

108 FERC ¶ 61,159
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

New York Independent System Operator, Inc.	Docket No.	ER04-449-000
New York Transmission Owners		ER04-449-001
		ER04-449-002

ORDER CONDITIONALLY ACCEPTING LARGE GENERATOR
INTERCONNECTION PROCEDURES AND LARGE GENERATOR
INTERCONNECTION AGREEMENT

(Issued August 6, 2004)

1. The New York Independent System Operator, Inc. (NYISO), and the New York Transmission Owners¹ (collectively, Joint Filing Parties) have submitted, in compliance with Order Nos. 2003² and 2003-A, proposed variations from the *pro forma* Large Generator Interconnection Procedures (LGIP) and Large Generator Interconnection Agreement (LGIA). The Joint Filing Parties request that the Commission accept their proposed amendments to the LGIP and LGIA under the independent entity variation discussed in Order No. 2003.³ The Commission accepts both filings, subject to modification as discussed below. This order benefits customers because it ensures that

¹ The New York Transmission Owners are comprised of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority (LIPA), New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation (collectively, NYTO).

² Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004) (Order No. 2003-A), *reh'g pending*; *see also* Notice Clarifying Compliance Procedures, 106 FERC ¶ 61,009 (2004).

³ Order No. 2003 at P 827.

the terms, conditions, and rates for interconnection service are just and reasonable and thus encourages more competitive markets.

I. Background

2. In Order No. 2003, pursuant to its responsibility under sections 205 and 206 of the Federal Power Act (FPA)⁴ to remedy undue discrimination, the Commission required all public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to append to their open access transmission tariffs (OATT) a *pro forma* LGIP and *pro forma* LGIA. In order to achieve greater standardization of interconnection terms and conditions, Order No. 2003 required such public utilities to file revised OATTs containing the *pro forma* LGIP and LGIA by January 20, 2004.⁵ Order No. 2003-A reaffirmed most of Order No. 2003's provisions, with some modifications. Public utilities were required to update their OATTs to reflect the changes in Order No. 2003-A by April 26, 2004.⁶

3. Under Order No. 2003, non-independent Transmission Providers⁷ seeking a variation from the Commission's *pro forma* LGIP or LGIA must demonstrate that the proposed modifications are "consistent with or superior to" the terms of the *pro forma* LGIA and LGIP⁸ or that the proposed change is in response to an established regional reliability requirement.⁹

4. Independent Transmission Providers (such as NYISO), however, are given greater flexibility under Order No. 2003 to tailor the terms of the LGIP and LGIA to their

⁴ 16 U.S.C. §§ 824d, 824e (2000).

⁵ See Notice Clarifying Compliance Procedures, *supra* note 1 (clarifying that Commission will deem OATTs of non-independent public utilities to be revised as of January 20, 2004).

⁶ Order No. 2003-A at P 42.

⁷ Under the Joint Filing Parties' proposal, the term "Transmission Provider" has been replaced with either "NYISO" or "Transmission Owner." Additionally, the term "Interconnection Customer" has been replaced with "Developer." For the sake of clarity, we use those terms throughout, except where discussing the *pro forma*.

⁸ Order No. 2003 at P 825.

⁹ See Order No. 2003 at P 822-24, 826.

specific needs under what is called the independent entity variation.¹⁰ The independent entity variation permits an independent Transmission Provider to propose provisions that vary from the *pro forma* LGIP and LGIA. This approach recognizes that individual Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) may have different operating characteristics, depending on their geographic size and location, and are less likely to act in an unduly discriminatory manner than non-independent Transmission Providers.¹¹

II. Description of NYISO's Current Interconnection Procedures

5. According to the Joint Filing Parties, the task of interconnecting new generators within the New York Control Area (NY Control Area) is currently shared between the NYISO and the individual Transmission Owners. Interconnections to lines of 115 kV and above are administered primarily by the NYISO,¹² while interconnection to lines of less than 115 kV are handled by the owner of the line to which the Developer is interconnecting.¹³ In both cases, the NYISO's tariff governs the interconnection process and NYISO handles all transmission and delivery services (including responsibility for system reliability, managing congestion, scheduling, administering the day-ahead and real-time energy and ancillary services markets, etc.). According to the Joint Filing Parties, even for lower voltage interconnections, the Transmission Owner must follow the same reliability and operating rules and procedures that NYISO itself follows, even though it is the Transmission Owner who conducts the studies and constructs the needed

¹⁰ See Order No. 2003 at P 827.

¹¹ *Id.*

¹² The Joint Filing Parties note, however, that there have been "relatively few" interconnections of Large Generating Facilities with lines smaller than 115 kV. The Joint Filing Parties also suggest that the few pending interconnection applications of generators located on transmission below 115 kV and larger than 20 MW currently being processed by a Transmission Owner would be processed by the NYISO if the Joint Filing Parties' current proposal is accepted by the Commission.

¹³ The instant filing proposes to eliminate this distinction and have all interconnection requests processed by the NYISO.

facilities.¹⁴ In addition, the individual Transmission Owners are responsible for the physical operation and maintenance of the New York State Transmission System.

6. Studies are conducted on a "class year" basis, with all Interconnection Requests received within a given time period studied together on a clustered basis. The fair assignment of interconnection costs to each member of the class year is governed by "Attachment S" of NYISO's current OATT.¹⁵ Under Attachment S, each Developer pays: (1) the entire cost of Interconnection Facilities necessary to interconnect the Developer with the Transmission System, and (2) its share of the cost of any Network Upgrades that would not have been made "but for" the interconnection, minus the cost of any facilities that the NYISO's Regional Plan dictates would have been necessary anyway for load growth and reliability purposes. Applying the "but for" test has been difficult in practice and the determinations have been bogged down in litigation.¹⁶

7. Generally, the NYISO conducts an Annual Transmission Baseline Assessment (Baseline Assessment) and an Annual Transmission Reliability Assessment (Reliability Assessment). The Network Upgrades identified in the Baseline Assessment are those that are required by the Transmission System if there were no new interconnection projects interconnecting with the system. The Reliability Assessment basically looks at the same thing, but includes Network Upgrades necessary to accommodate all interconnection requests filed within a given year. Attachment S dictates that the NYISO subtract the cost of upgrades identified in the Baseline Assessment from the costs identified in the Reliability Assessment and then allocate those "but for" costs to the various developers.

¹⁴ The Joint Filing Parties also note that most utilities in the New York region have largely divested their generation. Thus, they argue, the Commission's concerns regarding the ability of vertically-integrated Transmission Providers to discriminate against independent generation to the benefit of their affiliated generation is not as applicable in the New York context.

¹⁵ The Commission accepted Attachment S with conditions. *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,118 (2001), *order on reh'g*, 100 FERC ¶ 61,103 (2002). *See also* 98 FERC ¶ 61,201 (2002) (order on compliance).

¹⁶ *See, e.g., KeySpan Energy Development Corp., et al. v. NYISO*, 101 FERC ¶ 61,099 (2003).

III. Notice of Filing, Interventions, Protests and Answers

8. Notice of the Joint Filing Parties' Order No. 2003 compliance filing was published in the Federal Register, 69 Fed. Reg. 5850 (2004), with comments, interventions and protests due on or before February 10, 2004.

