

129 FERC ¶ 61,045
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. OA08-52-005

ORDER ON REHEARING AND MOTION

(Issued October 15, 2009)

1. On April 29, 2009, the New York Regional Interconnect, Inc., (NYRI) filed a request for rehearing of the Commission's March 31, 2009 Order on Rehearing¹ and a motion to reopen the record. In this order, we deny NYRI's request for rehearing and dismiss the motion as moot.

I. Background

2. On October 16, 2008, the Commission issued an order conditionally accepting New York Independent System Operator, Inc.'s (NYISO) filings to comply with nine planning principles set forth in Order No. 890.² The Commission found, as relevant here, that NYISO's transmission planning process complies with each of the nine planning principles and accepted, *inter alia*, the following two threshold requirements an economic project³ would have to satisfy in order to be eligible for cost allocation and recovery: (1) the benefit of the proposed project must exceed its costs ("production cost metric")

¹ *N.Y. Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,320 (2009) (March 31, 2009 Order).

² *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299, (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009) (Order No. 890).

³ The parties use the term "economic project," in contrast to a project to improve reliability, to refer to a project designed to reduce congestion that is eligible for cost recovery.

and (2) eighty percent (a so-called “supermajority”) of the project beneficiaries must support the project by voting for it in the stakeholder process.⁴

3. NYRI sought rehearing of the Commission’s October 16, 2008 Order, arguing that NYISO’s then-proposed reliance on its production cost savings metric as the determiner of benefits was unjust and unreasonable, and that NYISO’s proposed supermajority voting provision was anticompetitive and violates antitrust law.

4. On March 31, 2009, the Commission denied rehearing of the October 16, 2008 Order. In rejecting NYRI’s arguments against adoption of the production cost metric, the Commission found that, because NYISO’s production cost metric identifies projects that produce net system-wide cost savings, the use of this metric is just and reasonable.⁵ The Commission also stated that consideration of other metrics takes place later in NYISO’s process, during the vote among project beneficiaries.

5. The Commission rejected NYRI’s arguments regarding the supermajority voting procedure. The Commission found that NYRI’s antitrust argument was speculative and that the Commission is not charged with enforcing antitrust laws.⁶ The Commission also disagreed with NYRI’s assertion that expensive transmission projects cannot be funded outside of NYISO’s cost allocation process and listed examples of long-term firm transmission contracts with merchant transmission developers.⁷

6. On April 29, 2009, NYRI filed the instant request for rehearing of the March 31, 2009 Order and included a motion to reopen the record to include a certain NYISO “White Paper” entitled *Transmission Expansion in New York State* dated November 2008.⁸ Long Island Power Authority and LIPA (collectively LIPA) and Consolidated Edison Company of New York, Inc. (ConEd) filed answers to NYRI’s request for rehearing and motion. NYRI filed an answer to these answers.

7. On May 15, 2009, the Commission issued an order denying a petition for late intervention by the American Antitrust Institute, the American Public Power Association,

⁴ *N.Y. Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,068 (2008) (October 16, 2008 Order).

⁵ March 31, 2009 Order, 126 FERC ¶ 61,320 at P 20.

⁶ *Id.* P 39.

⁷ *Id.*

⁸ Energy Security Analysis, Inc. & NYISO, *Transmission Expansion in New York State: A New York ISO White Paper* (Nov. 2008) (White Paper).

and the National Rural Electric Cooperative Association (collectively, Movants), and dismissing their request for rehearing of the same statement in the March 31, 2009 Order that NYRI seeks rehearing of here, i.e., that the Commission is not charged with enforcing antitrust laws.⁹ In dismissing rehearing, however, the Commission noted that the March 31, 2009 Order addressed the substantive issues raised by Movants, reiterated that the Commission does not enforce the antitrust laws, agreed that the Commission does have responsibility “to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations,” and “to give reasoned consideration to the bearing of antitrust policy on matters within [our] jurisdiction,” and found that the Commission did consider such matters in this proceeding.¹⁰

II. NYRI’s Request for Rehearing of the March 31, 2009 Order

A. Procedural Issues

8. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2009), prohibits an answer to a request for rehearing. Accordingly, the answers to NYRI’s request for rehearing will be rejected. Pursuant to Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), and in light of the rejection of the answers to NYRI’s rehearing request, NYRI’s answer to the answers will be dismissed. However, we accept ConEd’s Answer, at 5, to NYRI’s motion to reopen the record as answers to motions are permitted.¹¹

9. Further, we dismiss as moot, NYRI’s motion to reopen the record to include the NYISO White Paper in the record, because it already is in the record of this proceeding. The White Paper was submitted in NYRI’s February 23, 2009 answer to answers to its protest to NYISO’s January 14, 2009 compliance filing, which answers we accepted in our companion order in Docket No. OA08-52-004 and OA08-52-006 issued concurrently herewith.

