

UNITED STATES OF AMERICA 90 FERC ¶ 61,015
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Central Hudson Gas & Electric
Corporation
Consolidated Edison Company of
New York, Inc.
New York State Electric & Gas
Corporation
Niagara Mohawk Power Corporation
Orange and Rockland Utilities, Inc.
Rochester Gas and Electric
Corporation

Docket Nos. ER00-550-000
and ER00-556-000

ORDER ACCEPTING PROPOSED TARIFF REVISIONS
FOR FILING, AS MODIFIED

(Issued January 12, 2000)

This order addresses proposed revisions to the New York Independent System Operator's (New York ISO or ISO) Open Access Transmission Tariff (ISO Transmission Tariff), the New York ISO Services Tariff (ISO Services Tariff) and various related agreements submitted by the New York ISO and the Member Systems of the New York Power Pool (Member Systems) (together, Applicants). With the modifications discussed below, we accept the proposed changes.

Background

In Docket No. ER00-550-000, the ISO and the Member Systems have proposed revisions to the tariffs "to memorialize the outcome of negotiations between the Member Systems and the New York ISO with respect to proposed changes to the Commission-approved ISO Tariffs and ISO related

Agreements." ¹ The Applicants assert that the filing addresses certain issues which must be resolved for the orderly functioning of New York ISO operations and to provide for greater consistency between the ISO Tariffs and agreements. It includes proposed revisions to the ISO Transmission Tariff, ISO Services Tariff, ISO/Transmission Owner Agreement, ISO Agreement, and the ISO/New York State Reliability Council (NYSRC) Agreement and addresses indemnification, liability limitation, ISO obligations with respect to Transmission Owners, ISO tariff and agreement amendment procedures, identification of Transmission Owner rights under ISO operation, and procedures for the Transmission Owners to withdraw from participation in the ISO/Transmission Owner agreement.

With one exception as noted below, Member Systems and the New York ISO request waiver of notice to allow an effective date of November 18, 1999, the date the New York ISO commenced operations.

In Docket No. ER00-556-000, the Applicants seek to revise the ISO Transmission Tariff, and the ISO Services Tariff to address certain revisions that Member Systems and the New York ISO characterize as essential to the commencement of ISO operations. The application contains revisions which modify certain provisions of the tariffs, as well as numerous non-substantive clarifying, typographical, grammatical and stylistic changes. The Applicants note that some of the proposed revisions were previously rejected without prejudice by the Commission because they were included in a compliance filing. ²

The Member Systems and the New York ISO request waiver of notice to allow an effective date of November 18, 1999, the commencement date of New York ISO operations.

II. Notice of Filings and Interventions

Notice of the Applicants' filing in Docket No. ER00-550-000 was published in the Federal Register, 64 Fed. Reg. 66,621 (1999), with protests and interventions due on or before November 30, 1999. ³ Notice of the Applicants' filing in Docket No. ER00-556-000 was published in the Federal Register, 64 Fed. Reg. 66,623 (1999), as amended 64 Fed. Reg. 69,244 (1999), with protests and interventions due on or before December 13, 1999.

¹Transmittal letter at 2.

²See Central Hudson Gas & Electric Corp., *et al.*, 89 FERC ¶ 61,110 (1999).

³ Under ordinary circumstances, the last date of Commission action on this filing would be January 9, 2000. At the Commission's request, the Applicants submitted a letter to allow the Commission to extend the time to act on the filing so it can be acted on at the regularly scheduled January 12, 2000 meeting.

Parties filing motions to intervene and/or protests are listed in Appendix A of this order.

On December 15, 1999, in Docket No. ER00-550-000, the Applicants filed a response to the protests and comments filed by the intervenors. On December 17, 1999, in Docket No. ER00-556-000, the Applicants filed a response to the protests and comments filed by the intervenors. In addition, on December 27, 1999, the New York ISO filed an additional answer in Docket No. ER00-556-000.

III. Discussion

A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1999), the timely, unopposed motions to intervene of those parties listed in the Appendix serve to make them parties to this proceeding.

Although the Commission's Rules of Practice and Procedure do not permit answers to protests,⁴ given the complex nature of this proceeding, and given that the answers help in clarifying certain issues, we will accept the answers filed by the Applicants.