9. A number of parties intervened and filed comments or protests, including: Reliant Energy (Reliant), AES Eastern Energy, L.P. (AES), Constellation Energy Group LLC (Constellation), New York Transmission Owners (NYTO), Independent Power Producers of New York, Inc. (IPPNY), and Tenaska, Inc. (Tenaska).¹⁷

10. On February 25, 2004, the Joint Filing Parties filed an answer (February 25 Answer). On March 30, 2004, at the request of the Joint Filing Parties, the Commission met with the Joint Filing Parties and other interested parties at a publicly noticed meeting.¹⁸ Subsequently, on April 8, 2004, the Joint Filing Parties made a supplemental compliance filing (April 8 Supplement) and addressed many of the topics discussed in the March 30, 2004 meeting. Specifically, the Joint Filing Parties noted that existing interconnection rule apply only to interconnections to transmission facilities at 115 kV and above, and that Transmission Owners deal with interconnections to lower voltages facilities. They explain that the instant filing eliminates this distinction and that all interconnections within the New York Control Area will be administered by the NYISO upon Commission acceptance of this filing. The Joint Filing Parties also argue in their April 8 Supplement that the NYISO should also be considered to have "operational control" over interconnections to the transmission facilities below 115 kV. Additionally, the Joint Filing Parties request that the Commission grant any waivers of Order Nos. 2003 and 2003-A necessary to avoid making each NYTO member file a revised OATT for the low voltage facilities for the time period between January 20, 2004 and the effective date of this order.

11. On April 26, 2004, the Joint Filing Parties filed to comply with Order No. 2003-A. While much of the filing was identical to their Order No. 2003 compliance filing, the Joint Filing Parties did propose to track many of the changes to the *pro forma* LGIP and LGIA made in Order No. 2003-A, as well as to correct certain typographical errors in their initial filing.

¹⁷ The Reliant and Constellation comments simply state that they support the comments filed by IPPNY and are not discussed further.

¹⁸ 69 Fed. Reg. 17,138 (2004).

12. Notice of the Joint Filing Parties' Order No. 2003-A compliance filing was published in the Federal Register, 69 Fed. Reg. 26,584 (2004), with comments, interventions and protests due on or before May 17, 2004. None were received.

IV. Discussion

13. There are many differences between the Commission's *pro forma* LGIP and LGIA documents and the filing submitted by the Joint Filing Parties. For each of the issues discussed below, the summary of the Joint Filing Parties' proposal appears first, followed by a description of any protests received, and then the Commission's conclusion.

14. The Joint Filing Parties advise that their LGIP and LGIA documents conform to the Commission's *pro forma* LGIA and LGIP language except where it has been modified to reflect the regional differences or current NYISO practices, or to conform to NYISO OATT definitions and terminology. Changes not otherwise discussed are accepted by the Commission.

A. Procedure

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest, as well as supplemental compliance filings, unless otherwise ordered by the decisional authority. We will accept the Joint Filing Parties' February 25 Answer and April 8 Supplement because they provide information that assisted us in our decision-making process.

B. Non-Substantive Changes in Terminology

17. Order No. 2003 established standardized terminology to describe both the interconnection process and the parties to an Interconnection Agreement. The Joint Filing Parties' compliance filing changes many of these terms (such as calling the "Interconnection Customer" the "Developer", and using the term "Facilities" instead of "Generator"). The Joint Filing Parties also propose to replace the generic terms "Transmission Provider" with "NYISO" wherever it appears, as well as specifically naming the reliability organizations that exist in New York.

18. Additionally, the Joint Filing Parties propose to call its interconnection procedures document the "Standard Large Facility Interconnection Procedures."¹⁹

19. While the Commission has generally rejected such changes in terminology in cases involving non-independent Transmission Providers,²⁰ it recognizes that NYISO is an independent Transmission Provider and will allow it to modify the LGIP and LGIA to make them consistent with NYISO's existing OATT and current NYISO practices.

C. Type of Interconnection Service Offered Under NYISO's OATT

20. The Joint Filing Parties propose to provide only one level of interconnection service under NYISO's OATT, as opposed to the two levels of service described in the Commission's *pro forma* interconnection procedures and agreement.²¹ The Joint Filing Parties argue that this "Network Access Interconnection Service" (NAIS) is consistent with NYISO's existing Commission-approved interconnection rules and should be accepted by the Commission as just and reasonable under Order No. 2003's independent entity standard.

21. The Joint Filing Parties also state that they have initiated a stakeholder process to examine whether or not the NYISO's OATT should allow for more than one level of interconnection service. The Joint Filing Parties state that they have agreed not to take a position on this matter, but are working on developing a consensus stakeholder position.

¹⁹ For the sake of consistency, however, this order continues to refer the interconnection procedures document as the "LGIP".

²⁰ *See, e.g.*, Xcel Energy Operating Companies, 106 FERC ¶ 61,260 at P 26 (2004).

²¹ The two levels of service required in Order No. 2003 are "Energy Resource Interconnection Service" (ERIS) and "Network Resource Interconnection Service" (NRIS). In brief, ERIS provides an Interconnection Customer with a simple connection to the network capable of transmitting energy from the Interconnection Customer's Generating Facility to the network. NRIS, on the other hand, is a higher level of service that not only connects the Interconnection Customer to the network, but also provides the infrastructure necessary for the Interconnection Customer's power to flow to multiple places on the network. In essence, NRIS gives the Interconnection Customer an interconnection suitable as a Network Resource. However it is important to note that neither NRIS nor ERIS actually conveys the right to actually sell energy into the network – in either case, a separate transmission service agreement is required. *See* Order No. 2003 at P 752 *et seq.*; *see also* Order No. 2003-A at P 498 *et seq.*

Protests

22. Tenaska argues that the Commission should require the NYISO to offer two levels of interconnection service as envisioned in Order No. 2003. According to Tenaska, the Joint Filing Parties have not explained why such a major deviation from the *pro forma* is necessary and the Joint Filing Parties should be required to demonstrate a "regional need" in order to justify such a major deviation from the *pro forma*.

23. Tenaska also argues that the Joint Filing Parties' main justification for offering only one service is that it is consistent with NYISO's pre-Order No. 2003 policies. According to Tenaska, following this logic, no Transmission Provider would be required to change any tariff provision in response to Order No. 2003.

Commission Conclusion

24. We agree with Tenaska that offering two levels of interconnection service is a crucial component of Order No. 2003 and that the NYISO must offer a level of interconnection service that incorporates a deliverability component.²² However we also agree with the Joint Filing Parties that the New York Control Area presents unique regional circumstances that make developing a second level of interconnection service difficult and the Commission is persuaded to allow the stakeholders within the NYISO additional time to reach consensus on this issue. Order No. 2003-A recognized that an RTO or ISO has different regional operational characteristics than non-independent Transmission Providers and is less likely to unduly discriminate against market participants.²³

25. NAIS is a different service than either NRIS or ERIS; it combines elements of both. NAIS allows the Interconnection Customer to physically interconnect with the New York State Transmission System and, under Attachment S, allocates to the Interconnection Customer any "but for" interconnection upgrade costs in excess of the Annual Baseline Assessment. However, while NAIS does allow the Interconnection Customer's power to flow on the New York State Transmission System, it does not address where on the New York system the power can go. The Joint Filing Parties request additional time to study incorporating this deliverability component into its interconnection service.

²² See, e.g., Order No. 2003 at P 751, *et seq.*

²³ Order No. 2003 at P 827.

26. In fact, Order No. 2003 specifically addresses the levels of interconnection service required to be offered in bid-based energy markets, such as the NYISO, and discusses the need for both an ERIS-equivalent service,²⁴ as well as an NRIS-equivalent service.²⁵

27. The Joint Filing Parties acknowledge that under some circumstances (such as avoiding congestion costs by locating generation in the same zone as the load it is serving), a higher level of interconnection service would benefit some generators. In their filing, the Joint Filing Parties request additional time to study the concept and to complete a plan to integrate generators seeking this higher level of service with the NYISO's existing market-based congestion management system and locational installed capacity requirements.

