UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket Nos. ER13-102-007

REQUEST FOR REHEARING AND CLARIFICATION OF NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Pursuant to Section 313(a) of the Federal Power Act[1] and Rules 713 and 2007[2] of the Commission's Rules of Practice and Procedure,[3] the New York Independent System Operator, Inc. ("NYISO") requests rehearing of the Commission's December 23, 2015, *Order Conditionally Accepting Tariff Revisions and Requiring Further Compliance* in the above-captioned proceeding.[4] The December Order conditionally accepted the May 18, 2015 joint compliance filing[5] by the NYISO and the New York Transmission Owners[6] (collectively the "Filing Parties"). But the December Order also imposed a number of conditions and additional compliance directives.

As discussed below, two of these determinations are inconsistent with the Commission's obligation to engage in reasoned decision making and thus must be modified on rehearing. They

[1] 16 U.S.C. § 8251(a).

[2] This filing was originally due on January 22, 2016, the 30th day following the Commission's December 23, 2015 order. The filing deadline was automatically extended by operation of Rule 2007(a)(2) because adverse weather conditions in the Washington, D.C. region resulted in the Commission closing early on January 22 and not reopening until today.

[3] 18 C.F.R. § 385.713.

[4] *New York Independent System Operator, Inc.*, Order Conditionally Accepting Tariff Revisions and Requiring Further Compliance, 153 FERC ¶ 61,341 (2015) ("December Order").

[5] New York Independent System Operator, Inc. and New York Transmission Owners, *Compliance Filing*, Docket No. ER13-102-007 (May 18, 2015) ("May 18 Filing").

[6] The New York Transmission Owners are Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company d/b/a LIPA ("LIPA"), New York Power Authority ("NYPA"), New York State Electric & Gas Corp., Niagara Mohawk Power Corp. d/b/a National Grid, Rochester Gas & Electric Corp., and Orange & Rockland Utilities, Inc.. LIPA and NYPA are not subject to the Commission's jurisdiction under Section 205 of the Federal Power Act but joined in making the filing voluntarily.

are the directives that: (i) the NYISO not be indemnified under the Development Agreement for acts of ordinary negligence; and (ii) Responsible Transmission Owners[7] must execute the *pro forma* Development Agreement for a backstop solution that the NYISO triggers to proceed in parallel to a selected alternative regulated solution. In addition, the NYISO seeks clarification that it may propose to use interconnection processes other than those currently set forth in Attachments X and S of its Open Access Transmission Tariff ("OATT") to evaluate the interconnection of future proposed solutions to its transmission system.

I. COMMUNICATIONS

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[7] Capitalized terms that are not otherwise defined herein shall have the meaning specified in Attachment Y of the NYISO OATT, and if not defined therein, in the body of the NYISO OATT and the NYISO Market Administration and Control Area Services Tariff.

[8] Waiver of the Commission's regulations (18 C.F.R. § 385.203(b)(3) (2014)) is requested to the extent necessary to permit service on counsel for the NYISO in both Richmond, VA and Washington, DC.

II. SPECIFICATION OF ERRORS/STATEMENT OF ISSUES

In accordance with Rule 713(c),[9] the NYISO submits the following specifications of error and statement of the issues on which it seeks rehearing of the December Order:

- The Commission failed to engage in reasoned decision making, to provide a reasoned explanation for its decision, or to explain its departure from its own precedent when it directed that the Development Agreement be modified so that the NYISO would not be indemnified in cases of ordinary negligence.[10]

- To the extent that the December Order's directive that the Development Agreement's limitation on liability and indemnification provisions be made "mutual" is not limited to the extent permitted under the NYISO's tariff it does not constitute reasoned decision-making and is inconsistent with applicable precedent.[11]

- The Commission's directive that Responsible Transmission Owners must execute the Development Agreement for backstop solutions that are triggered by the NYISO to begin implementation in parallel to a selected alternative regulated solution was inconsistent with the Commission's obligation to engage in reasoned decision making.[12]

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[9] 18 C.F.R. § 385.713(c).

[10] *Id.*

[11] *See* Midcontinent Independent System Operator, Inc., 153 FERC ¶ 61,168 at P 215 (2015)

[12] *See, e.g., Motor Vehicle Mfr. Ass 'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 at 43 (1983); *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 at 839 (D.C. Cir. 2006); *NorAM Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998); *citing K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 12 (D.C. Cir. 2014).

