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**

POST-HEARING REPLY BRIEF OF NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

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

Howard H. Shafferman
Daniel R. Simon
Jack N. Semrani
Ballard Spahr LLP
1909 K Street, NW, 12th Floor
Washington, DC 20006
(202) 661-2200
hhs@ballardspahr.com
simond@ballardspahr.com
semranij@ballardspahr.com

Attorneys for New York Independent System Operator, Inc.

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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**

INITIAL POST-HEARING BRIEF OF NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

To: Honorable Steven L. Sterner
Presiding Administrative Law Judge

The New York Independent System Operator, Inc. ("NYISO") hereby submits its reply brief. This reply brief responds primarily to the Initial Brief submitted jointly by ITC*Transmission*, or "ITC," and the Midwest Independent Transmission System Operator, Inc., or "MISO" (together, the "Joint Applicants").

Issue numbers 4, 5, 6, 7, 9 and 11 from the Joint Statement of Issues are addressed in this reply brief. Issue numbers 1-3, 8 and 10 are not.

I. JOINT STATEMENT OF ISSUES #4 -- WHETHER THE ALLOCATION OF THE COSTS OF THE ITC PARS TO NYISO AND PJM, AND THE LEVEL OF SUCH ALLOCATIONS, IS JUST, REASONABLE AND NOT UNDULY DISCRIMINATORY OR PREFERENTIAL UNDER THE FEDERAL POWER ACT AND THE APPLICABLE COMMISSION POLICIES, ORDERS AND PRECEDENT THEREUNDER (INCLUDING BUT NOT LIMITED TO THE POLICIES, IF APPLICABLE, CONTAINED IN ORDER NO. 1000)

A. The Presiding Judge Should Reject the Joint Applicants' Attempt to Block Damaging Evidence

The Joint Applicants' Initial Brief (at 39-42) seeks to prevent the Presiding Judge, as a matter of law - under the doctrine of judicial estoppel and as a collateral attack against orders previously issued by the U.S. Department of Energy ("DOE") - from considering evidence addressing (a) when, whether, and to what extent the Replacement PARs will better conform

actual power flows to scheduled power flows at the MI/ON Interface[1] and (b) whether the Operating Instruction that governs MISO's and IESO's operation of the MI/ON PARs provides benefits to MISO, IESO and their customers that are not available to NYISO, PJM and their customers. In essence, the Joint Applicants want the Presiding Judge and the Commission to ignore the actual MI/ON PAR operating data, to ignore the actual MI/ON PAR outage data, and to ignore the actual terms and conditions of the Operating Instruction that MISO and IESO executed and that ITC submitted to DOE in Presidential Permit Docket No. PP-230-4 in support of ITC's Presidential Permit application.[2]

The NYISO responds to Joint Applicants' contentions in two parts. First, the NYISO explains why the arguments the Joint Applicants seek to preclude the NYISO from raising, and the record evidence that supports those arguments, are directly relevant to the issues presented in this proceeding. The Joint Applicants ask the Presiding Judge to ignore NYISO's arguments that are based on: (i) actual Lake Erie loop flow and MI/ON PAR operating data that shows the MI/ON PARs have not, and cannot reasonably be expected to conform actual power flows to scheduled power flows at the MI/ON Interface as frequently or as effectively as the Joint Applicants allege; (ii) actual MI/ON PAR operating history demonstrating the MI/ON PARs are prone to failure and that the failure of the L4D PAR could be imminent; (iii) uncontroverted expert testimony and supporting evidence that explains why the MI/ON PARs cannot effectively conform actual power flows to scheduled power flows at the MI/ON Interface when one or more of the four circuits that comprise the MI/ON Interface are not PAR controlled; and (iv) provisions of the MI/ON PAR Operating Instructions that directs how MISO and IESO will

[1] Joint Applicants' Initial Brief at 39 (arguing that, as "a threshold matter," the NYISO should be prohibited from arguing that "the PARs will not work" under the doctrine of judicial estoppel).

[2] *See* Exhibit NYI-3 at 4 (identifying the MISO/IESO Operating Instruction as the "CO2 Agreement" and stating that the CO2 Agreement is being submitted for "informational purposes" (*i.e.*, not for DOE approval)).

operate the MI/ON PARs, and of MISO's proposed Tariff Attachment SS-1, that are unduly discriminatory against the NYISO, PJM and their customers, and unduly preferential to MISO, IESO and their customers.

The second part of the NYISO's response explains why the Presiding Judge should reject the Joint Applicants' assertion that: (1) the doctrine of judicial estoppel prohibits the NYISO from making the arguments Joint Applicants seek to prevent NYISO from raising, and/or (2) the NYISO arguments constitute a collateral attack against the DOE order that approved ITC's Presidential Permit to operate the Replacement PARs.

1. The NYISO's Arguments and the Associated Evidence Are Relevant to Determining Whether the Joint Applicants' Proposal is Just and Reasonable and Not Unduly Discriminatory or Preferential

The arguments and associated evidence that Joint Applicants ask the Presiding Judge to ignore refute the Joint Applicants' claim that it would be just and reasonable, and not unduly discriminatory, preferential, or prejudicial to require the NYISO's customers to pay for approximately 29% of the cost of ITC's Replacement PARs. The Joint Applicants base their proposed cost allocation, in part, on allegations that the NYISO's customers will benefit from the operation of the MI/ON PARs.[3] The NYISO is entitled to use actual, real-world data to refute the Joint Applicants' vastly overstated assertions of the benefits that the MI/ON PARs might provide to the NYISO's customers, to show that the Joint Applicants' proposed cost allocation is unjust and unreasonable, and to show that the operation of the MI/ON PARs will provide greater benefits to MISO's and IESO's customers, than they will provide to NYISO or PJM customers.

Whether or not the MI/ON PARs are in fact providing, and will in the future provide, substantial control of Lake Erie loop flow is relevant to determining whether the Joint

[3] *See, e.g.*, Joint Application Transmittal Letter at 5-6.

Applicants' proposal is just and reasonable and not unduly discriminatory or preferential. The Seventh Circuit Court of Appeals has stated that the Commission "is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members."[4] The Seventh Circuit also stated that the Commission must have "an articulable and plausible reason to believe that the benefits are at least roughly commensurate" with the costs assessed.[5]

There is a practical reason the Joint Applicants seek to prevent the Presiding Judge from even considering the NYISO's arguments and evidence: they are very compelling. The record evidence demonstrates that the MI/ON PARs have not, and will not, provide the degree of Lake Erie loop flow control that the Joint Applicants allege. Evidence in the record demonstrates that the MI/ON PAR Operating Instruction permits MISO and IESO to operate the Replacement PARs in a manner that provides benefits to their transmission systems and to their customers that are not similarly available to NYISO, PJM, or their customers. The inequality of the MI/ON PAR operating rules makes the Joint Applicants proposal to equally allocate the cost of the MI/ON PARs unjust, unreasonable, unduly preferential, unduly prejudicial and unduly discriminatory.

2. The Record Demonstrates That the MI/ON PARs Are Not Providing the Loop Flow Control Promised in the Joint Application

The record demonstrates that the MI/ON PARs' actual performance does not come close to meeting the Joint Applicants' loop flow control representations. MISO and ITC claim that the MI/ON PARs will "fully mitigate" Lake Erie loop flow whenever it is less than 600 MW, and

[4] *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009).

[5] *Id.* at 477.

will reduce Lake Erie loop flow by 600 MW at all other times.[6] However, Exhibit NYI-66 (provided by MISO in discovery) tells a compelling story about the actual operating effectiveness of the MI/ON PARs in their first 104 days of operation, and shows that what has actually happened is very different from what the MISO and ITC claimed would happen.

The data in Exhibit NYI-66 indicates that from April 5 to July 18, 2012 the MI/ON PARs did not effectively conform actual power flows to scheduled power flows at the MI/ON Interface, and were frequently a cause of additional Lake Erie loop flow. The Exhibit NYI-66 data indicates that the average absolute value of Lake Erie loop flow for the entire 104-day period was 214 MW, which is significantly more than zero MW of Lake Erie loop flow, and is also outside than the +/-200 MW control band that MISO and IESO are expected to operate the MI/ON PARs to achieve.[7] The Exhibit NYI-66 data MISO provided indicates that the operation of the MI/ON PARs made Lake Erie loop flow worse in 10,158 five minute intervals, or in 33.7 percent of all intervals over the April 5 to July 18, 2012 period.[8] The operation of the MI/ON PARs exacerbated Lake Erie loop flow in 5,613 intervals (18.6 percent of all intervals) during which the actual Lake Erie loop flow was outside the +/-200 MW Control Band.[9] In 1337 intervals (4.4 percent of all intervals) the operation of the MI/ON PARs caused loop flow that was expected to be inside the +/-200 MW Control Band to instead fall outside the Control Band.[10]

Review of the Exhibit NYI-66 MI/ON PAR performance data for specific operating days also verifies that the MI/ON PARs do not control loop flow as claimed. On June 16, 2012 the

[6] Ex. MSO-Tab E at 19:1-20:21; Ex. ITC-1 at 15:19-24; Tr. 492:24-493:19.

[7] NYISO Initial Brief at 86 n.288, 101, and 138.

[8] NYISO Initial Brief at 140 (discussing Ex. NYI-66).

[9] NYISO Initial Brief at 140.

[10] NYISO Initial Brief at 140.

MI/ON PARs showed little ability to control loop flow with only three of the four interface circuits PAR controlled;[11] the L4D PAR was out of service on this day.[12] Shortly after 8:00 a.m. on June 16, 2012, counterclockwise loop flow exceeded the +/-200 MW Control Band, and Lake Erie loop flow remained outside the Control Band in a counterclockwise direction for the rest of the day.[13] MISO and IESO made little effort to move the MI/ON PARs to better conform actual power flows to scheduled power flows at the MI/ON Interface, moving MI/ON PAR taps in only 15 five-minute intervals out of 191 (total) five-minute intervals between 8:05 a.m. and 11:55 p.m.[14] The PAR taps taken by MISO and IESO did not bring actual power flow significantly closer to scheduled power flow.

On June 19, 2012 there was predictable counterclockwise Lake Erie loop flow that significantly exceeded the +/-200 MW Control Band for most of the day, even though all MI/ON PARs were in service. The MI/ON PARs were operated to counteract approximately 400 MW of loop flow, but no attempt was made to operate the PARs to achieve the claimed 600 MW limit of their control capability to further reduce Lake Erie loop flow. Only one MI/ON PAR tap was taken over the entire day.[15]

On July 18, 2012 MISO and IESO placed the MI/ON PARs in "Regulated" mode at a time when loop flow was not even close to achieving the +/-200 MW control band.[16] MISO and IESO then left the PARs in "Regulated" mode while the loop flow was well outside the +/-200

[11] NYISO Initial Brief at 141 (citing Ex. NYI-66 at 551-559).

[12] NYISO Initial Brief at 141 (citing Ex. NYI-73 at 3 and 6 (the PS4 Hydro One PAR on the L4D line was bypassed on June 10, 2012 and returned to service on June 17, 2012)).

[13] NYISO Initial Brief at 141 (citing Tr. 888:1-10 (corrected)).

[14] NYISO Initial Brief at 141.

[15] NYISO Initial Brief at 146; *see also* NYISO Proposed Findings of Fact and Conclusions of Law #133 (citing Ex. NYI-66 at 574-581), at Appendix to NYISO Initial Brief at 15.

[16] NYISO Initial Brief at 143 (citing Ex. NYI-66 at 794).

MW control band for more than two consecutive hours. MISO and IESO's actions were not consistent with the commitments that they made to the DOE in Exhibit NYI-10 to accurately set the flag that is used by the NERC Interchange Distribution Calculator ("IDC") to determine how the MI/ON PARs should be modeled. From April 5 to July 18, 2012, in 28.6 percent of the intervals that MISO and IESO set the NERC IDC flag to "Regulated," actual power flow at the MI/ON Interface differed from scheduled interchange by more than the +/- 200 MW Control Band.[17]

In sum, unrefuted evidence shows:

(1) MI/ON PARs actual performance does not come close to meeting the Joint Applicants' representations[18] that the MI/ON PARs will "fully mitigate" Lake Erie loop flow whenever it is less than 600 MW, and will reduce Lake Erie loop flow by 600 MW at all other times.

(2) The average absolute value of Lake Erie loop flow from April 5 to July 18, 2012 was 214 MW, which is significantly more than zero MW of Lake Erie loop flow, and is also outside than the +/-200 MW control band that MISO and IESO are expected to operate the MI/ON PARs to achieve.[19]

(3) MI/ON PAR operation made Lake Erie loop flow worse in 10,158 five minute intervals, or 33.7 percent of all intervals over the April 5 to July 18, 2012 period, and exacerbated Lake Erie loop flow in 5,613 intervals (18.6 percent of all intervals) during which the actual Lake Erie loop flow was outside the +/-200 MW Control Band. In 1337 intervals (4.4

[17] NYISO Initial Brief at 149-150; *see also* NYISO Proposed Findings of Fact and Conclusions of Law #121, p. 13 (citing Ex. NYI-66, Column 4). To address infirmities in the data that MISO provided, NYISO's 28.6% statistic considers only days on which MISO and IESO changed the NERC IDC status of the MI/ON PARs. *See* NYISO Initial Brief at 149 and n. 516.

[18] Ex. MSO-Tab E at 19:1-20:21; Ex. ITC-1 at 15:19-24; Tr. 492:24-493:19.

[19] NYISO Initial Brief at 86 n.288, 101 & 138.

percent of all intervals) the operation of the MI/ON PARs caused loop flow that was expected to be inside the +/-200 MW Control Band to instead fall outside the Control Band.

(4) On June 16, 2012, counterclockwise loop flow exceeded the Control Band for most of the day. MISO and IESO made little effort to operate the MI/ON PARs to better conform actual power flows to scheduled power flows at the MI/ON Interface.

(5) On June 19, 2012, there was predictable counterclockwise Lake Erie loop flow that significantly exceeded the +/-200 MW Control Band for most of the day. The MI/ON PARs were operated to counteract approximately 400 MW of loop flow, but no attempt was made to operate the PARs to achieve the claimed 600 MW limit of their control capability to further reduce Lake Erie loop flow. Only one MI/ON PAR tap change was made over the entire day.

(6) On July 18, 2012 MISO and IESO placed the MI/ON PARs in "Regulated" mode at a time when loop flow was not even close to achieving the +/-200 MW control band.[20] From April 5 to July 18, 2012, in 28.6 percent of the intervals that MISO and IESO set the NERC IDC flag to "Regulated," actual power flow at the MI/ON Interface differed from scheduled interchange by more than the +/- 200 MW Control Band.[21]

3. The Record Demonstrates That the MI/ON PARs Are Prone to Failure

Evidence in the record demonstrates that the MI/ON PARs are prone to failure. The MI/ON PAR outage concerns that NYISO witness Wesley Yeomans raised in his testimony were identified by the NYISO as an important issue after (1) the L4D PAR suffered a forced outage on

[20] NYISO Initial Brief at 143 (citing Ex. NYI-66 at 794).

[21] NYISO Initial Brief at 150; *see also* NYISO Proposed Findings of Fact and Conclusions of Law #121, p. 13 (citing Ex. NYI-66, Column 4). To address infirmities in the data that MISO provided, NYISO's 28.6% statistic considers only days on which MISO and IESO changed the NERC IDC status of the MI/ON PARs. *See* NYISO Initial Brief at 149 and n. 516.

December 17, 2011 and did not return to service until June 1, 2012,[22] and (2) MISO stated that its proposed tariff revisions obligate MISO to continue to charge NYISO and PJM customers for the Replacement PARs at times when one or more of the MI/ON PARs (including the Replacement PARs) are out of service.[23]

Mr. Yeomans' unrebutted testimony[24] and exhibits[25] explain that when one or more of the four circuits that comprise the MI/ON Interface are not PAR controlled, the ability of the available MI/ON PARs to conform actual power flows to scheduled power flows at the MI/ON Interface is dramatically reduced. Discovery responses from MISO and ITC admit that Mr. Yeomans is correct, and state that Joint Applicants have made no attempt to determine the impact that MI/ON PAR outages have on the ability of the remaining MI/ON PARs to better conform actual power flows to scheduled power flows at the MI/ON Interface.[26]

The data in Exhibit NYI-66 backs up Mr. Yeomans' conclusion. Exhibit NYI-66 sets forth Lake Erie loop flow and MI/ON PAR operating data for the period from April 5, 2012 to July 18, 2012. On 73 of the 104 days covered by Exhibit NYI-66, at least one of the four circuits that comprise the MI/ON Interface was not PAR controlled.[27] Exhibit NYI-66 shows that on the 73 days when at least one of the MI/ON PARs was out-of-service, the maximum Column Five "Total PAR Offset" (MISO-estimated loop flow reduction) that the PARs achieved was 115

[22] NYISO Initial Brief at 151.

[23] NYISO Initial Brief at 125 (citing Ex. NYI-1 at 15:5-17; Ex. NYI-7; Ex. NYI-8).

[24] NYISO Initial Brief at 132 (citing Ex. NYI-1 at 31:5-38:15).

[25] NYISO Initial Brief at 132 (citing Ex. NYI-30 through NYI-33).

[26] NYISO Initial Brief at 132 (citing Ex. NYI-35 and Ex. NYI-37).

[27] At least one MI/ON PAR was out of service from 10:00 a.m. on April 5, 2012 to 3:50 p.m. on June 5, 2012; from 4:00 p.m. on June 10, 2012 to 2:00 p.m. on June 17, 2012; and from 12:00 a.m. on July 13, 2012 to 1:00 a.m. on July 18, 2012. NYISO Initial Brief at 141-144.

MW. Exhibit NYI-66 indicates that the estimated 115 MW loop flow reduction was achieved in only four, five-minute long intervals on June 10, 2012 starting at 17:50.[28]

As the NYISO's Initial Brief explained, unrefuted evidence shows:

(1) The MI/ON PARs fail from time to time. When a MI/ON PAR fails catastrophically, it takes years to replace.[29]

(2) Hydro One's L4D PAR has been experiencing gassing alarms and bad oil samples and has been removed from service three times since December 17, 2011.[30]

(3) Repeated gassing alarms and bad oil samples are symptoms of a potentially significant problem with the L4D PAR.[31]

(4) MISO and ITC did not perform any studies to determine the capability of the MI/ON PARs to reduce Lake Erie loop flow under sub-optimal conditions (such as when a MI/ON PAR is out-of-service).[32]

(5) When the L4D circuit at the MI/ON Interface was not PAR controlled, MISO's estimate[33] of the greatest demonstrated efficacy of the remaining MI/ON PARs indicated the

[28] Ex. NYI-66 at 511. At 16:05 on June 10, 2012 MISO estimates that the available MI/ON PARs were influencing Lake Erie loop flow by 136 MW. However, at that time the operating of the available MI/ON PARs was exacerbating Lake Erie loop flow. As the NYISO explained on page 140 of its Initial Brief, when the loop flow in Column Four of Exhibit NYI-66 is greater than the loop flow in Column Six of Exhibit NYI-66 (without regard to the direction of the loop flow in either column), it indicates that the operation of the MI/ON PARs is exacerbating Lake Erie loop flow.

