107 FERC ¶ 51,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

New York Independent System Operator, Inc. Docket Nos. ER03-552-006
ER03-552-007
ER03-552-008
ER03-984-004
ER03-984-005
ER03-984-006

# ORDER CONDITIONALLY ACCEPTING COMPLIANCE FILINGS

(Issued June 2, 2004)

## I. Introduction

1. In this order, the Commission conditionally accepts revisions to the New York Independent System Operator, Inc.'s (NYISO's) Open Access Transmission Tariff (OATT)[1] and Market Administration and Control Area Services Tariff [2] (Services Tariff).[3] We also accept a report we required the NYISO to file.[4] This order benefits customers by ensuring that the NYISO's creditworthiness policies appropriately protect it against the risk of nonpayment without creating unnecessary barriers to entry or unduly burdening customers.

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[1] New York Independent System Operator, Inc., FERC Electric Tariff, Original Volume No. 1.

[2] New York Independent System Operator, Inc., FERC Electric Tariff, Original Volume No. 2.

[3] These changes were ordered by the Commission in New York Independent System Operator, Inc., 105 FERC ¶ 61,340 (2003) (December 23 Order).

[4] See New York Independent System Operator, Inc., 104 FERC ¶ 61,311 (2003) (September 22 Order).

## II. Background

2. The NYISO filed revisions to its OATT and Services Tariff to specify the creditworthiness requirements for customers participating in the NYISO-administered markets. It stated that the proposed creditworthiness requirements protected against losses from non-payment by a NYISO customer without creating barriers to entry or unduly burdening customers in these markets. The NYISO stated that the customers who would be subject to the requirements were also those for whose benefit the requirements had been designed, since they ultimately have to cover the bad debts of other customers. The NYISO provided a detailed description of its creditworthiness requirements, as we required.[5] The NYISO later filed proposed revisions that would enhance its rules governing the allocation of new working capital contributions and bad debt losses among the NYISO customers.

3. In the September 22 Order, the Commission conditionally accepted the NYISO's proposed revisions to its OATT and Services Tariff. However, the Commission found that the NYISO did not provide adequate justification for certain aspects of its filings. The Commission stated that we must balance the goal of allowing Independent System Operators and Regional Transmission Organizations to reduce their exposure in the event of default with the goal of ensuring that the credit or collateral requirements are not so stringent that they unnecessarily inhibit access to the marketplace.[6]

4. On October 23, 2003, the NYISO submitted proposed revisions to comply with the Commission's September 22 Order. It proposed to reduce the Energy Component of non-investment and unrated customers' Operating Requirements[7] to reflect 50 days of obligation. The NYISO also proposed to make conforming changes to the Operating Requirement for customers that have executed a prepayment agreement. The NYISO explained that the conforming changes were necessary because a prepayment agreement reduces the amount of collateral a customer must provide by half, so a customer with a prepayment agreement only needs to supply 25 days of security.

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[5] See New York Independent System Operator, Inc., et al., 98 FERC ¶ 61,282 at 62,217 (2002).

[6] September 22 Order at P 29.

[7] The Operating Requirement reflects the nonpayment exposure attributable to each customer based on the customer's activity in each of the NYISO's markets; there is an Energy and Ancillary Services component, an Unforced Capacity component, a Transmission Congestion Charge component, and a Bid component.

5. Additionally, to comply with the Commission's directives, the NYISO proposed revisions to its OATT and Services Tariff to: (1) allow all customers participating in the NYISO-administered markets to enter into pay-down agreements; (2) incorporate a Netting Provision that allows a customer to use only current amounts due to the customer from the NYISO to reduce its collateral requirement; (3) permit customers to use as collateral a surety bond with a "pay now, fight later" provision; and (4) provide that the revised methodology for calculating working capital contributions would apply to both existing working capital contributions and those made after the effective date of the filing.

