

136 FERC ¶ 61,116
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 No. ER11-3312-000

ORDER ON TARIFF REVISIONS

(Issued August 19, 2011)

1. On April 6, 2011, pursuant to section 205 of the Federal Power Act,¹ the New York Independent System Operator, Inc. (NYISO) submitted proposed revisions to its Market Monitoring Plan, filed as Attachment O to NYISO's Market Administration and Control Area Services Tariff (Services Tariff). As discussed below, we conditionally accept the proposed tariff revisions effective June 5, 2011, subject to NYISO submitting a compliance filing.

I. Background

2. In Order No. 719, the Commission found that state public utility commissions (PUC) may make tailored requests for information from a Regional Transmission Organization's (RTO) Market Monitoring Unit (MMU), so long as the request is limited to information regarding general market trends and performance of the wholesale market.² The Commission recognized that a MMU's response to such a request might include confidential material. To address that possibility, the Commission directed the RTOs and Independent System Operators (ISO) to develop confidentiality provisions for their tariffs, with such provisions designed to protect commercially sensitive material but to be no more restrictive than necessary to protect that information.³ The Commission stated

¹ 16 U.S.C. § 824d (2006).

² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

that “[w]here information to be provided raises confidentiality concerns, the information may nonetheless be provided, if appropriate non-disclosure agreements are executed....It will be up to each RTO or ISO, together with its stakeholders, to propose the confidentiality provisions they deem most appropriate, and to propose them to the Commission in a tariff filing.”⁴ The Commission further stated that “unless the information violates confidentiality restrictions regarding commercially sensitive material, is designed to aid state enforcement actions, or impinges on the confidentiality rules of the Commission with regard to referrals, it may be produced, so long as it does not interfere with the MMU’s ability to carry out its core functions.”⁵

3. In its May 15, 2009 filing in compliance with Order No. 719, NYISO stated that it planned to make a separate filing proposing confidentiality provisions after completing its discussions with stakeholders.⁶ The Commission found this plan to be acceptable.⁷ On April 6, 2011, NYISO made such filing, including provisions dealing with exchange of protected information among NYISO, its MMU, and other RTOs, ISOs, and MMUs.

4. On June 3, 2011, the Commission issued a deficiency letter directing NYISO to provide additional information relating to its proposal to establish protocols for limited exchange of Protected Information between and among MMUs, ISOs, and RTOs. NYISO filed a response to the deficiency letter on June 21, 2011.

II. Details of the April 6, 2011 Filing

5. NYISO states that its proposed tariff changes: (1) address Order No. 719 requirements relating to the MMU’s disclosure obligations vis-à-vis state PUCs, and

³ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 448.

⁴ *Id.*

⁵ *Id.* P 449.

⁶ *New York Independent System Operator, Inc.*, 129 FERC ¶ 61,164, at P 136 (2009) (November 20, 2009 Order).

⁷ *Id.* P 143.

(2) establish a framework for the exchange of Protected Information⁸ among NYISO, its MMU, and other RTOs, ISOs, and MMUs, to address concerns raised in the context of the Lake Erie Loop Flow investigation by NYISO and other ISOs and RTOs about confidentiality restrictions potentially impeding market monitoring investigations.⁹ NYISO explains that it is submitting the second category of proposed changes in response to the Commission's statement in that proceeding that it "should continue to work with its market participants, [the North American Electric Reliability Corporation], and neighboring RTOs to develop potential solutions to this issue."¹⁰

6. NYISO states that the proposed tariff changes were presented at multiple Market Participant Working Group meetings in 2010 and were unanimously approved (with abstentions) by the Management Committee on November 17, 2010. NYISO states that it recognizes that the specific language proposed in this filing may not be appropriate for other ISOs and RTOs and their market monitoring organizations and does not propose that the Commission direct any of the other ISOs or RTOs to make any specific modifications to their tariffs in response to its proposal. NYISO proposes to modify various sections of its Market Monitoring Plan, as described below.

