126 FERC ¶ 61,320
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

New York Independent System Operator, Inc. Docket No. OA08-52-003

ORDER ON REHEARING

(Issued March 31, 2009)

1. In this order, the Commission grants, in part, and denies, in part, rehearing of its October 16, 2008 Order,[1] which conditionally accepted New York Independent System Operator, Inc.'s (NYISO's) filing of its transmission planning process as in compliance with Order No. 890.[2] The Commission also accepts a revised Reliability Agreement NYISO included with its compliance filing.

I. Background

2. In Order No. 890 the Commission reformed the *pro forma* Open Access Transmission Tariff (OATT) to clarify and expand the obligations of transmission providers to ensure that transmission service is provided on a non-discriminatory basis. The Commission directed all transmission providers to develop a planning process that satisfies nine planning principles and to clearly describe that process in a new attachment to their OATTs. Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) with Commission-approved planning processes already on file were directed to either reform their planning processes or show how they were consistent with or superior to the *pro forma* OATT, as modified by Order No. 890.

[1] *N.Y. Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,068 (2008) (October 16, 2008 Order).

[2] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008).

3. NYISO's filing included revisions to Attachment Y of its OATT to incorporate a new economic planning process, known as the Comprehensive System Planning Process (CSPP) which contained three major components: (1) local transmission planning; (2) reliability planning, and (3) economic planning. NYISO's filing also included the Rate Mechanism for the Recovery of the Reliability Facilities Charge, to be a new Rate Schedule No. 10 to NYISO's OATT, and the revised Agreement Between the New York Independent System Operator, Inc. and the New York Transmission Owners on the Comprehensive Planning Process for Reliability Needs (Reliability Agreement).

A. October 16, 2008 Order

4. In the October 16, 2008 Order, the Commission found that NYISO's transmission planning process with certain modifications complies with each of the nine planning principles and other planning requirements adopted in Order No. 890. The Commission accepted, *inter alia*, three threshold requirements an economic project would have to satisfy in order to be eligible for cost allocation and recovery: (1) the benefit of the proposed project must exceed its costs; (2) the total capital cost of the project must exceed $25 million; and (3) eighty percent (a so-called "supermajority") of the project beneficiaries must support the project by voting for it in the stakeholder process.

5. The project benefit is measured as the present value of annual New York system-wide production cost savings that would result from the implementation of the proposed project, measured for the first ten years from the project's proposed commercial operation date. Cost is expressed as the present value of annual total revenue requirement for the project, allocated over the first ten years from the project's proposed commercial operation date. To identify beneficiaries, NYISO will measure the present value of annual Locational Based Marginal Price (LBMP) load savings for all load zones which would have a load savings, net of reductions in transmission congestion credit payments, and bilateral contracts as a result of the implementation of the proposed project.

6. In the October 16, 2008 Order, the Commission required NYISO to make a compliance filing explaining two issues related to costs and benefits: (1) whether NYISO in identifying beneficiaries would be comparing the total present value of benefits incurred over a ten-year period to the total amount of costs or whether it would be comparing the benefits and the costs for each year; and (2) an explanation of how additional metrics, to be made available for consideration by market participants funding the projects, will be calculated, weighed, and/or combined.[3]

[3] October 16, 2008 Order, 125 FERC ¶ 61,068 at P 112–13.

7. Under the supermajority voting rule, in order for the costs of an economic based transmission project to be recovered through NYISO's tariff, the cost allocation and recovery for that specific project must be approved by a vote of 80 percent or more of the beneficiaries of that project (who will pay for the project), weighted in accordance with each beneficiary's share of the total project benefits. The Commission stated that "the ability of project beneficiaries to vote on potential projects will serve to check-and-balance the costs and benefits of projects subject to cost allocation under NYISO's tariff."[4]

II. Requests for Clarification or Rehearing

8. On November 17, 2008, NYISO and the New York Transmission Owners[5] (NY Transmission Owners) (collectively, Joint Parties), Niagara Mohawk Power Corporation (National Grid), and the New York Regional Interconnect, Inc. (NYRI) filed requests for clarification or, in the alternative, rehearing. On December 2, 2008, as corrected on December 8, 2008, Consolidated Edison Company of New York, Inc. (Con Ed) and Orange and Rockland Utilities, Inc. and NYISO filed answers to NYRI's request for rehearing. On December 2, 2008, Public Service Electric and Gas Company (PSEG) filed an answer to NYRI's request for rehearing. On December 16, 2008, NYRI filed an answer to all of the answers.