B. Substantive Issues

10. We deny NYRI’s request for rehearing. The Commission generally does not allow rehearing of an order denying rehearing unless the order denying rehearing modifies the result reached in the original order in a manner that gives rise to a wholly

⁹ *N. Y. Indep. Sys. Operator, Inc.*, 127 FERC ¶ 61,136 (2009) (May 15, 2009 Order).

¹⁰ *Id.* P 6.

¹¹ 18 C.F.R. § 385.213(a)(3) (2009).

new objection.¹² Further, even if in a subsequent order the Commission gives a different “improved rationale” for the original order’s ruling on a given issue, that would not justify allowing a request for rehearing of the subsequent order to contest the original order’s ruling.¹³ On rehearing in its March 31, 2009 Order, the Commission did not modify the core ruling in the October 16, 2008 Order accepting NYISO’s proposed supermajority voting procedure tariff provisions subject to its obligation to file reports on the votes.¹⁴

11. The arguments NYRI raises here regarding the supermajority voting procedure, including antitrust law and competition, are not entirely new; its request for rehearing reiterates most of the arguments it previously made and which the Commission addressed in the March 31, 2009 Order. As to these arguments, NYRI simply wants a second bite at the same apple. Accordingly, we will not revisit these same issues here. However, as discussed below, we will address and reject certain other arguments NYRI raises here in response to the discussion in our March 31, 2009 Order of antitrust and competition issues in light of the fact that NYRI raised similar antitrust and competition issues in its protest and answer to protests earlier in the proceeding, but the October 16, 2008 Order did not specifically address them; that discussion first occurred in the March 31, 2009 Order. We will also address and reject NYRI’s arguments regarding the modification of NYISO’s reporting obligation directed by the March 31, 2009 Order.

1. The NYISO White Paper

12. In its April 29, 2009 request for rehearing, NYRI argues that the Commission erred in the March 31, 2009 Order by not addressing the White Paper in that order. NYRI states that NYISO released a transmission study, the White Paper, shortly after the Commission issued its October 16, 2008 Order and after NYRI filed its November 17,

¹² See, *KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 112 FERC ¶ 61,153, at P 8 (2005); *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Co. d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

¹³ See *KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 112 FERC ¶ 61,153, at P 6 (2005) (citing *Southern Natural Gas Co. v. FERC*, 278 U.S. App. D.C. 278, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (citing *Tennessee Gas Pipeline Co. v. FERC*, 276 U.S. App. D.C. 359, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988) and *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001)).

¹⁴ The Commission only modified the ruling in the October 16, 2008 Order by adding a further direction requiring NYISO to report the reasons stated by the parties that vetoed a project. March 31, 2009 Order, 126 FERC ¶ 61,320 at P 38.

2008 rehearing request. NYRI states that it filed the White Paper as an attachment to its December 16, 2008 answer to several answers to NYRI's request for rehearing of the October 16, 2008 Order. NYRI states that it also filed the White Paper with its February 23, 2009 answer to the answers filed in response to NYRI's protest of NYISO's January 14, 2009 compliance filing in Docket No. OA08-52-004, and also cited and summarized the White Paper in its February 2, 2009 motion for expedited review of its instant rehearing request.

13. NYRI asserts that the Commission erred by ignoring the White Paper. NYRI claims that the White Paper contradicts statements made by NYISO and the NYTOs in this proceeding, acknowledges many of the problems NYRI outlined in its November 2008 rehearing request, and validates NYRI's concern that the supermajority voting proposal and what NYRI asserts was NYISO's "sole reliance on production cost savings in its cost/benefit analysis" are unjust and unreasonable. To support its case, NYRI culled out certain specific excerpts from the White Paper and included them in six argument points on page 14 of its pleading. NYRI asserts that the Commission's failure to consider this evidence resulted in an incomplete record and that the Commission cannot ignore evidence that goes to the heart of an issue that is before it.¹⁵ We disagree that we committed error in not addressing the White Paper in our March 31, 2009 Order and deny rehearing on this issue.