⁸ The proposed amended definition of "Protected Information" in the Market Monitoring Plan is: "(a) information that is confidential, proprietary, commercially valuable or competitively sensitive or is a trade secret, (b) information that is Confidential Information under Attachment F of the ISO OATT, (c) information that the Market Monitoring Unit or the ISO is obligated by tariff, regulation or law to protect, (d) information which, if revealed, would present opportunities for collusion or other anticompetitive conduct, or that would facilitate conduct that is inconsistent with economic efficiency, (e) information relating to ongoing investigations and monitoring activities (including the identity of the person or Market Party that requested or is the subject of an investigation, unless such party consents to disclosure), (f) information subject to the attorney-client privilege, the attorney work product doctrine, or concerning pending or threatened litigation, or (g) information that has been designated as such in writing by the party supplying the information to the ISO or to its Market Monitoring Unit, or by the ISO or its Market Monitoring Unit, provided that such designation is consistent with the ISO's tariffs and this Plan." Market Monitoring Plan, NYISO Services Tariff, Attachment O, proposed revised section 30.2.

⁹ Filing at 3 (citing *New York Independent System Operator, Inc.*, 124 FERC ¶ 61,174 at, P 28 (2008) (NYISO)).

¹⁰ *Id.*

7. NYISO proposes to amend the definition of Protected Information to clarify that the designation of information as protected by the party supplying the information must be consistent with NYISO's tariffs and the Market Monitoring Plan.

8. NYISO's proposed changes to section 30.6.4, "Confidentiality," of the Market Monitoring Plan include adding that NYISO's and its MMU's obligation to protect and preserve the confidentiality of Protected Information shall be of a continuing nature. Further, the changes clarify that Protected Information shall not be disclosed to any person or entity, without the prior written consent of the party that the Protected Information pertains to, by the MMU and the ISO, except as required by subpoena or other compulsory process, or as authorized in the ISO's Tariffs and governing documents (including the Market Monitoring Plan). NYISO also proposes to amend this section to require that NYISO or its MMU promptly notify the source of Protected Information provided under section 30.6.6 upon receipt of a subpoena or other compulsory process seeking disclosure of the information and to provide reasonable assistance requested by the party to prevent or limit disclosure. NYISO also proposes to clarify that nothing in the Market Monitoring Plan alters any existing statutory jurisdiction or authority to compel disclosure that may apply to NYISO, its MMU, or any other ISO, RTO, or MMU.

9. NYISO proposes amendments to section 30.6.5., "Collection and Availability of Information," of the Market Monitoring Plan. NYISO proposes to revise section 30.6.5.1 to provide that NYISO and its MMU may provide Protected Information to each other as they determine necessary to carry out the purposes of the Market Monitoring Plan. NYISO also proposes changes to section 30.6.5.5.1 to add that, except as provided within the instant section, its MMU shall not provide Protected Information to a state PUC in response to a request under section 30.6.5.5.¹¹ The proposed section states that its MMU may, but is not required, to provide Protected Information to a state PUC when the party to which the requested Protected Information pertains has consented in writing to its disclosure, or if the general counsel/chief legal officer of the state PUC certifies in writing that: (1) the requested Protected Information will be protected from disclosure by law, (2) the requested Protected Information will be treated as confidential to the fullest

¹¹ Section 30.6.5.5 of the Market Monitoring Plan provides:

"The New York Public Service Commission and any Other State Commission may make tailored requests to the Market Monitoring Unit for information related to general market trends and the performance of the New York Electric Markets. If the Market Monitoring Unit determines that such a request is not unduly burdensome, it shall provide the information sought, subject to the restrictions and limitations established in Sections 30.6.5.5.1, 30.6.5.5.2 and 30.6.5.5.4, below." Market Monitoring Plan, NYISO Services Tariff, Attachment O, section 30.6.5.5.

extent of the laws of its state, (3) the state PUC will promptly notify the MMU if it receives a request for disclosure of all or part of the Protected Information, (4) the state PUC agrees to provide all reasonable and permissible assistance to prevent further disclosure of the Protected Information in response to a request governed by section 30.6.5.5, and (5) the Protected Information will not be used for a state enforcement action. Proposed section 30.6.5.5.1 also prohibits the MMU from providing Protected Information it receives from another ISO, RTO, or MMU. The MMU shall instead identify the ISO, RTO, or MMU that provided the information so that the state PUC can request the Protected Information directly from the source.

