UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator Corp.) Docket No. OA08-52-003

MOTION OF THE AMERICAN ANTITRUST INSTITUTE, AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION FOR LEAVE TO INTERVENE OUT OF TIME AND REQUEST FOR REHEARING

Pursuant to Rules 212, 214 and 713, the American Antitrust Institute (AAI), American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) (collectively Movants), hereby request leave to intervene out-of-time in the above-captioned proceeding and request limited rehearing of the Commission's March 31, 2009 order, *New York Independent System Operator Corp.*, 126 FERC ¶ 61,320 (2009)("March 31 Order"). As discussed below, by dismissing the New York Regional Interconnect, Inc.'s (NYRI's) competitive concerns on grounds that the Commission had no authority to enforce the antitrust laws, the Commission has overlooked the legally inseparable interrelationship between its competition policy and the antitrust laws and ignored its obligations to consider antitrust policies, obligations supported by settled court and agency precedent going back many decades.

MOTION FOR LEAVE TO INTERVENE OUT OF TIME

AAI is an independent nonprofit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality both of the antitrust laws and the antitrust principles embodied in the

public interest mandate of the Commission. In carrying out its responsibilities, AAI has participated in a number of Commission proceedings.

NRECA is the national service organization dedicated to representing the national interests of cooperative electric utilities and the consumers they serve. NRECA represents the nation's 930 not-for-profit, customer-owned rural electric cooperatives serving more than 40 million end users in 47 states, including New York. Of those 930 cooperatives, 64 are generation and transmission cooperatives that are owned by and sell power to their member distribution cooperatives.

APPA represents the nation's more than 2,000 not-for-profit, publicly-owned electric utilities, which do business in every state except Hawaii. Public power systems own about 10 percent of the nation's electric generating capacity, and provide over 15 percent of all kilowatt-hours of electricity sold to ultimate customers.

Both NRECA and APPA members participate in wholesale power markets as buyers *and* sellers.

Movants submit that good cause exists to grant their motion for late intervention. The Commission did not make clear in this proceeding until it issued its March 31 Order its current view that it could dismiss antitrust allegations without any consideration on grounds that it had no jurisdiction to enforce the antitrust laws. Given what the Movants believed was settled law concerning the Commission's obligation to consider antitrust issues raised in its proceedings, they had no reason to seek to participate in this proceeding at an earlier stage. Further, given the limited nature of Movants' intervention, no party would be unduly prejudiced by the grant of intervention at this stage of the proceedings. Finally, Movants have a substantial interest in the outcome of this case that

cannot adequately be represented by other parties, as it will have substantial future import for defining the Commission's obligation to consider antitrust-related claims in future proceedings.

COMMUNICATIONS

The names and addresses of persons to whom correspondence in regard to this proceeding should be addressed are as follows:

Diana L. Moss, Ph.D.*
Vice President and Senior Fellow
American Antitrust Institute
P.O. Box 20725
Boulder, CO 80308
dmoss@antitrustinstitute.org

Harvey L. Reiter*
Stinson Morrison Hecker LLP
1150 18th Street, NW, Suite 800
Washington, DC 20036-3816
(202) 785-9100 (Telephone)
(202) 785-9163 (Fax)
hreiter@stinson.com

Susan N. Kelly*
Vice President of Policy Analysis
and General Counsel
Allen Mosher
Senior Director of Policy Analysis
and Reliability
American Public Power Association
1875 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20009
(202) 467-2900 (Telephone)
(202) 467-2920 (Fax)
skelly@appanet.org

Wallace F. Tillman, General Counsel
And Vice President
Richard Meyer,* Senior Regulatory Counsel
Jay A. Morrison, Senior Regulatory Counsel
David L. Mohre, Executive Director,
Energy & Power Division
National Rural Electric Cooperative Association
4301 Wilson Boulevard
Arlington, VA 22203-1860
(703) 907-5811 (Telephone)
rxm0@nreca.coop

* Designated for service

SPECIFICATION OF ERROR

The Commission erred in concluding that, because it has no jurisdiction to enforce the antitrust laws, it has no responsibility or obligation to consider antitrust-related claims in cases that come before it.

STATEMENT OF ISSUE RAISED

In rejecting NYRI's antitrust allegations on grounds that it "does not have jurisdiction to determine violations of the antitrust laws… and is not strictly bound to the dictates of these laws" (March 31 Order at P 39 n. 31), the Commission abdicated its obligations under the Federal Power Act. While the Commission does not have the authority to enforce the antitrust laws, it is obligated to consider allegations that its actions or the actions of the entities it regulates contravene antitrust policy and to weigh antitrust concerns against other countervailing public interest factors, if any. ***Relevant precedent***: *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973); *Northern Natural Gas Co. v. FPC*, 399 F. 2d 953 (D. C. Cir. 1968); *Connecticut Light & Power C*o., 8 FERC ¶61,187 (1979): *Southern Natural Gas Co.*, 75 FERC ¶ 61,046 at 61,165 (1996); Order No. 474, FERC Stats. & Regs., ¶ 30,751 at 30,708 (1987).

