

139 FERC ¶ 61,139
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc. Docket No. EL12-38-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued May 22, 2012)

1. On February 28, 2012, New York Independent System Operator, Inc. (NYISO) filed a petition for declaratory order (NYISO Petition) asking the Commission to resolve uncertainty regarding how NYISO can recover the costs associated with phase angle regulator (PAR) transmission facilities that have been allocated to NYISO pursuant to the Commission's order of December 30, 2010, in Midwest Independent Transmission System Operator, Inc. (MISO) Docket No. ER11-1844.¹ In addition, NYISO seeks a declaration that it cannot be required to pay PAR transmission facilities charges until after the Commission determines the propriety of those charges in Docket No. ER11-1844. For the reasons discussed below, we grant the NYISO Petition in part, on a limited basis.

I. Background

2. The December 30, 2010 MISO Order accepted and suspended, to become effective January 1, 2011, subject to refund, proposed revisions to the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (MISO Tariff).² In addition, the December 30, 2010 MISO Order established hearing and settlement judge

¹ *Midwest Independent Transmission System Operator, Inc.*, 133 FERC ¶ 61,275 (2010) (December 30, 2010 MISO Order). On December 13, 2011, NYISO filed a "Motion to Dismiss or for Summary Disposition, or, in the Alternative, Request for Expedited Action on Rehearing Requests of the New York Independent System Operator, Inc." in Docket No. ER11-1844-001, which is currently pending.

² The proposed tariff provisions consist of new attachments, Attachments SS and SS-1, and a new schedule, Schedule 36, to MISO's Tariff.

procedures.³ The revisions to the MISO Tariff established a methodology and charges to allocate the costs of PARs installed by the International Transmission Company (ITC) among three regions that cause the Lake Erie loop flow problem and benefit from its mitigation: NYISO, PJM Interconnection, LLC (PJM), and MISO. The proposed cost allocation and charges are based on each region's contribution to the Lake Erie loop flow problem that would occur if the PARs were not operational.⁴

3. On November 9, 2011, PJM filed a petition for declaratory order (PJM petition) in PJM, Docket No. EL12-10, in which it requested substantially the same relief as requested in the instant NYISO Petition.⁵ PJM also requested an expedited order to ensure that a cost-recovery mechanism would be in place when the PARs entered into service or an interim order stating that PJM would not have to pay any amounts billed by MISO to PJM related to the PARs while the Commission considered the PJM petition. The Commission granted the PJM petition on a limited basis on April 6, 2012.⁶

II. NYISO Petition

4. NYISO requests guidance on how it should recover from its members the costs allocated to NYISO pursuant to the December 30, 2010 MISO Order. NYISO asks for declaratory relief because it contends that: (1) the NYISO Tariffs do not provide a mechanism to recover from its customers the charges that MISO plans to assess; (2) there is no existing Commission precedent to guide NYISO in developing a recovery mechanism; and (3) NYISO is a non-profit entity that relies on collections from its customers to fund its operation expenses, including the charges MISO will assess NYISO for the PARs. NYISO states that, accordingly, it must amend its Tariffs to authorize recovery from its customers of any MISO charges for the ITC PARs, but that it would first need stakeholder approval to amend its Tariffs pursuant to section 205 of the Federal Power Act (FPA). NYISO states that it is unlikely that its stakeholders would support such a change. Without stakeholder support, NYISO states that its only option is to seek to amend its Tariffs through a section 206 filing. However, NYISO maintains that it will not make a section 206 filing because it believes the existing terms of its Tariffs are just

³ On December 20, 2011, the settlement judge procedures were terminated and a presiding judge was designated to conduct a hearing.

⁴ December 30, 2010 MISO Order, 133 FERC ¶ 61,275 at P 10.

⁵ PJM Interconnection LLC, Petition, Docket No. EL12-10-000 (filed Nov. 9, 2011).

⁶ *PJM Interconnection LLC*, 139 FERC ¶ 61,024 (2012) (April 6, 2012 PJM Order).

and reasonable and because it objects to the allocation of the PARs-related costs to NYISO. Accordingly, NYISO argues that a declaratory order is appropriate in these circumstances as it will remove uncertainty as to how NYISO should recover the charges allocated to it stemming from the ITC PARs.

