

Joint NYISO/TO Presentation on Proposed Revisions to the OATT to Limit Liability of the NYISO and the Transmissions Owners to Acts of Gross Negligence or Intentional Misconduct

I. Background

State regulatory commissions and FERC have generally approved tariff provisions that limit the liability, and provide indemnification, for transmission providers except in cases of gross negligence and intentional misconduct. As a result, transmission providers are generally insulated from liability for ordinary negligence. FERC departed from the historic norm in the pro forma Open Access Transmission Tariff in Order No. 888. The pro forma tariff did not provide for a limitation on liability, or an indemnification provision that would insulate transmission providers from ordinary negligence. In Order No. 2000-A, the Commission expressed a willingness to reconsider the liability standard for transmission providers on a case-by-case basis.

The Commission has since approved a gross negligence standard for several RTOs and ISOs, including PJM, the Southwest Power Pool, the Midwest ISO, and ISO New England.¹ The NYISO and the New York Transmission Owners propose a FERC filing to request a gross negligence standard in the NYISO OATT.

II. Current NYISO Tariff Provisions Concerning Liability and Indemnification

It is important to note that, since the inception of the NYISO, the NYISO's Market Services Tariff has included provisions limiting the liability of the NYISO and transmission owners for acts or omissions related to the Services Tariff, except to the extent that

¹ See PJM Interconnection L.L.C., 112 FERC ¶ 61,264 at pp 9-10; Southwest Power Pool, Inc., 112 FERC ¶ 61,100, pp 36-44 (2005)(“SPP”); Midwest Indep. Transmission Sys. Operator, Inc., 110 FERC ¶ 61, 164 at p 29 (2005); ISO New England Inc. FERC Electric Tariff No. 3, sections I.5.2 and I.5.3.

the NYISO or a transmission owner is found liable for gross negligence or intentional misconduct (see NYISO Services Tariff, §12.3, Limitation on Liability). The Services Tariff also provides that customers and market participants shall indemnify the NYISO and the transmission owners for all claims arising out of acts or omissions related to performance under the Services Tariff, except to the extent they are found liable for gross negligence or intentional misconduct (see NYISO Services Tariff, §12.4, Indemnification). The NYISO's market functions, of course, are performed under the Services Tariff.

The NYISO OATT, however, does not have a comparable liability limitation and indemnification provisions.

III. Rationale For Proposed Tariff Revisions

As noted, transmission providers have historically been subject to a gross negligence liability standard, and the FERC has approved that standard for RTOs and ISOs in recent decisions. In the Southwest Power Pool (SPP) decision, the Commission stated as follows:

[We] find the gross negligence and intentional wrongdoing standard to be just and reasonable for several reasons. As noted by the United States Court of Appeals for the District of Columbia Circuit, prior to unbundling, many state commissions had approved retail tariff provisions permitting utilities to limit their liability for service interruptions to instances of gross negligence or willful misconduct. Courts found that such provisions balance lower rates for all customers against the burden of limited recovery for some, and that the technological complexity of modern utility systems and resulting potential for service failures unrelated to human errors justify liability limitations. We agree. SPP and its TOs are solely regulated by the Commission for their provision of transmission services under the SPP OATT, so the Commission is the only regulator with the ability to ensure that they are protected from potentially excessive damage awards by adequate limitation of liability provisions. Several state commissions in SPP's footprint allow utilities to limit their liability to gross negligence.

We believe that SPP and its TOs should be afforded similar protection. Otherwise, disparate treatment is a disincentive to participate in SPP.

In addition, as we stated with regard to the Midwest ISO, the risk of potentially excessive damage awards could be reflected in higher insurance premiums and higher cost of capital, which, in turn would be borne by customers and could result in inequities among customers. Strong limited liability provisions can help ensure that excessive damage awards will not be passed through to customers in the form of increased rates.

Furthermore, SPP and its TOs must provide service to all customers, and cannot deny service to particular customers based on the risk of potential damages associated with interruption of service to those customers. It is also difficult for them quantify the potential risk associated with service to such customers and price such service accordingly. Ultimately, all customers bear the cost associated with the risk of such service, including those customers who do not have special reliability needs. (Footnotes omitted).²

The Commission noted that several state commissions within the SPP footprint permit utilities to limit their liability for acts of ordinary negligence. Similarly, New York State law permits regulated utilities to limit their liability to gross negligence (see Lee v. Consolidated Edison Co., 413 N.Y.S. 2d 826, 828, N.Y. App. Div. 1978).

The potential liability covered by the proposed provision is for adequacy for service, which is a traditional tariff matter that should be regulated by FERC. Because of the absence of a liability standard in the OATT, FERC's policies and the NYISO tariff would be subject to interpretation by state courts and juries, which lack FERC's expertise in the area of transmission service. The liability standard applicable to the NYISO OATT should be determined by FERC, and not state courts.

² SPP Order, pp 7-8.

The NYISO and the transmission owners have legal obligations to perform services under the OATT. Given the nature of providing electricity service, and the consequences related to service disruptions, there is an almost unlimited potential for damage claims based on allegations of ordinary negligence. Such claims, their litigation and settlement, pose a significant risk to the NYISO, the transmission owners and market participants. Costs related to negligence claims against the NYISO and transmission owners will ultimately be recovered from market participants in the form of Rate Schedule 1 charges or higher transmission rates.

IV. Conclusion

Since its inception, the NYISO and the transmission owners have been subject to the traditional gross negligence standard in the NYISO Services Tariff. FERC has recognized the justification for applying the same liability standard to an RTO or ISO OATT, and has approved that standard in a number of recent cases. The risk of excessive claims against the NYISO and the transmission owners based on allegations of ordinary negligence poses a significant risk to the NYISO, the transmission owners and market participants. Consequently, the NYISO OATT should be revised to insulate the NYISO and the transmission owners from claims based on allegations of ordinary negligence.

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