UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REQUEST FOR REHEARING AND CLARIFICATION AND REQUEST FOR EXPEDITED ACTION OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure,[1] the New York Independent System Operator Inc. ("NYISO") respectfully requests rehearing and/or clarification of several aspects of Commission Order No. 681, the final rule in the above-captioned proceeding.[2]

On rehearing, the Commission should reverse Order No. 681's determination that Congress required existing ISO/RTO rules for allocating and auctioning transmission rights to be modified in this proceeding. The Commission's interpretation distorts the plain meaning of new Section 217 of the Federal Power Act ("FPA") and effectively nullifies a key part of it. To the extent that the Commission refuses to reconsider its legal interpretation, it should grant rehearing to allow the NYISO a more reasonable time to make the fundamental changes necessary for it to comply with Order No. 681. In addition, the Commission should grant clarification or rehearing on a handful of other issues (described below) where further guidance will facilitate the development of a compliance filing.

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1 18 C.F.R. § 385.713 (2006).

2 *Long-Term Firm Transmission Rights in Organized Markets*, Final Rule, Order No. 681, 71 Fed. Reg. 43564 (Aug. 1, 2006) ("Order No. 681").

Finally, the NYISO respectfully asks that the Commission issue an order on rehearing in this proceeding as expeditiously as possible. Resolving rehearing issues quickly will make it easier for ISOs/RTOs to work with their stakeholders and prepare compliance filings by the Commission's deadline.

I. SPECIFICATION OF ERRORS

In compliance with Commission Rule 713(c) and Order No. 663-A,[3] the NYISO identifies the following errors, or points requiring clarification:

1. The Commission should grant rehearing of Order No. 681's misinterpretation of new FPA Section 217(b)(4) and EPAct Section 1233(b). The Commission has erred by reading these provisions as requiring changes to ISO/RTO procedures for allocating and auctioning transmission rights that go beyond the statutory language and the intent of Congress. The Commission's erroneous interpretation impermissibly nullifies Section 217(c). The Commission should revise Order No. 681 on rehearing to eliminate its requirements that ISOs/RTOs must: (a) make a new class of Long-Term Firm Transmission Right ("LTFTR") available; (b) give LSEs preferential access to them; (c) not allocate LTFTRs by auction; (d) require that LTFTRs automatically "follow load" and that LTFTR trades be "recallable;" and (e) comply with any other requirement that the Commission may later assert is imposed by Order No. 681, or in a future order on rehearing, that conflicts with Section 217(c).

2. If the Commission does not remedy its legal errors, it should grant rehearing of Order No. 681's requirement that ISOs and RTOs submit compliance tariff revisions within 180 days. A 180 day compliance period is unreasonable for entities like the NYISO, that will have to make fundamental and costly changes to their existing procedures, engage in extensive stakeholder deliberations, and be sensitive to the impact new rules might have on New York State's retail access program. The Commission should instead allow each ISO/RTO sixty days to develop a feasible compliance plan and timetable (which would include a proposed date for filing tariff revisions.) Alternatively, the Commission should, at a minimum, delay the start of the compliance period until after it issues an order on rehearing. In addition, the NYISO notes that Order No. 681 set a deadline for filing, not implementing, tariff revisions. The NYISO reserves the right to seek rehearing if the Commission imposes an unreasonable implementation deadline in the future.

[3] *Revision of Rules of Practice and Procedure Regarding Issue Identification*, 112 FERC ¶ 61,297 (2005), *order on reh'g*, 114 FERC ¶ 61,284 (2006).

3. The Commission should clarify that LSEs' entitlement to receive new LTFTRs should be reduced to the extent that they already hold grandfathered transmission rights. Under the NYISO's system, LSEs that have grandfathered rights already receive transmission service that confers the same level of price certainty and stability, and in many cases do so for a longer time, than Order No. 681 requires. To the extent that an LSE's needs are already satisfied by these grandfathered rights, giving it preferential access to additional LTFTRs would give it a windfall without serving any useful policy purpose. If the Commission denies the requested clarification, it should grant rehearing because granting additional LTFTR preferences would go beyond Order No. 681's stated goals. It would also be arbitrary and capricious because it would require other market participants to subsidize favored LSEs without any rational justification.

4. The Commission should clarify that ISOs/RTOs may consider both the need to support State retail access programs and market participants' desire for access to shorter-term transmission rights when deciding what constitutes a "reasonable" amount of existing transmission capacity to set aside for LTFTRs. In the alternative, the Commission should grant rehearing because it has not offered a reasoned explanation of its reasons for prohibiting the consideration of these factors, and because such a prohibition would be inconsistent with other statements in Order No. 681.

5. The Commission should clarify that ISOs/RTOs need not allocate, or allow as many opportunities to reconfigure, LTFTRs as they do for shorter-term transmission rights. In the alternative, the Commission should grant rehearing because it has not offered a reasoned explanation of why LTFTRs and shorter-term rights must be treated the same in this regard.

6. Finally, the Commission should clarify that LSEs that obtain LTFTRs must pay a fair share of transmission system costs. If this was not the Commission's intent, the Commission should reverse its position on rehearing. Making LTFTRs available for free would be arbitrary and capricious because it would be inconsistent with relevant precedent and Order No. 681's stated goals.

