

140 FERC ¶ 61,110
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

New York Independent System Operator, Inc.

Docket Nos. ER11-3949-005
ER11-3951-001

ORDER ON COMPLIANCE

(Issued August 6, 2012)

1. On April 30, 2012, New York Independent System Operator, Inc. (NYISO) proposed tariff revisions in response to the directives in Order Nos. 741 and 741-A.¹ Specifically, NYISO submitted proposed revisions to the NYISO Market Administration and Control Area Services Tariff (Services Tariff), Open Access Transmission Tariff (OATT), the Agreement Between New York Independent System Operator And Transmission Owners (ISO-TO Agreement), and the Agreement Between The New York System Operator And New York State Reliability Council (ISO-NYSRC Agreement). NYISO states that the revisions clarify NYISO's role as the single counterparty to Market Participant transactions, establish that NYISO will take title to the products that are the subject of the transactions it administers, and enhance NYISO's protections against financial losses due to the bankruptcy of a Market Participant. NYISO requests an effective date of July 1, 2012.

2. As discussed in this order, the Commission finds that NYISO's proposed revisions comply with the requirements set forth in Order Nos. 741 and 741-A. Accordingly, we accept NYISO's proposed tariff revisions, effective July 1, 2012, as requested.

I. Background

3. In Order No. 741, the Commission adopted reforms to strengthen the credit policies used in organized wholesale electric power markets. Citing its statutory responsibility to ensure that all rates charged for the transmission or sale of electric

¹ *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, FERC Stats. & Regs. ¶ 31,317 (2010), *order on reh'g*, Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 (2011), *order denying reh'g*, Order No. 741-B, 135 FERC ¶ 61,242 (2011).

energy in interstate commerce are just, reasonable, and not unduly discriminatory or preferential,² the Commission directed regional transmission organizations (RTO) and independent system operators (ISOs) to revise their tariffs to reflect the following reforms: implementation of shortened settlement timeframes, restrictions on the use of unsecured credit, elimination of unsecured credit in all financial transmission rights (FTR) or equivalent markets, clarification of legal status to continue the netting and set-off of transactions in the event of bankruptcy, establishment of minimum criteria for market participation, clarification regarding the organized markets' administrators' ability to invoke "material adverse change" clauses to demand additional collateral from market participants, and adoption of a two-day grace period for "curing" collateral calls. The Commission directed each RTO and ISO to submit tariff changes by June 30, 2011, with an effective date of October 1, 2011. In Order No. 741-A, the Commission extended the deadline for complying with the requirement regarding the ability to offset market obligations to September 30, 2011, with the relevant tariff revisions to take effect January 1, 2012. The Commission subsequently extended the deadline for complying with that requirement to April 30, 2012.

4. On June 30, 2011, in Docket No. ER11-3949-000, as corrected on July 5, 2011, in Docket No. ER11-3949-001, NYISO proposed revisions to the Services Tariff, including revisions to Services Tariff section 26 of Attachment K, and the NYISO OATT in response to the directives in Order Nos. 741 and 741-A. Also on June 30, 2011, in a Supplemental Filing in Docket No. ER11-3951-000, NYISO filed proposed corresponding revisions to its ISO Agreement in accordance with the requirements of Order No. 741. For both dockets, the proposed revisions: (1) established billing and settlement periods of no more than seven days each; (2) limited the amount of unsecured credit extended to any one market participant or affiliated group of market participants to \$50 million; (3) eliminated unsecured credit for financial transmission rights markets; (4) established minimum participation criteria for market participants related to financial risks; (5) provided examples of circumstances that may justify NYISO's invocation of the "material adverse change" provision of its creditworthiness policy; and (6) limited to no more than two days the time period permitted for a market participant to meet a collateral call.

5. In an order issued September 15, 2011, the Commission determined that NYISO's proposed revisions complied with the requirements set forth in Order Nos. 741 and 741-A with limited exceptions.³ The first exception was NYISO's proposal to treat as cash

² 16 U.S.C. §§ 824d, 824e (2006).

