

120 FERC ¶ 61,026
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

New York Independent System Operator, Inc.

ER07-834-000

ER07-834-001

ORDER ACCEPTING TARIFF PROVISIONS

(Issued July 6, 2007)

1. In this order, the Commission accepts, effective July 1, 2007, as requested, proposed revisions to the New York Independent System Operator, Inc. (NYISO) Open Access Transmission Tariff (OATT) and Market Administration and Control Area Services Tariff (Services Tariff). The revisions amend the liability limitation provisions.

Background

2. NYISO states that its current Commission-accepted OATT and Services Tariff contain two different liability limitation standards. It explains that OATT section 10.2 contains an ordinary negligence standard for indemnification but contains no liability limitation provisions addressing claims against NYISO or the New York Transmission Owners in connection with the provision of transmission services. The Services Tariff, on the other hand, has contained a gross negligence standard liability limitation provision since its inception in 1999.

Proposed Tariff Revisions

3. On May 1, 2007, as corrected on May 7, 2007, NYISO filed proposed revisions to add liability limitations to section 10 of its OATT and to section 12.3 of its Services Tariff. NYISO proposes to add sections 10.3, 10.4 and 10.5 to its OATT and to revise OATT section 10.2:

- New OATT section 10.3(a) limits the liability of Transmission Owners for service interruptions and actions undertaken at the direction of NYISO, except to the extent that a Transmission Owner is found liable for gross negligence or intentional misconduct. In cases of gross negligence or intentional misconduct, damages would be limited to direct damages.

- New OATT section 10.3 (b) limits the liability of NYISO for acts and omissions in the provision of transmission service, except to the extent it is found liable for gross negligence or intentional misconduct. In cases of gross negligence or intentional misconduct, damages would be limited to direct damages.
- New OATT section 10.3(c) limits the liability of NYISO and Transmission Owners for acts or omissions arising out of services provided under the Tariff as a result of conditions or circumstances beyond the control of NYISO or Transmission Owners, or from electric system design or practices or conditions common to the electric industry.
- New OATT section 10.4 applies the limitations on liability and damages to generators acting in good faith to implement or comply with the directives of NYISO or Transmission Owners.
- New OATT section 10.5 states that if NYISO is required to pay damages, such amounts will be recoverable under Rate Schedule 1 of the OATT.
- Revised OATT section 10.2 adds a gross negligence standard to the current indemnification provision.

4. NYISO further proposes to revise section 12.3 of the Services Tariff to state that the provisions on limitation of liability and damages included in that section would be applicable to generators acting in good faith to implement or comply with the directives of NYISO, Transmission Owners, or the New York State Reliability Council.

5. NYISO states that the proposed revisions make the OATT and the Services Tariff consistent with one another as well as with the liability protection of other Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs).¹ According to NYISO, ISOs and RTOs are in a unique position in that they provide transmission services that are exclusively regulated by the Commission and are not provided with the liability protections that many utilities receive at the state level. Further, NYISO states that ISOs and RTOs, along with their Transmission Owners, are obligated under the OATT to provide jurisdictional services to all eligible customers at the same tariff rate regardless of whether there is a significant risk of damages associated with a particular eligible customer.

¹ Citing *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164 (2005); *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,100, *order denying reh'g*, 113 FERC ¶ 61,287 (2005); *ISO New England, Inc.*, 106 FERC ¶ 61,280, *order on reh'g*, 109 FERC ¶ 61,147 (2004); *PJM Interconnection, LLC*, 112 FERC ¶ 61,264 (2005).

6. NYISO notes that the proposed change to tariff language is the outcome of discussions between NYISO and its stakeholders, was endorsed by a vote of NYISO's Management Committee, and also is responsive to concerns raised by the New York Public Service Commission regarding the scope of the proposed tariff language as it applies to the Transmission Owners. Further NYISO states in its transmittal letter that "[a]s with similar provisions accepted by the Commission, the proposed changes herein will not affect any pending claims. . . ."²

Notice and Responsive Filings

7. Notice of the filing in Docket No. ER07-834-000 was published in the *Federal Register*, 72 Fed. Reg. 27,111 (2007), with interventions or protests due on or before May 22, 2007. Notice of the filing in Docket No. ER07-834-001 was published in the *Federal Register*, 72 Fed. Reg. 28,485 (2007), with interventions or protests due on or before May 25, 2007. The New York State Public Service Commission filed a notice of intervention. New York Transmission Owners,³ individually and collectively, filed a motion to intervene and comments in support of NYISO's filing. The 330 Fund I, LP (the Fund) filed a motion to intervene and conditional protest. NYISO filed an answer to the Fund's protest.