28. Requiring a level of interconnection service that incorporates a deliverability requirement (such as with NRIS) remains a goal of the Commission. We agree with the Joint Filing Parties that the NYISO's collaborative stakeholder process should be allowed to determine how to integrate a deliverability component into its interconnection service. Therefore, we accept the Joint Filing Parties' current proposal but will require that the parties modify their tariff to include a second level of service containing a deliverability standard, similar to NRIS, within 60 days of the issuance of this order.²⁶

D. Who Should Draft the Disputed Portions of an Unexecuted LGIA?

29. The Joint Filing Parties propose modifications to section 11.3 of the LGIP, entitled "Execution and Filing", in order to accommodate both the NYISO and the relevant Transmission Owner. Specifically, the parties propose adding the following language to the discussion of the filing of unexecuted Interconnection Agreements with the Commission:

The Transmission Owner will draft the portions of the LGIA and appendices that are in dispute and assume the burden of justifying any departure from the *pro forma* LGIA and its appendices. The Transmission Owner will provide its explanation of any matters as to which the Parties disagree and support for the

²⁴ Order No. 2003 at P 753.

²⁵ Order No. 2003 at P 754.

²⁶ As stated in their transmittal letter, the Joint Filing Parties indicated that they hoped to have reached a consensus on offering multiple levels of interconnection service before July 20, 2004.

The compliance filing will be effective as of the effective date of this order.

costs that the Transmission Owner proposes to charge to the Developer An unexecuted LGIA should contain terms and conditions deemed appropriate by the Transmission Owner for the Interconnection Request. The NYISO will provide in the filing any comments it has on the unexecuted agreement, including any alternative positions, it may have with respect to the disputed provisions.

30. The Joint Filing Parties point out that under existing rules in New York, all interconnection agreements are two-party agreements between the Developer and the Transmission Owner. Under the current proposal, all new Interconnection Agreements would be three-party agreements between the Developer, the Transmission Owner and the NYISO.

Protests

31. AES and IPPNY both contend that the NYISO, not the Transmission Owner, should draft the disputed provisions of an unexecuted LGIA. Additionally, Tenaska objects more generally to the role the Transmission Owner plays in the negotiation process.

32. While AES is generally supportive of the increased role of the NYISO in the negotiation process, it believes that allowing the Transmission Owner to draft the disputed provisions of the LGIA removes the ISO from the process at the exact moment when a neutral third-party would be most useful. AES argues that the independent entity should serve as the "tie breaker" in the case of a dispute and that it should be the one to draft the disputed provisions. Otherwise, AES reasons the self-interested Transmission Owner will use its authority to draft the provisions of the unexecuted LGIA as a negotiating tactic to extract other concessions from the Developer.

33. IPPNY also argues that the NYISO should have the final say in which terms are included in the filing of an unexecuted agreement. Otherwise, IPPNY argues, the Transmission Owner could use its authority to draft the disputed provisions to inhibit competition and gain a competitive advantage against independent generators. IPPNY also points out that, under section 205 of the FPA, the provisions drafted by the Transmission Owner would automatically become law if the Commission fails to take action. Additionally, IPPNY notes that resolving a disputed LGIA often takes many months to resolve, during which time the interconnection process proceeds under the provisions drafted by the Transmission Owner.

34. Finally, IPPNY argues that the parties will have a greater incentive to negotiate in good faith and adopt reasonable positions if the parties know that the ISO will ultimately draft the provisions that will actually be filed with the Commission.

Answer of the Joint Filing Parties

35. The Joint Filing Parties argue that protesters misunderstand and mischaracterize its proposal. Instead, it argues that, under its proposed tariff, the ISO and the Transmission Owner would jointly file the unexecuted agreement. While the Transmission Owner would be responsible for drafting the disputed provisions, it would also bear the burden of justifying its proposed variations from the *pro forma*. Additionally, the Joint Filing Parties point out that the ISO's comments, including any alternative language, would be included as part of the filing. The Joint Filing Parties believe that the ISO's comments will assist the Commission in dealing with any disputed issues and that the proposed allocation of filing responsibilities between the NYISO and Transmission Owners is reasonable.

Commission Conclusion

36. We believe that the NYISO's independence places it in the best position to draft any disputed portions of the LGIA.²⁷ We agree with protesters that allowing the self-interested Transmission Provider to "fill in the blanks" invites abuse. Order No. 2003 allows flexibility to independent Transmission Providers precisely because they are independent. Relegating the ISO to a supporting role at the very point at which independence is most needed makes no sense.

37. Under the system proposed by the Joint Filing Parties, the Transmission Owner drafts the disputed provisions and files the unexecuted LGIA. The NYISO includes its own comments and recommendations in that filing. This system for dealing with the filing of unexecuted agreements works equally well whether it is the Transmission Owner or the ISO who actually makes the filing. Simply reversing this process – having the NYISO draft the disputed provisions and allowing the Transmission Owner to add its comments to the filing – avoids the appearance (or reality) of the Transmission Owner using the interconnection process to bar new entrants from the wholesale energy marketplace. And since both the NYISO and the Transmission Owner both file comments under the system proposed by the Joint Filing Parties, the additional burden of having the NYISO draft the disputed provisions instead of the Transmission Owner should be minimal.

38. Additionally, allowing the ISO "first crack" at resolving disputes between the parties benefits everyone, from ratepayers to market participants to stakeholders to Commission staff by resolving problems in the most efficient manner possible and at the

²⁷ See Order No. 2003-A at 827.

least cost. The Commission also agrees with IPPNY that parties will be encouraged to take more reasonable positions if they know that an independent entity will be reviewing the proposals and resolving disputes.

39. Finally, as protesters point out, the interconnection generally proceeds under the terms and conditions proposed in the unexecuted LGIA until the Commission resolves the issue, which can take many months. Given the choice between allowing the interconnection to proceed under the terms and conditions proposed by the Transmission Owner or the NYISO, the Commission must side with proceeding under the terms and conditions developed by the independent entity.

40. While parties do not specifically address the issue, the Commission is sympathetic to concerns of the Transmission Owners that they know the reliability issues affecting their system better than the NYISO does, and that therefore, the Transmission Owners' proposal should govern until FERC has time to decide the issue in order to preserve system reliability. As stated above, Transmission Owners have the right to jointly file comments with the Commission at the same time as the NYISO files the disputed LGIA. While the Commission is confident that the NYISO will examine each proposal and make recommendations consistent with the continued reliability of the New York electric system, the Transmission Owners' FPA section 205 rights to file with this Commission are in no way restricted by this tariff filing. Should the NYISO make a recommendation that the Transmission Owner truly believes will create a potentially unsafe situation, it may always make a filing with this Commission laying out its concerns and requested expedited action.

E. Filing Rights Under Section 205 of the FPA

41. The Joint Filing Parties propose only slight modifications to the *pro forma* LGIA's treatment of the parties' filing rights.²⁸ Under Order No. 2003, both parties retain the unilateral right to make unilateral filings with the Commission under FPA sections 205 and 206. The Joint Filing Parties only modifications to this article are ministerial and are made to change the LGIA from a two-party agreement into a three-party agreement.

²⁸ Filing rights were addressed in Article 30.11 of the Order No. 2003-A *pro forma* LGIA.

Protest

42. IPPNY and AES both contend that only the NYISO, and not the Transmission Owners, should have the right to make unilateral filings with the Commission under sections 205 and 206.

43. AES argues that the Transmission Owners should not be given the unilateral right to request modifications to the LGIA. It argues that Transmission Owners are market participants with a financial stake in the interconnection process and that it is not appropriate to afford a non-independent entity the same filing rights as the independent ISO. AES notes that while the *pro forma* allows the Transmission Provider unilateral filing rights, in the ISO context the ISO fulfills the role of Transmission Provider and that, therefore, there is no need for the Transmission Owner to have the same rights. Doing so, AES asserts, will tip the balance of power toward the Transmission Owner in the negotiating process.

