

# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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## PUBLIC SERVICE COMMISSION

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January 31, 2011

SENT VIA ELECTRONIC FILING  
Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Room 1-A209  
Washington, D.C. 20426

Re: Docket No. ER11-1844-000 - Midwest Independent  
Transmission System Operator Inc.

Dear Secretary Bose:

Attached, for filing, is the Request for Rehearing of the New York State Public Service Commission in the above-entitled proceeding. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler  
Assistant Counsel

Attachment  
cc: Service List

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission     )     Docket No. ER11-1844-000  
System Operator Inc.                     )

REQUEST FOR REHEARING  
OF THE NEW YORK STATE  
PUBLIC SERVICE COMMISSION

INTRODUCTION

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure, the New York State Public Service Commission (NYPSC) respectfully submits its Request for Rehearing of the Commission's Order issued in the above-referenced proceeding on December 30, 2010 (December 30, 2010 Order).<sup>1</sup> The December 30, 2010 Order accepted and suspended, subject to refund based on the outcome of settlement and hearing procedures to resolve issues of material fact, tariff sheets filed by the Midwest Independent Transmission System Operator, Inc. (MISO) and International Transmission Company (ITC) (collectively

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<sup>1</sup> Docket No. RM11-1844-000, Midwest Independent Transmission System Operator Inc., Order Accepting and Suspending Proposed Tariff Sheets and Establishing Hearing and Settlement Judge Procedures, 133 FERC ¶61,275 (issued December 30, 2010). The NYPSC submitted a timely Notice of Intervention and Protest in this proceeding on November 17, 2010.

Petitioners) on October 20, 2010 (October 20, 2010 Petition).<sup>2</sup> The October 20, 2010 Petition proposed to allocate, for the first time, the costs of replacing Phase Angle Regulator facilities located solely within the MISO region to other regions, including the regions administered by the PJM Interconnection (PJM) and the New York Independent System Operator, Inc. (NYISO).<sup>3</sup>

The NYPSC maintains that the Commission impermissibly accepted the October 20, 2010 Petition because it contains tariff provisions allocating the costs of facilities within MISO to regions other than the MISO on an involuntary basis. By doing so, the Commission has made a significant departure from its precedent, which has consistently rejected attempts by utilities to involuntarily impose related costs on neighboring utilities in the first instance. However, the Commission has not presented any explanation or rationale for this departure.

The December 30, 2010 Order could have profound implications for interregional planning, which is the subject of the Commission's recent Notice of Proposed Rulemaking on Transmission Planning and Cost Allocation by Transmission Owning

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<sup>2</sup> The Commission suspended the tariff sheets for a nominal period, and made them effective on January 1, 2011.

<sup>3</sup> The costs of the facilities would be allocated 49.6% to MISO, 19.5% to PJM, and 30.9% to NYISO.

and Operating Public Utilities.<sup>4</sup> The Cost Allocation NOPR posited that the planning process and cost recovery methodologies for transmission facilities, which may be needed on an interregional basis, must be based on tariff provisions developed in advance.<sup>5</sup> In the first instance, these tariff provisions would be developed cooperatively and with mutual agreement among neighboring regions.<sup>6</sup> Under the Cost Allocation NOPR, if a facility is not located within a transmission planning region, then the costs could not be assigned involuntarily to that region. The Commission appears to have abandoned this approach and prejudged the Cost Allocation NOPR by accepting MISO and ITC's unilateral allocation of costs for facilities located within the MISO region, and involuntarily recovering them from other regions.

The NYPSC is concerned with the Commission's sudden and abrupt departure from its precedent and the Cost Allocation NOPR. Particularly troubling is that the December 30, 2010 Order provides support for the proposition that a utility may

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<sup>4</sup> Docket No. RM10-23-000 - Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Notice of Proposed Rulemaking (issued June 17, 2010) (Cost Allocation NOPR).

<sup>5</sup> See, Cost Allocation NOPR.

