

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

New York Independent System Operator, Inc.) Docket No. RM10-13-_____

**REQUEST OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC. FOR
CLARIFICATION OR, IN THE ALTERNATIVE, FOR REHEARING AND REQUEST
FOR EXPEDITED ACTION**

Pursuant to Rules 212 and 713 of the Commission’s Rules of Practice and Procedure,¹ the New York Independent System Operator, Inc. (“NYISO”) respectfully requests clarification or, in the alternative, rehearing of limited aspects of the Commission’s final rule in the above-captioned proceeding on *Credit Reforms in Organized Wholesale Electric Markets* (“Order No. 741”).²

In Order No. 741, the Commission states that ISOs/RTOs may establish customer credit requirements based on net exposure if market participants provide security interests in their ISO/RTO transactions.³ In the absence of a security interest or equivalent protection, the Commission directs ISOs/RTOs to establish credit requirements for market participants based on their gross obligations.⁴ The NYISO seeks clarification that the Commission, when using the terms “net exposure” and “gross obligations,” is referring to the net exposure or gross obligations across product or service categories and is not referring to a customer’s positions within product or service categories. As organized in the NYISO-administered markets, the product or service

¹ 18 C.F.R. §§ 385.212 and 385.713 (2010).

² *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 133 FERC ¶ 61,060 (2010).

³ *Id.* at P 117.

⁴ *Id.* at PP 117-21.

categories include Energy (including day-ahead, real-time, and ancillary services charges), Capacity, Transmission Congestion Contracts (“TCCs”), and Virtual Transactions.

The NYISO respectfully requests that the Commission act on this filing within 30 days. The NYISO is in the process of redesigning and enhancing certain aspects of its billing and settlement, credit management, and invoicing systems in order to implement shortened settlement periods in compliance with Order No. 741. The NYISO plans to implement this new software consistent with the understanding described herein unless the Commission indicates otherwise.

I. Background

In Order No. 741, the Commission speaks to its concern that, in the event of a market participant bankruptcy, a bankruptcy court may refuse to allow an ISO/RTO to offset amounts the ISO/RTO owes to the market participant by amounts the market participant owes to the ISO/RTO, which could result in a larger than anticipated default that must be pursued as an unsecured claim.⁵

The Commission seeks to address this concern in Order No. 741 by directing each ISO/RTO to submit a compliance filing with tariff revisions adopting one of the following four options:

1. Establish a central counterparty.
2. Require market participants to provide a security interest in their transactions in order to establish collateral requirements based on *net exposure*.
3. Propose another alternative, which provides the same degree of protection as the two above-mentioned methods.
4. Choose none of the three above alternatives, and instead establish credit requirements for market participants based on their *gross obligations*.⁶

⁵ *Id.* at P 81 and P 116.

⁶ *Id.* at P 117 (*emphasis added*).

II. Request for Clarification

The NYISO seeks clarification that when the Commission uses the term “net exposure” in Option 2 (requiring market participants to provide a security interest in their transactions in order to establish collateral requirements based on net exposure) and the term “gross obligations” in Option 4 (requiring the NYISO to establish credit requirements for market participants based on their gross obligations), the Commission is referring to net exposure or gross obligations across product or service categories and is not referring to a customer’s positions within product or service categories.

Under its existing credit practices, the NYISO establishes separate credit requirements for each of its product or service categories based on an estimate of the market participant’s position within that product or service category at the end of the billing period. The NYISO does not reduce a credit requirement in one product or service category to account for the amount the NYISO expects to owe the market participant in another product or service category.⁷ For example, the NYISO might expect a market participant active in Energy, ICAP, and TCCs to owe the NYISO for Energy and ICAP, but expect the NYISO to owe the market participant for TCCs. In that case, the NYISO would establish credit requirements for Energy and ICAP without any reduction based on the amount the NYISO estimates it would owe the market participant for TCCs. The NYISO interprets Order 741 to permit it to continue this practice because the NYISO does not net across product or service categories in establishing credit requirements.

⁷ The limited extent to which the NYISO permits netting across product and service categories under its current credit rules is by allowing customers to elect to treat their net receivables for the billing period as cash collateral upon request. In compliance with the Commission’s order, the NYISO plans to begin requiring a customer requesting this treatment to provide a first priority lien on its net receivables.

