

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

PJM Interconnection, L.L.C.

)

Docket No. EL12-10-000

**NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.
MOTION TO INTERVENE AND
COMMENTS IN SUPPORT OF PETITION FOR DECLARATORY ORDER**

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”), 18 C.F.R. §§ 385.212 & 385.214 (2011), the New York Independent System Operator, Inc. (the “NYISO”) hereby moves to intervene and submits comments in the above-captioned proceeding.

As explained herein, the NYISO supports the petition for declaratory order submitted by PJM Interconnection, L.L.C. (“PJM” and the “PJM Petition”).

I. COMMUNICATIONS

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II. BACKGROUND

A. The MISO/ITC Filing in Docket No. ER11-1844-000

On October 20, 2010, the Midwest Independent Transmission System Operator, Inc. (“MISO”) and International Transmission Company (“ITC”) filed in Docket No. ER11-1844-000 a proposal (the “MISO/ITC Filing”) under Section 205 of the Federal Power Act (“FPA”) to amend the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (the “MISO Tariff”) to recover from the NYISO and PJM – without their consent – costs incurred for installing phase angle regulating transformers at Bunce Creek on the Michigan-Ontario border (the “ITC PARs”) within the MISO-operated transmission system.

Multiple parties intervened and protested the MISO/ITC Filing on a wide variety of grounds. In particular, the NYISO argued that none of the Commission and judicial orders cited in the MISO/ITC Filing authorized “*ex post* cost allocation to non-customers.”¹ The NYISO is not a Market Participant,² Transmission Customer³ or Coordination Customer⁴ of the MISO under the MISO Tariff. Additional protests⁵ argued that the Commission does not have the legal

¹ See Protest of the New York Independent System Operator, Inc. at 34, Docket No. ER11-1844-000 (filed November 17, 2010) (the “NYISO Protest”).

² The NYISO has not registered with, or been qualified by, the Midwest ISO as a Market Participant. See Midwest ISO Tariff at § 1.384.

³ The NYISO has not executed a transmission Service Agreement or requested the Midwest ISO to file with the Commission an unexecuted Service Agreement. See Midwest ISO Tariff at § 1.666.

⁴ The NYISO is not taking Coordination Services from the Midwest ISO under Module F of its tariff. See Midwest ISO Tariff at § 1.98.

⁵ See, e.g., Notice of Intervention and Protest of the Massachusetts Department of Public Utilities at 3-4; Motion to Intervene, Protest and Motion for Summary Rejection of New England Conference of Public Utilities Commissioners at 6-15; Motion to Intervene and Protest [of the] New England States Committee on Electricity at 2-5; Notice of Intervention and Protest of the Public Service Commission of the State of New York at 4; Motion to Intervene and Protest of the New York Transmission Owners and New York Municipal Power Agency at 4-5; Protest of PJM Interconnection, L.L.C. at 4-6; PJM Transmission Owners Group Protest to Rate Filing at 5-6 (the “PJM TOs Protest”); Motion to Intervene, Protest and Request for Summary Dismissal and Motion to Consolidate of the PSEG Companies at 7-9.

authority to accept a rate filing that assesses charges to entities that do not have a contractual relationship with the filing utility or otherwise do not take service from that utility. The PJM TOs argued that the attempt to unilaterally and involuntarily assign costs to non-customers was inconsistent with existing Commission precedent, as enunciated in the cost-allocation principles included in the then-pending Notice of Proposed Rulemaking issued June 17, 2010.⁶ The Commission affirmed this approach in Order No. 1000,⁷ which it issued on July 21, 2011, through “Regional Cost Allocation Principle 4,” which states:

The allocation method for the cost of a transmission facility selected in a regional transmission plan must allocate costs solely within that transmission planning region unless another entity outside the region or another transmission planning region voluntarily agrees to assume a portion of those costs.⁸

On December 30, 2010 the Commission issued its *Order Accepting and Suspending Proposed Tariff Sheets and Establishing Hearing and Settlement Judge Procedures* (“December 30 Order”) in response to the MISO/ITC Filing.⁹ The Commission did not address any of the substantive legal challenges protesters raised regarding the fact that the Commission did not have the legal authority to allow public utilities to impose involuntary charges to non-customers, or that such a proposal conflicted with Commission precedent. The December 30 Order simply accepted and suspended the MISO/ITC Filing, subject to refund, and set the proceeding for

⁶ PJM TOs Protest at 13 (discussing *Transmission Planning and Cost Allocation by Transmission Owners and Operating Public Utilities*, Notice of Proposed Rulemaking, 131 FERC ¶ 61,253 at P 154 (2010)).

⁷ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000 (“Order No. 1000”), 76 Fed. Reg. 49842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323 (2011).

⁸ *Id.* at P 657.

⁹ 133 FERC ¶ 61,275 (2010).

settlement judge and hearing procedures. On January 21, 2011, the NYISO and other parties filed timely rehearing requests of the December 30 Order.

The parties have spent over nine months engaged in good-faith settlement efforts with the assistance of Judge Dring as settlement judge and FERC Trial Staff. The participants met in Washington, DC for more than half a dozen face-to-face settlement conferences, in addition to numerous e-mail exchanges and teleconferences discussing various settlement options.

