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August 22, 2011

VIA ELECTRONIC FILING

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

Re: Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, Docket No. RM10-23-001; Rehearing Request of New York Independent System Operator, Inc.

Dear Secretary Bose:

Transmitted electronically for filing in the referenced docket is the Rehearing Request of New York Independent System Operator, Inc.

If there are any questions concerning this filing, please call me at (202) 661-2212.

Very truly yours,

/s/ Daniel R. Simon

Daniel R. Simon
Counsel for
New York Independent System Operator, Inc.

Enclosure

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities	**Docket No. RM10-23-001**

REHEARING REQUEST OF NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"), 18 C.F.R. § 713 (2011), the New York Independent System Operator, Inc. (the "NYISO") hereby requests rehearing of Order No. 1000,[1] which the Commission issued on July 21, 2011.

I. INTRODUCTION AND SUMMARY

Designed to further reform the transmission planning and cost allocation requirements established in Order No. 890, Order No. 1000 imposes new requirements on public and non-public utilities to participate in regional transmission planning processes that include certain regional cost allocation methods and adds new rules addressing interregional cost allocation. Relevant to this rehearing request, Order No. 1000 held that the Commission has the authority to require the allocation of interregional transmission costs to entities that incidentally benefit (to an undefined extent) from transmission facilities, but that neither take transmission service from nor have a contractual or formalized customer relationship with, the entity that owns and is proposing to charge for the transmission facilities. In particular, Order No. 1000 declares that "the Commission's jurisdiction is clearly broad enough to allow it to ensure that *all beneficiaries*

[1] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011) ("Order No. 1000").

of services provided by specific transmission facilities bear the costs of those benefits *regardless of their contractual relationship* with the owner of those transmission facilities."[2] The Commission bases this conclusion on its understanding that, under the Federal Power Act, the Commission has jurisdiction over the provision of transmission service, not certain types of transactions:

> Section 201(b)(1) of the FPA gives the Commission jurisdiction over "the transmission of electric energy in interstate commerce." The Commission's jurisdiction therefore extends to the rates, terms and conditions of transmission service, rather than merely transactions for such transmission service specified in individual agreements. Moreover, section 201(b)(1) gives the Commission jurisdiction over "all facilities" for the transmission of electric energy, and this jurisdiction is not limited to the use of those transmission facilities within a certain class of transactions. As a result, the Commission has jurisdiction over the use of these transmission facilities in *the provision of transmission service*, which includes consideration of the benefits that any beneficiaries derive from those transmission facilities in electric service regardless of the specific contractual relationship that the beneficiaries may have with the owner or operator of these transmission facilities.[3]

In this quoted section of the Order, the Commission argues that if a jurisdictional transmission facility provides some undefined "benefit" to "beneficiaries," then the facility's

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[2] *Id.* at P 531 (emphasis added). The Commission apparently does not exercise this authority in Order No. 1000, which limits the new cost allocation principles to entities that do in fact have a customer or contractual relationship with one another, such as through inclusion of transmission facilities in regional and interregional transmission plans with the consent of the affected transmission owners. Nevertheless, in order to preserve its rights to raise this issue on review of this or other proceedings where transmission cost allocation issues are pending or may be raised, the NYISO seeks rehearing of the Commission's assertion of authority in Order No. 1000. *See, e.g., New York State Elec. & Gas Corp. v. Saranac Power Partners, L.P.*, 117 F. Supp. 2d 211, 238 (N.D.N.Y. 2000) ("Indeed, the court found that if plaintiffs failed to pursue their remedies of judicial review [within 60 days of rule promulgation], they did so 'at the peril of losing the right ever to challenge the validity of [FERC]'s regulations.' [citing *American Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226, 1232 n.26 (D.C. Cir. 1982)]").

[3] *Id.* at P 532 (emphasis added).

owner is providing Commission-jurisdictional "transmission service" to those beneficiaries. In addition, although the Commission limited the cost allocation provisions of Order No. 1000 to new transmission facilities, the discussion in Order No. 1000 arguing that the Commission has authority to require any beneficiary to pay for transmission facilities does not distinguish between new and existing facilities.