<sup>6</sup> Id. at ¶165. The Commission would direct appropriate tariff provisions to be implemented if a mutual agreement could not be reached.

unilaterally impose the costs of transmission facilities located within their region on other regions, without any prior involvement of the other region in the planning process. The Commission's decision may lead to contentious cost allocation disputes between regions, and undermine efforts to establish collaborative interregional transmission planning processes. It is foreseeable that the Commission's decision will result in numerous filings by utilities seeking to shift the costs of transmission facilities to other regions that purportedly receive benefits from those facilities.

In addition, the December 30, 2010 Order would undermine the Commission's Broader Regional Markets initiative, which sought the involvement of stakeholders in each affected region.<sup>7</sup> Rather than developing consensus approaches with the involvement of all affected stakeholders, the December 30, 2010 Order would allow MISO to single out its preferred approach and obtain financial assistance from other regions. Our preferred approach would involve the preparation of an interregional planning study involving all affected regions to find an optimal solution that could garner the support of affected stakeholders. For all of the above reasons, the NYPSC respectfully asks that

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<sup>7</sup> See, Docket No. ER08-1281-000, New York Independent System Operator, Inc., Order on Compliance Filing (issued July 15, 2010), reh'g, Order on Rehearing and Compliance (issued December 30, 2010).

the Commission grant our Request for Rehearing and dismiss the petition filed by MISO and ITC without prejudice, pending the issuance of a final order based on the Cost Allocation NOPR.

#### STATEMENT OF ISSUE

Issue: Whether the Commission's decision, which failed to address parties' arguments and departed from precedent, was arbitrary, capricious, or otherwise not in accordance with law.<sup>8</sup>

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<sup>8</sup> In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right...; or, unsupported by substantial evidence." See, 5 U.S.C. §706; see also, Public Service Commission of the Commonwealth of Kentucky v. Federal Energy Regulatory Commission, 397 F.3d 1004, 1008-09 (D.C. Cir. 2005) (finding that the Commission may not ignore arguments that have been presented); Federal Communications Commission v. FOX Televisions Stations Inc., 129 S. Ct. 1800, 1811 (2009) (finding that an agency is required to provide a reasoned explanation for "disregarding facts and circumstances that underlay or were engendered by [a] prior policy"); Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841, 852 (D.C. Cir. 1970) (determining that an agency must engage in reasoned decision-making when changing course from its prior precedents), cert. denied, 403 U.S. 923 (1971); Docket No. ER95-215-000, Southern California Edison Company, et al. Order Accepting for Filing and Suspending Proposed Rates and Establishing Further Procedures, 70 FERC ¶61,087, 61,250 (issued January 27, 1995); Cost Allocation NOPR.

## DISCUSSION

### The Commission's Failure To Explain Why The December 30, 2010 Order Departed From Precedent Was Arbitrary, Capricious, And Not In Accordance With Law

Under the "arbitrary and capricious" standard within the Administrative Procedure Act, the Commission must respond meaningfully to the arguments that have been raised.<sup>9</sup> More importantly, when the Commission deviates from its prior decisions, as it has done here, it is required to explain the reasons for the deviation. As courts have consistently held, an agency must supply a reasoned analysis when modifying its prior policies.<sup>10</sup>

In this proceeding, several arguments have been presented that support the Commission's rejection of the October 20, 2010 Petition. In particular, the NYPSC argued that the Commission's precedent does not support the involuntary

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<sup>9</sup> Public Service Commission of the Commonwealth of Kentucky v. Federal Energy Regulatory Commission, 397 F.3d 1004, 1008-09 (D.C. Cir. 2005) (finding that the Commission may not ignore arguments that have been presented).

