

UNITED STATES OF AMERICA 88 FERC ¶ 61,229
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hébert, Jr.

Central Hudson Gas & Electric
Corporation
Consolidated Edison Company of
New York, Inc.

Long Island Lighting Company
New York State Electric & Gas
Corporation

Niagara Mohawk Power Corporation
Orange and Rockland Utilities, Inc.
Rochester Gas and Electric
Corporation

and
New York Power Pool

Docket Nos. ER97-1523-005,
ER97-1523-006, OA97-470-006,
ER97-4234-004 and EC99-31-001

ORDER APPROVING AGREEMENT ON GOVERNANCE AND
DENYING REQUESTS FOR REHEARING

(Issued September 15, 1999)

This order addresses the proposed governance structure of the New York Independent System Operator (New York ISO) filed by the Member Systems of the New York Power Pool (NYPP)

(collectively Member Systems or Transmission Providers)¹ in compliance with our April 30, 1999 order (April 30 order).² In this order, we also deny requests for rehearing of the April 30 order .

Background

On June 30, 1998, the Commission conditionally authorized the establishment of an ISO by the Member Systems in order to restructure the wholesale electric industry in the state of New York.³ The June 30 order found that the proposal submitted by the Member Systems satisfied the 11 ISO principles enunciated in Order No. 888.⁴ That order approved the majority of the ISO governance provisions proposed by the applicants, including the establishment of the New York State Reliability Council (NYSRC). However, the Commission found that the proposed voting structure of the ISO committees was problematic. In pertinent part, the Commission found that the weighted voting structure of the ISO committees⁵ would assign excessive voting power to the Member Systems.⁶ The Commission directed the Member Systems and all interested parties to negotiate and propose a modified voting structure.

¹The seven public utility Member Systems are Central Hudson Gas & Electric Corporation (Central Hudson), Consolidated Edison Company of New York, Inc. (ConEd), Long Island Lighting Company (LILCO), New York State Electric & Gas Corporation (NYSEG), Niagara Mohawk Power Corporation (Niagara Mohawk), Orange and Rockland Utilities, Inc. (O&R), and Rochester Gas and Electric Corporation (Rochester G&E). The eighth Member System, the New York Power Authority, is not a public utility. For the ease of reading, rather than distinguishing repeatedly between the two, we shall refer to all eight together as Member Systems or Transmission Providers.

²Central Hudson Gas & Electric Corp., et al., 87 FERC ¶ 61,135 (1999).

³Central Hudson Gas & Electric Corp., et al., 83 FERC ¶ 61,352 (1998).

⁴See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

⁵A detailed discussion of the responsibilities of each committee is contained in the June 30 order. See 83 FERC at 62,408.

⁶Id. at 62,409.

On October 23, 1998, the Member Systems filed an agreement among themselves and eighteen other parties addressing the ISO governance and reflecting a revised voting structure of the ISO committees.

In the April 30 order, the Commission found that, with minor modifications, the representation contained in the proposed agreement for the Operating and Business Issues Committees balanced the needs of Transmission Providers, wholesale suppliers and retail customers. However, the Commission rejected the Member Systems' proposal regarding governance for the Management Committee, finding that the proposed weighted voting vested a disproportionate amount of power in the Transmission Providers. The Commission directed the Member Systems to submit a new proposal concerning the governance that eliminated the control of the vertically integrated utilities in the NYPP and represented as many stakeholders as possible.

The April 30 order also authorized the transfer of jurisdictional facilities to the New York ISO.

The Agreement

On July 2, 1999, the Member Systems submitted an agreement concerning the governance structure of the New York ISO. The Member Systems state that the revised ISO governance procedures are the product of a dispute resolution process and have widespread support among parties from all major segments of the industry.

The agreement filed by the Member Systems in this proceeding proposes a sector voting governance structure. As proposed by the Member Systems, the Management Committee will consist of the following five sectors and corresponding voting percentages: (1) Transmission Providers (20%); (2) Generator owners (21.5%); (3) Other suppliers, including marketers and energy service companies (21.5%); (4) End-use consumers (20%); and (5) Public power/environmental parties (17%). The end-use consumers sector is further divided into three subsectors and corresponding voting percentages: (1) Large consumers (10%); (2) Small consumers (5%); and (3) Governmental entity (5%). The public power/environmental sector is further divided into three subsectors: (1) State public power authorities (8%); (2) Municipal electric systems and cooperatively owned electric systems (7%); and (3) Environmental (2%).

Under the proposed governance structure, the vote required to approve a measure before the Management Committee is reduced from sixty-seven to fifty-eight percent of the total votes cast.