For the reasons set forth below, the NYISO explains how Order No. 1000's extremely broad claims of the Commission's statutory authority exceed its jurisdiction under the Federal Power Act, and diverge from Commission precedent without a reasoned explanation.

II. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure, the NYISO requests rehearing of the following issues:

- Whether Section 205 of the Federal Power Act permits the filing or acceptance of a rate filing where the filing utility does not provide transmission service to, or have a contractual or customer relationship with, the entities to which the rate will be charged. *See, e.g.*, *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968); *Midwest Independent Transmission System Operator, Inc.*, Order on Initial Decision, 131 FERC ¶ 61,173 (2010); *Commonwealth Edison Co.*, 129 FERC ¶ 61,298 (2009).

- Whether any entity that "benefits" from certain transmission facilities necessarily receives Commission-jurisdictional transmission service under the Federal Power Act from the facilities' owner. *See, e.g.*, Section 201(b) of the Federal Power Act, which grants the Commission jurisdiction over the transmission of electric energy in interstate commerce, *not* over all benefits produced by facilities that are subject to the Commission's jurisdiction.

III. SPECIFICATION OF ERROR AND REQUEST FOR REHEARING

The NYISO specifies that the Commission erred in concluding that "the Commission's jurisdiction is broad enough to allow it to ensure that beneficiaries of service provided by specific transmission facilities bear the costs of those benefits regardless of their contractual

relationship with the owner of those transmission facilities."[4] Specifically, a public utility under Section 205 of the Federal Power Act cannot require all beneficiaries of specific transmission facilities to bear the costs of those facilities regardless of whether a customer or other contractual relationship exists between the beneficiary and the owner of those transmission facilities, and the Commission cannot accept a utility's filing to collect those costs. The NYISO also specifies that the Commission erred in concluding that the Federal Power Act permits a rate filing to require an entity to pay for transmission facilities simply for receiving a "benefit" from the construction or existence of such facilities, where the beneficiary does not receive transmission service from the facilities' owner.

For these reasons, the Commission should remove these conclusions from Order No. 1000, because their removal would not undermine legally the cost allocation principles articulated in the Order's final rule.

A. Section 205 Filings Must Be Premised on a Customer or Other Contractual Relationship Between the Filing Utility and the Ratepayer

Judicial and Commission precedent dictate that a Section 205 rate filing requires a customer or other contractual relationship between the filing utility and the ratepayer. As explained by the U.S. Supreme Court in *In re Permian Basin Area Rate Cases* ("*Permian Basin*"), this follows from the principle that "[t]he regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies…."[5] If an

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4 *Id.* at P 539.

5 *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968). *Permian Basin* addressed rate filings under the Natural Gas Act. However, the "filing and rate-revision provisions of the Federal Power Act 'are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act.' *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353, 76 S. Ct. 368, 371-372, 100 L. Ed. 388, 394 (1956); *see also Permian Basin Area Rate Cases* (Continental Oil Co. v. FPC), supra note 36, 390 U.S. at 821, 88 S. Ct. at 1388, 20 L. Ed. 2d at 366; *Richmond Power & Light v. FPC*, 156 U.S. App. D.C. 315, 317, 481 F.2d 490, 492, cert. denied, 414 U.S. 1068, 94 S.

(continued...)

entity does not take jurisdictional service as a customer from a utility under a contractual relationship, or if there is no other voluntary contractual agreement (such as an RTO agreement) by which charges can be assessed to an entity by a utility, application of the *Permian Basin* principle means that the Federal Power Act's "regulatory system" provides no authority for a utility to file for collection of a rate from the unrelated entity. Under that same principle, the Commission lacks authority to accept a Section 205 filing proposing to allocate costs to non-customers and entities with which the pertinent utility does not have a contractual agreement, regardless of any incidental benefits such entities may receive from a particular transmission facility.

Commission precedent has long recognized that Section 205 of the Federal Power Act requires the existence of contractual relationships between a utility and its customers, and the Commission has rejected rate filings that contravene this basic principle. Consistent with the contractual context of Federal Power Act regulation, the Commission has as a matter of course included customer-specific agreements in its *pro forma* tariffs that clearly establish a contractual relationship before a customer may be required to pay for transmission service.

