UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	**)**	
Central Hudson Gas & Electric Corporation	**)**	
Consolidated Edison Company of New York, Inc.	**)**	
Long Island Lighting Company	**)**	
New York State Electric & Gas Corporation	**)**	
Niagara Mohawk Power Corporation	**)**	**Docket No. ER00-550-000**
Orange and Rockland Utilities, Inc.	**)**	
Rochester Gas and Electric Corporation	**)**	
Power Authority of the State of New York	**)**	

RESPONSE OF THE MEMBER SYSTEMS AND THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Introduction

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, the Members of the Transmission Owners Committee of the Energy Association of the State of New York ("Member Systems"), formerly known as the Member Systems of the New York Power Pool[1] and the New York Independent System Operator, Inc. ("NYISO" or "ISO") respectfully respond to the protests and comments filed in the above-captioned proceedings concerning their joint November 10, 1999 filing to amend the provisions of certain ISO Related

[1] The Member Systems include: Central Hudson Gas & Electric Corporation ("Central Hudson"), Consolidated Edison Company of New York, Inc. ("Con Edison"), LIPA, New York State Electric & Gas Corporation ("NYSEG"), Niagara Mohawk Power Corporation ("Niagara Mohawk"), Orange and Rockland Utilities, Inc. ("O&R"), Power Authority of the State of New York ("NYPA") and Rochester Gas and Electric Corporation ("RG&E").

Agreements,[2] as well as related changes to the ISO's tariffs.[3] The Member Systems and the ISO submit that this response will assist the Commission in its analysis of these issues and will facilitate the Commission's resolution of these proceedings.[4] In support hereof, the Member Systems and the ISO state as follows:

On January 27, 1999, the Commission issued an "Order Conditionally Accepting Tariff and Market Rules, Approving Market-Based Rates, And Establishing Hearing and Settlement Judge

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[2] The three ISO Related Agreements at issue include the Agreement between the New York Independent System Operator and the Transmission Owners ("ISO/TO Agreement"), which was submitted as part of the April 30 Compliance Filing and approved in the July 29 Order; and the Independent System Operator Agreement, which was revised on July 2, 1999 pursuant to Ordering Paragraph C of the Commission's April 30 Order in this proceeding. Central Hudson Gas & Electric Corp., et al., 87 FERC ¶ 61,135 at 61,546 (1999)("April 30 Order"). The Commission accepted the revised ISO Agreement on September 15, 1999. Central Hudson Gas & Electric Corp., et al., 88 FERC ¶ 61,229 (1999)("September 15 Order").

The third agreement at issue is the Agreement between the NYISO and the New York State Reliability Council ("ISO/NYSRC Agreement"), which was submitted as part of the April 30 Compliance Filing and approved in the July 29 Order. July 29 Order, 88 FERC at 61,380 n.7.

Collectively, these three agreements are referred to herein as the ISO Related Agreements.

[3] The ISO's tariffs include the ISO Open Access Transmission Tariff ("ISO OATT") and the NYISO Market Administration and Control Area Services Tariff ("ISO Services Tariff").

[4] The Member Systems and the ISO respectfully request waiver of the Commission's regulations to the extent necessary to permit this response. The Member Systems and the ISO submit that good cause exists for the Commission to grant waiver of Rule 213 regarding the filing of answers to protests. The Commission consistently has waived the requirements of its Rules where a responsive pleading will assist in the Commission's analysis, provide useful and relevant information, or otherwise facilitate a full and complete record upon which the Commission can base its decision. See, e.g., East Tennessee Natural Gas Co., 81 FERC ¶ 61,219 at n.4 (1997); Natural Gas Pipeline Co. of America, 81 FERC ¶ 61,216 at n.3 (1997); Pacific Interstate Transmission Co., 80 FERC ¶ 61,369 at n.2 (1997); Florida Gas Transmission Co., 79 FERC ¶ 61,147 at n.7 (1997).

Procedures" in the above-captioned dockets.[5] In compliance with the January 27 Order, the Member Systems filed the NYISO OATT, the ISO Services Tariff and the ISO Related Agreements on April 30, 1999 ("April 30 Compliance Filing").[6]

Certain of the ISO Related Agreements required the execution of both the Member Systems and the ISO, including the ISO/TO Agreement, prior to commencement of operations. On June 11, 1999, the newly-formed ISO filed Comments in Lieu of Protest in which it identified several aspects of the Member Systems' April 30 Compliance Filing which required revision to ensure the independence of the ISO and to clarify its scope of responsibilities, as a condition precedent to execution of the agreements and the transition to the ISO.