In its filing, the Member Systems have also proposed a change in representation on the Operating and Business Issues Committees from twenty-five member committees, representing various sectors, to committees in which all parties participate.

In addition, the agreement provides for a shortened time frame for handling disputes. The proposal provides that the Dispute Resolution Administrator will be given 10 days, rather than thirty days, to decide whether a dispute should be sent to non-binding mediation or arbitration. Moreover, disputing parties have thirty days, rather than ninety days, to resolve a dispute that has been referred to non-binding mediation.

Notices of Filings and Interventions

The agreement was noticed in the Federal Register, 64 Fed. Reg. 38,415 (1999), with protests and motions to intervene due on or before July 22, 1999.

Motions to intervene out-of-time with comments in support of the agreement were filed by Citizens Power, LLC, AES-NY, TransCanada Power Marketing, Ltd., Indeck Energy Services, Inc. and Constellation Power Source (collectively, Citizens Power); Tractebel Energy Marketing, Inc. and Aquila Energy Marketing Corp (Tractebel); and Wisvest CT, LLC (Wisvest). These parties support the proposed governance proposal, stating that it balances the competitive interests of market participants and other interested persons.

Additional comments in support of the agreement were filed by the New York Public Service Commission (New York Commission) and Enron Power Marketing, Inc. The New York Commission requests that the Commission approve the revised governance proposal, noting the widespread support of the proposal and the equitable share of voting that market participants possess under the current approach. The New York Commission states that, unlike the previous governance proposal, the current allocation does not allow the Transmission Providers to dominate the Management Committee.

Protests were filed by the City of New York on behalf of the New York City Public Utility Service (NYCPUS), 1st Rochdale Cooperative Group, Ltd. and Consolidated Housing Services, Inc. (1st Rochdale) and the New York Power Authority (NYPA).

The City of New York explains that the NYCPUS is an entity that purchases electricity and transmission services from NYPA and additional transmission and distribution services from Con Ed, and then resells electricity at retail to customers in New York City. The City of New York argues that the NYCPUS has been improperly excluded from the New York ISO's governance structure and should be entitled to participate in the "Other Suppliers" sector.

NYPA objects to a provision in the proposed governance that prohibits it from participating in any sector other than the "public power/environmental" sector. NYPA argues that possible changes in its operations and services (such as divestiture of generation and transmission) could render its present

sector inappropriate. NYPA claims that a restriction on movement from one sector to another as it pertains to NYPA is arbitrary and discriminatory.⁷

1st Rochdale objects to the proposed governance on the ground that it fails to provide retail marketers a full opportunity to participate in the governance of the New York ISO. 1st Rochdale notes that the "Other Supplier" sector does not distinguish between wholesale and retail suppliers of energy. Thus, it argues that an additional subsector should be created which allocates a greater percentage of the "Other Supplier" vote specifically to retail suppliers in order to give retail marketers a distinct voice in the governance of the New York ISO. 1st Rochdale also requests that the Commission evaluate the sector voting after one year.

Requests for rehearing of the April 30 Order

Separately, requests for rehearing and/or clarification of the April 30 order were filed by the Member Systems and Sithe/Independence Power Partners (Sithe). The arguments that these parties raise in their pleadings are discussed below.

Discussion

Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1997), given the stage of this proceeding and the absence of undue delay or prejudice, we find good cause to grant the untimely, unopposed motions to intervene of Citizens Power, Tractebel and Wisvest.⁸

The Agreement

⁷NYPA claims that language in Section 7.04 of the Agreement effectively prohibits it from transferring out of the public power/environmental sector. That language states:

If a Party is qualified to participate in more than one sector, it shall advise the ISO President, in writing, of the Sector in which it chooses to vote; provided, however, that. . . a State Public Power Authority qualified to participate in the Public Power/Environmental Party Sector must participate in that Sector.

⁸Certain of the parties to the joint motions to intervene have been separately admitted as intervenors previously in the underlying dockets to this proceeding. Therefore, we do not need to act here on their requests for late intervention.

The revised governance proposal submitted by the Member Systems is the result of an open settlement process facilitated under the general oversight of an administrative law judge of the New York Commission, the New York ISO counsel and the Director of the Commission's Dispute Resolution Service. In addition, it reflects broad consensus of interested parties to the New York electricity market.

Under the revised governance proposal, Transmission Providers belong to their own sector, which possesses 20% of the vote. Together with the 8% of the vote allocated to the state public power authorities, the resulting 28% of the vote is significantly less than the 55% of the vote possessed by these parties under the previous weighted voting proposal.

