

136 FERC ¶ 61,193
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

New York Independent System Operator, Inc.	Docket Nos. ER11-3949-000
	ER11-3949-001
	ER11-3951-000

ORDER ON COMPLIANCE FILING

(Issued September 15, 2011)

1. On June 30, 2011, in Docket No. ER11-3949-000, as corrected on July 5, 2011, in Docket No. ER11-3949-001, New York Independent System Operator, Inc. (NYISO) proposed revisions to the NYISO Market Administration and Control Area Services Tariff (Services Tariff), including revisions to Services Tariff section 26 of Attachment K (Attachment K), and the NYISO Open Access Transmission Tariff (OATT) in response to the directives in Order Nos. 741 and 741-A.¹ Also on June 30, 2011, in a Supplemental Filing in Docket No. ER11-3951-000, NYISO filed proposed revisions to its ISO Agreement in accordance with the requirements of Order No. 741. The proposed revisions: (i) establish billing and settlement periods of no more than seven days each; (ii) limit the amount of unsecured credit extended to any one market participant or affiliated group of market participants to \$50 million; (iii) eliminate unsecured credit for financial transmission rights markets; (iv) establish minimum participation criteria for market participants related to financial risks; (v) provide examples of circumstances that may justify NYISO's invocation of the "material adverse change" provision of its creditworthiness policy; and (vi) limit to no more than two days the time period permitted for a market participant to meet a collateral call.

2. NYISO requests an effective date of October 1, 2011 for most of the revisions, with certain limited exceptions becoming effective on October 18, 2011, and also requests a limited waiver with respect to certain sections of the Services Tariff and OATT.

¹ *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, FERC Stats. & Regs. ¶ 31,317 (2010), *order on reh'g*, Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 (2011), *order denying reh'g*, Order No. 741-B, 135 FERC ¶ 61,242 (2011).

3. As discussed below, with limited exceptions discussed below, the Commission finds that NYISO's proposal complies with the requirements set forth in Order Nos. 741 and 741-A. Accordingly, the proposed revisions to the Services Tariff, OATT, and ISO Agreement are conditionally accepted, subject to the filing conditions set forth below, to be effective as proposed. In addition, NYISO's request for limited tariff waiver is granted.

I. Background

4. In Order No. 741, the Commission adopted reforms to strengthen the credit policies used in organized wholesale electric power markets. Citing its statutory responsibility to ensure that all rates charged for the transmission or sale of electric energy in interstate commerce are just, reasonable, and not unduly discriminatory or preferential,² the Commission directed regional transmission organizations (RTO) and independent system operators (ISOs) to revise their tariffs to reflect the following reforms: implementation of shortened settlement timeframes, restrictions on the use of unsecured credit, elimination of unsecured credit in all financial transmission rights (FTR) or equivalent markets, clarification of legal status to continue the netting and set-off of transactions in the event of bankruptcy, establishment of minimum criteria for market participation, clarification regarding the organized markets' administrators' ability to invoke "material adverse change" clauses to demand additional collateral from market participants, and adoption of a two-day grace period for "curing" collateral calls.

5. The Commission applied these reforms to all RTO and ISO markets, explaining that the activity of market participants is not confined to any one region or market. The Commission stated that the credit practices in all RTOs and ISOs are only as strong as the weakest credit practice because a default in one market could have ripple effects in another market. In order to implement these reforms, the Commission directed each RTO and ISO to submit tariff changes by June 30, 2011, with an effective date of October 1, 2011. In Order No. 741-A, the Commission extended the deadline for complying with the requirement regarding the ability to offset market obligations to September 30, 2011, with the relevant tariff revisions to take effect January 1, 2012.³ Accordingly, the Commission will not address compliance with this requirement in this order.

II. Notice of Filing and Responsive Pleadings

6. Notice of NYISO's June 30, 2011 filing was published in the *Federal Register*, 76 Fed. Reg. 41,775, with protests and interventions due on or before July 21, 2011. Notice of NYISO's July 5, 2011 errata filing was published in the *Federal Register*,

² 16 U.S.C. §§ 824d, 824e (2006).

³ Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 25.

76 Fed. Reg. 41,782, with protests and interventions due on or before July 26, 2011. Motions to intervene were timely filed by H.Q. Energy Services (U.S.) Inc., Edison Mission Energy, J.P. Morgan Ventures Energy Corporation, GenOn Energy Marketing, LLC and GenOn Bowline, LLC, Calpine Corporation, Consolidated Edison Solutions, Inc. and Consolidated Energy, Inc., BP Energy Company, Shell Energy North America (US), L.P., NRG Companies, Vitol Inc., Constellation Energy Commodities Group, Inc. and Constellation New Energy, Inc., and Brookfield Energy Marketing LP. Motions to intervene and comments were timely filed by New York Transmission Owners (NYTO)⁴ and DC Energy, LLC. Motions to intervene and protests were timely filed by Electric Power Supply Association (EPSA); Morgan Stanley Capital Group Inc. and Macquarie Energy LLC and DB Energy Trading LLC (collectively, Indicated Participants); and Twin Cities Power, LLC, Twin Cities Energy, LLC, TC Energy Trading, LLC, Cygnus Energy Futures, LLC, and Summit Energy, LLC (collectively, Indicated Marketers).

