

UNITED STATES OF AMERICA 91 FERC ¶ 61,012
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
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.

Docket Nos. ER00-550-001
and ER00-556-001

New York State Electric & Gas
Corporation
Niagara Mohawk Power Corporation
Orange and Rockland Utilities, Inc.
Rochester Gas and Electric
Corporation

ORDER ON REHEARING

(Issued April 4, 2000)

On January 12, 2000, the Commission issued an order ¹ accepting with certain modifications proposed revisions to the New York Independent System Operator's (New York ISO or ISO) Open Access Transmission Tariff (ISO OATT), the New York ISO Services Tariff (ISO Services Tariff) and various related agreements submitted by the New York ISO and Members of the Transmission Owners Committee of the Energy Association of New York State (Member Systems). ² As discussed below, we grant rehearing on the issue of recovery of liability insurance costs and deny rehearing on all other issues.

¹ New York Independent System Operator, Inc. *et al.*, 90 FERC ¶ 61,015 (2000) (January 12 Order).

² The Member Systems were formerly known as the member systems of the New York Power Pool.

Background

The January 12 Order addressed two dockets. In Docket No. ER00-550-000, the New York ISO and the Member Systems 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 as well as ISO-related Agreements intended to, *inter alia*, provide for greater consistency between these documents. In Docket No. ER00-556-000, they sought certain revisions in the ISO OATT and the ISO Services Tariff which they characterized as essential to the commencement of ISO operations. We will address only those issues raised by the parties on rehearing.

The applicants proposed a provision to the ISO OATT that would limit their liability except in circumstances of negligence or willful misconduct. Additionally, they proposed adding language to Section 10.2 of the OATT governing indemnification which provided that the ISO will procure insurance or other alternative risk financing arrangements to cover the risks associated with carrying out its responsibilities under the tariff. The proposed language also provided that any proceeds from such insurance would be used by the ISO before it exercises its right to seek indemnification, and 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.

The January 12 Order rejected these proposals. First, the Commission rejected the proposed liability provision because "the *pro forma* tariff did not and was not intended to address liability issues," and held that the parties "should pursue any legal remedies they may have with respect to liability in the appropriate forum."³ Concerning the proposed addition to Section 10.2, the Commission accepted the proposed language regarding insurance, as consistent with or superior to the *pro forma* tariff, "only to the extent that, as

³ 90 FERC at 61,034 (footnote omitted). The Commission relied on language in Order No. 888 and particularly Order No. 888-B in this regard. *See* 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).

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." The Commission noted in this regard that "payment by transmission customers of insurance premiums for insurance that covers negligence or intentional wrongdoing" was "effectively the same as transmission customers directly indemnifying against negligence or intentional wrongdoing." ⁴

Finally, while the Commission permitted the ISO OATT to be amended to allow the addition of indemnification costs to the Schedule 1 charge, it held that before the New York ISO or the Member Systems "may recover any such costs they must file pursuant to section 205 of the [Federal Power Act (FPA)] to do so, with appropriate justification and cost support." ⁵

The January 12 Order additionally addressed the applicants' proposed exemption from regulatory penalty for certain classes of generators. ⁶ Responding to the concerns of the New York Public Service Commission (New York Commission) that the costs associated with the proposed exemptions could not be accurately ascertained, and of 1st Cooperative Group, Ltd. and Coordinated Housing Services, Inc. (1st Rochdale) that the exemption could result in discriminatory cost shifting and was not adequately supported, the Commission rejected the exemption as "inappropriate at this time" because the applicants had "provided no rationale for exempting any class of participants from regulation charges." ⁷ However, this rejection was without prejudice to the parties refiling the proposal in a new docket with appropriate justification and cost support.

⁴ 90 FERC at 61,035 & n.9, citing Rochester Gas and Electric Corp., 78 FERC ¶ 61,262 at 62,122 & nn.10-11 (1997), reh'g denied, 82 FERC ¶ 61,250 (1998) .

⁵ 90 FERC at 61,035 (footnote omitted)

⁶ The classes of generators are: (1) generators providing power under existing contracts, including contracts under the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 824 a-3 (1994), 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 generators whose electric output is intermittent because it is subject to environmental elements or actions taken by public authorities.

⁷ 90 FERC at 61,037.