44. IPPNY also opposes including Article 29.13 in the NYISO's OATT. It notes that in the New England ISO, the Independent System Operator of New England and the New England Transmission Owners (NETO) divided the FPA filing rights; modifications to some provisions could only be made by the ISO, while modifications to other provisions could only be made by the NETO. Rather than go through this time consuming process, IPPNY notes that the Joint Filing Parties instead decided not to limit the parties' respective filing rights. However, according to IPPNY, the language proposed by the Joint Filing Parties affirmatively grants the Transmission Owners filing rights instead of remaining silent on the issue. In order to properly characterize the parties' filing rights, IPPNY proposes replacing the proposed Article 29.13 with the following:
"Notwithstanding the foregoing, nothing contained herein shall be construed as affecting in any way the rights of NYISO, the Transmission Owner or developer to make regulatory filings with the Commission in accordance with the Federal Power Act, the NYISO OATT and ISO Agreement."²⁹

45. In the advent that the Commission requires the parties to delineate their respective filing rights, IPPNY requests that the Commission permit the stakeholder process to study the issue and make a further proposal to the Commission.

²⁹ IPPNY Comments at p. 16.

Answer of the Joint Filing Parties

46. In its answer, the Joint Filing Parties assert that the language suggested by IPPNY was not adopted into the LGIA because it deviated from the Commission's *pro forma* LGIA and that its proposed changes were made only to reflect the addition of a third party to the LGIA. In addition, they explain that the only modification was to use "NYISO and Transmission Owners" in place of the term "Transmission Provider," which reflects the shared responsibility for transmission facilities these entities have in New York.

Commission Conclusion

47. The proposed Article 29.13, Reservation of Rights, simply reserves the rights that the parties have under sections 205 and 206 of the FPA, absent a specific LGIA provision to the contrary.³⁰ Throughout the interconnection rulemaking and compliance process, the Commission has encouraged national uniformity. The proposal put forth by the Joint Filing Parties tracks the allocation of rights *pro forma* language.

48. It is important to note that under the proposal accepted here, any filing made by the Transmission Owner must still be reviewed by the Commission before it goes into effect. While other ISOs and RTOs may decide to allocate filing results differently,³¹ the protests have not convinced us that the proposed allocation is unjust and unreasonable. Therefore, we will accept the proposed language.

F. Attachment S: Cost Allocation and Construction of System Network Upgrades

49. The development of interconnection cost assignment principles is an ongoing process within the NYISO. Attachment S to the NYISO's OATT governs the assignment of network upgrade costs and has been the subject of much litigation and ongoing negotiations between various market participants in the New York energy marketplace.

50. Under Attachment S, the NYISO designates certain upgrades as "System Network Upgrades." System Network Upgrades are those that would have been needed in order to accommodate native load growth regardless of any new interconnections. System Network Upgrades are paid for by the Transmission Owners, without contribution from the Developer. However if an interconnection requires Network Upgrades above and

³⁰ See *Atlantic City Electric Company*, 295 F.3d 1, 20-26 (D.C. Cir. 2002).

³¹ See, e.g., *ISO New England et al.*, 106 FERC ¶ 61,280 at P 71 (2004).

beyond those that would have been built anyway, *i.e.*, Network Upgrades that would not be constructed "but for" the Interconnection Request at issue, the Developer is responsible for paying for those upgrades.

51. As mentioned above, the process of assigning upgrade costs has been a contentious one. In fact, until recently, the legal battle over the proper assignment of costs for the 2001 Class Year was ongoing. However the parties have now reached a settlement resolving these issues in *Keyspan Energy Development Corp. v. NYISO*, currently pending in Docket Nos. EL02-125-000 and EL02-125-001. Because of the uncertainty regarding the assignment of costs from 2001, the assignment of costs from generators in Class Years 2002 and 2003 has also been delayed.

Protests

52. Tenaska criticizes the use of Commission approved "but for" analysis in allocating interconnection costs without providing any type of rights associated with those Network Upgrades. Particularly, Tenaska complains that the NYISO does not propose to provide developers any valuable transmission or capacity rights in return for the Network Upgrades that developers construct. Tenaska urges the Commission not to give NYISO such flexibility in the design of its pricing policy.

53. Tenaska points out that the Commission stated that it would accept "but for" pricing provisions from an independent Transmission Provider so long as it did not amount to "and" pricing.³² In Order No. 2003, the Commission stated that the "but for" approach to Network Upgrade pricing "is not 'and' pricing if, for example, the Interconnection Customer is allowed to receive well-defined capacity rights that are created by the upgrades"³³ Tenaska claims that the NYISO grants no such rights in exchange for charging Developers the full cost of the Network Upgrades. Tenaska concludes by saying that the "NYISO has not justified why it should be able to claim all the benefits of the Network Upgrades without providing the Interconnection Customer with anything in return."³⁴

³² For a detailed discussion of "but for" and "and" pricing, see Order No. 2003 at P 692, *et seq.*

³³ Order No. 2003-A at P 695.

³⁴ Tenaska Protest at p. 3-4.

Answer of Joint Filing Parties

54. In its response, the Joint Filing Parties contend that Tenaska's protest is unfounded. The Joint Filing Parties assert that Order No. 2003 allows for alternative pricing policies (such as the "but for" policy in New York), so long as those policies are consistent with Commission policies.

55. The Joint Filing Parties point out that the Commission previously approved the pricing program employed by the NYISO in *New York System Operator, Inc.*, 97 FERC ¶ 61,118 (2001), *order on Compliance Filing*, 98 FERC ¶ 61,201 (2002). Under Attachment S, a Developer is not responsible for all upgrade costs – only those that are not otherwise required in order to maintain system reliability. As the Joint Filing Parties point out, the cost of these system reliability facilities are borne by the Transmission Owner.

56. The Joint Filing Parties also point out that few, if any, interconnection facilities (such as circuit breakers) will improve deliverability or reduce system congestion. However, the Joint Filing Parties agree that if these facilities do improve deliverability or reduce congestion, the Developer would receive Incremental Transmission Congestion Contracts (TCC) in accordance with the relevant provisions of NYISO's OATT.

Commission Conclusion

57. In Order No. 2003, the Commission proposed to adopt its existing interconnection pricing policy. Specifically, the Commission said it would allow independent Transmission Providers to adopt the "but for" approach and noted that it differs from the crediting approach established for non-independent Transmission Providers. The Commission also noted that the Developer is allowed to receive well-defined, long-term and tradable capacity rights (in lieu of transmission credits) that are created by the upgrades. Specifically, a TCC is the right to collect or obligation to pay Congestion Rents between a specified point of injection and a point of withdrawal. Once acquired, a TCC can be used as a financial instrument to hedge fluctuations in the price of transmission or can be traded or released for sale at a TCC auction. Thus, the Commission noted in Order No. 2003 that the "but for" approach is consistent with its pricing policy and is not a form of "and" pricing.

58. Additionally, the Attachment S proposal is different from the type of prohibited "and" participant funding schemes prohibited in Order No. 2003.³⁵ Since transmission

³⁵ Order No. 2003 at PP 694, 696.

costs in the NY Control Area are paid for by the load receiving the power, the Developer is not stuck paying for both the physical upgrades themselves and the right to use them.

59. Therefore, we accept the pricing approach proposed by the Joint Filing Parties in compliance with Order No. 2003.

G. Establishment of a Deadline to Reform the Attachment S Class Assignment Process

Protest

60. IPPNY requests that the Commission direct the NYISO to set a date-certain by which it will have developed procedures governing the timetable for construction of System Upgrade Facilities. IPPNY points out that the NYISO has been struggling with this issue for several years and that a swift resolution of this issue would benefit of all parties by decreasing the uncertainty in the interconnection process.