7. On August 3, 2011, Cambridge Valley Enterprises LLC (CVE) filed comments on Order Nos. 741 and 741-A in Docket No. RM10-13-000.⁵

III. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make those entities that filed them parties to this proceeding.

B. Substantive Matters

1. Shortening the Settlement Cycle

9. Order No. 741 directed each RTO and ISO to submit a compliance filing that includes tariff revisions to establish shorter billing and settlement periods that are, at most, weekly.⁶

⁴ The New York Transmission Owners are comprised of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

⁵ The Commission treats CVE's submission as a protest in these dockets.

⁶ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 32.

a. Filing

10. NYISO proposes to revise section 7.2 of the Services Tariff and section 2.7.3 of the OATT to establish a weekly settlement process for approximately 99 percent of the dollar volume of market transactions furnished under NYISO tariffs.⁷

11. NYISO states that, under its proposal, customers must pay any amount due for the weekly invoice or the monthly invoice⁸ by the first banking day common to all customers that falls on the second business day after NYISO's issuance of the weekly or monthly invoice. NYISO continues that, under its proposal, NYISO must then pay all amounts due to a customer in its weekly invoice or monthly invoice by the first banking day common to all customers that falls on or after the second business day after the due date for the customer's payment.

12. NYISO notes additional tariff revisions to accord the Services Tariff and the OATT with the proposed weekly settlement process. These include revisions to Attachment K to: (i) decrease the energy and ancillary services credit requirement; (ii) modify the terms of the form prepayment agreement to adjust the timing of weekly prepayments; and (iii) eliminate its pay-down program. NYISO also proposes revisions to OATT section 28, Attachment V to provide a mechanism for NYISO, at its discretion, to decrease the Working Capital Fund reserve and return the excess contributions to market participants on a pro rata basis.⁹ Finally, NYISO proposes other miscellaneous

⁷ NYISO states that the remaining 1 percent of the dollar volume of market transactions, which NYISO proposes to continue to invoice on a monthly basis, is limited to: (i) true-ups and adjustments of previous settlement amounts as accurate data replaces initial estimates; (ii) penalty and dispute settlement amounts; and (iii) a small number of *de minimis* initial settlements. NYISO June 30, 2011 Transmittal at 5.

⁸ NYISO proposes to continue to issue a monthly invoice within five business days after the first day of each month for: (i) any monthly invoice components from the previous month; (ii) any true-ups to weekly invoices issued in the preceding month; (iii) any true-ups to monthly invoices issued four-months previously; and (iv) any true-ups to previously issued monthly invoices that are being finalized. NYISO also states that, since it proposes that billing periods not cross over months (to minimize the impact of the revised settlement process on market participants' existing settlement systems and processes), any weekly invoice components from a shortened billing period that concludes a month will be included in the monthly invoice. NYISO June 30, 2011 Transmittal at 5.

⁹ NYISO states that Attachment V currently only provides a mechanism for NYISO to collect, at its discretion, additional contributions from market participants. NYISO states that it plans to reduce the Working Capital Fund balance in November 2011 because, as a result of implementing a shortened settlement cycle, NYISO has

revisions to the Services Tariff, the OATT, and the ISO Agreement to reflect the proposed settlement process.¹⁰

13. NYISO proposes to continue, in a modified form, to allow a customer to treat as cash collateral a net receivable amount. NYISO states that, in conjunction with the proposed transition to weekly invoicing, NYISO proposes to allow a customer, as of the day after NYISO makes its weekly settlement payments, to treat as cash collateral the net receivable the customer has accrued for its prior week's activity, which amount NYISO will pay to the customer the following week. NYISO states that, to this limited extent, it is permitting the customer to net across product and service categories.¹¹ As part of this proposal, NYISO proposes to revise Attachment K to require a customer to enter into a security agreement with NYISO in order for the customer to treat its net receivable as cash collateral.¹² NYISO states that this will protect NYISO's position as a secured creditor and support its right to these funds in the event the market participant files for bankruptcy protection, consistent with the Commission's directive in Order No. 741 to establish better protection against loss in the event of a market participant bankruptcy.

b. Protests and Comments

14. No protests were filed regarding NYISO's proposal on shortening the settlement cycle.

c. Commission Determination

15. We find NYISO's proposals to shorten the settlement cycle to be in compliance with the directives noted above. Accordingly, we accept the proposal. However, NYISO's proposal to treat as cash collateral a net receivable amount is accepted conditioned upon acceptance of NYISO's future filing regarding the ability to offset market obligations.

determined that it can reduce the Working Capital Fund balance and maintain the same level of liquidity.

¹⁰ NYISO June 30, 2011 Transmittal at 7-9.

¹¹ NYISO states that this change does not impact NYISO's practice of netting a market participant's purchases and sales within a product or service category when establishing the market participant's credit requirement for that product or service category. NYISO states that, consistent with Order No. 741-A, NYISO will make a separate filing by September 30, 2011 to comply with the Commission's requirements regarding the ability to offset market obligations.

¹² NYISO states that the security agreement must grant NYISO a first priority lien on the customer's net receivables. NYISO June 30, 2011 Transmittal at 14.