Finally, as relevant here, the January 12 Order accepted a proposal by the applicants 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 reliability of the transmission grid, which revision would be effective for up to 120 days. The Commission concluded that it was 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."⁸

Timely requests for rehearing were filed by the New York ISO, the Member Systems, the New York Commission, AES, NY, L.L.C. (AES), PG&E Generating, Selkirk Cogen Partners, L.P. and PG&E Energy Trading-Power, L.P. (PG&E Companies), Sithe/Independence Power Partners, L.P. (Sithe), and 1st Rochdale. On February 11, 2000, the Independent Power Producers of New York, Inc. (IPPNY) filed a motion to intervene out of time in these proceedings, and a request for rehearing. Also, on March 3, 2000, Indeck Energy Services of Corinth, Inc. (Indeck) filed a motion to intervene in these proceedings.⁹

The New York ISO, the Member Systems, the New York Commission, Sithe, AES and 1st Rochdale all assert that the Commission erred in denying the New York ISO the ability to recover the cost of insurance from transmission customers. The New York ISO explains that because Section 10.2 of its OATT (following the pro forma tariff) does not provide for indemnification in cases of negligence or intentional wrongdoing either by the New York ISO or the Member Systems, the New York ISO "has no alternative to acquiring liability insurance," and indeed must do so as a matter of "Good Utility Practice."¹⁰ The Commission's decision, the New York ISO states, imposing a requirement

that would deny the [New York] ISO the opportunity to recover the costs of insurance from its customers would effectively deny [it] the ability to purchase insurance

⁸ 90 FERC at 61,034 (footnote omitted). The Commission further noted that it had accepted a substantively similar provision. 90 FERC at 61,034 n.5, citing Pennsylvania-New Jersey-Maryland Interconnection, et al., 81 FERC ¶ 61,257 (1997), order on reh'g, 82 FERC ¶ 61,047 (1998).

⁹ On March 20, 2000, the Member Systems filed an answer to Indeck's motion.

¹⁰ New York ISO Request for Rehearing at 4.

[T]he [New York] ISO has no other sources from which it could pay insurance premiums. It will not be paying dividends to shareholders, nor will it have any retained earnings. It cannot operate under such circumstances. [¹¹]

The New York ISO further observes that the Commission has routinely permitted utilities to recover the costs of insurance as part of their cost of service, and that insurance expenses have thus always been included in Section 4 of Schedule 1 of its OATT.

The New York ISO additionally argues the Commission erred by requiring a section 205 filing with appropriate justification and cost support before it may recover the costs of indemnification. Because it has no alternative to recover such costs except through its OATT, the New York ISO observes that a section 205 filing "would serve no useful purpose, [as] [a]ny denial of recovery by the Commission would require [it] either to sell the very assets it needs to operate or to declare bankruptcy." ¹²

1st Rochdale argues with respect to the January 12 Order's resolution of the indemnity provision issues that the Commission ignored its view that certain provisions of the ISO/Transmission Owners Agreement unfairly shield the New York ISO and the Member Systems from indemnification obligations and place such obligations on the users of the ISO. According to 1st Rochdale, these indemnity provisions render the New York ISO beholden to the transmission owners for the risks of establishment and operation of the ISO, while the owners have "no clear responsibility" to the ISO, "and the Transmission Owner at fault cannot be called upon to provide indemnity." ¹³

PG&E Companies, Sithe and the Member Systems seek rehearing of the portion of the January 12 Order rejecting the regulatory penalty exemption.¹⁴ The Member Systems

¹¹ Id. at 6.

¹² Id. at 7. The other parties seeking rehearing on this issue essentially agree with the New York ISO's analysis.

¹³ 1st Rochdale Request for Rehearing at 7.

¹⁴ The New York Commission asserts that its comments on this issue may have been misinterpreted by the Commission. It notes that it "supported the exemptions on an interim basis," but "ask[ed] for a collaborative process" to ascertain the costs at issue and how they should be allocated among market participants. Request for Rehearing of New

assert that the regulation charge was crafted to provide an incentive to generators to comply with regulation requirements, but that the classes of generators for which the exemption was proposed "are not capable of accurately following an output schedule and therefore not capable of complying with the [r]egulation requirements."¹⁵ They state that qualifying facilities (QFs) operating under PURPA contracts which do not require QF plants to be designed or built to follow regulation requirements are in this position, as are steam/electric generating units which cannot accurately follow the New York ISO's basepoint signals and still meet their customer demand, and intermittent renewable resource generators whose output is dictated by environmental and regulatory factors beyond their control. Thus, the Member Systems contend that it is reasonable to exempt these classes of generators from the regulation charge, because the regulation charge cannot serve as an incentive to comply with requirements that are beyond the operational capabilities of the generators.