9. On February 2, 2009, NYRI filed a motion for expedited review of its rehearing request.[6]

A. Procedural Matters

10. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2008), prohibits an answer to a request for rehearing. Accordingly, the answers to the requests for rehearing will be rejected. Pursuant to Rule 213(a)(2) of the

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[4] *Id*. P 116.

[5] For purposes of this filing, the New York Transmission Owners consist of Central Hudson Gas & Electric Corp., Consolidated Edison Co. of New York, Inc., New York State Electric & Gas Corp., Orange and Rockland Utilities, Inc., Rochester Gas and Electric Corp., and Long Island Power Authority.

[6] NYRI's filing was coupled with a protest of NYISO's January 14, 2009 Compliance Filing. That protest and the answers filed in response to it are not a part of the instant proceeding, which is limited to the requests for rehearing of the October 16, 2008 Order.

Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), and in light of the rejection of the answers to NYRI's rehearing, NYRI's answer to the answers will be dismissed.

B. Discussion

11. In the instant order, the Commission grants in part and denies in part the requests for clarification or rehearing of the October 16, 2008 Order.

1. The Revised Reliability Agreement

12. The Joint Parties state that they seek clarification or, in the alternative, rehearing of the October 16, 2008 Order with respect to the revised Reliability Agreement which NYISO included in its Order No. 890 compliance filing. They state that the October 16, 2008 Order does not mention the revised Reliability Agreement and request that the Commission clarify that it has accepted the revised Reliability Agreement for filing or, in the alternative grant rehearing and accept it. The Joint Parties state that the Reliability Agreement is the mechanism under which the NY Transmission Owners agree that, subject to certain conditions regarding cost recovery, they will plan and construct regulated backstop solutions to reliability needs identified by NYISO during its Reliability Needs Assessment (RNA). The Joint Parties further state that while the Commission approved a nearly identical agreement submitted by NYISO in 2004,[7] that agreement was never executed. They state that the cost allocation and cost recovery mechanisms referred to by the Commission in that order were not submitted to the Commission until the June 2008 filing in the instant docket. The Joint Parties contend that the revised Reliability Agreement filed in this docket contains only two significant changes from the one approved in 2004: (1) the NY Transmission Owners' obligation to propose a backstop solution is limited to the proposal of transmission upgrades only; and (2) the NY Transmission Owners may propose, voluntarily, a regulated non-transmission upgrade subject to the implementation of a rate recovery mechanism at the state level. The Joint Parties state that, under both agreements, a NY Transmission Owner's obligation to proceed with a regulated backstop solution is conditioned on the applicable NY Transmission Owner recovering all reasonable costs related to the project.

Commission Determination

13. In the October 16, 2008 Order, we intended to accept and did accept the revised Reliability Agreement for filing, which specifies the rights and obligations of the NY Transmission Owners associated with their participation in the NYISO planning process, but, to the extent that we may not have been clear before, we make our acceptance clear

[7] *New York Indep. Sys. Operator*, 109 FERC ¶ 61,372, at P 1 (2004).

here. In the December 28, 2004 Order in Docket No. ER04-1144, the Commission accepted a Reliability Agreement as amended in a subsequent compliance filing.[8] In its June 18, 2008 filing in Docket No. OA08-52-001, NYISO filed the same Reliability Agreement as previously accepted with only the foregoing two significant revisions from the previously-accepted version. We find those revisions were and are reasonable and we make clear here, to the extent it is necessary, that we have accepted and do accept the revised Reliability Agreement for filing.

2. Rate Schedule 10

14. The Joint Parties and National Grid seek clarification or, in the alternative, rehearing of the statement in the October 16, 2008 Order that "NYISO continues to bear the ultimate burden of proof, i.e., to demonstrate the justness and reasonableness of the charges resulting from the application of the formula rate" for regulated reliability projects.[9]

15. The Joint Parties request that the Commission clarify that (1) the NY Transmission Owners and other developers retain the unilateral right to make rate filings under Rate Schedule 10 and (2) that it is the NY Transmission Owners or other developers, and not NYISO that will bear the burden of proving that rates for jurisdictional regulated transmission reliability projects recovered under new Rate Schedule 10 of NYISO's OATT are just and reasonable.