[29] NYISO Initial Brief at 132-133, 150-153.

[30] NYISO Initial Brief at 151-152 (citing Ex. NYI-73 at 1; Ex. NYI-20).

[31] NYISO Initial Brief at 152 (citing Tr. 871:25-872:10).

[32] NYISO Initial Brief at 132 (citing Ex. NYI-35).

[33] As the NYISO explains in n. 471 on pages 135 and 136 of its Initial Brief, the NYISO was not given an opportunity to review the method that MISO used to develop its "Total PAR Offset" estimate, or to test the accuracy of the MISO's "Total PAR Offset" estimate. The NYISO's use of the "Total PAR Offset" estimate that MISO provided to refute the Joint Applicants' claims should not be interpreted as indicating that the NYISO agrees to or accepts the accuracy of the untested data that MISO provided.

available MI/ON PARs achieved 115 MW of Lake Erie loop flow reduction. The MI/ON PARs only sustained this level of loop flow reduction for 20 minutes.[34]

(6) It does not matter whether a MI/ON Interface circuit is not PAR controlled due to the failure of a Hydro One PAR or due to the failure of ITC's Replacement PARs. In either case, the potential ability of the MI/ON PARs to better conform actual power flows to scheduled power flows at the MI/ON Interface will be significantly reduced.[35]

(7) The tariff revisions proposed in the Joint Application require MISO to charge NYISO and PJM, on behalf of their customers, without regard to the availability of the Replacement PARs, without regard to the availability of the Hydro One PARs, and without regard to the ability or efficacy of the MI/ON PARs to conform actual power flows to scheduled power flows at the MI/ON Interface.[36]

(8) The Joint Applicants' failure to submit proposed tariff revisions limiting MISO's authority to charge NYISO and PJM customers at times when a MI/ON PAR is out-of-service renders Joint Applicants' proposed tariff revisions unjust and unreasonable because the tariff provisions do not tie the charge that is being assessed to any purported benefit that NYISO or PJM customers will receive.[37]

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[34] NYISO Initial Brief at 150-153.

[35] NYISO Initial Brief at 132-33, 150-153.

[36] *See* Ex. NYI-7, NYI-8, NYT-30, NYI-65; Tr. 201:1-5.

[37] *See, e.g.*, *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (explaining that the Commission "is not authorized to approve a pricing scheme that requires benefits that are trivial in relation to the costs sought to be shifted to its members"); *see also Transcontinental Gas Pipe Line Corp.*, 112 FERC ¶ 61,170, at P 109 (2005) (noting that "claim[s] of generalized system benefits [are] not enough to justify" a proposed cost allocation); *id.* ("They point to no evidence in the record that seeks to quantify this benefit, or even shows that such a benefit has occurred..... The Commission concludes that all these alleged benefits are simply too speculative and unsupported to be taken into account.").

4. The MI/ON PAR Operating Instruction Is Unduly Discriminatory, Preferential and Prejudicial

The MISO-IESO Operating Instruction[38] provides MISO and IESO broad discretion to suspend normal operation of the MI/ON PARs to address reliability concerns, possible future reliability concerns, or anomalous market results that occur in the MISO or IESO control areas. The same treatment is not available for reliability concerns or market anomalies that occur in the NYISO or PJM control areas.[39] The Joint Application's proposal to impose equal charges on entities that are not eligible or expected to receive equal benefits from the operation of the MI/ON PARs is unduly preferential, unduly prejudicial and unduly discriminatory.

Neither the NYISO nor PJM have a "vote" regarding how MISO and IESO operate the MI/ON PARs.[40] Several provisions of the Operating Instruction require, or at least permit, MISO and IESO to operate the MI/ON PARs in a manner that favors their control areas and customers over the NYISO and PJM control areas and customers.[41] For instance, Section 3.4.2 of the Operating Instruction provides "[i]n order to prevent an emergency in MISO or Ontario, PARs may be adjusted such that the Interface Deviation exceeds the Control Band providing other actions are utilized first, time permitting."[42] The Operating Instruction also grants MISO and IESO discretion to suspend normal operation of the MI/ON PARs to protect MISO and/or IESO customers in the event of unexpected operational or market outcomes in their regions.

[38] Ex. NYI-3 at 50-59.

[39] NYISO Initial Brief at 77.

[40] NYISO Initial Brief at 78 (citing Ex. NYI-1 at 20:5-11; Ex. NYI-3 at 50).

[41] NYISO Initial Brief at 78.

[42] NYISO Initial Brief at 78.

A more restrictive set of rules applies to operating the MI/ON PARS to address emergencies that occur in the NYISO or PJM territories.[43] The Operating Instruction does not provide any ability to adjust the PARs to prevent an emergency in New York or PJM. The operating instruction does not permit the normal operation of the MI/ON PARs to be suspended to address market anomalies that occur in NYISO's or PJM's markets. Section 3.5.2.1 of the Operating Instruction provides that, for an emergency outside of MISO and Ontario, the PARs may be operated to assist with the emergency only after, among other things, the non-MISO or Ontario parties (such as NYISO or PJM) have "taken all mitigating steps except voltage reduction and shedding of firm load" to address the problem." Section 3.5.1 of the Operating Instruction does not impose the same mitigation obligation before the MI/ON PARs may be operated to address MISO or IESO emergencies. In addition, Section 3.5.2 of the Operating Instruction provides that, for emergencies that occur outside of MISO or Ontario, "[t]he type of assistance shall be agreed upon and directed by MISO and the IESO."

Consistent with the terms of the Operating Instruction, proposed Attachment SS-1 to the MISO Tariff[44] allows MISO to temporarily suspend normal operations of the MI/ON PARs in the event of anomalous MISO market results related to the MI/ON PARs. As MISO witness Zwergel confirmed, proposed Attachment SS-1 does not provide a similar opportunity for the operation of the MI/ON PARs to be suspended if NYISO or PJM encounter anomalies in their markets that are affected by, or related to, the operation of the MI/ON PARs.[45] Here again, the Joint Application's proposal to impose equal charges on entities that are not eligible or expected

[43] NYISO Initial Brief at 79.

[44] NYISO Initial Brief at 80 (citing Ex. MSO-Tab H (last page) and Ex. NYI-1 at 23:5-22).

[45] NYISO Initial Brief at 80 (citing Tr. 202:8-13).

to receive equal benefits from the operation of the MI/ON PARs is unduly preferential, unduly prejudicial and unduly discriminatory.

MISO witness Mallinger justifies the different treatment the Operating Instruction allows MISO and IESO to apply to the NYISO and PJM because of the geographic differences:

> These provisions, however, merely reflect the fact ***that because of their geographical proximity to the MISO and IESO balancing areas, the PARs have more potential for use to address emergencies in those areas than elsewhere***, and that, for similar reasons, the PARs have more potential to contribute to unforeseen market outcomes in those areas than elsewhere. Given the obvious differences between MISO and IESO on the one hand, and PJM and NYISO on the other hand, in terms of physical distance from the PARs, these provisions are not discriminatory and, in my judgment, it is misleading for witnesses Zugris and Yoemans to suggest otherwise.[46]

If MISO witness Mallinger is correct that "the PARs have more potential for use to address emergencies in" the MISO and IESO territories, then the cost allocation to the NYISO and PJM should reflect this different level of potential benefits.

In sum, unrefuted evidence shows:

(1) The MISO-IESO Operating Instruction[47] provides MISO and IESO broad discretion to suspend normal operation of the MI/ON PARs to address reliability concerns or anomalous market results for the benefit of MISO and IESO customers.[48]

(2) Neither the NYISO nor PJM has a "vote" in how MISO and IESO will operate the MI/ON PARs.[49]

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[46] Ex. MSO-3 at 21:14-21 (emphasis added).

[47] Ex. NYI-3 at 50-59.

[48] NYISO Initial Brief at 77-80.

[49] NYISO Initial Brief at 78.

(3) Several provisions of the Operating Instruction require, or at least permit, MISO and IESO to operate the MI/ON PARs in a manner that favors themselves (and their own customers) over the NYISO and PJM (and their customers).[50]

5. The Presiding Judge Should Reject the Joint Applicants' Judicial Estoppel and Collateral Attack Arguments

The Presiding Judge should reject the Joint Applicants' judicial estoppel and collateral attack arguments for the following reasons:

- The December 30, 2010 Commission order setting the Joint Application for hearing[51] does not prohibit the NYISO from raising these arguments. Any rights the Joint Applicants may have had to argue judicial estoppel and collateral attack have been waived because the Joint Applicants did not seek rehearing regarding the unlimited scope of the issues that were set for hearing.

- The Joint Applicants waived any right they may have had to raise judicial estoppel or collateral attack arguments by failing to make motions necessary to preserve those arguments. The Joint Applicants were required to make any such motions by the July 23, 2012 deadline specified by the Presiding Judge for the filing of motions to strike[52] or, at the very latest, prior to the points during the hearing at which the pertinent testimony was admitted into evidence.

- The Joint Applicants stipulated to the admission of the actual data on Lake Erie loop flow measured at the MI/ON Interface and the actual operation of the MI/ON PARs (Exhibit NYI-66), and that such evidence "may be used for all purposes in this proceeding."[53] The Joint Applicants cannot now ask the Presiding Judge to limit the use of this evidence by precluding the NYISO from making arguments based on the evidence in Exhibit NYI-66.

- The Joint Applicants failed to establish the elements of judicial estoppel, a doctrine the Commission has never applied.

- None of the arguments the NYISO raised in this proceeding conflict with the position the NYISO took in the exigent circumstances proceeding at the Commission, or in the DOE Presidential Permit application proceeding.

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[50] NYISO Initial Brief at 78.

[51] *Midwest Indep. Transmission Sys. Operator, Inc.,* 133 FERC ¶ 61,275 (2010) ("Hearing Order").

[52] *See* Order Establishing Revised Procedural Schedule, Docket No. ER11-1844-002 at P 6 (issued April 3, 2012).

[53] August 10, 2012 Joint Stipulation at 2.

- The arguments the NYISO raises in this proceeding do not constitute a collateral attack on the DOE Presidential Permit. The DOE Presidential Permit considered the reliability impact of the Replacement PARs. The NYISO is not arguing that the operation of the MI/ON PARs in a manner that is consistent with ITC's Presidential Permit will harm reliability in the United States.[54] The NYISO does not seek to undo the Presidential Permit or the DOE determinations supporting it.

- ITC did not seek to recover a portion of the cost of the Replacement PARs from NYISO or PJM customers in its DOE Presidential Permit proceeding. Cost recovery for the Replacement PARs is before the FERC in this proceeding.

- NYISO's arguments demonstrate that the Joint Applicants have not met the burden of showing that their rate filing is just and reasonable, and not unduly discriminatory or preferential, given: (i) the poor operating performance of the MI/ON PARs, (ii) the fact that the proposed charges to NYISO and PJM do not take MI/ON PAR outages into account, (iii) the MI/ON PARs demonstrated inability to control loop flow when one of the four circuits that comprise the MI/ON Interface is not PAR controlled, (iv) the fact that the MI/ON PAR Operating Instruction and proposed Rate Schedule SS-1 permit the MI/ON PARs to be operated to provide greater benefits to the MISO and IESO regions and customers; (v) that the PARs have more potential for use to address emergencies in the MISO and IESO territories than in the NYISO and PJM territories. Despite these demonstrated infirmities, Joint Applicants propose to assess a full "proportional" share of the replacement PAR ownership, operating and maintenance costs to NYISO and PJM customers.

a. NYISO Can Rely on the Record Evidence to Support Any Arguments Within the Scope of the Hearing Order, and the Joint Applicants Have Waived Their Rights to Object to NYISO's Use of Record Evidence

The Presiding Judge should reject the Joint Applicants' judicial estoppel and collateral attack arguments because the NYISO has the right to use record evidence to support any arguments within the scope of the Commission's hearing order.

The Hearing Order recognized that a broad range of concerns were raised in the protests to the Joint Application, including arguments that Joint Applicants' estimate of the benefits that the MI/ON PARs will provide is exaggerated.[55] The Hearing Order did not specify or limit the

[54] Exhibit NYT-35 has caused NYISO to be concerned that MISO and ITC may attempt to twist the language of the Presidential Permit to escape their operating obligations. See, *e.g.*, NYISO Initial Brief at 153-154.

[55] *Midwest Indep. Transmission Sys. Operator, Inc*., 133 FERC ¶ 61,275 at PP 33-34 (2010).

matters that could or should be addressed at the hearing on the merits.[56] Whether or not the Joint Applicants' proposal is just and reasonable and not unduly discriminatory or preferential is directly affected by: (1) the MI/ON PARs' actual ability to control Lake Erie loop flow, (2) how the Joint Applicants' proposed tariff revisions assign costs at times when one or more of the MI/ON PARs are not in-service, and the MI/ON PARs are less able to control Lake Erie loop flow, and (3) how the Joint Applicants proposed tariff revisions incorporate provisions of the Operating Instruction and Attachment SS-1 that apply different MI/ON PAR operating rules to addressing emergencies and market anomalies in the MISO and IESO than apply to the NYISO and PJM.

Any rights the Joint Applicants may have had to raise judicial estoppel or collateral attack concerns have been waived because the Joint Applicants did not seek rehearing of the Hearing Order, which did not limit the scope or nature of the issues or arguments that could be addressed at the hearing.[57]

More broadly, the Joint Applicants waived any right they may have had to raise judicial estoppel or collateral attack arguments by failing to make motions necessary to preserve those arguments. The NYISO filed its initial testimony on May 11, 2012. The April 3, 2012, *Order Establishing Revised Procedural Schedule* required motions to strike testimony to be submitted by July 23, 2012. Joint Applicants did not submit a motion to strike any portion of Mr. Yeomans' testimony. Mr. Yeomans' May 11, 2012 testimony addressed the ability of the

[56] *Id*. at PP 43-44 ("The Filing Parties' proposed tariff sheets raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.").

[57] *See, e.g.*, *El Paso Natural Gas Co.*, 132 FERC ¶ 61,155, P 86 (2010) (concluding that a party waived its rights by failing to seek rehearing); *El Paso Natural Gas Co.*, 67 FERC ¶ 61,324 (1994) (same).

MI/ON PARs to control loop flow, the outage history of the MI/ON PARs and the discriminatory provisions of the Operating Instruction and Attachment SS-1.

By raising judicial estoppel and collateral attack arguments at this late juncture, the Joint Applicants ultimately ask the Presiding Judge to ignore record evidence. It is well-settled that a party is precluded from raising an evidentiary objection in a post-trial submission when the party failed to object to the evidence at trial when it was first introduced.[58] A party must raise an objection as soon as the party knows or reasonably should know of the grounds for objection, unless postponement is desirable for a "special reason" and "not unfair to the opposition."[59] This rule applies equally to objections on estoppel grounds. In *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994), the court held that a party had properly preserved on appeal its collateral estoppel argument by having objected to the admission of underlying evidence at trial.

The Joint Applicants stipulated to the admission of Exhibit NYI-66 (containing the actual data on Lake Erie loop flow measured at the MI/ON Interface and the actual operation of the MI/ON PARs). The Joint Stipulation that resulted in the unopposed admission of Exhibit NYI-66 provided that Exhibit NYI-66 "may be used for all purposes in this proceeding."[60] The Joint Applicants cannot now ask the Presiding Judge to limit the use of this evidence by precluding the

[58] *See* Federal Rule of Evidence 103(a)(1), which provides that a party may claim error in a ruling to admit evidence only if the error "affects a substantial right of the party and . . . a party, on the record . . . timely objects or moves to strike." (emphasis added). In *State Farm Mutual Automobile Insurance Company v. Lincow*, 715 F. Supp. 2d 617, 635 n.16 (E.D. Pa. 2010), the court determined that the defendant could not raise evidentiary arguments in its post-trial motions that it failed to raise at trial. In that case, the defendant waived its argument that the plaintiffs did not lay a proper foundation for the introduction of an exhibit because the defendant failed to object on this basis at trial.

[59] *United States v. Gibbs*, 739 F.2d 838 (3d Cir. 1984).

[60] August 10, 2012 Joint Stipulation at 2 ("MISO, ITC and IESO agree that the data responses that NYISO is requesting permission to offer into the evidentiary record in this proceeding are authentic copies of the original responses and they do not object to the new exhibits that are identified above being entered into the evidentiary record in this proceeding. NYISO and the other signatories hereto hereby agree that they do not object to the statements of MISO, ITC and IESO attached hereto as Exhibit ITC-13 being entered into the evidentiary record in this proceeding. The Exhibits described above may be used for all purposes in this proceeding, except that no crossexamination of witnesses of MISO, ITC and IESO will be conducted by any party or participant using Exhibit Nos. NYI-64 through NYI-73, or Exhibit No. ITC-13…").

NYISO from making arguments based on admitted evidence, including Mr. Yeomans' testimony and exhibits, and Exhibit NYI-66.

By arguing for the first time in their Initial Brief that NYISO should be precluded from making arguments to the Commission that were already raised in a NYISO witness's testimony, Joint Applicants' estoppel and collateral attack arguments, in effect, propose to strike significant portions of Mr. Yeomans' testimony more than five months after the testimony was filed and nearly three months after motions to strike were due. The estoppel and collateral attack arguments similarly seek to undo the Joint Applicants' stipulation that Exhibit NYI-66 "may be used for all purposes in this proceeding" and to prevent the NYISO's use of that Exhibit.

Joint Applicants' extremely tardy request, if granted, would raise significant due process concerns. For example, assuming *arguendo* that a motion to strike portions of Mr. Yeomans' testimony had been timely submitted and granted by the Presiding Judge, the NYISO would have adjusted its trial strategy based on the ruling and might have emphasized different issues and arguments at the hearing on the merits, and sought admission of a different set of exhibits that would have been consistent with its modified strategy. The same can be said for the admission of Exhibit NYI-66. Joint Applicants' estoppel and collateral attack arguments were not timely raised, would have significantly impacted the NYISO's trial strategy if they had been timely raised and granted, and must now be rejected as untimely.

b. The Joint Applicants Failed to Satisfy the Elements of the Judicial Estoppel Doctrine

The Joint Applicants submit in their Initial Brief (at 7-10 and 39-41) that the doctrine of judicial estoppel should defeat any attempt by the NYISO to claim "that the PARs will not work … because NYISO's position in this regard is inconsistent and irreconcilable with the position it took regarding the PARs before this Commission in the exigent circumstance case in Docket No.

ER08-1281 and before DOE in the ITC Presidential Permit proceeding."[61] The Presiding Judge should reject this argument.