ARGUMENT

In its request for rehearing of the Commission's October 16, 2008 order in this proceeding, NYRI maintained "that NYISO's supermajority voting provision is anticompetitive and violates antitrust law, because 'the NYISO proposal allows an LSE monopolist (such as ConEd, or group of LSEs with 21 percent or more of the benefiting load) to foreclose potential competition.'" March 31 Order at P 31. The Commission dismissed NYRI's antitrust claim without substantive discussion, holding that it was "not

charged with enforcing such laws," nor "'strictly bound to the dictates of these laws.'" *Id.* at P 39 and n. 31.

To be clear, Movants take no position on the merits of the antitrust issues raised by NYRI. The Commission, however, was not free to dismiss NRYI's antitrust contentions without considering them. The Commission's sweeping statement is extraordinarily troubling, for it represents a repudiation, in a single seemingly offhand passage, of decades of court and Commission jurisprudence outlining its obligations to weigh antitrust policy in administering the Federal Power and Natural Gas Acts.[1] As Movants demonstrate below, the Commission's lack of authority to enforce the antitrust *laws* does not relieve it of what FERC itself has described as its "general obligation to give reasoned consideration to the bearing of antitrust *policy* on matters within its jurisdiction." Order No. 474, FERC Stats. & Regs., ¶ 30,751 at 30,708 (1987) (emphasis added).[2] On the contrary, the Commission's obligations in this regard very substantial.

It can scarcely be debated that there is a "'public interest' standard embodied in the Federal Power Act," Order No. 474, *supra* at 30,708 and that in "fulfilling the Commission's responsibilities" under that standard, the Commission is "called upon to

---

[1] Several years ago, the Commission dismissed a similar contention – that a utility "was violating the antitrust laws by refusing to sell power to [a customer] at cost-based rates" on grounds that "even if the antitrust laws impose a duty on certain sellers to sell power at cost-based rates, matters involving alleged violations of antitrust laws are beyond the Commission's jurisdiction to address." *PPL Montana, LLC*, 115 FERC ¶61,204 at P 64 (2006). It retreated, however, from this legally indefensible position on rehearing, noting that it had, in fact undertaken the very type of analysis of market power and market concentration that had "long been staples of market power analysis among the antitrust agencies." *PPL Montana*, 120 FERC ¶ 61,096 at P 86 (2007).

[2] *See also, Gulf States Utilities Co.*, 5 FERC ¶ 61,066 at 61,098 (1978) (describing FERC's "responsibility to consider antitrust policy in exercising its regulatory authority, including its examination of rates, terms and conditions for wholesale electric service").

consider applicable antitrust policies in its determination of what is in the public interest." *Southern Natural Gas Co*., 75 FERC ¶ 61,046 at 61,165 (1996). The derivation of that obligation is clear. Antitrust principles are "a fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conf*., 383 U. S. 213, 218 (1966). Indeed, the courts have found that antitrust policy is an integral part of the public interest equation for agencies overseeing a wide range of regulated industries – whether the reference term is "public convenience and necessity," "public interest" or "just and reasonable." *See, e.g, Northern Natural Gas Co. v. FPC*, 399 F. 2d 953, 960-63 (and cases cited therein) (D. C. Cir. 1968). *See also Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758-9 (1973).[3]

It is equally clear why, even where, as in the Commission's case, the regulatory agency does not enforce the antitrust laws, it is nonetheless obliged under a public interest standard to consider evidence of antitrust violations:[4] "By its very nature an illegal restraint of trade is in some ways 'contrary to the public interest.'" *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 244 (1968). "The history of Part II of the Federal Power Act, in fact, "indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Otter Tail Power Co. v. United States*, 410 U. S. 366, 374-75 (1973). Thus while FERC's March 31 Order states

[3] *See also, Kansas Power and Light v. FPC*, 511 F.2d 1178 (D. C. Cir. 1977) (duty to consider antitrust policies under "public interest" test of Section 203); *FPC v. Conway Corp*., 426 U.S. 271 (1976) (duty to consider anticompetitive effects of rates under "just and reasonable" standard); *Tenneco Oil Co*., 2 FERC ¶ 61,247 (1978) ("duty to consider antitrust and competition policy in determining public convenience and necessity in certification proceedings").