B. Docket No. ER00-550-000

Unilateral Modification of Tariffs by ISO Board

Currently, all revisions to New York ISO tariffs and agreements require the ISO Board to obtain the concurrence of the Management Committee, which is comprised of ISO participants. Applicants propose to revise this authority to permit the ISO Board to unilaterally file to revise any ISO tariff or agreement without concurrence of the Management Committee when necessary to "address exigent circumstances" related to the New York ISO market or the transmission grid. The provision states that any such proposed revisions would terminate within 120 days after the date of filing with the Commission.

PG&E Generating and PG&E Energy Trading-Power L.P.(PG&E Gen) and Sithe/Independence Power Partners, L.P. (Sithe) state that this provision is open ended and ill defined. They claim that since there are no criteria for invoking this authority other than that a situation requires immediate aid or action, the ISO Board is vested with the authority to make changes of any kind for any reason. PG&E Gen requests rejection of the revisions. Sithe requests rejection of the provision as it relates to energy markets, and that revisions terminate in 60 days rather than 120 days.

⁴See 18 C.F.R. § 385.213(a)(2) (1999).

It is reasonable for an ISO to have the ability to file a unilateral amendment with the Commission when the ISO believes that immediate action is necessary to protect the integrity of an energy market or the transmission grid.⁵ We reject Sithe's request to require the revisions to terminate in 60 days and will accept the Applicants' proposal in this regard.

Indemnification and Liability

The Applicants have added a provision to the ISO Transmission Tariff that would limit their liability except in circumstances of negligence or willful misconduct.

While the ISO Transmission Tariff retains the pro forma tariff's indemnification language, the Applicants have added language to Section 10.2 that provides that the ISO will procure insurance or other alternative risk financing arrangements to cover the risks associated with carrying out its responsibilities under the ISO Transmission Tariff. The added language further provides that proceeds from such insurance would be used by the ISO before it exercises its right to seek indemnification. Finally, the language provides that, unless indemnification is required directly from a particular transmission customer, indemnification costs would be recovered under the existing Schedule 1 charge under the ISO Transmission Tariff.

Dynergy Power Marketing, Inc. (Dynergy) and Connecticut Municipal Electric Energy Cooperative note that the Applicants seek to place inappropriate limits on their liability. Dynergy claims such a limitation would be inconsistent with prior Commission rulings.⁶ Moreover, 1st Rochdale Cooperative Group, Ltd. and Coordinated Housing Services, Inc. (1st Rochdale) contends that Applicants have set up a framework in which New York ISO depends on Member Systems to shield it from risk of operating the ISO, but where a Member System at fault cannot be required to provide indemnification. 1st Rochdale argues that this proposal should be rejected, as it appears to be biased in favor of the Member Systems, who would not bear the full responsibility for their actions. Moreover, 1st Rochdale notes that New York ISO has provided neither a detailed formula nor specific cost support for the recovery of indemnification costs under Schedule 1 and requests rejection of the Applicants' proposal in this regard.

We will reject the additional liability provision to the ISO Transmission Tariff. The pro forma tariff does not address (and was not intended to address) liability issues, for the reasons discussed in

⁵In fact, a substantively similar provision was accepted for the PJM ISO. *Pennsylvania-New Jersey-Maryland Interconnection, et al.*, 81 FERC ¶ 61,257 (1997), order on reh'g, 82 FERC ¶ 61,047 (1998).

⁶See *Central Hudson Gas & Electric Corp, et al.*, 83 FERC ¶ 61,352 at 62,412 (1998); *Dynergy Protest* at 3.

Order No. 888.⁷ Instead, the Applicants should pursue any legal remedies they may have with respect to liability in the appropriate forum.⁸

We will accept the proposed language added to Section 10.2, regarding insurance, as consistent with or superior to the pro forma tariff, only to the extent that, as provided by the pro forma tariff, transmission customers are not required to indemnify (in any manner, including through the payment of insurance premiums) the ISO or the Transmission Owner in cases of negligence or intentional wrongdoing.⁹ We direct the Applicants to refile this proposed language to clearly reflect the requirements of the pro forma tariff and this determination.

In addition, while we will allow the ISO Transmission Tariff to be amended to allow the addition of costs to the Schedule 1 charge, before Applicants may recover any such costs they must file pursuant to section 205 of the FPA to do so, with appropriate justification and cost support.

