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September 7, 2012

VIA ELECTRONIC FILING

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

**Re: Midwest Independent Transmission System Operator, Inc., Docket No.
ER11-1844-000; Opposition of New York Independent System Operator, Inc. to
Motion of International Transmission Company d/b/a ITCTransmission for
Leave to File Supplemental Answering and Rebuttal Testimony**

Dear Secretary Bose:

Transmitted electronically for filing in the referenced docket is the Opposition of the New York Independent System Operator, Inc. to the Motion of International Transmission Company d/b/a ITCTransmission for Leave to File Supplemental Answering and Rebuttal Testimony.

If there are any questions concerning this filing, please call me at (202) 661-2205.

Very truly yours,

/s/ Howard H. Shafferman

Howard H. Shafferman
Counsel for
New York Independent System Operator, Inc.

Enclosure

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Midwest Independent Transmission)
System Operator, Inc.)**

Docket No. ER11-1844-000

**OPPOSITION OF NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.
TO MOTION OF INTERNATIONAL TRANSMISSION COMPANY D/B/A
ITC TRANSMISSION FOR LEAVE TO FILE SUPPLEMENTAL ANSWERING AND
REBUTTAL TESTIMONY**

**To: Honorable Steven L. Sterner
Presiding Administrative Law Judge**

The New York Independent System Operator, Inc. (the “NYISO”), pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2012), hereby provides its answer in opposition to the referenced motion submitted by International Transmission Company (“ITC”).

I. Background

ITC has filed the motion and extensive supplemental testimony of Dr. Ira Shavel (including new charts) only **one working day** before the resumption of the hearing. The supplemental testimony includes wholly new assertions not raised in ITC's or any other party's testimony to date.

As explained herein, the filing violates Commission Rule of Practice and Procedure 507(b), and the acceptance of the portion of the supplemental testimony making new assertions and arguments (specifically, page 1, line 9 through page 2, line 4, and page 6, line 6 through page 11, line 2) relating to Change Order 345 (collectively, the "New Arguments") would be highly prejudicial to NYISO. Moreover, that portion of the supplemental testimony exceeds the scope of the discovery ruling of the Presiding Judge.

The New Arguments are not responsive to the NYISO's corrections to Exhibits NYI-46 or NYI-59, and should be rejected altogether. Specifically, the Presiding Judge should reject the substantial portion of the proposed supplemental testimony that relies on untested data that OATI provided in response to Change Order 345 to makes wholly new arguments. ITC uses the untested OATI Change Order 345 data to assert that a large number of transactions between NYISO and Ontario and between NYISO and PJM were curtailed due to a limitation at the MI/ON interface.¹

There are several reasons why the proposed supplemental testimony should be rejected. First, Dr. Shavel argues that the NYISO's exhibits ignore cuts to transactions between other markets around the lake which would be affected by Lake Erie loop flow.² While Dr. Shavel's statement may be true, the NYISO made very clear in Mr. Pike's testimony that it was only addressing "transactions scheduled over the MI/ON Interface that were curtailed via TLR..." Exhibit NYI-46 at page 10, lines 5-6. If ITC wanted to make an argument that the scope of the NYISO's review of the impact of TLR curtailments was too narrow, it both could and should have made that argument in the rebuttal testimony that ITC filed on July 16, 2012.³ However, this argument did not appear in Dr. Shavel's July 16, 2012 rebuttal testimony and ITC should not be permitted to raise it, for the first time, at this late date.

¹ See proposed supplemental testimony at page 7, lines 2-4.

² See proposed supplemental testimony at page 1, lines 11-15 and page 6, line 6, through page 11, line 3.

³ ITC should not be permitted to correct its failure to timely propound discovery requesting the Change Order 345/347 data at this late juncture. The MISO assisted the NYISO's efforts to obtain both the Change Order 345 and the Change Order 347 data at the NERC IDC Working Group. The NYISO submitted Exhibit NYI-59 with Mr. Pike's May 11, 2012 Direct and Answering Testimony (Exhibit NYI-46), and indicated on page 10, lines 4-10 of Mr. Pike's testimony that Exhibit NYI-59 was prepared based on data that OATI provided. The Joint Applicants were on notice that the OATI Change Order data existed long before the NYISO sought permission to correct Exhibit NYI-59, but did not propound discovery seeking the underlying data prior to the submission of the Joint Applicants' rebuttal testimony on July 16, 2012.

