

153 FERC ¶ 61,010
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

New York Independent System
Operator, Inc.

Docket No. ER14-2518-004

ORDER DENYING REHEARING

(Issued October 2, 2015)

1. On April 30, 2015, the Commission issued an order conditionally accepting in part and rejecting in part the New York Independent System Operator, Inc.'s (NYISO) proposed revisions to its Market Administration and Control Area Services Tariff (Services Tariff) and Open Access Transmission Tariff (OATT) that define certain types of generator outage states, or conditions, and their associated requirements and calculations.¹ On June 1, 2015, the New York State Public Service Commission (New York Commission) filed a request for rehearing of the April 30 Order, challenging the Commission's jurisdiction over setting compensation for generators returning to service to resolve reliability needs. For the reasons discussed below, we deny rehearing.

I. Background

2. Prior to this proceeding, neither NYISO's Services Tariff nor its OATT² defined certain generator outage states or identified how long a generator could remain in certain

¹ *N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,075, at P 1 (2015) (April 30 Order).

² Transmission Service is provided under NYISO's OATT. NYISO's Services Tariff "sets forth the provisions applicable to the services provided by [NYISO] related to its administration of competitive markets for the sale and purchase of Energy and Capacity and for the payments to Suppliers who provide Ancillary Services to [NYISO] in the ISO Administered Markets . . . and [NYISO's] provision of Control Area Services .

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outage states before becoming ineligible to participate in NYISO's Installed Capacity (ICAP) market. With its filing in this case, NYISO proposed to define various states of outages, and the associated eligibility to participate in the ICAP market.³ NYISO also proposed several amendments to its Services Tariff to integrate the new outage states provisions into the Market Power Mitigation Measures, including exempting from the Physical Withholding Test generators that have experienced a Catastrophic Failure.⁴ NYISO further proposed to amend the OATT sections describing Minimum Interconnection Standard and the tests for determining deliverability, and to amend its Large and Small Generator Interconnection Procedures and *pro forma* Large and Small Generator Interconnection Agreements to include the new outage states and termination provisions.⁵ In addition, NYISO proposed to require a generator in an outage state, if selected as a Gap Solution⁶ or identified as a solution to a reliability need on the non-bulk

. . . , including services related to ensuring the reliable operation of the NYS Power System.” NYISO, Services Tariff, § 1 (0.0.0).

³ NYISO, Services Tariff, §§ 2.3 (13.0.0) (“Commenced Repair” and “Credible Repair Plan”), 2.6 (5.0.0) (“Forced Outage”), 2.7 (5.0.0) (“Gap Solution”), 2.9 (13.0.0) (“ICAP Ineligible Forced Outage” and “Inactive Reserves”), 2.13 (11.0.0) (“Mothball Outage”), 2.14 (11.0.0) (“New York State Bulk Power Transmission Facility” and “Notice of Intent to Return”), 2.18 (18.0.0) (“Repair Plan” and “Retired”), 5.12 (11.0.0) (“Requirements Applicable to Installed Capacity Suppliers”), 5.18 (2.0.0) (“Generator Outages and Generator Obligations While In These Outages”).

⁴ *Id.*, Attachment H, § 23.4 (14.0.0) (“Mitigation Measures”), Attachment O, § 30.4 (20.0.0) (“Market Monitoring Unit”).

⁵ NYISO, OATT, Attachment S, §§ 25.5 (5.0.0) (“Cost Responsibility Rules for both ERIS and CRIS”), 25.7 (5.0.0) (“Cost Allocation Methodology for CRIS”), 25.9 (4.0.0) (“Going Forward”), Attachment X, §§ 30.3.1 (5.0.0) (“Interconnection Requests”), 30.14 (6.0.0) (“Appendix 6 – Standard Large Generator Interconnection Agreement”), Attachment Z, §§ 32.1.3 (8.0.0) (“Interconnection Request”), 32.5 (8.0.0) (“Appendix 9 – Standard Small Generator Interconnection Agreement”).

⁶ A Gap Solution is “[a] solution to a Reliability Need that is designed to be temporary and to strive to be compatible with permanent market-based proposals. A permanent regulated solution, if appropriate, may proceed in parallel with a Gap Solution.” *Id.*, Attachment Y, § 31.1 (9.0.0).

power system, to either make a timely return to service to address the reliability need or provide temporary use of its interconnection point.⁷

3. In the April 30 Order, the Commission conditionally accepted all of NYISO's proposed tariff revisions, but rejected NYISO's proposal to require certain generators experiencing an outage that fail to make a timely return to service to pay the costs incurred to install an alternative reliability solution.⁸