Cost Shifting

The Applicants propose to revise the New York ISO/Transmission Owner Agreement to add a new section 6.15 which would require New York ISO and Member Systems to work together in good faith to resolve any cost shifting that may occur as a result of litigation in Docket No. ER97-1523-011, et al., dealing with third party grandfathered agreements. PG&E Gen notes that it is unclear whether this refers to cost shifts solely among the Member Systems. To the extent the provision may bind third parties, PG&E Gen requests rejection. The Applicants answer that the provision is not intended to be binding on third parties or the Commission.

⁷See 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 at 30,301-02 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 at 62,080-81(1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998). See also, Pacific Gas and Electric Company, et al., 81 FERC ¶ 61,122 (1997); Delmarva Power & Light Company, 88 FERC ¶ 61,247 (1999).

⁸See Order No. 888-B at 62,080-81.

⁹ See Order No. 888-A at 30,514. Payment by transmission customers of insurance premiums for insurance that covers negligence or intentional wrongdoing is effectively the same as transmission customers directly indemnifying against negligence or intentional wrongdoing, which we consistently have not allowed. See, e.g., Rochester Gas and Electric Corp., 78 FERC ¶ 61,262 at 62,122 & nn.10-11 (1997), reh'g denied, 82 FERC ¶ 61,250 (1998).

As clarified by the Applicants, the provision merely requires New York ISO and Member Systems to work in good faith to resolve cost shifts and would not bind third parties. Moreover, any attempt to reallocate cost shifts resulting from litigation would require a section 205 filing. Therefore, we will accept this proposed change.

Amortization of Start-up Costs

The Applicants propose to reduce the period for amortizing New York ISO start-up costs from ten to five years. Municipal Electric Utilities Association of New York State (MEUA) notes that the Commission set for hearing New York ISO's recovery of start-up costs,¹⁰ including the ten-year amortization period, and Applicants should not be permitted to end-run the hearing. The Applicants respond that they have proposed the same change in the ongoing hearing proceeding. Accordingly, we will accept these revisions subject to the outcome of the hearing in that proceeding.

Recovery of NYPA Transmission Adjustment Charges (NTAC)

The Applicants propose to revise section 3.06 of the New York ISO/Transmission Owner Agreement to state that the agreement is conditioned on the Transmission Owners being "authorized" to recover the NTAC, as opposed to being "able" to recover NTAC costs.

MEUA objects to the revision, noting that recovery of NTAC charges is at issue in the hearing in Docket No. ER97-1523-000, et al. The Applicants respond that the change is merely a clarification since the Commission has already approved recovery of the NTAC charges. The Applicants add that the issue at hearing is limited to the extent to which the NTAC can be recovered from grandfathered customers.

We find that the hearing is unaffected by Applicants' proposed revision, which merely clarifies that recovery of the NTAC must be authorized by the Commission. Accordingly, we will accept this revision.

C. Docket No. ER00-556-000

Scheduling of Transmission Service in the Balancing Market Evaluation

The New York ISO Transmission Tariff currently provides that a generator within the New York ISO control area is deemed to have supplied into the market 100 percent of the power it scheduled, regardless of whether the generator actually delivers the power. Under that provision, a

¹⁰ Central Hudson Gas & Electric Corp., et al., 89 FERC ¶ 61,032 (1999).

generator is deemed to have purchased any shortfall between the scheduled and delivered amounts from the New York ISO and resold it to the third party purchaser. This provision was accepted and set for hearing along with amendments to existing Qualifying Facility (QF) power purchase agreements, in Docket No. ER97-1523-011, et al. ¹¹

To prevent a QF from having to make any purchases from the New York ISO, the Applicants propose to revise the ISO Transmission Tariff and ISO Services Tariff to retroactively adjust: (1) the scheduled output for certain generators pursuant to existing must-take QF power purchase contracts so that the scheduled output of the QF is adjusted to equal the actual output in each hour; and (2) transmission service from these generators so that the amount of transmission service scheduled in the hour-ahead Balancing Market Evaluation (BME) is adjusted to equal the generator's actual output in the hour.