8. In its protest, the Fund refers to the statement in NYISO's transmittal letter, quoted above, regarding pending claims. The Fund conditionally protests the NYISO filing on one point – claims which have accrued prior to the effective date of NYISO's proposed OATT limitations on liability and damages should not be subject to the new tariff provisions. The Fund urges the Commission to direct NYISO to add to the OATT the following statement of applicability of the new limitation on liability:

Applicability: The amendments to sections 10.3 and 10.4 which became effective in Docket No. ER07-834 on July 1, 2007 shall apply to all claims which have accrued on or after July 1, 2007, unless and until modified pursuant to the Federal Power Act; and these amendments shall not

² NYISO May 1, 2007 Transmittal Letter at 6.

³ The New York Transmission Owners are comprised of the eight electric systems in the State of New York that own the transmission facilities operated by NYISO: Central Hudson Gas and Electric Corp.; Consolidated Edison Co. of New York, Inc.; Long Island Power Authority; Orange and Rockland Utilities, Inc.; New York State Electric & Gas Corp.; New York Power Authority; Niagara Mohawk Power Corp.; and Rochester Gas and Electric Corp.

(i) apply to any and all claims which accrued before July 1, 2007 or (ii) bar claims or damages to the extent they are based on the NYISO's or other identified party's acts or omissions before July 1, 2007.

9. The Fund contends such a statement will avoid wasteful litigation over which standard of liability is applicable to a claim. It further contends that it would be unfair and inappropriate to notify contracting parties after they had entered into transactions that the conduct of a party would no longer be actionable for a negligent act or omission which already occurred. The Fund adds that exempting "pending" claims is also problematic because the statutes of limitations applicable under New York law would effectively be shortened for claims which accrued before the filing but have not yet been asserted. The Fund asserts that the clause it offers (1) clarifies the term "pending," which should be based on the time of accrual of a claim or NYISO act or omission, (2) makes clear that the cut-off date with respect to accrual of a claim is July 1, 2007, (3) will avoid confusion concerning how to apply the filed rate, and (4) will avoid needless conflicts with the applicable New York Statutes of Limitations which govern claims against NYISO.

10. In its answer, NYISO states four reasons why the Fund's proposed language should not be inserted in the OATT: (1) NYISO's proposed tariff sheets contain an "effective date" that governs their applicability and the Funds proposed applicability language seeks to confuse what is otherwise a straightforward exercise in determining the date of the tariff sheets' effectiveness; (2) NYISO's proposed provision is consistent with similar liability limitation provisions accepted by the Commission for other RTOs and ISOs, which do not contain language attempting to further specify the date of applicability of the provisions; (3) the Fund is seeking to modify the effective date of the tariff sheets, *i.e.*, the date of general applicability permitted by the Commission, with the accrual of a claim against another party in a tort claim, which NYISO states is a question of law to be determined by a court of competent jurisdiction applying the relevant legal standard to the particular facts and circumstances of each case; and (4) NYISO's use of the term "pending" in the transmittal letter was not intended to alter the generally accepted operation of the effective date of tariff sheets and, indeed, was intended to stress the generally recognized principle that tariff sheets will have a prospective application beginning on the effective date as permitted by the Commission.

Discussion

Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by a decisional authority. We will accept NYISO's answer because it has provided information that assisted us in our decision-making process.