6. In the December 23 Order, the Commission conditionally accepted the NYISO's proposed revisions. However, the Commission directed the NYISO to either eliminate or modify the Energy Component of the Operating Requirement for customers with prepayment agreements to reflect only the NYISO's actual risk of non-payment. The Commission further directed the NYISO to clearly describe the terms and conditions of a Prepayment Agreement and to adopt a pro forma Prepayment Agreement.[8] In addition, the Commission ordered a minor revision to First Revised Sheet No. 499 of the Services Tariff.

7. The NYISO submitted this compliance filing on January 7, 2004.[9] On February 2, 2004, the Commission requested additional information. The NYISO submitted its response on February 24, 2004.[10] On March 29, 2004, the NYISO submitted a report required by the September 22 Order.[11] That order had directed the NYISO to explore through its stakeholder process whether additional changes should be made to the settlement or credit procedures and to file revised tariff provisions or a report on the results of these discussions within 180 days.

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[8] December 23 Order at P 20.

[9] The NYISO requests that the revisions in this filing become effective on December 21, 2003, which is the effective date established in the September 22 Order.

[10] On February 11, 2004, the NYISO requested an extension of time to file its response to the data request. The Commission granted this request on February 17, 2004.

[11] On March 19, 2004, the NYISO requested an extension of time to file its report. The Commission granted this request on March 22, 2004.

## III. Notice of Filing, Interventions and Protests

8. Notices of the NYISO's compliance filing and its response to the data request were published in the Federal Register, 69 Fed. Reg. 3129 and 10,218 (2004), with motions to intervene and protests due on or before March 16, 2004. Notice of the NYISO's report was published in the Federal Register, 69 Fed. Reg. 18,895 (2004), with motions to intervene and protests due on or before April 19, 2004.[12] The National Energy Marketers Association (NEM), Fluent Energy Corporation (Fluent),[13] and the New York Transmission Owners (NYTO) filed timely comments. The NYISO filed an answer to NEM's comments on May 3, 2004.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the NYISO's answer and therefore will reject it.

## IV. Discussion

### A. Analysis of Compliance Filing

10. The NYISO's proposed revisions to its tariffs generally comply with the December 23 Order, and we will conditionally accept the revisions for filing, based on the discussion below.

11. The NYISO proposes to revise the calculation of the Operating Requirement for a customer that has executed a prepayment agreement to reflect only the NYISO's actual risk of nonpayment. Consequently, the NYISO has reduced a customer's Energy and Ancillary Services Component of the Operating Requirement to reflect only ten days of security plus a reasonable estimate of the net amount that the customer owes the NYISO as a result of true-ups to invoices.

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[12] The New York Transmission Owners (NYTO) filed timely motions to intervene in Docket Nos. ER03-552-006 and ER03-552-007. They were already parties to this proceeding by virtue of their timely intervention in Docket Nos. ER03-552-000 and ER03-984-000.

[13] Fluent Energy was formerly known as Leveraged Energy Purchasing Corporation (LepCorp). LepCorp filed a motion to intervene in this proceeding on August 12, 2003.

### 1. **Arguments**

12. The NYISO explains that, even when a customer prepays for service based on its estimated purchases, the NYISO may be exposed to a risk of nonpayment in two ways. First, the NYISO may underestimate the amount of the customer's purchases. Ten days' worth of security is a reasonable approximation of the loss that could result from underestimating the correct amount of a prepayment due to the time lag between the initial service and the time when the NYISO could terminate service if a customer failed to make the supplemental payment.

13. Second, the customer may have additional payment obligations to the NYISO as a result of true-ups to invoices. The NYISO states that true-ups are a significant amount of a customer's total outstanding payment obligation to the NYISO. Prepayments will not reduce its risk of loss with respect to true-ups, since prepaying customers contribute a substantially smaller amount of security relative to their true-up obligations than do non-prepaying customers. The NYISO asserts that the true-up security provision is non-discriminatory because it addresses the greater true-up risk posed by prepaying customers, both in proportion to the security that they have provided and in an absolute sense. Additionally, the NYISO asserts that prepaying customers have greater true-up exposure than do non-prepaying customers, i.e., 18.5 percent compared with 3 percent of the final settlements.

