

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: <http://www.dps.state.ny.us>

PUBLIC SERVICE COMMISSION

GARRY A. BROWN

Chairman

PATRICIA L. ACAMPORA

MAUREEN F. HARRIS

ROBERT E. CURRY JR.

JAMES L. LAROCCA

Commissioners



PETER MCGOWAN

General Counsel

JACLYN A. BRILLING

Secretary

August 3, 2011

SENT VIA ELECTRONIC FILING

Kimberly D. Bose, Secretary

Federal Energy Regulatory Commission

888 First Street, N.E.

Room 1-A209

Washington, D.C. 20426

Re: Docket No. EL11-50-000 - Astoria Generating Company, L.P., et al. v. New York Independent System Operator, Inc.

Dear Secretary Bose:

Attached, for filing, is the Notice of Intervention and Comments of the New York State Public Service Commission in the above-entitled proceeding. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler
Assistant Counsel

Attachment

cc: Service List

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Astoria Generating Company, L.P.,)	
and TC Ravenswood, LLC)	
)	
v.)	Docket No. EL11-50-000
)	
New York Independent System)	
Operator, Inc.)	

NOTICE OF INTERVENTION AND COMMENTS
OF THE NEW YORK STATE
PUBLIC SERVICE COMMISSION

INTRODUCTION

On June 11, 2011, several incumbent generation owners in New York City¹ filed a complaint alleging that the New York Independent System Operator, Inc. (NYISO) incorrectly applied the Market Power Mitigation provisions in the Market Administration and Control Area Services Tariff (Services Tariff) that are applicable to new entrants in the New York City Installed Capacity (ICAP) market (Complaint). Complainants allege that the NYISO has either erroneously granted Astoria Energy II an exemption from mitigation, or established an Offer Floor for Astoria Energy II that is too low. Complainants also assert that Bayonne Energy Center, which is anticipated to enter

¹ The generation owners include Astoria Generating Company, L.P., and TC Ravenswood, LLC. (Incumbent Generation Owners or Complainants).

the market in 2012, may have also received a potentially erroneous determination.

NOTICE OF INTERVENTION

Pursuant to the Commission's Notice of Complaint, issued July 14, 2011, and Rule 214 of the Commission's Rules of Practice and Procedure, the New York State Public Service Commission (NYPSC) hereby submits its Notice of Intervention and Comments. Copies of all correspondence and pleadings should be addressed to:

David Drexler
Assistant Counsel
New York State Department
of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
david_drexler@dps.state.ny.us

William Heinrich
Chief, Policy Coordination
New York State Department
of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
william_heinrich@dps.state.ny.us

BACKGROUND

In 2007, the Commission adopted various tariff provisions designed to address identified market power concerns by buyers and sellers of ICAP in NYC.² Given their ability to exert market power as pivotal suppliers, the Incumbent Generation Owners, or their predecessors, were subjected to

² Docket No. ER11-2224-001, NYISO, Order on Requests For Expedited Clarification and Rehearing, 134 FERC ¶61,178 (issued March 9, 2011).

stringent bid caps. The Commission also established minimum bid requirements to prevent new entry from suppressing market clearing prices. Although this mitigation was initially narrowly targeted at buyers that may have the incentive and ability to artificially suppress clearing prices, the mitigation was subsequently expanded to include all new entrant in the NYC ICAP market (i.e., New Entry Mitigation).³

If a new unit does not pass the exemption test for new entry, it is subject to the mitigation rules. The New Entry Mitigation rules include a minimum bid requirement (i.e., an Offer Floor) equivalent to the lower of 75% of Mitigation Net Cost-Of-New-Entry (Mitigation Net CONE),⁴ or the Unit-specific Net CONE (Unit Net CONE). The CONE is administratively determined by the NYISO every three years as part of the ICAP

³ Although the Incumbent Generation Owners refer to the mitigation thresholds as part of the "Buyer-Side Market Power Rules," this phrase is a misnomer given that the thresholds for mitigation are applied to all new entry, regardless of whether the new entrant has any relationship with a buyer (i.e., a Load-Serving Entity). Because a purely merchant generation owner that relies entirely on private equity is subject to the mitigation rule, regardless of whether they lack any incentive to suppress market prices, the phrase "New Entry Mitigation" is used herein.