We are satisfied that the voting structure as submitted by the Member Systems affords fair representation across a broad spectrum of market participants. Moreover, the current proposal does not provide the vertically integrated utilities an opportunity to control the Management Committee, because they have only 28% of the vote, as compared to the 58% of the vote necessary to carry a measure. This addresses our earlier concern (under the previous weighted voting structure) that the Transmission Providers would have the ability to dominate the Management Committee.⁹ Accordingly, we will approve the proposed voting structure of the Management Committee of the New York ISO.

We find that the concerns of the City of New York, NYPA and 1st Rochdale do not warrant rejection or modification of this widely-supported proposed governance proposal. First, the City of New York's interest is already adequately represented in the governance under the "End Use Consumer" sector. Second, creating additional subsectors to accommodate each variation of market participants, as advocated by 1st Rochdale, seems unnecessary and would complicate a result which has been negotiated and agreed upon by most parties at this time. Third, with regard to the concerns of NYPA, the circumstances which may warrant a change in its status within the governance structure (i.e., changes in legislation) are speculative at this time. We do not see a need to modify the governance proposal at this time to address a concern regarding a possible future need for NYPA to change sectors.

We will, however, require the New York ISO to file a status report on the operation of the governance structure after one year from the commencement of operations. This will allow the Commission to revisit parties' concerns regarding sector representation.

⁹The proposed sector voting is also consistent with the governance structure approved by the Commission in PJM Interconnection, et al., 81 FERC ¶ 61,257 (1997), order on reh'g, 82 FERC ¶ 61,047 (1998).

We also accept the other proposed changes to the governance structure, including the change in representation on the Operating and Business Issues Committees and the proposed changes in the dispute resolution process.¹⁰

Rehearing of the April 30 Order

On rehearing, the Member Systems argue that the Commission's decision to reject the governance settlement was arbitrary and capricious. We reiterate that the previously submitted governance proposal vested disproportionate and unacceptable voting power with the Transmission Providers and provided an opportunity for them to dominate the Management Committee of the ISO.¹¹ The Member Systems have not persuaded us to alter our earlier decision in this regard.

Sithe argues that the Commission did not address its comments regarding the ISO's operational control over facilities connected to transmission facilities under ISO control, such as substations, circuit breakers, and disconnect switches. Sithe requests the Commission to determine expressly that the ISO also must have control over associated facilities that are interconnected with each transmission facility. We previously stated, in the April 30 order and earlier, that the designation of which facilities were to be under ISO operation control or subject to ISO notification was reasonable.¹² Sithe has not provided sufficient justification for us to alter the designation of facilities under the control of the ISO.

The Commission orders:

(A) The agreement on governance filed by the Member Systems is hereby accepted for filing effective the date the New York ISO becomes operational.

(B) The Member Systems are hereby required to file a report on the status of the governance of the New York ISO, as discussed in the body of this order.

(C) The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Bailey dissented in part with a separate statement attached.

¹⁰We note that the dispute resolution process is similar to the PJM dispute resolution process which we approved. 81 FERC ¶ 61,257 at 62,268.

¹¹87 FERC at 61,540-41.

¹²Id. at 61,543 & n. 37.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

Central Hudson Gas & Electric
Corporation, et al.

Docket Nos. ER97-1523-005, et al.

(Issued September 15 , 1999)

BAILEY, Commissioner, dissenting in part

I disagree with the decision of the Commission in today's order to the extent it denies rehearing of the April 30 Order. In that order, I dissented from the decision to reject a negotiated settlement of the governance structure of the Management Committee of the New York ISO. 87 FERC at 61,546-47. I continue to believe that the Commission should have accepted the previously-submitted

consensus governance proposal. For this reason, I disagree with the judgment of the Commission in today's order that the earlier proposal "vested disproportionate and unacceptable voting power with the Transmission Providers and provided an opportunity for them to dominate the Management Committee of the ISO."

The parties to the earlier proposal -- representing a broad spectrum of interested parties, working with the support and facilitation of the New York Department of Public Service -- did not think that the Transmission Providers were in a position to exhibit "disproportionate" influence over the activities of the Management Committee (which would have required a 67% vote). I continue to fail to understand why the Commission was not more deferential to the consensus it had previously encouraged. Indeed, the Commission bases its decision in today's order to accept the latest settlement proposal on the fact that it is the result of an "open settlement process," as well as the product of "broad consensus of interested parties to the New York electricity market." That rationale equally would have justified approval of the previously-submitted consensus proposal. (Both of the settlements were opposed by a small minority of intervenors.)

I hope that the Commission's series of orders in this proceeding will not be construed as allowing for only one type of model -- the sector voting model approved today -- of ISO governance, or otherwise inhibiting flexibility and innovation in the design and administration of ISO governing and voting structures.

Vicky A. Bailey
Commissioner