

July 18, 2012

**Submitted Electronically**

Kimberly D. Bose  
Secretary  
Federal Energy Regulatory Commission  
888 First Street N.E.  
Washington, D.C. 20426

Re: New York Independent System Operator, Inc.'s Proposed Tariff Amendments to Permit Recovery of Charges for International Transmission Company's Phase Angle Regulators and Request for Retroactive Effective Date;  
Docket No. ER12-\_\_\_\_-\_\_\_\_\_.

Dear Ms. Bose:

Pursuant to Section 205 of the Federal Power Act ("FPA")<sup>1</sup> and consistent with the Federal Energy Regulatory Commission's ("FERC's" or "Commission's") May 22, 2012 *Order On Petition for Declaratory Order* in Docket No. EL12-38, ("May Order")<sup>2</sup> the New York Independent System Operator, Inc. ("NYISO") hereby submits proposed amendments to Section 6.1.6 of Rate Schedule 1 to the NYISO's Open Access Transmission Tariff ("OATT"). The proposed amendments will permit the NYISO to recover from its Transmission Customers<sup>3</sup> payments that the NYISO makes to the Midwest Independent Transmission System Operator, Inc. ("MISO") for charges assessed by the MISO for International Transmission Company's ("ITC's") replacement Bunce Creek phase angle regulators ("PARs").

The NYISO has argued that it should not be required to pay the charges assessed by the MISO for ITC's PARs until the Commission determines that the ITC PAR charges are just and reasonable.<sup>4</sup> However, in its May Order the Commission instructed the NYISO "...the Commission has accepted MISO's proposed allocation and charges in Docket No. ER11-1844, and permitted them to become effective, subject to refund. Therefore, any charges properly billed pursuant to these Commission-accepted MISO Tariff provisions must be paid by NYISO in accordance with the provisions of MISO's Tariff." The Commission

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<sup>1</sup> 16 U.S.C. § 824d (2010).

<sup>2</sup> *New York Independent System Operator, Inc.*, 139 FERC ¶ 61,139 (2012).

<sup>3</sup> Capitalized terms that are not expressly defined herein have the meaning specified in the NYISO's OATT.

<sup>4</sup> See the *Petition for Declaratory Order* that the NYISO filed in the above docket on February 28, 2012 at 3-4.

further instructed the NYISO that it would need to make a filing under section 205 of the FPA proposing whatever cost allocation method NYISO determines to be most appropriate. This filing is submitted to comply with the Commission's instruction.

The proposed tariff revisions are submitted under protest. The NYISO and New York Transmission Owners are vigorously contesting the propriety, justness and reasonableness of MISO's and ITC's proposed charges in the hearing that is being held in Docket No. ER11-1844. This submission should not be interpreted as supporting either the merits of ITC's claim for compensation for the Bunce Creek PARs, or the merits of the MISO's proposed mechanism for recovering the cost of those facilities from the NYISO's customers. The allocation method that the NYISO proposes in this filing is not based on the benefits that ITC's PARs provide to New York, because ITC has yet to prove that its PARs provide *any* benefits to New York.<sup>5</sup> Whether, and the extent to which, ITC's PARs may provide "benefits" to New York is one of the many matters being considered in the hearing on the merits in Docket No. ER11-1844.

To comply with the Commission's instruction that it pay the charges it receives from the MISO, and in the absence of tariff authority to charge its customers, the NYISO has used its working capital fund to pay approximately \$850,000.00 in charges it has already received from the MISO for the ITC PARs. In order to permit the NYISO to recover payments that it has already made in a manner that is consistent with its recovery of subsequent MISO charges, and consistent with the implementation authority that the Commission granted to PJM Interconnection, L.L.C. ("PJM"),<sup>6</sup> the NYISO requests that the Commission permit the proposed tariff revisions to become effective on April 5, 2012, the date on which the ITC PARs entered service. Because the MISO's tariff revisions only permit the MISO to charge the NYISO "on behalf of its customers," the NYISO's customers have been on notice that they could have to pay charges related to the ITC PARs since the Commission issued its December (2010) Order permitting the MISO's proposed tariff revisions to take effect. The NYISO's requested effective date is appropriate under the unusual circumstances presented.