As the Commission has explained, "[t]he doctrine of judicial estoppel applies only where, as a result of prior testimony, parties have relied upon that testimony and changed positions by reason of that testimony."[62] The Joint Applicants, however, fail to allege (let alone demonstrate) that they (1) relied on the NYISO's prior testimony in the exigent circumstances or Presidential Permit proceedings and (2) changed their position in this proceeding as a result.[63] The Joint Applicants, therefore, have "failed to make the required allegations under the doctrine of judicial estoppel," and their claim must be rejected.[64] Furthermore, the Commission has stated: "[t]he doctrine of judicial estoppel has been rejected in many jurisdictions and has never been applied by the Commission."[65] In fact, the Commission refused to apply judicial estoppel in the *Missouri Interstate Gas*[66] order relied on by the Joint Applicants. The instant proceeding clearly would be an inappropriate context for the Commission's first foray into applying the judicial estoppel doctrine.

[61] Joint Applicants' Initial Brief at 39; *see also id.* at 39-41 (presenting full argument on judicial estoppel).

[62] *San Diego Gas & Electric Co. v. Sellers of Ancillary Services*, 115 FERC ¶ 61,230, at P 33 & n.59 (2006) (citation omitted); *see also Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,224, P 45 & n.32 (2007) (quoting *San Diego Gas & Electric*); *United Illuminating Co.*, 119 FERC ¶ 61,182, P 80 & n.52 (2007) (same).

[63] Joint Applicants' Initial Brief at 39-41 (presenting judicial estoppel argument but failing to demonstrate the elements of judicial estoppel).

[64] *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,224 at P 45 ("In this case, AEEC does not allege that it relied upon prior testimony by the Louisiana Commission and changed positions by reason of that testimony. Thus, AEEC has failed to make the required allegations under the doctrine of judicial estoppel.").

[65] *Kentucky Utils. Co.*, 62 FERC ¶ 61,097, p. 61,705 (1993); *see also Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,224, P 45 & n.32 (2007) (quoting *Kentucky Utils. Co.*). Furthermore, research has not identified a single Commission order applying the doctrine of judicial estoppel.

[66] *Missouri Interstate Gas, LLC, et al*., 122 FERC ¶ 61,136 at PP 36-44 (2008), *see* Joint Applicants' Initial Brief at 39.

Because the Joint Applicants "failed to make the required allegations under the doctrine of judicial estoppel," and because the Commission has never applied the doctrine, the Presiding Judge should reject the Joint Applicants' request to apply judicial estoppel here.

c. None of the Positions the NYISO Advanced in this Proceeding Are Inconsistent With Positions NYISO Presented in the Exigent Circumstances and DOE Presidential Permit Proceedings

The NYISO has not advanced any positions in this proceeding that are inconsistent with those taken in the exigent circumstances or the DOE Presidential Permit proceedings. The evidence cited by the Joint Applicants merely demonstrates that the NYISO acknowledged in the prior proceedings that the MI/ON PARs - when operating properly - could help control Lake Erie loop flows. The NYISO has acknowledged as much in this proceeding. For the Presiding Judge's convenience, the NYISO compiles below the NYISO statements to which Joint Applicants cite in their Initial Brief (at 39-40):

- NYISO's November 2008 loop flow report at 10-11 (Exhibit ITC-3): The NYISO stated that, "[w]hen fully operational, the PARs are ***expected*** to help align the actual power flows with the corresponding level of scheduled transactions between the IESO and MISO, reducing the impact of Lake Erie loop flows on the New York bulk electricity grid and wholesale electricity markets." The NYISO also made clear that "an agreement addressing the operation of the Michigan/Ontario PARs still needs to be negotiated." (emphasis added)

- NYISO's July 21, 2008 exigent circumstances filing at 4, fn. 11 (Exhibit ITC-3): The NYISO explained (at 4, n.11) how "the commissioning and operation ***of all four of the [MI/ON PARs]*** … is a necessary prerequisite to more closely conform actual power flows to scheduled power flows around Lake Erie." (emphasis added)

- NYISO's July 21, 2008 exigent circumstances filing at 7, fn. 20[67] (Exhibit ITC-3): "It is the NYISO's ***understanding and expectation*** that the [MI/ON PARs] are being commissioned to control the IESO-MISO Scheduling Path actual power flows to their corresponding interchange schedule, within operational tolerances.

[67] The Joint Applicants appear to have inadvertently cited to fn. 30 on page 7 of the exigent circumstances filing. Page 7 does not contain a footnote 30; it does contain a footnote 20 that discussed the MI/ON PARs.

The NYISO has been anticipating the commissioning of the [MI/ON PARs] for more than three years." (emphasis added)

- NYISO's July 21, 2008 exigent circumstances filing at 26-27 (Exhibit ITC-3): "The NYISO ***expects*** that the operation of [the MI/ON PARs] will enable the MISO and IESO to better align their actual Control Area interchange power flows to their scheduled interchange, thereby reducing Lake Erie circulation." (emphasis added)

- NYISO's Broader Regional Market White Paper filed in the exigent circumstances case on January 12, 2010, at 7-8 (Exhibit ITC-26): The NYISO explained that "[u]sing the [MI/ON PARs] to more closely match actual power flows to scheduled power flows will reduce unscheduled Lake Erie loop flows and their corresponding impact on congestion management costs and LBMP prices." The NYISO also noted that the MI/ON PAR configuration "was designed to both increase the import/export capacity of the interconnection and also to provide a means to manage loop flows through Ontario …," and that "[o]ngoing operation of these facilities has been delayed due to a number of equipment failures, events and difficulties in getting operating agreements in place between the parties." Page 8 also includes a section on the MI/ON PARs called "Expected capabilities."[68]

- NYISO's response to Commission's questions filed in exigent circumstances case on August 16, 2010, at 17 (Exhibit ITC-23): "***If*** the [MI/ON PARs] are operated to conform actual flows to scheduled flows at the Ontario-Michigan border, the ***NYISO expects*** that Generation-to-Load and Interchange impacts from its western neighbors on the New York transmission system would be greatly diminished, thereby leaving more of the New York transmission system available for scheduling by the NYISO."). (emphasis added) The NYISO also made clear that it "has not performed any studies on the actual operation of the Michigan-Ontario PARs." *Id.*

- In the DOE Presidential Permit Proceeding, the NYISO submitted comments supporting ITC's filing, and supplemental comments supporting the proposed operation of the Replacement PARs. *See* Exhibit ITC-14 at 7 (DOE Order summarizing NYISO comments). In its comments, the NYISO noted that its initial reliability concerns related to the appropriate modeling of the MI/ON PARs in the NERC IDC had been addressed. *See* Exhibit MSO-7, NYISO Comments at 1.

[68] Also, the NYISO explicitly stated on page 15 of its filing letter in the Broader Regional Market White Paper filing with the Commission that it refused to pay for the Replacement PARs. For instance, the NYISO stated that it "declines ITC's invitation to to schedule discussions to determine whether consumers in other markets are willing to pay for a portion of the cost of ITC's Ontario-Michigan PARs. Ex. S-4 at page 15; *see also id.* ("The opposition of the NYISO and its stakeholders to ITC's proposal to reallocate the cost of existing transmission facilities that were not developed pursuant to a Commission approved regional planning effort is consistent with the Commission's decisions regarding the allocation of transmission costs within the Midwest ISO and PJM Interconnection.").

A review of these statements makes clear that the NYISO's position in the current proceeding is not at all "inconsistent and irreconcilable," as claimed by the Joint Applicants, with the statements above. In none of the statements cited above did the NYISO take a position on the justness and reasonableness of recovering Replacement PARs costs through rates charged to NYISO and PJM customers - the issue presented in the instant proceeding. Nor did the NYISO make any representations about how effectively the Replacement PARs or the MI/ON PARs *actually* operated or how often they have (or had) been out of service. It would not have been possible for the NYISO to address the actual operation of the MI/ON PARs in 2008, 2009, 2010 or 2011, since the Replacement PARs were not placed into service, and the MI/ON PARs were not operated to better conform actual power flows to scheduled power flows, until *after* the statements the Joint Applicants cite were made.

The NYISO presented evidence regarding the performance problems of the MI/ON PARs - much of which the NYISO obtained through discovery in this proceeding after the exigent circumstances tariff revisions were accepted for filing and DOE Presidential Permit proceeding was completed - in order to rebut the Joint Applicants' justification for allocating costs to the NYISO. Accordingly, there was, and could have been, no inconsistency between NYISO's position in those earlier proceedings and the instant proceeding. For these reasons, the Presiding Judge should reject the Joint Applicants' estoppel argument.

d. The NYISO's Position in this Proceeding Does Not Constitute a Collateral Attack on the DOE Presidential Permit

The Presiding Judge should reject the Joint Applicants' claims (on pages 7-10 and 41-42 of their Initial Brief) that the NYISO's arguments addressing (1) the outage history, and potential for future outages of the MI/ON PARs, (2) the MI/ON PARs efficacy in conforming actual power flows to scheduled power flows at the MI/ON Interface (with all MI/ON PARs in service,

or with one or more of the MI/ON PARs unavailable), and (3) identifying aspects of the Operating Instruction that grant MISO and IESO rights and opportunities that are not granted to NYISO and PJM (or are not granted to NYISO and PJM on an equivalent basis), amount to a collateral attack on the DOE order granting ITC a Presidential Permit for the Replacement PARs. The concerns the NYISO raises in this proceeding are relevant to determining the justness and reasonableness of the Joint Applicants' proposal to assign approximately 29 percent of the cost of the Replacement PARs to the NYISO's customers. The DOE Presidential Permit proceeding and order did not consider or address the justness and reasonableness of ITC's proposal to allocate 29% of the cost of its Replacement PARs to the NYISO's customers.

DOE's criteria for decision-making on Presidential Permit applications are specific and limited. As explained by DOE:

> Executive Order 12038 states that, before a Presidential permit may be issued, the action must be found to be consistent with the public interest. The two criteria used by DOE to determine if a proposed project is consistent with the public interest are:
>
> 1. Environmental Impact - The National Environmental Policy Act of 1969 (NEPA) requires that Federal agencies give due consideration to the environmental consequences of their actions. Pursuant to NEPA, DOE must determine the environmental impacts associated with issuing or denying a Presidential permit. DOE published NEPA implementing procedures on April 24, 1992 (57 FR 15122). These rules, codified at 10 CFR 1021, specifically delineate the steps of the NEPA process.
>
> 2. Impact on Electric Reliability - DOE considers the effect that the proposed project would have on the operating reliability of the U.S. electric power supply system; *i.e.*, the ability of the existing generation and transmission system to remain within acceptable voltage, loading and stability limits during normal and emergency conditions. The standards DOE applies include the standards of the North American Electric Reliability Council (NERC) and the

> standards of the member regional councils that are formulated by the utilities themselves.[69]

Page five of DOE's February 24, 2012 Order in OE Docket No. PP-230-4 (Exhibit ITC14) states:

> DOE has also assessed the impact the proposed international transmission facilities would have on the reliability of the U.S. electric power supply system. Based on the information filed in this docket as discussed above, DOE has determined that the installation and operation of the proposed international transmission facilities by ITC, as conditioned herein, would not adversely impact the reliability of the U.S. electric power supply system.

The NYISO agrees with DOE's reliability determination. The NYISO does not expect that (a) the terms and conditions set forth in the Operating Instruction for the MI/ON PARs (when those Operating Instructions are properly followed by MISO's and IESO's operators), (b) the possible failure of one or more MI/ON PARs, or (c) the inability of the MI/ON PARs to accurately conform actual power flows to scheduled power flows at the MI/ON Interface, will "adversely impact the reliability of the U.S. electric power supply system."

At the hearing, NYISO witness Wesley Yeomans explained to counsel for ITC that, consistent with the stated scope of DOE's review, the NYISO only raised issues that could "adversely impact the reliability of the U.S. electric power supply system" at DOE:

> **Q** ...I guess it is true, is it not, that you never mentioned to the DOE that you thought that these facilities were prone to failure; is that true?
>
> **A** That's true. We did not mention that statement to DOE.
>
> **Q And failure of a facility would be a reliability issue, wouldn't it? A**
>
> Be a reliability issue?
>
> **Q** Yes.

[69] *See* Dept. of Energy's Electricity Policy Coordination and Implementation,International Electricity Regulation, Presidential Permits - Procedures *available at* http://energy.gov/oe/services/electricity-policy-coordination-and-implementation/international-electricity-regulatio-9.

A No. If we're able to operate the system, to reliability limits and then there's an outage and maybe that results in a reduced or modified operating limit, we still operate to that modified one. So I would not call an outage on one of these PARs a directly a reliability outage. That might make controlling the interface ineffective, but I don't know if I would call that a New York reliability issue.[70]

…

Q Isn't it true that NYISO didn't raise any concerns about this provision of the CO2 agreement in any of its filings at DOE?

A The filings we made at DOE, **we really did just focus on the reliability aspects and commenting to the DOE how important the TLR process is for us maintaining reliability in New York**. We did not choose that avenue to bring up all of our comments or concerns or great ideas from application of the CO2 agreement.

Q So you didn't think the fact that you thought that the agreement was discriminatory was an important thing to raise?

A We thought maybe in some other avenues those were important things to bring up. But really at that point in time, **for the DOE presidential permit, we were really focused on the reliability concerns and what we could comment to modify the CO2 [Operating Instruction] and make sure the TLR process still works for New York so we can maintain reliability, and that included the proper setting of the IDC flag.** That was our primary focus with our comments to the DOE.

Q Just focusing on that for a minute, based on those comments, **you do agree that the CO2 agreement does not disturb the operation of the TLR process from New York's standpoint** since you didn't object to it at DOE?

A When executed properly, it does not disturb reliability. The flag is set per the language in the CO2 and that still has not been our observation since April [5th], but to answer your question, **to the extent that the operators follow the language in the CO2, the reliability concerns that New York had are fine -- our concerns are resolved if the language is followed properly**.[71]

The NYISO has not advanced a single argument in this Docket No. ER11-1844 proceeding that is inconsistent with DOE's reliability determination in OE Docket No. PP-230-4. The arguments that the NYISO raises in FERC Docket No. ER11-1844 all address whether or

[70] Tr. 851:13-852:4.

[71] Tr. 833:9-834:15.

not the Joint Applicants' rate proposal is just and reasonable and not unduly discriminatory, preferential or prejudicial.

As summarized by the Commission, the basis for the collateral attack doctrine is:

> the fact that it is contrary to sound administrative practice and a waste of resources to **relitigate** issues in succeeding cases once those issues have been **fully determined**. Absent a showing of significant change in circumstances, the relitigation of an issue is simply not justified.[72]

The DOE proceeding did not *litigate* or *determine* any issues related to cost allocation, or the justness and reasonableness of rates, for the Replacement PARs. Rather, the DOE proceeding focused on "the effect that the proposed project would have on the operating reliability of the U.S. electric power supply system." Consistent with DOE's stated scope of review, NYISO's pleadings in OE Docket PP-230-4 focused on reliability concerns related to the modeling of the MI/ON PARs in the NERC IDC. The arguments that the NYISO has raised in FERC Docket No. ER11-1844 do not collaterally attack the DOE order on ITC's Presidential Permit application. Instead, they focus on the cost allocation that the Joint Applicants proposed in their October 20, 2010 Joint Application.

For these reasons, NYISO's position in this proceeding does not constitute a collateral attack on the DOE Presidential Permit.

B. Joint Applicants' Failure to Identify the Service MISO is Providing and to Define MISO's Service Obligations In the MISO Tariff, Along with Joint Applicants' Denial of Any Obligation to Serve, Makes the Proposed Tariff Revisions Unjust and Unreasonable

Joint Applicants propose to charge NYISO customers for the Replacement PARs based on a theory that the operation of the MI/ON PARs will significantly reduce Lake Erie loop flow and provide benefits to the NYISO's customers.[73] However, the Joint Applicants do not propose

[72] *Alamito Company*, 43 FERC ¶ 61,274 at p. 61,753 (1988) (emphasis added).

[73] *See, e.g.,* Joint Applicants' Initial Brief at 3.

to assume any obligation, whatsoever, to *actually* reduce Lake Erie loop flow in their proposed tariff revisions.[74] Joint Applicants' proposed tariff revisions do not identify the service that Joint Applicants will provide in return for the millions of dollars NYISO's customers are required to pay each year, and do not contain any performance or service standards that Joint Applicants must satisfy. MISO's proposed tariff revisions are not just and reasonable, and are unduly discriminatory and prejudicial, because they do not tie NYISO customers' obligation to pay to a reciprocal obligation that (1) Joint Applicants actually operate the MI/ON PARs to reduce Lake Erie loop flow in the manner described in the Joint Application, and (2) the operation of the MI/ON PARs significantly reduce Lake Erie loop flow.

On page 13 of his testimony, NYISO witness Wesley Yeomans explained:

> Despite the fact that the testimony of MISO witnesses Mallinger (at 19), Chatterjee (at 26, 31) and Zwergel (at 8) repeatedly state "[t]he MI/ON PARs "will fully mitigate Lake Erie loop flow approximately 74% of the time and will mitigate it by approximately 600 MW the remainder" (Chatterjee at 26), in response to discovery requests, MISO and ITC have indicated that they are not proposing to actually be held to meeting this operating standard, or to meeting *any* operating standard, in order to collect the charges proposed in this proceeding. MISO and ITC state that <u>their proposed tariff revisions</u> will require customers in New York and PJM to pay for the Replacement PARs even when the Replacement PARs are not in service, or when one or more of the Hydro One PARs are not available.[75] [Underlining added.]

Mr. Yeomans went on to recommend that *if* the Commission allows the collection of the charges Joint Applicants propose, the Joint Applicants should be required to meet the performance expectations they create in their direct testimony in order to collect the charges.[76] In particular, the Joint Applicants should be required to operate the MI/ON PARs to "fully

[74] Joint Applicants' Initial Brief at 37-38.

[75] Ex. NYI-1 at 13:19-28.

[76] Ex. NYI-1 at 16:2-11.

mitigate" Lake Erie loop flow when it is less than 600 MW and to reduce Lake Erie loop flow by 600 MW at times when Lake Erie loop flow exceeds 600 MW.

In their Initial Brief the Joint Applicants respond to Mr. Yeomans recommendation by arguing (1) that their filing does not create any obligation to serve the NYISO's customers;[77] (2) that it is not necessary to subject Joint Applicants to a service obligation because ITC's Presidential Permit specifies certain operating requirements for the MI/ON PARs;[78] (3) that specific service agreements with NYISO and PJM would be redundant to the Presidential Permit provisions specifying how the PARs are to be operated;[79] and (4) that if one or more of the MI/ON PARs fail, and the MI/ON PARs are no longer capable of better conforming actual power flow to scheduled power flow at the MI/ON Interface, NYISO should be required to file a complaint under Section 206 of the Federal Power Act ("FPA") in order to prevent MISO from continuing to charge an unjust and unreasonable rate.[80] The NYISO responds to Joint Applicants contentions below.