16. The Joint Parties argue that this ruling is inconsistent with the rate filing rights and responsibilities that currently exist under NYISO's OATT, as well as the express language of Rate Schedule 10 itself. They assert that Rate Schedule 10 makes clear that the rates charged for regulated reliability projects – and recovered by NYISO from Load Serving Entities (LSEs) in NYISO's footprint pursuant to the mechanism in Rate Schedule 10 – are to be based on rate filings for which the developers of those projects ultimately are responsible. They cite section 2.0 of Rate Schedule 10, which requires each Transmission Owner to have on file at the Commission the rate treatment that will be used to derive and determine the revenue requirement for regulated transmission projects undertaken pursuant to a determination by NYISO that a regulated solution is needed to address reliability needs. They also argue that this responsibility is reinforced by sections 2.0, 2.1, and 2.2, which address Transmission Owner responsibilities in the recovery of costs of Transmission Owners, pursuant to FPA section 205. The Joint Parties state that the wholesale Transmission Service charge is calculated pursuant to a

[8] *New York Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61,372, at P 39 (2004), *order on reh'g and compliance filing*, 111 FERC ¶ 61,182, at P 19 (2005).

[9] *Citing* October 16, 2008 Order, 125 FERC ¶ 61,068 at P 94.

formula set forth in Attachment H of NYISO's OATT, but the key elements of that formula are "updated based on Transmission Owner Filings to [the Commission]. . . under the FPA."[10] They add that the NY Transmission Owners retain the right to file rate changes to certain components of the wholesale Transmission Service Charge under section 205 of the FPA, and have the responsibility to justify the justness and reasonableness of those components. They contend that the assignment of this responsibility to the NY Transmission Owners is reasonable given that the rates are for facilities that they own. Furthermore, according to the Joint Parties, assigning responsibility to the NY Transmission Owners to defend their filed rates has been the long-standing practice under NYISO's tariffs, and is consistent with the purpose of FPA section 205.

Commission Determination

17. We grant rehearing. We agree with the Joint Parties that the NY Transmission Owners and other developers have the burden to justify the justness and reasonableness of the rates they file in the section 205 filings contemplated by the NYISO planning proposal, and not NYISO. We intended to recognize this burden in the October 16, 2008 Order when we stated that, "Schedule 10, section 2.0, of the proposed tariff requires each transmission owner to make a section 205 filing at the Commission detailing the rate treatment that it will use to determine the revenue requirement to be included in its reliability facilities charge."[11] However, in discussing the burden of proof regarding the inputs to or the charges resulting from the implementation of the formula approved by our October 16, 2008 Order, we inadvertently stated that "NYISO continues to bear the ultimate burden of proof, i.e., to demonstrate the justness and reasonableness of the charges resulting from application of the formula rate." We thus grant rehearing and clarify here that the NY Transmission Owners and other developers have the burden in a FPA section 205 filing to prove that rates they propose for jurisdictional regulated transmission reliability projects subject to Rate Schedule 10 are just and reasonable.

3. Cost/Benefit Metric

18. NYRI requests rehearing or, in the alternative, clarification of NYISO's proposed cost/benefit study. NYRI states that it has proposed a 1,200 MW transmission line of approximately 190 miles between Marcy, New York and New Windsor, New York (NYRI Project). NYRI states that the NYRI Project will provide sufficient transmission capability to transport 1200 MW of lower cost power generated by existing and new

[10] New York Indep. Sys. Operator, Inc., FERC Electric Tariff Original Volume No. 1, Attachment H § 2.1, Substitute First Revised Sheet No. 397.

[11] October 16, 2008 Order, 125 FERC ¶ 61,068 at P 92.

renewable and other resources in upstate New York (existing generators that, until now, have had an insufficient market for their output) and lower cost energy generated in Canada. NYRI argues that NYISO's proposed methodology for determining benefits associated with an economic project fails to account for all of the benefits of such projects, and thus will deter investment in projects that reduce congestion and provide economic and environmental benefits.

19. According to NYRI, limiting consideration to production cost savings and not considering the numerous other economic, environmental, and reliability benefits creates a bias against economic transmission investment. NYRI states that such a limitation all but ensures that no transmission project designed to reduce congestion will be built and it fails to consider the positive impact that new transmission facilities will have on the development of renewable generation resources. NYRI states that reliance on production cost savings alone is an inaccurate measure of project benefits because it wrongly assumes that the mix of generation resources will not change, it ignores the benefits associated with replacing generation projects that are costly and difficult to site with generation located remotely, and it fails to consider non-internalized, non-monetized costs. NYRI states that the most important of these benefit metrics is the reduction in customer energy prices, a metric which the Commission has traditionally relied upon. NYRI states that NYISO is unique among transmission organizations regarding its reliance solely on production cost savings as the determiner of benefits. NYRI states that the Midwest ISO, PJM, and ISO New England all use additional factors.