2. Use of Unsecured Credit

16. Order No. 741, as revised by Order No. 741-A, required each RTO and ISO to revise its tariff provisions to establish a limit on unsecured credit of no more than \$50 million per market participant, including the corporate family to which a market participant belongs.¹³

17. The Commission emphasized that the \$50 million limit on unsecured credit is a ceiling, and that an organized wholesale electric market may establish a lower ceiling, either for individual market participants or, for example, based on the relative market size, the price of energy, the number of megawatt (MW) hours, and the size and number of members. The Commission also directed that RTOs and ISOs not take parent guarantees into account when establishing the appropriate level of unsecured credit for a market participant.¹⁴

a. Filing

18. NYISO proposes to revise section 26.4.2 of Attachment K to cap the amount of unsecured credit extended to any one customer, or group of customers that are affiliates, at \$50 million.

19. In order to facilitate this \$50 million limit on unsecured credit, NYISO proposes several additional tariff revisions. Specifically, NYISO proposes to: (i) delete the definition of “Native Load Credit Requirement;” (ii) eliminate from Sections 26.4.2 and 26.4.3.6 the right of market participants to approve an indexing methodology that would increase NYISO’s unsecured credit limit; (iii) add a new tariff provision to the end of Section 26.4.1 of Attachment K to provide that a market participant that fails to maintain a complete and accurate list of its affiliates with NYISO, in accordance with NYISO tariff requirements, is not eligible for unsecured credit; and (iv) clarify in Attachment K that the presence of affiliate guarantees does not affect the \$50 million cap.

b. Protests and Comments

20. No protests or comments were filed regarding NYISO’s proposal on the use of unsecured credit.

¹³ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 49; Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 9. In Order No. 741-A, the Commission stated that “a corporate family may choose to have a single member company participate in an RTO/ISO’s market, or instead opt to have more than one do so, [but] in either case, the single entity or multiple entities together will have a cap of no more than \$50 million.” Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 9 & n.15.

¹⁴ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 55-56.

c. Commission Determination

21. We find NYISO's proposal on the use of unsecured credit to be in compliance with the requirements noted above. Accordingly, we accept the proposal.

3. Elimination of Unsecured Credit for Financial Transmission Rights Markets

22. Order No. 741 directed each RTO and ISO to submit a compliance filing that includes tariff revisions to eliminate the use of unsecured credit in its FTR, or FTR-equivalent, markets.¹⁵

a. Filing

23. NYISO proposes to revise sections 26.4 and 26.5 of Attachment K to disallow the use of unsecured credit to meet TCC credit requirements related to Fixed Price TCCs.¹⁶ NYISO notes that, with the exception of credit requirements related to Fixed Price TCCs, the use of unsecured credit to meet TCC credit requirements was previously disallowed by NYISO tariff revisions effective November 12, 2009.¹⁷

b. Protests and Comments

24. No protests were filed regarding NYISO's proposal on the elimination of unsecured credit for TCCs.

c. Commission Determination

25. We find NYISO's proposal on the elimination of unsecured credit for TCCs to be in compliance with the directives noted above. Accordingly, we accept the proposal.

4. Minimum Criteria for Market Participation

26. In Order No. 741, the Commission directed each RTO and ISO to revise its tariff to establish minimum criteria for market participation.¹⁸ The Commission further directed each RTO and ISO to develop these criteria through its stakeholder processes.¹⁹

¹⁵ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 75.

¹⁶ In the NYISO marketplace, FTRs are known as Transmission Congestion Contracts (TCC).

¹⁷ *New York Independent System Operator, Inc.*, Docket Nos. ER09-1612-000 and ER09-1612-001 (Nov. 4, 2009).

¹⁸ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 131.

While Order No. 741 did not provide specific criteria, the Commission offered examples of acceptable criteria, and stated that it would evaluate each RTO and ISO proposal to ensure that it is just and reasonable and not unduly discriminatory. For example, the Commission explained that minimum criteria for market participation could include the market participant having the capability to engage in risk management or hedging or to out-source this capability with periodic compliance verification. The Commission stated that the minimum criteria for market participation would make sure that each market participant has adequate risk management capabilities and adequate capital to engage in trading with minimal risk, and related costs, to the market as a whole.²⁰ Moreover, the Commission stated that any minimum participation criteria apply to all market participants rather than only certain participants.²¹ The Commission later clarified in Order No. 741-A that some criteria may be tiered or calibrated based on, for example, the size of a market participant's positions.²²

a. Filing

27. NYISO states that section 8 of the Services Tariff sets forth eligibility requirements applicable to all customers participating in the NYISO-administered markets and all applicants seeking to become customers. NYISO further notes that, pursuant to sections 8.1.1 and 8.1.2 of the Services Tariff, each customer is subject to the creditworthiness requirements set forth in Attachment K and must also demonstrate that it is capable of performing all operational communication requirements.

28. NYISO proposes to add a new section 26.1 to Attachment K to set forth minimum participation criteria. NYISO states that the proposed minimum participation criteria will form a part of the NYISO's overall eligibility requirements and will apply to all customers participating in the NYISO-administered markets and all applicants seeking to become customers.