1. MISO is Required to Specify All Terms and Conditions of Service In its FERC Tariff

Joint Applicants asked the Commission to grant their requested cost allocation and to require the NYISO to collect,[81] and the NYISO's customers to pay, for a portion of the cost of ITC's Replacement PARs.[82] By requesting the Commission's authorization to impose the

[77] Joint Applicants' Initial Brief at 37.

[78] *Id*.

[79] *Id.* at 38.

[80] *Id.* at 43-44.

[81] NYISO is being compelled to act as an involuntary collection agent for MISO and ITC and to pass-through monies it collects from its customers to MISO for disbursement to ITC. MISO's proposed Schedule 36 provides that MISO bills the NYISO "on behalf of its customers." *See* Midwest Independent Transmission System Operator, Inc. and International Transmission Company d/b/a ITCTransmission, ("Joint Application") Tab A at § II, Docket No. ER11-1844-001 (filed October 20, 2010)

[82] *See* Joint Application's transmittal letter ("Joint Application Transmittal Letter").at 15-17.

charges, and Commission review of the proposed cost allocation,[83] Joint Applicants admit they are providing Commission-jurisdictional service.[84] Commission-jurisdictional service must be adequately described in the MISO's tariffs, including the relevant terms and conditions of the service that is being provided.

Section 35.2(c)(1) of the Commission's regulations[85] specifies that a "tariff" must include in writing a description of the "service" being provided:

> The term *tariff* as used herein shall mean a statement of (1) electric service … offered[86] on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. … [emphasis added]

The revisions to MISO's tariffs that Joint Applicants propose in this proceeding do not satisfy the requirements of the Commission's regulations. They do not identify the FERC jurisdictional service that MISO is "offering."[87] They do not include all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. Compliance with the requirement to identify in MISO's tariffs the electric service that MISO is offering, and to include "all classifications, practices, rules, or

[83] *Id.*at 1.

[84] *Id.* at 7 (noting that "costs of jurisdictional transmission facilities must be allocated in a manner that satisfies the cost causation principle"). If the New York customers that are paying for the Replacement PARs are *not* receiving a FERC-jurisdictional service from MISO, then the Commission lacks authority to accept the tariff revisions proposed in the Joint Application.

[85] 18 C.F.R. § 35.2(c)(1) (2012).

[86] The use of the term "offered" in the Commission's regulations suggests that becoming a customer and obtaining the electric service occurs on a *voluntary* basis. However, in this proceeding the Joint Applicants are asking the Commission to *compel* NYISO's customers to pay for approximately 29% of ITC's ongoing costs of owning and operating the Replacement PARs.

[87] In the hearing, ITC witness Grover admitted that he could see no description in the proposed tariff provisions of the service that NYISO would be receiving in return for the payments. Tr. 127:2-4.

regulations which in any manner affect or relate to the aforementioned service, rates, and charges" in the FERC tariff is not optional.

In *Cargill Power Mkts., LLC v. Public Serv. Co*., the Commission found that Public Service Company of New Mexico's ("PNM") Open Access Transmission Tariff ("OATT") "does not specify which services it actually offers" even though "the Commission does require the OATT to state accurately which services are offered."[88] The Commission determined that "PNM acted unreasonably by denying [a transmission service] request that complied with PNM's OATT" based on criteria and limitations that were not specified in PNM's filed OATT.[89] The Commission explained that "[u]nder the filed rate doctrine, the rate on file with the Commission is the only lawful rate."[90]

The Commission explained further that "The Commission's regulations require that '[e]very public utility shall file with the Commission . . . full and complete rate schedules . . . clearly and specifically setting forth all rates and charges . . . [and the] practices, rules and regulations affecting such rates and charges.'"[91] The Commission directed PNM "to file tariff revisions . . . to specify all transmission services the company provides, and to detail the procedures PNM follows when processing transmission service requests"[92] because "the

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[88] *Cargill Power Mkts., LLC v. Public Serv. Co*., 132 FERC ¶ 61,079 at P 22 (2010).

[89] *Id*. at P 22.

[90] *Id*. at P 22 n. 16 *citing Maislin Indus., U.S. v. Primary Steel*, 497 U.S. 116, 126-127 (1990); *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915); and *Town of Norwood v. FERC*, 217 F.3d 24, 28 (1st Cir. 2000) ("The filed rate doctrine . . . revolves around the notion that under statutes like the Federal Power Act, utility filings with the regulatory agency prevail over unfiled contracts and other claims seeking different rates or terms than those reflected in the filings with the agency.").

[91] *Id*. at P 23 n. 18 *citing* 18 C.F.R. § 35.1(a) (2010); *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985); *Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890*, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, at P 989 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

[92] *Id.* at Ordering Paragraph (B).

Commission, consistent with the FPA, requires all practices that significant affect rates, terms and conditions of service to be on file" with the Commission.[93]

In *Midwest Indep. Transmission Sys. Operator, Inc*., a Commission order related to MISO's filing of its Transmission and Energy Markets Tariff ("TEMT"), the Commission "direct[ed] Midwest ISO to . . . provide details on how the [revenue credit to transmission customers] will be calculated and assessed,"[94] "to provide details on alternatives to the SSR designation,"[95] to "[m]odify the definition [of Aggregated Price Node] to provide in detail what the weighting mechanism is[] for,"[96] and to "detail[] its metering standards."[97] The Commission explained that its "regulations require that any practices that directly affect rates should be included in the tariff."[98]

The tariff revisions Joint Applicants propose in this proceeding do not identify, describe or explain the jurisdictional service that MISO is providing.[99] The tariff revisions proposed in this proceeding do not include any service standards, rules, or criteria that MISO must satisfy or meet in order to demonstrate that it is providing adequate service.[100] For these reasons, the Joint Applicants proposed tariff revisions do not satisfy the requirements of the Commission's regulations, are not just and reasonable, and must be rejected.

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[93] *Id*. at P 22 (footnote omitted).

[94] *Midwest Indep. Transmission Sys. Operator, Inc*., 109 FERC ¶ 61,157 at P 200 (2004).

[95] *Id*. at P 293.

[96] *Id*. at P 408.

[97] *Id*. at P 561.

[98] *Id*. at P 560 *citing* 18 C.F.R. § 35.1.

[99] Tr. 124:21-23 (on cross-examination MISO witness Grover admitted that the service being provided is not described in the tariff or otherwise specified but stated "I guess if I had to name the service, I would say it's control of Lake Erie loop flows, flow equal to schedule"); *see also* NYISO Initial Brief at 125-126.

[100] NYISO Initial Brief at 125-126.

In response to Joint Applicants argument that specific service agreements with NYISO and PJM would be redundant to the Presidential Permit provisions specifying how the PARs are to be operated,[101] the NYISO clarifies that it never proposed to enter into a bilateral service agreement with MISO or ITC. A bilateral service agreement between NYISO and the Joint Applicants is not necessary because all of the terms and conditions of service must be specified in MISO's tariffs. The NYISO responds to Joint Applicants' argument related to the terms and conditions of ITC's Presidential Permit below.

2. Response to Joint Applicants' Unsupported Claim that MISO Is Not Subject to Any Service Obligation

On page 37 of their Initial Brief, the Joint Applicants state, without providing any legal justification or citations to supporting legal precedent, that the obligations that MISO's proposed tariff revisions impose on the NYISO and its customers[102] do not result in any reciprocal service obligation that MISO owes to the NYISO. In Exhibit NYI-6, MISO denies it will be subject to any obligation to provide reliable service to the NYISO customers that are required to pay for a portion of the cost of ITC's Replacement PARs. In Exhibit NYI-9, ITC similarly denies that it will be subject to any service obligations, but does not identify the legal basis for, or provide any support for its position.

Because Joint Applicants did not provide a clear explanation of the basis for their position, The NYISO has reviewed the record to try to determine the basis for the Joint Applicants' position. In Exhibit NYI-5, MISO states:

> [a]pproval of the current rate filing will not affect or alter MISO's existing service obligations as defined under Section 38 of the MISO Tariff and related

[101] Joint Applicants' Initial Brief at 38.

[102] NYISO is being required by the Commission to collect from the NYISO's customers the Replacement PAR charges issued by MISO, and to remit the monies it collects to MISO. Joint Applicants propose that NYISO's customers must pay for approximately 29% of the cost of ITC's Replacement PARs.

> agreements identified therein…. At present, NYISO is not a MISO Transmission Owner, Transmission Customer, or Market Participant, and MISO does not have service obligations to NYISO related to these categories.[103]

The explanation MISO provides in Exhibit NYI-5 is cryptic. However, it is the only explanation of the Joint Applicants' position that the NYISO was able to locate in the record. MISO appears to be suggesting that because MISO's proposed tariff revisions do not identify a new class of "customer" that receives the service that MISO proposes to provide, MISO will not be subject to any obligation to serve the NYISO or the NYISO customers that are currently being required to contribute[104] approximately 29% of the cost of constructing and maintaining ITC's Replacement PARs.

The Midwest ISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (the "MISO Tariff") identifies many different types of customers: Tariff Customers,[105] Market Participants,[106] Transmission Customers,[107] Coordination Customers,[108] Reliability Coordination Customers[109] and Congestion Management Customers.[110] The various types of customers the MISO Tariff identifies receive different services from the MISO that are also described in the MISO Tariff.[111] However, the tariff revisions proposed in the Joint Application

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[103] In Ex. NYI-6, MISO makes clear that the reassigning in Ex. NYI-5 also applies to the NYISO's customers.

[104] The NYISO customer payments are being made subject to refund pursuant to the Commission order setting this proceeding for hearing.

[105] *See* Module A to the MISO Tariff § 1.652. The MISO Tariff is available on the web at https://www.midwestiso.org/_layouts/MISO/ECM/Download.aspx?ID=19218.

[106] *See* Module A to the MISO Tariff § 1.384.

[107] *See* Module A to the MISO Tariff § 1.666.

[108] *See* Module A to the MISO Tariff § 1.98.

[109] *See* Module A to the MISO Tariff § 1.559.

[110] *See* Module A to the MISO Tariff § 1.83.

[111] *See, e.g.,* Module A to the MISO Tariff § 1.676 (Transmission Service is defined as "Point-To-Point Transmission Service provided under Module B of this Tariff on a firm and non firm basis, including HVDC Service, and the Network Integration Transmission Service under Module B of this Tariff."); Preamble to Part II of Module F to the MISO Tariff ("The Transmission Provider shall provide, subject to the terms and conditions of this

do not identify a *new* kind of customer that receives and pays for the *new* service that Joint Applicants propose to provide. MISO apparently believes that by not identifying a new class of customer, it can avoid the obligation to describe in its tariff the service it will provide (including all of the terms and conditions associated with that service).

The problem with MISO's logic is that its proposed tariff revisions are subject to review by the Commission to determine if the proposed terms and conditions of service are just and reasonable, and not unduly discriminatory, preferential or prejudicial.[112] In this proceeding, the Commission determined that "[t]he Filing Parties' proposed tariff sheets raise issues of material fact"[113] and that "the Filing Parties' proposed tariff sheets have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful."[114] The Commission then set the matter for hearing.

The tariff revisions that the Joint Applicants submitted in support of the Joint Application are wholly inadequate to support the service and charges that the Joint Applicants propose. Under the Joint Applicants' proposal, NYISO's customers will be required to pay for a significant portion (approximately 29%) of the ongoing cost of constructing and maintaining ITC's Replacement PARs, but the NYISO customers that will be paying the proposed rate are not guaranteed to receive anything in return. For example, the Joint Applicants propose that NYISO's customers be required to continue to pay when the Replacement PARs, or other MI/ON PARs are out-of-service.[115] Because the tariff provisions filed with the Joint Application

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Part II of Module F, specific congestion management services, including redispatch of generation within the Energy and Operating Reserve Markets, for interconnected transmission providers.").

[112] *See* Sections 205(a) and (b) of the FPA, 16 U.S.C. §§ 824d(a), 824d(b) (2006). [113]

Hearing Order at P 43.

[114] *Id.* at P 44.

[115] *See* Ex. NYI-1 at15:5-17; NYI-7; NYI-8.

do not propose just and reasonable rates, terms and conditions, and do not contain the substantive details required by the Commission's regulations, the Joint Application must be rejected.

3. MISO Is Obligated to Provide Reliable Service in a Non-Discriminatory Manner and at a Just and Reasonable Rate

The NYISO's customers are currently paying for a portion of the cost of the Replacement PARs (subject to refund) under a FERC-accepted rate. MISO has operational control of the Replacement PARs, and is responsible for coordinating the operation of the MI/ON PARs with IESO.[116] Hence, the NYISO's customers are receiving a FERC-jurisdictional service from the MISO.[117] This is true even though MISO does not propose to identify the NYISO customers that are paying for the Replacement PARs as MISO customers in its tariff.[118] The evidence adduced in this proceeding shows that MISO intends to treat the NYISO customers that are contributing to the cost of the MI/ON PARs differently from MISO's existing customers.

As discussed above, the MISO Tariff identifies many different types of customers (such as Tariff Customers, Market Participants, Transmission Customers, Coordination Customers, Reliability Coordination Customers and Congestion Management Customers), and the various types of customers that MISO identifies in its tariff receive different services from MISO that are also described in the MISO Tariff. The MISO Tariff has over 3500 pages (not including agreements designated under the MISO tariff) of Commission-accepted tariff rules in place that

[116] *See* Ex. NYI-3 at 14, 50.

[117] As discussed above, the Joint Application Transmittal Letter (at 7) refers to the filing's context as the allocation of the "costs of jurisdictional transmission facilities." Again, if the New York customers that are paying for the Replacement PARs are *not* receiving a FERC-jurisdictional service from MISO, then the Commission lacks authority to accept the tariff revisions proposed in the Joint Application.

[118] *See* Ex. NYI-5. None of the MISO Tariff changes filed with the Joint Application contain any new "customer" definitions.

describe the services that MISO provides to its existing customers.[119] MISO's tariff sets forth the circumstances under which MISO may permissibly bill its existing customers for providing a service,[120] and the circumstances under which the MISO is precluded from doing so.[121] The tariff revisions proposed in this proceeding are not comparable to the tariff provisions that govern MISO's provision of service to its existing customers.[122]

Instead of developing proposed tariff rules to protect the NYISO customers from the unjust and unreasonable charges that will occur when one or more of the MI/ON PARs fail and the MI/ON PARs are not able to conform actual power flows to scheduled power flows at the MI/ON Interface,[123] the Joint Applicants suggest that the NYISO, which is not directly subject to the charges and is not a MISO customer,[124] should instead file a complaint under Section 206 of the FPA on behalf of its customers, and demonstrate that the MI/ON PARs are no longer providing benefits to those customers.[125] Joint Applicants suggest that only after NYISO steps in and demonstrates that the rates MISO is charging are unjust and unreasonable, should the

[119] *See* https://www.midwestiso.org/_layouts/MISO/ECM/Download.aspx?ID=19218 (MISO tariff); https://www.midwestiso.org/Library/Agreements/Pages/Agreements.aspx (agreements designated under the MISO tariff).

[120] *See, e.g.,* Section 2.2 of Schedule 23 of the MISO tariff, which addresses monthly billing by Transmission Provider for cost recovery of Schedule 10 and 17 charges applicable to services provided to customers under "Carved-Out GFAs."

[121] For example, Section 2.2 of MISO tariff Schedule 23 states that if the Carved-Out GFA Customer receives a bill directly from the MISO, MISO shall not bill the Transmission Owner for these costs, and cost recovery will not occur under Schedule 23.

[122] *See* NYISO Initial Brief at 125-126. [123]

See id. at 132-133, 150-153.

[124] NYISO is being compelled to act as an involuntary collection agent for MISO and ITC and to pass-through monies it collects from its customers to MISO for disbursement to ITC. Schedule 36 of the MISO tariff provides that MISO bills the NYISO "on behalf of its customers." *See* Ex. ITC Tab A at § II.

[125] Joint Applicants' Initial Brief at 43-44.

Commission excuse the NYISO customers from their obligation to pay for a portion of the cost of the Replacement PARs.[126]

Joint Applicants' proposed tariff revisions are unduly prejudicial and unduly discriminatory because the tariff provisions addressing service to NYISO and PJM customers are not, in any way, comparable to the rules that MISO has in place addressing service to MISO's existing customers. For example, the MISO Tariff provides a credit to MISO customers whose energy schedules associated with confirmed Point-To-Point Transmission Service are curtailed due to a TLR event.[127] Joint Applicants' proposal that a FPA Section 206 complaint should be required to protect NYISO and PJM customers from unjust and unreasonable charges that are assessed by the MISO turns on its head the concept that ISOs and RTOs have a duty to administer their tariffs in a non-discriminatory manner for all customers.[128]

4. Response to Joint Applicants' Argument that the Provisions of ITC's DOE-Jurisdictional Agreements and Presidential Permit Obviate the Need To Submit Tariff Rules Governing the Service MISO Proposes to Provide

On pages 37 and 38 of their Initial Brief, Joint Applicants argue that it is not important that MISO will have no tariff obligation to serve the NYISO and PJM customers it is charging

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[126] *Id.*

[127] *See* MISO Tariff Schedule 7 at § 10.

[128] Order No. 888 states: "The primary purpose of an ISO is to ensure fair and non-discriminatory access to transmission services and ancillary services for all users of the system." *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 ¶ 31,036, at p. 31,730 (1996), *order on reh'g*, Order No. 888-A, FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC,* 535 U.S. 1 (2002).

Appendix A ("Standards of Conduct") to the Commission-accepted MISO Transmission Owner Agreement states (at Section II) that "the Tariff shall be applied to any Owner, Member, or User of the Transmission System without adverse distinction or preference to any of the Owners, Members, or Users of the Transmission System." The Transmission Owners Agreement is available on the web at https://www.midwestiso.org/Library/Repository/Tariff/Rate%20Schedules/Rate%20Schedule%2001%20-%20Transmission%20Owners%20Agreement.pdf.

for ITC's Replacement PARs, and it is not important that the terms and conditions under which MISO is providing service to NYISO customers are not specified in MISO's tariffs, because ITC's Presidential Permit addresses how ITC must operate the MI/ON PARs. In particular, MISO and ITC allege that they are required to maintain the Interface Deviation (*i.e.*, the difference between actual and scheduled flow) within the +/-200 MW Control Band to the maximum extent practical.[129] There are several problems with Joint Applicants' contentions.