14. NEM argues that requiring customers to provide 10 days of security and the amount a customer owes as a result of true-ups exceeds the NYISO's exposure. NEM states that the NYISO is still requiring up to twenty-three days worth of charges from customers: ten days worth of purchases plus up to six days worth of charges for true-ups to invoices[14] plus seven days advance payment for energy and ancillary services purchases the customer will incur in the next seven days. NEM calculates the NYISO's total exposure to be 9 days (based on the NYISO's ability to terminate service after two days).[15] NEM also asserts that the NYISO posits a highly improbable scenario that the

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[14] NEM calculates the six days using the NYISO's claim that in some cases true-ups comprise nearly twenty percent of a customer's monthly invoice, which is equivalent to six days worth of charges.

[15] NEM points out that, since an evaluation has already occurred earlier in the week, the only time period involving a risk of loss for purchases exceeding the prepayment is that from the mid-week evaluation to the termination day (post-evaluation on Wednesday through termination), or only a total of seven and a half days. See NEM Comments filed March 16, 2004, at 3.

prepay amount might fall short by 50 percent despite the fact that, in the NYISO's limited history with prepayments, the NYISO has not significantly underestimated customers' prepayments relative to their daily and monthly invoices. The NYISO's exposure will never amount to a day's or even a half-day's worth of purchases.

15. NEM states that the NYISO admits that the true up liability is not unique to prepaying customers. Therefore, imposing additional unique payment requirements on prepaid customers for a non-unique obligation is undue discrimination and an unjustifiable barrier to market entry. If the NYISO demands true-up obligations from prepaying customers, it should demand them from all customers.

16. Fluent states that the NYISO should be required to separately analyze the credit exposure for the prepaying customers that Fluent represents (i.e., Direct Customers[16]), and it wants NYISO to further clarify the application of its credit standards as they pertain to prepaying customers. The under-scheduling that the NYISO implies that prepayment customers engage in seems to be most applicable to a prepaying Energy Services Company (ESCO)/Marketer.[17] Fluent urges the Commission to require the NYISO to separately analyze the credit exposure for prepaying Direct Customers and prepaying ESCO/Marketers as it relates to the four month true-up rate. Fluent does not oppose a logical, well-designed approach toward protecting the financial health and stability of the marketplace; however, the NYISO's responses to the Commission's data request suggest that it desires to include all prepaying customers, especially the customers Fluent represents, in a single overly broad and indistinct "high risk" category.

### 2. Resolution

17. We will accept the NYISO's proposal with respect to the number of days (10) of exposure from prepaying customers. In our September 22 Order, we stated that it is necessary to require only enough collateral to protect the NYISO from the risk of non-payment by its customers.[18] A customer's prepayment for a given week (starting on Saturday) is made on the preceding Friday and the NYISO does not evaluate the

[16] Direct Customers are entities that purchase and schedule delivery of electricity or natural gas for their own consumption and not for resale.

[17] Fluent states that the four month true-up rate for prepayment customers of 18.3 percent (as compared to approximately 3 percent for all other customers) implies that prepayment customers purposely underestimate their loads to delay payment to the NYISO.

[18] September 22 Order at P 42.

customer's purchases until the subsequent Tuesday to see if a supplemental payment is required. If a supplemental payment is required, it is not due until 4:00 p.m. on the following business day (Wednesday). If the customer fails to make this supplemental payment on Wednesday the NYISO can terminate the prepayment agreement and demand collateral from the customer in accordance with the standard credit requirements for a non-prepaying customer. The customer would have three business days within which to satisfy such demand (i.e., until the following Monday), and if the customer does not provide the required collateral, the NYISO could terminate service. The time between the commencement of service (Saturday) and the termination of service on the second Monday is ten days.[19] We agree with the NYISO that its exposure should be covered for this time period.

