UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc. and International Transmission Company d/b/a ITC*Transmission*

Docket No. ER11-1844-002

ANSWER OF NEW YORK INDEPENDENT SYSTEM OPERATOR, INC. IN OPPOSITION TO THE MOTION TO LODGE OF THE JOINT APPLICANTS

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2012), the New York Independent System Operator, Inc. ("NYISO") hereby submits this answer in opposition to the motion filed by the International Transmission Company d/b/a ITC*Transmission* ("ITC") and the Midcontinent Independent Transmission System Operator, Inc. ("MISO") (collectively, "Joint Applicants") to lodge one slide from the FERC Office of Enforcement's 2012 State of the Markets Report ("State of the Markets Report") in the evidentiary record in this proceeding ("Motion to Lodge").

The Commission should deny the Joint Applicants' Motion to Lodge because:

- A full evidentiary hearing was already held in this proceeding;
- Precedent demonstrates that denial is appropriate; and
- Granting the motion would be highly prejudicial to the NYISO and would violate due process.

I. BACKGROUND

Presiding Administrative Law Judge Steven L. Sterner (the "Presiding Judge") engaged the parties in approximately eight months of proceedings to develop a complete

evidentiary record in this Docket. The evidentiary record was closed in September of 2012[1] and was relied on by all of the parties to draft initial and final briefs, for the Presiding Judge to draft his Initial Decision and for the parties to draft and/or respond to briefs on exceptions to the Initial Decision. Since the record was closed, all of the parties to this proceeding have accepted the record as developed, except the Joint Applicants. The Joint Applicants have made two previous attempts to reopen the record; first with their failed Motion to Supplement in November 2012, second with their failed Motion to Lodge in December 2012.

Following the submission of reply briefs, MISO filed a Motion to Supplement the Record on November 14, 2012 (the "MISO Motion to Supplement"). The MISO Motion to Supplement sought the admission of a MISO-produced summary of Michigan-Ontario PAR operating data into the evidentiary record after the record had closed.[2] The NYISO and FERC Trial Staff opposed the MISO Motion to Supplement.[3] The Presiding Judge rejected the motion in his "Order Denying Motion to Supplement"[4] because MISO had not made the required showing of extraordinary circumstances to permit, pursuant to Rule 716, reopening the record to admit supplemental exhibits. While the Presiding Judge stated that this reason alone was sufficient to deny the motion, the Order Denying Motion to Supplement also

[1] *Midwest Independent Transmission System Operator, Inc.*, 141 FERC ¶ 63,021 at P 52 (2012).

[2] *Motion of the Midwest Independent Transmission System Operator, Inc. to Supplement the Record*, Docket No. ER11-1844 (November 14, 2012).

[3] *See Answer of NYISO in Opposition to Motion of Midwest Independent Transmission System Operator, Inc. to Supplement the Record*, Docket No. ER11-1844 (November 19, 2012); *Answer of Commission Trial Staff Opposing Motion of the Midwest Independent Transmission System Operator to Supplement the Record*, Docket No. ER11-1844 (November 29, 2012).

[4] *Midwest Independent Transmission System Operator, Inc.*, Order Denying Motion of the Midwest Independent Transmission System Operator, Inc. to Supplement the Record, Docket No. ER11-1844 at P 9 (December 3, 2012).

found that: (i) "the scales tipped in favor of administrative finality" when balanced against reopening the record;[5] (ii) granting the motion would violate due process and be highly prejudicial to the non-moving parties;[6] and (iii) the exhibits offered were not subject to the same scrutiny and cross-examination as evidence produced in discovery or as exhibits attached to sworn testimony.[7] The Joint Applicants did not challenge the Presiding Judge's ruling.

On December 11, 2012, the Joint Applicants filed a Motion to Lodge a Commission Order from another Commission Docket in this Docket. The Joint Applicants moved to supplement the record with the Commission's December 10, 2012, ruling in Docket No. ER12-1761.[8]

On December 18, 2012, the Presiding Judge issued his Initial Decision[9] based on the full hearing, corresponding record, and all briefs filed by the parties. The Presiding Judge found that it is unjust, unreasonable, and unduly discriminatory to allocate the costs of the ITC Replacement PARs to NYISO and PJM customers. The Joint Applicants' December 11, 2012 Motion to Lodge Commission Order was denied by the Presiding Judge in the Initial Decision.[10] The Joint Applicants did not file an exception to the Presiding Judge's rejection of their Motion to Lodge Commission Order.

The Motion to Lodge that is before the Commission is the Joint Applicants' third post-hearing attempt to supplement the evidentiary record that was developed in this

[5] *Id*. at P 10.