First, there has been evidence presented in this proceeding showing that, while MISO and ITC are interested in receiving payment from NYISO customers for a portion of the cost of the Replacement PARs, MISO and ITC may not be committed to actually achieving the operating targets that they boldly proposed in the Joint Application and in their supporting sworn testimony. In Exhibit NYT-35, Mr. Moltane of ITC first states that he is "greatly concerned over the apparent volatility of the loop flow" shown in the August 2011 loop flow data. Mr. Moltane then goes on to state:

> As you know ITC's concurrence with 200 Mw Deadband was based on the assumption and MISO study that the PARs would only have to be moved a limited amount of time. If I am reading this graph correctly, both MISO and ITC would have had to have a dedicated employee doing nothing but moving the PARs all month….
>
> At this point, I am not suggesting changing anything as we are at a critical point in the negotiations with our external partners. However, we will need to figure out some criteria for changing the deadband or methodology if we end up having to move these things as frequently as this chart indicates. *We need to absolutely ensure that we have the flexibility to change the operation if this becomes onerous on MISO, ITC and IESO.*[130]

Throughout this proceeding, MISO and ITC have repeatedly claimed that they intend to operate the MI/ON PARs to conform actual power flows to scheduled power flows at the MI/ON

[129] Joint Applicants' Initial Brief at 37-38.

[130] Ex. NYT-35 (emphasis added).

Interface in order to "fully mitigate" Lake Erie loop flow whenever it is less than 600 MW, and to reduce Lake Erie loop flow by 600 MW at all other times.[131] However, Exhibit NYT-35 indicates that ITC and MISO may not be strongly committed to achieving this operating goal. If the Joint Applicants are not required to specify how the MI/ON PARs will be operated in MISO's FERC tariff, the Commission's ability to protect customers that are paying for a portion of the cost of the PARs will be limited to exercise of the Commission's FPA Section 206 authority (which does not permit refunds for periods prior to the filing of a complaint).[132]

Second, DOE's decision granting ITC's Presidential Permit (Ex. ITC-14) was issued on February 24, 2012, before the Replacement PARs entered service on April 5, 2012, so Joint Applicants are subject to the DOE requirement to operate the PARs to maintain the Interface Deviation within the+/-200 MW Control Band "to the maximum extent practical." However, the data in Exhibit NYI-66 shows that from April 5, 2012 to July 18, 2012 power flows at the MI/ON Interface were within the +/-200 MW Control Band only 55.4% of the time. The PAR control Joint Applicants achieved over the 104-day period from April 5, 2012 to July 18, 2012 does not compare favorably to periods in 2011 before the MI/ON PARs were being operated to better conform actual power flows to scheduled power flows at the MI/ON Interface. For example, for the seven month period commencing July 1, 2011 and ending January 31, 2012 (before the Replacement PARs entered service, and before MISO and IESO began operating the MI/ON PARs to better conform flow to schedule) MI/ON Interface flows were estimated to be within +/-200 MW of MI/ON Interface schedules in 57.5% of hours.[133] The operation of the

[131] *See, e.g.,* Ex. MSO Tab-E at 19:5-12.

[132] 16 U.S.C. § 824e(b) (2006) ("In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint.")

[133] Ex. NYI-1 at 37:19-21; Ex. NYI-4.

MI/ON PARs to better conform flow to schedule at the MI/ON Interface "to the maximum extent practical" from April 5 to July 18, 2012 was not very effective.

Exhibit NYI-66 identifies many days when there were clear opportunities to operate the MI/ON PARs to better conform actual power flows to scheduled power flows at the MI/ON Interface. June 19, 2012 is a good example. On June 19, 2012 all MI/ON PARs were in service and there was predictable counterclockwise Lake Erie loop flow that significantly exceeded the +/-200 MW Control Band for most of the day. The MI/ON PARs were operated to counteract approximately 400 MW of loop flow, but no attempt was made to operate the PARs to achieve the claimed 600 MW limit of the MI/ON PARs control capability to further reduce Lake Erie loop flow. Only one MI/ON PAR tap was taken over the course of the entire day.[134]

Did MISO and IESO operate the MI/ON PARs to reduce Lake Erie loop flow "to the maximum extent practical" from April 5, 2012 to July 18, 2012? The NYISO believes the evidence in Exhibit NYI-66 shows they did not. Given the opportunity, the Joint Applicants would almost certainly argue to the contrary. The DOE standard is a vague standard. It is difficult to determine, after the fact, whether MISO and IESO operated the MI/ON PARs to reduce loop flow "to the maximum extent practical." In order to accurately determine if the standard is met, it would be necessary to (among other things) identify the most limiting facility at all times throughout the dispatch day. The Joint Application does not explain how MISO's and IESO's effectiveness in meeting the DOE operating standard can be readily ascertained.

Perhaps more important, the DOE Presidential Permit does not impose any consequence on MISO or ITC when the MI/ON PARs are not effectively operated to maintain the Interface Deviation within the+/-200 MW Control Band "to the maximum extent practical." Joint

[134] NYISO Initial Brief at 146; see also NYISO Proposed Findings of Fact and Conclusions of Law #133 (citing Ex. NYI-66 at 574-581) at Appendix to NYISO Initial Brief at 15.

Applicants do not propose any consequence for inefficient or ineffective operation of the MI/ON PARs in their filing. For example, the Joint Applicants have not proposed to excuse the NYISO customers that are paying for the MI/ON PARs from their payment obligation at times when the MI/ON PARs are not operated to maintain the Interface Deviation within the+/-200 MW Control Band "to the maximum extent practical."

Another factor that is relevant to whether NYISO customers should pay for a portion of the cost of the Replacement PARs is MI/ON PAR outages. Because the DOE standard is an operating standard, it is not well suited to be used to determine whether and when it is appropriate for NYISO customers to pay for ITC's Replacement PARs. The DOE standard excuses poor performance when one or more of the MI/ON PARs are out-of-service because it is not possible to operate the MI/ON PARs to reduce a significant quantity of Lake Erie loop flow under those conditions. The "maximum practical extent" to which Lake Erie loop flow can be reduced when one or more of the MI/ON PARs is out-of-service is small.[135]

As the NYISO's testimony[136] and Exhibit NYI-66[137] show, when one or more of the four circuits that comprise the MI/ON Interface are not PAR controlled, the ability of the remaining MI/ON PARs to better conform actual power flows to scheduled power flows is minimal. MI/ON PAR outages dramatically reduce MISO's and IESO's ability to operate the MI/ON PARs to conform actual power flows to scheduled power flows at the MI/ON Interface. Under the Joint Applicants' proposal, when one or more of the four circuits at the MI/ON Interface is not PAR controlled, NYISO customers will be paying Joint Applicants for the costs of the Replacement PARs, but will not be getting a reduction in Lake Erie loop flow in return for their

[135] *See* NYISO Reply Brief at Section I.A.3.

[136] NYISO Initial Brief at 132-133 (citing Ex. NYI-1 at 31-38, Ex. NYI-46 at 25). [137]

See id. at 141-142.

payment. In order for a rate to be just and reasonable, the charges imposed must be reasonably related to the benefits received.[138]

Third, as NYISO witness Yeomans explained in his testimony, the MI/ON PAR Operating Instruction that MISO and IESO executed does not require MISO and IESO to operate the MI/ON PARs to conform actual power flows to scheduled power flows at times when the MI/ON PARs are set to "Non-Regulated Mode."[139]

The DOE requirement that the MI/ON PARs be operated so that the Interface Deviation (the difference between actual and scheduled flow) remains within the +/-200 MW Control Band "to the maximum extent practical" is not an appropriate standard to use to determine when the NYISO's customers should be required to pay for a portion of the cost of the Replacement PARs for the following reasons:

(1) Exhibit NYT-35 shows that MISO and ITC may not be interested in assiduously operating the MI/ON PARs to ensure that the Interface Deviation (the difference between actual and scheduled flow) remains within the +/-200 MW Control Band to the maximum extent practical.

(2) There is no consequence to MISO or ITC when they fail to meet the DOE operating standard.

(3) It is difficult to determine whether the DOE standard was met after-the-fact. At minimum, MISO and IESO would have to retain information on the most limiting element that was restricting the MI/ON PARs operation for every interval of every day in order to test compliance with the DOE standard.

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[138] *See, e.g., Midwest ISO Transmission Owners v. FERC,* 373 F.3d 1361, 1368 ((D.C. Cir. 2004) ("comparing the costs assessed against a party to the … benefits drawn by that party").

[139] Ex. NYI-1 at 16:18-19:23; Tr. 813:12-814:22; Tr. 815:23-818:10.

(4) The Commission's ability to protect the customers that are paying for a portion of the cost of the MI/ON PARs is significantly reduced if the appropriate performance standard is not specified in MISO's FERC tariff. The Commission can require retroactive refunds for periods when the Commission determines that a public utility has not complied with the requirements of its tariffs.[140] However, the Commission can only order refunds in response to complaints submitted under Section 206 of the FPA for a period beginning not earlier than the date on which the Section 206 complaint was filed.[141]

(5) The DOE standard does not address MI/ON PAR outages; however, the record shows that MI/ON PAR outages dramatically reduce the ability of the MI/ON PARs to better conform actual power flows to scheduled power flows at the MI/ON Interface.

The Joint Application should be rejected because the proposed tariff revisions do not result in a just and reasonable rate.

II. JOINT STATEMENT OF ISSUES #5: WHETHER ANY ALLOCATION OF COSTS OF THE ITC PARS TO NYISO AND PJM AND THEIR CUSTOMERS (OR OTHERS) IS APPROPRIATE BASED ON COST CAUSATION/INCURRENCE AND/OR BENEFICIARY PAYS PRINCIPLES OR ON OTHER CONSIDERATIONS, AND IF SO, IS THE PROPOSED COST ALLOCATION ROUGHLY COMMENSURATE WITH (A) THE EXTENT TO WHICH NYISO AND PJM AND THEIR CUSTOMERS (OR MISO, IESO OR OTHERS) CAUSED ITC TO INCUR THE COSTS OF THE INSTALLATION AND OPERATION OF THE ITC PARS (AND, TO THE EXTENT RELEVANT, THE REASONS FOR WHICH DETROIT EDISON/ITC INCURRED COSTS FOR INSTALLATION OF THE ORIGINAL PAR); AND/OR (B) THE EXTENT TO WHICH NYISO AND PJM AND THEIR CUSTOMERS (OR MISO, IESO OR OTHERS) WILL BENEFIT FROM (OR BE HARMED BY) THE INSTALLATION AND OPERATION OF THE ITC PARS?

A. The Proposed Cost Allocation is Unjust and Unreasonable Because, *Inter Alia,* It Disregards All of the Benefits (Other Than Loop Flow Control) that

[140] *See, e.g., Public Utilities Commission of the State of California v. FERC,* 462 F.3d 1027, 1048 (9th Cir. 2006). [141] 16 U.S.C. § 824e(b) (2006).

MISO, ITC and Their Customers Receive That Are Not Shared with NYISO or PJM Customers

On pages 14 and 15 of their Initial Brief, the Joint Applicants state that the fundamental purpose of the Original PAR was to improve the reliability of the bulk power system by controlling circulating loop flows around Lake Erie that would otherwise interfere the ability to carry out scheduled transactions. On that basis, the Joint Applicants find it appropriate to seek to assignment of approximately 50% of the cost of the Replacement PARs to MISO and ITC.[142]

The only "benefit" on which Joint Applicants base their proposed cost allocation is "control of Lake Erie loop flow,"[143] but the record in this proceeding shows that MISO, ITC and their customers receive other economic and reliability benefits from the operation of the Replacement PARs. The Joint Applicants' proposed cost allocation is not just and reasonable because it focuses solely on the purported ability of the MI/ON PARs to reduce Lake Erie loop flow and disregards all of the other benefits that MISO, ITC and their customers are expected to receive from the operation of the Replacement PARs that are not shared with NYISO's customers or PJM's customers.

As discussed in the NYISO Initial Brief,[144] Exhibit NYI-56, a November 12, 1998 internal Detroit Edison memorandum, describes the Original PAR as part of a project that is the "solution" to an increase in Lake Erie loop flow that "has reduced our ability to import power from Ontario Hydro….This project provides both a benefit in importing more power from OH through increased capacity and by blocking the loop flow and the additional benefit of obtaining more import capability on either the [MI/ON] or Southern Interface, therefore, providing

[142] Joint Applicants' Initial Brief at 15.

[143] *Id.*

[144] NYISO Initial Brief at Section III.B, pp. 34-43.

operating flexibility."[145] Hence, Detroit Edison recognized that the installation of the Original PAR would improve its ability to import power from Ontario, and its ability to import power into Michigan from the South. The circumstances under which New York might benefit from the operation of the Replacement PARs are more limited.[146]

In addition, the Detroit Edison memorandum lists eleven separate "major benefits" Detroit Edison expected to receive from the installation of the Original PAR:

> 1. A maximum increase in capacity of 1000 MW's, or 500 MW of <u>fixed capacity</u> increase and ±500 MW's of <u>controllable</u>. [Emphasis in original.]
>
> 2. A reduction in loss capacity of about $1.1M/yr and a reduction in energy losses of about $.8M/yr.
>
> 3. A reduction in TLR's (from 25 to 7 for last year) - 18 TLR's could be eliminated by this project.
>
> 4. An increase in revenue through additional power sales.
>
> 5. A reduction in our cost for transmission service (for example, transmission service through OH [*i.e.*, Ontario Hydro] is lower than through AEP when open access occurs in OH on July 2000).
>
> 6. A reduction in the uncertainty in planning and scheduling power. Less purchase power options are needed because more sources are available from the East and South.
>
> 7. If an emergency occurs, more resource options are available.
>
> 8. The Operation and Facilities agreements with OH are nearly finalized and DE will realize 400 MW of QFW capacity increase from OH during emergencies; and receive favorable treatment of incremental capability from the South when phase shifters are blocking (***if DE drops out of the this project, OH will undoubtedly operate phase shifters in full block during high LEC and therefore DE would have reduced capabilities from the South***.). [Emphasis added.]
>
> 9. We have negotiated very favorable positions with respect to the cost of facilities for DE (phase shifter at $.7M below next bidder, and autotransformer $.5M below next bidder - re-bidding at a later date will increase these costs by about $2M).

[145] Ex. NYI-56 at 1.

[146] See Section V.C. of NYISO Initial Brief; Section I.A.2-4 of NYISO Reply Brief.

10. The market power concern for DE would be reduced by increasing the OHMI import capability up to 1000 MW.

11. During the transition period of open access, DE may be required to provide back up, unless increased import capability allows customers access to external markets.[147]

The memorandum also indicates that one of the reasons Detroit Edison decided to construct the Original PAR was a concern about how Ontario Hydro would operate the PARs on the MI/ON Interface if Detroit Edison, and that Detroit Edison's decision was also based on the opportunity to increase capacity imports into Michigan either from the north (Ontario) or from the south.

In addition to operational benefits, the memorandum reflects that Detroit Edison expected to gain regulatory benefits from the construction of the MI/ON PARs, given the concern of the Michigan Public Service Commission ("MPSC"), in the context of its initiative to restructure the Michigan electric utility industry, about Detroit Edison's ability to exercise market power in its service territory.[148]

That the construction of the Original PAR was intended to enhance Michigan power supply through increased transactions with Ontario is verified through ITC's submission of a portion of a December 2000 "Joint Report" to the MPSC in Case No. U-12781,[149] in which ITC relied on the installation of the Original PAR as an element of satisfying the requirements of a 2000 Michigan law to increase import capability from Ontario by 2000 MW.[150] The NYISO's

[147] Ex. NYI-56 at 2-3.

[148] *See In the matter, on the Commission's own motion, to consider the restructuring of the electric utility industry,* Case No. U-11290, Michigan Public Service Comm'n, 1997 Mich. PSC LEXIS 171 at *62-*72; 177 P.U.R.4th 201(1997).

[149] Ex. NYI-58.

[150] NYISO Initial Brief at 41-42.

customers do not gain any benefit from efforts related to the implementation of effective retail competition in the State of Michigan.

It is well documented in the record that the Replacement PARs are a replcement-in-kind for the Original PAR.[151] The Replacement PARs will provide all of the operational benefits to MISO and ITC that are attributed to the Original PAR in Exhibit NYI-56.

The reliability benefits the Replacement PARs provide to the ITC service territory are similarly well-documented. For example, MISO's analysis from 2005 states:

> Based on review of studies performed by ITC, and by contingency review performed by the Midwest ISO, we conclude that the B3N circuit is beneficial to reliability to the ITC system….
>
> In addition to the steady state overload conditions found, the B3N circuit contributes to import capability for the ITC system. In the Midwest ISO expansion planning study, MTEP 05, the Midwest ISO found that the ITC system may not have sufficient import capability by 2009 to meet typical loss of load expectation guidelines even with the B3N circuit in service. Clearly a decision not to restore the B3N circuit would tend to aggravate the ITC system resource reliability situation….
>
> Midwest ISO believes that the number of problematic conditions possible for which restoration of the B3N circuit would provide enhanced operator flexibility and control argue for the need to restore this circuit to operational status.[152]

A 2006 e-mail from MISO witness Chatterjee to ITC witness Capra, among others, states that:

> B3N Project: A study had been performed by ITC and reviewed by Midwest ISO last year *to study the impact of not replacing the failed phase shifter. It was concluded that the phase shifter was beneficial to reliability of the ITC system.* I manually tested one of the contingencies in the report using the latest model with reduced load forecast model and found the overload level to be pretty close to the one in the report.[153]

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[151] *See, e.g.,* Ex. NYI-53, Ex. NYI-54, Ex. NYT-2 at 4. [152]

Ex. PJM-15 at 4.

[153] Ex. NYI-60 at 2 (emphasis added).

The MTEP06 report in which the Replacement PARs project was approved by MISO includes a substantial list of reliability benefits to the ITC system provided by the Replacement PARs and the restoration of the B3N circuit:

> *The new phase shifting transformers will increase both MVA capability* and phase angle control. Midwest ISO reviewed the impact on system performance of system operation with and without the B3N tie between ITC and IMO in service. The review was based both on review of the recent 2010 study reported to ECAR by ITC, and on independent review of contingent conditions. There a substantial number of contingencies involving multiple elements that can result in significant system overloads without the B3N circuit, which would not occur with the B3N circuit available. Contingencies that have the most significant impact are shown in the table below:
>
> • 116% for St Clair - Cypress 120 kV & St Clair - Bunce Creek 120 kV DCT
>
> • 112% for Jewell-Spokane 345-230-120 kV & Apache-Troy 120 kV
>
> • 102% for Jewell-Spokane 345-230-120 kV & Dean (all)
>
> • 101% for Caniff-Northeast 120 kV & Conners Creek (all)
>
> • 130% for Greenwood 120-345 kV & Atlanta-Tuscola 120 kV
>
> • 104% for Pontiac 345-120 kV #303 & Pontiac-Sunbird 120 kV
>
> • 115% for Both St.Clair-Lambton lines
>
> Following Phase 2 analysis, there were 129 outstanding violations, 7 of which were category B violations. Proposed projects were modeled to relieve the thermal overloads on ITC system. Subsequent analysis in MTEP06 demonstrated the project's effectiveness in addressing the system needs. Midwest ISO recommends the proposed projects become planned projects.[154]

On cross-examination, MISO witness Chatterjee discussed the MTEP06 report and explained that the contingencies listed above, which were resolved by the B3N project, were the source of reliability issues on the ITC system:

> **Q** Am I correct that MISO would have authorized ITC to help install the new PARs regardless of the fixing of these contingencies on MTEP 06?