29. NYISO proposes to establish a capitalization requirement, holding that well capitalized market participants are less likely to default in the event of market fluctuations that lead to unexpected losses because they have more resources available to cover these losses. NYISO states that to meet the capitalization requirement a customer,

¹⁹ *Id.* P 132.

²⁰ *Id.* P 131.

²¹ *Id.* P 133. While there needs to be minimum criteria for all market participants, as we explained in Order No. 741-A, not all market participants need necessarily be held to the same minimum criteria. Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 33 & n.43.

²² Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 33 & n.43.

or its guarantor, must demonstrate based on its most recent audited financial statements that it has either \$10 million in assets or \$1 million in tangible net worth.²³ However, NYISO states that NYISO recognizes that some of its existing market participants are not capable of meeting the proposed capitalization requirement. NYISO states that, for this reason, it is also proposing to allow market participants to post \$200,000 in security (\$500,000 if participating in the TCC market)²⁴ with NYISO, in lieu of satisfying the capitalization requirement. NYISO states that this security is in addition to any collateral required to satisfy the market participant's credit requirements. NYISO states that this alternative to the capitalization requirement will allow NYISO to reduce overall market risk without creating undue barriers to market entry.²⁵

30. NYISO also proposes to implement a requirement that each market participant submit a certificate annually, signed by a duly authorized officer, to certify that: (i) the market participant has written risk management policies and procedures that address those risks that could materially and adversely affect the market participant's ability to pay its NYISO invoices when due; (ii) all employees and agents of the market participant with the right to bid, offer, or schedule in NYISO-administered markets have appropriate training and/or experience to transact in such markets; (iii) the market participant has appropriate personnel resources and technical abilities to allow the market participant to promptly and effectively respond to all communications and directions from NYISO related to settlements, billing, credit requirements, and other financial matters; and (iv) the market participant is in compliance with NYISO's minimum capitalization requirements.

31. Finally, NYISO proposes tariff revisions to establish minimum training requirements for market participants that participate in the TCC market and/or engage in Virtual Transactions. NYISO states that each employee and agent of a market participant

²³ NYISO states that these thresholds are consistent with thresholds accepted by the Commodity Futures Trading Commission (CFTC) and the Securities Exchange Commission as important indicators of a company's sophistication and ability to assume a loss of investment without causing severe damage to the company's overall net worth. NYISO June 30, 2011 Transmittal at 11-12 (citing Commodity Exchange Act, 7 U.S.C. § 1a(12)(v) (2006); Securities Exchange Act of 1934, 15 U.S.C. § 78c(54) (2006)).

²⁴ NYISO states that it set a higher amount for TCC market participants because, as the Commission recognizes, the duration of TCCs creates unique risks that are difficult to quantify and that distinguish TCCs from other wholesale electric market products. NYISO June 30, 2011 Transmittal at 12 (citing Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 70-72).

²⁵ NYISO states that, with limited exceptions, an additional \$200,000 in collateral would have covered most NYISO historical bad debt losses. NYISO June 30, 2011 Transmittal at 12.

with the right to bid on TCCs or Virtual Transactions must complete one-time training specific to those products.²⁶

b. Protests and Comments

32. EPSA urges the Commission to require that processes across RTOs and ISOs be sufficiently uniform to ensure compliance and clarity. In that vein, EPSA suggests that the Commission hold a compliance workshop so that RTOs, ISOs, and industry can discuss both the necessary differences in compliance across the regions as well as areas that can be standardized. Indicated Participants similarly ask the Commission to direct the RTOs/ISOs to coordinate their certification statements and verification processes both in terms of substance and dates for submission.

33. EPSA also argues that the Commission should direct RTOs and ISOs to amend their proposed certification forms to allow a corporate parent to make the certification on behalf of the market participant. Similarly, Indicated Participants argue that RTOs and ISOs should uniformly be required to accept both domestic and foreign guarantees from creditworthy guarantors for satisfaction of minimum capitalization, and that flexibility should be allowed with respect to the form of guarantee (e.g., choice of governing law, termination and assignment, waiver of surety defense). In addition, the Indicated Participants support a net worth requirement, consistent with the definition of Eligible Contract Participant as administered by the CFTC, instead of the tangible net worth requirement proposed by RTOs and ISOs. Indicated Participants argue that no demonstrable benefit arises from using a standard more burdensome than the CFTC's Eligible Contract Participant definition. Indicated Participants support the creation of an exemption from the minimum capitalization requirements (and from certain risk management and training requirements) for entities that are already subject to other stringent capitalization requirements (e.g., Federal Reserve (or similar foreign regulator) following Basel III Standards for banks and/or the exchange capitalization requirements of the ICE, the CME Group, and the Green Exchange).

34. Indicated Participants state that the RTOs and ISOs have proposed revisions to their Commission-jurisdictional tariffs to enable them to obtain an exemption from regulation of RTO and ISO products and services under the Commodity Exchange Act.²⁷ However, Indicated Participants assert that they are not privy to the discussions between the RTOs and ISOs and the CFTC, and are not certain what changes are necessary to

²⁶ NYISO states that it currently offers free training on-line and anticipates offering free, enhanced Virtual Transaction and TCC training online no later than September 1, 2011, and that the enhanced training will include a test to evaluate user understanding and successful completion of the training course. NYISO June 30, 2011 Transmittal at 12-13.

