

127 FERC ¶ 61,136  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

New York Independent System Operator, Inc.

Docket No. OA08-52-003

ORDER DENYING LATE INTERVENTION AND DISMISSING REHEARING  
REQUEST

(Issued May 15, 2009)

1. In this order, the Commission denies a motion by the American Antitrust Institute, the American Public Power Association, and the National Rural Electric Cooperative Association (collectively, Movants) for late intervention in this proceeding and dismisses Movants' request for rehearing of an order on rehearing issued in this proceeding on March 31, 2009.<sup>1</sup>

**Background**

2. In its March 31, 2009 Order, the Commission granted, in part, and denied, in part, rehearing of its October 16, 2008 Order<sup>2</sup> which conditionally accepted the New York Independent System Operator, Inc.'s (NYISO's) filing of its transmission planning process as in compliance with Order No. 890. The Commission, *inter alia*, addressed the New York Regional Interconnect, Inc.'s (NYRI's) argument that NYISO's supermajority voting provision is anticompetitive and violates antitrust law. The Commission denied rehearing in regard to the supermajority voting procedure and found that NYRI's argument, that a violation of antitrust laws would occur if a group of load serving entities (LSEs) with a combined benefit load of 21 percent were to vote against a project, was speculative.<sup>3</sup> The Commission added that it is not charged with enforcing antitrust laws.

---

<sup>1</sup> *New York Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,320 (2009) (March 31, 2009 Order).

<sup>2</sup> *New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,068 (2008) (October 16, 2008 Order).

<sup>3</sup> March 31, 2009 Order, 126 FERC ¶ 61,320 at P 39.

The Commission disagreed with NYRI's assertion that expensive transmission projects cannot be funded outside of NYISO's cost allocation process and listed examples of long-term firm transmission contracts with merchant transmission developers.<sup>4</sup> The Commission concluded that NYISO's supermajority voting does not foreclose potential competition.<sup>5</sup>

### **Movant's Filing**

3. On April 16, 2009, Movants filed a motion to intervene out-of-time and a request for rehearing of the March 31, 2009 Order. In support of their motion to intervene out-of-time, Movants state that the Commission did not make clear in this proceeding, until it issued its March 31, 2009 Order, its current view that it could dismiss antitrust allegations without any consideration on grounds that it had no jurisdiction to enforce the antitrust laws. Movants argue that, given what they believed was settled law concerning the Commission's obligation to consider antitrust issues raised in its proceedings, they had no reason to seek to participate in this proceeding at an earlier stage. They further argue that no party would be unduly prejudiced by the grant of intervention at this stage of the proceedings.

4. In support of their request for rehearing, Movants state that they take no position on the merits of the antitrust issues raised by NYRI, but that the Commission was not free to dismiss NYRI's contentions without considering them. Movants add that the Commission's lack of authority to enforce the antitrust laws does not relieve it of what the Commission has described as its "general obligation to give reasoned consideration to the bearing of antitrust policy on matters within its jurisdiction."<sup>6</sup> Movants argue that the courts have determined that antitrust policy is an integral part of the public interest equation for agencies overseeing a wide range of regulated industries,<sup>7</sup> that a public interest standard is embodied in the Federal Power Act, and that the Commission is obliged under a public interest standard to consider evidence of antitrust violations.<sup>8</sup>

---

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Electric Rates; Construction Work in Progress; Anticompetitive Implication*, Order No. 474, FERC Stats. & Regs. ¶ 30,751, at 30,708 (1987).

<sup>7</sup> *Citing Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 960–63 (D.C. Cir. 1968); *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758–59 (1973).

<sup>8</sup> *Citing Otter Tail Power Co. v. United States*, 410 U.S. 366, 374–75 (1973); *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 244 (1968).

Movants urge the Commission to vacate the sentence stating that the Commission is not charged with enforcing antitrust laws as well as the accompanying footnote 31. Movants assert that failure to do so will cast into substantial doubt decades of well-settled case law regarding the Commission's responsibilities to consider antitrust-related claims in carrying out its statutory responsibilities under the Federal Power Act.