II. REQUEST FOR EXPEDITED ACTION

In its current form, Order No. 681 establishes a very aggressive 180-day deadline for ISOs/RTOs to file compliance tariff revisions. For the reasons set forth below in Part III.B, it will be a challenge for those ISOs/RTOs that will be required to make fundamental changes to their systems to meet the deadline. Order No. 681 is also likely to prompt many requests for rehearing, some of which will likely seek significant

changes. If the Commission waits until the middle or late stages of the 180-day period to act on rehearing, it may disrupt an already difficult compliance effort at the worst possible time.

In the past, the Commission has sometimes issued rehearing orders on an expedited basis in complex rulemakings in order to alleviate uncertainty and facilitate timely compliance. For example, the Commission acted on rehearing a little more than sixty days after the issuance of Order No. 2000 so that stakeholders would have the benefit of additional guidance before regional collaborative processes got underway.[4] The NYISO respectfully asks that the Commission make every effort to act with similar speed in this proceeding.

III. REQUESTS FOR REHEARING AND/OR CLARIFICATION

A. Order No. 681's Interpretation of New FPA Section 217(b)(4) and EPAct Section 1233(b) Is Based on Fundamental Legal Errors Because It Is Inconsistent with the Statutory Text and Effectively Nullifies Section 217(c)

The NYISO understands the importance that the Commission places on faithfully implementing the Energy Policy Act of 2005 ("EPAct").[5] It also recognizes that the Commission believes it has faithfully followed EPAct's commands by promulgating Order No. 681. Nevertheless, the NYISO respectfully submits that Order No. 681 is based on a fundamental misinterpretation of new FPA Section 217. The NYISO will, of course, obey the terms of the final rule and work in good faith to comply with them as quickly as it can. The NYISO must, however, respectfully ask the Commission to correct its legal errors on rehearing.

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[4] *See Regional Transmission Organizations*, Order No. 2000-A, 65 Fed Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000).

[5] Pub. L. No. 109-58, § 1233, 119 Stat. 594, 957 (2005).

1. The Commission Has Read FPA Section 217(b)(4) and EPAct Section 1233(b) Too Broadly

The Commission issued Order No. 681 pursuant to new FPA Section 217(b)(4) and EPAct Section 1233(b). Section 217(b)(4) states 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-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

Section 1233(b) of EPAct declares that

> Within 1 year after the date of enactment of this section and after notice and an opportunity for comment, the Commission shall by rule or order, implement section 217(b)(4) of the Federal Power Act in Transmission Organizations,[6] as defined by that Act with organized electricity markets.

The Commission reads these provisions as establishing that existing ISO/RTO financial transmission rights do not provide LSEs with sufficient price certainty or stability over a long enough term. Order No. 681's LTFTR guidelines are all ultimately predicated on the Commission's interpretation that Congress saw problems with the existing rules and intended for the Commission to remedy them.

Unfortunately, the Commission has read too much into these provisions and inferred that they impose requirements that go well beyond what they actually impose. As is discussed in Part III.A.2 below, the error becomes especially clear when Section 217 is read in its entirety. That said, the Commission's interpretation of Section

[6] The definition of "Transmission Organization" encompasses ISOs and RTOs.

217(b)(4) and EPAct Section 1233(b) is unreasonable based solely on the language of the two provisions themselves.[7]

Simply stated, there is nothing in the text of Section 217(b)(4) or Section 1233 that says existing ISO/RTO transmission rights auction systems or planning procedures are deficient. Nor is there any express Congressional directive that the Commission require major modifications to existing ISO or RTO rules. To the contrary, Section 217(b)(4) recognizes that "tradable" or "financial" rights are, or at the very least, can be the complete equivalent of traditional firm rights. There is every reason to think that Congress had the financial rights that currently exist in ISO/RTO markets in mind when it wrote these words. Section 217(c) expressly refers to ISO/RTO "financial transmission rights" rules that were in place prior to January 1, 2005, which implies that Congress viewed them as being acceptable in their current form. Congress was also presumably aware of the numerous Commission orders finding that existing ISO/RTO financial rights were the full equivalent of firm transmission rights under Order No. 888.[8] If Congress had truly thought that existing ISO/RTO allocation and auction procedures for

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[7] The NYISO recognizes that courts will normally defer to an administrative agency's reasonable construction of a statute, *see, e.g.*, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), but respectfully submits that the Commission's interpretation here is sufficiently unreasonable that it will not receive such deference, especially in light of the Commission's effective nullification of Section 217(c).

[8] *See, e.g.*, *Central Hudson Gas & Electric Corp., et al.*, 86 FERC ¶ 61,062, at 61,228-33, *order on reh'g*, 88 FERC ¶ 61,138 at 61,399-61,402 (1999) (approving, among other things, the NYISO's financial-based Transmission Congestion Contract mechanism); *Pennsylvania-New Jersey-Maryland Interconnection, et al.*, 81 FERC ¶ 61,257 (1997), *order on clarification*, 82 FERC ¶ 61,068 (1998) (conditionally accepting PJM restructuring proposal, including FTR mechanism). *Cf. New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287, *order on reh'g*, 101 FERC ¶ 61,344 (2002) (accepting ISO-NE's Standard Market Design, including FTR structure); *PJM Interconnection, LLC*, 102 FERC ¶ 61,276 (2003) (accepting FTR and ARR auction process). *See also, e.g.*, Order No. 681 at P 14 (citing statutory language) and P 473 (interpreting Section 217(b)(4) as ensuring that LSEs have access to long-term firm rights, "whether as physical rights or as equivalent financial rights.").

transmission rights were flawed, it would have presumably said so directly and expressly called for Commission action.