²⁷ Indicated Participants July 21, 2011 Comments at 8; *see* 7 U.S.C. § 1 (2006).

obtain an exemption. Given that RTOs and ISOs have not proposed uniform changes to their tariffs, Indicated Participants argue that individual RTOs and ISOs may fall short of, or exceed, whatever requirements are being set forth by the CFTC as creating a necessary basis for exemption, particularly the proposed certification statements. Thus, Indicated Participants request that the Commission solicit input from the CFTC explaining what that agency requires and require the RTOs and ISOs to tailor their revisions to satisfy only those requirements.

35. Indicated Marketers protest NYISO's requirement that tangible net worth or assets be demonstrated by audited financial statements, rather than market participant officer-certified financial statements, for the most recent fiscal year. Indicated Participants also argue that NYISO should be required to accept foreign guarantees from creditworthy guarantors for satisfaction of minimum capitalization, and that flexibility should be allowed with respect to the form of guarantee (e.g., choice of governing law, termination and assignment, waiver of surety defense). Indicated Marketers also protest NYISO's failure to include a minimum operating requirement in its capitalization requirement, below which a market participant would not need to meet the capitalization requirement. Indicated Marketers state that these two aspects of NYISO's compliance filing make it very difficult, if not impossible, for smaller entities such as Indicated Marketers to participate in the various wholesale electric markets because of increased costs of doing business. Indicated Marketers also state that a minimum operating requirement in the capitalization requirement is important for small companies with registrations in RTOs that may not be active (i.e., participants with legacy settlements or little or no credit exposure) for some period of time. Indicated Marketers continue that such participants should not be required to post collateral just to keep the account open, particularly where reopening the account could take up to six months, by which time a trading opportunity could be lost. As such, Indicated Marketers request that the Commission require NYISO to further modify its tariff to allow market participants to demonstrate tangible net worth or assets with internally prepared financial statements that are verified by a corporate officer certificate and to establish an operating requirement minimum of \$100,000, akin to the proposal from ISO-New England.

36. In its protest, CVE asserts that NYISO did not comply with Order No. 741 to work with market participants on credit issues and to develop policies that are just, reasonable, and not unduly discriminatory or preferential. Specifically, CVE states that NYISO's capital adequacy credit requirements are not reasonable because any problem NYISO seeks to address is not due to insufficient security provided by market participants, but rather due to the underpriced nature of collateral cost of bid MWs. CVE states that, as a result, NYISO's approach is discriminatory, does not provide adequate protection to the marketplace, creates a barrier against entry by small businesses, and lessens the health of the current competitive electricity marketplace. As such, CVE requests that the Commission direct NYISO to abandon its proposed minimum participation criteria of \$200,000 and to implement a revised method of determining collateral prices on a per

MW basis to achieve capital adequacy requirements for all companies participating in the NYISO Virtual Markets.

37. Finally, Indicated Participants do not support NYISO's training requirements, preferring that this be left to market participants. The Indicated Participants also state that, if it is determined that the imposition of training requirements is necessary, such requirements should be uniform across the RTOs and ISOs.

38. NYTO supports NYISO's filing and urges the Commission to approve the proposed tariff revisions as soon as practicable. In particular, NYTO states that it supports NYISO's Officer Certification Form, which will serve as evidence that a particular customer has met the minimum participation criteria requirements set forth in

section 26.1 of Attachment K of the Services Tariff. NYTO states that the certification form is appropriate in scope to ensure that NYISO markets are not exposed to undue credit risk.

c. Commission Determination

39. In Order No. 741, the Commission required RTOs and ISOs to develop minimum participation criteria to ensure that markets are protected from risks posed by under-capitalized participants or those who do not have adequate risk management procedures in place.²⁸ In evaluating whether the proposed tariff revisions comply with Order No. 741, the Commission is concerned with whether the proposed minimum participation criteria accomplish this goal, and are just and reasonable and not unduly discriminatory or preferential. In so doing, we review the proposal before us, and understand that there may be more than one just and reasonable set of minimum participation criteria. The minimum participation criteria submitted by NYISO, as revised as discussed below, are consistent with the Commission's directives, and just and reasonable and not unduly discriminatory or preferential, and therefore the Commission conditionally accepts the proposed tariff revisions.

40. While we expect each RTO and ISO will comply with applicable rules and requirements of all federal agencies, the Commission is presently concerned with compliance with Order No. 741 and with the reasonableness of the proposed tariff changes now before us. Any issues related to a potential CFTC exemption are out outside the scope of this proceeding. The Commission, however, remains open to subsequent tariff revisions offered by the RTOs and ISOs in light of future events.

²⁸ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 131.

41. In Order No. 741, the Commission directed all RTOs and ISOs to adopt minimum participation criteria, but explicitly left it to each RTO and ISO and its stakeholders to develop minimum participation criteria that are applicable to its markets.²⁹ The Commission thus declines to require RTOs and ISOs to adopt uniform minimum participation criteria, including uniform certification statements, at this time. The Commission will not require NYISO to revise its proposal to reflect certain uniform changes proposed by EPSA and Indicated Participants, such as allowing a corporate parent to submit a certification on behalf of a market participant and exempting market participants that are already subject to capitalization requirements required by other regulators or entities. Although we decline to require uniform minimum participation criteria, we recognize that there may be merit in minimizing the differences in requirements for each ISO and RTO, and we are open to subsequent efforts by industry participants and the RTOs and ISOs to come up with uniform criteria.