As recently as May 2010,[6] the Commission reversed a finding of an initial ALJ decision that the Midwest Independent Transmission System Operator ("MISO") could collect the Seams Elimination Charge/Cost Adjustment/Assignment ("SECA") transmission-related charges from a retail load-serving entity (Green Mountain) that was not a MISO transmission customer or

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(...continued)

Ct. 578, 38 L. Ed. 2d 473 (1973)." *Cleveland v. Federal Power Comm'n*, 525 F.2d 845, 855 (D.C. Cir. 1976).

6 *See Midwest Independent Transmission System Operator, Inc.*, Order on Initial Decision, 131 FERC ¶ 61,173 (2010) ("*Green Mountain*").

market participant, even though Green Mountain benefitted from the transmission service that MISO provided by receiving transmission service through its affiliate, BP Energy, as an intermediary.

To facilitate collection of SECA charges, MISO filed with the Commission an unexecuted service agreement with Green Mountain. Green Mountain argued that the proposed Schedule 22 through which MISO would collect the SECA charges exceeded the Commission's jurisdiction because it sought to apply charges to non-customers on an involuntary basis.[7] The Presiding ALJ rejected Green Mountain's argument that the Commission lacked the necessary jurisdiction to accept Schedule 22.[8] Although acknowledging that Green Mountain was not a MISO "Transmission Customer," the ALJ found Green Mountain should pay the SECA charges because it nevertheless benefitted from MISO transmission service:

> Under these contractual arrangements BP Energy passed through all energy transmission costs and other direct costs incurred by BP Energy related to the sale of power to Green Mountain. Since the procurement of network transmission service was for the benefit of Green Mountain and its financial responsibility, Green Mountain is the entity that paid transmission costs and should pay SECAs. Thus, Green Mountain is a Customer under the Midwest ISO TEMT and the Midwest ISO's filing of unexecuted service agreements on Green Mountain's behalf was proper.[9]

In its Brief on Exceptions, Green Mountain argued that "the Commission does not have statutory authority to authorize [MISO] to bill Green Mountain for SECA charges under

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7 *Midwest Indep. Transmission Sys. Operator, Inc.*, Initial Decision, 116 FERC ¶ 63,030 at P 530 (2006).

8 *Id.* at P 569 ("Green Mountain's assertion that the Commission lacks the necessary jurisdiction to allow the Midwest ISO to assess it a SECA under Schedule 22 is also rendered moot by the finding above. As discussed above, Green Mountain is a LSE. Again, Green Mountain's argument that Schedule 22 does not apply to it because it is not a Transmission Customer or Market Participant is irrelevant.").

9 *Id.* at P 563.

Schedule 22 because it was never a transmission customer of [MISO]."[10] Ultimately, the Commission rejected the Initial Decision's finding that Green Mountain must pay for SECA charges as a beneficiary, regardless of the absence of a contractual or customer relationship. As the Commission explained:

> We disagree with the Initial Decision's finding that "[s]ince the procurement of network transmission service was for the benefit of Green Mountain and its financial responsibility, Green Mountain is the entity that paid transmission costs and should pay SECAs." Thus, we will reverse the Initial Decision's conclusions that Green Mountain is a "customer" under the Midwest ISO tariff and that Midwest ISO properly filed unexecuted service agreements on Green Mountain's behalf pursuant to Schedule 22.[11]

The Commission did not dispute the finding that Green Mountain benefited from MISO transmission service. Rather, the Commission recognized that it could not require a beneficiary of certain transmission facilities to pay for those facilities in the absence of a customer or contractual relationship with the transmission provider.[12] The approach in *Green Mountain* was correct, and clearly conflicts with the assertion in Order No. 1000 that any beneficiary may be required to pay for transmission facilities, without regard to whether a transmission customer or other contractual relationship exists. In the absence of a customer relationship or contract, the Commission simply has no jurisdictional basis to accept a rate filing to recover costs from an asserted beneficiary.

