

141 FERC ¶ 61,277
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

New York Independent System Operator, Inc. Docket Nos. ER13-435-000
ER13-437-000

ORDER CONDITIONALLY ACCEPTING TARIFF FILINGS

(Issued December 31, 2012)

1. On November 20, 2012, pursuant to section 205 of the Federal Power Act (FPA),¹ the New York Independent System Operator, Inc. (NYISO) submitted proposed revisions to the rules governing prohibited investments by its directors, employees, their spouses and their minor children (NYISO Employees) set forth in NYISO's Independent System Operator Agreement (ISO Agreement) and Open Access Transmission Tariff (NYISO OATT). The purpose of the proposed revisions is to permit NYISO Employees to place such investments in a blind trust as an alternative to divestiture. As discussed below, the Commission conditionally accepts NYISO's proposed revisions, effective January 1, 2013, as requested, subject to a compliance filing.

I. Background

2. In Order No. 888,² the Commission set forth 11 Principles for use in assessing proposals for the formation of Independent System Operators (ISOs) to ensure that they are independent of market participants. Principle No. 2 states that

¹ 16 U.S.C. § 824d (2006).

² *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

“[a]n ISO and its employees should have no financial interest in the economic performance of any power market participant,” the ISO “should adopt and enforce strict conflict of interest standards,” and “[e]mployees of the ISO should also be financially independent of market participants.”³

3. In authorizing the establishment of NYISO as an ISO in accordance with Order No. 888, the Commission accepted a Code of Conduct which includes a conflict of interest policy that prohibits NYISO Employees from owning securities of market participants or their affiliates.⁴ The conflict of interest policy states that NYISO Employees may not own securities of market participants or their affiliates whether the ownership is direct or through participation in mutual funds concentrating in market participants or their affiliates (Prohibited Securities).⁵ The policy also states that NYISO Employees must divest Prohibited Securities within six months of commencement of employment, when an entity becomes a market participant, or when a Prohibited Security is acquired by another means (e.g., inheritance, gift, marriage).⁶ The ISO Agreement contains requirements for directors, including a requirement that Prohibited Securities be disposed of in accordance with the terms of the Code of Conduct.⁷

II. Details of the Filings

4. NYISO proposes to modify its tariff provisions governing Prohibited Securities to permit NYISO Employees to place such securities in a blind trust as an alternative to divestiture under certain circumstances. In Docket No. ER13-435-000, NYISO filed proposed revisions to sections 12.7.1, 12.7.2, and 12.14 of Attachment F to the NYISO OATT, and in Docket No. ER13-437-000, NYISO filed proposed revisions to section 5.01 of the ISO Agreement.

5. NYISO explains that, over time, the list of Prohibited Securities for NYISO Employees has grown to include several hundred publicly-traded companies, including many that are not primarily engaged in the electric sector and whose NYISO market activities are *de minimus* in relation to the companies’ overall business activities. NYISO states that the current blanket restriction is a possible

³ *Id.* ¶ 31,730-32.

⁴ *Central Hudson Gas & Electric Corp., et al.*, 83 FERC ¶ 61,352, at 62,410 (1998), *reh’g*, 87 FERC ¶ 61,135 (1999).

⁵ NYISO OATT, Attachment F, section 12.7.1, *Financial Interests*.

⁶ *Id.* section 12.7.2.

⁷ ISO Agreement, section 5.01, *Composition of the ISO Board and Voting*.

impediment to recruiting and retaining the most qualified directors and employees and may cause unreasonable financial harm to a NYISO Employee who is required to divest the securities of a company that does not present a meaningful conflict of interest concern.

6. NYISO proposes to modify the NYISO OATT and ISO Agreement to allow NYISO Employees to place certain Prohibited Securities in a single blind trust as an alternative to divestiture, provided that the Prohibited Securities meet a two-pronged test: (1) the issuing company's industry code is not within the Electric Power Generation, Transmission, and Distribution industry group under the North American Industry Classification System;⁸ and (2) the issuing company's or its affiliate(s)' total participation in the NYISO markets is less than 0.5 percent of gross revenue. If the issuing company meets both prongs of this test, NYISO proposes that an NYISO Employee may elect to place the Prohibited Securities into a single blind trust rather than divesting them. The proposed revisions specify that NYISO will review each year whether a company that previously qualified for inclusion in a blind trust continues to be qualified under the two-pronged test, and if it no longer qualifies, then the company's Prohibited Securities must be divested.

7. NYISO explains that a blind trust "requires an independent third party to have full managerial discretion over a [blind] trust's holdings" and "the [blind] trust beneficiary—the NYISO Employee—would not have control over or visibility into the holdings of the [blind] trust."⁹ NYISO asserts that its proposed blind trust mechanism is consistent with the Commission's independence requirements for ISOs because, when an employee's Prohibited Securities are placed in a blind trust, the employee does not have a financial incentive to favor a particular market participant or class of market participants. NYISO also asserts that its proposal is consistent with the Commission's acceptance of a similar blind trust mechanism submitted by the Midwest Independent Transmission System Operator, Inc. (MISO),¹⁰ but, in addition, includes the two-pronged test as an additional safeguard to ensure independence.