5. NYISO also seeks a declaration that it cannot be required to pay invoices for charges imposed by MISO until after the pending hearing, and after the Commission issues a final order, in Docket No. ER11-1844. NYISO states that it is not clear how the Commission could devise a cost allocation and recovery mechanism for the ITC PARs charges until the hearing in Docket No. ER11-1844 is concluded and a final Commission order is issued.

III. Notice of Filing and Responsive Pleadings

6. Notice of the NYISO Petition was published in the *Federal Register*, 77 Fed. Reg. 13,590 (2012), with interventions and protests due on or before March 29, 2012. Timely motions to intervene were filed by PJM, Exelon Corporation, New York Association of Public Power, Old Dominion Electric Cooperative, MISO, PPL PJM Companies,⁷ and PSEG Companies.⁸

7. Timely motions to intervene and comments in support of the petition were filed by New York Municipal Power Agency (NYMPA), Municipal Electric Utilities Association of New York (MEUA), and New York Transmission Owners (NYTO).⁹

8. A timely motion to intervene and protest was filed by ITC.

⁷ The PPL PJM Companies consist of PPL Electric Utilities Corporation, PPL EnergyPlus, LLC, PPL Brunner Island, LLC, PPL Holtwood, LLC, PPL Martins Creek, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, Lower Mount Bethel Energy, LLC, PPL New Jersey Solar, LLC, PPL New Jersey Biogas, LLC, and PPL Renewable Energy, LLC.

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

⁹ The New York Transmission Owners consist of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

9. On March 29, 2012, PJM filed a request for Commission action in this proceeding.

IV. Comments and Protest

10. NYMPA and MEUA support the NYISO Petition and urge the Commission to declare that NYISO should not have to pay invoices for charges by MISO or be able to pass any of those costs through to its customers until the Commission issues a final order in Docket No. ER11-1844 addressing “whether such costs may legally be allocated to NYISO or its members, in the absence of an agreement to assume such costs and where there is no contractual relationship that authorizes the imposition of the costs subject to a justness and reasonableness review by the Commission.”¹⁰ NYMPA and MEUA state that there is no basis for MISO to allocate the PARs-related costs to NYISO and NYISO’s Tariffs lack a mechanism for recovering those costs. NYMPA and MEUA state that it is unlikely that NYISO’s stakeholders would support changes to NYISO’s Tariffs to allow for PARs-related cost recovery. Further, NYMPA and MEUA point out that NYISO indicated in its Petition that it will not make a section 206 filing to amend its Tariffs to allow it to recover PARs-related costs from its customers.

11. NYTO supports the NYISO Petition because it contends that guidance is needed with respect to how and whether NYISO can recover from its customers the PARs-related costs. NYTO further states that there is no mechanism under the NYISO Tariffs to recover the PARs-related costs from its customers. NYTO contends that, absent provisions in its Tariffs, NYISO’s only recourse is to obtain a finding from the Commission pursuant to section 206 of the FPA that the existing NYISO Tariffs are unjust and unreasonable and that additional rates would be just and reasonable. NYTO states that the Commission cannot make any findings based on the existing record and thus a section 206 finding would be inappropriate at this time. NYTO maintains that, since NYISO’s costs cannot be passed on to its customers absent a section 206 finding that the existing NYISO Tariffs are unjust and unreasonable, the Commission should clarify that no charges can be passed through to NYISO’s customers pending the outcome of the hearing in Docket No. ER11-1844.

12. ITC states that the Commission should dismiss or deny the NYISO Petition because it failed to provide the Commission with a cost allocation proposal to review and approve, and instead asked the Commission to develop a method on its own. ITC argues that NYISO and its stakeholders should, in the first instance, develop and file a proposed cost recovery plan for Commission review because they are more familiar with NYISO’s Tariffs and thus better suited than the Commission to develop a method to recover such costs. ITC states that NYISO’s argument that its petition should be granted because

¹⁰ NYMPA and MEUA Comments at 2.

NYISO is unlikely to gain stakeholder support to make a section 205 filing is without merit. ITC argues that failure by NYISO and its stakeholders to “take action within their power that is allegedly necessary to permit NYISO to comply with a valid and effective Commission order” is “simple defiance of the Commission.”¹¹

13. ITC also argues that the Commission should not eliminate NYISO’s payment obligation until after the final resolution of the proceeding in Docket No. ER11-1844, as requested by NYISO. Instead, ITC states that, at most, NYISO should be given the option of making the required payments as scheduled or deferring them and allowing them to accrue for up to six months, with applicable interest. ITC maintains that NYISO should also be directed to develop and file a cost recovery mechanism for the PARs costs during the deferral period.

V. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

B. Substantive Matters

15. The Commission has discretion as to whether to issue a declaratory order, and if so, what guidance to provide.¹² Here, we find that the petition contains insufficient information on which to provide the detailed guidance NYISO seeks.¹³

¹¹ ITC Protest at 5.

¹² *USGen New England, Inc.*, 118 FERC ¶ 61,172, at P 19 (2007) (“As the Commission has stated, section 554(e) of the Administrative Procedure Act provides that an agency in its sound discretion may issue a declaratory order to terminate a controversy or remove uncertainty”).

¹³ *Compare Morgan Stanley Capital Group, Inc. and Barclays Bank, Plc*, 119 FERC ¶ 61,298 (2007) (finding insufficient basis for issuing a declaratory order where the filers simply recounted the conflicting positions taken by their counterparties and asked the Commission to adopt one position or the other), *with Nicole Gas Prod. Ltd.*, 103 FERC ¶ 61,328, at P 13 (2003) (petition for declaratory order seeking interpretation of gas tariff), *and Colonial Pipeline Company*, 116 FERC ¶ 61,078, at P 10 (2006) (petition for declaratory order seeking pre-approval regarding future use of certain proposed rate methodologies to facilitate a proposed mainline pipeline expansion.)

16. In our April 6, 2012 PJM Order, we provided guidance on a limited basis that there are potential methods that may result in a reasonable allocation of the costs to those that benefit, which are applicable in this proceeding as well.¹⁴ For example, NYISO could propose to allocate costs using a flow-based distribution factor (DFAX) methodology modified to include parameters similar to those used in the underlying ITC allocation proceeding. Alternatively, NYISO could attempt to demonstrate that the PARs costs are properly considered “Non-ISO Facilities Payment Charges” that should be borne by all NYISO participants and that NYISO may recover under schedule 1, section 6.1.6 of its Open Access Transmission Tariff.¹⁵ While these options are not exclusive, and other options may be equally or more appropriate, NYISO would need to make a filing under section 205 of the FPA proposing whatever cost allocation method it determines most appropriately allocates costs in a manner roughly commensurate with benefits.

17. Further, we find that NYISO’s ability to devise a cost allocation and recovery mechanism does not depend on the outcome of the proceeding in Docket No. ER11-1844. That proceeding only addresses the ITC PARs cost allocation issues raised by the MISO filing and not how each respective ISO is to pass through such allocated costs to their own market participants.

18. In addition, we deny the second part of NYISO’s request seeking a declaration that it does not have to pay the PARs-related charges until after the Commission makes a final determination following the conclusion of the hearing in Docket No. ER11-1844. As

¹⁴ April 6, 2012 PJM Order, 139 FERC ¶ 61,024 at P 17.

¹⁵ Section 6.1.6, Non-ISO Facilities Payment Charge, of NYISO’s Open Access Transmission Tariff states:

The ISO shall charge, and each Transmission Customer shall pay, a charge in accordance with Section 6.1.6.1 of this Rate Schedule 1 for the recovery of the costs of the ISO’s monthly payments to the owners of facilities that are needed for the economic and reliable operation of the NYS Transmission System. At present, the ISO makes such payments to: (i) Consolidated Edison Co. of New York, Inc. for the purchase, installation, operation, and maintenance of phase angle regulators at the Branchburg-Ramapo Interconnection between the ISO and PJM Interconnection, LLC, and (ii) Rochester Gas & Electric Corporation for the installation of a 135 MVAR Capacitor Bank at Rochester Station 80 on the cross-state 345 kV system.

noted above, the Commission has accepted MISO's proposed allocation and charges in Docket No. ER11-1844, and permitted them to become effective, subject to refund. Therefore, any charges properly billed pursuant to these Commission-accepted MISO Tariff provisions must be paid by NYISO in accordance with the provisions of MISO's Tariff.

The Commission orders:

NYISO's petition for declaratory order is hereby granted in part, on a limited basis, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.