It is true that Section 217(b)(4) specifies that "long-term" rights must be available but the statute does not specify what "long-term' means, or indicate that existing rights in ISO/RTO markets fall short. It is not unreasonable to assume that Congress was aware of Commission precedent defining long-term transmission rights as those with a term of one year or longer.[9] One-year financial rights are currently available from the NYISO and from other ISOs/RTOs. Nothing in the statute suggests that Congress believed these rights were inadequate to cover 'long-term" supply arrangements.

Similarly, the NYISO is aware of nothing in the legislative history of Sections 217(b)(4) or Section 1233 that supports the Commission's interpretation of them. Neither Order No. 681 nor any of the commenters who have taken the Commission's view have identified any such support. While a number of individual members of Congress have supported an expansive interpretation,[10] it would be inappropriate to think that their individual perspectives represent the will of Congress as a whole.

A more natural reading of Section 217(b)(4) is that it requires the Commission to ensure that the rules governing financial rights in ISO/RTO markets provide LSEs with a reasonable opportunity to meet their "long-term" service obligations. Similarly, the statute should be read as requiring the Commission to ensure that ISO/RTO planning procedures are adequate to enable LSEs to meet their reasonable "long-term" needs. Critically, the statute should not be construed as pre-judging whether or not existing

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[9] *See, e.g.*, NOPR at n.59 (noting that the proposed rule's definition of long-term differed from the Commission's "previous practice" of defining long-term as one year or more).

[10] *See, e.g.*, Comments of U.S. Representatives Roscoe Bartlett, Bill Shuster, and Frank Wolf filed in Docket No. RM06-8-000 (April 28, 2006).

ISO/RTO rules are satisfactory. Those questions were left for the Commission to answer based on its own informed judgment and a review of the available evidence. In short, Section 217(b)(4) is open to the possibility that ISOs/RTOs already satisfy its standards.

In defending its more expansive interpretation, the Commission relies on the fact that Section 1233(b) directed it to issue a final rule "implementing" Section 217(b)(4) with respect to ISOs/RTOs within one year.[11] The Commission has drawn the sweeping inference that its assignment to "implement" Section 217(b)(4) within ISOs/RTOs amounts to a Congressional declaration that all ISOs/RTOs fall short of that section's requirements. This interpretation is not reasonable. It places far too much substantive weight on the choice of single word in a provision whose primary purpose is to establish a procedural deadline. This is especially true in light of the language in the rest of Section 217, as is noted in Part III.A.2 below. Moreover, even the Commission does not read Section 1233(b) so broadly because it concedes that some ISOs/RTOs may already be complying with Section 217(b)(4)'s standards.[12]

The Commission also suggests that its reading is valid because it is based on the entirety of Section 217(b)(4), rather than just the first clause, which is confined to transmission planning issues. The NYISO respectfully wishes to clarify that its interpretation of Section 217(b)(4) is based on all of the language of that section, as well as the language found in the rest of Section 217.

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[11] *See* Order No. 681 at PP 80, 101.

[12] *See id.* at P 81 ("As a result, section 217 permits the Commission to require changes to existing market designs and transmission rights allocation methods if necessary to implement section 217(b)(4). This does not mean that the Commission will require such changes or that section 217(b)(4) requires changes to existing designs and allocations in all cases; if a transmission organization can offer long-term firm transmission rights that satisfy each of the guidelines in this Final Rule while retaining its current systems, it may do so.")

Finally, if the Commission abandoned its overly expansive interpretation of Section 217(b)(4), it would avoid imposing time-consuming, and costly, compliance obligations on ISOs/RTOs that will have to make fundamental changes to comply with Order No. 681. As is noted below in Part III.B, the NYISO falls into this category. The NYISO currently has established and successful Transmission Congestion Contract ("TCC") rules that already allow LSEs to meet their reasonable needs and are the foundation of an efficient financial rights market. New York's stakeholders have shown little interest in changing these rules.[13] If the Commission did not insist that the NYISO commit its resources to the LTFTR issue it could focus its attention on matters that a substantial majority of its stakeholders believe are more important. It was unreasonable for the Commission to infer a mandate for radical change from statutory language that includes no express call for action.

2. Order No. 681's Interpretation of Section 217 Is Erroneous, Arbitrary, and Capricious Because It Effectively Nullifies Section 217(c)

Section 217(c) reads:

> Allocation of Transmission Rights- Nothing in subsections (b)(1), (b)(2), and (b)(3) of this section shall affect any existing or future methodology employed by a Transmission Organization for allocating or auctioning transmission rights if such Transmission Organization was authorized by the Commission to allocate or auction financial transmission rights on its system as of January 1, 2005, and the Commission determines that any future allocation is just, reasonable, and not unduly discriminatory or preferential . . . .