III. BACKGROUND

The May 18 Filing included numerous proposed tariff revisions that were intended to address the remaining regional transmission planning requirements of Order No. 1000[13] and the Commission's April 16, 2015 Order in Docket Nos. ER13-102-005 and -006.[14] Among other things, the May 18 Filing included a *pro forma* Development Agreement between the NYISO and the Developer of an alternative regulated transmission solution selected in the NYISO's reliability planning process as the more efficient or cost-effective solution to a Reliability Need. The tariff revisions were the product of an extensive stakeholder process.

The proposed *pro forma* Developer Agreement included liability and indemnification provisions. Under proposed Article 9.2, Developers would only be excused from the duty to indemnify the NYISO in cases where the NYISO is grossly negligent or engages in intentional misconduct. The Filing Parties explained that this proposal was "consistent with the general limitation of liability and indemnification requirements applicable to the NYISO under Sections 2.11.2 and 2.11.3(b) of the NYISO OATT."[15] The December Order appears to have overlooked the extensive history of Commission rulings affirming the use of a gross negligence indemnification standard under the NYISO's tariffs which strongly supports the NYISO's gross negligence indemnification proposal. That history is discussed in more detail below in Section IV.A.

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[13] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011) ("Order No. 1000"), *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012) ("Order No. 1000-A"), *order on reh'g and clarification*, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B").

[14] *New York Independent System Operator, Inc.*, 151 FERC ¶ 61,040 (2015) ("April 2015 Order").

[15] May 18 Filing at 15.

IV. REQUEST FOR REHEARING

A. The Commission's Determination that the NYISO Should Not Be Indemnified Under the Development Agreement for Acts of Ordinary Negligence Is Inconsistent with Precedent and Commission-Approved NYISO Tariff Provisions and is Unjust and Unreasonable.

Paragraph 103 of the December Order directed the Filing Parties to revise Article 9.2 of the Development Agreement so that Developers would not be obliged indemnify the NYISO in case of losses resulting from the NYISO's ordinary negligence or intentional misconduct.

The December Order cited a November 2014 ruling[16] involving the California Independent System Operator Corporation's ("CAISO") proposed *pro forma* "Approved Project Sponsor Agreement" ("APSA").[17] In that case, the Commission required that the CAISO "revise the *pro forma* APSA to exempt from the indemnification provision a party's own ordinary negligence . . . ."[18] The Commission stated that a "hold harmless provision must strike a balance between protecting the indemnified party and ensuring that the indemnified party has an incentive to avoid negligent acts."[19] The *CAISO* ruling was based principally on a 2005 determination in *Northeast* that "indemnification for ordinary negligence would fail to incentivize a party to avoid negligent actions."[20]

The December Order acknowledged that a gross negligence indemnification exception had been approved in the *pro forma* Large Generator Interconnection Agreement. But it argued that this treatment was justified because interconnection involved greater risks than other

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[16] *California Independent System Operator Corporation*, 149 FERC ¶ 61,107 (2014) ("*CAISO*").

[17] The *pro forma* APSA "sets forth the terms and conditions that will govern an approved project sponsor's responsibilities and relationship with CAISO during the period prior to the time that the CAISO assumes operational control over the approved project sponsor's transmission facilities." CAISO at P 1.

[18] *CAISO* at P 96.

[19] *CAISO* at P 96.

[20] December Order at P 105; *citing Northeast Utilities Service Company*, 111 FERC ¶ 61,333 at P 27 (2005) ("*Northeast*").

transmission services. The Commission concluded that "ordinary negligence should be exempted from the indemnity provision in the Development Agreement because this change will incentivize the parties to avoid negligent actions."[21]

The Administrative Procedure Act[22] requires federal agencies, including the Commission, to engage in "reasoned decision making," to provide a reasonable explanation for their decisions, and, in particular, to reasonably justify departures from precedent. Commission decisions are remanded, or vacated, on appeal if they fail to satisfy these standards. Specifically, courts have held the Commission must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[23] The Commission also cannot depart from its prior rulings without "'providing a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'"[24]

The Commission's determination that developers should not indemnify the NYISO in cases of ordinary negligence is not consistent with reasoned decision making. It ignores factors and precedents that apply to the NYISO rather than the general principle in the *Northeast* ruling. Specifically, *Northeast* is part of a line of cases dating back to Order No. 888[25] that rejected

[21] December Order at P 105.