[154] Ex. NYI-50 at 19.

A I do not believe that is correct. MISO's independent review showed that there are reliability needs and that was the basis for moving forward with these PARs.

Q The reliability needs from these contingencies was the reason for moving forward with these PARs?

A Yes.

Q You would not have authorized the PARs if it wasn't fixing this reliability?

A I do not see why you'd need to replace a facility if it wasn't really identified as needed from any circumstances. This was one of the circumstances where we identified a basic threshold of reliability needs driving the need for that PAR.[155] [Emphasis added.]

Mr. Chatterjee went on to say that, if the seven needs identified in the bullets in MTEP 06 did not exist, MISO would see no need for the Replacement PARs.[156]

It would be unjust, unreasonable, and unduly discriminatory, to allocate the costs of the Replacement PARs in a manner that accounts for expected Lake Erie loop flow reduction, but ignores transactional and reliability benefits that only ITC, MISO and their customers will receive from the operation of the MI/ON PARs. For this reason, the Joint Applicants' proposed cost allocation should be rejected.

B. Lake Erie Loop Flow Can Aggravate or Relieve Transmission Congestion

In their Initial Brief, Joint Applicants assert that a study performed on the NYISO's behalf estimated that between October 2008 and November 2009 "loop flow had caused a total of approximately $430 million in pricing inefficiencies in the four control areas around Lake Erie."[157] As NYISO witness Robert Pike repeatedly explained to counsel for ITC at the hearing, Joint Applicants misinterpret the study. Mr. Pike explained that the "430 million is not a cost

[155] Tr. 354:4-19 (corrected).

[156] Tr. 355:8-11.

[157] Joint Applicants' Initial Brief at 5.

incurred"[158] by the ISOs and RTOs around Lake Erie. Rather, the $427 million is an estimate of the total gross value of the over-priced and under-priced loop flow for the specific period from October 2008 through November 2009, without regard to whether the loop flow was increasing or decreasing congestion costs or whether that loop flow was circulating around Lake Erie, or not.[159]

The impact that Lake Erie loop flow has on congestion costs depends on the system topology of each ISO or RTO, the direction of loop flow, and the locations where transmission congestion is being experienced. One direction of loop flow, which the study identifies as "forward" loop flow,[160] aggravates constraints and increases transmission costs of a particular ISO or RTO. Loop flow in the other direction, referred to as "reverse" loop flow in the study, relieves constraints and reduces congestion costs.[161] The total cost of congestion cited by the Joint Applicants represents the loop flow impacts on transmission constrained facilities in both directions for all four RTOs around Lake Erie, which is "not the equivalent of [$]427 [million] in loop flow costs because the forward and reverse loop flow[] [impacts] are offsetting in terms of congestion costs."[162] On page 5 of Joint Applicants' Initial Brief they state that NYISO witness Pike agreed that reducing loop flow will reduce price inefficiencies that are caused by loop flow. While that statement is accurate, the Joint Applicants still do not appear to understand that the

[158] Tr. 1013:21-22.

[159] Ex. ITC-23 at Attachment B slide 9; *see also* Tr. 1003:15-19 and Tr. 1013:14-22.

[160] *See* Ex. NYI-46 at 22:13-16 and Tr. 1080:4-8 (the direction of "forward" loop flow is different for New York than it is for PJM).

[161] Tr. 1010:8-11.

[162] Tr. 1013:13-18.

"price inefficiencies" they are referring to include "inefficiencies" that *reduce* transmission congestion and associated congestion costs.[163]

The purpose of the study was not to estimate the impact of unscheduled power flows on congestion costs, it was to determine the potential benefits that improved scheduling, and coordinated congestion management could provide to the ISOs and RTOs around Lake Erie.[164] The estimated cost of congestion calculated in the study was an intermediate step in the process of determining potential production cost savings that could be achieved by implementing an identified set of market improvements. The study addresses "production cost savings because it is the most accurate measure of the improvement in economic efficiency."[165] Production cost savings accrue through the joint and coordinated actions of the ISOs and RTOs around Lake Erie to make the most efficient use of the regions' collective transmission systems.

The estimated impact of Lake Erie loop flow on the cost of congestion can be positive or negative and will change with every change in direction of loop flow.[166] In their Initial Brief, Joint Applicants state that the direction of Lake Erie loop flow changes frequently.[167] The congestion costs and loop flows identified in the study are based on the system conditions that existed during the late 2008 through late 2009 study period. During the study period average Lake Erie loop flow was significantly clockwise[168] and the study indicates that NYISO was subject to slightly higher forward loop flow costs than reverse loop flow cost reductions. For

[163] Tr. 1013:13-21.

[164] Tr. 1010:22-25 (the study did not draw any conclusions directly from the estimated cost of congestion). [165] Ex. ITC-23 at Attachment B slide 2.

[166] Tr. 1013:13-22.

[167] Joint Applicants' Initial Brief at 4 and 18. [168] Ex. ITC-23.

other ISOs and RTOs, the forward loop flow costs and reverse loop flow cost reductions identified in the 2008-2009 study almost exactly offset.

Reviewing a snapshot of the impact of Lake Erie loop flow on the cost of congestion in 2012 would produce significantly different results from the 2008-2009 study Joint Applicants point to. In 2012 Lake Erie loop flow has occurred in a predominantly counterclockwise direction.[169] MISO's DFAX analysis suggests that the generation-to-load contribution to Lake Erie loop flow will continue to be significantly counterclockwise in direction in 2015, and beyond.[170] When Lake Erie loop flow is predominantly counterclockwise in direction, Lake Erie loop flow will tend to relieve transmission congestion in New York and reduce congestion costs.[171] In addition, congestion costs (and LBMPs) are generally lower in 2012 than they were in 2009 because natural gas prices are even lower today than they were in 2009.[172] Because the direction and magnitude of loop flow can vary significantly from hour-to-hour, from day-to-day and from year-to-year, a one-year snapshot does not present a valid basis for reaching any conclusions about the expected impact of loop flow on congestion costs.

Joint Applicants' argument "that the Lake Erie loop flow attributable to PJM caused approximately $14 million in increased costs to NYISO in each of 2010 and 2011"[173] is similarly flawed and should be dismissed. Dr. Shavel's calculation incorporated the inaccurate expectation that the MI/ON PARs would have "fully mitigated," to zero, Lake Erie loop flow whenever unscheduled power flows were less than 600 MW, and would have reduced Lake Erie

[169] Tr. 1039:13-14; *see also* Ex. NYI-66.

[170] Ex. MSO-1B; *see also* NYISO Initial Brief at 87. [171]

Tr. 1014:13-16; Ex. NYI-46 at 22:13-16.

[172] Tr. 1079:17-20.

[173] Joint Applicants' Initial Brief at 5.

loop flow by 600 MW whenever unscheduled power flows exceeded 600 MW.[174] Dr. Shavel's analysis was based on a time period when Lake Erie loop flow was predominantly clockwise. The results would be significantly different if 2012 data was included because Lake Erie loop flow has occurred in a predominantly counterclockwise direction in 2012.[175] Counterclockwise loop flow tends to reduce congestion costs in NYISO.[176] As discussed above, MISO's DFAX analysis suggests that counterclockwise Lake Erie loop flow should continue in the mid-term future.[177]

C. The Cost Figure Included in the NYISO's 2008 Exigent Circumstances Filing Is Not An Appropriate Indicator of Benefit to NYISO

On pages 5-6 of their Initial Brief, Joint Applicants quote a statement from the NYISO's July 21, 2008 exigent circumstances filing[178] that described the costs ($97,000/hour) that NYISO incurred for a fifteen hour period on May 26, 2008, at the height of the circuitous scheduling problem. Joint Applicants do not explain how the quote from NYISO's 2008 filing is relevant to this proceeding.

Lake Erie loop flow was artificially inflated in the first half of 2008 by Market Participants scheduling transactions via circuitous (indirect) paths around Lake Erie. The NYISO addressed the circuitous scheduling of transactions by filing tariff revisions requiring transactions to be scheduled directly between contiguous control areas.[179] The loop flow that was being caused by circuitously scheduled transactions is not representative of the Lake Erie loop flow that has been occurring since the NYISO implemented its circuitous scheduling

[174] NYISO Initial Brief at 127-154.

[175] Tr. 1039:13-14; *see also* Ex. NYI-66.

[176] Tr. 1014:13-16; Ex. NYI-46 at 22:13-16. [177]

Tr. 1014:13-16.

[178] Ex. ITC-3.

[179] *Id*.

prohibition in late July of 2008.[180] As NYISO witness Pike explained in his testimony, the MI/ON PARs were not available in 2008, were not part of the solution to the circuitous scheduling problem, and did not enter service until April of 2012; almost four years after NYISO's identification of the circuitous scheduling issue.[181] Joint Applicants have recognized the efficacy of the NYISO's circuitous scheduling prohibition in their testimonies and briefs in this proceeding.[182]

The May 26, 2008 data NYISO used in its exigent circumstances filing focused on one of the worst and most extreme examples of the impact that circuitous scheduling was causing.[183] Joint Applicants claim that when all of the MI/ON PARs are in service, they can achieve approximately 600 MW of loop flow control. As the NYISO explained on pages 127 to 154 of its Initial Brief, the Joint Applicants claims are not consistent with the actual MI/ON PAR operating data in Exhibit NYI-66. Even assuming the MI/ON PARs are capable of reducing Lake Erie loop flow by 600 MW under ideal conditions,[184] the loop flow that the NYISO was experiencing during the fifteen identified hours on May 26, 2008 was more than three times the MI/ON PARs alleged control capability. Because the loop flow was significantly in excess of the MI/ON PARs capabilities, there is no information in the record that shows how much cost reduction the MI/ON PARs might have provided, if they had all been in service on that day. Joint Applicants blithe assumption that the MI/ON PARs would have reduced loop flow to zero, and that the extreme costs the NYISO was experiencing would have gone away is unsubstantiated and not credible.

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[180] *See e.g.*, Ex. ITC-3, Ex. NYI-66, Ex. NYI-67, Ex. NYI-68, and Ex. NYI-69. [181] Ex. NYI-46 at 13:10-18.

[182] *See* Joint Applicants' Initial Brief at 11, and Ex. MSO Tab E at 14:9-12. [183] *See e.g.*, Ex. NYI-66, Ex. NYI-67, Ex. NYI-68 and Ex. NYI-69.

[184] *See* Ex. NYI-34 and Ex. NYI-35.

III. JOINT STATEMENT OF ISSUES #6: WHAT IS THE EXTENT OF THE CONTRIBUTIONS TO LOOP FLOWS OF MISO, IESO, NYISO AND PJM AND OTHERS, AND DO THEY REPRESENT A BASIS FOR MISO/ITC TO ALLOCATE THE COSTS OF THE ITC PARS TO PJM AND NYISO?

A. The Joint Applicants' Proposal Inappropriately Reallocates to the NYISO Costs Caused By IESO

The Joint Applicants' Initial Brief (at 20-22) argues that it is appropriate to reassign cost responsibility for costs caused by IESO and its customers to the NYISO's customers. The DFAX analysis that Joint Applicants rely on to determine cost causation to support their proposed cost allocation indicates that IESO and its customers "cause" 55% of Lake Erie loop flow.[185] According to the MISO's DFAX analysis, New York "causes" 13% of Lake Erie loop flow.[186] However, the Joint Application (as revised per Chatterjee Rebuttal Testimony, Ex. MSO-1 at 9:7) proposes to assign a 29.2% cost responsibility to the NYISO's customers.[187] The reason for the difference between New York's alleged cost causation (13%) and the proposed cost allocation (29.2%) is the re-allocation to NYISO's customers of responsibility for costs that Joint Applicants determined were caused by IESO and its customers. Joint Applicants' proposal to charge NYISO customers for costs that were caused by IESO and its customers is inconsistent with Commission precedent, unjust, unreasonable, unduly preferential, unduly prejudicial and unduly discriminatory.[188]

MISO's testimony recognizes "that a cost allocation where certain market participants are required to pay for … costs caused by other market participants although both sets of market

[185] Joint Applicants' Initial Brief at 20-21.

[186] Ex. NYT-19 at 6:119-7:120.

[187] Joint Applicants' Initial Brief at 34.

[188] *See* NYISO Initial Brief at 69-74.

participants engage in activities that cause the additional costs, is unjust and unreasonable"[189]; and that "just and reasonable rates require that customers pay only those costs that are attributable to them"[190]; and that "a cost allocation methodology that allocates costs to one set of market participants, but exempts others engaged in the same cost causing behavior is unjust and unreasonable."[191] The Joint Applicants proposed cost allocation method patently violates the principles that the Joint Applicants espouse.

In 2007, ITC negotiated an Interconnection Facilities Expansion Agreement with Hydro One to construct the Replacement PARs. ITC's agreement with Hydro One assigned cost responsibility for the Replacement PAR(s) to ITC.[192] Neither NYISO nor PJM, nor any of their customers, were invited to participate in the negotiation of the cost sharing agreements that ITC and Hydro One voluntarily entered into. Because ITC unilaterally and voluntarily entered into a cost sharing agreement with Hydro One that addressed cost responsibility for the Replacement PARs in 2007, ITC's inability to recover a portion of the cost of the Replacement PARs from customers in the IESO control area is a problem that is properly assigned to ITC.[193]

Joint Applicants argue that because they expect the NYISO and PJM to benefit from the "loop flow control facilities installed in Canada," NYISO and PJM should be required to pay a proportionate share of the cost of the Replacement PARs.[194] However, as the NYISO explains on pages 73 and 74 of its Initial Brief, Joint Applicants do not apply this logic consistently. In

[189] Ex. MSO-Tab D at 29:9-16.

[190] Ex. MSO-Tab D at 31:20-32:1 *citing Ameren Services Company*, 125 FERC ¶ 61,161 at P 44 n.39 (2008) (citing *Enron Power Marketing, Inc.*, 119 FERC ¶ 63,013 at P 157 (2007) (citing *KN Energy, Inc.* v. *FERC,* 968 F.2d 1295,1300 (D.C. Cir. 1992))).

[191] Ex. MSO-Tab D at 32:4-6.

[192] *See* Ex. NYI-48 at 2 § 3.2 and NYI-49 at 12 § 10.3. *See also* Section III.B.1 of the NYISO Initial Brief. [193] See NYISO Initial Brief at 72.

[194] Joint Applicants' Initial Brief at 22.

particular, NYISO has shown that PARs and other controllable transmission facilities located in New York, in PJM, and throughout the Eastern Interconnection, also reduce Lake Erie loop flow.[195] Joint Applicants have not been asked to pay for any of the New York or PJM PARs or other controllable facilities.[196] The NYISO has also shown that several new Broader Regional Market measures that the NYISO and PJM have implemented, or will soon be implementing, improve the ability to manage Lake Erie loop flow.[197]

Joint Applicants do not propose to give the NYISO or PJM any credit for the loop flow mitigation that facilities they have installed provide. Nor do the Joint Applicants propose to recognize the NYISO's or PJM's implementation of their Broader Regional Market initiatives in their proposed cost allocation. Joint Applicants' proposal to credit IESO's customers for transmission facilities Hydro One installed, but to give no credit for the NYISO's and PJM's transmission facilities and market initiatives that also reduce Lake Erie loop flow, is unduly preferential, unduly prejudicial and unduly discriminatory.

B. The Joint Applicants Failed to Demonstrate That the NYISO Contributes to Lake Erie Loop Flows

The Joint Applicants contend that MISO's DFAX study (the "DFAX Study") "confirms that both NYISO and PJM contribute significantly to loop flow."[198] Joint Applicants also state "NYISO has never denied that it is a significant contributor" to loop flow.[199]

There are many things that the NYISO has "never denied." The same can be said for the Joint Applicants. Joint Applicants bear the burden of proof in this proceeding. "Where, as here,

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[195] NYISO Initial Brief at 91-101.

[196] NYISO Initial Brief at 95.

[197] NYISO Initial Brief at 83; Exhibit NYI-46 at 15:3-18:22. [198]

Joint Applicants' Initial Brief at 25.

[199] *Id.*

a filing is made under section 205 of the FPA, the burden of proof is on the filing party to show that its proposal is just and reasonable; the onus is not on protesters … to show that the proposal is unjust and unreasonable."[200] The Joint Applicants must demonstrate, based on evidence in the record, that the NYISO is a significant contributor to Lake Erie loop flow before the Presiding Judge can find the proposal to be just and reasonable and not unduly discriminatory or preferential.[201] The Joint Applicants have failed to make this required showing, which is why they instead allege that the NYISO "never denied" that it contributes to Lake Erie loop flow.

The Joint Applicants provided no evidence of the NYISO's actual contribution to Lake Erie loop flow.[202] Instead, the Joint Application relies on[203] a hypothetical planning analysis (the DFAX Study) that posits the contributions MISO, NYISO, PJM and IESO might make to Lake Erie loop flow in 2015 if each ISO/RTO only uses generation located in its control area to serve its load (an unrealistic assumption), if the impact of transactions on loop flow is ignored, and if the principles of economic dispatch are ignored. The MISO's study is flawed in every material respect,[204] and was developed in a result-oriented fashion that merits rejection for that reason alone.[205] The substantive flaws that the NYISO identified in the MISO's DFAX analysis include:

- MISO's reliance on three representative load blocks to represent an entire year was a gross over-simplification that produced inaccurate weighted participation percentages penalizing the NYISO. The MISO should have conducted 8,760 DFAX runs for each region, one DFAX run for every hour of the year, instead of

[200] *ISO New England Inc.*, 136 FERC ¶ 61,221, P 20 (2011).

[201] *Id.*; *see also* Hearing Order at P 44 ("Our preliminary analysis indicates that the Filing Parties' proposed tariff sheets have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.").

[202] NYISO Initial Brief at 105 (citing Tr. 351:22-352:1).

[203] NYISO Initial Brief at 105 (citing Joint Application Transmittal Letter at 8). [204]

NYISO Initial Brief at 106-123; NYISO Reply Brief at § IV.B.

[205] NYISO Initial Brief at 123-124.

using the three representative load blocks to represent the entire year.[206] Mr. Chatterjee admitted that performing 8,760 DFAX runs would be the most accurate way to time normalize the DFAX analysis over an entire year.[207]

- MISO inappropriately relied on an aggregate load duration curve for MISO, NYISO and PJM. [208] The MISO should have used each region's individual load duration curve to perform the DFAX analysis over all 8,760 hours of the year to calculate each region's individual participation over the MI/ON Interface.

- MISO's unilateral decision to permit directional contributions to the flow participation over the four circuits that comprise the MI/ON Interface to offset each other is inappropriate.[209] Netting participation across the four circuits reduced MISO's flow participation significantly more than any other region. MISO's decision to allow netting of contribution over the circuits that comprise the MI/ON Interface was not consistent with MISO's decision not to permit netting of contributions in circumstances that did not work to MISO's advantage.