The NYISO and other ISOs/RTOs with rules governing the auction and allocation of transmission rights that went into effect before January 1, 2005 are all expressly covered by Section 217(c).

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[13] *See* NYISO Initial Comments at 8 and 17.

Section 217(b)(1) defines the class of LSEs to which Section 217(b)(2) and (3) apply. Section 217(b)(2) states that LSEs are entitled to use "firm transmission rights or equivalent tradable or financial transmission rights" in order to deliver energy that they generate or purchase to meet their service obligations (to the extent deliverable using the rights). Section 217(b)(3)(A) specifies that insofar as "all or a portion of the service obligation covered by the firm transmission rights or equivalent tradable or financial transmission rights is transferred to another [LSE], the successor [LSE] shall be entitled to use the firm transmission rights or equivalent tradable of financial transmission rights associated with the transferred service obligation." Finally, Section 217(b)(3)(B) says that "[s]ubsequent transfers to another [LSE], or back to the original [LSE], shall be entitled to the same rights."

Order No. 681 accurately notes that Section 217(c) does not mention Section 217(b)(4). The Commission, however, commits a fundamental interpretative error by concluding that Section 217(c) therefore imposes no limit on the actions it may take under Section 217(b)(4).[14] It is a cardinal principle of statutory construction that, whenever possible, laws should be read in a manner that gives effect to all of their provisions.[15] Order No. 681 itself makes a similar point, stating on two separate

[14] *See, e.g.*, Order No. 681 at P 81. *See also id.* at P 392 ("[S]ection 217(c) of the EPAct does not prevent the Commission from modifying the allocation processes of any transmission organization under section 217(b)(4)").

[15] *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal citations and quotations omitted). Moreover, as the NYISO argued in its comments on the LTFTR NOPR, two other canons of statutory construction prevent the interpretation of a general command to trump a specific command. *See* NYISO Initial Comments at n.11. The NYISO incorporates that argument by reference herein.

occasions that "common principles of statutory construction support reading section 217 as a whole to ascertain its intent."[16]

The Commission has identified the correct principle but has violated it by reading Section 217(b)(4) in isolation from the rest of Section 217. As a result, it has effectively read Section 217(c) out of the FPA. Under the Commission's interpretation, Section 217(c) has no effect whatsoever. The protections that it expressly provides for previously approved ISO/RTO rules governing the auction and allocation of transmission rights are nullified in their entirety. In one instance, the Commission goes beyond merely overlooking Section 217(c) and openly flouts it by citing Section 217(b)(3) to impose a requirement on ISOs/RTOs.[17] The Commission's conclusion that it is free to disregard Section 217(c) is unlawful, arbitrary, and capricious. It must be corrected on rehearing.

The Commission can easily avoid nullifying Section 217(c), and give full and consistent effect to all of Section 217, by adopting the interpretation of (b)(4) that is outlined in Part III.A.1 above. If the Commission abandons its flawed premise that Section 217(b)(4) compels modifications to existing ISO/RTO allocation and auction rules, it would not create a conflict with Section 217(c). Section 217(b)(4) itself would not become a "nullity," as some have claimed,[18] because it would still require the Commission to consider whether ISOs/RTOs were fulfilling their planning

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[16] Order No. 681 at ns. 47, 111, *citing United States v. Andrews*, 441 F.3d 220, 223 (4th Cir. 2006) (noting that statutory phrases are not construed in isolation and are instead read as a whole).

[17] Order No. 681 at P 358 states that LTFTRs that are obtained "preferentially through an allocation process should be tradable only with the proviso that any trades may be subject to recall if load migrates to another [LSE]." The Commission explained that making LTFTRs subject to recall "ensures that they can be reassigned if necessary to follow migrating load, consistent with section 217(b)(3)(A) of the FPA." The Commission ignored Section 217(c)'s mandate that ISOs/RTOs with previously approved auction and allocation rules are not subject to Section to 217(b)(3)(A). The NYISO agrees with the Commission's policy determination that transmission rights should be tradable, if not its directive that they must be recallable, but objects to the violation of Section 217(c).

[18] *See* Order No. 681 at P 76.

responsibilities and adequately supporting long-term supply arrangements. If the Commission identified a problem, it could take any necessary remedial action using its existing FPA authority.[19]

This more natural reading of Section 217(b)(4) is also consistent with the fact that (b)(4) is not included in the list of provisions that are subject to Section 217(c). Congress had no reason to specifically make (b)(4) subject to Section 217(c) because (b)(4) was not intended to impose any requirements that would conflict with (c).

3. On Rehearing the Commission Should Revise Order No. 681 to Eliminate Prescriptions that Are Inconsistent with the Statute

Given the analysis above, the Commission should revise Order No. 681 on rehearing to eliminate requirements that are inconsistent with Section 217(c). The NYISO believes that these include: (i) the requirement to set aside existing transmission capacity to make a new class of LTFTRs that significantly differ from existing ISO/RTO transmission rights available;[20] (ii) the requirement that LSEs with a load serving obligation have preferential access to such LTFTRs;[21] (iii) the requirement that LTFTRs may not be initially allocated by auction;[22] (iv) the requirement that LTFTRs must "follow load" and that LTFTR trades be "recallable;"[23] and (v) any other requirement that the Commission may later assert is imposed by Order No. 681, or in a future order on rehearing, that conflicts with Section 217(c).