The Member Systems also assert that the New York ISO's proposal merely provided a mechanism to maintain the regulatory status quo in New York, where such regulation service costs have always been borne by load rather than these categories of generators, so that the proposed exemption will not result in cost shifting. Finally, the Member Systems allege that the Commission's decision is contrary to federal policy to encourage such classes of generators.¹⁶

PG&E Companies and Sithe additionally argue that the January 12 Order's rejection of the exemption of these generator categories from regulation charges is inconsistent with the Commission's policy of not permitting generic abrogation of existing contracts, in that removal of the exemption would result in such generators paying a

¹⁴(...continued)
York Commission at 1 n.2.

¹⁵ Member Systems Request for Rehearing at 4 (Docket No. ER00-556-001).

¹⁶ PG&E Companies further claim that the Commission's decision on this issue runs counter as well to the policy of the State of New York, designed to foster development of "more efficient and environmentally compatible generators," such as those to whom the exemption would apply. PG&E Companies Request for Rehearing at 6-7.

charge for service under the ISO OATT even though the service is covered under their existing transmission agreements.¹⁷

1st Rochdale also seeks rehearing of the January 12 Order on the ground that it failed to address what it terms "the fundamental question" of the New York ISO's independence, in light of the proposed tariff amendment being made as a joint filing by the New York ISO and the Member Systems, which presents "at least the appearance of control of the decisionmaking process by one class of participants, i.e., the Transmission Owners."¹⁸ 1st Rochdale alleges that the Commission's acceptance of this joint filing is inconsistent with both precedent governing filings by Independent System Operators as well as principles espoused by the Commission in the course of promulgating Order No. 2000.¹⁹

Finally, Sithe maintains that the January 12 Order erred in accepting the New York ISO's proposal permitting its board to file unilateral amendments which may be effective up to 120 days from the filing date if the board certifies that exigent circumstances exist with regard to matters of reliability or market integrity. According to Sithe, such tariff amendments, which do not have Management Committee approval, should expire no later than 60 days after their effective date, and be limited to addressing an exigent circumstance related to reliability.

Discussion

We will deny the late motions to intervene of IPPNY and Indeck. As the Commission recently stated: "[O]ur regulations require prospective parties to intervene in

¹⁷ On March 3, 2000, the New York ISO filed in Docket No. ER00-556-000 a so-called "status report" and request for deferral of action by the Commission on the regulation charge exemption issue. The New York ISO states that proposed exemption was based "at least in part, on assumptions that schedules would be provided to the [New York] ISO that would fairly accurately predict the actual operation of such generating units," which has not occurred. New York ISO March 3 Letter at 1. The New York ISO further states that it has discussed these issues with affected parties and will continue to do so "to achieve a consensus." Id. at 2.

¹⁸ 1st Rochdale Request for Rehearing at 3.

¹⁹ Id. at 3-4, citing Pacific Gas & Electric Co., 77 FERC ¶ 61,204 at 61,816 (1996); Regional Transmission Organizations, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,541 at 33,718 (1999).

a timely manner or to demonstrate good cause for intervening out of time." ²⁰ Neither IPPNY or Indeck attempt to explain why they are filing at this late stage of the proceedings, after the issuance of the January 12 Order, and they both raise issues that were raised by other parties and have been fully addressed by the Commission. We therefore find no good cause for their late interventions and deny the motions. It follows that, because IPPNY and Indeck are not parties to these proceedings, they cannot request rehearing of the January 12 Order. ²¹

The Commission will grant rehearing on the January 12 Order's determination that the New York ISO not be permitted to recover the cost of liability insurance from its transmission customers. We agree that such insurance is a cost of doing business, and, as we have recognized in the past, a recoverable cost of service. ²² We also find, upon fuller consideration, that payment for insurance premiums is not the same as directly indemnifying the actual costs of negligence or wrongdoing, which is the reason, as just noted, that payment of insurance premiums has been a permissible cost of doing business recoverable in rates. Accordingly, we grant rehearing, and we will allow the New York ISO to recover the cost of liability insurance in its rates. It follows that we grant rehearing on our decision that a section 205 filing is required to recover the costs of liability insurance in rates; such costs are recoverable through Schedule 1 of the New York ISO OATT.