⁸ NYISO states that the Electric Power Generation, Transmission, and Distribution industry group (2211) includes companies that generate electric power (22111), transmit electric power (221121), distribute electric power (221122), or operate as electric power brokers or agents to arrange the sale of electric power via distribution systems (221122). NYISO Filing at 5.

⁹ *Id.*

¹⁰ *Id.* at 2 (citing *Midwest Independent Transmission System Operator, Inc.*, 115 FERC ¶ 61,255, at P 11 (2006) (MISO)).

8. NYISO requests a waiver of the 60-day prior notice requirement in order to make these revisions effective on January 1, 2013. NYISO states that this will ensure that the blind trust mechanism is part of NYISO's compliance program at the start of the calendar year and will be in place as NYISO is entering the final phases of its search for a new director.

III. Notice of Filing and Responsive Pleadings

9. Notices of NYISO's filings were published in the *Federal Register*, 77 Fed. Reg. 71,407 (2012), with protests and interventions due on or before December 4, 2012. Motions to intervene were filed by New York Transmission Owners¹¹ and Multiple Intervenors.¹²

IV. Discussion

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹³ the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

11. We grant NYISO's request for waiver of the 60-day notice requirement and conditionally accept NYISO's proposed revisions to the NYISO OATT and ISO Agreement, effective January 1, 2013, as requested, subject to NYISO making a compliance filing within 30 days from the date of this order, as discussed below.

12. As modified as directed below, we find NYISO's proposed revisions to the NYISO OATT and ISO Agreement to be just and reasonable. The proposed revisions will provide NYISO Employees with an alternative to divestiture while maintaining NYISO's independence consistent with ISO Principle No. 2. In addition to being consistent with the provisions accepted by the Commission in *MISO*, the two-pronged test provides an additional safeguard of independence by restricting eligibility for the blind trust alternative to companies not primarily

¹¹ 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.

¹² Multiple Intervenors is an association of industrial, commercial, and institutional energy consumers located throughout New York State.

¹³ 18 C.F.R. § 385.214 (2012).

engaged in the electric sector and with *de minimus* activity in the NYISO markets in relation to their overall business activities.¹⁴ Furthermore, the proposed revisions require NYISO to review each year whether the Prohibited Securities that previously qualified for inclusion in a blind trust continue to be qualified under the two-pronged test, and if they no longer qualify, then they must be divested.

13. In the transmittal letter to the filing, NYISO explains that a blind trust “requires an independent third party to have full managerial discretion over a [blind] trust’s holdings” and “the [blind] trust beneficiary—the NYISO Employee—would not have control over or visibility into the holdings of the [blind] trust.” However, while NYISO describes the attributes of a blind trust in its transmittal letter, the proposed tariff revisions themselves do not define the term “blind trust.”¹⁵ Accordingly, because this term is not self-explanatory and to avoid confusion, we direct NYISO to make a compliance filing within 30 days from the date of this order to incorporate a definition of “blind trust” into the OATT and ISO Agreement.

The Commission orders:

(A) The proposed revisions to the NYISO OATT and the ISO

¹⁴ In another case, *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,036 (2011), the Commission denied a petition for a declaratory order regarding a proposed formula methodology to allow PJM personnel to hold financial interests in companies or their affiliates that were defined as “market participants,” but whose participation in PJM’s markets was minimal in relation to their overall business activities. PJM’s proposal is distinguishable from the NYISO proposal that we accept herein because PJM proposed to apply its formula methodology to independently determine whether a company qualified as a “market participant” pursuant to section 35.34(b)(2)(i) of the Commission’s regulations. The Commission found that allowing the RTO to make this determination, instead of the Commission, was inconsistent with the Commission’s regulations. Here, NYISO’s proposal does not put NYISO in the position of independently exempting companies from the definition of “market participant.”

¹⁵ MISO’s filing incorporated the following definition of “blind trust” in its tariff: “[A] ‘blind trust’ means a legally binding arrangement in which a fiduciary third party trustee (the administrator of the trust) has full management discretion over the assets of the trust (the securities), and the trust beneficiary (i.e., the Midwest ISO Director, agent, Officer, or employee) has no knowledge of the holdings or assets of the trust.” MISO Transmission Owner Agreement, Appendix A, section II.E.6.

Agreement are hereby conditionally accepted, effective January 1, 2013, as requested.

(B) NYISO is hereby directed to make a compliance filing within 30 days from the date of this order, as discussed in the body of the order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.