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19 *See* Part III.A.4 infra.

20 *See* Order No. 681 at PP 318-20.

21 *See id.* at P 318.

22 *See id.* at P 385.

23 *See id.* at PP 356-60.

By contrast, the NYISO is not seeking rehearing of the Commission's determination that ISOs/RTOs should make LTFTRs available with a term (inclusive of renewal rights) of at least ten years or its more limited rulings on transmission planning. Neither of these issues are covered by Section 217(c). To the extent that the Commission believes that longer-term transmission rights are needed in ISO/RTO markets, it should return to the NOPR's suggestion that ISOs/RTOs could fully comply with Section 217 by simply offering longer-term versions of their existing financial rights. The NYISO supported this approach in its NOPR comments and continues to have no objection to it now, as long as the proper precautions are taken to avoid undesirable consequences.[24]

4. In the Absence of a Statutory Mandate, the Commission Must Have Substantial Evidence Before Modifying Previously Approved ISO/RTO Auction and Allocation Rules

Section 217(b)(4) neither directs the Commission, nor gives it any new authority, to modify existing ISO/RTO rules for allocating and auctioning transmission rights. This does not mean, however, that existing ISO rules are forever immune to Commission review under other parts of the FPA. The Commission continues to have the same authority that it had prior to the enactment of EPAct to modify existing ISO/RTO rules pursuant to FPA Section 206. FPA Section 217(c) only restricts the Commission's freedom of action under Section 217 itself.

This proceeding, however, was not undertaken under Section 206. The Commission has neither invoked Section 206, nor even tried to build the record support required to satisfy its evidentiary requirements. The Commission has likewise offered no explanation of why it is now necessary to overturn its precedents accepting existing ISO/RTO allocation and auction rules, other than its assertion that Congress has required

[24] *See* NYISO Initial Comments at 17.

it. Consequently, the Commission may not now look to Section 206 to provide legal support for those aspects of Order No. 681 that cannot be justified under Section 217.

In the event that the Commission nevertheless considers acting under Section 206, the NYISO respectfully submits that the Commission should not begin its inquiry with the premise that Congress believed there were flaws with existing ISO/RTO procedures. Section 217(c) clearly indicates that Congress was not hostile to existing ISO auction and allocation rules.

B. Order No. 681's 180-Day Compliance Deadline Is Unreasonable and Should Be Modified on Rehearing

The NYISO appreciates that the Commission believes Congress intended for ISOs/RTOs to implement LTFTRs as rapidly possible.[25] The NYISO also recognizes that the deadline adopted by Order No. 681 has the force of law and that it must, and will, do everything it can to meet it, unless the Commission grants relief.

Nevertheless, the reality is that 180 days will not be long enough for the NYISO, and perhaps other ISOs/RTOs to collaborate with their stakeholders and prepare tariff revisions that address the complex market, system planning, and equity issues that Order No. 681 creates. The NYISO simply must do more to comply than those ISOs/RTOs whose current rules are closer to what Order No. 681 requires. Contrary to what some have insinuated,[26] asking for more time, is not an excuse for delay, but an essential part of making sure that the job is done right. Rather than insisting that all ISOs/RTOs meet the same arbitrary deadline, the Commission should allow each region to develop a compliance timetable of its own. This approach would not be an invitation to obstruction

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[25] *See* Order No. 681 at PP 490-91.

[26] *See, e.g.*, Initial Comments of American Public Power Association at 35-36.

since each ISO/RTO would still be required to develop a workable timetable that recognized the high priority the Commission places on these issues.

The Commission should also recognize that complying with Order No. 681 in its current form will be costly for entities, such as the NYISO, that will have to make fundamental changes to existing systems. Costs will include both the actual expense of implementing new software and the lost benefits from other projects delayed or postponed in response to the mandate that LTFTRs be a top priority. The final rule's emphasis on regional flexibility may help to reduce the first category of costs, but the total burden will still be significant. The NYISO respectfully asks that the Commission consider that the NYISO's customers have shown little interest in LTFTRs before imposing the costs of implementing LTFTR arrangements on them. In future proceedings, the Commission should also remember that the stakeholders who have argued most vociferously in support of LTFTRs are generally the same ones that have been most strident in their criticism of ISO/RTO expenses.

1. Contrary to the Commission's Expectation, the NYISO Will Have to Make Major Changes to Established Systems and Procedures To Comply With Order No. 681

The NYISO emphasized in its comments on the LTFTR NOPR that it would only be able to meet the then-proposed 180 day compliance deadline if the final rule did not require it to make major changes to its existing systems.[27] Order No. 681 will require it to make major changes, but nevertheless imposed a 180-day deadline.

[27] *See* NYISO Initial Comments at 4.