61. IPPNY asserts that had the NYISO required detailed monthly reports following the assignment of costs for the Class Year 2001 cost allocation process the Commission would now have more of a record to examine the 80 percent increase in the costs of Network Upgrades reported in March 2003 by the Transmission Owners.

62. According to IPPNY, assignment of cost responsibility for the 2001 upgrade costs and cost increases has stymied progress on the 2002 and 2003 interconnection cost allocation process. IPPNY advises that inadequate reporting has also left developers with insufficient information on which to make decisions concerning the need to accelerate or delay their completion dates and generally has impeded efficient development. IPPNY believes that greater detail should be included in the LGIA and LGIP to improve construction and budget reporting. Accordingly, IPPNY requests that the Commission establish a prompt deadline by which the NYISO must establish construction and budget reporting procedures.

Answer of the Joint Filing Parties

63. The Joint Filing Parties agree that the assignment of costs has been problematic over the last several Class Years, but assert that a process is underway to develop procedures that will solve this problem. In its answer, the Joint Filing Parties oppose setting an arbitrary deadline and request additional time to continue the stakeholder process.

Commission Conclusion

64. All parties acknowledge the flaws in the current cost allocation process. The debate arising out of the Attachment S cost allocation process, in particular determining which upgrades should be considered System Network Upgrades, has come close to halting the interconnection of new generation within the NY Control Area. However, settlement negotiations between the various stakeholders have been progressing and the Commission anticipates that the parties soon will be filing extensive revisions to the Attachment S procedures.³⁶

65. We do not believe that taking a piecemeal approach to resolving the proper implementation of the Attachment S process is wise. Placing a deadline on one aspect of the allocation process, as requested by IPPNY, would inhibit the ongoing negotiations.

66. But the Commission agrees that a resolution must be reached soon in order to ensure the proper functioning of the energy markets within the State of New York, and we will continue to revisit this issue until a resolution is reached. To this end, we will require the parties to provide us with a status report on the progress of these proceedings within sixty days of this order, unless the tariff amendments have been filed before that time. In the event that no procedures have been finalized by that date, the NYISO should include in that status report a summary of issues that are holding up the process, with a notice for comments to follow.

³⁶ The Commission set several issues relating to the Attachment S cost assignment process for hearing.

In that proceeding we set three particular issues for expedited hearing: (1) whether the NYISO's selection of generic generating units was consistent with the Attachment S rules for selecting such units; (2) whether the NYISO's exclusion of certain generating units from the Baseline Assessment was consistent with the cost allocation rules; and (3) whether the model used to conduct the studies was the proper model and if not, what effect using the improper model had.

An Initial Decision resolving the issues presented in EL02-125-000 was issued by Judge Massey on May 8, 2004 and is currently pending before the Commission.

On June 14, 2004, the NYISO filed proposed settlements with the Commission resolving both the financial and non-financial aspects of the Attachment S dispute, which is also pending before the Commission in Docket Nos. EL02-125-000 and EL02-125-001.

H. Clustering

67. The Joint Filing Parties propose to retain the *pro forma* LGIP's clustering provisions in its LGIP. The Joint Filing Parties propose only minor changes to section 4.2, which allows the Transmission Provider, at its option, to cluster Interconnection Requests and perform the Interconnection System Reliability Impact Study (SRIS) for all generators within a given class year.

Protest

68. IPPNY contends that performing SRIS in a cluster is at odds with long-standing NYISO procedures and simply is not compatible with Attachment S procedures as they currently exist. IPPNY explains that under existing NYISO procedures, the NYISO starts with a list of baseline facilities that must be included in each Developer's SRIS. The baseline includes only facilities for which a completed SRIS already exists. According to IPPNY, a cluster study is likely to attribute to a group of Developers impacts that would not exist if the NYISO were studying Developers on a case-by-case basis. IPPNY argues that NYISO must be able to isolate the impact of each project separately in order to assign costs and have the Attachment S cost assignment process function properly. Additionally, IPPNY notes that the class year is not even finally determined until the costs have been assigned and the Developers have either accepted their cost assignments or dropped out.

Answer of the Joint Filing Parties

69. In response, the Joint Filing Parties contend that New York's SRIS is equivalent to the Commission's Interconnection System Impact Study and consistent with the Commission's *pro forma* LGIP and Attachment S. The Joint Filing Parties explain that the SRIS is used to develop a rough estimate of costs and that it is not until later in the study process that costs are actually allocated amongst Developers. Developers, according to the Joint Filing Parties, are not required to decide whether to proceed with the interconnection based on the cost estimates established in the SRIS because those results are subject to review and possible modification based on the subsequent Facilities Study.

70. Additionally, the Joint Filing Parties assert that clustering will save time and money, resulting in a lower cost SRIS.

Commission Conclusion

71. In Order No. 2003, the Commission allowed transmission providers the flexibility to study interconnection requests serially or in clusters and strongly encouraged clustering as an efficient queue management technique.³⁷ Order No. 2003 also noted that the Interconnection Feasibility Study, which is conducted serially and early in the study process, provides much of the information needed by the parties in order to assign network impacts to each Developer.

72. At the most basic level, the Commission is reluctant to prohibit an independent Transmission Provider from using an LGIP provision that it allows non-independent Transmission Providers to use. Additionally, we believe that IPPNY may slightly misunderstand what is entailed in the Order No. 2003 SRIS process. Clustering simply enables the ISO to more efficiently determine what Network Upgrades are required. Performing studies on a clustered basis in no way prevents the NYISO from being able to state which upgrades are attributable to which project. Therefore, IPPNY's protest is denied.

I. Liquidated Damages & Stand-Alone Network Upgrades

Protest

73. The NYTO argue that the Attachment S process does not allow for liquidated damages. While NYTO agrees that liquidated damages may have a role in some regions, it asserts that they are not appropriate in a region administered by an independent Transmission Provider.

74. NYTO also suggests that a Transmission Owner could be held liable for the inaction of the NYISO and that if the liquidated damages provision is kept at all, it should be applied equally to both the Transmission Owner and the NYISO.

75. NYTO attacks Articles 5.1, 5.2, and 5.3 of the LGIA as presenting the Transmission Provider with a "Hobson's Choice" of accepting construction milestones unilaterally proposed by the Developer, or allowing the Developer to control the construction process. NYTO argues that the situation is particularly acute in New York because the Attachment S process contemplates that the Transmission Owner will build and own all upgrades to the existing Transmission System for the benefit of all users of the system. NYTO also argues that since, under Attachment S, generators pay all "but

³⁷ Order No. 2003 at P 155.

for" interconnection costs, a liquidated damages provision would violate the "but for" principle.

76. Finally, the NYTO requests that the Commission require the Developer to transfer ownership of any network upgrades it may construct to the Transmission Owner.

Commission Conclusion

77. Many of the concerns that NYTO raises were addressed in Order No. 2003-A. For instance, Order No. 2003-A now requires that any Network Upgrades constructed by the Developer be transferred to the Transmission Owner, unless both parties agree otherwise.³⁸ Additionally, the Commission has explained that a Transmission Owner is never required to agree to include liquidated damages in the LGIA.³⁹

78. NYTO's other comments were discussed in Order Nos. 2003 and 2003-A. To that extent, its generic liquidated damages comments constitute a collateral attack on those Commission decisions, and are therefore denied. Additionally, as stated above, Order No. 2003-A addressed the exact issues that the NYTO request be altered and makes those arguments moot.