42. In Order No. 741, the Commission stated that each ISO/RTO should, through its stakeholder process, include language to specify minimum participation criteria, such as requirements related to adequate capitalization.³⁰ The Commission further stated that it was “aware that stakeholder groups with competing interests may disagree on these criteria, and so the Commission will review proposed tariff language to ensure that it is just and reasonable and not unduly discriminatory.”³¹ NYISO’s proposed capital adequacy requirements of either \$10 million in assets or \$1 million in tangible net worth comply with Order No. 741, are consistent with the capitalization thresholds in other markets,³² and also are not protested. Therefore, we accept the proposed capitalization requirement.

43. For market participants that are not capable of meeting the capitalization requirement, NYISO provides a reasonable alternative that allows market participants to satisfy the minimum participation criteria by posting, in lieu of satisfying the capitalization requirement, additional collateral of \$200,000 in security (\$500,000 if participating in the TCC market). Indicated Marketers and CVE contend that NYISO’s proposed collateral alternative may force market participants to exit the market. While we recognize that any minimum participation criteria, however high or low, potentially could lead to some market participant(s) leaving the market, Indicated Marketers and CVE fail to substantiate their claim that this will, in fact, occur, and that a less competitive market will result, and fail to show that NYISO’s collateral alternative is not

²⁹ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 132-133; Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 33.

³⁰ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 131-132.

³¹ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 133.

³² NYISO June 30, 2011 Transmittal at 11-12.

just and reasonable. We believe that NYISO's collateral alternative strikes a reasonable balance that accommodates smaller market participants that cannot meet the capitalization requirement, while protecting the markets from the risks posed by under-capitalized participants. In addition, we find that requiring an additional \$200,000 in collateral has a rational basis in that it would have covered most of NYISO's historical bad debt losses.³³ Finally, we find that it is reasonable for NYISO to tier this collateral requirement based on whether a market participant is involved in the TCC market because such tiering reflects the disparate nature of the associated risks.

44. Indicated Marketers request that the Commission require NYISO to include an exemption to the capitalization requirement for market participants that have a total financial assurance requirement of lower than \$100,000 and are not engaged in the TCC market, similar to the proposal made by ISO-New England.³⁴ Indicated Marketers, however, have not established that this revision is necessary to make NYISO's proposal just and reasonable. The Commission recognizes that the adoption of minimum participation criteria may result in additional costs to market participants but, given the Commission's interest in minimizing risk, and related costs, to the market as a whole,³⁵ the Commission finds that adopting such criteria remains appropriate. NYISO's proposed capital adequacy requirements satisfy the requirements in Order No. 741, have a rational basis, and are just and reasonable. We need not determine whether Indicated Marketers' proposal is superior; our determination is limited to whether NYISO's proposal is just and reasonable, and we find that it is. Indicated Marketers' request is therefore denied.

45. CVE requests that the Commission direct NYISO to eliminate the option of posting \$200,000 in collateral to satisfy the minimum capitalization requirement and instead to raise the collateral costs of bid MWs in the NYISO marketplace. CVE argues that this is the only way to protect consumers from a market participant default in a just, reasonable, and not unduly discriminatory or preferential manner. As discussed above, we conclude that the option of posting additional collateral to satisfy the minimum participation requirement is just and reasonable because it properly balances the need to protect markets from the risks posed by under-capitalized participants while providing smaller market participants with an alternative to the capitalization requirement. Moreover, CVE's proposal is beyond the scope of this compliance filing, as raising collateral costs on a per MW basis does not establish minimum participation criteria or adequate capitalization to participate in the organized wholesale electric market.³⁶ We therefore deny CVE's request.

³³ *Id.*

³⁴ Indicated Marketers July 22, 2011 Protest at 7 (citing ISO-New England June 30, 2011 Compliance Filing in Docket No. ER11-3953-000).

³⁵ *E.g.*, Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 131.

46. Indicated Marketers also protest NYISO's proposal to require use of audited financial statements by market participants to establish their level of capitalization. Indicated Marketers argue that the auditing requirement, together with the \$200,000 additional collateral requirement, will "unnecessarily and drastically increase Indicated Marketers costs of doing business and unreasonably limit their ability to continue to participate in multiple RTOs."³⁷ Indicated Marketers also contend that audited financial statements are not required in CFTC-regulated markets. The Commission rejects Indicated Marketers' arguments. Indicated Marketers do not provide any evidence to support their assertion that the requirement for audited financial statements will "drastically increase" their costs or that the requirement is unnecessary. Indeed, audited financial statements are already required as part of NYISO's creditworthiness requirements.³⁸ Nor are we persuaded that we should reject NYISO's proposal as not just and reasonable merely because another regulator may not require the use of audited financial statements. Ensuring the accuracy and thus adequacy of a market participant's capitalization through audited financial statements is an appropriate and reasonable requirement.³⁹ Moreover, for entities with limited resources, NYISO provides the option of posting additional collateral in lieu of satisfying the capitalization requirement, thus obviating the need for audited financial statements for this purpose. Based on this record, we conclude that NYISO's stakeholder-approved auditing requirement is just and reasonable.