The Commission's adoption of a 180-day period was based, in substantial part, on its expectation that compliance would not be unduly difficult for "most" ISOs/RTOs.[28] This assessment may be accurate for some ISOs/RTOs, particularly those that already have rules in place for allocating auction revenue rights ("ARRs") to LSEs,[29] or that encompass states that do not have retail access. It is not accurate, however, for the NYISO. Among other things, the NYISO: (i) does not have an express ARR allocation system but instead currently assigns auction revenues to transmission owners;[30] (ii) does not yet have complete rules governing the allocation of incremental LTFTRs to entities that pay for the construction of new transmission capacity;[31] (iii) does not have rules governing mandatory re-assignments of LTFTRs;[32] (iv) will need to consider the implications of its proposed tariff revisions for billing and accounting systems that are not currently set up to track ARR transfers or automatic reassignments (or "recalls") of transmission rights; and (v) already has in place substantial grandfathered transmission rights which already provide long term service in excess of the requirements of Order 681 and which were determined following a lengthy period of negotiations, settlement and

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[28] *See. e.g.*, Order No. 681 at P 18 ("While it is difficult to generalize…we expect that in most transmission organizations with organized electricity markets the process for obtaining a long-term firm transmission right will not be substantially different from the current procedures.").

[29] *See, e.g.*, *PJM Interconnection, LLC*, 102 FERC ¶ 61,276 (2003) (accepting PJM's revised FTR and ARR processes).

[30] *See, e.g.*, NYISO Initial Comments at 23 (noting that the Commission had approved the NYISO's TCC allocation process that assigns the rights to TCC auction revenues to the New York transmission owners).

[31] Order No. 681 states (at P 19) that "market participants that request an expansion or upgrade in accordance with their transmission organizations prevailing rules for cost responsibility and allocation must be awarded a long-term firm transmission right for the incremental transfer capability created by the expansion or upgrade."

[32] *See* Order No. 681 at P 356: "[M]ost, if not all, [ISOs/RTOs] now have rules governing the reassignment of transmission rights when load migrates from one ["LSE"] to another. The introduction of LTFTRs should not in itself require a change in the basic structure of these rules." This is not true of the NYISO.

litigation at the Commission and in the Courts. Perhaps most importantly, the NYISO must take care to ensure that whatever compliance proposal it develops is compatible with New York State's highly successful retail access program. Poorly designed compliance provisions could do substantial harm to the retail market, *e.g.*, by creating barriers to entry by new LSEs.

In short, the compliance burden that Order No. 681 has imposed on the NYISO will be greater than the Commission appears to have anticipated. The NYISO's existing Commission-approved rules are substantially further removed from what Order No. 681 requires than others are. The NYISO therefore asks that the Commission adopt a more flexible compliance deadline that will better accommodate its need to make fundamental changes.

2. Nothing in the EPAct or the FPA Requires the Commission to Impose an Inflexible and Arbitrary Compliance Deadline

Order No. 681 unreasonably inferred that because Congress directed the Commission to take action under Section 217(b)(4) within one year that it also meant to impose an aggressive compliance deadline on ISOs/RTOs. Section 217 is silent with respect to deadlines that ISOs/RTOs must meet. To the extent that Section 217 implies anything about deadlines, it would be more reasonable to read its support for financial rights and protection of existing ISO/RTO auction rules as signaling that the need for change is not pressing.

Moreover, the Commission did not interpret new FPA Section 215's requirement that it adopt rules governing the certification of an Electric Reliability Organization ("ERO") within 180 days as somehow imposing deadlines on the ERO's compliance with

future regulations promulgated by the Commission. In fact, the Commission has recently said that it will take a flexible approach when setting deadlines for NERC.

Consequently, absent any explicit mandate from Congress, the Commission is free to exercise its discretion to allow a more reasonable compliance period for the NYISO.

3. The Commission Should Allow Differently Situated ISOs/RTOs to Have Different Compliance Plans

The NYISO will comply with the Commission's requirements as quickly as it can. Insisting that the NYISO meet an arbitrary deadline will not enable it to create a workable compliance proposal any faster. An arbitrary deadline would only force the NYISO to submit a less complete proposal, with less stakeholder input, and less attention to integration with other NYISO (and New York State) programs.

Because the Commission is not under a legal mandate to set uniform compliance deadlines, it should let each ISO/RTO propose a compliance timetable that realistically reflects what each ISO/RTO must actually do to comply. Specifically, each ISO/RTO should be allowed ninety days from the date Order No. 681 was issued to consult with stakeholders and submit a detailed compliance plan, including timetables for developing and filing tariff revisions as quickly as is reasonably possible in light of regional circumstances. This approach would be in keeping with the final rule's overall theme of accepting and accommodating legitimate regional variations.

4. At A Minimum the Commission Should Delay the Start of the 180-Day Period Until After It Issues an Order on Rehearing

If the Commission denies the relief requested above, it should at least delay the start of the compliance period until after the issuance of an order on rehearing.

The Commission does not ordinarily delay the implementation of rulemakings pending action on rehearing requests. An exception should be made, however, for this proceeding because of the complexity of the issues, the level of effort needed to comply, and the relatively brief duration of the compliance period. Because the Commission's deadline is so short ISOs/RTOs will have to launch major compliance efforts well before a rehearing order is issued. There are, however, likely to be a large number of rehearing requests in this proceeding. Some of them may seek significant revisions to Order No. 681's requirements. Unless the Commission is able to act very quickly, as the NYISO has requested above in Part II, it is reasonable to anticipate that a rehearing order would be issued no sooner than midway through the compliance period, and more likely closer to the end. If significant changes are required, a great deal of effort expended on developing and drafting compliance tariff provisions would be wasted. The Commission could alleviate this problem by tying the compliance deadline to the issuance of an order on rehearing, not the issuance of Order No. 681.