79. Additionally, article 5.1.2 grants the Transmission Owner additional protections by extending the milestone dates proposed by the Developer for each day the NYISO refuses to grant clearances to install equipment. The Commission declines to apply liquidated damages to the NYISO since, as an independent entity, it has no financial incentive to unduly discriminate against the Developer. Liquidated damages provide an appropriate incentive for the non-independent Transmission Owner to carry out interconnections expeditiously.

80. Finally, in regard to construction of Network Upgrades by the Developer, the tariff already restricts the rights of Developers by allowing them to build only Stand-Alone Network Upgrades. In addition to having its milestone dates reviewed and approved by the Transmission Owner, the Developer is also required to seek permission from other Developers whose projects also depend on that particular Stand-Alone Network Upgrade.

³⁸ Order No. 2003-A at P 230.

³⁹ Order No. 2003-A at P 249.

J. Access Rights

81. The Joint Filing Parties propose to require a party seeking to inspect the other party's facilities to pay the costs of such a visit. The issue of whether the access-granting party could charge another party seeking to inspect its facilities was addressed in Order No. 2003.⁴⁰ LGIA Article 5.12 specifically prohibits charging for that access. The Commission does not believe that one party should be required to pay another party simply for exercising its right of inspection under the LGIA.

82. Many, if not most, inspections will involve the non-independent Transmission Owner and the Developer – not the NYISO. Therefore the Commission believes that allowing these two self-interested parties to require payments whenever one wishes to inspect the other's facility invites abuse.

83. The Joint Filing Parties do not justify (or even address) this deviation from the *pro forma* LGIA. Therefore the Commission directs the Joint Filing Parties to change article 5.12 to state that the granting party may not charge the access party for granting access.

84. The other changes proposed by the Joint Filing Parties are, however, acceptable, including the addition of the indemnity clause to article 5.12.

K. Changes to Definition of Applicable Reliability Standards

85. The Joint Filing Parties propose to modify the definition of "Applicable Reliability Standards"⁴¹ to specify that an interconnection will be subject to the reliability

⁴⁰ Order No. 2003 at P 291 (In rejecting NYTO's arguments that costs should be paid by the other Party, the Commission stated that "[t]he phrase 'at no cost to the other Party' is clear.")

⁴¹ Specifically, Applicable Reliability Standards are defined as

the requirements and guidelines of the Applicable Reliability Councils, and the Transmission District, to which the Developer's Large Facility is directly interconnected, as those requirements and guidelines are amended and modified and in effect from time to time; provided that no party shall waive its right to challenge the applicability or validity of any requirement or guideline as applied to it in the context of the Large Facility Interconnection Procedures.

requirements of individual Transmission Districts,⁴² as opposed to state-wide reliability requirements.

Protest

86. IPPNY requests that the Commission reject the proposed changes to the definition of "Applicable Reliability Standard." IPPNY states that while it recognizes the need for differing reliability requirements and interconnection guidelines on different parts of the New York State Transmission System, the proposed modifications to the definition of "Applicable Reliability Standards" would give non-independent Transmission Owners the ability to unilaterally modify the rules governing the interconnection process. And without an independent body reviewing these changes, IPPNY fears that independent developers may face discriminatory treatment from self-interested Transmission Owners in the guise of reliability requirements.

87. Specifically, IPPNY claims that allowing these standards to be set at the "Transmission District" level instead of the "Transmission System" level would allow the rules to be set or changed without going through the stakeholder process that determines the Reliability Rules for the New York State Transmission System. IPPNY explains that, currently, New York Control Area requirements are established and controlled by either the New York State Reliability Council (NYSRC) or the NYISO, with input from a variety of interested parties.

88. Rather than allow non-independent Transmission Owners to set the rules for each Transmission District, IPPNY recommends requiring the NYSRC and/or NYISO to incorporate Local Reliability Rules into the overarching set of rules maintained for the New York Control Area.

Answer of the Joint Filing Parties

89. In their February 25 Answer the Joint Filing Parties argue that the change reflects the fact that, even though New York is a single control area, each individual Transmission Owner sets its own reliability requirements and that such variations are necessary to protect the reliability of the entire New York State Transmission System.

⁴² A "Transmission District" is defined in the NYISO OATT as "[t]he geographic area served by the Investor-Owned Transmission Owners and LIPA, as well as the customers directly interconnected with the transmission facilities of the Power Authority of the State of New York." NYISO's Tariff, Second Revised Sheet, No. 70 at § 2.184.

90. The Joint Filing Parties also note that the modified definition specifically gives a Developer the right to challenge the applicability or validity of a particular reliability requirement being applied to it by a Transmission Owner. Finally, the Joint Filing Parties note that New England Transmission Owners and PJM also rely on local reliability requirements that vary from Transmission Owner to Transmission Owner.

Commission Conclusion

91. Both parties assert the need for Transmission District-specific protocols in order to assure the safe and reliable operation of the New York State Transmission System, but they disagree as to how those protocols should be created and enforced.

92. A similar issue was discussed at length in the Commission's order authorizing the creation of the NYISO in 1998.⁴³ In that proceeding, the parties proposed that the newly-constituted NYSRC would be in charge of developing new reliability standards, while the NYISO would be in charge of implementing them.⁴⁴

93. The parties to the 1998 proceeding proposed to require the NYISO to implement any Local Reliability Rule promulgated by a Transmission Owner without input from, or the consent of, the NYISO or NYSRC. The Commission rejected that portion of the filing, stating that:

[t]he disparate treatment of these rules could provide the Transmission Providers with short-term competitive advantages. This provision would undermine one of the fundamental purposes of an ISO: . . . to remove transmission control from Transmission Providers that have an affiliate with an interest in the power market. It would permit an individual transmission owner to dictate reliability rules for immediate implementation – some of which could have a significant effect on transmission operations affecting commercial practices – without review or approval by the either the NYSRC or the NYISO.^[45]

⁴³ See *Central Hudson Gas & Electric Corp., et al.*, 83 FERC ¶ 61,352 (1998) (*Central Hudson*), *order on reh'g*, 87 FERC ¶ 61,135 (1999).

⁴⁴ Included in the 1998 filing was a detailed agreement between the NYISO and the NYSRC that governs how disputes between the two entities are to be resolved and allowing for rights of appeal to either the New York State Commission or to this Commission in certain circumstances. *Id.* at ¶ 62,411-62,413.

⁴⁵ *Central Hudson* at 83 FERC ¶ 62,412-62,413.

94. The Commission was clear in 1998 that Local Reliability Rules established at the Transmission District level should be treated the same way as Reliability Rules that apply across the entire New York State Transmission System and we see no reason to depart from that holding now.⁴⁶

95. While in principle we agree with IPPNY that non-independent Transmission Owners should not be allowed to alter Local Reliability Rules without the oversight of an independent body, we believe that the rules governing the relationship between the NYISO and the NYSRC already require the type of independence IPPNY seeks. In its OATT, the NYISO defines "Local Reliability Rule" as a "Reliability Rule established by a Transmission Owner, and adopted by the NYSRC, to meet specific reliability concerns in limited areas of the NY Control Area, including without limitation, special conditions and requirements applicable to nuclear plants and special requirements applicable to the New York City metropolitan area."⁴⁷ The definition of Applicable Reliability Standards, as proposed by the Joint Filing Parties does not alter that definition or the Commission-accepted process for making Local Reliability Rules effective. Finally, should a dispute arise over the applicability of a particular Local Reliability Rule, the parties are free to appeal to the NYISO, the New York State Commission, or to FERC, as described more fully in *Central Hudson*.