Commission Determination

13. We will accept NYISO's proposed limitations of liability provisions, to be effective July 1, 2007, as requested, as they appear to be just and reasonable and have not been shown to be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. As we stated in Order No. 890, we have provided such liability protection to RTOs and ISOs because they were created by and solely regulated by us, and otherwise would be without limitations on liability.⁴ We agree with NYISO that the language of the liability limitations proposed here is consistent with provisions that we have accepted for other RTOs and ISOs.⁵ In those orders we reasoned that RTOs and ISOs must provide service to all eligible customers, and cannot deny service to particular customers based on the risk of potential damages associated with interruption of service to those customers, thus, all customers ultimately bear the cost associated with the risk of such service.⁶ We also reasoned that gross negligence provisions balance lower rates for all customers against the burden of limited recovery for some.⁷ The same reasoning applies here. In prior orders, we also found ISO cost recovery of damages it must pay, as proposed here, to be appropriate and based on Commission precedent, because the RTO or ISO has no shareholders from which to recover costs and, thus, must look to entities taking transmission service pursuant to its tariff.⁸

14. We will reject the Fund's tariff language proposal and approve the proposed limitations of liability provisions with an effective date of July 1, 2007, as proposed. We agree with NYISO that NYISO's proposed limitations of liability provisions are consistent with similar liability limitation provisions accepted by the Commission for

⁴ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 at P 1676 (2007).

⁵ *See supra* note 1.

⁶ *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,164 at P 31 (2005).

⁷ *Id.* P 29.

⁸ *Southwest Power Pool, Inc.*, 112 FERC 61,100 at P 40 (2005).

RTOs and ISOs, which do not contain language attempting to further specify the date of applicability of the provisions. Nor has the Commission ordered any RTO or ISO to include any such language. Moreover, contrary to the Fund's claim, the effectiveness of the proposed new tariff sheets is not rendered unclear by NYISO's statement in the transmittal letter to the filing, that "the proposed changes herein will not affect any pending claims."⁹ NYISO has clarified that its statement was not intended to affect the prospective applicability of the provision from the date of effectiveness of the accepted tariff sheets. The tariff sheets are effective July 1, 2007. Therefore, we will not order further revisions to the proposed tariff language in response to NYISO's statement. The Fund may, nonetheless, raise issues regarding the application of state law in any proceeding in which the subject revised tariff provision is being applied. Those issues go beyond the scope of the proposed tariff provisions.

15. Accordingly, we accept the proposed revisions to NYISO's OATT and Services Tariff, effective July 1, 2007.

The Commission orders:

NYISO's proposed revised tariff sheets are accepted, effective July 1, 2007.

By the Commission. Commissioner Kelly dissenting with a separate statement attached.
Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

⁹ NYISO May 1, 2007 Transmittal Letter at 6.

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KELLY, Commissioner, *dissenting*:

As I have written previously,¹ I believe that appropriate liability limitation provisions can strike a proper balance between reasonable customer rates and the rights of harmed parties to seek recovery for certain acts by jurisdictional utilities. For the reasons enumerated in *Midwest ISO*, however, I do not think that this order achieves such a balance.

Accordingly, I respectfully dissent.

Suede G. Kelly

¹ *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164 (2005) (*Midwest ISO*).

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WELLINGHOFF, Commissioner, dissenting in part:

I have previously expressed concern about parties failing to provide adequate support for proposals to limit liability by broadly applying a gross negligence standard.¹ I write separately because I have similar concerns about the Commission's acceptance of NYISO's proposal to revise its tariff to include such liability limitation provisions.

Liability limitation provisions must strike the proper balance between contributing to reasonable customer rates and protecting the rights of harmed entities to seek recovery for certain acts by jurisdictional utilities. In this instance, NYISO has not demonstrated that its proposal strikes that balance. For example, as Commissioner Kelly has stated, the distinction between claims that result from economic damages and those that result from personal injury or death is important in this context.² NYISO has not adequately explained why it is appropriate to broadly apply a gross negligence standard without regard to such distinctions among types of claims.

For this reason, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

¹ *Southwest Power Pool, Inc.*, 117 FERC ¶ 61,207 (2006) (Dissenting statement of Commissioner Wellinghoff at 3).

² *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,100 (2005) (Dissenting statement of Commissioner Kelly at 2 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,164 (2005))).