



**Public Service
Commission**

Public Service Commission

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June 1, 2015

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. ER14-2518-000 - New York Independent
System Operator, Inc.

Dear Secretary Bose:

For filing, please find 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

New York Independent System) Docket No. ER14-2518-000
Operator, Inc.)

REQUEST FOR REHEARING OF THE
NEW YORK STATE PUBLIC SERVICE COMMISSION

INTRODUCTION AND SUMMARY

The New York State Public Service Commission (NYPSC) respectfully requests rehearing of the Federal Energy Regulatory Commission's (FERC or Commission) April 2015 Order, which determined that the Commission is the "only agency with jurisdiction to issue a 'compensation order'" that requires a generator in an outage state to respond to reliability needs by returning to service.¹ The April 2015 Order failed to recognize that the NYPSC may approve Reliability Support Services Agreements (RSSAs) that serve as a "Compensation Order," whereby generators are compensated in exchange for their commitment to be available if needed for reliability purposes. The Commission's determination impermissibly interferes with the NYPSC's authority to ensure adequate levels of generation facilities needed for safe and reliable service, which are matters reserved to the States under the Federal Power Act

¹ Docket No. ER14-2518-002, New York Independent System Operator, Inc., Order Conditionally Accepting In Part And Rejecting In Part Proposed Tariff Changes And Directing Compliance Filing, 151 FERC ¶61,075 (issued April 30, 2015) (April 2015 Order), ¶¶48-52.

(FPA). The Commission must recognize that the NYPSC has the authority and obligation to act to ensure reliability, particularly where local reliability needs arise, as New York is the single state within the NYISO.

In addition, the April 2015 Order exceeded the Commission's jurisdiction over generation facilities by seeking to compel generators to provide service. Because the Commission lacks authority under the FPA to order a generator to return to service, the Commission cannot grant itself such authority by accepting tariff provisions that compel a generator to return to service under a "Compensation Order." The Commission compounds its error by proclaiming that it is the "only agency" that may issue such a Compensation Order. To address these errors, the NYPSC seeks rehearing of the April 2015 Order pursuant to Section 313 of the Federal Power Act (16 U.S.C. §8251) and Rule 713 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.713).²

BACKGROUND

On July 28, 2014, the New York Independent System Operator, Inc. (NYISO) filed proposed tariff revisions that, in

² The NYPSC submitted its Notice of Intervention in this proceeding on September 2, 2014. The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to Section 12 of the New York Public Service Law, the Chair of the NYPSC is authorized to direct this filing on behalf of the NYPSC.

relevant part, define various generator outage states and clarify that generators classified under certain outage states are ineligible to participate in the Installed Capacity market.³ The NYISO also proposed tariff amendments that address circumstances where a generator has been selected as either a Gap Solution or to resolve a reliability issue arising on the non-bulk power system. The proposed amendments specified that such a generator shall return to service in a timely manner where they have received a Compensation Order from an applicable regulatory agency.⁴

On October 7, 2014, the NYPSC filed comments on the NYISO's proposed tariff amendments explaining that the New York State Public Service Law (NYS PSL) assigns the NYPSC responsibility for, inter alia, ensuring "safe and adequate service" by "electric corporations," which include independently-owned generation owners.⁵ In order to fulfill that responsibility, the NYPSC takes an active role in reviewing whether the proposed retirement of independently-owned generation facilities may adversely affect reliability, and thereafter ensuring the maintenance of adequate levels of

³ Capitalized terms, which are not otherwise defined herein, have the meanings specified in the NYISO tariffs.

⁴ The April 2015 Order determined that FERC was the only applicable regulatory agency that may issue a Compensation order.

⁵ NYS PSL §§2(13) and 65-66.

generation facilities needed to maintain reliability. This includes providing for compensation to such generators under Reliability Support Services Agreements (RSSAs) that ensure the generator remains available to provide reliability services until a long-term solution is implemented.⁶ These RSSAs merely compensate generators for keeping their facilities available, while any wholesale sales remain regulated by FERC.

The NYPSC further explained that the NYISO's tariff clarifies that the NYPSC may select a generation facility as either a Gap Solution or to address a non-bulk transmission system need, and may issue a Compensation Order (i.e., an RSSA). In particular, the NYISO tariff specifies that "[t]he appropriate governmental agency(ies) and/or authority(ies) with jurisdiction over the implementation or siting of Gap Solutions will determine whether the Gap Solution or an alternative Gap Solution will be implemented to address the identified Reliability Need."⁷ The NYISO tariff also provides that the "[c]osts related to regulated non-transmission reliability projects will be recovered by Responsible Transmission Owners, Transmission Owners and Other Developers in accordance with the

⁶ As the NYISO noted in its July 28, 2014 filing, the NYPSC has approved several reliability service agreements. See, e.g., NYPSC Case 12-E-0136, Dunkirk Power LLC and NRG Energy, Inc., Order Deciding Reliability Need Issues and Addressing Cost Allocation And Recovery (issued May 20, 2013).