⁴ Mitigation Net CONE is the CONE at the assumed excess level of capacity.

Demand Curve, which establishes the price for ICAP relative to the amount of available supply.⁵

Complainants allege that the NYISO's evaluation of Astoria Energy II, and potentially Bayonne Energy Center, should not have resulted in a determination that either is exempt from the New Entry Mitigation or allowed to bid below 75% of Mitigated Net CONE. The Incumbent Generation Owners claim that they are statutorily entitled to ICAP revenues and ask that the Commission reverse the NYISO's determinations and require that these new entrants submit bids at no less than 75% of Mitigated Net CONE.

SUMMARY OF POSITION

As discussed below, the Complaint filed by the Incumbent Generation Owners raises several important policy and legal considerations. We address these considerations below, including the need for appropriate price signals for new generation and the retirement of existing generation. It appears that the ICAP auction results that are the subject of the Incumbent Generation Owners' Complaint are consistent with those needs under current excess supply conditions.

⁵ Services Tariff, Attachment H, §23.2.1.

In addition, there is a need for market certainty for new entrants that have made significant investment decisions based on the NYISO's determinations related to the application of the New Entry Mitigation rules. The Commission should not reverse the determinations made by the NYISO that are consistent with the Services Tariff.

The Commission should also reject the Complainants' claims of statutory entitlement to ICAP payments. The First Circuit Court of Appeals already rejected any such claims, and recognized the important distinction between the sale of energy, where there is a right to just and reasonable rates under the Federal Power Act (FPA), and capacity charges, which merely serve as a regulatory incentive.⁶

DISCUSSION

I. The ICAP Market Results Are Consistent With Appropriate Price Signals Regarding The Need For New Generation And The Retirement Of Existing Generation

The Incumbent Generation Owners argue that the July 2011 Spot Market clearing price of \$5.76/kW-month is

⁶ These comments do not directly address the alleged factual errors in implementing the Services Tariff, which the NYISO is uniquely capable of explaining.

unreasonably low.⁷ However, the prices, which are administratively established on the NYC ICAP Demand Curve, have appropriately declined as a result of adding 575 MW of capacity, which was recently built by Astoria Energy II. Under current market conditions, with approximately 11% to 12% excess capacity, it is reasonable to expect the price for ICAP to decline, as it did in the July 2011 auction. This price sends an appropriate price signal regarding the reduced need for new entry. Moreover, if the addition of approximately 575 MW of economic capacity in New York City did not lower capacity prices, we would question the effectiveness of the NYC capacity market structure. The Incumbent Generation Owners merely seek to maintain high-enough ICAP prices to forestall the prospect of a retirement by insulating themselves from competition with Astoria Energy II and Bayonne Energy Center.

Current ICAP prices are also generally consistent with the prices that prevailed under similar excess capacity conditions before the New York Power Authority (NYPA) retired approximately 885 MW at its Poletti facility in January 2010. With the retirement of Poletti, capacity prices in New York City nearly doubled. The retirement of the Poletti facility, which was publicly known in October 2002, resulted in a predictable

⁷ Complaint, p. 18.

increase in capacity prices that provided proper signals for new entry. With the recent additions in capacity, summer excess capacity levels are currently 2%-3% higher than in 2009. Therefore, the ICAP market results appear to be consistent with prior excess supply conditions and providing appropriate price signals.⁸

To the extent ICAP price signals suggest the appropriateness of retiring existing generation units, the NYISO's Comprehensive Reliability Planning Process and the NYPSC's generator retirement notification process⁹ provide a mechanism to ensure that any reliability needs are identified and adequately addressed. Contrary to the Incumbent Generation Owners' suggestion, not all generation units provide "critical reliability services."¹⁰ In fact, several generating units have

⁸ The July and August 2011 monthly auction prices cleared at \$11.84/kW-month and \$9.50/kW-month respectively, while the ICAP spot prices cleared at \$5.76/kW-month and \$5.83/kW-month, respectively. Prior to the retirement of the Poletti facility, both July and August 2009 monthly and spot prices ranged between \$8.00/kW-month to \$9.00/kW-month. See, http://icap.nyiso.com/ucap/public/auc_view_spot_detail.do. It should also be noted that if the currently-pending Demand Curves are approved, we expect spot prices to increase further to around \$7.00/kW-month.