³ *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,193 (2011) (Initial Compliance Order), *reh'g denied sub nom. PJM Interconnection, L.L.C., et al.*, 138 FERC ¶ 61,182 (2012).

collateral a net receivable amount. Acceptance of this proposal was conditioned upon acceptance of NYISO's future filing regarding the ability to offset market obligations.⁴ The Commission also conditionally accepted NYISO's minimum participation criteria, but found that an annual risk management policy certification was insufficient to ensure the protection of the markets, and therefore required NYISO to develop a periodic verification compliance process to independently verify that risk management policies and procedures are actually being implemented and that adequate capitalization is being maintained.

6. On December 14, 2011, NYISO submitted a filing to comply with the directive in the Initial Compliance Order to develop a periodic verification compliance process that will allow NYISO to independently verify that risk management policies and procedures are actually being implemented by Market Participants and that adequate capitalization is being maintained. In an order issued March 15, 2012, the Commission rejected NYISO's proposed periodic verification compliance process and directed NYISO to submit a new proposal within 60 days.⁵ On April 5, 2012, NYISO submitted a new proposed periodic verification compliance process, which was accepted by delegated letter order on May 9, 2012.⁶ On April 30, 2012, NYISO submitted the compliance filing of issue in this proceeding.

II. Notice of Filing and Responsive Pleadings

7. Notice of NYISO's April 30, 2012 compliance filing was published in the *Federal Register*, 77 Fed. Reg. 80,357 (2012), with protests and interventions due on or before May 14, 2012.⁷ Motions to intervene were timely filed by New York Association of Public Power, PSEG Companies,⁸ EEI, and EPSA. A motion to intervene and protest was timely filed by Exelon Corporation. On May 29, 2012, NYISO, ISO New England

⁴ Initial Compliance Order at P 15.

⁵ *New York Independent System Operator, Inc.*, 138 FERC ¶ 61,186 (2012) (Second Compliance Order).

⁶ *New York Independent System Operator, Inc.*, Docket No. ER11-3949-004 (May 9, 2011) (delegated letter order).

⁷ On May 11, 2012, Edison Electric Institute (EEI) and Electric Power Supply Association (EPSA) jointly filed a motion requesting an extension of the comment deadline to May 29, 2012. In a notice issued on May 14, 2012, the deadline for comments was extended to May 21, 2012.

⁸ The PSEG Companies are composed of Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.

Inc. (ISO-NE), and Midwest Independent Transmission System Operator, Inc. (MISO) (collectively, Joint ISOs) filed a joint answer.

III. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the Joint ISO's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

a. Filing

10. NYISO proposes to add new Section 7.1.1 to the Services Tariff and new Section 2.7.1.1 to the OATT to establish that NYISO will be the contracting counterparty, in its own name and right, for the purchase or sale of any product or service, or for any other transaction, that is financially settled by NYISO under its tariffs. NYISO also proposes to revise current Sections 7.1, 7.2.3.3, 7.2.5-7.2.7, and 7.3 of the Services Tariff and Sections 2.7.1, 2.7.3.3.3, 2.7.3.4-2.7.3.7, and 2.7.4 of the OATT to clarify that Market Participants will make payments to and receive payments from NYISO, as the counterparty, through the ISO Clearing Account. To clarify that NYISO in its role as counterparty will hold title to the funds in the account used to settle transactions, NYISO also proposes to delete from these provisions language requiring NYISO to hold the funds in the ISO Clearing Account as trustee and prohibiting NYISO from taking title to such funds. NYISO proposes revisions to Section 3.04(g) of the ISO-TO Agreement and Section 3.3 of the ISO-NYSRC Agreement to allow NYISO to take title to products and services purchased and sold in the NYISO-administered markets to the limited extent required for NYISO to become the central counterparty to those transactions. NYISO proposes to add new Section 7.1.2 to the Services Tariff and new Section 2.7.1.2 to the OATT to require that amounts NYISO owes the Transmission Customer and amounts the Transmission Customer owes NYISO shall be netted such that the party owing the greater aggregate amount shall pay the other party the difference between the amounts owed. NYISO proposes to make related edits eliminating existing language regarding netting and setoff in current Sections 7.2.1 and 7.5.5 of the Services Tariff and Section 2.7.3.1 of the OATT.

11. To protect NYISO against insolvency in the event Market Participants do not timely pay in full amounts owed to NYISO for purchases, NYISO proposes to add new Section 2.7.1.4 to the Services Tariff and new Section 7.1.4 to the OATT to limit NYISO's liability for monies owed to Market Participants for a given settlement period to the amount NYISO recovers from Market Participants for that settlement period plus the amount of Market Participants' monies held by NYISO in its Working Capital Fund.