Commission Determination

20. We will deny NYRI's request for rehearing regarding NYISO's proposed benefit metric.[12] NYRI argues that the proposed production cost savings metric is inadequate, and will ignore the many other metrics that demonstrate a project's benefits. We disagree. As we stated in the October 16, 2008 Order, "changes in production costs resulting from a transmission project measure a project's total benefits on the entire system."[13] The production cost savings metric, identifying the total economic benefits, is fundamental to deciding whether a project is *economic* – i.e., whether it will result in the least-cost economic solution to a transmission congestion problem. The total economic

[12] The NYRI Project itself is not before us here. It would be premature for us to comment on it here. Thus, we make no findings on the merits of the NYRI Project, but rather we consider the merits of the proposed benefits metric as it would apply to any and all NYISO economic projects.

[13] October 16, 2008 Order, 125 FERC ¶ 61,068 at P 110.

benefit of a project is equal to the total producer benefit[14] plus the total consumer benefit[15] resulting from the construction of the contemplated transmission project. When the production cost savings of a transmission project exceed the cost of the transmission project, the project is one that produces overall benefits to the market as a whole. Conversely, if a transmission project costs more than the production costs that it saves, such a project would not produce overall benefits to the market as a whole. Because the production cost metric identifies projects that produce such net system-wide cost savings, we continue to find NYISO's use of the production cost metric to be a just and reasonable determinant. However, that does not mean that other metrics are ignored. Rather, as discussed below, the process also requires later consideration of other metrics, as requested by NYRI, to better inform entities who must pay for such projects of the individual benefits they may expect to receive from the projects.

21. The NYISO process is, we emphasize, a two-step process. The first step looks at system-wide benefit[16] and the second step, discussed further below, allows for an individual LSE's estimation of its individual benefit. It is reasonable that where costs are allocated, and not voluntary, in order to go forward a project should provide a system-wide benefit. Economic projects allow, for example, expensive generation located near load to be displaced with cheaper generation farther away from load. That benefit is captured in the reduction of production cost that forms the first step of NYISO's process. As the objective is to promote economic efficiency, a production cost reduction test is the relevant test. Considering other metrics at this stage, even though other RTOs may choose to do so, is not relevant to whether a project promotes economic efficiency.

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[14] The total producer benefit is the increase in net generator revenue that would result from the building of the transmission project. To determine the total producer benefit, one calculates the difference in producer benefit (total gross generator revenue minus total generator production costs) with and without the transmission project.

[15] The total consumer benefit is the decrease in net load payment that would occur as a result of the transmission project. To determine total consumer benefit, one calculates the consumer benefit with and without the transmission project.

[16] With regard to the first step, NYISO does not produce the cost/benefit analysis on its own, but does so in coordination with the stakeholders. *See* New York Indep. Sys. Operator, Inc., FERC Electric Tariff, Original Volume No. 1, Attachment Y, Original Sheet No. 958D (stating "In conducting the CARIS, the NYISO shall conduct benefit/cost analysis of each potential solution to the congestion identified, applying benefit/cost metrics that the NYISO will develop in conjunction with ESPWG. The principal benefit metric for the CARIS analysis will be expressed as the present value of the NYCA-wide production cost reduction that would result from each potential solution.").

22. However, there may be good reasons for RTOs ultimately to consider other metrics and NYISO's second step, the vote among the beneficiaries, does so. One important reason for including other metrics is that it is difficult to measure benefits accurately, because a project's production cost savings occur in the future, and thus, someone must estimate what these future benefits are going to be. Because project costs are allocated among beneficiaries, regardless of whether the beneficiaries agree with NYISO's benefit calculation, it is reasonable to build in a second step where beneficiaries vote. Thus, the parties that will actually have to pay for the project – and should have the greatest incentive to estimate benefits and burdens accurately – have a vote in determining whether costs should be allocated.