In its June 11 Filing, the ISO committed to continue on-going negotiations with the Member Systems in order to achieve resolution of the issues prior to start-up of operations, noting, however, that if negotiations were unsuccessful it would file a complaint requesting invocation of Fast Track procedures. As a result of the June 11 Filing, the Member Systems commenced discussions with the ISO to resolve its concerns. The instant filing is the product of those negotiations. Because the ISO and the Member Systems are the signatories to the ISO/TO Agreement which was the central focus of the ISO-requested changes, it was both appropriate and necessary for the filing to be jointly submitted

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[5] See Central Hudson Gas & Electric Corp., et al., 86 FERC ¶ 61,062 (1999) ("January 27 Order"), order on reh'g, 88 FERC ¶ 61,138 (1999) ("July 29 Order").

[6] The Commission approved the NYISO OATT and the ISO Services Tariff in its July 29 Order. July 29 Order, 88 FERC ¶ 61,138 (1999). On September 23, the Commission issued an order granting rehearing for purposes of further consideration of the July 29 Order. On September 27, 1999, certain parties filed a petition for review of the January 27 and July 29 Orders in the United States Court of Appeals for the District of Columbia Circuit.

to the Commission.[7] As a result of the modifications to the ISO/TO Agreement, certain other changes were agreed to with respect to the NYISO Tariff, the ISO Services Tariff and the other ISO Related Agreements. All of these changes were submitted on November 10, 1999. Interventions, protests and comments were due on or before November 30, 1999, and approximately nine filings were submitted.[8]

I. Proposed Section 10.1A of the ISO OATT

Certain protests focus on proposed Section 10.1A of the NYISO OATT requested by the ISO and agreed to by the Member Systems. Dynegy Power Marketing, Inc. ("Dynegy") asserts that:

> While proposed Section 10.1A of the [NYISO OATT] would, consistent with Commission precedent, limit the liability of the NYISO and TOs to instances when the NYISO and the TOs are found to have been negligent or to have engaged in intentional misconduct,[9] the provision goes on to further limit the types of damages that can be recovered from the NYISO and TOs,

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[7] The governance procedures were not required to be invoked in order to effectuate the proposed changes as the governance procedures were not effective until after the ISO agreed to the provisions in the Member Systems' filing and the ISO commenced operations on November 18, 1999.

[8] The filings include: Motion to Intervene and Protest of Dynegy; Motion to Intervene and Protest of PG&E Generating and PG&E Energy Trading-Power, L.P. ("PG&E Gen"); Motion to Intervene and Protest of the Connecticut Municipal Electric Energy Cooperative ("CMEEC"); Motion to Intervene and Comments of Sithe/Independence Power Partners, L.P. ("Sithe"); Motion to Intervene and Protest of 1st Rochdale Cooperative Group, Ltd. and Coordinated Housing Services Inc. ("Rochdale"); Motion to Intervene, Protest and Request for Partial Rejection or Hearing of Municipal Electric Utilities Association of New York State ("MEUA") ; Motion to Intervene of AES NY, L.L.C., Motion of Duke Energy Trading and Marketing, L.L.C. for Leave to Intervene ("DETM"); and Motion for Leave to Intervene of Southern Energy Bowline, L.L.C., Southern Energy Lovett, L.L.C. and Southern Energy NY-Gen, L.L.C. (collectively, the "Southern Parties").

[9] Unlike Dynegy, CMEEC fails to recognize that the proposed Section 10.1A is consistent with Commission precedent. CMEEC argues that the ISO and the Member Systems should not be exempt from liability even in the absence of negligence or intentional misconduct. See Motion to Intervene and Protest of CMEEC. However, as Dynegy has recognized, the Commission has already addressed and resolved this issue. See Pacific Gas & Electric Co., et al., 81 FERC ¶ 61,122 at 61,520 (1997), order on reh'g, 82 FERC ¶ 61,223 (1998).

> even in cases where the NYISO and the TOs are found to have been negligent or to have been engaged in intentional misconduct.[10]

Thus, Dynegy protests that portion of proposed Section 10.1A that excludes liability for "any incidental, consequential, punitive, special, exemplary or indirect damages" even where the ISO is liable for direct damages because of negligence or intentional misconduct. Dynegy argues that, although the ISO is correct that the Commission in Pacific Gas and Electric Co., et al.[11] has found it appropriate to limit the liability of the ISO in the absence of negligence or intentional misconduct, the Commission declined to go so far as to limit liability for indirect or consequential damages where the ISO has been found to be negligent, choosing rather to leave that up to the courts.[12]

Dynegy is correct that the Commission in Pacific Gas and Electric Co., et al. elected to defer this issue to the courts. However, the ISO and the Member Systems submit that this is a policy decision that the Commission must resolve, because it is central to the ISO structure approved by the Commission. The ISO is not only a non-profit entity with limited assets, but it also was created solely to manage the transmission system in New York for the benefit of all market participants. The ISO's costs are thus borne by the market participants. While it is reasonable and appropriate for the ISO to make provision for any direct damages resulting from its negligence or intentional misconduct, it is not commercially reasonable or, indeed, feasible to subject the ISO to claims by all market participants for speculative, consequential, special or punitive damages that would ultimately be picked up by other market participants in one form or another if the ISO is held liable for them. It is more appropriate, and

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[10] Motion to Intervene and Protest of Dynegy at 2-3.