Second, as recognized by Dr. Shavel in the supplemental testimony (at page 3, lines 9-10), OATI made substantial errors in the data it provided to the NYISO in response to Change Order 347, on which Exhibit NYI-59 relied. Because the NYISO has not used or relied on the data OATI provided in response to Change Order 345, the NYISO has not reviewed or made *any* attempt, whatsoever, to verify with OATI the accuracy of the data provided in response to Change Order 345. Dr. Shavel's testimony includes no extrinsic evidence that the data OATI provided in response to Change Order 345 is credible. Given the problems that relying on OATI data have already created, it would be both inappropriate and prejudicial to permit new, untested, OATI data and related testimony to be admitted at this late date, without permitting significant discovery in order to test the accuracy of the newly offered data.

Acceptance of the New Arguments would violate the prohibition of Rule 507(b) and raise numerous issues of fairness and due process, as described further herein. Accordingly, the Presiding Judge should reject the portion of the supplemental testimony that constitutes the New Arguments.

If instead the Presiding Judge is nonetheless inclined to consider permitting admission of the New Arguments, then the resumption of the hearing should be postponed for a period similar to that granted to ITC in relation to the correction of Exhibit NYI-59, to permit the other parties to: (i) conduct discovery on parties including ITC and IESO, and potentially OATI⁴, regarding the New Arguments and the data on which they rely; and (ii) to prepare to cross-examine Dr. Shavel on these newly raised issues that rely on previously unreviewed and untested data.

⁴ The NYISO may require a new Change Order in order to be able to adequately respond to ITC's use of Change Order #345. It would likely take at least a month to get a new Change Order approved by the NERC IDC Working Group, completed by OATI, and adequately reviewed, questioned and digested by the NYISO and the other parties to this proceeding.

II. Rule 507(b) Precludes Admission of the Supplemental Testimony, and No Circumstances Merit Waiver Under Rule 507(c)

Rule 507(b) precludes admission of the New Arguments, and no circumstances merit waiver under Rule 507(c).

Rule 507 provides, in relevant part:

(b) Time for filing. Any prepared written testimony must be filed and served within the time provided by the presiding officer, in no case later than 10 days before the session of the hearing at which such exhibit is offered, unless a shorter period is permitted under paragraph (c) of this section.

(c) Late-filed testimony. (1) If all participants in attendance at the hearing agree, the 10-day requirement for filing any written testimony under paragraph (b) of this section is waived.

(2) The presiding officer may permit the introduction of any prepared written testimony without compliance with paragraph (b) of this section, if the presiding officer determines that the introduction of the testimony:

(i) Is necessary for a full disclosure of the facts or is warranted by any other showing of good cause; and

(ii) Would not be unduly prejudicial to any participant.

As noted above, the supplemental testimony was submitted only **one working day** prior to the resumption of the hearing, thus violating the prohibition of Rule 507(b). Although Rule 507(c) permits waiver of that Rule 507(b) in very limited circumstances, those circumstances are in no way present here. The NYISO would be unduly prejudiced if the New Arguments included in ITC's proposed supplemental rebuttal testimony were admitted for the following reasons:

First, as explained above, the New Arguments rely on untested and potentially unreliable data (the Change Order 345 data). Accordingly, the New Arguments cannot be fairly described as "facts." Instead, it is apparent that ITC is attempting to improve its case by submitting a second round of supplemental rebuttal testimony, premised wholly and precariously on discovery conducted after its rebuttal testimony was filed and on brand new arguments that were not

included in ITC's July 16, 2012 rebuttal testimony. With more time to prepare, it is likely that any of the parties to this proceeding could present a better case. ITC should not be given the exclusive and preferential opportunity to do so.⁵

Second, good cause does not exist for admission of New Arguments that ITC makes, for the first time, in its supplemental testimony. In an attempt to show good cause, the motion states (at paragraph 2) that Change Order 345 data "was heretofore unavailable." ITC's claim is incorrect. In fact, the information was available to ITC, either through a data request asking the NYISO for the data, or via a MISO-sponsored request to OATI (similar to the New York Transmission Owner data request that the NYISO shepherded through the NERC IDC Working Group with the MISO's assistance).

