

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket Nos. ER04-1144-000
ER04-1144-001

(December 30, 2004)

Attached is Commissioner Kelliher's statement to the order issued December 28, 2004 in the above-referenced proceeding.

Linda Mitry,
Deputy Secretary.

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Joseph T. KELLIHER, Commissioner *dissenting in part*:

I dissent in part from the order and write separately to explain my reasons.

Under the current New York Independent System Operator, Inc. (NYISO) tariff approved by the Commission, members are required to comply with reliability standards that govern operation of the bulk power system in the State of New York. The proposed planning process is directed at assuring compliance with these reliability standards. Under this process, both market-based and regulated solutions will be considered. Under some circumstances, the NYISO could require a transmission owner to seek approval from state regulators to expand transmission. However, absent such approval the transmission owner would not have authority to site transmission facilities.

It is not clear what kinds of market-based or regulated solutions may be developed under the Comprehensive Reliability Plan (CRP). Some may be matters that properly fall under state jurisdiction, others may fall under exclusive federal jurisdiction, still others may have mixed state and federal jurisdiction.

What is clear is that this is a planning process. Both the Reliability Needs Assessment (RNA) and CRP will include recommendations. NYISO members may be required to pursue certain actions. To the extent those actions are regulated solutions, they may be subject to future approval by the New York State Public Service Commission (New York Commission) and the Commission. To the extent those actions are market-based solutions, the New York Commission will retain its authority to prevent pass-through of costs by state-regulated electric utilities it deems imprudent.

In no way does this planning process impinge on the jurisdiction of the State of New York. Indeed, the planning process approved in this order grants the New York Commission an extraordinary role in the NYISO reliability planning process, one that, in my view, is not consistent with the Federal Power Act (FPA).

Under the proposed planning process, the New York Commission would have screened alternative regulated solutions proposed by non-transmission owners. Proposals that did not meet their favor would not have even been presented to the NYISO. The New York Commission would also have resolved disputes arising under the planning process. Disputes relating to the final conclusions of recommendations of the RNA could have been referred to the New York Commission. Significantly, determinations by the New York Commission would have been final, and not subject to review by the Commission. Moreover, those determinations would have been subject to judicial review in state courts. Disputes arising out of the CRP were required to be referred to the New York Commission, not the Commission. Again, determinations by the New York Commission would have been final, not subject to review by the Commission, and subject to judicial review in state courts.

The Commission's role in determining the NYISO's compliance with a tariff approved by the Commission and issued under the FPA would have been limited to those matters not decided by the New York Commission.

The NYISO is a public utility regulated by the Commission under the FPA. It is not a state-regulated electric utility regulated by the New York Commission. Compliance with a tariff approved by the Commission, issued under the FPA, is a matter for the Commission to decide, not the New York Commission.

I agree with some of the policy decisions made by the Commission with respect to circumscribing the role of the New York Commission in the planning process and the appropriate forum for judicial review. The Commission properly rejected the proposed screening role for alternative regulated solutions proposed by non-transmission owners. The Commission also allowed that some disputes arising under a Commission-approved tariff may be considered by federal courts, rather than state courts.

However, the order still allows the New York Commission a role that I believe is inconsistent with the FPA. The New York Commission would make final determinations regarding compliance with a tariff issued by the Commission, determinations that could not be considered or reversed by the Commission. Certain disputes arising under a Commission approved tariff would be subject to judicial review in state court. In my view, that is not consistent with the FPA. The order could also be vulnerable on constitutional grounds, since it seems we are commandeering the machinery of state government for a federal purpose. The fact that the New York Commission is eager to offer its machinery is irrelevant to whether the Commission may legally vest the New York Commission with such authority.

I recognize that it is difficult to forecast what kinds of solutions may be advanced in the RNA and CRP. Without that knowledge, it is difficult to draw jurisdictional lines.

That argues for flexibility in our approach. As I indicated earlier, disputes arising under the planning process will fall into three different jurisdictional categories: state jurisdiction, mixed federal and state jurisdiction, and exclusive federal jurisdiction. It is reasonable to vary our approach towards resolution of disputes based on jurisdiction. In the case of disputes regarding matters that fall under state jurisdiction, I would have granted the New York Commission a role. In that circumstance, I believe the Commission should establish a joint board under section 209 of the FPA,¹ composed of a member or members of the New York Commission. That would provide a means for state resolution of disputes arising from the NYISO planning process that is consistent with the FPA. Since I joined the Commission I have looked for circumstances where the Commission could establish joint boards. This is one area where I believe a joint board is appropriate.

Disputes may also fall under mixed federal and state jurisdiction. Indeed, most disputes may well fall under this category. The order provides the possibility of joint or concurrent hearings for resolution of these disputes. However, there is no certainty the Commission will act in this manner. If not, the New York Commission will resolve disputes involving mixed federal and state jurisdiction, and parties would be barred from appealing the decisions of the New York Commission to the Commission. Even though these disputes involve federal jurisdiction, judicial review will occur in state courts, not federal courts.

The order may limit the role of the Commission to resolution of only those disputes that involve the exclusive jurisdiction of the Commission. Very few disputes are likely to fall into this category, and this category may be a null set. If that proves the case, all disputes arising out the planning process will be decided by the New York Commission. Through its control of the planning process, the New York Commission would be in a position to control filings made by NYISO to the Commission. That would clearly violate the FPA.²

The effect of this order is to grant the New York Commission control over the planning process of a public utility established to assure compliance with a Commission-approved tariff. While the order does not transmogrify the NYISO into a state-regulated electric utility, it grants an improper measure of control to the state over a public utility that is otherwise subject to the exclusive jurisdiction of the Commission.

Joseph T. Kelliher

¹ 16 U.S.C. § 824h (2000).

² Commonwealth of Massachusetts v. United States, 729 F.2d 886 (1st Cir. 1984).