[11] See Pacific Gas & Electric Co., et al., 81 FERC ¶ 61,122 at 61,520 (1997), order on reh'g, 82 FERC ¶ 61,223 (1998).

[12] Motion to Intervene and Protest of Dynegy at 3.

commercially reasonable, to leave all market participants to manage the risks associated with any such indirect damages as part of their own businesses and to insure against such risk to the extent necessary. This will reduce any such claims for indirect damages and the number of disputes that the Commission will be called upon to resolve. It also will lessen the number of disputes between and among market participants. Most important, it will strengthen the viability and financial integrity of the ISO to the benefit of all market participants.

II. Proposed Section 10.2 (ISO OATT) and Section 5.3 (ISO/TO Agreement)

Rochdale protests the change to Section 10.2 of the ISO OATT (Original Sheet No. 54 A).[13] Rochdale also claims that this proposed change together with the proposed change to Section 5.3 of the ISO/TO Agreement shields Transmission Owners from liability and unfairly shifts liability to the market participants through the Schedule 1 charge.[14] Rochdale is obviously confused. The change to Section 5.3 of the ISO/TO Agreement was requested by the ISO and agreed to by the Member Systems. The proposed change would clarify that the indemnification of the Transmission Owners that was previously approved by the Commission applies where the action in question relates to the Transmission Owner's ownership or operation of its transmission facilities and such acts or omissions are either: 1) pursuant to or consistent with the ISO Procedures or direction; or 2) in any way related to the Transmission Owner's or ISO's performance under the ISO OATT, except to the extent that the Transmission Owner(s) is found liable for negligence or intentional misconduct. Thus, contrary to

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[13] Motion to Intervene and Protest of Rochdale at 7-9. Rochdale also makes several unfounded allegations with respect to the fact that the filing was made by jointly by the Member Systems and the ISO. As discussed previously, the joint filing was the natural result of the ISO's June 11 Filing and the ISO's requested changes in the ISO/TO and other related agreements prior to ISO start-up.

[14] Motion to Intervene and Protest of Rochdale at 7-9.

Rochdale's claims, the ISO did not request or obtain consent to this change to expand the indemnification approved for Transmission Owners. The ISO believes that this clarification is helpful to explain the scope of the indemnity and the Member Systems have agreed to this change.

Rochdale's concern with the change to Section 10.2 of the ISO OATT is equally puzzling. The proposed change to the tariff simply clarifies what the ISO had previously agreed to, i.e., to obtain insurance to cover the risks associated with carrying out its responsibilities.[15] The proposed change in Section 10.2 also makes clear that the insurance proceeds will be used first prior to the ISO seeking indemnification from Transmission Customers, and that, if any such indemnification from Transmission Customers is necessary, it will be collected through the Schedule 1 charge. Thus, these changes simply clarify what was intended by the tariff and the ISO Related Agreements already approved by the Commission and, indeed, the proposed changes are for the benefit of transmission customers such as Rochdale.

III. Schedule 1 Issues

MEUA claims the proposed revision to Original Sheet No. 145 of the ISO OATT (which reduces the amortization period for revenues of ISO start-up costs from 10 years to 5 years) is an end-run around the Commission's October 13 Order.[16] MEUA is simply mistaken. The ISO and the Member Systems recognize that the Commission's October 13 Order set the previously proposed ten-year amortization period charge for hearing and that any issues related to the appropriateness of that charge will be dealt with therein. Indeed, the ISO and the Member Systems have filed to revise that

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[15] See ISO/TO Agreement, filed April 30, 1999, at 19.

[16] Motion to Intervene, Protest and Request for Partial Rejection or Hearing of MEUA at 4.

proposed change to reflect the 5 year amortization as well as the revised estimate of start-up costs which reflects the previous delay in the ISO start-up.[17] Thus, the proposed change in the tariff provision to allow for the 5 year amortization period is not intended, in any way, to circumvent the Commission's review called for in the October 13 Order. Rather, this change was simply proposed here as part of the group of changes requested by the ISO and agreed to by the Member Systems in this instance to reflect the financing challenges which the ISO faces. However, to reiterate, the appropriateness of the Schedule 1 charge including the 5 year amortization period will be resolved by the Commission pursuant to its October 13 Order.