[22] 5 U.S.C. §§ 551 *et seq.*

[23] *Motor Vehicle Mfr. Ass 'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted).

[24] *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 12 (D.C. Cir. 2014); *quoting Alcoa*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (*quoting Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003)).

[25] *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 Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997); *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*

attempts by Commission jurisdictional public utilities to be indemnified for acts of ordinary negligence under their transmission tariffs. But as a 2005 decision in *Southern Company Services, Inc.*, explained, the Commission had consistently provided special liability protections to public utilities that were Independent System Operators or Regional Transmission Organizations ("ISOs/RTOs").[26] This special protection was originally afforded because ISOs/RTOs "were created by and solely regulated by the Commission, and otherwise would be without limitations on liability."[27] Without such protections ordinary negligence claims could threaten ISOs/RTOs with bankruptcy.[28] By contrast, in cases like *Northeast* that did not involve ISOs/RTOs, the Commission consistently "rejected revisions to indemnification provisions (in particular, changing the standard from "negligence" to "gross negligence")."[29]

In keeping with the Commission's precedent concerning ISO/RTO indemnification provisions, the NYISO has had a gross negligence liability limitation rule in its Services Tariff since its inception in 1999. In 2007, two years after the *Northeast* decision, the Commission accepted the NYISO's proposal to revise its OATT to adopt additional liability protection.[30] This included a revision to the NYISO OATT's indemnification provision to incorporate a gross negligence standard. The Commission approved language, which remains in effect today,

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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).

[26] *Southern Company Services, Inc*., 113 FERC ¶ 61,239 (2005) ("*Southern*").

[27] *Southern* at P 7. *See also Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164 (2005); *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,100 (2005); *ISO New England, Inc.*, 106 FERC ¶ 61,280, *order on reh'g*, 109 FERC ¶ 61,147 (2004) (each of these three orders approved special liability protections for ISOs/RTOs.)

[28] *See Midwest Independent Transmission System Operator, Inc*., 110 FERC ¶ 61,164 at P 12 (granting protection in response to argument that "potential damages associated with liability for ordinary negligence, even when limited to direct damages, are significant, and could force Midwest ISO to consider liquidation in a bankruptcy proceeding . . . .")

[29] *Southern* at P 7; *citing Northeast* at PP 24-30.

[30] *See New York Independent System Operator, Inc.*, 120 FERC ¶ 61,026 (2007).

specifying that Transmission Customers must "at all times indemnify, defend, and save the ISO" from "any and all damages, losses, claims" arising out of or resulting from the NYISO's "performance of its obligations under this Tariff on behalf of the Transmission Customer, except in cases of gross negligence or intentional wrongdoing by the ISO."[31] The Commission explained that enhanced liability and indemnification provisions were warranted in the NYISO's case because:

> As we stated in Order No. 890, we have provided such liability protection to RTOs and ISOs because they were created by and solely regulated by us, and otherwise would be without limitations on liability. We agree with NYISO that the language of the liability limitations proposed here is consistent with provisions that we have accepted for other RTOs and ISOs. In those orders we reasoned that RTOs and ISOs must provide service to all eligible customers, and cannot deny service to particular customers based on the risk of potential damages associated with interruption of service to those customers, thus, all customers ultimately bear the cost associated with the risk of such service. We also reasoned that gross negligence provisions balance lower rates for all customers against the burden of limited recovery for some. The same reasoning applies here. In prior orders, we also found ISO cost recovery of damages it must pay, as proposed here, to be appropriate and based on Commission precedent, because the RTO or ISO has no shareholders from which to recover costs and, thus, must look to entities taking transmission service pursuant to its tariff.[32]

In addition, in 2009 the Commission accepted tariff revisions to allow the NYISO to recover the costs associated with penalties assessed for violations of NERC reliability standards and other regulatory requirements if certain conditions were met.[33] Among other things, the revisions allowed the NYISO to recover penalty costs in cases where it was "demonstrably at fault" but had acted with ordinary, not gross, negligence. The Commission expressly noted this

[31] NYISO OATT at Section 2.11.2.