96. To be clear, the Commission is not granting a Transmission Owner carte blanche to modify its reliability rules. Any change (barring the type of emergency orders specifically allowed for in *Central Hudson*) to a Local Reliability Rule must be approved by NYSRC and is subject to protest by the NYISO. Just as the Commission held in *Central Hudson*, Local Reliability Rules are to be developed and implemented in the same fashion, and with the same procedural safeguards as all Reliability Rules applicable to the entire New York Control Area.

L. Suspension

97. NYTO argues that a clarification to article 5.16 is necessary to eliminate any doubt as to the proper interpretation of a particular generator's cost responsibility in the case of a generator that suspends its project. According to NYTO, there is no disagreement between stakeholders as to the meaning of this provision and that all agree that a generator continues to be responsible for all costs properly allocated to it under Attachment S despite any project suspension. NYTO proposes modifying article 5.16 to read "[i]n such event, Developer shall continue to be responsible for all reasonable and

⁴⁶ *Id.* at ¶ 62,413.

⁴⁷ NYISO's Tariff, Second Revised Sheet, No. 47 at § 2.96.

necessary costs and/or obligations in accordance with Attachment S of the NYISO OATT including those which Transmission Owner" incurred prior to the suspension or as a result of the suspension.

Commission Conclusion

98. In its Order No. 2003-A compliance filing, the Joint Filing Parties modified article 5.16 as requested by the NYTOs and the Commission has received no additional comments on this issue. The Commission wishes to make clear that, while we accept the revision, it does not change the fundamental nature of the Developer's right to suspend work.

M. Power Factor Requirements & Wind Technology

99. The Joint Filing Parties propose to remove the specific numeric requirements from article 9.5.1 entitled Power Factor Design Criteria. Instead, it proposes to allow each Transmission Owner to set its leading/lagging criteria.

100. In its Order No. 2003-A compliance filing, the Joint Filing Parties note that the NYISO and the New York State Energy Research and Development Authority have sponsored a study investigating the special requirements for wind generation to be interconnected to the New York State Transmission System. The Joint Filing Parties state that they intend to seek Commission approval of these special requirements in the future.

101. In the meantime, however, the Joint Filing Parties propose to remove the provision in article 9.5.1, Power Factor Design Criteria, exempting wind from having to meet more restrictive reactive power requirements.

Protest

102. AES and IPPNY complain that the Joint Filing Parties have removed from the LGIA the requirement that a Developer's facility maintain a power factor within the range of 0.95 leading to 0.95 lagging at the Point of Interconnection. Both protesters complain that the revised LGIA now provides that power delivery must be within a range established by the Transmission Owner on a comparable basis, until the NYISO has established different requirements that apply to all generators in the NY Control Area on a comparable basis. IPPNY believes that this would permit each TO to select its own power factor requirement and impose burdensome requirements on generators.

Answer

103. The Joint Filing Parties respond that the filing merely preserves the status quo on a comparable basis until such time as the NYISO establishes state-wide requirements. However, in order to ensure greater transparency of the existing power factor requirements, Transmission Owners agree to post their power factors on the NYISO's website.

Commission Conclusion

104. In Order No. 2003 the Commission permitted Transmission Providers to set their own power factor requirements, so long as the same requirement applied to all generators within the Control Area on a comparable basis.⁴⁸ Therefore, we will permit the Joint Filing Parties to retain their current proposal.⁴⁹

N. Responsibility for Interconnection Study Costs

105. NYTO asserts that while the NYISO manages the interconnection process, it shoulders none of the attendant risk. NYTO points specifically to section 7 of Appendices 2 – 5 to the LGIP. Each of these appendices governs a different portion of the interconnection study process and each contains a provision relieving the NYISO and its consultants of any liability.

106. NYTO argues that, at a minimum, the Commission should require that the appendices be modified to treat all parties comparably. Accordingly, NYTO provides suggested language in Appendix A to their comments.

Commission Conclusion

107. We agree with the NYTO that it is reasonable to extend the disclaimer of warranties and limitation of liabilities to all parties. Particularly, Article 18.2, Consequential Damages, of the LGIA extends similar provisions to both parties of a two-party agreement. Here, where we have a three-party agreement, it makes sense to extend these protections to all parties.

108. Therefore, the Commission will require the Joint Filing Parties to propose modifications to the study agreements found in the LGIP appendices that will adequately protect all parties within 30 days of the issuance of this order.

⁴⁸ Order No. 2003 at P 542.

⁴⁹ See also Midwest ISO, 108 FERC ¶ 61,027 (2004).

O. Requirement to Follow Instructions Resulting in Adverse Plant Impacts

109. Article 13.6 of the Commission's *pro forma* LGIA states that a Developer is not required to follow Transmission Provider instructions "to the extent the instruction would have a material adverse impact on the safe and reliable operation of the Interconnection Customer's Large Generating Facility."

110. The Joint Filing Parties propose to eliminate this provision.

Protest

111. IPPNY states that the potential harm to Developers that may result from the exclusion of this provision is "obvious." IPPNY also argues that the Joint Filing Parties have failed to justify removing this provision.

Answer of Joint Filing Parties

112. The Joint Filing Parties argue that the safe and reliable operation of the New York Control Area depends on the ability of the NYISO and of Transmission Owners to take emergency actions should the circumstances warrant.

113. The Joint Filing Parties argue that the removed language would allow the Developer to unilaterally decide to ignore instructions from the NYISO/Transmission Owner and would jeopardize the reliable operation of the network. The Joint Filing Parties also assert that the removed provision is inconsistent with article 13.4.2 which requires that, during an emergency system condition, the Developer comply with all NYISO/Transmission Owner operating instructions.

Commission Conclusion

114. Order No. 2003-A modified article 13.6 to remove the language deleted by the Joint Filing Parties in their initial compliance filing.⁵⁰ Therefore we will reject IPPNY's protest.

P. Operational Control & Request for Waiver

115. As explained by the Joint Filing Parties, the NYTOs retain sole control over certain facilities within the NY Control Area and the interconnections with those

⁵⁰ Order No. 2003-A at P 442.

facilities. While parties propose to eliminate this distinction, currently interconnections to transmission facilities of less than 115 kV are handled by the Transmission Owner, while interconnections to transmission facilities of 115 kV or greater are handled by the NYISO.

116. The Joint Filing Parties state that the *pro forma* LGIA and *pro forma* LGIP will no longer apply to any interconnections within the NY Control Area after the Commission accepts this compliance filing.

117. In order to avoid confusion, the Joint Filing Parties request that the Commission clarify that the individual Transmission Owners within the NY Control Area were not deemed to have adopted the *pro forma* LGIA and *pro forma* LGIP on January 20, 2004, when Order No. 2003 became effective for all non-independent Transmission Providers.⁵¹

118. The Joint Filing Parties also argue that the Commission's concerns over potential discrimination by Transmission Owners are less applicable to the New York context where the Transmission Owners have largely divested themselves of their generation assets.

119. The Joint Filing Parties assert that the Commission should interpret the term "operational control" generously and construe all of its facilities to be under the operational control of the NYISO. They argue that, since interconnection service is offered under the NYISO's OATT, that the NYISO has operational control over the relevant facilities, even though the Transmission Owner actually receives the Interconnection Request, performs the studies, and builds the necessary facilities.

120. Finally, if the Commission does determine that the New York Transmission Owners are considered to have "operational control" over jurisdictional transmission facilities, the Joint Filing Parties request that the Commission grant any necessary waivers to allow the NYISO, pursuant to this compliance filing, to administer the Interconnection Request. The Joint Filing Parties also point out that, even where the Transmission Owner has operational control, the NYISO is still responsible for administering the energy, capacity, ancillary services, and congestion management markets and related auctions.