14. NYRI initially included the White Paper as an attachment to its answer in opposition to answers to its request for rehearing of the October 16, 2008 Order. The Commission properly dismissed NYRI's answer on procedural grounds.¹⁶ Therefore, as the copy of the White Paper appended to that pleading was not properly before us on rehearing of the October 16, 2008 Order, we did not err in not considering it in the March 31, 2009 Order. The other instance in which NYRI included a copy of the White Paper was in its February 23, 2009 answer to answers filed in response to NYRI's protest of NYISO's January 14, 2009 filing in Docket No. OA08-52-004. The January 14, 2009

¹⁵ Citing *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2nd Cir. 1965); *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 892 (S.D.N.Y. 1951), *aff'd by an equally divided court*, *A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co.*, 342 U.S. 950 (1952).

¹⁶ March 31, 2009 Order, 126 FERC ¶ 61,320 at P 10. ("Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a request for rehearing. Accordingly, the answers to the request for rehearing will be rejected. Pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), and in light of the rejection of the answers to NYRI's April 29, 2009 request for rehearing, NYRI's answer to the answers will be dismissed.").

filing was made to comply, in part, with the October 16, 2008 Order. This filing, and related protest and answers, are being addressed in a companion order as a compliance matter, not a rehearing matter. Thus, the copy of the White Paper included in the February 23, 2009 answer was not before us on rehearing of the October 16, 2008 Order and, therefore, the Commission did not err by not considering it in the March 31, 2009 Order. Finally, the fact that NYRI mentioned the White Paper in its February 2, 2009 motion for expedited review of its request for rehearing of the October 16, 2008 Order was insufficient justification for addressing the White Paper in the March 31, 2009 Order. Accordingly, we deny rehearing on this issue.

15. In addition, even if we consider the White Paper, we find NYRI's reliance on it to be unavailing. First, the arguments that NYRI culls from the White Paper do not accurately characterize its contents. For example, NYRI overlooks that the White Paper also concludes that "[i]t is too early to tell whether the CARIS process will succeed in encouraging a significant increase in transmission investment" but that "[i]mplementation of the CARIS process . . . , in conjunction with the various New York State energy and environmental policy initiatives (*e.g.*, RPS and RGGI), may provide the vehicle to facilitate significant economic transmission investment in New York."¹⁷ Finally, as we said in the March 31, 2009 Order,

Long Island Power Authority (LIPA) has signed some of largest long-term firm transmission contracts with merchant transmission developers, as evidenced by its long-term firm transmission contracts with both Cross Sound Cable, LLC and Neptune RTS. Thus, NYISO's supermajority voting does not foreclose potential competition. In addition, NYISO's reliability and economic planning processes always give preference to market solutions – be it transmission, generation, or demand response solutions. These planning processes ensure that no market participant is precluded from making proposals that would lower congestion in the NYISO grid."¹⁸

2. Antitrust and Competition Issues

16. NYRI argues that the Commission erred in the March 31, 2009 Order when it allegedly "relied on its lack of authority to enforce antitrust laws as justification for not

¹⁷ White Paper at 6-1.

¹⁸ March 31, 2009 Order, 126 FERC ¶ 61,320 at P39.

addressing the anticompetitive aspects of the NYISO's supermajority voting scheme and the unreasonably narrow cost/benefit analysis."¹⁹

17. NYRI also asserts that NYISO's supermajority voting procedure and its cost/benefit analysis are anticompetitive because they allow a NYTO/Load Serving Entity monopolist to prevent competition. NYRI further argues that the Commission has routinely prohibited Transmission Owners from having veto power in ISO and RTO stakeholder processes and yet this is what NYISO's supermajority voting scheme provides.