10. NYISO also proposes changes to section 30.6.6, "Sharing Information with Other ISOs/RTOs and Market Monitoring Units." NYISO proposes to delete sections 30.6.6.2 through 30.6.7.3.6 and amend section 30.6.6.1 to provide that NYISO or its MMU may disclose Protected Information to another ISO, RTO or MMU (Requesting Entity) under specified conditions. The Requesting Entity first must submit a written request stating that the Protected Information is necessary to an investigation or evaluation that it is undertaking within the scope of its approved tariffs, other governing documents, or an applicable law or rule to make certain listed determinations. The Requesting Entity then must either: (1) demonstrate that its tariff or other governing document limits further disclosure of the information, or (2) execute a non-disclosure agreement with NYISO or its MMU and provide written certification that the Requesting Entity possesses legal authority to enter into the agreement and be bound by its terms.

11. NYISO proposes to add section 30.6.6.1.1, which provides that the Requesting Entity's governing documents or non-disclosure agreement must: (1) protect Protected Information from disclosure, except where disclosure may be required by the Commission, subpoena, or other compulsory process, (2) establish a legally enforceable, continuing obligation to treat Protected Information as confidential, (3) require state PUCs to request Protected Information provided by NYISO or its MMU directly from NYISO or its MMU, and promptly inform NYISO or its MMU of any such requests, (4) require the Requesting Entity to promptly notify NYISO or its MMU and seek appropriate relief to prevent or limit disclosure of Protected Information in the event that a compulsory process seeks to require disclosure, (5) require the Requesting Entity to promptly notify NYISO or its MMU of any third party requests for additional disclosure of Protected Information where it has been disclosed to a court or regulatory body in response to a compulsory process and seek appropriate relief to prevent or limit further disclosure, and (6) require the destruction of Protected Information at the time specified in section 30.6.6.1.1.

12. Proposed section 30.6.6.1.1 also states that NYISO or its MMU may undertake a joint investigation with another ISO, RTO, or MMU to make certain determinations, in which case NYISO or its MMU may disclose Protected Information to other RTOs under certain conditions. Finally, proposed section 30.6.6.1.1 provides that Protected

Information provided by another ISO, RTO, or MMU to NYISO or its MMU shall either be destroyed or returned to the source at the earlier of (1) five business days after receipt of a request from the source for the return of the Protected Information, or (2) the conclusion or resolution of the matter being investigated.

III. Notice and Comments

13. Notice of NYISO's filing was published in the *Federal Register*, 76 Fed. Reg. 21,732 (2011), with interventions and protests due on or before April 27, 2011. A notice of intervention was filed by the New York State Public Service Commission. A timely motion to intervene was filed by the New York Transmission Owners. No protests were filed.

IV. The June 21, 2011 Supplemental Filing

14. The Commission's deficiency letter asked NYISO to (1) provide examples of the types of investigations and/or evaluations that would be covered under proposed sections 30.6.6.1 and 30.6.6.1.1; (2) describe under what circumstances and for what time period Protected Information would be shared among MMUs and/or RTOs/ISOs prior to sharing the information with the Commission, and at what point the Commission would be informed of the sharing and be provided the same information; and (3) explain how NYISO or the MMU would ensure that a Requesting Entity under proposed section 30.6.6.1 would not release information to another party.

15. NYISO states in its response to the deficiency letter that proposed tariff sections 30.6.6.1 and 30.6.6.1.1 are intended to permit sharing of Protected Information necessary to investigate possible Market Violations or market design flaws to determine if: (a) "sufficient credible information" exists to warrant referral of a possible Market Violation to the Commission, or (b) there is "reason to believe that a market design flaw exists" between two interconnected markets.¹² NYISO states that, for example, an MMU of a neighboring ISO/RTO might find that the number of External Transactions scheduled in that neighboring market that failed check-out with New York was gradually increasing. Under these circumstances, according to NYISO, this MMU might want to review the bids submitted by Market Participants in New York or be interested in determining if there were reliability reasons causing the transactions to fail in New York. NYISO contends that proposed section 30.6.6.1 would permit NYISO or its MMU to respond to requests for such data, so long as all of the requirements and safeguards NYISO proposes in its filing are satisfied. NYISO states that if the information obtained pointed to possible Market Violations, or to a possible market design flaw, then the MMU of the neighboring ISO or RTO would present the concerns it identified to the

¹² NYISO June 21, 2011 Response at 2 (citing Services Tariff sections 30.4.5.3.1 and 30.4.5.4.1).