[32] 120 FERC ¶ 61,026 at P 13 (internal citations omitted).

[33] *New York Independent System Operator, Inc.*, 127 FERC ¶ 61,196 (2009)

part of the NYISO's proposal "with approval" and rejected arguments that a gross negligence standard would mute the NYISO's incentives to comply with NERC's Reliability Standards.[34]

The NYISO's proposal had been developed based on the Commission's 2008 *Guidance Order* addressing penalty cost recovery issues facing ISOs/RTOs.[35] The *Guidance Order* had acknowledged "the careful balance required when addressing recovery of reliability penalties by RTOs and ISOs."[36] On the one hand, ISOs/RTOs performed critical reliability functions, but on the other they are "typically member-supported non-profit organizations" and "they do not have an independent source of funds with which to pay any penalties assessed to them . . . ."[37] These factors justified providing ISOs/RTOs with special protection, including, potentially, the ability to recover penalty costs caused by their ordinary negligence.[38]

More generally, the use of a gross negligence liability standard is commonplace in state utility regulation. The United States Court of Appeals for the District of Columbia Circuit has explained, and the Commission has acknowledged, that:

> [P]rior to unbundling, many state commissions had approved retail tariff provisions permitting utilities to limit their liability for service interruptions to instances of gross negligence or willful misconduct. Courts found that such provisions balance lower rates for all customers against the burden of limited recovery for some, and that the technological complexity of modern utility systems and resulting potential for service failures unrelated to human errors justify liability limitations.[39]

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[34] 127 FERC ¶ 61,196 at P 35.

[35] *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008) ("*Guidance Order*").

[36] 127 FERC ¶ 61,106 at P 6; *citing* Guidance Order.

[37] *Id*.

[38] *See* Guidance Order at P 27.

[39] *See Southwest Power Pool. Inc.*, 112 FERC ¶ 61,100 at P 36 (2005) *citing Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 727 (D.C. Cir. 2000) ("Prior to unbundling, retail tariffs were primarily a matter for state regulation, and most states had approved tariff provisions permitting utilities to limit their liability for service interruptions to instances of gross negligence or willful misconduct. Courts upheld these limitations on the public policy grounds that they balanced lower rates for all

The Commission has also pointed to state laws establishing gross negligence liability protections as a basis for providing similar federal protection to ISOs/RTOs operating in those states.[40] New York State law permits regulated utilities to limit their liability to gross negligence. This further supports the use of a gross negligence standard for both liability and indemnification in the NYISO's case.[41]

The difference between permitting and preventing the NYISO from obtaining indemnification in cases of ordinary negligence is significant, particularly when viewed in light of New York precedent. New York courts in utility cases have defined gross negligence as the "failure to exercise even slight care"[42] and equated it with willful misconduct.[43] Other courts equate gross negligence with recklessness or even intentional misconduct. By contrast, ordinary negligence can be shown by demonstrating a failure to exercise reasonable due care without the kind of exceptional failures associated with gross negligence. Thus, by directing the NYISO to remove the word "gross" before negligence, and thereby requiring the NYISO to indemnify for "negligence and intentional misconduct," the Commission, without explanation, erroneously conflated a reasonable duty standard of care with culpable acts of misconduct. The Commission should grant rehearing to correct this error.

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customers against the burden of limited recovery for some, and that the technological complexity of modern utility systems and resulting potential for service failures unrelated to human errors justified liability limitations.") (internal footnotes omitted).

[40] *See, e.g.,* 112 FERC ¶ 61,100 at P 36 ("Several state commissions in SPP's footprint allow utilities to limit their liability to gross negligence. We believe that SPP and its TOs should be afforded similar protection. Otherwise, disparate treatment is a disincentive to participate in SPP.") (internal footnotes omitted).

[41] *See Lee v. Consolidated Edison Co.*, 413 N.Y.S. 2d 826, 828 N.Y. App. Div. 1978).

[42] *Food Pageant, Inc. v Consolidated Edison Co., Inc*., 54 NY2d 167 (1981). *See also Balacki v. Long Island Power Authority*, 40 Misc.3d 1220 (Dist. Nas. 2013) (rejecting claim for damages caused by Hurricane Sandy of grounds that the Long Island Power Authority storm preparations did not constitute "gross negligence.")