Granting this request is unlikely to substantially affect the actual effective date of compliance tariff provisions. It would not be a reasonable business practice for ISOs/RTOs to finalize expensive, time-consuming, and labor-intensive system software changes at least until after a rehearing order establishes final requirements.[33] Delaying the date for tariff filings would therefore not, as a practical matter, delay the most intense technical implementation work.

[33] The Commission itself recognizes that considerable work on software and procedural changes will likely need to be done after the Commission acts on ISO/RTO tariff proposals. *See* Order No. 681 at P 493.

The NYISO notes that Order No. 681 sets a deadline for filing, but not for implementing, tariff revisions.[34] The NYISO respectfully reserves the right to seek rehearing if the Commission establishes an unreasonable implementation deadline in the future, or later asserts that such a deadline was implicit in Order No. 681.

C. The Commission Should Clarify That LSEs Are Not Entitled to LTFTRs to the Extent That They Already Have Grandfathered Transmission Rights

In New York, many market participants that had pre-NYISO transmission wheeling agreements opted to convert them into grandfathered transmission rights or grandfathered TCC's under the provisions of Attachment K to the NYISO's Open-Access Transmission Tariff ("OATT").[35] As grandfathered rights holders, they are entitled to use the transmission system to deliver energy to meet their service obligations without being exposed to congestion charges until the time that those grandfathered rights expire. The NYISO believes that similar arrangements exist in other ISOs/RTOs.

Order No. 681 does not clearly address the question of how ISOs/RTOs should account for LSEs that already have grandfathered transmission rights. There is no evidence that the Commission intended for those rights to be abrogated. New FPA Section 217(f), which is not mentioned in Order No. 681, would appear to prohibit abrogation.[36] An abrogation requirement would also raise constitutional takings and property rights issues that are not even addressed in the final rule.

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[34] Order No. 681 at P 493.

[35] A comprehensive listing of these grandfathered transmission rights is contained in Attachment L to the NYISO's OATT.

[36] Section 217(f) states: "Nothing in this section shall provide a basis for abrogating any contract or service agreement for firm transmission service or rights in effect as of the date of the enactment of this subsection."

Order No. 681 implies, at P 321, that LSEs should have the same entitlements to transmission rights that they had in the past.[37] The NYISO believes that this is the correct approach. The Commission should eliminate any ambiguity on this point by clarifying that LSEs are not entitled to preferential access to new LTFTRs to the extent that existing grandfathered rights already enable them to meet their service obligations. Adopting such a rule would be consistent with Order No. 681's theme that LSEs should have access to LTFTRs to meet their "reasonable needs," but are not guaranteed as many LTFTRs as they might wish to have.

In the alternative, the NYISO requests rehearing. Order No. 681's stated policy objective is to ensure that LSEs have access to firm transmission rights that resemble those available under the *pro forma* OATT. In New York, LSEs that have grandfathered transmission rights under Attachment L already receive this type of service.[38] Making them eligible for LTFTRs before their grandfathered rights expire would provide them with a redundant level of protection that goes beyond Order No. 681's goals. It would also be arbitrary and capricious because it would require other market participants to subsidize favored LSEs without any rational justification.

D. The Commission Should Clarify that ISOs/RTOs May Consider the Need to Accommodate State Retail Access Programs, and Market Participants' Desire for Shorter Term Transmission Rights, When Determining What Constitutes A "Reasonable" Portion of Existing Transmission System Capacity to Set Aside for LTFTRs

Order No. 681 leaves it to each ISO/RTO to propose what is a "reasonable" amount of existing transmission capacity to set aside for LTFTRs so long as LSEs'

[37] Order No. 681 at P 321 states that "in most cases, [LSEs} can continue to receive the same allocation of firm transmission rights (or auction revenue rights) that they have received in the past."

[38] Holders of grandfathered rights in New York are still required to pay certain other charges, such as losses and ancillary services, but the same is true of transmission customers that take firm service under the Commission's *pro forma* OATT.

"reasonable needs" are met. P 323 mentions minimum daily peak load or fifty percent of daily maximum peak load as possible examples of quantities that might be set aside without precluding the use of other metrics. In that same paragraph, the Commission recognizes that ISOs/RTOs will have "valid reasons" to limit the amount of capacity that they reserve for LTFRs such as the burden of accounting for such rights in their planning procedures.

Order No. 681 is less clear on the question of whether ISOs/RTOs may account for the needs of State retail access programs when determining how much capacity to set aside for LTFTRs. As a general matter, many LSEs in retail access states should be expected to prefer shorter-term rights since the amount of load that they serve may be subject to frequent change. Reserving too much capacity for LTFTRs could also become a serious barrier to market entry if it prevented new LSEs from securing reasonable transmission rights.