[4] Indeed, as FERC noted in *Florida Power & Light Co*., 8 FERC ¶ 61,121 at 61,457-8 (1979), it has found such evidence of "significant assistance" in the discharge of its responsibilities under the FPA.

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,"[5] Congress *did* view FERC as the "first line of defense against those competitive practices that might *later* be the subject of antitrust proceedings." *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 760-62 (1973) (emphasis added). The D. C. Circuit has similarly observed that, "[u]nder Section 20 of the NGA," the "Commission, while not included on the list of antitrust enforcement agencies has been instructed to 'transmit * * * evidence * * * concerning apparent antitrust violations to the Attorney General.'" *Northern Natural*, 399 F.2d at 960.

The fact that NYRI referred in its pleading to antitrust *law violations* rather than invoking antitrust policies or principles cannot absolve the Commission of its duty to consider the underlying antitrust policies involved. The Commission itself has noted that even where they are not raised by any party, agencies are obliged to consider antitrust policy issues *sua sponte*. *Tenneco Oil Co*., 26 FERC ¶ 61,030 at 61,069 (1984). *See also, Marine Space Enclosures v. FMC*, 420 F.2d 577, 586 (D.C. Cir. 1969).[6]

In support of its ruling dismissing NYRI's contentions, FERC also cites the fact that Section 203 "makes no explicit reference to antitrust policies or principles." March 31 Order at P 39 n. 31. The import of this observation is wholly mystifying for two reasons.

---

[5] March 31 Order at P 39 n. 31 (quoting *Northeast Utilities Service Co. v. FERC*, 993 F. 2d 937, 947 (1st Cir. 1993)).

[6] ("The importance of adherence to the 'fundamental policies' of the antitrust laws is undeniable. We need not consider whether or to what extent they may in some instances permit relaxation of the customary adversarial process in order to ensure the surveillance contemplated by law. *Certainly consideration of antitrust issues was required in this case, where they were timely raised by petitioner's protest, albeit in general terms*." (emphasis added)).

First, the absence of an express reference to antitrust policy in Section 203 notwithstanding, the Commission itself has explained that it has "an obligation under section 203 of the Federal Power Act to consider antitrust policies in determining whether a merger satisfies the 'public interest' standard." Order No. 474, *supra* at 30,708. There is no "explicit reference to antitrust policies" in other provisions of the FPA either. But again it is the Commission that has explained why this observation is wholly irrelevant to antitrust contentions raised in Section 205 and 206 cases:

> There is little explicit language in the Federal Power Act concerning what part antitrust policies or considerations have in the context of the Commission's regulatory activities**.** In 1973, however, the Supreme Court issued two decisions which interpreted the "public interest" and "unjust," "unreasonable," and "unduly discriminatory" language contained in the Federal Power Act as requiring the Commission to evaluate the antitrust ramifications of certain of its regulatory activities.

Id. at 30,707. "[L]ongstanding and well-entrenched decisions" like these command the Court's respect. *California v. FERC*, 495 U.S. 490, 499 (1990). More importantly, where, as here, they determine a statute's "clear meaning, [the Supreme Court will] adhere to that determination under the doctrine of stare decisis, and [will] judge an agency's later interpretation of the statute against [the Court's] prior determination of the statute's meaning." *Maislin Industries, U.S. V. Primary Steel*, 497 U.S. 116, 128 (1990). Even if the Commission had discretion to vary from the Supreme Court's now well-settled pronouncements in cases like *Gulf States* it would be obliged to acknowledge its change in policy and explain its reasons for the change. *Greater Boston Television Corp. v. FCC*, 444 F. 2d. 941 (D. C. Cir. 1970). Not only does the Commission's March 31 Order fail to acknowledge any change in settled policy, but it invokes the *Northern*

Natural case, which comports squarely with the Supreme Court precedents under *Gulf States, et al*.

Second, original Part II of the Act not only makes no express reference to antitrust policy, it make no express reference to competition either, yet FERC has spent the better part of the last quarter century fashioning policies to promote competition and eliminate what it regards as anticompetitive practices in the electric and gas industries. Defining what is "anticompetitive," however, cannot be divorced from antitrust policies. In ascertaining whether some action has an anticompetitive effect, FERC, in fact, "*begin[s]* by reviewing the policies established by the courts in administering the antitrust laws." *Connecticut Light & Power Co*., 8 FERC ¶61,187 at 61,653 (1979) (emphasis added).