4. Relevant here, protesters argued that the proposed tariff revisions were unclear as to whether this Commission or the New York Commission has authority to issue an order establishing compensation for a generator's return to service to resolve a reliability need and that the tariff should specify that such authority rests with this Commission.⁹ The New York Commission disagreed.¹⁰ In its order, the Commission clarified that it is "the 'appropriate regulatory agency' to establish compensation" and required NYISO to revise its proposed Services Tariff provisions to identify the "Commission as the only agency with jurisdiction to issue a 'compensation order' that triggers the return to service provisions."¹¹ The Commission pointed to section 201 of the Federal Power Act (FPA), which gives the Commission exclusive jurisdiction over the rates, terms, and conditions of "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce."¹² The Commission reasoned that "[t]he payment provided under the 'compensation order' provided for in NYISO's proposed return to service provisions relates to a generator's provision of jurisdictional service, and so falls within the Commission's exclusive jurisdiction."¹³ The Commission emphasized that its focus was on the compensation order, and not on which regulatory agency "has

⁷ NYISO, Services Tariff, §§ 5.18.4, 5.18.5 (2.0.0); NYISO, OATT, § 31.2.10.4 (11.0.0).

⁸ April 30 Order, 151 FERC ¶ 61,075 at P 17.

⁹ *Id.* PP 40, 47.

¹⁰ *Id.* P 46.

¹¹ *Id.* P 51.

¹² *Id.* (quoting 16 U.S.C. § 824(b)(1) (2012)).

¹³ *Id.*

the authority to review generator retirements and to take action where needed for reliability.”¹⁴

II. Request for Rehearing

5. The New York Commission seeks rehearing of two findings in the April 30 Order: (1) that the Commission is the “only agency with jurisdiction to issue a ‘compensation order’” that requires a generator in an outage state to respond to a reliability need by returning to service; and (2) that the Commission has jurisdiction to compel generators to return to service.¹⁵

6. The New York Commission asserts that the April 30 Order interferes with the New York Commission’s ongoing exercise of authority over matters affecting generation facilities, resource adequacy, and approval of Reliability Support Services Agreements (RSSAs), under which generators are compensated in exchange for their commitment to be available if needed for reliability purposes.¹⁶ The New York Commission argues that the Commission’s designation of itself as the only agency with jurisdiction to issue a “compensation order” that requires a generator in an outage state to return to service presents a direct jurisdictional conflict. According to the New York Commission, the planning and procurement of generation resources have traditionally been subject to state jurisdiction, whereas the FPA constrains the Commission’s jurisdiction to facilities used for interstate transmission of electricity and to wholesale power rates.¹⁷ The New York Commission contends that the Commission cannot lawfully presume that the states’ historic police powers have been superseded without clear intent from Congress.¹⁸

7. The New York Commission cites New York law, which authorizes the New York Commission to ensure the provision of safe and adequate service by electric corporations, including independent generation owners, and to consider, approve, condition, or reject plans for changes in ownership of an electric corporation, including abandonments and

¹⁴ *Id.*

¹⁵ New York Commission June 1, 2015 Request for Rehearing at 1-2 (citing April 30 Order, 151 FERC ¶ 61,075 at PP 48-52).

¹⁶ *Id.* at 1, 5.

¹⁷ *Id.* at 6-7 (citing 16 U.S.C. §§ 824(b)(1), 824o(i)(2) (2012)).

¹⁸ *Id.* at 7 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

retirements.¹⁹ The New York Commission argues that it has authority to determine the appropriate level of compensation to be paid to generators for furnishing reliability support services. The New York Commission explains that RSSAs merely compensate generators for keeping their facilities available, while any wholesale sales are regulated by the Commission. The New York Commission asserts that, to the extent compensation provided for in RSSAs affect wholesale rates, any such affect is incidental and does not justify Commission action to preempt state jurisdiction.²⁰ The New York Commission points to provisions in NYISO's OATT that recognize the New York Commission's responsibility to select among non-transmission alternatives and establish compensation under New York law.²¹ Where the New York Commission directs a generator to remain available for reliability, the New York Commission argues that it must be able to provide appropriate compensation for such a generator in order to preserve reliability when faced with a potential generator retirement that would have adverse impacts on the public health, safety, and welfare.²²

8. The New York Commission also asserts that the April 30 Order exceeded the Commission's jurisdiction because it allows the Commission to compel a generator to return to service under a "compensation order."²³ According to the New York Commission, under the FPA, states retain authority over "facilities used for the generation of electric energy" and the ability "to take action to ensure the safety, adequacy, and reliability of electric service within that State."²⁴ The New York

¹⁹ *Id.* at 7-8 (citing N.Y. Pub. Serv. L. §§ 4, 70; NYPSC Case 05-E-0889, *Proceeding on Motion of the Commission to Establish Policies and Procedures Regarding Generation Unit Retirements*, Order Instituting Proceeding (issued July 27, 2005); NYPSC Case 05-E-0889, Order Adopting Notice Requirements for Generation Unit Retirements (issued Dec. 20, 2005); NYPSC Case 12-E-0136, *Dunkirk Power LLC and NRG Energy, Inc.*, Order Deciding Reliability Need Issues and Addressing Cost Allocation and Recovery (issued May 20, 2013)).

