip op.* at 3 (2002).

7 *See supra* n. 2.

8 *See, e.g., Application for Rehearing of Consumers Energy Company*, Docket No.
ER02-1021-001 (May 9, 2002).

9 The IMO also operates Ontario’s competitive retail electricity market.

10 Consumers’ claim that it was required to buy or sell energy from the IMO appears to be
based on a misunderstanding, or mischaracterization of the IMO market rules. *See IMO Brief* at
5.

11 Commission precedent establishes that the existence of such binding legal obligations is a
key factor in the Commission’s assessment of Canadian system operators. *See TransAlta
Enterprises Corp.*, 75 FERC ¶ 61,268 (1996), compare to *Ontario Hydro Interconnected
Markets, Inc.*, 78 FERC ¶ 61,369 (1997).

12 *See IMO Brief* at 3.

13 *Id.*

14 *Id.*

15 *IMO Brief* at 5.

16 *See, e.g., H.Q. Energy Services (U.S.) Inc.*, 79 FERC ¶ 61,152 at 61,652 (1997), quoting
Energy Alliance Partnership, 73 FERC ¶ 61,019 at 61,031 (1995).

17 In June 1998 the ESBI Alberta, Ltd. assumed the Gridco’s functions and commenced
operations as Alberta’s Independent Transmission Administrator. ESBI Alberta, Ltd. continues
to administer a market-based system. *See* [http://www.eal.ab.ca/index_main.asp].

18 *See TransAlta Enterprises Corporation*, 75 FERC ¶ 61,268 (1996). The Commission

held that transmission market power was adequately mitigated in Alberta even though market participants were required to buy and sell energy from the Gridco market instead of wheeling energy through it. *See Application of TransAlta Enterprises Corporation for Blanket Authorizations, Certain Waivers and Order Approving Rate Schedule*, Docket No. ER96-1316-000 at 9-11.

¹⁹ *IMO Brief* at 3-6.

²⁰ *See Central Hudson Gas & Electric Corp., et al.*, 88 FERC ¶ 61,138 at 61,382 (1999) (Finding that the NYISO's bid-based system coupled with long-term transmission congestion contracts auctions, was consistent with or superior to the Order No. 888 standard).

²¹ *Mirant Delta, LLC v. California Independent System Operator Corp.*, 100 FERC ¶ 61,059 (July 17, 2002).

²² *See CU Power Canada Ltd.*, 85 FERC ¶ 61,216 (1998) ; *H.Q. Energy Services (U.S.) Inc.*, 81 FERC ¶ 61,184 (1997) ; *British Columbia Power Exchange Corp.*, 80 FERC ¶ 61,343 (1997) ; *TransAlta Enterprises Corp.*, 75 FERC ¶ 61,268 (1996).

²³ One difference is that the IMO market design, unlike the NYISO's, does not yet incorporate a congestion management system based on locational marginal pricing. This does not mean, however, that the IMO is not already providing open-access service comparable to that required by Order No. 888, which is all that the Commission's market power standards require.