It is true, as FERC states, that it is not "strictly bound by the dictates of [the antitrust] laws." March 31 Order at P 39 n. 31 (quoting *Northern Natural, supra*, 399 F. 2d at 960-61). But this does not relieve FERC of the obligation to take antitrust principles into account. On the contrary, in *Northern Natural*, the very case the Commission cites here, the Commission had "concede[d] that it *must* consider the antitrust implications of its actions." *Id*. at 959 (emphasis added). The court remanded the FPC's order granting a certificate of public convenience and necessity to a joint venture pipeline,[7] not because the Commission contested that obligation, but because it found "that the Commission failed to apply proper standards to determine the relevant antitrust policy and consequently ignored significant anticompetitive effects of the joint venture." *Id*. at 977.

[7] The joint venture, between Great Lakes Gas Transmission Company and Trans-Canada Pipeline Company, was to operate a new natural gas pipeline.

When the Commission has in its case law previously noted that it is not "strictly bound by the dictates of [the antitrust] laws," its reason for doing so was not to *downplay* the importance of antitrust policies, but to emphasize that it had authority to condemn practices as anticompetitive even where all the elements of the relevant antitrust offense were not present. *Connecticut Light & Power Co., supra*, 8 FERC at 61,653 ("Our task is not to determine whether a utility has actually violated a particular statute and thus we do not need to determine whether every element of an offence has been established. Rather, we will look to the antitrust laws and cases to determine whether the objectives of these statutes are being hindered in cases where price discrimination has been established."); *Florida Power & Light Co., supra*, 8 FERC at 61,457 ("Every rate case in which anticompetitive effects are alleged need not become a full-blown antitrust proceeding.") Thus, for example, in the price squeeze context, FERC has declared that its focus is on "anticompetitive effects, not motives." *Missouri Power & Light Co.*, 5 FERC ¶61,086 at 61,140-41 (1978).[8]

CONCLUSION

The Commission's pronouncements in its March 31 Order reflect a virtual about face from the primacy FERC has accorded antitrust policy under the settled FERC precedent discussed above. It is certainly true that an agency has discretion to fashion standards by which it will weigh antitrust policy considerations against other public interest considerations. *Northern Natural, supra* at 961. On a proper showing, for

[8] In this respect, Sections 203, 204, 205, 206 etc. of the Federal Power Act are analogous to Section 5 of the Federal Trade Commission Act, which bars unfair methods of competition. As the Supreme Court has held, actions may be anticompetitive under the FTC Act that would not themselves violate the Sherman or Clayton Acts. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

example, an agency may approve actions that contravene antitrust policy, but serve some other overriding public policy. *Id.* It is also true that where a party's antitrust allegations lack merit, it may be appropriate to dismiss those allegations summarily. *Gulf States Utilities Co. v. FPC*, *supra*, 411 U.S. at 762. "But such summary action must not go unexplained in the face of the statutory obligation placed on the Commission [to consider the antitrust issues raised]." *Id.* On rehearing, Movants accordingly urge the Commission to vacate the second sentence of Paragraph 39 of its March 31 Order, as well as accompanying footnote 31. Failure to do so will cast into substantial doubt decades of well-settled case law regarding the Commission's responsibilities to consider antitrust-related claims in carrying out its statutory responsibilities under the FPA.

Respectfully submitted,

/s/ Diana L. Moss
Diana L. Moss, Ph.D.*
Vice President and Senior Fellow
American Antitrust Institute
P.O. Box 20725
Boulder, CO 80308
dmoss@antitrustinstitute.org

/s/ Harvey L. Reiter
Harvey L. Reiter*
Stinson Morrison Hecker LLP
1150 18th Street, NW, Suite 800
Washington, DC 20036-3816
(202) 785-9100 (Telephone)
(202) 785-9163 (Fax)
hreiter@stinson.com

/s/ Susan N. Kelly
Susan N. Kelly*
Vice President of Policy Analysis
and General Counsel
Allen Mosher
Senior Director of Policy Analysis
and Reliability
American Public Power Association
1875 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20009
(202) 467-2900 (Telephone)
(202) 467-2920 (Fax)
skelly@appanet.org

/s/ Richard Meyer
Wallace F. Tillman, General Counsel
And Vice President
Richard Meyer*, Senior Regulatory Counsel
Jay A. Morrison, Senior Regulatory Counsel
David L. Mohre, Executive Director,
Energy & Power Division
National Rural Electric Cooperative
Association
4301 Wilson Boulevard
Arlington, VA 22203-1860
(703) 907-5811
rxm0@nreca.coop

* Designated for service

Counsel for
American Antitrust Institute, the American Public Power Association
and the National Rural Electric Cooperative Association

April 16, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document, via electronic or first class mail, upon each party on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington, D.C., this 16th day of April, 2009.

/s/ Harvey L. Reiter
Harvey L. Reiter