23. Other RTOs have other processes that provide for a margin of error in measuring benefits. For example, both MISO and PJM consider whether load payments will be reduced as a metric in determining whether a project should be included in the transmission plan, and thus, whether parties must pay for the project whether they want to or not. These processes are also reasonable. NYISO, however, does not need to consider the load payment metric in its first step, because the NYISO process factors in the beneficiaries' estimate of benefits in the second step, the voting process.

24. Moreover, in NYISO, a project that does not garner enough votes from the beneficiaries may still get built. That is because the parties that think that the project benefits them still have the option of proceeding voluntarily – building it and paying for it themselves, if they think that the benefits warrant their doing so.

25. NYRI also argues that the production cost savings metric wrongly assumes that the mix of generation resources will not change and ignores the benefits associated with replacing generation projects that are costly and difficult to site in areas of large population density like New York City with less expensive generation located remotely. Again, we disagree. Both economic and reliability planning processes consider changes in the generation mix including the replacement of costly generation with less expensive generation. The reliability planning process allows new generation to be identified as a solution to reliability needs of the system. In addition, through its economic planning process, NYISO will model each year what generation mix is available, and include that in the calculation of production costs. The production costs are calculated for each year of the 10-year planning horizon.

26. NYRI also states that the most important of these benefit metrics is the reduction in customer energy prices, a metric which it states the Commission has traditionally relied upon, but which it asserts the Commission has ignored here. NYRI is mistaken in its argument that the Commission ignores the impact on the energy prices paid by the

customer. As explained above and in our October 16, 2008 Order, [17] the production cost savings metric indeed captures the energy price effect on customers system-wide.

27. With regard to NYRI's argument that NYISO is unique among transmission organizations regarding its reliance solely on production cost savings as the determiner of benefits, and that reliance should have been found to be unjust and unreasonable, we find that our acceptance of a provision for one Regional Transmission Organization (RTO) does not require that the same approach be adopted in every case. Differences exist between the various RTOs' planning processes. The fact that one planning process for one RTO is just and reasonable does not preclude the possibility that other planning processes may also be just and reasonable, and even better suited, to other RTOs.

28. Finally, we note that NYISO's planning process does, in fact, incorporate the very metrics that NYRI argues should be included in the evaluation of economic upgrades. NYISO's process is a two-step process that strikes a balance between competing concerns. First, because payment of costs is not voluntary (i.e., voluntarily agreed to, such as a merchant transmission project), but rather costs are allocated, the project should show a net system-wide benefit, i.e., production cost savings. We find that it is reasonable to require net system-wide benefits before proceeding with a project for which costs will be allocated to all beneficiaries. Second, to strike an appropriate balance between NYISO's estimation of benefits from a system perspective and an individual member's estimation of benefits from its individual perspective, NYISO provides that the costs of an economic project will not be recovered under the NYISO OATT unless the project is approved by a supermajority of the beneficiaries. NYISO's approach thus allows the beneficiaries of an economic upgrade to review a number of additional metrics, such as reductions in energy and ancillary service costs, changes to generator payments, capacity costs, emissions costs, losses, etc., in deciding how to vote on a project. In our October 16, 2008 Order, we required NYISO to develop and clearly explain how such additional metrics will be calculated, weighed and/or combined.[18] This will better allow the beneficiaries who would have to pay for such projects to decide how the project, which has been shown to produce system-wide benefits (through the production cost savings metric), will affect them individually. Armed with that information, the beneficiaries should be better able to make informed decisions when voting.[19]

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[17] October 16, 2008 Order, 125 FERC ¶ 61,068 at P 110 n.99.

[18] *Id*. P 113.

[19] We note that even if a project does not receive the supermajority vote needed for cost allocation under the NYISO OATT, it can still proceed as a merchant project. *See infra* P 32.

4. Supermajority Voting Procedure

29. NYRI disagrees with the Commission's finding that:

> NYISO's supermajority voting proposal is a reasonable component of NYISO's economic planning process and that it is a valuable element in the process of selecting those economic transmission projects whose costs should be allocated through the NYISO tariff. The supermajority rule provides a useful check to ensure that a project has net benefits by requiring that most of those whom NYISO expects to benefit from a project agree that they actually will benefit.[20]

30. NYRI argues that in New York, because no other revenue source is plausible for a Transco[21] to build a $2 billion congestion-reduction project, such as the project proposed by NYRI, the power to prevent recovery of economic transmission project investment under NYISO's OATT is the power to prevent economic project construction. NYRI asserts that through its veto proposal process, NYISO abdicates responsibility for economic transmission project planning to the NY Transmission Owners, and that no other RTO in the eastern interconnection has granted such veto authority to a market participant.

