

126 FERC ¶ 61,068  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. ER08-1281-001

ORDER ON CLARIFICATION

(Issued January 28, 2009)

1. On August 21, 2008, the Commission accepted tariff sheets filed by the New York Independent System Operator, Inc. (NYISO) that, as an interim measure through November 18, 2008, precluded the scheduling of flows over eight different transmission paths for which there are more direct routing options.<sup>1</sup> On September 4, 2008, the New York Municipal Power Agency and Municipal Electric Utilities Association of New York (New York Municipals) requested clarification or, in the alternative, rehearing of the August 21, 2008 Order. Subsequently on September 22, 2008, the Long Island Power Authority, Central Hudson Gas & Electric Corporation, New York Power Authority, and Niagara Mohawk Power Corporation (Indicated Transmission Owners) also requested clarification of the Commission's August 21, 2008 Order. The Commission will grant in part and deny in part the requested clarifications as discussed below.

**Background**

2. On July 21, 2008, NYISO filed tariff sheets to implement proposed revisions to its Open Access Transmission Tariff (OATT) and its Market Administration and Control Area Services Tariff (Services Tariff) under the "exigent circumstances" provision of its Independent System Operator Agreement (ISO Agreement).<sup>2</sup> That provision of the ISO Agreement empowers the NYISO Board to direct NYISO to submit a Federal Power Act

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<sup>1</sup> *New York Independent System Operator, Inc.*, 124 FERC ¶ 61,174 (2008). (August 21, 2008 Order).

<sup>2</sup> ISO Agreement § 19.01s.

(FPA) section 205<sup>3</sup> filing without the concurrence of the NYISO's Management Committee in certain specified exigent circumstances, but states that such filing must expire no later than 120 days after it is filed with the Commission unless the Management Committee files a concurrence within the 120 day period. NYISO asserted that, since January 2008, an increasing amount of transactions had been scheduled by market participants around Lake Erie so that they would supposedly exit NYISO, be wheeled through the Independent Electricity System Operator of Ontario (IESO) and the Midwest Independent Transmission System Operator (MISO), and sink in PJM Interconnection, L.L.C. (PJM). However, NYISO stated that, in fact, approximately 80 percent of the power flowed over the common border between NYISO and PJM. NYISO stated that several market participants were scheduling transactions in these circuitous routes around Lake Erie to take advantage of differences in the way regional transmission organizations (RTOs) price transactions that exit their systems. NYISO stated that for a variety of reasons this type of scheduling caused market distortions and congestion and uplift costs. NYISO stated that its proposed tariff changes would not eliminate all loop-flow issues but that they would reduce unscheduled power flows.

3. On August 21, 2008, the Commission accepted the tariff sheets submitted by NYISO under the exigent circumstances provision of its ISO Agreement to be effective July 22, 2008, for a 120 day period terminating November 18, 2008.<sup>4</sup> The Commission also required NYISO to file a report by September 12, 2008, providing the status of the discussions with the Management Committee concerning its ratification of the filing.<sup>5</sup> The Commission also reserved the right to undertake further consideration of the tariff revisions at issue in the filing under FPA section 206.<sup>6</sup> Moreover, the Commission stated that its:

Office of Enforcement began a non-public investigation under Part 1b of the Commission's regulations in May of this year into the scheduling of flows over the circuitous paths such as those that are addressed in the instant order. The Commission will determine what further action may be appropriate with respect to the above described claims after it considers the results of the staff investigation. We also will not require NYISO to file

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<sup>3</sup> 16 U.S.C. § 824d (2006).

<sup>4</sup> August 21, 2008 Order, 124 FERC ¶ 61,174 at P 20.

<sup>5</sup> *Id.* P 23.

<sup>6</sup> 16 U.S.C. § 824e (2006).

reports beyond those directed above, as such issues are more appropriately addressed in the investigation.<sup>7</sup>

4. Subsequently, on October 31, 2008 in Docket No. ER09-198-000, as amended on November 4, 2008 in Docket No. ER09-198-001, NYISO filed tariff sheets to preclude the scheduling of flows over the same eight circuitous transmission paths. NYISO stated that these tariff sheets contained the same language as that accepted by the Commission for an interim period in its August 21, 2008 Order. The primary difference between NYISO's July 21, 2008 filing and its October 31, 2008 filing is that the latter filing was not made pursuant to the "exigent circumstance" provision of NYISO's ISO agreement and, therefore, NYISO was not required to propose that the tariff sheets be terminated after 120 days. Therefore, NYISO proposed that the tariff sheets take effect on November 19, 2008 upon the termination of those tariff sheets accepted by the August 21, 2008 Order. The Commission accepted the tariff sheets as proposed on November 17, 2008.<sup>8</sup> The Commission also required that NYISO file a status report on its progress in developing solutions to the loop flow problem, including an inter-RTO congestion management process within 90 days of the Commission's order.<sup>9</sup>

5. In addition, the Commission noted that:

its Office of Enforcement began a non-public investigation under Part 1b of the Commission's regulations in May of this year into the scheduling of flows over the circuitous paths such as those that are addressed in the instant order. This investigation is ongoing and as set forth by the August 21, 2008 Order, the Commission will determine what further actions may be appropriate after it considers the results of the staff investigation.<sup>10</sup>

### **Request for Clarification of the August 21, 2008 Order**

6. New York Municipals request clarification of the Commission's statement that it "will not require NYISO to file reports beyond those directed [in the August 21, 2008

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<sup>7</sup> August 21, 2008 Order, 124 FERC ¶ 61,174 at P 32.