[6] *Id*. at P 13.

[7] *Id*.

[8] *PJM Interconnection, L.L.C.*, 141 FERC ¶ 61,200 (2012).

[9] *Midwest Independent Transmission System Operator, Inc.*, 141 FERC ¶ 63,021 (2012).

[10] Initial Decision at P 923.

proceeding. Consistent with the Presiding Judge's unchallenged rulings on the Joint Applicants' first two attempts, the Commission should reject the Joint Applicants' third attempt to supplement the extensive record that has been developed in this proceeding.

II. JOINT APPLICANTS HAVE FAILED TO SATISFY THE RULE 716 STANDARD FOR REOPENING THE RECORD

Rule 716 provides, "[t]o the extent permitted by law, the presiding officer or the Commission may, for good cause under paragraph (c) of this section, reopen the evidentiary record in a proceeding for the purpose of taking additional evidence."[11] Paragraph (c) allows the Commission to reopen the record in a proceeding after the initial decision for "good cause" if the Commission "has reason to believe that reopening of a proceeding is warranted by any changes in conditions of fact or of law or by the public interest."[12]

The Commission has explained how it applies the Rule 716 "good cause" standard in number of cases. In *System Energy Resources, Inc.* ("System Energy Resources"),[13] the Commission explained that it applies a general rule that "'the record once closed will not be reopened' absent a determination that extraordinary circumstances outweigh the need for administrative finality."[14] The Commission then applies the following test to determine when it is appropriate to reopen the evidentiary record:

> To persuade the Commission to exercise its discretion to reopen the record, the requesting party must demonstrate the existence of 'extraordinary circumstances.' The party must demonstrate a change in circumstances that is more than just material – it must be a change that goes to the very heart of the case. This policy against reopening the

[11] 18 C.F.R. § 385.716 (2012).

[12] 18 C.F.R. § 385.716(c) (2012).

[13] *System Energy Resources, Inc.*, 96 FERC ¶ 61,165 (2001).

[14] *Id*. at 10 (citing *Transwestern Pipeline Company*, Opinion No. 238, 32 FERC ¶ 61,009 at 61,037 (1985), *reh'g denied*, Opinion 238-A, 36 FERC ¶ 61,175 (1986)).

> record except in extraordinary circumstances is based on the need for finality in the administrative process.[15]

The Joint Applicants' Motion to Lodge does not identify or demonstrate any change in fact, law or public interest, any extraordinary circumstances, or any change in circumstances that is (a) more than just material, and that (b) goes to the very heart of the case. The Joint Applicants' Motion to Lodge fails to satisfy the Rule 716 standard.

Rule 212(c)(1) of the Commission's Rules of Practice and Procedure requires a proponent to include ***in*** its motion "the facts and law which support the motion."[16] Joint Applicants are well aware of the obligation to demonstrate "a change in circumstances that is more than just material … that goes to the very heart of the case" in their Motion to Lodge. Paragraph 7 of the Presiding Judge's Order Denying MISO's Motion to Supplement clearly articulated this obligation.[17] The Joint Applicants' Motion to Lodge does not explain how the evidence they are asking the Commission to admit satisfies this standard. The Motion to Lodge must be denied.

The Joint Applicants have argued previously, in the MISO Motion to Supplement, that the NYISO should be precluded from advancing any arguments regarding the efficacy of the Michigan-Ontario PARs based on "short term PAR operating data."[18] Nonetheless, the Joint Applicants now propose the extraordinary procedural maneuver of reopening the record to admit a new document commenting on loop flow that occurred over a "short term," *i.e.*, a six-month period. Given MISO's previous statements, it is difficult to discern how the

[15] *Id*. at 10 (internal citations omitted).

[16] 18 CFR § 385.212(c)(1) (2012).

[17] *Midwest Independent Transmission System Operator, Inc.*, Order Denying Motion of the Midwest Independent Transmission System Operator, Inc. to Supplement the Record, Docket No. ER11-1844 at P 7 (December 3, 2012).

[18] MISO Motion to Supplement at 2.

Joint Applicants can now argue that the slide from the Office of Enforcement's State of the Markets Report presents a change in circumstance that goes to the very heart of this proceeding. Joint Applicants' Motion to Lodge must be rejected.

III. THE STATEMENTS THAT JOINT APPLICANTS SEEK TO ADMIT ARE OF NO PROBATIVE VALUE

The slide from the State of the Markets Report that Joint Applicants seek to introduce into the evidentiary record states:

> Since the complete system of PARs on the Michigan-Ontario interface have gone into service, loop flows have decreased compared to earlier periods. Early reports indicate that congestion costs in Michigan are lower with fewer binding constraints and the interchange capacity across the Michigan-Ontario interface has been boosted.