## I. LIST OF DOCUMENTS SUBMITTED

The NYISO submits the following documents:

1. this filing letter;
2. a statement issued by the NYISO's Board of Directors (Attachment I);

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<sup>5</sup> For example, MISO's response to NYISO/MISO Data Request No. 10-3 in Docket No. ER11-1844 states "MISO further explains that it has not performed any studies evaluating 'the benefits that NYISO's customers received from the B3N PARs' either prior to, during, or after the outage referenced in NYISO/MISO 10-1."

<sup>6</sup> *PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,012 at P 18 (2012) (accepting PJM's proposed rate schedule effective April 5, 2012).

3. a clean version of the proposed revisions to NYISO OATT Rate Schedule 1 (Attachment II); and
4. a blacklined version of the proposed revisions to NYISO OATT Rate Schedule 1 (Attachment III).

## II. COPIES OF CORRESPONDENCE

Correspondence concerning this filing should be served on:

Robert E. Fernandez, General Counsel  
Mary K. McGarvey, Vice President and Chief Financial  
Officer  
Raymond Stalter, Director of Regulatory Affairs  
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## III. BACKGROUND

On December 30, 2010 the Commission issued an order in Docket No. ER11-1844 accepting, subject to refund, revisions to the MISO's tariffs that permit MISO to charge the NYISO "on behalf of its customers"<sup>7</sup> for the cost of ITC's Bunce Creek PARs. In its May Order, the Commission instructed the NYISO that it must pay the ITC PAR charges that it receives from MISO. However, the NYISO's existing tariff provisions do not permit the NYISO to recover the cost of ITC's PARs from the NYISO's customers. The NYISO is a not-for-profit corporation with no retained earnings. The only sources of funding the NYISO has are those that its tariffs specifically authorize the NYISO to recover from its customers. For this reason, the NYISO has been temporarily using its Working Capital Fund, a fund specifically authorized by the NYISO tariffs and accumulated via collections from all customers to ensure the liquidity of the NYISO markets, to pay the ITC PAR charges, until the NYISO obtains authority to recover its payments to the MISO from its customers.

In this filing the NYISO seeks authority to recover charges it receives from MISO for ITC's PARs from the NYISO's customers. As explained in the statement issued by the NYISO's Board of Directors that is included as Attachment I to this transmittal letter, the

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<sup>7</sup> See MISO's proposed Schedule 36 that was included as Tab A to the MISO's and ITC's October 20, 2010 joint filing initiating Docket No. ER11-1844.

NYISO and its stakeholders disagree with the Commission's decision to require the NYISO's customers to pay for the ITC PARs, even on an interim basis, subject to refund. The NYISO, the New York Transmission Owners, and the New York State Public Service Commission have all requested rehearing of the Commission's December 30, 2010 Order accepting the MISO's proposed tariff revisions, subject to refund.<sup>8</sup> The Commission has yet to rule on the pending rehearing requests in Docket No. ER11-1844. While the NYISO is confident that the Commission will rule in the NYISO's favor following the completion of the hearing on the merits in Docket No. ER11-1844, the hearing, briefing and decision process are expected to require many months to complete. The NYISO cannot continue to pay the ITC PAR charges "on behalf of its customers" without having a means of recovering the payments it makes from its customers.

#### IV. PROPOSED TARIFF REVISIONS

The NYISO proposes the following changes to Section 6.1.6 of Rate Schedule 1 of its OATT in order to permit the NYISO to pass-through to its customers charges it receives from the MISO for ITC's PARs:

- The proposed amendments make clear that the ITC PARs are not needed for the economic and reliable operation of the NYS Transmission System. Since the NYISO has operated the NYS Transmission System reliably and efficiently for the past decade without ITC's PARs in place, it is clear that the ITC PARs are not "needed" for the economic and reliable operation of the NYS Transmission System
- The proposed amendments require the NYISO to include ITC PAR charges as NonISOFacilitiesCosts in the allocation formulae set forth in Sections 6.1.6.1.1 and 6.1.6.1.2 of Rate Schedule 1 to its OATT.
  - If and when the NYISO's proposed revisions to OATT Rate Schedule 1 are permitted to become effective, the NYISO will apply its proposed allocation method to recover from its Transmission Customers ITC PAR payments that the NYISO has drawn on its Working Capital Fund to make on their behalf.
- The proposed amendments specify how any Commission-ordered refunds will be redistributed to the NYISO's Transmission Customers. In general, refunds will be made to NYISO Transmission Customers that paid ITC PAR-related charges in proportion to their payments. Entities that have left the NYISO's markets will not receive a refund.
  - The NYISO's proposed refund mechanism does not require the NYISO to re-open closed bills in order to appropriately process and allocate refunds to its Transmission Customers.