The Commission's decision in *Commonwealth Edison Co.* ("*Commonwealth Edison*") reflected the principles announced by the Supreme Court in *Permian Basin* and followed by the

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[10] *Green Mountain* at P 409 (paraphrasing Green Mountain's Brief on Exceptions).

[11] *Id.* at P 421.

[12] *Id.* at PP 422-23 (finding that BP Energy was responsible for the SECA charges because it constituted the MISO transmission service customer, even though Green Mountain benefitted from that service).

Commission in *Green Mountain*.[13] In *Commonwealth Edison*, the Commission rejected the filing by Commonwealth Edison ("ComEd") – a transmission owner that had departed MISO – of a proposed rate schedule to ComEd's own tariff. The rate schedule proposed to assign to another utility (Ameren) credits accruing to ComEd when ComEd took transmission service from MISO. The rate schedule provided that Ameren could use the credits that ComEd accrued to offset the capital cost component of future MISO administrative charges.

Section 4 of ComEd's proposed rate schedule stated that the Commission's acceptance would "constitute direction to Midwest ISO to charge its administrative costs to [Ameren] pursuant to Schedule 10-A of the Midwest ISO [Tariff], rather than under Schedule 10 of the Midwest ISO [Tariff]."[14] Protestors, including MISO, asserted that this new rate schedule would have the effect of raising rates payable by other MISO transmission customers under a MISO rate schedule. In essence, ComEd's proposed rate schedule would have imposed increased charges on entities with which ComEd had no direct contractual or customer relationship.

The Commission's order summarily rejected Section 4 of ComEd's proposed rate schedule, acknowledging that only through Section 206 of the Federal Power Act could the Commission approve ComEd's request to amend the tariff of another entity (*i.e.*, MISO).[15]

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[13] *Commonwealth Edison Co.*, 129 FERC ¶ 61,298 (2009), *order on reh'g*, 132 FERC ¶ 61,268 (2010).

[14] *Id.* at P 6.

[15] *Id.* at P 27 ("Further, we reject section 4 of the proposed rate schedule, which states that our acceptance of the [ComEd] rate schedule shall constitute direction to the Midwest ISO to charge its administrative costs to Ameren pursuant to Schedule 10-A of the Midwest ISO Tariff…. In the meantime, ComEd and/or Ameren may exercise their right under section 206 of the Federal Power Act to seek to enforce the Midwest ISO Tariff, or amend it if necessary, to recognize the assignment.").

Thus, the Commission in *Commonwealth Edison* implicitly agreed that it is *ultra vires* for one utility to make a filing under Section 205 to assign costs to non-customers.[16]

Order No. 1000 departs from the lawful approach that the Commission has followed previously. In Order No. 1000 the Commission declares that it can require all entities that "benefit" from a particular transmission facility (new or previously existing) to bear a portion of its costs. Even if this approach were lawful, Order No. 1000 unlawfully deviates from prior Commission policy without adequate explanation.[17] The NYISO therefore seeks rehearing and respectfully requests the Commission to remove from Order No. 1000 its assertion that rate filings under Section 205 of the Federal Power Act may impose transmission facility costs on an entity that does not take transmission service through a customer or contractual relationship with the filing public utility. Removing this unnecessary assertion would not undermine the legal basis for the final rules promulgated in Order No. 1000, as the cost allocation principles reflected in those rules specifically exclude the right of a transmission provider to impose costs involuntarily, both within and across regions.

B. The Commission Erred in Determining that Any Entity that "Benefits" from a Facility Necessarily Receives Commission-Jurisdictional Transmission Service Under the Federal Power Act from the Facility's Owner

Order No. 1000 explains that a transmission provider may recover the costs it incurs for constructing transmission facilities from any bulk-power system users that somehow "benefit" from their construction, even without demonstrating that the beneficiary receives transmission

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16 *Id.* at P 17 (summarizing MISO's protest).

17 *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 960 (D.C. Cir. 2007) ("FERC may not depart from its own precedent without a reasoned explanation." (citing *Dominion Res., Inc. v. FERC*, 286 F.3d 586, 592 (D.C. Cir. 2002))).

service from the filing utility.[18] Because this conclusion is inconsistent with the scope of the Commission's jurisdiction under Section 201(b) of the Federal Power Act, the NYISO seeks rehearing.