18. Finally, NYRI contends that the Commission erroneously relied on three limited merchant projects in New York to conclude that "NYISO's supermajority voting does not foreclose potential competition."²⁰ According to NYRI, those projects prove that where a Southeastern NYTO can interconnect directly with a neighboring RTO to access lower cost energy, there is little or no likelihood that those same NYTOs will support a major improvement of the New York's transmission system whether proposed by an independent transmission company or incumbent NYTO. NYRI asserts that these projects do nothing to improve the transmission facilities that cross multiple NYTO service territories, and they do not deliver lower cost renewable resources located in upstate New York and Canada to metropolitan New York.

19. We will deny rehearing on these issues. At the outset, NYRI's contention that the Commission did not address the antitrust or anticompetitive aspects of the NYISO's supermajority voting scheme in the March 31, 2009 Order is flatly incorrect. In the March 31, 2009 Order, we accurately stated, consistent with longstanding Commission precedent, that the Commission is not charged with "enforcing" the antitrust statutes.²¹

¹⁹ NYRI April 29, 2009 Request for Rehearing at 15.

²⁰ March 31, 2009 Order, 126 FERC ¶ 61,320 at P 38 & n. 19.

²¹ March 31, 2009 Order, 126 FERC ¶ 61,320 at n. 10, citing, e.g., *Entergy Services, Inc.*, 64 FERC ¶ 61,326, at 63,404-05 (1993) ("the Commission does not have jurisdiction to determine violations of the antitrust laws. . . and is not 'strictly bound to the dictates of these laws'"); *accord Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 960-61 (D.C. Cir. 1968) (same); *Northeast Utilities Service Co.*, Opinion No. 364, 56 FERC ¶ 61,269, at 61,998 (1991) (same), *order on reh'g*, Opinion No. 364-A, 58 FERC ¶ 61,070, *order denying reh'g*, Opinion No. 364-B, 59 FERC ¶ 61,042 (1992), *aff'd in relevant part*, 993 F.2d 937 (1st Cir. 1993) (noting that section 203 of the Federal Power Act makes "no explicit reference to antitrust policies or principles" and that there is "no evidence that Congress sought to have the Commission serve as an enforcer of antitrust policy in conjunction with the Department of Justice and the Federal Trade Commission").

The Commission considers, where appropriate, anticompetitive effects and the bearing of antitrust policy on matters within its jurisdiction.²² As we noted in our May 15, 2009 Order, our March 31, 2009 Order expressly considered and rejected NYRI's virtually identical arguments that the supermajority provision is anticompetitive and violates antitrust laws.²³ We found NYRI's contention of possible future antitrust violations to be speculative. We also identified examples of LSEs using merchant transmission providers and the existence of long-term firm transmission contracts with merchant transmission developers as evidence of transmission projects that can be funded outside of NYISO's cost allocation processes. Further, we stated that NYISO's reliability and economic planning processes always give preference to market solutions -- whether transmission, generation, or demand response solutions -- and that no market participant is precluded from making proposals that would lower congestion in the NYISO grid. Accordingly, we found that the supermajority voting procedure does not foreclose competition.²⁴ We adopt here the discussion in the May 15, 2009 Order in response to NYRI's arguments.

20. NYRI disagrees that the Commission's examples of projects show that expensive transmission projects can be funded outside of NYISO's cost allocation process. NYRI argues that, to the contrary, the existence of limited merchant projects connecting LIPA and ConEd to neighboring RTOs demonstrates that NYISO's proposal is anticompetitive in that where a Southeastern NYTO can interconnect directly with a neighboring RTO to access lower cost energy, there is little or no likelihood that the same NYTO will support a major improvement of the New York transmission system. NYRI further contends that none of these projects are subject to NYISO's control, they do nothing to reduce congestion on NYISO-operated facilities, and they will not aid in transmission of existing and future upstate New York and Canadian renewable energy to metropolitan New York.

21. NYRI offers no support for these contentions. Further, NYRI's view of competition is too narrow. A project that provides access to energy, whether from neighboring RTOs, from upstate New York, or from Canada, contributes to competition in the marketplace. It stands to reason that the stated transmission projects would reduce congestion below what it would have been without the addition of these projects. NYRI acknowledges that the Neptune RTS project, for example, allows Long Island to import cheaper power from the south by providing LIPA access to diversified low-cost power generation.²⁵ Further, NYRI's claim that "these merchant projects do nothing to improve

²² May 15, 2009 Order, 127 FERC ¶ 61,136 at P 6.

