

134 FERC ¶ 61,185
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.

Midwest Independent Transmission
System Operator, Inc.

Docket Nos. ER11-1844-000
ER11-1844-001

ORDER DENYING MOTION FOR STAY

(Issued March 11, 2011)

1. On October 20, 2010, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and International Transmission Company (ITC) (together, Filing Parties) filed, pursuant to section 205 of the Federal Power Act (FPA),¹ proposed revisions to Midwest ISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff to establish a methodology to allocate and recover the costs of ITC's Phase Angle Regulating Transformers (PAR)² located at Bunce Creek on the Michigan-Ontario border among Midwest ISO, New York Independent System Operator (NYISO), and PJM Interconnection, L.L.C. (PJM). In its December 30, 2010 order, the Commission accepted for filing the Filing Parties' proposed tariff sheets, suspended them for a nominal period, subject to refund, and established hearing and settlement judge procedures.³ In this order, we deny a motion for stay of the hearing and settlement judge procedures established in the December 30 Order.

I. Background

2. Power flows over the path of least resistance, and, as a result, it may not flow over the path for which it is scheduled by a transmission operator. This difference between actual and scheduled flow on a path or interface is called loop flow, and has historically

¹ 16 U.S.C. § 824d (2006).

² PARs are electrical devices that help control power flows through a particular component of the transmission network.

³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,275 (2010) (December 30 Order).

been both common and extremely volatile in the Lake Erie region. This situation has been referred to generally as the Lake Erie loop flow issue.⁴

3. In their filing, submitted on October 20, 2010, the Filing Parties proposed a methodology to calculate the revenue requirement for the PARs and allocate the revenue requirement for the PARs among Midwest ISO, PJM, and NYISO. The Filing Parties explained that their analysis, based on 2015 data, supported allocating 49.6 percent of the PARs revenue requirements to Midwest ISO, 19.5 percent to PJM, and 30.9 percent to NYISO based on each region's contribution to the loop flows over the Michigan-Ontario interface that would occur if the PARs were not controlling or regulating that loop flow. The Filing Parties also explained that each regional transmission organization (RTO) would determine how their individual share of the PARs revenue requirement would, in turn, be recovered from load within their region.

4. In the December 30 Order, the Commission found that the Filing Parties' proposed tariff sheets raised issues of material fact that cannot be resolved based on the record and that are more appropriately addressed in hearing and settlement judge procedures. Accordingly, the Commission accepted the proposed tariff sheets for filing, suspended them for a nominal period, made them effective January 1, 2011, subject to refund, and set them for hearing and settlement judge procedures.

5. A number of parties have requested rehearing of the December 30 Order.⁵ Several parties, including NYISO, argue that the Commission erred by not rejecting the Filing Parties' proposal because section 205 of the FPA does not permit the filing or acceptance of a rate filing where the filing utility does not have a customer or other contractual relationship with the entity or entities to which the rate will be charged.⁶

II. Motions to Stay

6. NYISO requests that the Commission stay the hearing and settlement judge procedures established by the December 30 Order until the Commission acts on NYISO's request for rehearing. NYISO states that a stay is warranted because hearing and settlement judge procedures will waste significant time, money, and resources for NYISO and other parties due to the fact that the justness and reasonableness of the proposed rates cannot be determined until the Commission rules definitively on whether Midwest ISO can impose costs on non-customers without a voluntary agreement. NYISO argues that settlement judge procedures are unlikely to resolve the issues set for hearing, given the

⁴ For a more detailed description of the history of the Lake Erie loop flow problem, *see* the December 30 Order at P 3-9.

⁵ The requests for rehearing will be addressed in a subsequent order.

⁶ *See, e.g.*, NYISO Request for Rehearing at 5-12.

far-reaching impacts of modifying the Commission's longstanding view that section 205 does not permit filings such as Midwest ISO's proposal. NYISO further maintains that requiring parties to participate in a hearing under such circumstances would be even more damaging because parties would be required to participate in lengthy and costly trial-type hearings that could be rendered moot once the Commission issues an order addressing NYISO's request for rehearing. NYISO states that, in contrast to the damage that will be sustained by other parties in the absence of a stay, granting NYISO's request will not substantially harm the Filing Parties, as charges for the PARs will not begin accruing until the facilities are placed in service, which gives the Commission sufficient time to consider NYISO's request for rehearing.⁷

7. Several parties filed answers supporting NYISO's motion to stay the hearing and settlement judge procedures instituted by the December 30 Order. PJM and the PJM Transmission Owners Group (PJM Transmission Owners)⁸ argue that, if NYISO's motion to stay is not granted, entities will be required to spend significant money, time, and resources participating in hearing and settlement judge procedures that should not have occurred in the first place.⁹ In addition, PJM and the PJM Transmission Owners argue that granting NYISO's motion to stay is in the public interest because failing to

⁷ *Id.* at 12-14.