⁷ NYISO Open Access Transmission Tariff (OATT), Attachment Y, §31.2.10.4.

provisions of New York Public Service Law, New York Public Authorities Law, or other applicable state law.”⁸

REQUEST FOR REHEARING

I. STATEMENT OF ISSUES

- A. Whether the Commission erred in directing tariff provisions that interfere with the NYPSC’s authority to make resource adequacy determinations and to approve RSSAs with generating facilities needed for reliability.⁹
- B. Whether the Commission erred in directing tariff provisions granting the Commission exclusive authority to issue a Compensation Order and to compel a generation facility to return to service.¹⁰

II. DISCUSSION

- A. The Commission Should Grant Rehearing Because The April 2015 Order Interferes With the NYPSC’s On-Going Exercise of Authority Over Matters Affecting Generation Facilities, Resource Adequacy, and Reliability, and Approval of RSSAs

The April 2015 Order determined that the Commission is the “only agency with jurisdiction to issue a ‘compensation order’” that requires a generator in an outage state to respond

⁸ NYISO OATT, Attachment Y, §31.5.1.6.

⁹ 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,...or, unsupported by substantial evidence.” 5 U.S.C. §706; see also, supra, notes 11-22 and accompanying text.

¹⁰ 5 U.S.C. §706; see also, supra, notes 23-24 and accompanying text.

to reliability needs by returning to service.¹¹ This determination interferes with the NYPSC's jurisdiction over generation facilities, resource adequacy determinations, and reliability, and presents a direct jurisdictional conflict. The Commission must allow the NYPSC to exercise its authority to ensure reliability, especially where local reliability needs arise. The NYPSC's ability to exercise this authority, and to carry out its obligations to ensure safe and adequate, are essential, as New York is the single state within the NYISO.

The planning and procurement of generation resources have been traditional subjects of the states' police powers from the earliest days of the electric power industry.¹² Congress preserved this state authority in the FPA, which constrains the Commission's jurisdiction to facilities used for interstate transmission of electricity and to wholesale power rates, while at the same time preserving state jurisdiction over facilities

¹¹ Docket No. ER14-2518-002, New York Independent System Operator, Inc., Order Conditionally Accepting In Part And Rejecting In Part Proposed Tariff Changes And Directing Compliance Filing, 151 FERC ¶61,075 (issued April 30, 2015) (April 2015 Order), ¶¶48-52.

¹² The FPA indicates that "[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, ... The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy" 16 U.S.C. §824(b)(1).

used for generation and local distribution.¹³ When it attempts to regulate a subject area traditionally occupied by the states, the Commission cannot lawfully presume that the states' historic police powers have been superseded unless Congress has clearly specified its intent to do so.¹⁴ In keeping with this fundamental and long-standing allocation of jurisdictional responsibility under the FPA, the NYS PSL authorizes the NYPSC to ensure the provision of safe and adequate service by electric corporations, including independent generation owners.¹⁵ Under this authority, the NYPSC considers, approves, conditions, or rejects plans for any changes of ownership an electric corporation might propose.¹⁶ That jurisdiction has been interpreted as extending to authority over abandonments,

¹³ The FPA explicitly provides that the Commission "shall not have jurisdiction, except as specifically provided in [the FPA], over facilities used for the generation of electric energy or over facilities used in local distribution." 16 U.S.C. §824(b)(1). The Commission's authority to approve "reliability standards" reiterates these exclusions from FERC's jurisdiction, by explicitly excluding Commission jurisdiction to "set and enforce compliance with standards for [the] adequacy or safety of electric facilities or services." 16 U.S.C. §824o(i)(2).

¹⁴ See, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citing, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

¹⁵ NYS PSL §4.