²⁰ *Id.* at 8-9 (citing *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014)).

²¹ *Id.* at 9 (citing NYISO, OATT, Attachment Y, § 31.5.1.6 (8.0.0)).

²² *Id.* at 9-10 (citing New York Commission, Request for Rehearing, Docket No. EL15-37-000 (filed Mar. 23, 2015)).

²³ *Id.* at 2, 10.

²⁴ *Id.* at 10 (citing 16 U.S.C. §§ 824, 824d, 824e, 824o (2012)).

Commission contends that reviewing generator retirement notices and taking action, as necessary, including directing generators to remain available for reliability purposes, is within this authority, such that the Commission's assertion of jurisdiction to require a generator to continue or resume service is contrary to law.²⁵ The New York Commission asks that the Commission grant rehearing and clarify that authority to direct a generator to return to service is reserved to the states and, in particular, the New York Commission with respect to NYISO.

III. Discussion

A. Jurisdiction to Issue Compensation Orders

9. We deny the New York Commission's request for rehearing on this issue. The New York Commission argues that the Commission does not have jurisdiction to issue a "compensation order" that triggers a generator's return to service to resolve an identified reliability need. We disagree. As explained below, the rates, terms, and conditions of compensation for a generator's return to service under NYISO's Services Tariff fall squarely within the Commission's jurisdiction under the FPA.²⁶

10. The FPA grants the Commission jurisdiction over all facilities for the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale.²⁷ FPA section 201(b)(1) limits the Commission's jurisdiction by stating that the Commission "shall not have jurisdiction, *except as specifically provided* in [Subchapters II and III of the FPA], over facilities used for the generation of electric energy."²⁸

²⁵ *Id.* at 10-11 (citing Case 28316, *Rochester Gas and Electric Corporation*, Opinion and Order Concerning Steam Service and Determining Revenue Requirement, Opinion No. 84-19 (issued July 11, 1984)).

²⁶ *See also R.E. Ginna Nuclear Power Plant, LLC*, 152 FERC ¶ 61,027, at PP 18-22 (2015) (denying a similar request for rehearing from the New York Commission).

²⁷ 16 U.S.C. §§ 824(a), 824(b) (2012).

²⁸ *Id.* § 824(b)(1) (emphasis added). We note that the language in FPA section 201(a) concerning matters regulated by the States does not alter our analysis of this issue. While FPA section 201(a) provides that the Commission's authority extends "only to those matters which are not subject to regulation by the States[,]" *id.* § 824(a), the Supreme Court has explained that this language is "a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction," and "[b]ecause the FPA contains such a clear and specific grant of jurisdiction to FERC over interstate transmissions . . . the

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However, the Commission's authority over interstate transmission and wholesale rates are examples of jurisdiction specifically provided in Subchapters II and III of the FPA.²⁹ As a result, the courts have long held that the Commission "clearly has exclusive jurisdiction over [wholesale rates]."³⁰ Indeed, the Commission "may exercise jurisdiction over generation facilities to the extent necessary to regulate interstate commerce."³¹ The compensation order contemplated under NYISO's Services Tariff will

[language in FPA section 201(a)] does not undermine FERC's jurisdiction. *New York v. FERC*, 535 U.S. 1, 22 (2002).

²⁹ See 16 U.S.C. §§ 824(a), 824(b)(1), 824d(a), 824e(a), 824o(b); *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (holding that the Commission has exclusive jurisdiction over wholesale rates) (*Nantahala*); *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) (explaining that section 201(b) does not limit the Commission's plenary jurisdiction over wholesale rates); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 383 (1988) (Scalia, J., concurring) ("It is reasonable to regard FERC's § 824e(a) authority to set wholesale rates as precisely an example of jurisdiction 'specifically provided.'"); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 718 (D.C. Cir. 2000) (explaining that the Commission's jurisdiction over interstate transmission is jurisdiction "'specifically provided'"), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 63 (2014) (holding that the Commission's transmission planning mandate did not intrude on States' authority because it was directed at ensuring the proper functioning of the interconnected grid and, therefore, fits within the Commission's jurisdiction over the transmission of electric energy in interstate commerce).

³⁰ *Nantahala*, 476 U.S. at 966.