Commission's Office of Enforcement or to the Office of Energy Market Regulation, consistent with relevant tariff provisions and the Commission's regulations.

16. NYISO asserts that the proposed authority to share information is explicitly limited to investigations that fall within a Requesting Entity's existing legal authority¹³ and that the authority to share information does not expand the permitted scope of the investigative authority of a MMU, ISO, or RTO. NYISO states that the Commission will be informed as soon as a MMU determines (a) that "sufficient credible information" exists to warrant referral of a possible Market Violation to the Commission, or (b) that there is "reason to believe that a market design flaw exists" between two interconnected markets. NYISO maintains that the Commission, upon receipt of a referral, could instruct all of the jurisdictional entities that participated in the exchange to turn over all information in their possession that was prepared to assist in the investigation, and request additional information from any non-jurisdictional participants.¹⁴ However, NYISO explains that it expects that its data sharing proposals would reduce the time a MMU would need to determine whether or not the referral of a possible Market Violation or market design flaw is required.

17. In the case of a joint investigation, NYISO states that the participating MMU(s) would make referrals to the Commission in compliance with the requirements of their respective market monitoring plans and the Commission's regulations. Thus, according to NYISO, the Commission would be informed as soon as a participating MMU determined either (a) that "sufficient credible information" existed to warrant referral of a possible Market Violation to the Commission, or (b) that there was "reason to believe that a market design flaw exists." NYISO states, once the Commission is made aware of the investigation, NYISO and its MMU would respond to requests for information, including Protected Information, consistent with their existing tariff obligations to provide data and information to the Commission.¹⁵ NYISO maintains it understands that other Commission-jurisdictional ISOs, RTOs, and their MMUs are subject to similar disclosure obligations. NYISO avers that the Commission's authority and ability to review the information developed in the course of a joint investigation would be the same

¹³ NYISO June 21, 2011 Response at 2 (citing proposed section 30.6.6.1, which requires a requesting MMU, ISO or RTO to "submit a written request stating that the requested Protected Information is necessary to an investigation or evaluation that the Requesting Entity is undertaking within the scope of its approved tariffs, other governing documents, or an applicable law or rule").

¹⁴ *Id.* at 3 (citing NYISO Market Services Tariff section 30.6.5.6).

¹⁵ *Id.* at 4.

as its authority and ability to review the information developed by one ISO/RTO or MMU conducting a unilateral investigation within its own market.

18. NYISO explains its proposals require a Requesting Entity to meet a high standard in maintaining the confidentiality of any Protected Information by applying at least the same level of protection for NYISO data that it is required to give to Confidential and Protected Information under its own tariffs. NYISO states that proposed section 30.6.6.1 requires a Requesting Entity to either (a) show that its Tariffs or other governing documents include all of the protections required in proposed section 30.6.6.1.1, or (b) to execute a Non-Disclosure Agreement that includes the same protections before NYISO discloses any Protected Information to that Requesting Entity.¹⁶ NYISO avers that proposed tariff sections 30.6.6.1.1(1) and (2) require the Requesting Entity to (a) protect the shared information from disclosure, and (b) be subject to an ongoing, legally enforceable obligation, to protect the confidentiality of the information that is shared.

V. Commission Determination

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁷ the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

20. We accept NYISO's proposed revisions to its Market Monitoring Plan. The Commission directed the RTOs and ISOs to develop confidentiality provisions for their tariffs that protect commercially sensitive material and allow confidential information to be provided if appropriate non-disclosure agreements are executed.¹⁸ The Commission specified that an RTO or ISO cannot provide such information if providing the information violates confidentiality restrictions regarding commercially sensitive material, is designed to aid state enforcement actions, or impinges on the confidentiality rules of the Commission with regard to referrals.¹⁹ NYISO's proposed tariff changes establish the conditions under which NYISO and its MMU will respond to tailored requests for information from state PUCs, in accordance with Order No. 719.²⁰ The

¹⁶ *Id.*

¹⁷ 18 C.F.R. § 385.214 (2011).

¹⁸ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 448.

¹⁹ *Id.* P 449.