[43] *Id*.; c*iting Weld v Postal Telegraph-Cable Co*., 210 NY 59 (1913) (equating gross negligence with willful misconduct.)

Moreover, the December Order imposed this drastic change on the indemnification protection available to the NYISO while apparently overlooking the accepted NYISO tariff provisions and precedents discussed above. It offers no reasoned explanation for its deviation from those precedents or of why it would be appropriate for the NYISO to be subject to a gross negligence indemnification standard for all of its Commission-jurisdictional activities, except those under the Development Agreement. It does not consider that under the test outlined in *CAISO* depriving the NYISO of indemnification for ordinary negligence would not represent a reasonable "balance between protecting the indemnified party and ensuring that the indemnified party has an incentive to avoid negligent acts."[44]

The NYISO has strong incentives to act reasonably under the proposed Development Agreement just as it does under its OATT, its Services Tariff, and the NERC reliability standards notwithstanding the applicability of a gross negligence standard in all of them. Disallowing indemnification in cases of ordinary negligence would be an unexplained departure from the standard normally applied to the NYISO that would unreasonably shift risk to it. Accordingly, the December Order's determination on this point is not based on reasoned decision making and deviates without any reasoned explanation from NYISO-specific precedent. It should therefore be reversed on rehearing.

Finally, paragraphs 99-101 and paragraph 103 of the December Order also required the Filing Parties to make Articles 9.1 and 9.2 mutual. The Commission directed the NYISO to revise Article 9.2 of the Development Agreement so that the NYISO would have an obligation to indemnify the Developer. For the reasons stated below, the NYISO should not be required to indemnify a Developer for the NYISO's own acts of ordinary negligence; however, a Developer

[44] *See supra*, n. 18.

should be required to indemnify the NYISO for that Developer's acts of ordinary negligence, gross negligence, or intentional misconduct. There is no reason why Developers should be afforded the same limitations of liability as ISOs and RTOs. Under Commission precedent, the gross negligence and intentional misconduct standard applies only to ISOs/RTOs, not to Developers. The Commission recently held in a case involving the Midcontinent Independent Transmission System Operator, Inc. ("MISO") that the MISO's obligation to indemnify Developers under its version of the Development Agreement should be "reciprocal to the extent allowed under the Tariff." Thus, the MISO is only required to indemnify a Developer in case of its own gross negligence or intentional misconduct because the MISO's liability for damages under its tariff is limited to such cases.[45] The same limitations on liability are established under the NYISO's tariffs.[46] The Commission has articulated no basis to apply a different standard to the NYISO than that recently applied to the MISO. Therefore, the Commission should grant rehearing and limit the NYISO's indemnity obligations to Developers to instances where the NYISO has acted with gross negligence or intentional misconduct.

B. Responsible Transmission Owners Should Not Be Required to Execute the Development Agreement for Backstop Solutions Running in Parallel to Selected Alternative Regulated Solutions.

The December Order directed the NYISO to require that the Responsible Transmission Owner execute a Development Agreement when its regulated backstop solution is selected as the more efficient or cost-effective transmission solution to a Reliability Need or is triggered to

[45] *Midcontinent Independent System Operator, Inc.*, 153 FERC ¶ 61,168 at P 215 (2015).

[46] NYISO OATT at Section 2.11.2. (The NYISO's tariff states that Transmission Customers must "at all times indemnify, defend, and save the ISO" from "any and all damages, losses, claims" arising out of or resulting from the NYISO's "performance of its obligations under this Tariff on behalf of the Transmission Customer, except in cases of gross negligence or intentional wrongdoing by the ISO.")

proceed in parallel with a selected alternative regulated transmission solution.[47] For the reasons described below, this directive is unreasonable, unduly burdensome, and inconsistent with reasoned decision making when applied to a regulated backstop solution that has been triggered solely to serve as the backup for a selected alternative regulated solution. The December Order should be modified on rehearing so that Responsible Transmission Owners are not required to execute the Development Agreement in that scenario.