³¹ *Transmission Access Policy Study Group v. FERC*, 225 F.3d at 718; see also *Conn. Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 482, 485 (2009) (*Connecticut*) (holding that the Commission's determination of the rate necessary to procure sufficient resources to meet the Commission's estimate of demand does not constitute regulation of generation facilities in violation of FPA section 201). Consistent with *Connecticut* and related precedent, the fact that the compensation order may provide incentives to trigger the return to service does not alter the jurisdictional analysis. *Connecticut*, 569 F.3d at 482 (noting that the court has previously "held it 'sufficient for jurisdictional purposes that the deficiency charge affects the fee that a participant pays for power and reserve service, irrespective of the objective underlying that charge'" (quoting *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978))); see also *id.* (noting that the Commission may act "even for the express purpose of incentivizing construction of new generation facilities").

set forth the rates, terms, and conditions of providing a service to maintain the reliability and efficient operation of the interstate transmission system and NYISO's wholesale markets.³² The Commission's exercise of jurisdiction over the compensation order is consistent with "[a] primary purpose of the Federal Power Act," which is "to encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices."³³

11. As an initial matter, we find irrelevant the New York Commission's contention that it has authority over the level of compensation for generators providing reliability support services under RSSAs.³⁴ At issue here is the Commission's jurisdiction to issue a "compensation order" that triggers a generator's return to service. Also, while the New York Commission argues that provisions in NYISO's OATT recognize the New York Commission's responsibility to select among non-transmission alternatives and establish compensation under New York law,³⁵ we disagree with its interpretation. Attachment Y of the NYISO OATT, to which the New York Commission cites in support of its argument, sets forth the procedures for NYISO's Comprehensive System Planning Process.³⁶ While NYISO's OATT does allow for Gap Solutions to address reliability needs, the fact that the Commission allowed for a state to have a role in the cost recovery of regulated non-transmission reliability projects developed pursuant to Attachment Y

³² See, e.g., NYISO Transmittal Letter at 21-22 ("As designed, these proposals provide the NYISO with additional reasonably available tools to resolve quickly-arising reliability issues. As Dr. Patton stated in his affidavit: [']As the entities responsible for maintaining reliability, it is important for the NYISO and the [Transmission Owners] in the [New York Control Area] to devise rules that would allow them to maintain reliability under circumstances where one or more generators unexpectedly cease to operate.'") (citing NYISO, OATT, §§ 31.2.5.10.1-2; Patton Aff. ¶ 33); *id.* at 24 ("While the need for these tools may be infrequent, the absence of these tools to resolve [a reliability need] could have significant impacts on preserving reliability.").

³³ *Pub. Utils. Comm'n of Cal. v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)).

³⁴ The Commission's jurisdiction over compensation of generators providing reliability support services under RSSAs has been addressed by the Commission in *R.E. Ginna Nuclear Power Plant, LLC*, 152 FERC ¶ 61,027, at PP 18-22 (2015).

³⁵ New York Commission June 1, 2015 Request for Rehearing at 9 (citing NYISO, OATT, Attachment Y, § 31.5.1.6 (8.0.0)).

³⁶ NYISO, OATT, Attachment Y, § 31 (0.0.0) ("Comprehensive System Planning Process"), *et seq.*

does not affect the Commission's exclusive jurisdiction over issuing the compensation order for generators returning to service to satisfy an imminent reliability need, which is not governed by Attachment Y. As stated in section 31.5.1.6 of Attachment Y, which contains the cost recovery language to which the New York Commission cites, "[n]othing in this section shall affect the [Federal Energy Regulatory Commission's] jurisdiction over the sale and transmission of electric energy subject to the jurisdiction of the Commission."³⁷

B. Jurisdiction to Require Generators to Return to Service

12. We also deny rehearing with regard to the New York Commission's argument that the April 30 Order improperly authorizes the Commission to compel a generator to return to service.³⁸ The New York Commission's argument on this issue misconstrues the tariff provisions and the April 30 Order. As the Commission explained in the April 30 Order, the tariff provisions governing a generator's return to service provide the generator with the option to return to service or to make its interconnection point temporarily available.³⁹ If the generator chooses to pursue returning to service, it can then negotiate for compensation for doing so.⁴⁰ The Commission's role in issuing a compensation order is to review a generator's proposed compensation to determine whether it is just and reasonable if the generator chose to return to service. The order would not require a generator to return to service.⁴¹ For these reasons, we deny rehearing.

³⁷ *Id.* § 31.5.1.6 (8.0.0).

³⁸ New York Commission June 1, 2015 Request for Rehearing at 2, 10.

³⁹ April 30 Order, 151 FERC ¶ 61,075 at P 38.

⁴⁰ NYISO, Services Tariff, § 5.18.4.1 (2.0.0).

⁴¹ Indeed, the generator will have already started "negotiations with the applicable Transmission Owner to effectuate such return" before seeking a compensation order from the Commission. *Id.*

The Commission orders:

The New York Commission's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.