

145 FERC 61,294
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System
Operator, Inc.

Docket Nos. ER14-308-000
ER14-309-000

ORDER ACCEPTING TARIFF FILINGS

(Issued December 30, 2013)

1. On November 4, 2013, pursuant to section 205 of the Federal Power Act (FPA),¹ the New York Independent System Operator, Inc. (NYISO) submitted proposed revisions to the rules governing prohibited investments by its directors, employees, their spouses and their minor children (NYISO Employees) set forth in the NYISO Open Access Transmission Tariff (OATT) in Docket No. ER14-308-000 and its Independent System Operator Agreement (ISO Agreement) in Docket No. ER14-309-000 (collectively, NYISO November 4, 2013 Filings). As discussed below, the Commission accepts NYISO's proposed revisions, effective January 3, 2014, as requested.

I. Background

2. In Order No. 888,² the Commission set forth 11 Principles for use in assessing proposals for the formation of Independent System Operators (ISO) to ensure that they are independent of market participants. Principle No. 2 states that “[a]n ISO and its

¹ 16 U.S.C. § 824d (2012).

² *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, *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 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).

employees should have no financial interest in the economic performance of any power market participant,” the ISO “should adopt and enforce strict conflict of interest standards,” and “[e]mployees of the ISO should also be financially independent of market participants.”³ Further, in Order No. 2000, the Commission established an independence standard for Regional Transmission Operators (RTO) to ensure that these entities would provide transmission service and operate in a non-discriminatory manner and stated that an RTO “[m]ust be independent of any entity whose economic or commercial interests could be significantly affected by the RTO’s actions or decisions.”⁴

3. In authorizing the establishment of NYISO as an ISO in accordance with Order No. 888, the Commission accepted a Code of Conduct which includes a conflict of interest policy that prohibits NYISO directors, officers, and employees from owning securities of market participants or their affiliates.⁵ According to the policy set forth in Attachment F of the OATT, such securities must be divested within six months. On December 31, 2012, the Commission accepted tariff revisions that allow NYISO directors, officers, and employees to place qualified prohibited investments in a blind trust as an alternative to divestiture.⁶

II. Details of the Filing

4. In the NYISO November 4, 2013 Filings, NYISO explains that the number of market participants has more than tripled since the rules restricting investments were initially developed, and it now has nearly 400 market participants. NYISO explains that these companies’ affiliates include approximately 340 publicly traded companies, many of which have little to do with the electric sector or NYISO markets. NYISO states that

³ *Id.* ¶ 31,730-32.

⁴ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

⁵ *Central Hudson Gas & Electric Corp., et. al.*, 83 FERC ¶ 61,352, at 62,410 (1998), *reh’g*, 87 FERC ¶ 61,135 (1999). *See also* NYISO OATT, Attachment F, section 12.7.

⁶ In order to qualify for transfer to a blind trust instead of divestiture, the securities must meet the following criteria: (1) the issuing company’s industry code is not within the Electric Power Generation, Transmission, and Distribution industry group under the North American Industry Classification System (NAICS); and (2) the issuing company’s or its affiliate(s)’ total participation in the NYISO markets is less than 0.5 percent of gross revenue. *N.Y. Indep. Sys. Op.*, 141 FERC ¶ 61,277 (2012).

the existing rules regarding prohibited investments can cause unnecessary financial harm by requiring divestiture of securities that do not pose real conflict of interest concerns and that these rules are causing recruiting and retention problems with respect to directors, officers, and employees. NYISO also states that, while the Commission approved tariff changes in 2012 to permit NYISO employees to transfer securities into a blind trust as an alternative to divestiture, additional changes are necessary because a blind trust is not workable in all cases.⁷

5. Accordingly, in Docket No. ER14-308-000, NYISO proposes revisions to sections 12.7 of Attachment F to the OATT, and in Docket No. ER14-309-000, NYISO proposes revisions to section 5.01 of the ISO Agreement to modify existing rules that prohibit ownership of securities of any market participant or any of their affiliates to instead prohibit ownership of prohibited securities. NYISO proposes to create a definition of “Prohibited Securities” that allows NYISO employees to invest in companies that have only a *de minimis* relationship with NYISO and the electric sector, as determined by a three-prong test.⁸ NYISO explains that the first two prongs of the proposed test for a Prohibited Security are the same criteria for use of a blind trust as an alternative to divestiture, and that the third prong is an additional safeguard to ensure that the company’s activities are minimal to the NYISO markets. According to NYISO’s proposed revisions, the same rules regarding divestiture that currently apply to the securities of market participants and their affiliates would apply to “Prohibited Securities” under the proposed revisions; that is, if a NYISO Employee owns a Prohibited

⁷ In particular, NYISO explains that the blind trust mechanism can be unworkable with respect to actively managed investment accounts because excessive substitutions of stocks can result in administrative burdens and departures from the intended investment model.