The NYISO's reliability planning process is used to identify solutions to timely address Reliability Needs. It strives to achieve market-based solutions to Reliability Needs, with regulated solutions serving as the backstop. In the absence of sufficient market-based solutions, the NYISO will turn to a regulated solution. The Responsible Transmission Owner is required by the NYISO tariffs to propose a regulated backstop solution to ensure there is a means of addressing the Reliability Need.[48] Other Developers, including other Transmission Owners, may also propose their own alternative solutions.[49]

The NYISO will evaluate all of the proposed transmission solutions that it has determined are viable and sufficient to address the Reliability Need for purposes of selecting the more efficient or cost-effective project.[50] If the selected project is an alternative regulated transmission solution, the NYISO may elect to also trigger the Responsible Transmission Owner's regulated backstop solution to begin seeking regulatory approvals and commence

[47] December Order at PP 45-48.

[48] OATT Attachment Y Section 31.2.4.3. The regulated backstop solution is not required to be solely a transmission project. In the event that the Responsible Transmission Owner proposes a regulated backstop solution that is not transmission or that is a hybrid transmission/non-transmission project, the NYISO will evaluate the viability and sufficiency of the solution, but will not include the solution in its determination of the more efficient or cost-effective transmission solution. The NYISO may trigger a regulated backstop solution to run in parallel with a selected solution, regardless of whether it is a transmission or non-transmission solution.

[49] OATT Attachment Y Section 31.2.4.7.

[50] OATT Attachment Y Section 31.2.6.5.

implementation as a standby, backup solution in case the selected transmission solution cannot or does not proceed to completion.[51] In such instance, the NYISO will continue to expect that the selected project will proceed to be developed and completed in time to address the Reliability Need. However, as system reliability is at issue and as the Developer of an alternative solution does not have the same obligations as the Responsible Transmission Owner to complete the project, the NYISO may require the standby project to proceed in parallel as a means for maintaining system reliability.[52]

Pursuant to Section 31.2.8.1.6 of Attachment Y of the OATT, the Developer of a selected alternative regulated transmission solution must execute a Development Agreement to proceed with its project. The Development Agreement serves as a mechanism for the NYISO to closely monitor the progress of the development and construction of the selected project and to identify as soon as possible whether the project cannot be constructed in time to satisfy the Reliability Need.

It is, however, unreasonable to require the Responsible Transmission Owner to enter into a Development Agreement when the regulated backstop solution has simply been triggered as an emergency backup.[53] In this scenario, the selected project and the regulated backstop solution are not similarly situated. It is not unduly discriminatory to require the Developer of the selected project to execute the Development Agreement, while a project on stand-by does not. Upon

[51] OATT Attachment Y Sections 31.2.8.1.3, 31.2.8.1.4.

[52] *See* OATT Attachment Y Sections 31.2.8.1.3, 31.2.8.1.4; *see also* Agreement Between the New York Independent System Operator, Inc., and the New York Transmission Owners on the Comprehensive Planning Process for Reliability Needs, available at: <http://www.nyiso.com/public/webdocs/markets_operations/documents/Legal_and_Regulatory/Agreements/NYISO/Comprehensive_Planning_Process_for_Reliability_Needs_Agreement.pdf>

[53] For the compliance filing due on March 22, 2016, the NYISO is reviewing tariff changes to incorporate appropriate requirements for a Responsible Transmission Owner in the event that its regulated backstop solution becomes the only solution to a Reliability Need.

selecting a transmission project, the NYISO expects the selected project will be constructed, and the project should be subject to the terms and conditions of a Development Agreement to ensure that it is making timely progress. This is particularly true for the non-incumbent Developers, as they are not subject to any other agreements or requirements to timely construct their projects. Insofar as the Developer of the selected project is timely developing its project to satisfy the Reliability Need, it will proceed to complete the project. In these circumstances, the regulated backstop solution simply exists to be available in the event the selected solution falls through.[54] The NYISO will halt this regulated backstop solution as soon as the selected solution has demonstrated through its own progress that there is no need for a back-up.[55]

To satisfy its obligations as the regulated backstop solution, the Responsible Transmission Owner must simply begin implementation activity required to be ready to ramp up and proceed with its project if the selected project will not proceed. There is no need for the Responsible Transmission Owner to enter into a Development Agreement at that time or for the NYISO to be performing the same level of project monitoring for the backup as the selected solution. If the NYISO were to enter into a Development Agreement with the backstop solution, the NYISO would be simultaneously a party to and responsible for administering two separate Development Agreements with two different Developers for two separate projects to satisfy the same Reliability Need. Such a requirement would create confusion regarding the separate roles of the projects, and result in an unnecessary administrative burden on the NYISO and the Responsible Transmission Owner, which may never be required to construct any facility.