²⁰ As the Commission explained in Order No. 719, state PUC requests must be "limited to information regarding general market trends and the performance of the

definition of “Protected Information” contained in the Market Monitoring Plan encompasses commercially sensitive material by including information that is “confidential, proprietary, commercially valuable or competitively sensitive or is a trade secret.”²¹ The definition of Protected Information also includes “information that NYISO or its MMU is obligated by tariff, regulation or law to protect.” The proposed changes allow Protected Information to be provided to a state PUC if the state PUC certifies in writing, *inter alia*, that the requested Protected Information will be protected from disclosure by law and that it will not be used for a state enforcement action. We therefore find that the proposed tariff revisions are consistent with the Commission’s directives in Order No. 719.

21. We also find NYISO’s proposed tariff changes regarding sharing of confidential information between RTOs, ISOs, and MMUs, as revised below, to be reasonable. The Commission expressed concern over suggestions that market monitoring rules might preclude prompt identification and resolution of possible market manipulation and encouraged NYISO to work with market participants to address concerns that confidentiality restrictions could impede market monitoring investigations.²² NYISO has used its stakeholder process to address these concerns. The proposed tariff revisions allow NYISO or its MMU to disclose Protected Information to another RTO, ISO, or MMU. Such sharing of information can play an important role in identifying and resolving possible market issues, with confidential information being protected.

22. In its supplemental filing, NYISO states that “[t]he Commission will be informed as soon as a MMU determines ... that ‘sufficient credible information’ exists to warrant referral of a possible Market Violation to the Commission.” We read this to address when a referral will be made to the OE staff pursuant to section 35.28(3)(iv)(A).²³ However, section 35.28(g)(3)(ii)(C) of our regulations requires an MMU to notify the OE staff once the MMU determines that a market participant’s or Commission approved ISO or RTO’s behavior may require investigation, including, but not limited to, suspected Market Violations.²⁴ A referral may occur after notification under section

wholesale market.” *Id.* P 446.

²¹ Market Monitoring Plan, NYISO Services Tariff, Attachment O, proposed revised section 30.2.

²² *NYISO*, 124 FERC ¶ 61,174 at P 28.

²³ 18 C.F.R. § 35.28(3)(iv)(A) (2011).

²⁴ *Id.* § 35.28(g)(3)(ii)(C). An MMU’s informal notification to OE does not

35.28(g)(3)(ii)(C), once an MMU has “reason to believe” that a Market Violation has occurred.²⁵

23. The Commission recognized the need for notification of these issues in promulgating Order No. 719. In Order No. 719, the Commission stated: “[W]e expect MMUs to be vigilant in identifying problems and bringing them to the attention of the RTO or ISO, the Commission, and other interested entities.”²⁶

24. To ensure that the Commission is notified of behavior that may require investigation, including, but not limited to, suspected Market Violations, we will require NYISO to file a compliance filing, within 30 days of the date of this order, revising its tariff to require that, if a Requesting Entity is a jurisdictional RTO or ISO, NYISO must also provide the requested information to that entity’s MMU. However, the receiving MMU must meet the confidentiality requirements and obligations in NYISO’s tariff, as accepted here.

The Commission orders:

(A) The proposed revisions to Attachment O to NYISO Services Tariff are hereby conditionally accepted to be effective June 5, 2011, as discussed in the body of this order.

require the MMU to cease investigation of the matter, as is the case with a referral.

²⁵ *Id.* § 35.28(g)(3)(iv)(A).

²⁶ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 356. The Commission also spoke to the importance of notifying OE of suspicious behavior in a prior NYISO Order No. 719 compliance order. There, the Commission stated:

NYISO’s tariff provision stating that the MMU will notify staff of suspected Market Violations is important in assuring that the Commission is aware of potential violations in a timely fashion. (Footnote omitted.) If the MMU does not notify the Commission of such actions by a market participant or NYISO itself, the Commission will not be able to uphold its responsibility to take appropriate enforcement action, where warranted, when such matters arise. ... Further, in the event the MMU observes activity that may be questionable, but it does not yet have sufficient grounds to make a referral, the MMU should notify Commission staff informally in order to comply with ... NYISO’s proposed tariff.

New York Independent System Operator, 129 FERC ¶ 61,164 at P 98, 100 (2009).

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.