⁸ Under the proposed revisions, Prohibited Securities are the securities of a market participant that has been active in NYISO markets in the previous 12 months or the securities of its affiliates, if: (1) the market participant or affiliate is an electric sector company based on its NAICS classification or otherwise determined by NYISO; or (2) the total activity in the NYISO markets (purchases and sales) for all market participants affiliated with the publicly traded company at issue during its most recently completed fiscal year is equal to or greater than 0.5 percent of its gross revenues for the same time period; or (3) the total activity in the NYISO markets (purchases and sales) for all market participants affiliated with the publicly traded company at issue during the prior calendar year is equal to or greater than three percent of the total NYISO market activity (purchases and sales) for the same time period. NYISO explains that, under the first prong, it reserves the right to designate a company as an electric sector company even if its NAICS code is other than that of an electric sector company.

Security, he or she will be required to, within six months, either divest it or transfer it to a blind trust.

6. In addition, NYISO proposes to require a director to disclose to the NYISO Board any financial interest he or she, or an immediate family member, has in a market participant or affiliate that is the subject of a matter before the NYISO Board, even if the securities held are not Prohibited Securities. The proposed revisions require the Chair of the ISO Governance Committee and NYISO legal counsel to consult with the director to determine whether the director should be recused from NYISO Board deliberations and decision-making regarding the matter.⁹ NYISO states that, in making this determination, it will consider, among other things, the margin by which the securities passed the screens for determining whether the securities are Prohibited Securities, the significance of an individual director's experience with the issues in question, and the potential that recusal could result in lack of quorum.¹⁰

7. NYISO argues that the proposed tariff revisions are distinguishable from a proposal by PJM Interconnection, L.L.C. that was rejected by the Commission¹¹ because NYISO is not proposing to independently exempt companies from the definition of "market participant," in conflict with the Commission's regulations, as PJM was. NYISO also argues that its proposed tariff revisions are consistent with the Commission's independence principles for ISOs because the proposed screens for Prohibited Securities establish strict and objective conflict of interest standards that are substantially similar to, but more comprehensive than, those previously approved by the Commission for the blind trust mechanism.

III. Notice of Filing and Responsive Pleadings

8. Notices of NYISO's filings were published in the *Federal Register*, 78 Fed. Reg. 68,431 (2013), with protests and interventions due on or before November 25, 2013. Motions to intervene were filed by PJM Interconnection, L.L.C. (PJM) and the NRG Companies.¹² No protests or comments were filed.

⁹ Proposed OATT section 12.7.1.1.

¹⁰ NYISO November 4, 2013 Filings at n.15.

¹¹ *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,036 (2011) (*PJM*).

¹² NRG Companies include: NRG Power Marketing LLC, GenOn Energy Management, LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, NRG Bowline LLC, Oswego Harbor Power LLC, and Energy Curtailment Services, Inc.

IV. Discussion

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹³ the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

10. We accept NYISO's proposed revisions to the OATT and the ISO Agreement, effective January 3, 2014, as requested. We find that the proposed revisions to the OATT and the ISO Agreement are a just and reasonable approach to addressing the challenge of recruiting and retaining directors and employees in light of both our concern with protecting NYISO's independence and our recognition that the rules restricting investments were developed prior to the expansion of market participation beyond traditional, electric sector companies. We find that NYISO's proposal should continue to safeguard NYISO's independence by prohibiting NYISO directors and employees from holding securities of market participants that are active in the NYISO market and that are either electric sector companies, companies whose NYISO market activity is significant to the company's revenues, or companies whose NYISO market activity is significant to NYISO; and, its proposed definition of Prohibited Securities should help avoid unnecessary divestitures. We also find the proposed recusal requirements for directors are just and reasonable and provide an additional safeguard of independence.

The Commission orders:

The proposed revisions to the NYISO OATT and the ISO Agreement are hereby accepted, effective January 3, 2014, as requested.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹³ 18 C.F.R. § 385.214 (2013).