The unverified information included in the excerpt from the State of the Markets Report that is the subject of the Joint Applicants' Motion to Lodge says very little about the ability of the Michigan-Ontario PARs to control Lake Erie loop flow. The first sentence quoted above offers an observation that loop flows in the second half of 2012 decreased by an unspecified amount, compared to an unspecified earlier period.[19] It does not state that the Office of Enforcement performed a thorough evaluation and determined that the operation of the "complete system of PARs on the Michigan-Ontario interface" caused a decrease in loop flows.

[19] The slide from the State of the Markets Report that Joint Applicants seek to lodge in the evidentiary record raises more questions than it answers. What "earlier periods" did the Office of Enforcement compare to the "late June" through December 2012 period identified in the 2012 State of the Markets Report? What was the magnitude of the decrease in loop flows that the Office of Enforcement observed? What impact did changes in intra-regional dispatch, inter-regional scheduling, transmission facility outages, or generator outages have on loop flows during the time periods that the Office of Enforcement compared? The State of the Markets Report does not identify the "early reports" addressing binding constraints and congestion costs in Michigan, or interchange capacity across the Michigan-Ontario interface, that the Office of Enforcement reviewed, where the reports came from, how they were developed, or who produced them.

Loop flow could have decreased due to any combination of the following factors: more efficient intra-regional dispatch, more efficient inter-regional scheduling (NYISO and PJM jointly implemented interregional scheduling enhancements (15 minute scheduling) on June 27, 2012[20]), reduced demand for electric power, fewer transactions being scheduled between the regions that surround Lake Erie, or possibly due to the operation of the Michigan-Ontario PARs. The State of the Markets Report excerpt does not demonstrate that the Michigan-Ontario PARs reduced loop flows. The Report excerpt, therefore, does not have any probative value in this proceeding and the Commission must reject the Joint Applicants' Motion to Lodge.

The Joint Applicants proposal to re-open the evidentiary record in order to include observations by unspecified members of the Commission's Office of Enforcement, based on data that is not in the evidentiary record is even less defensible than the Joint Applicants' prior requests to reopen the record that the Presiding Judge rejected.

Administrative finality is required in this case since the record closed approximately nine months ago and the Presiding Judge's Initial Decision was issued more than five months ago. The NYISO used the exhibits that were in the evidentiary record to formulate the arguments that it included in its initial and reply briefs. The Joint Applicants did not submit this Motion to Lodge until three and half months after replies to the Joint Applicants' exceptions to the Initial Decision were submitted. Under these circumstances, granting the

[20] *See* Letter Order issued in Docket No. ER11-2547-006 on October 12, 2012 (granting June 27, 2012 effective date for tariff revisions related to NYISO's implementation of 15 minute scheduling with PJM).

Joint Applicants' Motion to Lodge would be prejudicial, and the lack of an adequate opportunity to respond would be a denial of due process.[21]

IV. CONCLUSION

Wherefore, for the reasons explained in this answer, the Commission should reject the Joint Applicants' Motion to Lodge because granting it would be contrary to Commission precedent, be highly prejudicial and would deny the NYISO due process of law.

Respectfully submitted,

/s/ Alex M. Schnell
Alex M. Schnell
James H. Sweeney
New York Independent System Operator, Inc.
10 Krey Boulevard
Rensselaer, NY 12144
(518) 356-6000
aschnell@nyiso.com
jsweeney@nyiso.com

/s/ Howard H. Shafferman
Howard H. Shafferman
Ballard Spahr LLP
1909 K Street, NW, 12th Floor
Washington, DC 20006
202-661-2205
hhs@ballardspahr.com

Counsel for New York Independent System Operator, Inc.

June 6, 2013

[21] As explained by the Commission, "In *Office of Consumers' Counsel, Ohio v. FERC*, the United States Court of Appeals for the District of Columbia Circuit has held that, in a case in which an Administrative Law Judge has conducted a hearing, the Commission should not rely on new evidence presented in a post-hearing pleading, without giving other parties an opportunity to respond." *Northwest Pipeline Corp.*, 92 FERC ¶ 61,287 at pp. 62,014-15 (2000) (footnote omitted).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated at Rensselaer, NY this 6th day of June, 2013.

By: */s/ John C. Cutting*

John C. Cutting
New York Independent System Operator, Inc.
10 Krey Blvd.
Rensselaer, NY 12144
(518) 356-7521