Selkirk Cogen Partners, L.P. (Selkirk) asserts that the proposal, while a step in the right direction, is incomplete. Specifically, Selkirk states that the adjustment mechanism addresses only sales under the Public Utility Regulatory Policies Act (PURPA) ¹² and does not include merchant sales made by a QF. It argues that if the tariff does not treat merchant sales by the QF in the same fashion as PURPA sales, the QF may be required to purchase and resell power from New York ISO, thereby facing risk of loss of QF status. Selkirk also requests that the provision be expanded to include all merchant sales by QFs, not just sales under existing contracts. Otherwise, Selkirk asserts it may be required to take transmission service under the New York ISO transmission tariff rather than use its transmission rights under its existing grandfathered transmission service agreements. Finally, Selkirk notes that issues concerning grandfathered contracts are currently being litigated in Docket No. ER97-1523-011, et al., and that acceptance of the revisions without modification would adversely affect ongoing litigation.

We conclude that the treatment of merchant sales by QFs is an issue in the ongoing litigated proceeding; any resolution from that proceeding will require a revision to the filed tariff provisions. Accordingly, we will accept the proposed revisions subject to the outcome of Docket No. ER97-1523-011, et al.

Payment Obligations of Transmission Owners in Transmission Congestion Auctions Contract (TCC)

Available TCCs are acquired by market participants through an auction at the market clearing price. The market clearing price can be positive or negative; a positive price requires a payment to the seller, while a negative price requires a payment to the purchaser. Auction revenues are then distributed

¹¹ Central Hudson Gas & Electric Corp., et al., 88 FERC ¶ 61,306 (1999).

¹² 16 U.S.C. § 824 a-3 (1994).

to the transmission owners through the New York ISO. In order to encourage the release of additional transmission capacity by transmission owners into the auction, Applicants propose to revise the ISO Transmission Tariff and the ISO Services Tariff such that transmission owners releasing residual TCCs or existing transmission capacity for native load into the auction will not incur a payment obligation to the other transmission owners if the ultimate purchaser acquires the TCC at a negative market clearing price. Instead, it proposes that all transmission owners will proportionately bear the cost of the negatively-valued TCC through the auction revenues distribution process which is already in place.

1st Rochdale contends that this policy contradicts the price signals that are sent by the market regarding the value of congested transmission paths.

Participants that are awarded TCCs with negative value (that is, they are paid to take the TCC) will receive payments for taking those negatively valued TCCs. The proposed amendment simply sets forth a system by which auction revenues are distributed among the transmission owners. Because the proposed revision only impacts revenue sharing between the transmission owners and does not change the payments made to the TCC holder, this policy will have no effect on price signals sent by the market for TCCs. Given that no transmission owner has any objections to this revenue distribution mechanism, we will accept this provision.

Congestion Revenues

The Applicants have added minor clarifications indicating that congestion revenues from the real-time market which do not flow through to TCC holders will be used to offset the Scheduling, System Control, and Dispatch Service (Schedule 1) costs. Excess congestion revenues from the day-ahead market, where TCCs apply, will revert back to the transmission owners.

1st Rochdale believes that this provision requires considerable clarification. It contends that it is unclear how the Schedule 1 offset for real-time congestion rents will be applied. It suggests that such rents be refunded back to the transmission customers that paid the congestion revenues. Similarly, 1st Rochdale objects to the refund of excess day-ahead congestion revenues to transmission providers, claiming that this fails to provide transmission providers (the primary holders of TCCs) the incentive to alleviate congestion, but rather grants them an opportunity for profit.

We disagree with 1st Rochdale's concerns and find that the Applicants' revisions merely clarify the difference between congestion revenues in the day-ahead market and congestion revenues in the real-time market. The Commission has already approved the use of excess congestion rents to offset Schedule 1 charges as well as the payment of excess rents to transmission owners. Moreover, 1st Rochdale's request to refund real-time excess congestion rents back to those transmission customers who paid them would render the New York ISO's congestion management system meaningless; under 1st Rochdale's proposal, transmission customers would effectively not pay any congestion in real-time, and hence would receive the wrong price signals regarding the allocation of transmission capacity. 1st

Rochdale's concern that transmission owners will have a disincentive to relieve congestion due to excess rent payments is without merit. Therefore, we will approve the Applicants' proposed clarifications.