31. NYRI asserts that NYISO's supermajority voting provision is anticompetitive and violates antitrust law, because "the NYISO proposal allows an LSE monopolist (such as ConEd, or group of LSE's with 21 percent or more of the benefiting load, to foreclose potential competition."[22] NYRI asserts that it is unrealistic to suggest that large expensive transmission projects can be funded outside of NYISO's cost allocation process and thus the supermajority voting proposal essentially provides ConEd or a group of LSEs with 21 percent or more of the benefiting load a veto over such projects. NYRI further claims that southeastern New York transmission owners have built-in biases against paying for transmission facilities owned by others. Thus, NYRI argues, the NYISO proposal violates anti-trust laws. NYRI contends that a requirement that NYISO monitor the supermajority voting mechanism for improper usage and file a report, for informational purposes, with the Commission is not sufficient to police the exercise of

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[20] October 16, 2008 Order, 125 FERC ¶ 61,068 at P 130.

[21] NYRI notes that a Transco is defined as a stand-alone transmission company that has been approved by the Commission and that sells transmission services at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility. 18 C.F.R. § 35.35(b)(1) (2008).

[22] *Citing Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

the veto authority and lead to detection or prevention of vote withholding designed to undermine cost-effective transmission investment. NYRI adds that a NY Transmission Owner/LSE with veto authority can exercise that authority for any or no reason at all. Thus, according to NYRI, because there is no standard, there is no "wrong" reason for denying project cost recovery under NYISO's OATT.

32. NYRI also argues that the supermajority voting provision contravenes Congress' mandates under sections 216 and 219 of the FPA and the Commission's Order Nos. 689, 679, and 890, including Congress' mandate that the Department of Energy routinely study congestion and the Commission's policy in favor of independent transmission companies. NYRI explains that the voting provision is in direct conflict with the Commission's incentive rate policy and its backstop transmission siting authority, and the provision is unduly discriminatory to independent transmission companies. According to NYRI, the requirement of a super-majority vote, which may take place after the Commission has made a determination under Order No. 679 approving incentive rate treatment for a particular transmission project, or after an Order No. 689 determination granting a construction permit in a national interest electric transmission corridor, in effect, renders the Commission's authority under these two orders, a nullity.

33. NYRI further states that the supermajority voting provision is contrary to Order No. 890 because (1) it takes the authority for regional transmission planning with respect to projects designed to reduce congestion out of the hands of NYISO and places it squarely in the hands of incumbent transmission owners, (2) it discourages transmission investment by Transcos and any other NY Transmission Owner that is not the LSE-beneficiary of a specific project, and (3) it allows a single NY Transmission Owner to place its own economic interest over the interests of all customers and market participants in having a robust, reliable, and congestion-free transmission system. According to NYRI, in Order No. 890, the Commission states that stakeholders will not have veto authority over tariff language needed to comply with Order No. 890, particularly where that veto might be motivated by a market participant's economic self-interest.[23] NYRI states that the Commission rejected a veto proposal for PJM and, similar to that proposal, NYISO's proposal does not enjoy majority transmission owner support. NYRI adds that the NY Transmission Owners who serve upstate New York adamantly opposed the supermajority voting provision.

34. Finally, NYRI requests that, to the extent the Commission does not grant rehearing of the October 16, 2008 Order, it continue to promote transmission investment by independent transmission companies by providing an alternative objective evaluation and cost allocation process for congestion reduction (or economic) projects that meet objective criteria. NYRI requests that where a project has (1) satisfied the Commission's

[23] *Citing* Order No. 890 at P 159.

transmission incentive requirements under Order No. 679, (2) been objectively evaluated by the respective Transmission Organization (e.g., NYISO), and (3) has either received state commission siting authority or a construction permit from the Commission under Order No. 689, the Commission should set for evidentiary hearing or technical conference the appropriate method for determining the project cost/benefit and the just and reasonable cost allocation and revenue recovery methodology.