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<sup>8</sup> *Midwest Independent Transmission System Operator, Inc.*, 133 FERC ¶ 61,275 (2010).

- Finally, in the unlikely event that the Commission were to issue a final determination that NYISO customers must pay a portion of the cost of ITC's PARs, the proposed revisions require the NYISO to commence a stakeholder process to develop a permanent cost recovery mechanism. The permanent cost recovery mechanism may be the same as, or might be different from, the temporary cost recovery mechanism proposed in this filing.

The tariff revisions proposed in this filing are submitted herewith in both clean and redlined versions.

## V. REQUEST FOR APRIL 5, 2012 EFFECTIVE DATE

The NYISO respectfully requests that the tariff revisions proposed in this filing be permitted to become effective on April 5, 2012, the date on which ITC's Bunce Creek PARs entered service. The NYISO's request for a retroactive effective date is appropriate in this instance because the Commission has instructed that the NYISO is obligated to pay the charges it receives from the MISO, and because the NYISO's customers have been on notice<sup>9</sup> since late 2010 that they would be expected to pay any charges that MISO permissibly issued to the NYISO for the ITC PARs. The NYISO's requested effective date is consistent with the effective date that the Commission granted for PJM's proposed tariff revisions that will permit PJM to recover MISO charges for a portion of the cost of ITC's Bunce Creek PARs from PJM's customers.<sup>10</sup>

To comply with the Commission's instruction that it pay the charges it receives from the MISO, and in the absence of tariff authority to recover such payments from its customers, the NYISO has used its Working Capital Fund to pay approximately \$850,000.00 in charges it has already received from the MISO for the ITC PARs. In order to permit the NYISO to recover payment that it has already made to MISO in a manner that will be consistent with its recovery of subsequent charges that it receives from the MISO, the NYISO requests that the Commission permit the tariff revisions proposed in this filing to become effective on April 5, 2012, the date on which ITC's Bunce Creek PARs entered service. Because the MISO's proposed tariff revisions only permit the MISO to charge the NYISO "on behalf of its customers," the NYISO's customers have been on notice that they could have to pay for the ITC PARs since the Commission issued its December (2010) Order.<sup>11</sup> The Commission also provided notice to the NYISO's customers of this existing payment obligation in the order it issued in response to PJM's declaratory order request in Docket No. EL12-10 on April 6,

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<sup>9</sup> See *Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) quoting *Exxon Co. U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) ("the rule against retroactive ratemaking ... does not extend to cases in which [customers] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service").

<sup>10</sup> *PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,012 at P 18 (2012) (accepting PJM's proposed rate schedule effective April 5, 2012).

<sup>11</sup> The December Order permitted the MISO's proposed tariff revisions to become effective, subject to refund, on January 1, 2011.

2012, and in its May Order, which was issued one day before the NYISO paid the first invoice it received for the ITC PARs. The NYISO's requested April 5, 2012 effective date is appropriate under the unusual circumstances presented in this proceeding.

## **VI. STAKEHOLDER APPROVAL**

On June 12, 2012 the tariff revisions proposed in this filing were approved by the NYISO's Management Committee with approximately 64% of the Market Participants voting in favor of the measure. Several Market Participants indicated that they voted against, or would not vote for the proposed Tariff Revisions because they do not believe that NYISO customers should be paying for PARs that ITC designed and constructed without their input to benefit ITC's transmission customers.

## **VII. SERVICE**

The NYISO will send an electronic link to this filing to the official representative of each of its customers, to each participant on its stakeholder committees, to the New York State Public Service Commission, and to the New Jersey Board of Public Utilities. In addition, the complete filing will be posted on the NYISO's website at [www.nyiso.com](http://www.nyiso.com).

## **VIII. CONCLUSION**

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc. respectfully requests that the Commission accept the proposed tariff changes identified in the Attachments hereto, with an effective date of April 5, 2012.

Respectfully submitted,

/s/ Alex M Schnell

Robert E. Fernandez, General Counsel  
Alex M. Schnell  
New York Independent System Operator, Inc.