Installed Capacity

The Applicants propose to calculate a Load Serving Entities' (LSE) installed capacity requirements annually rather than seasonally—equal to the greater of: (1) the amount of energy consumed by an LSE's customers during the peak hour for the time period containing that capability period, or the immediately preceding capability period, whenever the load was greater; or (2) the average amount of energy consumed by that LSE's customers over the duration of the capability period in which the highest peak load occurred. Applicants explain that LSEs will have the same requirement for the winter and summer periods, assuming no customers switch LSEs.

1st Rochdale complains that the "greater of" change increases costs for LSEs and dilutes seasonal market signals and realities. It suggests that installed capacity requirements be computed more frequently so that the amount of installed capacity required during lower peak load periods is lower, and hence imposes lower costs on LSEs.

1st Rochdale's arguments mirror those rejected in the January 27 and July 29 orders, where the Commission approved the New York ISO's installed capacity requirements on an annual basis and rejected comments calling for more frequent changes of installed capacity requirements. Accordingly, we will accept the Applicants' proposed change.

Regulation Penalties

The Applicants propose to exempt from the regulation penalty: (1) generators providing power under existing contracts, including PURPA contracts, in which the power purchaser does not have control over the operation of the supply source; (2) certain turbine generators that provide steam within New York City; and (3) existing intermittent generators.

The Public Service Commission of the State of New York (New York Commission) states that the costs associated with the proposed exemptions cannot be accurately ascertained at this time. Therefore, it requests the Commission to order the ISO to revisit, through a collaborative process six months from the start-up of the New York ISO, how such costs will be allocated among market participants.

1st Rochdale argues that the proposed exemptions may be unduly discriminatory due to the fact that other parties, such as LSEs, will be called upon to make up the difference. It also argues that adequate support is not provided for the modification.

We agree with the intervenors that these exemptions are inappropriate at this time. The Applicants have provided no rationale for exempting any class of participants from regulation charges. Accordingly, we will reject this provision without prejudice to refiling the proposal in a separate docket including appropriate justification and cost support.

Additional Working Capital

The Applicants propose to revise the Schedule 1 (scheduling, cost recovery) formula to specify that the line item "capital requirements" specifically includes working capital. The Applicants note that it must have sufficient funds available to balance receipts and payments on a monthly basis.

1st Rochdale argues that the proposed revision should be rejected because the Applicants have neither supported the addition of working capital costs to the scheduling charge nor the components of the existing scheduling charge.

We disagree with 1st Rochdale that the revision proposed here should be rejected since the New York ISO requires working capital to operate. Moreover, the Applicants have not added costs, but rather, have added greater specificity to their existing formula. This does not require support since it recovers only New York ISO's actual costs. Accordingly, we accept this provision.

D. Effective Date and Waiver of Notice

The Applicants request the filings to become effective on the date the New York ISO commences operations. With respect to the effective date for changing the amortization period for the recovery of start-up costs, the New York ISO requests an effective date of January 1, 2000. In addition, the Applicants request waiver of the Commission's notice requirement because that date is likely to be less than 60 days from the date of the filings.

We find good cause to grant the Applicants' request for waiver of the 60-day prior notice requirement and we will allow the accepted tariff revisions to become effective, as requested, on the date the New York ISO commenced operations.¹³ Moreover, we will allow the January 1, 2000 effective date for changing the amortization period as requested.

The Commission orders:

¹³ See Central Hudson Gas & Electric Corp., et al., 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).

(A) The Applicants' filings are hereby accepted, as modified, to become effective as discussed in the body of this order.

(B) The Applicants are hereby directed to make a revised filing, with the modifications directed herein, within 30 days of the date of this order.

(C) The Applicants will be informed of rate schedule designations at a later date.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

Docket No. ER00-550-000

1st Rochdale Cooperative Group, Ltd. and Coordinated Housing Services, Inc. *
AES, NY, L.L.C.
Connecticut Municipal Electric Energy Cooperative *
Dynegy Power Marketing, Inc. *
Municipal Electric Utilities Association of New York State *
PG&E Generating and PG&E Trading-Power, L.P. *
Sithe/Independence Power Partners, L.P. *
Southern Energy Bowline, L.L.C., Southern Energy Lovett, L.L.C. and
Southern Energy NY-Gen, L.L.C.

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* Parties also filing comments or protests

** Parties filing comments only