²³ *Id.*

²⁴ March 31, 2009 Order, 126 FERC ¶ 61,320 at P 39.

²⁵ NYRI April 29, 2009 Request for Rehearing, at 26-27.

the transmission facilities that cross multiple NYTO service territories, and they do not deliver lower cost renewable resources located in upstate New York and Canada to metropolitan New York”²⁶ avoids the fact that NYRI would have NYTOs, who have the ability to access lower cost, diversified power, nonetheless be required to pay for new transmission projects that they conclude do not provide a net benefit for them. Indeed, the fact that NYISO’s voting provision permits NYTOs to avoid this outcome supports our finding the voting provision to be just and reasonable.

22. We find that NYRI has raised no new arguments or facts that warrant a grant of rehearing of our March 31, 2009 Order. For the above reasons, and the reasons as discussed in the March 31, 2009 and May 15, 2009 Orders, we deny rehearing on these issues.

3. Voting Reports

23. With regard to the Commission’s directive in the March 31, 2009 Order that NYISO include in its report on the voting process any reason given by a NYTO for vetoing an economic project, NYRI asserts that monitoring merely serves to document anticompetitive activity rather than prevent it. NYRI argues that the report requirement will do little to prevent abuses of the supermajority voting provision.

24. We find that, contrary to NYRI’s claims, the requirement for NYISO to file a report on votes on economic projects, thereby allowing the Commission to monitor the supermajority voting mechanism, is a reasonable vehicle to detect abuses in the supermajority voting process and, therefore, deny rehearing on this issue.²⁷ At the outset, we find that NYRI has not demonstrated that NYTOs are likely to abuse the supermajority voting provision. NYRI argues that a project built by a competitor that reduces the cost of energy to the voting entity’s customers might still be rejected in order to drive that competitor out of business and increase the voting entity’s market share.²⁸ NYRI also asserts that a Southeastern NYTO might deny NYRI cost recovery for its project and then grant cost recovery to an identical project proposed by itself or its affiliate, and that the Commission could not police such an abuse.²⁹ We agree that these are examples of improper voting behavior. Such improper voting behavior may be deterred by the requirement to report reasons for the negative vote. In any case, we can, indeed, “police” such actions as they would fall under the Commission’s investigatory

²⁶ *Id.* at 27.

²⁷ NYRI April 29, 2009 Request for Rehearing at 27.

²⁸ *Id.* at 33.

²⁹ *Id.* at 37.

and enforcement powers.³⁰ Evidence of such an improper vote could warrant an investigation by the Commission and possible further action. However, we have no basis to establish an investigation here based on NYRI's speculation.

25. NYRI further argues that it constitutes abuse when an individual NYTO votes against a project designed to deliver upstate renewable resources to downstate customers in order to avoid a negative impact on the individual NYTO's bottom line.³¹ NYRI contends that a NYTO's negative vote motivated by a desire to preserve its transmission congestion contract value, its power purchase agreement value, its owned-generation value or the value of its specific interconnections with neighboring RTOs is not reasonable since such a vote deprives that NYTO's competitors in the short term and its own customers in the long-term of lower-cost, renewable energy.³² What constitutes abuse of the voting process is a fact specific determination to be made by the Commission on a case by case basis after consideration of the information NYISO submits in its reports.

26. Accordingly, we deny NYRI's request for rehearing on the issue of the reporting requirement.

The Commission orders:

(A) NYRI's request for rehearing of the March 31, 2009 Order in this proceeding is denied, as discussed in the body of this order.

(B) NYRI's motion to reopen the record is dismissed as moot, as discussed above.

By the Commission. Commissioner Moeller is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁰ 16 U.S.C. §§ 825f, 825m (2006).

³¹ NYRI April 29, 2009 Request for Rehearing at 35.

³² *Id.* at 22–23.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket No. OA08-52-005

(Issued October 15, 2009)

MOELLER, Commissioner *dissenting*:

On rehearing of the March 31 Order, I have reconsidered NYRI's arguments and the evidence in the record. For the reasons discussed below, I would have granted rehearing and reversed the Commission's decision to approve the NYISO's supermajority voting provision.