- The MISO DFAX Study is not reflective of real-world electric power system operation practices. MISO did not account for economic generation commitment or dispatch in its hypothetical DFAX analysis.[210]

- MISO inappropriately based the DFAX analysis on the contribution to flows on all four of the circuits that comprise the MI/ON Interface[211] instead of just over the B3N circuit. The Replacement PARs on the B3N circuit are the only facilities that are being cost allocated in this proceeding.[212]

- MISO failed to consider in its DFAX analysis the cumulative Lake Erie loop flow contribution from regions other than MISO, NYISO, PJM and IESO.[213] The multitude of small "contributors" illustrates that if regions are permitted to assess charges to each other on the basis of asserted "benefits" in the absence of regional agreements, this "chain reaction" and ensuing litigation will have no logical stopping place.

For these reasons, the Joint Applicants have failed to meet their Section 205 burden. The Presiding Judge, therefore, should not accept the Joint Applicants' proposal.

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[206] NYISO Initial Brief at 106-110.

[207] NYISO Initial Brief at 108 (*citing* Tr. 400:15-21). [208]

NYISO Initial Brief at 110-113.

[209] NYISO Initial Brief at 113-116.

[210] NYISO Initial Brief at 116-118.

[211] NYISO Initial Brief at 119-121.

[212] FERC Staff Initial Brief at 43-44.

[213] NYISO Initial Brief at 122-123.

IV. JOINT STATEMENT OF ISSUES #7: WHETHER THE MISO/ITC DFAX STUDY PROVIDES AN ADEQUATE BASIS FOR THE PROPOSED COST ALLOCATION?

A. The Joint Applicants' Argument that the DFAX Study Provides Adequate Justification for Cost Allocation Should Be Rejected

The Joint Applicants argue[214] that the MISO/ITC DFAX study (the "DFAX Study") is an adequate basis for allocating the costs of the Replacement PARs. In particular, the Joint Applicants claim that "it is reasonable to base cost allocations on correlations between contributions to flows that are the cause of needed transmission investments, and that DFAX analyses are an appropriate method for determining such contributions." The Presiding Judge should reject the adequacy of the DFAX Study for cost allocation, for the reasons explained below.

1. The Joint Applicants Have Never Demonstrated that Loop Flows Were the Cause for Investment in the Replacement PARs

The statement quoted above from the Joint Applicants' Initial Brief leaps over one of the key failings of their case. That statement presumes that Lake Erie loop flows were the "cause" of ITC's investment in Replacement PARs. However, as explained in the NYISO Initial Brief,[215] the Joint Applicants have never demonstrated that Lake Erie loop flows were the cause of ITC's investment in the Replacement PARs, or the reason that the MISO Board of Directors approved the construction of the Replacement PARs in the MTEP06.

ITC's incurrence of the costs of the Replacement PARs was clearly caused by ITC's unilateral decision to assume a contractual obligation to install the Replacement PARs in ITC's

[214] Joint Applicants' Initial Brief at 35-37.

[215] NYISO Initial Brief at 101-105.

2007 Facilities Agreement with Hydro One.[216] As demonstrated in the NYISO Initial Brief, and summarized in Section II.B above of this NYISO Reply Brief, ITC's decision to execute the 2007 Facilities Agreement was made to address the transactional[217] and reliability needs[218] of ITC's customers and ITC's transmission system.

These reliability needs, and the manner in which PARs on the B3N circuit would solve them, are well-documented in the record. For example, MISO's analysis from 2005 states:

> Based on review of studies performed by ITC, and by contingency review performed by the Midwest ISO, we conclude that the B3N circuit is beneficial to reliability to the ITC system….
>
> In addition to the steady state overload conditions found, the B3N circuit contributes to import capability for the ITC system. In the Midwest ISO expansion planning study, MTEP 05, the Midwest ISO found that the ITC system may not have sufficient import capability by 2009 to meet typical loss of load expectation guidelines even with the B3N circuit in service. Clearly a decision not to restore the B3N circuit would tend to aggravate the ITC system resource reliability situation….
>
> Midwest ISO believes that the number of problematic conditions possible for which restoration of the B3N circuit would provide enhanced operator flexibility and control argue for the need to restore this circuit to operational status.[219]

A 2006 e-mail from MISO witness Chatterjee to ITC witness Capra, among others, states that:

> B3N Project: A study had been performed by ITC and reviewed by Midwest ISO last year *to study the impact of not replacing the failed phase shifter. It was concluded that the phase shifter was beneficial to reliability of the ITC system.* I manually tested one of the contingencies in the report using the latest model with reduced load forecast model and found the overload level to be pretty close to the one in the report.[220]

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[216] *See* Ex. PTO-4 at 2-3; NYISO Initial Brief at § III.B.1. [217]

NYISO Initial Brief at § III.B.2.

[218] NYISO Initial Brief at § V.D. [219]

Ex. PJM-15 at 4.

[220] Ex. NYI-60 at 2 (emphasis added).

The MTEP06 report in which the Replacement PARs project was approved by MISO includes a substantial list of reliability benefits to the ITC system provided by the Replacement PARs and the restoration of the B3N circuit:

> *The new phase shifting transformers will increase both MVA capability* and phase angle control. Midwest ISO reviewed the impact on system performance of system operation with and without the B3N tie between ITC and IMO in service. The review was based both on review of the recent 2010 study reported to ECAR by ITC, and on independent review of contingent conditions. There a substantial number of contingencies involving multiple elements that can result in significant system overloads without the B3N circuit, which would not occur with the B3N circuit available. Contingencies that have the most significant impact are shown in the table below:
>
> • 116% for St Clair - Cypress 120 kV & St Clair - Bunce Creek 120 kV DCT
>
> • 112% for Jewell-Spokane 345-230-120 kV & Apache-Troy 120 kV
>
> • 102% for Jewell-Spokane 345-230-120 kV & Dean (all)
>
> • 101% for Caniff-Northeast 120 kV & Conners Creek (all)
>
> • 130% for Greenwood 120-345 kV & Atlanta-Tuscola 120 kV
>
> • 104% for Pontiac 345-120 kV #303 & Pontiac-Sunbird 120 kV
>
> • 115% for Both St.Clair-Lambton lines
>
> Following Phase 2 analysis, there were 129 outstanding violations, 7 of which were category B violations. Proposed projects were modeled to relieve the thermal overloads on ITC system. Subsequent analysis in MTEP06 demonstrated the project's effectiveness in addressing the system needs. Midwest ISO recommends the proposed projects become planned projects.[221]

On cross-examination, MISO witness Chatterjee discussed the MTEP06 report and explained that the contingencies listed above, which were resolved by the B3N project, were the source of reliability issues on the ITC system:

> **Q** Am I correct that MISO would have authorized ITC to help install the new PARs regardless of the fixing of these contingencies on MTEP 06?

[221] Nex. NYI-50 at 19.

A I do not believe that is correct. MISO's independent review showed that there are reliability needs and that was the basis for moving forward with these PARs.

Q The reliability needs from these contingencies was the reason for moving forward with these PARs?

A Yes.

Q You would not have authorized the PARs if it wasn't fixing this reliability?

A I do not see why you'd need to replace a facility if it wasn't really identified as needed from any circumstances. This was one of the circumstances where we identified a basic threshold of reliability needs driving the need for that PAR.[222] [Emphasis added.]

Mr. Chatterjee went on to say that, if the seven needs identified in the bullets in MTEP 06 did not exist, MISO would see no need for the Replacement PARs.[223]

The Joint Applicants offered no evidence establishing that the reliability issues reflected in these contingencies were "caused" by Lake Erie loop flow, much less by NYISO-"caused" loop flow. The reliability issues identified in MTEP06 as being resolved by the Replacement PARs were not described as having been caused by Lake Erie loop flow.[224] Further, MISO and ITC have each admitted that they never performed an assessment or identified specific reliability criteria that are potentially violated by Lake Erie loop flow.[225] Further, MISO confirmed that: "The contingencies identified in the 2006 MTEP Report and the detailed technical report are the universe of documents of which MISO is aware that identify reliability criteria violations that may arise absent the installation of the PARs."[226] In sum, *nothing* in the MTEP06 report attributes any of the need for the Replacement PARs to NYISO power flows.

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[222] Tr. 354:4-19 (corrected).

[223] Tr. 355:8-11.

[224] Ex. NYI-50 at 19.

[225] *See* Ex. PTO-4 at 2-3; PTO-5. [226]

Ex. PTO-4 at 3.

For these reasons, Joint Applicants have not established that Lake Erie loop flow, whatever the source, was the "cause" of the investment in the Replacement PARs. Instead, the evidence shows that MISO's Board of Directors approved the construction of the Replacement PARs to address the seven contingencies on the ITC system that are identified in the MTEP06.

2. Joint Applicants Have Not Credibly Demonstrated the NYISO's Contribution to Lake Erie Loop Flow

Neither MISO nor ITC submitted evidence showing the NYISO's *actual* contribution to Lake Erie unscheduled power flows by examining and providing actual data (as discussed above in Section III.B of this Reply Brief). Instead, the Joint Applicants relied entirely on MISO's flawed DFAX Study that uses hypothetical data[227] to produce a forward-looking expectation of the loop flow that NYISO might cause in 2015. The NYISO identifies a laundry list of substantive flaws in the DFAX Study in Section III.B of this Reply Brief.

3. The MISO DFAX Study Is Not Consistent with the Provisions of the PJM-MISO Joint Operating Agreement ("JOA") and It Would Not be Appropriate to Rely on the PJM-MISO JOA To Allocate Costs to the NYISO's Customers

The Joint Applicants further allege that the DFAX Study is consistent with the cost allocation methods previously approved in the PJM/MISO JOA, and in an order on another MISO proceeding.[228] However, PJM has shown that the DFAX Study that MISO performed in this proceeding is not at all consistent with the method included in the PJM/MISO JOA.[229] Even more important from the NYISO's perspective, the terms and conditions set forth in the PJM/MISO JOA were negotiated by those two regions. While the methods set forth in the PJM/MISO JOA may well present a just and reasonable method of allocating costs between PJM

[227] *See* NYISO Initial Brief at § VII; NYISO Reply Brief at § IV.B.

[228] Joint Applicants' Initial Brief at 36-37.

[229] PJM Initial Brief at 53-55.

and MISO, the PJM/MISO JOA does not apply to the NYISO and no party has shown that it is appropriate to use a cost allocation method that MISO and PJM negotiated to allocate costs to the NYISO's customers.

4. The Commission Has Called into Question the Use of a DFAX Analysis as a Basis for Cost Allocation

The adequacy of the DFAX Study as a basis for cost allocation is also questionable in light of a Commission order on remand issued earlier this year.[230] In that order, the Commission rejected a snapshot, static DFAX model, of the type offered in this proceeding, as *inappropriate* for allocating costs of higher-voltage transmission facilities with a long useful life.[231] The Commission based this finding, *inter alia,* on the fact that a static DFAX model "fails to account for changes in usage and flow direction over time, particularly given the 40 year or longer life span for transmission facilities."[232] With respect to the failure to account for changes in usage and flow direction, the Commission explained: "Changes occur over time to generator, load, and flow patterns, as well as other structural changes, such as new transmission facilities and changes to, or retirement of, old transmission facilities."[233]

In this proceeding, ITC witness Grover stated the Replacement PARs will have a long-term useful life, in the neighborhood of 40 to 48 years.[234] NYISO witness Clarke explained that the DFAX analysis submitted in this proceeding inappropriately fails to take into account future

[230] *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,230 (2012) ("*PJM Remand Order*").

[231] The Commission found that "the difficulties of using flow-based analyses apply, to some extent, to lower voltage facilities as well." *Id.* at P 41. The Replacement PARs are more like higher-voltage facilities, given the broad impacts that Joint Applicants argue they will have on the four ISO/RTO Lake Erie region.

[232] *Id.* at P 37.

[233] *Id.* at P 38.

[234] Tr. 94:5-9.

usage and flow changes over the Replacement PARs' long useful life.[235] The Joint Applicants' Initial Brief recognizes that "Lake Erie loop flow can and does change direction frequently."[236]

The application of the principles enunciated in the *PJM Remand Order* to the instant proceeding confirms that the DFAX Study is an inappropriate basis for Joint Applicants' proposed cost allocation.

B. The DFAX Analysis Is Fundamentally Flawed

Joint Applicants' Initial Brief asserts that the DFAX Study is good enough.[237] The facts indicate to the contrary: the DFAX Study is fundamentally flawed.

NYISO witness Zachary Smith's testimony, and pages 106 to 123 of the NYISO's Initial Brief identify six technical flaws in the DFAX analysis that the MISO performed. As the NYISO explained on pages 121-123 of its Initial Brief, the cumulative impact of the flaws the NYISO identified is multiplicative. In other words, the cumulative impact of all of the corrections is larger than simply adding up the impact of each of the necessary corrections that the NYISO identified.

Because Joint Applicants have no good response to the NYISO's substantive arguments about the flaws in the MISO's DFAX Study, on page 35 of the Joint Applicants' Initial Brief, they admit that NYISO's correction to one of the flaws in the DFAX Study may be appropriate, but argue that the one correction Joint Applicants discuss, by itself, has little impact on the results of the MISO's DFAX Study. Joint Applicants then argue that the MISO DFAX Study results are "roughly commensurate" with NYISO's and PJM's contributions to loop flow.[238]

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[235] Exhibit NYT-19 at 8:160-10:191.

[236] Joint Applicants' Initial Brief at 18.

[237] *See* Joint Applicants' Initial Brief at 37 ("The MISO DFAX Study may not be perfect….").

[238] *See* Joint Applicants' Initial Brief at 35 (in addition to the *one* load duration curve flaw that Joint Applicants responded to in their Initial Brief).

The chart that the Joint Applicants included on page 35 of their Initial Brief misrepresents the NYISO chart to which it purports to correspond.[239] Joint Applicants' chart substantively alters the data the NYISO provided by removing IESO's weighted participation percentage and changing the column headings from "Weighted %" to "NYISO Proposed Allocation."[240] Joint Applicants are well aware that NYISO does not agree that it would be appropriate to reallocate costs that Joint Applicants allege are caused by the IESO and its customers to the NYISO's customers.[241]

NYISO's testimony and Initial Brief identified several fundamental flaws in the MISO's DFAX Study that justify its rejection.[242] First, NYISO witness Smith explained that the DFAX Study should have been performed for all 8,760 hours of the year, rather than based on three "representative" load blocks.[243] The problem with the "representative" load blocks that the MISO used is that they under-represent MISO's flow participation and significantly over-represent the NYISO's flow participation.[244] On cross-examination, Mr. Chatterjee admitted that an 8,760 hour load representation would more accurately reflect each RTO's load over the entire year than the three load block method he employed to produce the MISO's DFAX analysis.[245]

A second, related, flaw Mr. Smith identified was the DFAX Study should have used each region's individual load duration curve.[246] According to Mr. Chatterjee, "MISO is not opposed

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[239] The NYISO chart was included with the testimony of NYISO witness Smith. *See* Ex. NYI-38 at 13:5-6. [240] *See* Joint Applicants' Initial Brief at 35 *compare to* Ex. NYI-38 at 13:5-6.

[241] NYISO Initial Brief at 69-74.

[242] *See* NYISO Initial Brief at 106-123 (consideration of all the DFAX study flaws identified and NYISO recommendations would result in substantially different DFAX analysis results).

[243] NYISO Initial Brief at 106-110.

[244] Ex. NYI-38 at 14:20-15:19. [245] Tr. 399:15-400:5.

[246] NYISO Initial Brief at 110-113.

to using individual region's Load Duration Curves as included in the Ventyx database."[247] Mr. Chatterjee agreed to use the correct load duration curves in his rebuttal testimony because he could not rationally defend MISO's use of a single load duration curve for the MISO, NYISO and PJM that was created using an average of the MISO, PJM and NYISO load duration curves. Because MISO's load duration curve is the highest of the three areas, MISO benefitted from using an average curve.[248] Because NYISO's load duration curve is the lowest of the three areas, using an average curve inappropriately allocated additional flow participation/cost responsibility to the NYISO.[249] This is just one of the many ways MISO biased the DFAX analysis to reduce its cost responsibility for the Replacement PARs. While a correction to use each region's load duration curve may not result in significantly different weighted participation percentages, leaving in place an allocation method that includes acknowledged errors and biases cannot produce a just and reasonable rate.[250]

Possibly the most significant, flaw identified by NYISO and FERC Staff[251] was that the DFAX analysis should have only considered participation over the B3N circuit, on which the Replacement PARs are located, to determine the flow contribution of each ISO/RTO in the DFAX analysis.[252] The Replacement PARs on the B3N circuit are the only transmission

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[247] Ex. MSO-1 at 7:22-23.

[248] Ex. NYI-39.

[249] *Id*.

[250] *See, e.g., El Paso Electric Co.,* 89 FERC ¶ 61,237 at p. 61,699 (1999) (rejecting El Paso compliance filing because "El Paso has not supported various assumptions and adjustments to its Loads and Resources Forecast used in its transmission capacity spreadsheet calculations. In addition, some of El Paso's calculations contain errors."); *Williston Basin Interstate Pipeline Co*., 51 FERC ¶ 61,231 at pp. 61,649-50 & 61,653 (1990) (rejecting tariff sheets for containing errors that would result in a double collection of costs).

[251] FERC Staff Initial Brief at 43-44 ("Another flaw is that proposed DFAX methodology is based on the contribution to power flows across the entire MI-ON Interface, and not on the power flow contributions across the circuit on which the Replacement PARs are installed.").

[252] NYISO Initial Brief at 119-121.

facilities that Joint Applicants are attempting to cost allocate to NYISO and PJM.[253] The other PARs at the MI/ON Interface were not built by ITC, do not belong to ITC, are not located in the MISO (or in the United States), and are not the subject of this cost allocation proceeding.[254]

Performing the DFAX analysis for all 8,760 hours of the year, using each region's individual load duration curve, and only considering the flow participation over the B3N circuit would result in dramatic changes to the weighted participation percentages for IESO, MISO, NYISO and PJM.[255]

The numerous flaws that NYISO and others identified with the DFAX analysis effectively discredit the study in its entirety.[256] Joint Applicants' selection of, and response to, one of the many flaws in the DFAX Study that the NYISo identified does not transform MISO's DFAX analysis into a study that is sufficiently reliable and accurate to support involuntary interregional cost allocation.[257]

NYISO witness Smith prepared three charts to illustrate the impact of several of the many different flaws he identified in the MISO's DFAX analysis.[258] There were other flaws that Mr. Smith identified, but for which he did not have sufficient time to prepare a table or chart that quantified the resulting impact.[259] In order to prevail, Joint Applicants must show that the cumulative impact of *all* of the errors that Mr. Smith (and others) identified is *de minimis*. This Joint Applicants have not done and cannot do. The DFAX analysis relied on by Joint Applicants

[253] NYISO Initial Brief at 119 (citing Tr. 430:25-431:3).