12. NYISO proposes the following additional changes to the Services Tariff and OATT: (1) clarifying in Section 27 of the OATT that NYISO may recover from Market Participants any bad debt loss resulting from non-payment of an obligation arising under the NYISO tariffs by a defaulting Market Participant; (2) clarifying Sections 27.1, 27.2, and 27.3 of the OATT to state that NYISO recovers bad debt losses from Market Participants through a Schedule 1 charge;⁹ (3) clarifying in Section 27.3 of the OATT that NYISO is permitted, but not obligated, to use the Working Capital Fund to pay Market Participants in full in the event of a shortfall resulting from a Market Participant payment default; (4) clarifying in Section 27.3 of the OATT the procedures followed in the event of a non-payment of Wholesale Transmission Services Charges (WTSC) and recovery of unpaid WTSC; (5) clarifying that, in Schedule 1, Section 6.1.4 of the OATT, NYISO has the right to recover the full amount of bad debt losses from Market Participants; (6) clarifying in Section 26.6 of the Services Tariff that collateral posted by a Market Participant is security for the prompt payment of any of the Market Participant's obligations to NYISO arising under the NYISO tariffs; and (7) clarifying in Section 7.5.3(i) of the Services Tariff and Section 2.7.5.3(i) of the OATT that NYISO, as the central counterparty, has the sole and exclusive right to initiate debt collection procedures against defaulting Market Participants. NYISO also proposes certain ministerial tariff revisions.

13. NYISO observes that the Commission has held that PJM Settlement, Inc. (PJM Settlement), an entity established by PJM Interconnection L.L.C (PJM) as the counterparty to transactions in the PJM markets, must have rate schedules on file "showing all rates and charges for any transmission or wholesale sales subject to the jurisdiction of the Commission," but that PJM Settlement is not subject to the requirements associated with obtaining or maintaining market based rate authority under section 205 of the Federal Power Act (FPA).¹⁰ NYISO maintains that, unlike PJM,

⁹ The Schedule 1 charge described in Section 6.1.2.2.2 of the OATT states that the responsibility for costs associated with bad debt losses shall be allocated pursuant to Attachment U to the OATT. Attachment U states that a declared bad debt loss shall be allocated *pro rata* to all Transmission Customers pursuant to a formula in Section 27.3.

¹⁰ NYISO April 30 2012 Filing at 6-7 (*quoting PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,205, at P 52 (2010)).

NYISO is not proposing to establish a separate entity to perform the counterparty function, so it does not propose a separate rate or fee or propose a rate schedule to govern its counterparty function. NYISO contends that the proposed tariff revisions, together with the existing tariff provisions, establish all of the non-rate terms and conditions related to NYISO's role as a single counterparty and thus, as revised, its tariffs will continue to satisfy the section 205 filing requirements with respect to all of its FPA-jurisdictional activities. NYISO further states that, like PJM, NYISO will merely be in the chain of title for wholesale sales of electric energy, capacity, and ancillary services but will not submit bids or offers as a market seller. It states that it will serve as counterparty to the bids and offers of market participants but will have no discretion to transact, or not transact, at prices of its choosing nor have any discretion regarding which transactions clear the NYISO-administrated markets or the prices at which they clear. Thus, NYISO states that, while it will be in the chain of title, it "will not be a 'seller' with discretion to sell at market-based rates as defined in the Commission's regulations."¹¹ NYISO states that it is therefore not requesting market-based rate authorization and requests that the Commission confirm that it is not required to do so. NYISO also states that it does not anticipate changing its practices related to Electric Quarterly Reports (EQRs), as it is not establishing a new corporate entity to serve as a single counterparty, and in light of the Commission's holdings with respect to PJM Settlement.¹² Finally, it states that it is not requesting a waiver of section 382.10 of the Commission's regulations¹³ regarding annual charges for public utilities.¹⁴

b. Protest

14. Exelon requests that the Commission condition acceptance of the proposed tariff revisions on NYISO providing more transparency regarding its methods of assessing and modeling the creditworthiness of NYISO members.¹⁵ Exelon states that NYISO's decision to act as the counterparty in all transactions settled in its market, rather than creating an affiliate as PJM did, potentially poses a risk to NYISO's solvency and, by

¹¹ NYISO April 30 2012 Filing at 7 (*citing PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,205, at P 60 (2010)). NYISO asserts that the specification of NYISO in the chain of title would not affect the applicability of market-based rate requirements to Market Participants. *Id.* n.10.