In all other respects, however, we reaffirm the January 12 Order on the issues of indemnification and liability. ²³ Furthermore, we reject 1st Rochdale's argument that

²⁰ New York State Electric & Gas Corporation, et al., 87 FERC ¶ 61,342 at 62,323 (1999).

²¹ E.g., PJM Interconnection, L.L.C., 88 FERC ¶ 61,039 at 61,091 & n.11 (1999). In view of our disposition of Indeck's motion, we dismiss the Member Systems' answer to the motion as moot.

²² See, e.g., Alabama Tennessee Natural Gas Company, 48 FPC 774, 780 (1972).

²³ In arguing that the January 12 Order erred in rejecting the proposed liability clause, the Member Systems cite Pacific Gas & Electric Co., et al., 81 FERC ¶ 61,122 at 61,519-20 (1997), order on reh'g, 82 FERC ¶ 61,223 (1998) (PG&E), in which the Commission permitted such a liability limitation provision. However, to the extent the cited decision authorized such a provision, it is inconsistent with the other precedent cited on this issue by the January 12 Order, see 90 FERC at 61,034 n.7. Also, the Commission

(continued...)

the contested language governing the relationship between the ISO and the transmission owners in the ISO/Transmission Owners Agreement is unfair. Nothing in this language is inconsistent with the provisions governing indemnification contained in the pro forma tariff.

Concerning the regulation charge exemption, we observe that, in their initial filing, the New York ISO and the Member Systems provided no rationale and that we rejected it on this basis. Additionally, we advised the parties that they could refile their proposal in a separate docket with appropriate justification and cost support. Instead, they have chosen to renew their proposal in this proceeding with new justification. The Commission has often held that it looks with disfavor on new justifications advanced on rehearing.²⁴ We therefore deny the requests for rehearing on this issue.²⁵

We deny 1st Rochdale's request for rehearing that the January 12 Order failed to address the alleged unfairness of the New York ISO and the Member Systems jointly filing the tariff revisions at issue. As the New York ISO and the Member Systems have previously explained, the joint filing was the product of their negotiations to resolve issues necessary to allow the start-up of ISO operations.²⁶ Under these circumstances, we do not believe that the joint filing by the parties is vulnerable to 1st Rochdale's rather vague charge of "unfairness," or contradicts our views expressed in any other proceedings.

Finally, the Commission rejects Sithe's objection to our permitting unilateral amendments by the New York ISO Board on reliability or market integrity matters to be

²³(...continued)

is considering the issue on rehearing in that proceeding, see, e.g., Initial Brief of the California Independent System Operator Corporation, Docket No. ER98-3760-000, et al., at 13-25. We therefore decline to follow PG&E on this issue.

²⁴ E.g., Northern States Power Company (Minnesota), et al., 64 FERC ¶ 61,172 at 62,522 (1993) (citations omitted); Public Service Company of Colorado, 62 FERC ¶ 61,013 at 61,059-60 (1993).

²⁵ We are constrained to reject the New York ISO's request that we defer a decision on this issue, because the parties who requested rehearing on this issue (the New York ISO did not) have not sought any such delay.

²⁶ See Response of the Member Systems and the New York ISO at 3-4 (Docket No. ER00-550-000 December 15, 1999).

effective for 120 days (rather than Sithe's proposed 60 days) as conclusory and unsupported. We therefore reject Sithe's request for rehearing on this issue.

The Commission orders:

(A) The motions to intervene of IPPNY and Indeck are hereby denied.

(B) The requests for rehearing of the New York ISO, the Member Systems, the New York Commission, AES, Sithe and 1st Rochdale are hereby granted on the issue of liability insurance, as explained in the body of this opinion.

(C) In all other respects, the requests for rehearing of all parties are hereby denied.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.