Commission Determination

35. We deny rehearing in regard to the supermajority voting procedure.[24] The costs of economic transmission projects are recovered directly from the ratepayers who bear both the cost and risk of these projects. This is different from merchant (i.e. market-based) projects. Merchant developers contract directly with one or more market participants for the construction of an economic upgrade. The costs of those projects are borne solely by those market participants, and the NYISO's cost allocation procedures in Attachment Y are not invoked. As we recognized in the October 16, 2008 Order, the supermajority voting procedure at issue here is a reasonable method of determining which economic transmission project should be subject to OATT cost recovery. We explained that it "provides a useful check to ensure that a project has net benefits, by requiring that most of those whom NYISO expects to benefit from a project agree that they actually will benefit."[25]

36. Contrary to NYRI's arguments, Order No. 890-A held that a voting mechanism specifying a certain percentage affirmative vote for economic upgrades is permissible.[26] In response to a request for rehearing of Order No. 890 by Public Service Energy and Gas Company, et al. (PSEG), where PSEG supported adoption of voting processes such as a proposal requiring a minimum 30 percent approval and maximum 30 percent disapproval, the Commission in Order No. 890-A stated: "[V]oting mechanisms such as those suggested by PSEG could be adopted if stakeholders desire."[27] Thus, NYRI reads too much into the Commission's earlier statement in Order No. 890 rejecting a proposal that tariff changes to comply with Order No. 890 should be included "only with the support of

[24] As explained in note 11 *supra*, we make no findings on the merits of the NYRI Project.

[25] October 16, 2008 Order, 125 FERC ¶ 61,068 at P 130.

[26] Order No. 890-A at P 252.

[27] *Id*. (referring to PSEG Request for Rehearing, Docket No. RM05-17-002, at 14).

the RTO members who bear the costs."[28] Such a proposal would have been overly broad as it arguably would have given an absolute veto power to each market participant. By rejecting such a broad proposal, the Commission was not thereby precluding the use of voting mechanisms. In fact, voting mechanisms, such as NYISO's, meet the Commission's expressed desire in Order No. 890-A that beneficiaries who must pay for projects should have the right to determine if other solutions are superior to economic projects.[29]

37. Even if such a voting mechanism may result in one market participant casting a deciding vote, such mechanisms do not necessarily result in an unjust and unreasonable outcome. As we noted in our October 16, 2008 Order, market participants remain free to individually or jointly develop projects that have not received supermajority support at their own costs. Further, as we discuss below, merchant (i.e. market-based) solutions may be viable alternatives.

38. In addition, in the October 16, 2008, Order, we required NYISO to file, as an informational filing, a report on the voting process after the completion of each economic planning cycle.[30] Specifically, we directed NYISO to include the results of each vote on economic projects, the identified beneficiaries, the results of the cost/benefit analysis, and, if vetoed, whether the developer has provided any formal indication to NYISO as to the future development of the project. Here, we further direct that NYISO should include in such report the reasons stated by the parties that vetoed the project for their decision. This will help the Commission to better monitor the super-majority voting mechanism.

39. NYRI's argument, that a violation of anti-trust laws would occur if a group of LSEs with a combined benefit load of 21 percent votes against a project, is speculation. Moreover, we are not charged with enforcing such laws.[31] Additionally, NYRI's claim

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[28] Order No. 890, at P 159 (rejecting suggestion of Indianapolis Power & Light Company in Reply Comments, filed September 20, 2006, in Docket No. RM05-17-000, et al., at 7).

[29] *Id*.

[30] *See* October 16, 2008 Order, 125 FERC ¶ 61,068 at P 130.

[31] *See Entergy Services, Inc.*, 64 FERC ¶ 61,326, at 63,404-05 (1993) ("the Commission does not have jurisdiction to determine violations of the antitrust laws. . . and is not 'strictly bound to the dictates of these laws'"); *accord Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 960-61 (D.C. Cir. 1968)(same); *Northeast Utilities Service Co.*, Opinion No. 364, 56 FERC ¶ 61,269, at 61,998 (1991)(same), *order on reh'g*, Opinion No. 364-A, 58 FERC ¶ 61,070, *order denying reh'g*, Opinion No. 364-B, 59 FERC ¶ 61,042 (1992), aff'd in relevant part, 993 F.2d 937 (1st Cir. 1993)(noting that

(continued…)

that expensive transmission projects can not be funded outside of NYISO's cost allocation process because of opposition by southeastern New York LSEs is belied by the fact that downstate LSEs have been willing to use merchant transmission providers. For example, Consolidated Edison Energy, Inc., a wholly owned subsidiary of ConEd, was awarded transmission scheduling rights in the Linden VFT merchant line open season auction.[32] As a further example, Long Island Power Authority (LIPA) has signed some of largest long-term firm transmission contracts with merchant transmission developers, as evidenced by its long-term firm transmission contracts with both Cross Sound Cable, LLC and Neptune RTS. Thus, NYISO's supermajority voting does not foreclose potential competition. In addition, NYISO's reliability and economic planning processes always give preference to market solutions – be it transmission, generation, or demand response solutions. These planning processes ensure that no market participant is precluded from making proposals that would lower congestion in the NYISO grid.