¹² NYISO April 30, 2012 Filing at 7.

¹³ 18 C.F.R. § 382.10 (2012).

¹⁴ *Id.* n.8.

¹⁵ Exelon's protest is directed to MISO and ISO-NE, as well as NYISO.

extension, to its members. Exelon contends that NYISO's proposed tariff revisions do not reflect the methods or models NYISO will use to manage this solvency risk. Further, Exelon argues that the proposed revisions do not explain how NYISO will manage cash and credit facilities to ensure its solvency in a stress case where a significant payment default by one of more NYISO members triggers demands by non-defaulting member counterparties for payment from NYISO.

15. To provide transparency and establish processes to ensure adequate liquidity and RTO/ISO solvency under a variety of stress conditions, Exelon requests that NYISO be required to disclose to its members the models and model inputs it uses to evaluate members' creditworthiness. It further proposes that NYISO be required to demonstrate its ability to remain solvent in stress test cases. Specifically, Exelon wants NYISO to: (1) release quarterly portfolio statistics, including a distribution table by counterparty credit rating and exposure of assessed credit risk (similar to those published by PJM and MISO), and credit lines of NYISO's top risks as identified by the NYISO Credit Department; (2) perform and publish verifiable stress tests specifically targeting forward financial products to ensure collateral adequacy; (3) release quarterly data on NYISO's working capital and backup credit facilities available to demonstrate to its members that its liquidity is sufficient to meet an adverse credit event under various stress tests; and (4) create a process whereby NYISO's Credit Policy Working Group ensures that NYISO members are aligned with NYISO's credit policy and that undue credit risks are mitigated. As examples, Exelon submits two credit exposure reports from MISO and PJM that it deems appropriate to meet the aforementioned transparency goals.

c. Joint ISOs' Answer

16. In their answer to Exelon's protest, Joint ISOs argue that the tariff revisions requested by Exelon are beyond the scope of the central counterparty compliance filings because the revisions do not pertain to clarifying the legal status of Joint ISOs to act as the single counterparty to market participant transactions. They also argue that Exelon is wrong to assert that Joint ISOs are exposing their respective Market Participants to additional risks that warrant additional protections by not creating an affiliate to serve as the central counterparty. They state that PJM and PJM Settlement, its affiliate, mutually guarantee the responsibilities, activities, assets, and liabilities of each other so that this solvency risk is equally borne by PJM as guarantor.¹⁶

17. Joint ISOs also state that they protect themselves against any such solvency risk by explicitly limiting their obligations to make payments to Market Participants to the amount of money received from Market Participants through charges, drawdowns, and

¹⁶ Joint ISOs' Answer at 4 (*citing PJM Interconnection, L.L.C.*, 133 FERC ¶ 61,277, at P 10 (2010)).

other recovery mechanisms.¹⁷ Moreover, Joint ISOs state that the risk of insolvency is further minimized because each of the RTO/ISOs has the explicit right under its tariff to recover any Market Participant payment default/bad debt loss and related costs from its other market participants.¹⁸

18. Joint ISOs also assert that the protections that Exelon seeks are redundant because each of the RTO/ISO's tariffs sets forth the methods the RTO/ISO uses to assess and model the creditworthiness of its Market Participants and the collateral requirements imposed prior to a Market Participant's participating in the market. Joint ISOs also argue that Exelon has not explained what it would do with information such as models and the inputs thereto, nor how such information would safeguard the markets.

d. Commission Determination

19. We find NYISO's proposals, including its proposals to establish itself as the counterparty in NYISO-Market Participant transactions and to require netting, comply with the requirements set forth in Order Nos. 741 and 741-A and in the Initial Compliance Order.¹⁹ The establishment of NYISO as a counterparty addresses ambiguity regarding the identity of contracting parties in NYISO transactions by clarifying that there is a single, specified counterparty to Market Participants. Further, establishing itself as a single counterparty clarifies the legal authority supporting netting. Thus, the proposals provide the clarity lacking in the current NYISO governing documents and associated tariffs. Furthermore, the proposals represent a reasonable solution to address a potential mutuality risk, and they also received substantial support from stakeholders. We will therefore accept NYISO's proposed tariff revisions, as discussed below.