[54] The NYISO will monitor the progress of all triggered regulated solutions to a reliability need to ensure that they are proceeding, including a regulated backstop solution that proceeds in parallel with an alternative regulated solution, until such time as the parallel regulated solution is halted. *See* OATT Attachment Y, Section 31.2.13.2.

[55] OATT Attachment Y Section 31.2.8.2.1.

The December Order asserts that requiring the Responsible Transmission Owner to execute the Development Agreement is consistent with Commission action in PJM Interconnection, L.L.C. ("PJM"), where the entity that accepts its designation as a Designated Entity must execute a Designated Entity Agreement.[56] The Commission's analogy breaks down in the case of a Responsible Transmission Owner that is simply on stand-by in the event its backstop project is required because the selected project cannot be completed. While PJM can designate a Transmission Owner to step-in to complete a non-incumbent developer's project if the project cannot be timely completed, PJM does not designate the Transmission Owner in the backup role as a Designated Entity or require it to execute the Designated Entity Agreement prior to PJM's determination that the Transmission Owner must step-in to complete the project.[57] Similarly, while the CAISO can direct a Participating TO to construct a transmission solution when the Approved Project Sponsor is unable to do so, CAISO does not designate the Participating TO as the Approved Project Sponsor or require it to execute the Approved Project Sponsor Agreement prior to determining that the Participating TO must complete the project.[58]

Accordingly, the Commission's determination is flawed, serves no useful policy purpose, imposes unnecessary burdens on both the NYISO and Responsible Transmission Owner, is not supported by precedent, and is inconsistent with reasoned decision making. The Commission should revise the determination on rehearing.

V. REQUEST FOR CLARIFICATION

As the December Order noted, Attachment X of the NYISO OATT "sets forth NYISO's generation and 'Merchant Transmission Facilities' interconnection process. Attachment S of the

[56] December Order at P 48 n 113.

[57] *See* PJM Operating Agreement, Schedule 6, Section 1.5.8 (k).

[58] *See* CAISO Tariff, Section 24.6.4.

OATT contains the related cost requirements for that interconnection process, including the facilities cost allocation procedures."[59] Paragraph 67 of the December Order required the Joint Filing Parties to make "revisions to Article 4 of the Development Agreement to clarify that all alternative regulated transmission solutions will be evaluated for interconnection under Attachments X and S of the NYISO OATT, regardless of whether the entity developing the solution is a Transmission Owner signatory to the NYISO Transmission Owners Agreement or a nonincumbent transmission developer."[60] In addition, the Commission directed the Filing Parties "to further revise Article 4 to clarify that Responsible Transmission Owners developing regulated backstop solutions will also be evaluated for interconnection under Attachments X and S."[61]

Notwithstanding, the December Order also stated that the NYISO need not necessarily use its existing Attachment X and S processes for these purposes. Specifically:

> [T]o the extent the Filing Parties propose a not unduly discriminatory or preferential process other than the process in Attachments X and S for conducting the interconnection studies necessary for NYISO to select the more efficient or cost-effective transmission solution in the regional transmission plan for purposes of cost allocation, and for that selected transmission project to interconnect to NYISO's system, we will address that proposed process in the order addressing the compliance filing ordered herein.[62]

The NYISO interprets the language quoted above as applying to the directives in Paragraph 67. That is, the NYISO understands that it may propose that alternative regulated transmission solutions and regulated backstop solutions be evaluated using processes other than those established under Attachments X and S. The NYISO is considering proposing such an

[59] December Order at n. 157.

[60] December Order at P 67.

[61] *Id.*

[62] December Order at P 73.

alternative new process in its compliance filing. The NYISO therefore asks, out of an abundance of caution, that the Commission confirm that the NYISO's interpretation of Paragraph 67 and the language quoted above is correct.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc., respectfully requests that the Commission grant rehearing and clarification of the December Order as specified above.

Respectfully submitted,

s/Ted J. Murphy
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Counsel to the NYISO

January 27, 2016

Cc:
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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 Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Rensselaer, NY this 27th day of January 2016.

/s/ Joy A. Zimberlin

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