The MISO was fully aware of all of the NYISO's efforts at NERC to obtain the data requested in Change Order 345.⁶ MISO, including MISO's counsel and its NERC IDC Working Group representative, supported the NYISO's efforts to obtain TLR data from OATI. The NYISO submitted Exhibit NYI-59 with Mr. Pike's May 11, 2012 Direct and Answering Testimony (Exhibit NYI-46), and indicated on page 10, lines 4-10 of Mr. Pike's testimony that Exhibit NYI-59 was prepared based on data that OATI provided. The Joint Applicants were, therefore, well aware of the data NYISO was obtaining from OATI and ITC could have asked the NYISO for the data in discovery prior to the submission of ITC's rebuttal testimony. Alternatively, ITC could have asked MISO to obtain this data directly from OATI and used the OATI data to prepare the Joint Applicants' original filing to the Commission on October 20,

⁵ See, e.g., *WPS Canada Generation, Inc.*, Docket No. ER03-689-002 "Order to Show Cause Why Testimony Should Not Be Stricken" (Jan. 2, 2004) (J. Dowd) (requiring the filer to demonstrate good cause as to why it should be allowed to file late testimony that contains new material and is not merely an effort to correct inadvertent errors).

⁶ The MISO was aware of, and voted at the NERC IDC Working Group in favor of, the Change Order requests for data when they were submitted on March 12, 2012 and April 10, 2012.

2010, or to prepare ITC's July 16, 2012 rebuttal testimony. Thus, the information in Change Orders 345 and 347 was not "unavailable" to ITC. Rather, ITC didn't think to ask for the information.

Third, Dr. Shavel cannot, at this point in the proceeding, fairly be permitted to raise an issue with the fact that Exhibit NYI-59 only contains transactions between MISO and Ontario.⁷ That is true, and it was also clearly true in the original Exhibit NYI-59 and in Mr. Pike's Direct and Answering Testimony (Exhibit NYI-46). Mr. Pike's testimony, filed on May 11, 2012, clearly states (at p. 10) that his testimony and NYI-59 only address transactions scheduled over the MI/ON Interface between MISO and Ontario that were curtailed or removed by TLR actions.⁸ If Dr. Shavel had concerns about the breadth or scope of the NYISO's analysis he could have raised them in his July 16 rebuttal testimony, but he did not. Instead, Dr. Shavel takes issue with the limitation to MISO-Ontario transactions for the first time in his supplemental testimony.

Finally, admission of the New Arguments in ITC's supplemental testimony would be unfair and unduly prejudicial to NYISO and other parties, and deprive them of due process. The NYISO's limited correction of errors in its Exhibit NYI-59 does not present a valid basis for ITC to offer wholly new testimony and arguments into the record.

Finally, admission of the supplemental testimony would violate the terms and spirit of the Presiding Judge's ruling postponing the hearing and permitting discovery. The hearing was postponed, fundamentally, for one narrow purpose: to allow discovery about the proposed

⁷ On page 1, lines 11 and 12 of his supplemental testimony, Dr. Shavel argues that the NYISO's exhibits are "very selective, and purposefully designed only to show cuts to transactions that both source and sink in either MISO or IESO."

⁸ "Over that time period, 2213 transactions that were scheduled over the MI/ON Interface between Ontario and MISO were curtailed or removed via TLR actions." See Exhibit NYI-46, page 10, lines 6-10.

correction of Exhibit NYI-59 to permit ITC to confirm that the NYISO was not attempting some type of underhanded, last-minute, subterfuge, and so that Dr. Shavel could correct his corresponding rebuttal testimony (on page 16) regarding the percentage of NYISO TLR calls in 2011 that resulted in schedule cuts or reductions on the Michigan/Ontario interface would have been unnecessary if the PARs had been in service. The corrections to Dr. Shavel's rebuttal testimony should be narrowly limited to addressing the NYISO's corrections to Mr. Pike's testimony and exhibits.