<sup>10</sup> See, Federal Communications Commission v. FOX Televisions Stations Inc., 129 S. Ct. 1800, 1811 (2009) (finding that an agency is required to provide a reasoned explanation for "disregarding facts and circumstances that underlay or were engendered by [a] prior policy"); see also, Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841, 852 (D.C. Cir. 1970) (determining that an agency must engage in reasoned decision-making when changing course from its prior precedents), cert. denied, 403 U.S. 923 (1971).

allocation of costs to entities outside of the MISO that were not included as part of a planning process. According to its precedent,

[t]he Commission has consistently rejected unilateral filings by single utilities proposing to impose charges, terms and conditions on a neighboring utility that, according to the filing utility, is responsible for loop flows. The Commission has required utilities, in the first instance, to work to resolve these highly complex issues [related to loop flow] among themselves.<sup>11</sup>

The Commission should acknowledge that it recently put forth a proposal to require that a cost allocation methodology be put in place in advance for allocating the costs of intraregional facilities among different regions; and even there, the Commission proposed to leave the determination of an appropriate cost allocation methodology to the voluntary agreement of the affected regions.<sup>12</sup> Moreover, the Commission articulated the principle in its Cost Allocation NOPR that "[t]he allocation method for the cost of an intraregional facility must allocate costs solely within that transmission planning region unless another entity outside the region or

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<sup>11</sup> Docket No. ER95-215-000, Southern California Edison Company, et al. Order Accepting for Filing and Suspending Proposed Rates and Establishing Further Procedures, 70 FERC ¶61,087, 61,250 (issued January 27, 1995).

<sup>12</sup> See, Cost Allocation NOPR at ¶ 165 (proposing to allow transmission providers to develop a cost allocation method that best suits the needs of that planning region).



another transmission planning region *voluntarily* agrees to assume a portion of those costs."<sup>13</sup> In addition, the Commission indicated that "[c]osts cannot be assigned involuntarily under [the Cost Allocation NOPR] to a transmission planning region in which that facility is not located."<sup>14</sup> Thus, the December 30, 2010 Order is inconsistent with the Commission's Cost Allocation NOPR and the principles articulated therein.

The Cost Allocation NOPR carries forward the Commission's established principle affording parties the ability to voluntarily develop interregional cost allocation methodologies. The Commission should not undermine support for the Cost Allocation NOPR by accepting the October 20, 2010 Petition, which contradicts the Commission's principle. Moreover, as part of the Commission's effort to expand interregional planning and gain the acceptance of stakeholders, it is important that the planning process and proposed cost allocation rules are established up front before actual transmission planning studies are performed, and not after the fact, as proposed in the October 20, 2010 Petition.

The October 20, 2010 Petition would have far reaching implications upon the Cost Allocation NOPR and affect a broader

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<sup>13</sup> Cost Allocation NOPR at ¶ 164(4) (emphasis added).

<sup>14</sup> Cost Allocation NOPR at ¶ 174(4).

group of stakeholders than the limited number of stakeholders involved in this proceeding involving. The Commission should not prejudge the outcome of the Cost Allocation NOPR by determining issues of national interest in this limited proceeding.

In reaching its decision accepting Petitioners' proposed cost allocation and issuing the December 30, 2010 Order, the Commission did not address parties' arguments supporting the rejection of the October 20, 2010 Petition, or explain why it was deviating from its prior decisions. Therefore, the December 30, 2010 Order was arbitrary, capricious, and otherwise not in accordance with the law, contrary to the requirements of the Administrative Procedure Act.<sup>15</sup>

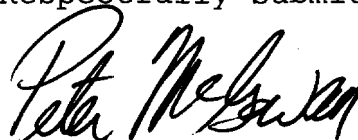
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<sup>15</sup> 5 U.S.C. §706.

CONCLUSION

For the reasons discussed above, the Commission should grant the NYPSC's Request for Rehearing, and reject the October 20, 2010 Petition.

Respectfully submitted,



Peter McGowan  
General Counsel  
Public Service Commission  
of the State of New York

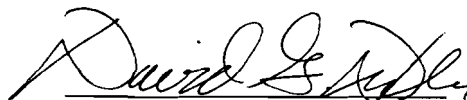
By: David G. Drexler  
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3 Empire State Plaza  
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(518) 473-8178

Dated: January 31, 2011  
Albany, New York

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: Albany, New York  
January 31, 2011



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