During the settlement negotiations, parties also discussed concerns regarding the presidential permit that MISO must obtain from the U.S. Department of Energy (“DOE”) before placing the ITC PARs into service. Several parties, including the NYISO, filed comments with DOE raising concerns about MISO’s to-be-filed revised presidential permit application. DOE granted extensions to the comment date once ITC filed the revised application to permit settlement of those concerns. During the DOE comment period the NYISO worked with MISO, ITC, and IESO to resolve NYISO’s most pressing and imminent concerns related to the operation of the PARs at the Ontario/Michigan interface and the appropriate representation of those PARs in the North American Electric Reliability Corporation’s Interchange Distribution calculator. PJM worked separately with MISO and ITC to resolve its concerns related to the operation of the PARs at the Ontario/Michigan interface. The DOE, therefore, might issue the presidential permit imminently, thus allowing MISO to place the ITC PARs into service. As soon MISO and ITC place the facilities into service, they will begin to invoice the NYISO and others in accordance with the MISO/ITC Filing.

Unfortunately, the settlement judge process appears to have stalled without resolution of the cost allocation issues raised by the MISO/ITC Filing. As a result, the NYISO and PJM may need to begin recovering from their customers the costs allocated to them by MISO and ITC for

the ITC PARs before the Commission has ruled on the NYISO Rehearing Request to determine whether the MISO/ITC Filing conflicts with the FPA or Commission policy.

B. The PJM Petition in this Docket No. EL12-10-000

The PJM Petition, submitted on November 9, 2011, asks “that the Commission issue a declaratory order to provide guidance on how PJM should recover from its members the costs of the MISO charges” imposed by the MISO/ITC Filing.¹⁰ PJM requests expedited action “so as to provide the needed guidance before it is billed by the MISO for the ITC PARs-related costs.”¹¹ As the PJM Petition explains, once DOE approves the settlement resolving various controversies about how MISO will operate the ITC PARs, ITC will place the ITC PARs into service, and MISO will begin charging PJM and the NYISO the costs allocated to them by the MISO/ITC Filing. The PJM Petition explains how its uncertainty on how to recover these costs stems in part from the fact that the Commission has not previously provided guidance on how to recover transmission facilities costs assessed by another RTO in this fashion.¹²

III. MOTION TO INTERVENE

Pursuant to Rule 214, the NYISO moves to intervene in this proceeding. Under the Commission’s rules, intervention is appropriate where “the movant has . . . an interest which may be directly affected by the outcome of the proceeding.”¹³ The MISO/ITC Filing unilaterally imposes charges on both PJM and the NYISO without their consent. The NYISO is not certain of its authority to recover PAR-related charges it receives from the MISO from its Customers. As PJM has done in this Docket, the NYISO intends to seek Commission guidance regarding

¹⁰ PJM Petition at 2.

¹¹ *Id.*

¹² *Id.* at 10-11.

¹³ 18 C.F.R. § 385.214(b)(2)(ii) (2011).

how it should recover costs for the ITC PARs from its customers. Accordingly, the NYISO has a direct and substantial interest in the outcome of this proceeding that cannot be represented by another party.

IV. COMMENTS

The NYISO supports the PJM Petition request for guidance.

As with PJM, the MISO/ITC Filing raises unique questions for the NYISO. The NYISO has not agreed to pay the charges proposed in the MISO/ITC Filing regarding the ITC PARs, and the NYISO does not take service from the MISO in a manner that would justify such charges. Despite these facts, the December 30 Order accepted, subject to refund, the MISO/ITC Filing.

The PJM Petition appropriately asks the Commission to provide guidance on how to recover from PJM's customers any costs ultimately imposed through the MISO Tariff changes implemented in the MISO/ITC Filing. As the PJM Petition notes, no Commission precedent exists that provides guidance to PJM on how to recover charges imposed without consent in this fashion.¹⁴ The NYISO finds itself in the same position as PJM and would find useful any guidance the Commission provides in response to the PJM Petition to ensure that the NYISO implements the intent of the December 30 Order in an appropriate and lawful manner.

The NYISO and other affected New York parties plan to submit in the near future their own petition for declaratory judgment formally requesting the same type of guidance sought in the PJM Petition. The NYISO will also be filing a motion to dismiss this proceeding as inconsistent with the policies adopted in Order No. 1000, because the MISO/ITC Filing is indistinguishable from one that would be barred by Regional Cost Allocation Principle 4 (discussed above), given the lack of consent by NYISO and PJM.

¹⁴ PJM Petition at 10-11.

V. CONCLUSION

For the reasons stated herein, the NYISO asks the Commission to grant its motion to intervene and to grant the PJM Petition's request to provide guidance on how PJM, and as appropriate, the NYISO, should recover from its customers the costs unilaterally imposed on it by the MISO/ITC Filing.

Respectfully submitted,

NEW YORK INDEPENDENT SYSTEM
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/s/ Robert E. Fernandez

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Dated: December 2, 2011

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 this 2nd day of December, 2011.