<sup>8</sup> *New York Independent System Operator, Inc.*, 125 FERC ¶ 61,184, at P 15, 18 (2008) (November 17, 2008 Order).

<sup>9</sup> *Id.* P 20.

<sup>10</sup> *Id.* P 21.

Order], as such issues are more appropriately addressed in the investigation.” New York Municipals request clarification that this sentence is limited only to the specific reverse flow problem identified in the July 21, 2008 Exigent Circumstances Filing and that this sentence does not relieve NYISO of its obligation to investigate and report on any unexplained increases in its congestion and uplift costs.

7. On September 19, 2008, NYISO responded to the New York Municipals’ request. NYISO states that the relief that New York Municipals seek is outside the scope of Docket No. ER08-1281-000 and should be denied. NYISO states that the New York Municipals do not contest the Commission’s substantive determination in this proceeding and that none of the topics or arguments contained in their request has anything to do with whether or not the tariff revisions that the NYISO proposed and the Commission accepted in this proceeding are just and reasonable. NYISO states that the Commission clearly explained that the Office of Enforcement is conducting a non-public investigation of the behavior described in the NYISO’s July 21, 2008 exigent circumstances Filing and that it will “determine what further actions may be appropriate with respect to the above described claims after it considers the results of the staff investigation.”

8. The Indicated Transmission Owners also request clarification of the August 21, 2008 Order. They point out the Commission stated that, with respect to its announced non-public investigation into the scheduling of flows over circuitous paths, the Commission “will determine what further action may be appropriate with respect to the above described claims after it considers the results of the staff investigation.”<sup>11</sup> The Indicated Transmission Owners state that, as customers of NYISO and as utilities serving consumers in New York who may have ultimately been harmed by the conduct under investigation, they seek to clarify that disgorgement of profits back to NYISO customers by malfeasant parties is a remedy that will be fully considered by the Commission. Further, they request that the Commission provide further disclosure of the conduct under investigation so that the amount of profits to be disgorged may be calculated. The Indicated Transmission Owners assert that their request is not intended to seek that the Commission pre-determine any outcome of its investigation, but rather solely to resolve any ambiguity over whether, should market manipulation or other violations of law, regulation or tariff be found, disgorgement of profits back to NYISO customers is an appropriate remedy.

### **Discussion**

9. The Commission grants in part and denies in part the requests for clarification or rehearing of the August 21, 2008 Order.

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<sup>11</sup> Citing August 21, 2008 Order, 124 FERC ¶ 61,174 at P 32.

10. First, in response to the New York Municipals' request, the Commission clarifies that its statement in the August 21, 2008 Order that NYISO would not be required to make additional reports was limited to any reports the Commission might require in the Docket No. ER08-1281-000 exigent circumstances proceeding, and was not intended to excuse NYISO from filing other reports that NYISO is otherwise required to file. In this regard, when NYISO made its subsequent filing in Docket No. ER09-198-000 to extend the scheduling limitations originally imposed in the exigent circumstances proceeding, the New York Municipals requested that NYISO be required to adopt a monitoring plan to ensure that future problems that unreasonably increase consumers' costs or affect system reliability are quickly identified and remedied. In addition, NYISO's Independent Market Monitor and PJM in Docket No. ER09-198-000 asked that the Commission require that NYISO work with PJM and others to develop a congestion management process between PJM and NYISO. In response, the Commission stated that it understood the need for a long-term comprehensive solution to these issues. The Commission accordingly directed NYISO in that proceeding to work with its market participants and others to address these matters on a comprehensive basis, and the Commission required NYISO to file a status report within 90 days on its progress in developing solutions to the loop flow problem, including an inter-RTO congestion management process.<sup>12</sup> Given this clarification the Commission need not address New York Municipals' alternative request for rehearing.

11. Second, the Commission denies the Indicated Transmission Owners' request for clarification. In both the August 21, 2008 and November 17, 2008 Orders, the Commission stated that its Office of Enforcement is conducting a non-public investigation into the scheduling of flows over circuitous paths and that the Commission will determine what further action may be appropriate after it considers the results of the staff investigation. The Commission, contrary to the request of the Indicated Transmission Owners, sees no reason to opine at this time as to what remedies, if any, may ultimately be appropriate.

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<sup>12</sup> November 17, 2008 Order, 125 FERC ¶ 61,184 at P 20.

The Commission orders:

The Commission grants in part and denies in part the requests for clarification or rehearing of its August 21, 2008 Order in the above-captioned docket, as discussed in the body of this order.

By the Commission. Commissioner Kelliher is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.