Today's decision to sustain the 80% voting requirement will have the effect of discouraging the construction of new economic transmission lines by non-incumbent developers. This conclusion and the decision to reverse my position were largely informed by a NYISO-authored White Paper that reviewed the current state of transmission development and planning mechanisms in the New York Control Area.¹ Although NYRI submitted the White Paper in this proceeding on several occasions, it was not addressed in the March 31 Order. Moreover, this relevant document is not substantively discussed in today's Order despite the majority's recognition that the White Paper is in the record of this proceeding. Order at P 9.

The findings in the White Paper constitute evidence that largely supports NYRI's argument that non-merchant, non-incumbent transmission developers face very long (if not impossible) odds in gaining the support of at least 80% of the proposed project's beneficiaries, thereby frustrating the development of economic transmission projects.² Since NYISO, as the independent system operator, takes ownership of the White Paper and the content is directly related to its transmission planning process, the Commission should have considered its merits during the course of this Order No. 890 proceeding.

¹ Energy Security Analysis, Inc. & NYISO, *Transmission Expansion in New York State: A New York ISO White Paper* (Nov. 2008) (White Paper).

² The NYISO has taken a litigation position in this proceeding that distances itself from its White Paper and does not acknowledge the existence of its White Paper in any of its pleadings in this Docket.

Under the NYISO's supermajority voting provision, certain beneficiaries of the proposed project may find it in their interest to vote against a transmission line in order to preserve or increase their own revenues or profits even if the project would yield net benefits in New York.³ For instance, a Transmission Owner (TO) holding valuable Transmission Congestion Contracts may choose not to support a congestion-reducing project because it financially benefits from existing levels of congestion. Likewise, it would not be unreasonable to assume that a TO would vote against an independent transmission (ITC) project because it may want to build a substantially similar transmission project and recover the expense in its own rate base. Such scenarios are plausible and highlight the difficulty of allocating costs among parochial interests.

The White Paper recognizes that incumbent TOs and load-serving entities have a bias to maintain the status quo as “[u]tilities will protect their franchise areas... and are loathe to allow competitor’s projects through their areas without some control and participation.”⁴ In Order No. 890, the Commission also realized that “the inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors....”⁵ The White Paper concludes that “[s]imply put, a load-serving entity, even one that is clearly the beneficiary, will not want to pay for a transmission project with the ownership benefits go to its competitor.”⁶

The main issue here is whether needed transmission is being built and according to the White Paper, no major transmission lines between upstate and downstate New York have been built in more than 20 years.⁷ If this pattern continues and hurdles remain in place, it is hard to envision that a non-merchant economic project will be built in the foreseeable future. This lack of transmission investment in the NYISO region also stands in contrast to its neighbors, PJM and ISO-New England, where billions of dollars have recently been committed to an extensive transmission build-out of their respective grids.

³ In a situation where a single entity is forecast to receive more than 20% of the benefits, that entity would have the ability to effectively veto a project.

⁴ White Paper at 4-7 to 4-8.

⁵ Order No. 890 at P 39.

⁶ White Paper at 5-6.

⁷ White Paper at 4-7.

While I have encouraged investment in transmission infrastructure, I recognize the difficulty of finding a cost allocation methodology that will satisfy both TOs and ITC developers, as well as the upstate and downstate interests. The White Paper too expresses doubt, questioning “whether the present NYISO transmission planning framework will lead to the construction of transmission for renewable resources.”⁸ As stakeholders and interested parties work towards transmission planning solutions in furtherance of Order No. 890’s goals, and as various other planning processes develop, the difficulties associated with building economic transmission in New York State must be addressed.⁹ However, in view of the assessments offered in the White Paper, I believe that the use of a supermajority voting provision will avoid the need to address some very tough issues and will ultimately prevent economic transmission from being developed.

Accordingly, for the reasons stated above, I conclude that the NYISO’s supermajority voting provision is unjust, unreasonable, and unduly discriminatory and as such, I respectfully dissent from today’s Order.

Philip D. Moeller
Commissioner

⁸ White Paper at 4-3.

⁹ NYISO and its stakeholders should consider all possibilities towards developing congestion-reducing transmission projects (from exploring shared development and joint ownership models to examining a change that would give NYISO the authority to direct the expansion of the transmission system.)