20. We do not find persuasive Exelon's arguments that NYISO must adopt additional protections to improve transparency and establish processes to ensure adequate liquidity and ISO solvency under stress conditions. First, we disagree with Exelon that NYISO's

¹⁷ *Id.* at 5, n.12 (*citing* Sections 3.3 and 3.4 of the ISO-NE Billing Policy; NYISO OATT Section 27; Section 7 of the MISO Tariff).

¹⁸ *Id.* at 5, n.14 (*citing* Section II and III of the ISO-NE Financial Assurance Policy; NYISO Services Tariff Section 26.4-26.5; Attachment L of the MISO Tariff).

¹⁹ In the Initial Compliance Order we conditioned acceptance of NYISO's proposal to treat as cash collateral a net receivable amount on acceptance of NYISO's future filing regarding the ability to offset market obligations. Initial Compliance Order, 136 FERC ¶ 61,193 at P 15. With our acceptance of the instant filing, NYISO has satisfied that condition.

proposal to act as the central counterparty instead of establishing a separate affiliate to perform this function as PJM did potentially poses a risk to NYISO's solvency. This is because establishing a separate affiliate did not necessarily reduce risk to PJM. As Joint ISOs note, PJM is guarantor of PJM Settlement, its separate affiliate, and therefore is exposed to the same risks as PJM Settlement.²⁰ Further, NYISO protects itself against insolvency risk by explicitly limiting its obligations to make payments to Market Participants by limiting its liability for monies owed to Market Participants to the amount NYISO recovers from them for that settlement period plus the amount of Market Participants' monies held by NYISO in its Working Capital Fund. NYISO's risk of insolvency is additionally minimized because NYISO has the explicit right under its tariffs to recover any Market Participant payment default/bad debt loss and related costs from its other Market Participants.

21. We also disagree with Exelon that NYISO's Market Participants are exposed to new risks by NYISO becoming the central counterparty. NYISO and its members already are exposed to the risk that a Market Participant may be unable to satisfy its payment obligations to NYISO because, as we stated above, defaults under existing NYISO requirements are socialized among all Market Participants. Instead of creating a new or greater risk, NYISO is reducing Market Participant risk by having the ability to offset amounts that a Market Participant might avoid paying through bankruptcy, with amounts owed to it by becoming the central counterparty and thereby clarifying its legal status to net.

22. Accordingly, we will not require NYISO to adopt the protocols and processes recommended by Exelon. In addition, we agree with the Joint ISOs that the additional disclosures that Exelon seeks are for the most part redundant of those already in NYISO's tariffs, and it is unclear how the transparency protocols that Exelon requests would strengthen NYISO's market. Although we decline to require NYISO to adopt Exelon's proposed protocols and processes, we are open to subsequent efforts by market participants and NYISO to further strengthen its credit practices.

23. NYISO requests that the Commission confirm that it will not be subject to the regulations and requirements regarding market-based rate authorization and wholesale sale of electric energy, capacity, and ancillary services at market-based rates in its role as counterparty. Based on NYISO's representations regarding its proposed activities as counterparty in NYISO-Market Participant transactions, we find that NYISO does not need market-based rate authority under Part 35, Subpart H of our regulations since NYISO will have no discretion regarding which transactions clear the markets or the prices at which they clear pursuant to the NYISO tariffs and will not be a "market seller"

²⁰ *PJM Interconnection*, 132 FERC ¶ 61,207, *order on compliance*, 133 FERC ¶ 61,277, at P 10 (2010).

with discretion to sell at market-based rates. While NYISO will be in the chain of title, we agree that NYISO will simply be a facilitating counterparty to the bids and offers of other Market Participants with respect to pool transactions and will not be a market seller, and will not submit bids or make offers, and thus will not affect which transactions clear the markets or the prices at which they clear.

The Commission orders:

The Commission hereby accepts NYISO's proposed tariff revisions, effective July 1, 2012, as requested.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.