### **Discussion**

5. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), we will deny Movants' late motion to intervene in this proceeding for failure to demonstrate good cause warranting late intervention. When late intervention is sought after the issuance of a dispositive order (in this instance, in fact, two dispositive orders – the October 16, 2008 Order and the March 31, 2009 Order), the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, Movants bear a higher burden to demonstrate good cause for granting such late intervention.<sup>9</sup> Movants have not met this higher burden of justifying their late intervention.

6. Movants are not a party to this proceeding. Pursuant to section 313(a) of the Federal Power Act, 16 U.S.C. § 825(a) (2006), only parties to a proceeding may seek rehearing of an order issued in the proceeding; hence, we dismiss the request for rehearing. We note, however, that our order addressed the substantive issues raised by Movants. We accurately stated, consistent with longstanding Commission precedent, that the Commission is not charged with enforcing and so does not enforce the antitrust statutes.<sup>10</sup> However, we agree with Movants that we do have a responsibility “to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of

---

<sup>9</sup> See, e.g., *Midwest Indep. Transmission Sys. Operator., Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

<sup>10</sup> See, e.g., *Entergy Services, Inc.*, 64 FERC ¶ 61,326, at 63,404-05 (1993) (“the Commission does not have jurisdiction to determine violations of the antitrust laws. . . and is not ‘strictly bound to the dictates of these laws’”); accord *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 960-61 (D.C. Cir. 1968)(same); *Northeast Utilities Service Co.*, Opinion No. 364, 56 FERC ¶ 61,269, at 61,998 (1991)(same), *order on reh’g*, Opinion No. 364-A, 58 FERC ¶ 61,070, *order denying reh’g*, Opinion No. 364-B, 59 FERC ¶ 61,042 (1992), *aff’d in relevant part*, 993 F.2d 937 (1st Cir. 1993)(noting that section 203 of the Federal Power Act makes “no explicit reference to antitrust policies or principles” and that there is “no evidence that Congress sought to have the Commission serve as an enforcer of antitrust policy in conjunction with the Department of Justice and the Federal Trade Commission”).

interstate utility operations,”<sup>11</sup> and “to give reasoned consideration to the bearing of antitrust policy on matters within [our] jurisdiction.”<sup>12</sup> Contrary to Movants assertion, we did consider such matters here. We found NYRI’s contention of possible future antitrust violations to be speculative. We also identified examples of LSEs using merchant transmission providers and the existence of long-term firm transmission contracts with merchant transmission developers as evidence of transmission projects that can be funded outside of NYISO’s cost allocation processes. Accordingly, we found that the supermajority voting procedure does not foreclose competition.<sup>13</sup> Finally, we note that we have required reports on votes on economic projects, allowing the Commission to monitor the supermajority voting mechanism.<sup>14</sup>

---

<sup>11</sup> *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758-59 (1973); accord *Pacific Gas and Electric Co.*, 77 FERC ¶ 61,265, at 62,088 (1996)(the Commission has “a responsibility to consider, in appropriate circumstances, anticompetitive effects”); *Northeast Utilities Service Co.*, Opinion No. 364, 56 FERC ¶ 61,269, at 61,998 (1991)(same), *order on reh’g*, Opinion No. 364-A, 58 FERC ¶ 61,070, *order denying reh’g*, Opinion No. 364-B, 59 FERC ¶ 61,042 (1992), *aff’d in relevant part*, 993 F.2d 937 (1st Cir. 1993) (noting that “[a]ntitrust considerations are, of course, relevant in [the Commission]’s consideration of the ‘public interest’ in merger proposals,” but that the Federal Power Act “does not require FERC to analyze proposed mergers under the same standards that the Department of Justice. . . must apply.” And the Commission “must include antitrust considerations in its public interest calculus under the [Federal Power Act],” although it “is not bound to use antitrust principles when they may be inconsistent with the Commission’s regulatory goals.”).

<sup>12</sup> *Alabama Power Co. v. Federal Power Com.*, 511 F.2d 383, 393 (D.C. Cir. 1974).

<sup>13</sup> March 31, 2009 Order, 126 FERC ¶ 61,320 at P 39.

<sup>14</sup> *Id.* P 38.

The Commission orders:

(A) Movants' motion for late intervention is hereby denied, as discussed in the body of this order.

(B) Movants' request for rehearing is hereby dismissed, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.