Part II of the Federal Power Act applies to "the transmission of electric energy in interstate commerce …."[19] It provides the Commission "jurisdiction over all facilities for such transmission …."[20] Order No. 1000 interprets these provisions together as providing the Commission "jurisdiction over the use of these transmission facilities in the provision of transmission service,"[21] and the NYISO does not take issue with that assertion. Order No. 1000, however, unlawfully leaps to the conclusion that any entity that purportedly benefits from a new or existing transmission facility is somehow receiving jurisdictional transmission service. The Commission's assertion that its jurisdiction "includes consideration of the benefits that any beneficiaries derive from those transmission facilities in electric service regardless of the specific contractual relationship that the beneficiaries may have with the owner or operator of these transmission facilities"[22] cannot be reconciled with the actual receipt of *transmission service* required to facilitate an entity's need to purchase or sell generation.

Due to the interconnected nature of the transmission system, transmission facilities may provide some greater or lesser degree of "benefit" to a broad range of bulk-power system users. However, showing that an entity receives some incidental "benefit" – based on a standard that

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18 Order No. 1000 at PP 531-32.

19 *See* Section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1).

20 *Id.*

21 Order No. 1000 at P 532.

22 *Id.*

the Commission has not yet articulated – from a new or existing transmission facility does not prove that the entity is receiving Commission-jurisdictional transmission service over that facility.

For example, a Balancing Authority Area might arguably "benefit," through reduced congestion, when a neighboring system constructs a new transmission facility to help serve its own load more reliably. In particular, the new facility may reduce loop flow impacts on the neighboring system that the constructing utility had caused. Under the described circumstances, in the absence of a voluntary contractual agreement between the two transmission providers allocating transmission rights, permitting the transmission provider that constructed the upgrade to charge its neighbor for a portion of the cost of its new facility has no rational basis. Until the date that the transmission owner constructed the upgrade, the constructing transmission owner had used (and therefore benefitted from) its neighbor's transmission system, but the neighbor had never charged the constructing transmission owner for its unscheduled use. The transmission upgrade merely reduced the constructing transmission provider's reliance on its neighbor's transmission system. The Federal Power Act would not allow the Commission to conclude under these facts that the neighbor took or is taking Commission jurisdictional transmission service over the constructing transmission owner's transmission system, or over the newly constructed facilities *even though* the construction of the new transmission facilities reduced congestion on the neighbor's transmission system. Contrary to the conclusions reached in Order No. 1000, the Federal Power Act's grounding in "transmission service" would not allow a public utility to require a neighboring system that does not receive "transmission service" to nevertheless pay for facilities from which the Commission might determine that it technically "benefits."

The NYISO, therefore, seeks rehearing of Order No. 1000's determination that the Commission has the authority under the Federal Power Act to allow a public utility to charge rates to an entity that, although perhaps receiving some quantifiable benefit from a new transmission facility, does not receive transmission service from the transmission provider that constructed the transmission facility. As with the NYISO's other specification of error, removing this unnecessary determination from Order No. 1000 would not undermine the legal basis for the final rules promulgated therein, as the cost allocation principles reflected in those rules specifically exclude the right of a transmission provider to impose costs involuntarily, both within and across regions.

IV. CONCLUSION

For the reasons stated herein, the NYISO asks the Commission to grant rehearing of Order No. 1000 and hold that Section 205 of the Federal Power Act does not permits the filing or acceptance of a rate filing where the filing utility does not provide transmission service to, or have a contractual or customer relationship with, the entities to which the rate will be charged. The NYISO also asks the Commission to grant rehearing of Order No. 1000 and hold that any entity that "benefits" from certain transmission facilities does not necessarily receive Commission-jurisdictional transmission service under the Federal Power Act from the facilities' owner. In the alternative, for the reasons explained herein, the Commission should simply remove from Order No. 1000 the aforementioned jurisdictional assertions.

Respectfully submitted,

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Dated: August 22, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this 22nd day of August, 2011.

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