⁵¹ The Joint Filing Parties first requested this clarification in the context of the Large Generator Rulemaking. *See* Request of the NYISO and the New York Transmission Provider for Clarification of Notice Clarifying Compliance Procedures, Docket No. RM02-1-004 (Feb. 9, 2004).

Commission Conclusion

121. As the Joint Filing Parties point out, the Commission has drawn a clear distinction between facilities that are under the operational control of independent Transmission Providers and those that are under the operational control of non-independent Transmission Providers.

122. It is hard to credit the Joint Filing Parties' argument that the party with whom the Developer files its Interconnection Request, who conducts the studies, and then builds the upgrades does not have "operational control" over those facilities as that term was used by the Commission in its January 8, 2004 order clarifying compliance.⁵² While the Parties are correct that the Commission did not specifically define that term "operational control," we believe that our meaning was clear.

123. However, the Commission agrees with the Joint Filing Parties that it would be counterproductive to require the creation of nine separate queues⁵³ throughout the New York Control Area to handle the relatively small number (if any) of Interconnection Requests filed between January 20, 2004 and the date this order is made effective. As the Commission stated in Order No. 2003-A, one of its overriding goals is establish "a single, uniformly applicable set of procedures and agreements to govern the process of interconnection Large Generators to a Transmission Provider's Transmission System."⁵⁴ Simply put, it would not benefit consumers or market participants to require that the various Transmission Owners go through the motions of adopting Order Nos. 2003 and 2003-A only to remove them upon acceptance of this joint filing.

124. Order No. 2003 recognized that not all public utilities are likely to receive interconnection requests and the burden of complying with Order No. 2003 may outweigh the benefits to consumers.⁵⁵ While this logic has usually been applied to smaller Transmission Providers, it also applies here.⁵⁶ Where we have granted waiver in the past, the Commission has stated that the waiver would last until such time as the

⁵² See Notice Clarifying Compliance Procedures, *supra* n.1.

⁵³ The Joint Filing Parties state that there would be eight queues for each of the eight Transmission Owners and one for the NYISO itself.

⁵⁴ Order No. 2003-A at P 2.

⁵⁵ See, e.g., Inland Power & Light Co., 107 FERC ¶ 61,054 (2004).

⁵⁶ See Order No. 2003 at P 830.

public utility receives a request for interconnection service.⁵⁷ Therefore, the Commission will grant the New York Transmission Owners a waiver so long as they have not received any requests for interconnection to facilities they control (*i.e.*, facilities of less than 115 kV) during the period between January 20, 2004 and the issuance of this order. If a Transmission Owner has received such a request, it must adopt Order No. 2003 or 2003-A into its tariff and process the interconnection under the *pro forma*.

Q. Redispatch and Line Outage Costs

125. In its Order No. 2003-A compliance filing,⁵⁸ the Joint Filing Parties propose to allow Transmission Owners to propose recovery of line outage costs for interconnections on a case-by-case basis, in accordance with the modifications made in Order No. 2003-A. The Joint Filing Parties have eliminated the reference to the Transmission Owner as being responsible for such compensation.

Protest

126. IPPNY requests clarification that changes to article 10.5 of the LGIA will not allow generators to be charged for redispatch costs associated with construction, operation and maintenance of interconnection facilities or system upgrade facilities.

Commission Conclusion

127. In Order No. 2003-A the Commission granted partial rehearing of its decision not to allow Transmission Providers to collect redispatch and line outage costs. Additionally, we indicated that we would consider proposals from an independent Transmission Provider as to whether the RTO/ISO or the Transmission Owner should compensate the Interconnection Customer with regard to outage schedules in article 9.7.1.2.⁵⁹ In regards to redispatch costs, we agreed to allow Transmission Providers to seek recovery of these

⁵⁷ *Id.* at P 830-31.

⁵⁸ In its initial compliance filing, the Joint Filing Parties stated that Attachment S does not currently provide for the recovery of redispatch costs, but that this issue may arise in future filings. Until such time, however, the Joint Filing Parties agree with IPPNY that redispatch costs are not recoverable.

⁵⁹ Order No. 2003-A at PP 417-420.

costs on a case-by-case basis.⁶⁰ Since the Joint Filing Parties' Order No. 2003-A compliance filing is in accordance with this change, we deny IPPNY's protest.

R. Disclosure of Information to State Regulators

128. The Joint Filing Parties note that the Commission added language to section 13.18 of the LGIP and article 22.1.10 of the LGIA in Order No. 2003-A to address a Transmission Owner's disclosure of confidential information to a state regulatory body.⁶¹

129. The Joint Filing Parties advise that this language was not included in its compliance filing because it would be in conflict with existing Code of Conduct provisions already included in Attachment F of the NYISO OATT.

Commission Conclusion

130. In order No. 2003-A, the Commission addressed concerns about a party's responsibility to provide information to state regulatory staff without providing notice to the other party.⁶² The Commission clarified that if a state is conducting an investigation, it should be able to request information from one party without that party notifying the other.⁶³ Accordingly, we included such a provision to section 22.1.10 of the LGIA.

131. Attachment F to the NYISO OATT does require that NYISO share otherwise confidential information with Commission staff under certain circumstances. However, Attachment F is not as clear in delineating situations in which information can be shared with state regulatory bodies and the Joint Filing Parties do not make a showing that Attachment F is consistent with or superior to the Commission's *pro forma* confidentiality provisions. Additionally, they also do not provide any specific regional needs that would justify deviating from the *pro forma* provisions. Therefore, we will direct the NYISO to either make such a showing or to adopt the modifications to the confidentiality provisions approved by the Commission in Order No. 2003-A within 60 days.

⁶⁰ Order No. 2003-A at P 647.

⁶¹ Order No. 2003-A at P 486.

⁶² Order No. 2003-A at P 481.

⁶³ Order No. 2003-A at P 486.

S. Miscellaneous Items

132. The Joint Filing Parties initially proposed to remove from article 9.6.2.3 provisions requiring written notification of emergency interruptions in service. IPPNY contends that there is no basis for removing the requirement that such notification be made in writing. In their answer, the Joint Filing Parties state that they have no objection to reinstating the struck language. Therefore we will require that the Joint Filing Parties reinstate the language in its compliance filing.

133. In Order No. 2003-A, the Joint Filing Parties note that the Commission concluded that the definition of Network Resource should conform to the OATT definition.⁶⁴ The Joint Filing Parties have therefore deleted the terms "Network Resource" and "Network Upgrades" from its LGIP and LGIA.

134. Also in Order No. 2003-A, the Commission clarified that a Transmission Owner using local furnishing bonds to finance Network Upgrades is not required to provide interconnection service if doing so would jeopardize its tax-exempt status.⁶⁵ The Joint Filing Parties advise that they have expanded this exception to cover other types of tax exempt bonds, as well as local furnishing bonds.

135. With regard to the LGIA, the Commission recognized in Order No. 2003-A the limitations on the obligations of a Transmission Provider to seize land for the benefit of another party.⁶⁶ The Joint Filing Parties have amended article 5.13 on Lands of Other Property Owners to track the Commission's conclusion on rehearing.

136. The Commission also notes that in the definition of the term "Clustering" the Joint Filing Parties appear to have left out the word "Impact" from its description of SRIS and will require that it fix this error or explain to the Commission why this change should not be made.

The Commission orders:

(A) The Joint Filing Parties' proposed modifications to the *pro forma* LGIA and LGIP are accepted in part and rejected in part, effective on the date of this order, as discussed in the body of this order.

⁶⁴ Order No. 2003 at PP 70 and 71.

⁶⁵ Order No. 2003-A at P 388.

⁶⁶ Order No. 2003-A at P 300.

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(B) The Joint Filing Parties are directed to submit a compliance filing, as directed in this order, within 60 days from the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.