47. NYISO proposes a certification that an officer of each market participant must execute on an annual basis. We find that this is insufficient to ensure the protection of the markets from risks posed by under-capitalized participants or those who do not have adequate risk management procedures in place.⁴⁰ A market participant officer-certified form that attests to the existence of risk management policies and procedures, as NYISO proposes, does not by itself satisfy the above criterion without independent verification that risk management policies and procedures are actually being implemented and adequate capitalization is being maintained. We believe that minimum participation criteria require NYISO to engage in periodic compliance verification to minimize risk to the market.⁴¹ We therefore direct NYISO to make a compliance filing, within 90 days

³⁶ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 131.

³⁷ Indicated Marketers July 22, 2011 Protest at 6.

³⁸ *See, e.g.*, Attachment K, section 26.2.2.1 "Financial Statements."

³⁹ *Cf., e.g.*, 18 C.F.R. §§ 41.10, 41.11, Part 101 General Instruction No. 1 (2011) (providing for independent audits of financial records of Class A and Class B, i.e., Major, public utilities).

⁴⁰ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 131.

from the date of this order, to establish such verification as part of its minimum participation criteria.

48. Finally, we reject the argument by the Indicated Participants on NYISO's training requirements. The Indicated Participants have not shown that these requirements are unduly burdensome or not compliant with Order No. 741. In fact, NYISO's training is at no cost to market participants and will provide common essential risk management information to all NYISO market participants.

5. Use of "Material Adverse Change"

49. In Order No. 741, the Commission directed each RTO and ISO to submit a compliance filing that includes tariff revisions to establish and clarify when a market administrator may invoke a "material adverse change" clause to compel a market participant to post additional collateral, cease one or more transactions, or take other measures to restore confidence in the market participant's ability to safely transact.⁴² The Commission, however, declined to adopt a *pro forma* list of circumstances that may trigger a "material adverse change" clause. Instead, the Commission directed each RTO and ISO to develop its own tariff provisions identifying circumstances when each market administrator may invoke a "material adverse change" clause in the form of a list that is illustrative, rather than exhaustive. Furthermore, the Commission explained that the tools used to determine a "material adverse change" should be sufficiently forward-looking to allow the market administrator to take action prior to any adverse effect on the market.⁴³

50. The Commission also directed each RTO and ISO to provide reasonable advance notice to a market participant, when feasible, when the RTO or ISO is compelled to invoke a "material adverse change" clause.⁴⁴ The Commission noted that the notification should be in writing, contain the reasoning behind invocation of the "material adverse change" clause, and be signed by a person with authority to represent the respective RTO or ISO in such action.

⁴¹ The Commission will not mandate a particular form of periodic verification of attestations concerning minimum risk management policies, practices and procedures. However, such a periodic verification could include periodic review of risk management policies, practices, and procedures, and their implementation, conducted on a random basis or directed to certain market participants based on identified risk.

⁴² Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 149.

⁴³ *Id.* P 149-150.

⁴⁴ *Id.* P 151.

a. Filing

51. NYISO proposes revisions to the material adverse change provision in its tariffs to provide an illustrative, but not exhaustive, list of examples of circumstances that would entitle NYISO to invoke the provisions.⁴⁵ NYISO states that it has included a requirement that, in the event NYISO invokes the provisions, it will provide affected customers with a written explanation of the reasons for its decision.

b. Protests and Comments

52. Indicated Participants argue that the Commission should direct RTOs and ISOs to modify their proposals to clarify that they will consider the totality of circumstances to determine whether a material adverse change has occurred.

c. Commission Determination

53. We have reviewed NYISO's proposal and its compliance with Order No. 741, and we find it to be just and reasonable as discussed below.

54. The Commission intended in Order No. 741 to reduce ambiguity as to when a market administrator may request additional collateral due to a material adverse change, by requiring each RTO and ISO to list in its tariff events that could trigger a collateral call. However, the Commission also required that this list be merely illustrative, rather than exhaustive, allowing each RTO and ISO reasonable discretion to independently determine whether a material adverse change that would warrant seeking additional collateral has occurred. In this regard, each RTO and ISO is responsible for administering and otherwise overseeing its markets, and as such, we expect each RTO and ISO to exercise its reasonable discretion in deciding in what circumstances to seek additional collateral, and when it need not do so. The Commission declines to limit an RTO's or ISO's exercise of such discretion and so we will not require each RTO and ISO to modify its proposed tariff revisions to expressly require that it must consider the totality of the circumstances in determining whether a material adverse change has occurred. Furthermore, we anticipate that every market participant has, or will have, sufficient resources for the participant to be aware of and report those events and circumstances identified by the ISO/RTO's illustrative list of material adverse changes.