¹⁶ NYS PSL §70.

including abandonment of property and abandonment of service through retirements.¹⁷

In exercising its jurisdiction, the NYPSC has required generation owners to provide notice of a proposed retirement at least 180-days in advance for generating units sized 80 MWs or more, or 90-days in advance for generators greater than 2 MW but less than 80 MWs.¹⁸ Where proposed retirements have threatened to adversely affect reliability, the NYPSC has worked with the applicable generation owners, Transmission Owner(s), and the NYISO to ensure that an appropriate solution for preserving reliability is found. Such solutions have included the procurement of reliability support services, through RSSAs, from independent generation owners needed for system reliability.¹⁹

Furthermore, the NYPSC has ample authority to determine the appropriate level of compensation to be paid to generators for furnishing these reliability support services. These RSSAs merely compensate generators for keeping their facilities available, while any wholesale sales are regulated by

¹⁷ NYPSC Case 05-E-0889, Proceeding on Motion of the Commission to Establish Policies and Procedures Regarding Generation Unit Retirements, Order Instituting Proceeding (issued July 27, 2005).

¹⁸ NYPSC Case 05-E-0889, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

¹⁹ See, e.g., NYPSC Case 12-E-0136, Dunkirk Power LLC and NRG Energy, Inc., Order Deciding Reliability Need Issues and Addressing Cost Allocation And Recovery (issued May 20, 2013).

FERC. To the extent that this compensation has an effect on wholesale rates for energy, ancillary services, or capacity, those effects are the incidental results of State action within State-jurisdictional areas. As both the Commission and federal courts have acknowledged, the presence of such incidental effects does not render an action preempted.²⁰

As noted above, the NYPSC's approval of RSSAs comports with the NYISO tariff provisions, which recognize the NYPSC's responsibility to select among non-transmission alternatives (i.e., generation facilities or demand response resources) and to establish compensation under State law.²¹ The Commission should not impermissibly intrude upon the NYPSC's exercise of its authority to ensure that a generator does not deactivate or retire when needed for reliability. Where the NYPSC directs a generator to remain available, the Commission must recognize that the NYPSC may provide appropriate compensation for such generator. The NYPSC's actions approving RSSAs are necessary to preserve reliability when faced with a potential generator

²⁰ See, e.g., PPL EnergyPlus, LLC v. Solomon, No. 13-4330 (3d Cir. Sept. 11, 2014) (indicating that "[w]hen a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid") (citing Northwest Central Pipeline v. State Corp. Commission of Kansas, 489 U.S. 493 (1989)).

²¹ NYISO, Attachment Y, §31.5.1.6.

retirement that would have adverse impacts on the public health, safety, and welfare.²²

B. The Commission Should Grant Rehearing Because the April 2015 Order Exceeded the Commission's Jurisdiction By Vesting Itself With Exclusive Authority To Compel Generating Facilities To Serve Customers

Contrary to the Commission's position, it does not possess the power to require generators to run. Under the FPA, states retain authority over "facilities used for the generation of electric energy" and the ability "to take action to ensure the safety, adequacy, and reliability of electric service within that State."²³ In reviewing generator retirement notices and taking action, as necessary, including directing generators to remain available for reliability purposes, the NYPSC is acting wholly within that well-established authority. Therefore, the Commission's assertion that it has exclusive authority to require a generator to continue or resume service is contrary to the law.

The NYPSC possesses the requisite authority to ensure generating facilities do not abandon service prematurely, and

²² The NYPSC raised similar arguments in response to the Commission's recent order directing the New York Independent System Operator, Inc. to implement "Reliability Must-Run" contract provisions, which are incorporated here by reference. See, Docket No. EL15-37-000, New York Independent System Operator, Inc., NYPSC Request for Rehearing (filed March 23, 2015).

²³ 16 U.S.C. §§ 824, 824d, 824e, 824o.

has long exercised its jurisdiction to prevent premature abandonment of a public service.²⁴ While the NYPSC possesses clearly established authority to order a generator to remain in-service, or to resume service for reliability reasons, neither the FPA nor any other provision of federal law grants such authority to the Commission or restricts its exercise by the state. To wit, the April 2015 Order fails to cite any such authority.

Because the Commission lacks authority under the FPA to order a generator to return to service, the Commission cannot grant itself such authority by accepting tariff provisions that compel a generator to return to service under a "Compensation Order" and then proclaiming that it is the "only agency" that may issue such a Compensation Order. The Commission should therefore grant rehearing to clarify that authority to direct a generator to return to service is reserved to the states, and, in particular, the NYPSC with respect to the NYISO.

²⁴ Case 28316, Rochester Gas and Electric Corporation, Opinion and Order Concerning Steam Service and Determining Revenue Requirement, Opinion No. 84-19 (issued July 11, 1984).

CONCLUSION

In accordance with the foregoing discussion, the NYPSC respectfully requests that the Commission grant rehearing of its April 2015 Order.

Respectfully submitted,




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Public Service Commission
of the State of New York
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Dated: June 1, 2015
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
June 1, 2015


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