18. However, we are concerned with the amount of money that the NYISO is proposing to require for those ten days of exposure. The NYISO proposes to require an amount equal to ten full days of purchases even though in its limited history with prepayments, it has not significantly underestimated customers' prepayments relative to their daily and monthly invoices. Under the NYISO's proposal, if a customer prepays, e.g., \$70,000 (\$10,000 per day times seven days) for a week's worth of purchases, it would have to also provide \$100,000 (\$10,000 per day times ten days) worth of collateral. Thus, a customer would have to provide collateral that is based on an assumption that the variance between the estimated and actual daily prepayment amount is 100 percent. Based on the NYISO's statement that it has not significantly understated customer's prepayments, and in the absence of any other support for this assumed level of under-estimation,[20] the Commission will reject this aspect of the NYISO's proposal. We will require the NYISO to make a compliance filing supporting the amount of money

[19] We disagree with NEM's calculation of nine days of total exposure, as NEM incorrectly assumed that the NYISO could terminate service two business days after a customer's failure to make the supplemental payments, rather than three days. We also do not agree with the NYISO's assertion that the time of exposure could range up to thirteen days since the NYISO should only be covered from the commencement of service to the termination of service, which in this case amounts to ten days.

[20] The NYISO declined to quantify how much it underestimates a prepayment customer's purchases to be in response to Question 1.c. of the data request.

required for the ten days of exposure.[21] The NYISO must submit its justification and/or revised tariff sheets within 30 days of the date of this order.

19. The Commission will conditionally accept the NYISO's proposal to require a prepayment customer to include an estimate of the net amount that the customer owes the NYISO as a result of true-ups to prior invoices as part of its Operating Requirement. The NYISO's unrefuted representation is that historically the average true-up for prepaying customers has been 18.5 percent of their final, trued-up settlements, as compared to only three percent for non-prepaying customers. Further, the NYISO asserts that it would have less collateral to draw upon, since prepaying customers provide less security up front (i.e., 10 days' worth of purchases) than non-prepaying customers (50 days worth of purchases).[22]

20. Although the Commission acknowledges that there is a true-up risk, the NYISO has not explained how this risk is ameliorated by the existence of security obtained to cover a different risk, i.e., the non-payment default risk of both the prepaying and non-prepaying customers. Although we note no objections to the NYISO's use of the non-payment default security for non-prepayment customers, the NYISO has not explained why such true-up risk is not similarly satisfied, at least in part, by the prepayment and 10-day collateral requirements for prepayment customers.

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[21] For example, if the NYISO can support a claim that prepayments are underestimated by 5 percent of customer's estimated daily purchases, it may seek to collect 5 percent of the daily amount for 10 days as collateral for prepaying customers.

[22] The NYISO sets forth an example of this true-up issue on page 6 in its response to the data request. In its example, the NYISO assumes that both a prepaying customer and a non-prepaying customer each make about $1 million of purchases per month. A non-prepaying customer would provide about $1,670,000 in security (fifty days worth) while a prepaying customer would provide $330,000 (ten days worth). The NYISO then assumes that the initial true-up to these purchases occurs four months later and is approximately twenty percent of the initial amount or $800,000 (20 percent of $1 million per month of purchases times 4 months). In this example, the NYISO asserts that the prepaying customer's true-up liability is much larger in proportion to the security that it has provided than is that of the non-prepaying customer.

21. Therefore, in order to avoid undue discrimination, the Commission will require the NYISO to file revised tariff sheets within 30 days so that the true-up collateral provision of the Operating Requirement for prepayment customers includes only the difference between the total amounts provided by the prepayment customer (i.e., the sum of the prepayment amount and the 10 days of collateral) and its true-up exposure.[23]

22. With respect to Fluent's concerns, we will not require the NYISO to separately analyze the credit exposure for prepaying Direct Customers and prepaying ESCO/Marketers with respect to the four month true-up rate, as Fluent has not supported its claim that Direct Customers are less subject to load forecasting errors than other prepaying customers.