⁴⁵ NYISO June 30, 2011 Transmittal at 14. This illustrative list of examples of circumstances is: (a) a material change in financial status pursuant to proposed section 26.2.1.4 of Attachment K, (b) a downgrade of an Equivalency Rating, (c) a significant change in the Customer's "Expected Default Frequency (EDF)" as determined by Moody's KMV CreditEdge, (d) a significant variation in the Customer's Credit Assessment, (e) a significant increase in a Customer's credit default swap (CDS) spreads, or (f) a significant decline in a Customer's market capitalization.

Accordingly, we find that NYISO's proposal is just and reasonable and in compliance with the directives noted above.

6. Grace Period to "Cure" Collateral Posting

55. In Order No. 741, the Commission directed each RTO and ISO to revise its tariff to allow no more than two days to post additional collateral due to invocation of a "material adverse change" clause or other provision of its tariff.⁴⁶

a. Filing

56. NYISO proposes to add a new section 26.10 to Attachment K to specify that a market participant shall have no more than two business days to "cure" a collateral shortfall.

b. Protests and Comments

57. No protests were filed regarding NYISO's proposal on the grace period to "cure" collateral posting.

c. Commission Determination

58. We find NYISO's proposal on the grace period to "cure" collateral posting to be in compliance with the directives noted above. Accordingly, we accept the proposal.

7. Effective Date

59. In Order No. 741, the Commission required that the compliance filing must be submitted by June 30, 2011, with the tariff revisions to take effect October 1, 2011.⁴⁷

a. Filing

60. With certain limited exceptions, NYISO requests that this filing become effective on October 1, 2011. NYISO requests that certain revisions become effective on October 18, 2011, rather than October 1, 2011. These revisions concern (i) the decrease in energy and ancillary services credit requirement (revised Section 26.4.2.1 of Attachment K), and (ii) the cap on the amount of unsecured credit of \$50 million (revised Sections 26.5.2, 26.5.3.6, and 26.6.3 of Attachment K). NYISO states that the delayed effective date is requested because it will not receive payment from market participants for September 2011 purchases until October 17, 2011 and does not want to reduce credit requirements until after it has collected these funds. Likewise, NYISO proposes to allow

⁴⁶ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 160.

⁴⁷ *Id.* P 32.

market participants to continue using their unsecured credit up to existing credit limits to meet the higher credit requirements related to the current monthly settlement process and delay until October 18, 2011, the date that NYISO proposes to establish a \$50 million cap on unsecured credit.

b. Protests and Comments

61. No protests were filed regarding NYISO's proposed effective dates.

c. Commission Determination

62. We find NYISO's proposed effective dates to be acceptable as they are either in compliance with the requirements noted above or adequately justified. Accordingly, we will accept the proposed effective dates.

8. Request for Waiver

a. Filing

63. NYISO requests a waiver of Section 7.4.2.2 of the Services Tariff and Section 2.7.4.3.2 of the OATT to permit NYISO to postpone by one month NYISO's issuance of customers' December 2010 invoices for final review and close-out. NYISO explains that the Services Tariff and the OATT provide that NYISO will issue a customer's monthly invoice for a final review period approximately seven months after NYISO's initial issuance of that invoice. However, NYISO states that it cannot issue the December 2010 final review invoices until its new platform, which will provide for weekly billing, is in place.

64. NYISO states that it recognizes that the Commission discourages incorporating items into a compliance filing that are not expressly required by the Commission's order. NYISO states, however, that the Commission has previously permitted such items when they are needed to implement the changes required by the Commission's order, and in this case, NYISO requires the requested waiver to administer its existing settlement process while implementing the system changes needed for the weekly invoicing process required by Order No. 741.

65. NYISO states that NYISO is acting in good faith to ensure that the new invoice platform is implemented with minimal disruption to the existing settlement process. NYISO states that the waiver is intended to resolve a concrete problem that needs to be remedied because NYISO is not able to issue the December 2010 related invoices until the platform changes to accommodate weekly invoicing have been completed. NYISO states that the duration and scope of the requested waiver are limited. NYISO states that the waiver will also not have undesirable consequences as customers will still have their

regular twenty-five day period for reviewing invoices prior to close-out; NYISO adds that NYISO has informed its customers of the temporary invoice postponement and has not received any objections.

b. Protests and Comments

66. No protests were filed regarding NYISO's request for waiver.

c. Commission Determination

67. We find NYISO's request for waiver to be reasonable under these circumstances. Generally, the Commission has granted waiver requests when: (1) the applicant has been unable to comply with the provision at issue in good faith; (2) the waiver is of limited scope; (3) a concrete problem will be remedied by granting the requisite waiver; and (4) the waiver does not have undesirable consequences, such as harming third parties.⁴⁸ As demonstrated by NYISO, the request for waiver meets these conditions. Accordingly, the request for waiver is granted.

The Commission orders:

(A) NYISO's filings in Docket Nos. ER11-3949-000, ER11-3949-001, and ER11-3951-000 are hereby accepted to be effective October 1, 2011, with the exception noted in the text above of certain provisions accepted effective October 18, 2011, subject to the filing condition set forth in the text above.

(B) NYISO's request for waiver is hereby granted.

(C) NYISO is hereby directed to make the compliance filing described in the text above, within 90 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴⁸ *E.g., Hudson Transmission Partners, LLC*, 131 FERC ¶ 61,157, at P 10 (2010).