⁸ The PJM Transmission Owners consist of American Electric Power Service Corporation on behalf of its affiliates, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company, AEP Appalachian Transmission Company Inc., AEP Indiana Michigan Transmission Company Inc., AEP Kentucky Transmission Company Inc., AEP Ohio Transmission Company Inc., and AEP West Virginia Transmission Company; Baltimore Gas and Electric Company; Duquesne Light Company; Exelon Corporation; FirstEnergy Service Company, on behalf of its affiliates Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company; Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company, all doing business as Allegheny Power; Old Dominion Electric Cooperative; Pepco Holdings, Inc., and its affiliates, Potomac Electric Power Company, Delmarva Power & Light Company, and Atlantic City Electric Company; PPL Electric Utilities Corporation, PPL EnergyPlus, LLC, PPL Brunner Island, LLC, PPL Holtwood, LLC, PPL Martins Creek, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, PPL University Park, LLC, Lower Mount Bethel Energy, LLC, PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; and PPL Renewable Energy, LLC; Public Service Electric and Gas Company, PSEG Power LLC and PSEG Energy Resources & Trade LLC; Rockland Electric Company; and Virginia Electric and Power Company, doing business as Dominion Virginia Power.

grant NYISO's motion will invite other unlawful filings by utilities seeking to impose costs on entities with whom the utility has no customer or contractual relationship.¹⁰

8. In addition, the New York State Consumer Protection Board (NYCPB) filed a motion to intervene out-of-time and comments in support of NYISO's motion to stay and request for rehearing. The Organization of PJM States, Inc. (OPSI) also filed a motion to intervene out-of-time.

9. The Filing Parties filed an answer opposing NYISO's motion to stay. They contend that NYISO's motion should be denied because NYISO's rehearing request merely raises the same issues that were raised in NYISO's original protest. They also state that the settlement and hearing procedures ordered by the Commission will not irreparably harm NYISO or any other party, as the rates accepted by the Commission are subject to refund. The Filing Parties further state that the expenditure of money involved in participating in hearing and settlement procedures clearly does not constitute irreparable injury and does not justify a stay of proceedings.¹¹ They also argue that granting the motion to stay would harm other parties and be contrary to the public interest, as it would further delay the development of the factual record that the Commission already found to be necessary to resolve the issues raised in this case. In addition, the Filing Parties argue that, despite NYISO's assertions to the contrary, it is quite possible that progress towards settlement can be made and there is no reason to abandon that effort before it has even begun.¹²

III. Discussion

⁹ See Joint Answer of the New England Power Pool Participants Committee, New England States Committee on Electricity, ISO New England, Inc., and the New England Conference of Public Utilities Commissioners (together, New England Entities) at 1; PJM Transmission Owners Answer; PJM Request for Rehearing and Answer at 11.

¹⁰ PJM Transmission Owners Answer at 1-2; PJM Request for Rehearing and Answer at 11-12.

¹¹ Filing Parties Answer at 1-2 (citing *Amaranth Advisors L.L.C.*, 121 FERC ¶ 61,238, at P 5 (2007)).

¹² *Id.*

A. Procedural Matters

10. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. NYCPB, in particular, and OPSI have not met this higher burden of justifying intervening late in order to, e.g., support NYISO's motion for stay and request for rehearing of the December 30 Order.¹³

B. Substantive Matters

11. To assure definiteness and finality in Commission proceedings, the Commission typically does not stay its orders.¹⁴ We are not persuaded that we should take a different approach and stay our order here. Accordingly, we will deny the motions for stay.

12. The Commission may stay its action when "justice so requires."¹⁵ In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.¹⁶ The key element in the inquiry is irreparable injury to the moving party.¹⁷ If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.¹⁸ The standard for showing irreparable harm is strict, as the D.C. Circuit has explained:

the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time." It is well established that economic loss does not necessarily constitute irreparable harm . . . [M]ere injuries, however substantial, in terms of

¹³ To the extent that NYCPB and OPSI seek to intervene in this proceeding to participate in the hearing and settlement judge procedures instituted by the December 30 Order, they may direct their requests to the appropriate presiding officer or settlement judge. *See generally* 18 C.F.R. §§ 385.214, 385.504(b)(12) (2010).

¹⁴ *E.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,142, at P 17 (2005) (*Midwest ISO*).

¹⁵ 5 U.S.C. § 705 (2006).

¹⁶ *See, e.g., Midwest ISO*, 111 FERC ¶ 61,142 at P 18.

¹⁷ *Id.*

¹⁸ *Id.*

money, time and energy necessarily expended in the absence of a stay are not enough.¹⁹

13. The Commission finds that NYISO will not suffer irreparable harm absent a stay. Here, the harm identified by NYISO—the alleged waste of time, money, and resources associated with hearing and settlement judge procedures while the Commission considers its request for rehearing—is essentially economic in nature. In determining whether an injury is irreparable, it is “well settled that economic loss does not, in and of itself, constitute irreparable harm.”²⁰ In particular, “litigation costs do not meet the standard of irreparable harm.”²¹ Thus, NYISO’s claim of economic loss does not constitute irreparable harm. Because NYISO has not met the irreparable harm criterion, we need not discuss the remaining two factors for evaluating a stay request and the request for stay is denied.

The Commission orders:

(A) The motion for stay filed by NYISO is hereby denied, as discussed in the body of this order.

(B) NYCPB’s and OPSI’s motions to intervene out-of-time are hereby denied.

By the Commission.

Kimberly D. Bose,
Secretary.

¹⁹ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)).

²⁰ *Amaranth Advisors L.L.C.*, 121 FERC ¶ 61,238 at P 5 (citing *Wis. Gas Co.*, 758 F.2d at 674).

²¹ *Id.*