23. As directed by the Commission in the December 23 Order, the NYISO adopted a pro forma prepayment agreement in its OATT and Services Tariff and made a revision to Sheet No. 499 of the Services Tariff.[24] We will accept these revisions, as they comply with the Commission's December 23 Order. However, we will require the NYISO to file revised tariff sheets for Sheet Nos. 507A, 507B, 507C, and 507D with the correct volume number. The NYISO incorrectly designated these sheets under the OATT or Volume No. 1 when in fact they should be under the Services Tariff or Volume No. 2.

### B. Analysis of Report

24. We will also accept the NYISO's report describing its exploration of whether there are other ways to decrease collateral requirements through more flexible settlement options. The NYISO explains that it has explored how features of the New York Mercantile Exchange's settlement process might be adapted for application to the NYISO markets and has hired an outside consultant to examine improvements to its settlement system. Within the stakeholder process, the NYISO is exploring allowing a customer to schedule a bilateral contract without identifying a specific generation source, which

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[23] Based on the NYISO's proposal and footnote 22 in this order, the NYISO should only require \$239,000 as a true-up obligation, since a prepaying customer would submit \$231,000 as a weekly prepayment (\$33,000 per day of purchases multiplied by 7 days) and \$330,000 for ten days of collateral (\$33,000 per day of purchases times 10 days). If we assume \$800,000 is the initial true-up from footnote 22, then a customer's true-up obligation is \$239,000 because the NYISO should take the difference between the initial true-up and the prepayment and posted collateral (\$800,000 - \$231,000 - \$330,000 = \$239,000).

[24] Designated as Second Revised Sheet No. 499 in the Services Tariff.

should reduce purchasing customers' credit requirements. It has developed tariff revisions to extend to the New York Municipal Power Agency the same unsecured credit that its individual members would be eligible for. In addition, the NYISO states that it has solicited stakeholder input regarding improvements to customer credit policies, is examining that input, and will schedule a meeting to discuss the suggestions.

25. NEM states that market participants were not adequately informed of the stakeholder discussions. NEM further asserts that the NYISO's report lacks concrete, short-term solutions for reducing the burden of the NYISO's current credit requirements on market participants.[25]

26. NYTO states that it supports the NYISO's goal of ensuring that adequate requirements exist to protect against credit risk without creating undue burdens. However, the creditworthiness issues are not being adequately vetted in the stakeholder process. NYTO urges the Commission to require the NYISO to fully use the stakeholder process when considering any changes to the creditworthiness and settlement requirements. NYTO states that the NYISO should be required to file further status reports on its progress.

27. We acknowledge the NYISO's commitment to the goals set forth in the September 22 Order and find that its actions comply with that order. Therefore, we will accept the NYISO's compliance report. However, we share NYTO's and NEM's concern that the NYISO is not fully using the stakeholder process in regard to creditworthiness issues since it might appear from the comments that some participants were left out of the stakeholder discussions. Therefore, we require the NYISO to make full use of the stakeholder process and will require it to file a status report on its progress within 180 days of the date of this order.

28. We also note that the New England Power Pool (NEPOOL) recently approved through its stakeholder process a proposal to implement a weekly payment and billing system that reduces the amount of required financial assurance and the likelihood of harmful defaults.[26] We urge the NYISO to consider development of a weekly payment and billing system through its stakeholder process.

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[25] NEM Comments (April 19, 2004) at 1-2.

[26] Docket No. ER04-697-000 filed on April 1, 2004.

The Commission orders:

(A) Subject to Ordering Paragraph (C), the NYISO's compliance filing is hereby conditionally accepted, as discussed in the body of this order, to become effective on December 21, 2003, as requested.

(B) The NYISO's compliance report is hereby accepted.

(C) The NYISO is hereby ordered to submit a compliance filing within 30 days of the date of this order based on the discussion in the body of this order.

(D) The NYISO is hereby ordered to submit a report on the results of additional stakeholder discussions within 180 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,
Secretary.