There are several indications in Order No. 681 that the Commission recognizes this. For example, P 50 states that "transmission organizations should ensure that different types of retail service providers that have service obligations are accommodated when implementing the final rule." Similarly, P 322 says that LSEs in retail access states should be able to "continue to receive and use their allocated firm transmission rights as short-term instruments, if that best suits their business model." LSEs that prefer, or that are legally required to use, shorter-term rights also should not "feel compelled to request [LTFTRs] (or enter into sham contracts) out of fear that they might otherwise lose out in the firm transmission right allocation process."

In addition, Order No. 681 repeatedly states that it is not intended to undermine existing ISO/RTO market designs and that ISOs/RTOs should be able to retain the efficiencies that come from having congestion-based pricing. This suggests that ISOs/RTOs should be able to account for market design considerations and the extent to which their market participants desire shorter-tem rights when deciding how much capacity should go for long-term rights.

The NYISO respectfully requests that the Commission clarify its position on these issues. In the event that the Commission indicates that it intended to prohibit ISOs/RTOs from accounting for retail access needs and market participant desires when deciding how much capacity to allocate to LTFTRs, the NYISO requests rehearing. Order No. 681 does not set forth any reasons for prohibiting ISOs/RTOs from considering these factors. It would be arbitrary and capricious to prevent them from doing so without a clearly explained policy rationale and in the face of contrary language in the text of the final rule.

E. The Commission Should Clarify that LTFTRs Need Not Be Allocated Every Time That An ISO/RTO Allocates Shorter Term Rights

The NYISO currently auctions TCCs twice a year and holds monthly reconfiguration auctions. Although the NYISO's plans for complying with Order No. 681 are still to be developed, the NYISO anticipates that it will continue to hold periodic auctions of shorter-term rights. Order No. 681 clearly allows the NYISO to do so, but does not address the question of whether LTFTRs must be made available, or whether adjustments to LTFTRs must be allowed, whenever opportunities to obtain or modify shorter-term rights are offered. There does not appear to be anything in Order No. 681 that would forbid ISOs/RTOs from following separate rules with respect to short and long-term rights. Allowing reasonable differences would also be consistent with Order

No. 681's emphasis on allowing regions to develop LTFTRs that best reflect their individual needs. It would also be consistent with Order No. 681's observations that LTFTRs are primarily meant to benefit baseload generation serving native load rather than other relationships that are likely to have more variations over time.[39]

Nevertheless, to avoid uncertainty and facilitate stakeholder compliance discussions, the NYISO requests clarification that long-term and short-term rights may be allocated, and adjusted, on different timetables. To the extent that the Commission denies clarification, the NYISO respectfully requests rehearing. It would be arbitrary and capricious for the Commission to require LTFTRs to be allocated and adjusted with the same frequency as shorter-term rights since Order No. 681 gives no indication that it establishing such a rule and offers no explanation of possible reasons.

F. The Commission Should Clarify that LSEs That Obtain LTFTRs Must Still Pay a Reasonable Portion of Transmission System Costs

Finally, Order No. 681 contains a number of statements that clearly demonstrate that LTFTRs should not be offered to LSEs for free. For example, P 386 states that LSEs "that are obligated to pay the embedded costs of the transmission system" should be allowed to receive LTFTRs without having to bid for them in an auction. Similarly, P 359 clearly implies that there are "cost responsibilities" associated with holding LTFTRs, such as having to pay transmission service charges. These statements are all entirely consistent with the Order No. 681's core principle that LTFTRs are supposed to provide the same level of price certainty and stability as to quantity as transmission rights under the *pro forma* OATT. It follows that because *pro forma* transmission rights under Order

[39] *See, e.g.*, Order No. 681 at P 80.

No. 888 are not available for free, that there should be some cost associated with obtaining LTFTRs.

Nevertheless, certain New York stakeholders have already informed the NYISO that they believe they are entitled to LTFTRs at no cost. The NYISO therefore requests that the Commission clarify that LSEs that opt to receive LTFTRs must pay a reasonable share of transmission system costs. Granting this clarification will facilitate the NYISO stakeholder process by cutting off the possibility of a distracting debate over an issue that the Commission appears to view as unambiguously settled.

On the other hand, if the Commission's intent was to require ISOs/RTOs to make LTFTRs available at no cost, the NYISO respectfully requests rehearing. Such a policy would be arbitrary and capricious because it would be flatly inconsistent with the language quoted above, and with other similar statements in Order No. 681. It would also require all other transmission system users to subsidize LTFTR holders even though there is no indication in the text or legislative history of Section 217 that a subsidy was intended. Similarly, although the Commission has interpreted Section 217 as giving LSEs preferential access to LTFTRs, it has not even suggested in Order No. 681 that it believes LSEs should not have to pay for LTFTRs.

III. CONCLUSION

In conclusion, the Commission should grant rehearing to correct its erroneous and overly expansive reading of new FPA Section 217(b)(4) and EPAct Section 1233(b). It should revise Order No. 681's holdings that would require the NYISO to change its existing TCC auction rules in ways that were not intended by Congress or desired by the majority of NYISO stakeholders. In the event that the Commission denies these requests, it should grant rehearing of its arbitrary and inflexible 180-day compliance deadline and

allow the NYISO a more reasonable time to develop a compliance proposal. In addition, the Commission should grant the requests for clarification, or in the alternative rehearing, of the other issues that are described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day electronically served the foregoing document on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 21st day of August, 2006.

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