40. In addition, we disagree with NYRI's interpretation of our PJM orders with respect to supermajority voting. NYRI argues that the Commission rejected a supermajority voting proposal for PJM; but, in fact, PJM never proposed supermajority voting. Rather, one of the intervenors, PSEG, argued in its protest for inclusion of a supermajority voting rule. The Commission stated that it could not find that, without that voting mechanism, PJM's methodology for identifying economically viable transmission projects was unjust and unreasonable.[33] As noted above, there can be more than one just and reasonable planning process and RTOs and ISOs are not required to have identical planning processes to comply with Order No. 890 and 890-A.

41. NYRI also argues that the proposed supermajority vote contravenes Congress's mandates in sections 216 (siting of interstate transmission facilities) and 219 (incentive-based rate treatment for transmission investment) of the FPA and the Commission's Order Nos. 679 and 689 which implemented these provisions. We disagree. Neither the Congressional mandates, nor the Commission orders which implement them, were intended to supplant an RTO's or ISO's planning process or the cost allocation provisions of the RTO's or ISO's tariff.

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section 203 of the Federal Power Act makes "no explicit reference to antitrust policies or principles" and that there is "no evidence that Congress sought to have the Commission serve as an enforcer of antitrust policy in conjunction with the Department of Justice and the Federal Trade Commission").

[32] The Commission accepted the results of this open season in *Linden VFT, LLC* 119 FERC ¶ 61,066 (2007).

[33] *PJM Interconnection L.L.C.*, 123 FERC ¶ 61,051, at P 86 (2008), *reh'g denied*, 126 FERC ¶ 61,152 (2009).

42. Finally, we reject NYRI's alternate proposal that, if the Commission rejects its requests for rehearing, the Commission should supplement NYISO's economic planning process with a new alternative process. NYRI's alternative proposal is beyond the scope of this proceeding.

43. As the Commission stated in Order Nos. 890 and 890-A, the economic planning principle is designed to ensure that economic considerations, and not just reliability considerations, are addressed in the transmission planning process.[34] In the October 16, 2008 Order, we found that NYISO has satisfied the requirements of the economic planning principle. NYISO's economic planning process complements the existing reliability planning process and allows market participants to request studies regarding congestion and the integration of new resources. Market participants are required to provide data necessary for development of the Congestion Assessment and Resource Integration Study (CARIS), and interested stakeholders may provide input regarding this data and any other assumptions used in the development of the congestion assessment.[35] NYRI's suggested alternative approach misinterprets the purpose of the economic planning process. Transmission incentives, evaluation of projects by NYISO, and siting are intended to work in tandem with the economic planning process, but not replace it. NYRI's alternative approach would ignore the results of NYISO's economic planning process. We find this contrary to the intent of our orders, and, for this reason as well, will reject NYRI's request for an alternative approach.

The Commission orders:

(A) The requests for rehearing or clarification are hereby granted, in part, and denied, in part, as discussed in the body of this order.

(B) To the extent it may be necessary to do so here, NYISO's revised Reliability Agreement is hereby accepted for filing.

[34] Order No. 890 at P 542; Order No. 890-A at P 239.

[35] October 16, 2008 Order, 125 FERC ¶ 61,068 at P 77.

(C) NYISO's informational reporting requirements regarding the NYISO voting process are revised as discussed in the text above.

By the Commission. Commissioner Moeller concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc. Docket No. OA08-52-003

(Issued March 31, 2009)

MOELLER, Commissioner *concurring*:

I understand that NYISO's supermajority voting requirement provides a useful check to ensure that a project has net benefits, by requiring that most of those whom NYISO expects to benefit from a project agree that they will actually benefit. Inversely, a single entity having more than 20 percent of the vote can block a project from going forward for any reason, no reason, or a self-serving reason. As such, I will continue to be mindful of both the upside and the downside of the 80 percent requirement when reviewing future informational voting reports after the completion of each economic planning cycle.

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Philip D. Moeller
Commissioner