III. Alternative Request for Rehearing

Should the Commission deny the NYISO's requests for clarification detailed above, the NYISO respectfully requests rehearing on these issues.

The NYISO submits that the equitable doctrine of recoupment provides an adequate legal basis in the context of a market participant bankruptcy proceeding to support the NYISO's practice of establishing distinct credit requirements for each of its product or service categories (e.g., Energy, ICAP, TCCs, Virtual Transactions) based on a customer's positions within the product or service category.

The premise underlying recoupment is that it would be inequitable for a debtor to enjoy the benefits of a transaction without also meeting its obligations.⁸ To the extent that a NYISO market participant benefits from its sales within a NYISO product or service category, it would be inequitable for a market participant not to meet its obligations related to its purchases within that same product or service category.

Order No. 741 provides no reasoned explanation that would support the imposition of credit requirements based on a customer's gross obligations within product or service categories.⁹ The Commission failed to articulate a rational connection, supported by substantial evidence, between the facts presented and such a policy decision on this matter.¹⁰ Moreover, a

⁸ See e.g., *In re Peterson Distributing, Inc.*, 82 F.3d 956 (10th Cir. 1996); See also, *In re McMahon*, 129 F.3d 93, 96 (2d Cir. 1997); *Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1400 (9th Cir. 1996) (quoting *In re B & L Oil Co.*, 782 F.2d 155, 157 (10th Cir. 1986)); *In re 105 E. Second St. Associates*, 207 B.R. 64, 68 (Bankr. S.D.N.Y. 1997).

⁹ See, e.g., *Panhandle Eastern Pipe Line Co. v. FERC*, 881 F.2d 1101, 1118 (D.C. Cir. 1989) ("The agency's determination must reflect reasoned decision making that has adequate support in the record and must include an 'understandable' agency analysis and rationale.").

¹⁰ See, e.g., *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (citing *KN Energy, Inc. v. FERC*, 968 F.2d 1294, 1300 (D.C. Cir. 1992)); *Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 543 (D.C. Cir. 2003); *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999).

policy decision by the Commission based on its interpretation of bankruptcy law should not be given deference because it is outside the Commission's area of expertise.

IV. Specification of Error and Statement of Issues

In accordance with Rule 713(c)(1) and (c)(2),¹¹ the NYISO respectfully submits the following specification of errors and statement of issues.

The Commission should clarify that, when it uses the terms “net exposure” and “gross obligations,” it is referring to the net exposure or gross obligations across product or service categories (e.g., Energy, ICAP, TCCs, Virtual Transactions) and is not referring to a customer's positions within product or service categories (e.g., for Energy, this includes day-ahead, realtime, and ancillary services charges).

In the absence of the requested clarification, the Commission erred by failing to engage in reasoned decision making when directing ISOs/RTOs to establish credit requirements, in the absence of a security interest or equivalent protection, based on a customer's gross obligations within product or service categories. *See, e.g., Panhandle Eastern Pipe Line Co. v. FERC*, 881 F.2d 1101, 1118 (D.C. Cir. 1989); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (citing *KN Energy, Inc. v. FERC*, 968 F.2d 1294, 1300 (D.C. Cir. 1992)); *Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 543 (D.C. Cir. 2003); *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999).

Moreover, in the absence of the requested clarification, the Commission erred by failing to articulate a rational connection between the facts, supported by substantial evidence, and its policy decision, which decision the Commission based on its interpretation of bankruptcy law and should not be given deference. *See, e.g., Midwest ISO Transmission Owners v. FERC*,

¹¹ 18 C.F.R. §§ 385.713(c)(1) and (c)(2) (2010).

373 F.3d 1361, 1368 (D.C. Cir. 2004) (citing *KN Energy, Inc. v. FERC*, 968 F.2d 1294, 1300 (D.C. Cir. 1992)); *Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 543 (D.C. Cir. 2003); *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999).

V. Conclusion and Request for Relief

For the reasons set forth above, the NYISO respectfully requests that the Commission grant the requested clarification or, in the alternative, rehearing of these issues. The NYISO also respectfully requests that the Commission act on this request as soon as possible so that the NYISO can proceed with the redesign and enhancement of its billing and settlement, credit management, and invoicing systems.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by electronic mail or first-class mail upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 22d day of November, 2010.

Respectfully submitted,

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