A review of the August 16 and August 20 hearing transcripts confirms this. Specifically, the purpose of the postponement was an opportunity to examine the corrected data and make appropriate corrections in Dr. Shavel's testimony, not to create an opportunity to present wholly new testimony. For example, the Presiding Judge has stated:

We do have the opportunity to try and cure this. We don't know what Dr. Shavel's opinion will be on this new data, Mr. Staffier, so we have to wait for the doctor to review that data and see how much time he needs to review it and to address it.⁹

The Presiding Judge also stated as follows:

[W]e will see how much time your witness needs to address this.¹⁰

Mr. Staffier specified that the recess and related discovery pertained to the changes related to OATI data:

What I'm interested in conducting discovery on is what led up to this last minute change of direction here on this exhibit and why it has taken so long to bring it to anybody's attention since the precipitating event was a footnote in Dr. Shavel's testimony that was filed a month ago. I think it's a very legitimate question, and I'd like to see -- what I've asked for is all the communications between OATI and

⁹ Midwest Independent Transmission System Operator, Inc., Transcript of hearing held on August 16, 2012 at Page 526, Lines 18-22, Docket No. ER11-1844 ("August 16, 2012 Hearing Transcript").

¹⁰ August 16, 2012 Hearing Transcript at Page 607, Line 7.

NYISO in this matter and the internal communications within NYISO on this matter.¹¹

Mr. Staffier further clarified that it is the impact of the new data on Dr. Shavel's testimony that is the focus of his request for discovery:

In terms of the impact on Dr. Shavel's testimony, he has not yet been able to actually do another computer run, but that could be done. I suspect it would take a couple days to just put it together and make sure it was all right. So that is a doable thing.¹²

The Presiding Judge further clarified that the purpose of the recess is to conduct discovery on the OATI data in connection with the correction of Exhibit NYI-59 . The Presiding Judge stated as follows:

We will then conduct discovery -- we're going to recess the hearing after this morning. We're going to recess. We're going to allow Mr. Staffier to conduct discovery on this OATI issue. And yes, although I have -- it would seem that OATI must have been a reputable third-party supplier of historical data because no one sought to challenge that during the course of this -- during the early course of this case. That was not done, so that seems to me that OATI has somewhat of a good reputation out there in that the data they supply is somewhat reputable and reliable because nobody sought to conduct discovery on that. Mr. Staffier, you will now have the opportunity to conduct discovery on that.¹³

III. Conclusion

For the foregoing reasons, the Presiding Judge should reject the portion of the proposed supplemental testimony containing the New Arguments. If the Presiding Judge is nevertheless considering allowing the admission of New Arguments, the NYISO requests that the resumption of the hearing be postponed for a period similar to that granted to ITC in relation to the correction of Exhibit NYI-59, to permit the other parties to: (i) conduct discovery on parties

¹¹ August 16, 2012 Hearing Transcript at Page 608, Lines 1-10.

¹² Midwest Independent Transmission System Operator, Inc., Transcript of hearing held on August 20, 2012 at Page 621, Lines 12-16, Docket No. ER11-1844 ("August 20, 2012 Hearing Transcript").

¹³ August 20, 2012 Hearing Transcript at Page 633 Line 25 through Page 634 Line 13.

including ITC and potentially OATI,¹⁴ regarding the wholly new assertions and arguments made in ITC's proposed supplemental rebuttal testimony; and (ii) to prepare to cross-examine Dr.

Shavel on the New Arguments that rely on previously unreviewed and untested OATI data.

Respectfully submitted,

/s/

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¹⁴ The NYISO may require a new Change Order in order to be able to adequately respond to Change Order #345. It would likely take at least a month to get a new Change Order approved by the NERC IDC Working Group, completed by OATI, and adequately reviewed, questioned and digested by the NYISO and the other parties to this proceeding.

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 these proceedings.

Dated at Washington, D.C. this 7th day of September, 2012.

/s/

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