Rochdale once again takes the opposite approach. It claims that the Commission should go beyond the scope of the Commission's October 13 Order and SHOULD investigate all ISO costs underlying the Schedule 1 charge and not just start-up costs.[18] Whatever the merit, or lack thereof, to Rochdale's claim, it is at best an untimely collateral attack on the Commission's prior approval of the Schedule 1 formula that has no relationship to the current filing. This filing does not change the formula for what costs are included in the Schedule 1 charge or the method for determining whether any such costs are appropriate. Rochdale is simply arguing in the wrong forum.

IV. Section 3.03 (ISO/TO Agreement) and Section 19.01 (ISO Agreement)

Sithe objects to the proposed changes that would permit the ISO Board -- without Management Committee support -- to make unilateral filings under Section 205 to amend the tariffs or the ISO Agreement if the Board certifies that exigent circumstances exist (i) with respect to reliability

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[17] See December 14, 1999 Filing. As pointed out in the December 14 Filing, although the shorter amortization change would reallocate costs to a shorter time period, it also would reduce carrying costs during the amortization period and, therefore, would reduce costs overall for transmission customers.

[18] Motion to Intervene and Protest of Rochdale at 9-12.

matters or (ii) related to an ISO Administered Market.[19] Sithe argues that any such proposed changes should expire within 60 days rather than the proposed 120 days and that the changes should not be allowed at all in the case of exigent circumstances related to the ISO Administered Markets.[20] Sithe argues that any changes in the tariff and the ISO Related Agreements should be made consistent with the input of all market participants through their representation on the Management Committee.[21]

The proposed changes were requested by the ISO and agreed to by the Member Systems to reflect the need for a limited exception to deal with the unusual situation where there is a need for immediate action and the independent ISO Board is not able to gain support from the necessary number of participants on the Management Committee. This is hardly a request by the ISO to have "permanent and on-going authority to intervene in the new electricity markets in New York" as Sithe would have the Commission believe.[22]

Rather, it is limited in both scope and duration and, indeed, only permits the ISO Board to request Commission approval for a proposed change under Section 205 of the Federal Power Act. Thus, the Commission will be the final arbiter of whether any such extraordinary and temporary relief is necessary.[23]

V. Section 3.06 of the ISO/TO Agreement

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[19] Motion to Intervene and Comments of Sithe at 3-5.

[20] Motion to Intervene and Comments of Sithe at 3-5.

[21] Motion to Intervene and Comments of Sithe at 3-5.

[22] Motion to Intervene and Comments of Sithe at 4.

[23] Importantly, these changes are consistent with Commission precedent. In PJM, unless a change is made to the Operating Agreement (which is similar to the ISO Agreement in the instant case), no approval of the member utilities is necessary at all.

MEUA claims that the proposed change to Section 3.06 of the ISO/TO Agreement is another end-run around the Commission's orders.[24] In this case, MEUA is arguing that the proposed revisions are the subject of hearing and settlement procedures in Docket Nos. ER97-1523-000, et al.[25] Once again, MEUA is mistaken.

This proposed change was requested by the ISO and agreed to by the Member Systems simply to clarify what the Commission already approved in Section 3.06 of the ISO/TO Agreement. The ISO wanted two words changed to make it clear that the Agreement was conditioned upon the Transmission Owners being "authorized" to fully recover "the" NTAC as opposed to being "able" to recover it. This very limited clarification of what has already been approved is hardly an end-run around anything. Moreover, the Commission has authorized collection of the NTAC and the only issue still subject to Commission review is the extent to which the NTAC will be applied in the situation of certain customers taking service under grandfathered agreements. This proposed change is not intended to circumvent the Commission's determinations in that regard at all.

VI. Section 6.15 of the ISO/TO Agreement

Some parties argue that modifications proposed to Section 6.15 of the ISO/TO Agreement seek to affect the outcome of separate litigation before the Commission. It is requested that the

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[24] Motion to Intervene, Protest and Request for Partial Rejection or Hearing of MEUA at 5.

[25] Motion to Intervene, Protest and Request for Partial Rejection or Hearing of MEUA at 4-5.

proposed language be rejected or clarified as to whether the "good faith"provision applies to cost shifting among only the Member Systems or between the Member Systems and Third Parties.[26]

The modifications to Section 6.15 are not intended to bind third parties or the Commission. Rather, the proposed changes by their express terms merely require the ISO and the Member Systems to work "in good faith to achieve a fair and equitable resolution" of any cost shifting that may occur due to a Commission order in Docket Nos. ER97-1523-011, OA97-470-010 and ER97-4234-008 (not consolidated)(dealing with third party grandfathered agreements). Any such good faith, voluntary efforts can hardly be objectionable.

Conclusion

For the foregoing reasons, the Member Systems and the ISO urge the Commission to accept this response and to approve the November 10, 1999 Filing.

Respectfully submitted,

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[26] See Motion to Intervene and Protest of PG&E Gen.