[254] *See* NYISO Initial Brief at 119-122 *citing* Ex. NYI-38 at 6:6-7. [255]

NYISO Initial Brief at 121-123.

[256] *See* NYISO Initial Brief 106-123; PJM Initial Brief at 46-55; FERC Staff Initial Brief at 41-45; and NYTO Brief at 33-37.

[257] *See* Joint Applicants' Initial Brief at 35. [258]

Ex. NYI-38 at 8, 13, and 17.

[259] Ex. NYI-38 at 15:21-16:2.

should be rejected because it is biased in MISO's favor and produces an inaccurate and inappropriate cost allocation.[260]

C. Response to PJM's Arguments that the DFAX Study Should Have Used the Same "Peak Conditions" Model as the MTEP06 and Improperly Considers All Flows as Harmful

The NYISO agrees with PJM's statement that MISO's DFAX Study "is so riddled with flaws that it cannot possibly provide an adequate basis for any just and reasonable cost allocation…."[261] The NYISO and PJM agree that MISO improperly re-allocated flows that its DFAX Study indicates are caused by IESO to NYISO and PJM.[262] NYISO and PJM agree that the DFAX Study improperly excluded flows attributable to scheduled transactions, and that entities scheduling transactions across the MI/ON Interface benefit from the operation of the MI/ON PARs to better conform actual power flows to scheduled power flows.[263]

The NYISO supports PJM's, and FERC Staff's, arguments that Joint Applicants' "attempt to allocate the costs of the ITC [Replacement] PARs to PJM [and NYISO] is in direct contravention of the Commission's policy that cost allocation follow transmission planning."[264] The NYISO agrees with PJM's statement that "were cost allocation to any party other [than] ITC to be valid, which it is not, for the ITC PARs, MISO/ITC would have had to evaluate the loop flows that affected the seven specific thermal overloads identified in MTEP06 that MISO claims it studied for the installation ITC PARs."[265] The only reliability issues resolved by the

[260] NYISO Initial Brief at 106-124.

[261] PJM Initial Brief at 46-47.

[262] *See* PJM Initial Brief at 49-52 NYISO Initial Brief at 69-74.

[263] *See* PJM Initial Brief at 55 and NYISO Initial Brief at 123-124.

[264] PJM Initial Brief at 31 and FERC Staff Initial Brief at 43.

[265] PJM Initial Brief at 49, *citing* Ex. PJM-10; FERC Staff Initial Brief at 43.

Replacement PARs in the MTEP06 occurred on ITC's own transmission system.[266] MTEP06 does not attribute the cause of the recognized reliability issues to Lake Erie loop flow.[267]

According to MISO witness Chatterjee, MISO would not have seen a need for the Replacement PARs if the seven reliability needs identified in the bullets in the MTEP06 report did not exist.[268] The seven thermal overloads identified in the MTEP06 as benefiting from the Replacement PARs are all located within ITC's zone[269] and the Joint Applicants presented no evidence in this proceeding to demonstrate how NYISO or PJM power flows impact those overloads.[270] NYISO supports PJM's assertion that the inconsistencies between the MTEP06 and the DFAX Study justify rejection of Joint Applicants proposed cost allocation.[271]

1. Response to Argument that Summer Peak Conditions Should Be Used to Determine Cost Allocation

However, there are some areas in which PJM and NYISO are not in complete agreement. PJM argues that any interregional cost allocation of the Replacement PARs must be based on summer peak conditions to be consistent with Commission policy, since MISO used summer peak conditions to evaluate the Replacement PARs in its MTEP06.[272] PJM also argues that its JOA with MISO requires cost allocation to be based on peak summer conditions.[273]

NYISO agrees that the PJM/MISO JOA may govern whether and how MISO is permitted to allocate costs to PJM. However, NYISO was not involved in the negotiation of, is not a

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[266] Ex. NYI-50 at 19.

[267] NYISO Initial Brief at 16, 89-91 and 103.

[268] Tr. 355:8-11. *See also* NYISO Reply Brief at § IV.A.1. [269]

Tr. 239:14-17.

[270] NYISO Initial Brief at 16, 89-91 and 103; *see also* Ex. PJM-10. [271]

PJM Initial Brief at 31.

[272] Ex. PJM-1 at 33:17-34:12 and PJM Initial Brief at 48-49. [273]

Ex. PJM-1 at 33:11-16.

signatory to, and did not agree to participate in or abide by the terms of, the PJM/MISO JOA.[274] The NYISO disagrees with any suggestion that the terms and conditions specified in the PJM/MISO JOA apply to the NYISO.

With regard to the MTEP06 process, the NYISO agrees that if it had been a MISO stakeholder and had participated in the MTEP06 process, it would be appropriate to use the studies that were performed in MTEP06 to approve the construction of the Replacement PARs to also determine an appropriate cost allocation for the Replacement PARs. However, the MTEP06 process occurred wholly within the MISO structure,[275] and without participation by NYISO.[276] MISO has confirmed that the Replacement PARs were not jointly planned with NYISO and PJM.[277] In its response to data request NYISO/MISO 1-28, MISO admitted that MISO never asked or invited the NYISO to discuss the design, costs or cost allocation for the Replacement PARs (as part of MISO's MTEP06 process, or otherwise).[278]

Because NYISO did not participate in MTEP06, and had no idea that ITC and MISO would attempt to re-allocate the cost of facilities that were approved and cost-allocated in MTEP06 to NYISO customers half-a-dozen years later, the NYISO does not agree that, under the circumstances presented, it would be just and reasonable for the cost allocation method to be based on the summer peak method that was used to study and approve the construction of the Replacement PARs in the MISO's MTEP06 process. As NYISO witness Pike explained in his cross-answering testimony, analyzing Lake Erie loop flow during only summer peak conditions is wrong because "unscheduled power flows around Lake Erie occur under a variety of system

[274] Ex. NYI-63 at 3:1-12.

[275] Ex. MSO-Tab D at 22:3-6.

[276] Ex. NYI-45 at 1.

[277] *See* NYISO Initial Brief at 45.

[278] *See* NYISO Initial Brief at 46 and Ex. NYT-10 at 1.

conditions, in all hours of the year."[279] MISO agrees that unscheduled power flows could impact transmission systems under a variety of system conditions,[280] and that the impacts vary across all hours of the year.[281]

Lake Erie loop flow occurs in, and may impact an ISO's or RTO's transmission system at any time of the year.[282] Unscheduled power flows around Lake Erie could impact transmission systems during shoulder peak or light load conditions because transmission lines or other equipment may be on planned maintenance outages at these times of the year. When major transmission facilities are out-of-service for maintenance a transmission system has less capacity to manage unscheduled power flows. This is as true for the PJM and MISO transmission systems as it is for the NYISO's transmission system.[283]

NYISO witness Pike explained, "[i]f peak load conditions are used to calculate the cost allocation, but PJM, MISO and NYISO customers are expected to contribute to the costs of the Replacement PARs based on their operation during all hours of the year, the cost allocation would be inconsistent with the expected contribution to Lake Erie unscheduled power flows in 8,759 hours out of the 8,760 hours in a year, or more than 99.9% of the time."[284] Such an allocation would also be inappropriate because the problem that drives Joint Applicants' proposed cost allocation is not a peak-specific problem.[285]

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[279] *See, e.g.*, Ex. NYI-4 and Ex. MSO-Tab E Exhibits 1 and 2. [280]
Tr. 267:25-268:23.

[281] Tr. 399:15-400:8.

[282] *See, e.g.*, Ex. NYI-4, Ex. NYI-66 and Ex. MSO-Tab E Exhibits 1 and 2. [283]
Tr. 261:24-262:2.

[284] Ex. NYI-63 at 6:18-22.

[285] Ex. NYI-63 at 7:12-15.

2. Response to Argument that the Direction of Contribution to Lake Erie Loop Flow Should Be Considered in the Cost Allocation

PJM, and FERC Staff, argue that the MISO DFAX Study improperly allocated costs on gross loop flows without any consideration of whether the loop flow is actually harmful to the transmission system.[286] With regard to real-time operation based on actual loop flow experienced, the NYISO agrees with PJM and Commission Staff that contributions to Lake Erie loop flow that are counter to the prevailing direction of Lake Erie loop flow reduce the overall magnitude of Lake Erie loop flow.

However, the DFAX analysis deals with loop flow in the planning horizon, not in real-time. Lake Erie loop flow can change direction several times a day, and it changes direction frequently over the course of a year.[287] The direction of loop flow and the locations of congested transmission facilities determine whether an ISO's or RTO's contribution to loop flow is harmful to the transmission system. MISO's DFAX must account for all possible flow scenarios because it is not assessing a single moment in time. Rather, it is being used to represent all of the various system conditions that are expected to occur over the course of the studied "year."

On cross examination, Mr. Chatterjee explained that, at any given instant, an ISO's or RTO's contribution to Lake Erie loop flow can be harmful or beneficial.[288] Mr. Chatterjee indicated that he opposed PJM's proposal to net contribution factors because, "it is recognized in some cases, the aggregate impact of PJM could have a negative impact on reliability."[289] Mr. Chatterjee explained that in some instances, PJM's contribution may be in the opposite direction

[286] PJM Initial Brief at 46, and 52-55 and FERC Staff Initial Brief at 42-43.

[287] Tr. 181:24-182:4; Tr. 252:6-10.

[288] Tr. 419:14-18.

[289] Tr. 367:25-368:3.

of the actual loop flow and benefit the transmission system by reducing overall loop flow.[290] However, at other times PJM's clockwise contribution will exacerbate clockwise loop flow that is occurring on the system.[291] The DFAX analysis cannot predict exactly when or how often specific contributions to loop flow will be harmful to transmission systems.[292] Part of the problem is MISO's failure to incorporate factors that influence Lake Erie loop flow, like economic dispatch and the impact that transactions have on Lake Erie loop flow, into its DFAX analysis. However, no hypothetical planning analysis is ever going to reliably predict what will happen in the real world on a particular day.

At times when Lake Erie loop flow is clockwise, and MISO, NYISO, or IESO are experiencing transmission congestion that is aggravated by clockwise loop flow, and PJM's generation-to-load flows are contributing to the clockwise loop flow, PJM's loop flow contribution will tend to aggravate transmission congestion in the neighboring regions.[293] MISO's DFAX Study had to consider all contributions to unscheduled flows over the MI/ON Interface as harmful because the DFAX Study cannot predict which direction of contribution will actually exacerbate loop flow in any given hour or whether any particular transmission facility or set of transmission facilities will be congested.[294]

For the very same reasons explained above, MISO's inconsistent decision to net flow participation over the four circuits that comprise MI/ON Interface when determining contribution

[290] Tr. 367:25-368:6.

[291] *See Id*.

[292] *See* NYISO Initial Brief at 113-118 (the direction and magnitude of each RTO's contribution to loop flow depends on many factors that are not considered in the DFAX study. Some of the factors that are relevant but were not part of the DFAX analysis include an RTO's economic dispatch of generation, the location of generation and load within each RTO, and the various transactions scheduled within and between the RTOs around Lake Erie).

[293] Ex. NYI-46 at 22:13-16.

[294] Tr. 370:6-12 (the DFAX study projects that loop flow based on the RTOs generation-to-load will, on average, be counterclockwise in the mid-term future, the DFAX study cannot predict the direction of actual loop flow in any particular hour throughout the year).

to Lake Erie loop flow[295] is inappropriate.[296] The record in this proceeding shows that, in performing the DFAX analysis, MISO picked-and-chose when to permit netting of flow contributions, and when not to permit netting of flow contributions.[297] As the NYISO explains on pages 113 to 116 of its Initial Brief, MISO's selective use of netting illustrates the flawed, biased nature of the DFAX analysis and supports its rejection.

V. JOINT STATEMENT OF ISSUES #9: WHETHER AND TO WHAT EXTENT WILL THE PARS CONTROL LAKE ERIE LOOP FLOW, INCLUDING WHETHER, IF ANY OF THE ITC PARS (OR THE HYDRO ONE PARS) ARE UNAVAILABLE, BYPASSED, OR NOT BEING OPERATED IN A MANNER THAT IS CONSISTENT WITH THE PRESIDENTIAL PERMIT ISSUED TO ITC BY THE DEPARTMENT OF ENERGY, NYISO OR PJM OR THEIR CUSTOMERS NONETHELESS SHOULD BE REQUIRED TO PAY THE CHARGES AT ISSUE IN THIS PROCEEDING?

A. NYISO's and PJM's Ability to Complain About the Flaws in Setting the PARs and About MISO's and IESO's Related Lack of Due Diligence Does Not Cure the Unjust and Unreasonable Nature of Joint Applicants' Proposal

MISO and IESO are responsible for determining if Lake Erie loop flows are within the +/-200 MW "control band," and are expected to remain within the +/-200 MW control band, and for accurately setting the NERC IDC flag to treat the MI/ON PARs as "regulated" or "non-regulated" on that basis.[298] It is very important for MISO and IESO to timely and accurately reflect the correct scheduling mode for the MI/ON PARs in the NERC IDC. When the IDC flag

[295] Ex. MSO-2 (MISO calculated one RTO's contributions over the four individual circuits as a net value, accounting for the direction of contribution over each circuit, however, MISO did not consider the overall direction of each RTO's contribution to Lake Erie loop flow); *See also*, NYISO Initial Brief at 113-116.

[296] NYISO Initial Brief at 113-116.

[297] Tr. 370:6-10; Tr. 419:8-420:24; and Ex. MSO-1B.

[298] Ex. NYI-10 at 7; Ex. NYI-64 at 2; Ex. NYI-72 at 2.

is set to "regulated," this blocks the ability of the NYISO and PJM (and other control areas) to use TLRs to remove transactions that are adversely impacting reliability.[299]

Rules addressing how MISO and IESO are required to set the NERC IDC flag are set forth in their Operating Instruction. The Operating Instruction (at Section 3.4.3) requires IESO to set "the IDC status flag for the Michigan-Ontario Interface to Regulated, Non-Regulated or Bypass Mode, reflecting the ability of the PARs to maintain the Interface Deviation within the Control Band."[300] Section 2.0 of the Operating Instruction defines each of these modes. The "Regulated Mode" applies when the Interface "is within operational limitations and retains the ability to maintain the Interface Deviation [*i.e.*, the difference between the Interface Flow and the Interface Schedule] within the [+/- 200 MW] Control Band…." The "Non-Regulated Mode" applies when the Interface "has reached Max Tap[301] and the Interface Deviation is exceeding or expected to exceed the Control Band." "Bypass Mode" applies when the PARs are either: (a) Physically bypassed or; (b) In-service PARs are at or near neutral tap and no attempt is being made to control to the Interface Schedule. The PARs may be adjusted as necessary to respect System Operating Limits ("SOLs") of the Interface and Local Interface Facilities."

The NYISO used the data in Exhibit NYI-66 to review how accurately and timely MISO and IESO have been setting the NERC IDC flag for the MI/ON PARs. The NYISO compared the actual loop flow in Column Four of Ex. NYI-66 to the "IDC Status" in Column Eight of Ex. NYI-66. The NYISO expected to find that when the Lake Erie loop flow in Column Four was less than 200 MW, the IDC Status flag would be set to "Regulated." When the loop flow in

[299] Ex. NYI-1 at 8:22-9:2.

[300] Ex. NYI-3 at 53.

[301] "Max Tap" occurs when the Interface (the MI/ON PARs) has reached the maximum ability to control flow in either direction.

Column Four exceeded 200 MW (regardless of direction) the NYISO expected to find the IDC Status flag set to "Non-Regulated." However, that is not what the NYISO found.

Considering only the days on which there was at least one change made to the IDC Status in Ex. NYI-66 (in order to address certain infirmities in the data that the MISO provided[302]), the NYISO found that 28.6 percent of the time that MISO and IESO set the flag to "Regulated," it is set incorrectly. Column Four indicates that Lake Erie loop flow is in excess of 200 MW, yet MISO and IESO have set the IDC Status to "Regulated."

In their Initial Brief, Joint Applicants gloss over MISO's consistent failure to comply with the requirements of the Operating Instruction and argue that when the settings of the PARs are incorrect, NYISO can simply call IESO and inform the IESO operators that the MI/ON PAR status in the NERC IDC model is not accurate.[303] Joint Applicants state that "if NYISO has concerns about PARs operations, it knows how to reach MISO and IESO."[304] Joint Applicants imply that since MISO and IESO stand ready to correct the incorrectly set MI/ON PAR status, this somehow makes their proposal just and reasonable. The attitude Joint Applicants take toward their MI/ON PAR operating obligations in their Initial Brief appears perilously similar to the attitude expressed by an ITC employee in Exhibit NYT-35, stating that if the MI/ON PAR operating obligations prove too onerous, MISO and ITC need to find a way to escape them.[305]

MISO's and IESO's lack of diligence in setting the IDC status of the MI/ON PARs could have significant adverse reliability consequences for the NYISO and other NERC Reliability Coordinators.[306] It is not acceptable for MISO and IESO to incorrectly set the NERC IDC status

[302] *See* Tr. 893:18-894:14.

[303] Joint Applicants' Initial Brief at 10.

[304] *Id*.

[305] NYISO Initial Brief at 153-154.

[306] NYISO Initial Brief at 150.

flag, then wait for other Reliability Coordinators to call and complain. MISO's and IESO's approach can delay the implementation of TLR at a time when immediate relief is needed to address a real-time reliability concern. It would be unjust and unreasonable for the NYISO and PJM to be charged for costs of the Replacement PARs when MISO's and IESO's failure to timely and accurately implement their MI/ON PAR operating responsibilities can prevent the NYISO, PJM, and other Reliability Coordinators from timely addressing reliability issues arising in their Control Areas.

VI. JOINT STATEMENT OF ISSUES #11: WHETHER, IF THE COSTS OF THE ITC PARS ARE ALLOCATED TO PJM OR NYISO, PJM OR NYISO IS RESPONSIBLE (RESPECTIVELY) FOR PAYING MISO IN THE CASE OF A PJM OR NYISO CUSTOMER'S FAILURE TO PAY PARS-RELATED CHARGES?

The NYISO supports PJM's position on this issue.

VII. CONCLUSION

For the reasons set forth herein, the NYISO requests the Presiding Judge to: (i) find that no allocation of the costs of the ITC PARs should be made to NYISO or its customers; and (ii) reject the Joint Application in its entirety.

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
Daniel R. Simon
Jack N. Semrani
Ballard Spahr LLP
1909 K Street, NW, 12th Floor
Washington, DC 20006
(202) 661-2200
hhs@ballardspahr.com
simond@ballardspahr.com
semranij@ballardspahr.com

Attorneys for New York Independent System Operator, Inc.

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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 Commission Secretary in these proceedings.

Dated at Washington, DC this 31st day of October, 2012.

/s/ *Jack N. Semrani*
Jack N. Semrani
Ballard Spahr LLP
1909 K Street NW, 12th Floor
Washington, D.C. 20006
202.661.7640