⁹ See, Case 05-E-0889, Policies and Procedures Regarding Generation Unit Retirements, Order Adopting Notice Requirements For Generation Unit retirements (issued December 20, 2005).

¹⁰ Complaint, p. 20.

already retired in New York after complying with the processes noted above.

II. New Entrants Should Be Afforded Market Certainty When Making Investment Decisions In Reliance On NYISO's Determinations Consistent With The Services Tariff

Complainants request that the Commission revisit the determinations made by the NYISO regarding mitigating new ICAP market entrants, and impose a bid floor of 75% of CONE. The Commission should not, however, act lightly in reversing the determinations regarding New Entry Mitigation made by the NYISO, in so far as the NYISO has acted consistent with the Services Tariff and interpreted any ambiguous provisions in a reasonable manner.

In determining whether to enter the market, new entrants are entitled to receive a determination by the NYISO whether they will be subject to New Entry Mitigation upon entering the market. This information is extremely important to new entrants because it is used to make informed decisions on whether to invest significant capital in new facilities based on anticipated revenues from the ICAP market. In order to afford market entrants reasonable certainty when relying on the NYISO's New Entry Mitigation determinations, the Commission should not reverse the NYISO's determinations unless they are clearly

inconsistent with the Services Tariff, or are an unreasonable interpretation of the tariff.

III. The Incumbent Generation Owners Impermissibly Seek To Establish An Entitlement To ICAP Payments

The Incumbent Generation Owners seek to establish an entitlement to ICAP payments. Complainants claim they are statutorily entitled to these payments under the Federal Power Act's requirement that rates are just and reasonable. Complainants further assert that the recent decline in ICAP market clearing price violates the U.S. Constitution's Fifth Amendment prohibition on confiscatory ratemaking.¹¹

Complainants impermissibly attempt to establish an entitlement to ICAP revenues. Their emphasis on the FPA and U.S. Constitution, however, is misplaced. The Incumbent Generation Owners fail to recognize the important distinction between the sale of energy, where there is a right to just and reasonable rates under the FPA, and capacity charges, where there can be no such claim because ICAP payments serve as a regulatory incentive for the retention, addition, and retirement of ICAP resources.

The Incumbent Generation Owners' claims have already been rejected by the First Circuit Court of Appeals. As the

¹¹ Complaint, pp. 3, 18, 41, and 44.

First Circuit explained in Sithe New England Holdings, LLC v.

FERC:

even on petitioners' own assumption [of entitlement to ICAP charges], they are *fatally wrong in thinking that ICAP is any part of a supposed statutory entitlement...* The ICAP charge...is a payment to suppliers over and above the amount they charge for power sold to or reserved for buyers.... It is true that ICAP charges are tariffed -- not by the sellers but by ISO-NE -- and that FERC uses the 'just and reasonable' rubric in regulating them, but they are simply not part of the compensation to sellers required by the statute. If ICAP charges were abolished by FERC tomorrow, the sellers could object that FERC was behaving unreasonably in its 'on and off' regulatory policies but *not that they were deprived of a just and reasonable rate.* Sellers can still charge the just and reasonable rate for whatever power they sell to buyers or reserve for them.¹²

The Court in Sithe recognized and clarified this important distinction between capacity markets and energy markets, and clearly indicated that ICAP suppliers have no statutory entitlement to ICAP payments. In accordance with this holding, the Commission should reject the Incumbent Generation Owners' claims of entitlement to ICAP payments.

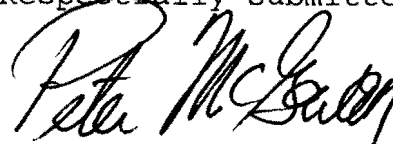
CONCLUSION

In accordance with the above discussion, the Commission should take various important policy and legal

¹² 308 F.3d 71, 77 (1st Cir. 2002) (rejecting generators' claims of entitlement to recover higher ICAP charges for past periods, since FERC's decision to not allow such charges was reasonable and adequately supported).

considerations into account when deciding upon the Incumbent
Generation Owners' Complaint.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter McGowan". The signature is written in a cursive style with a large initial "P".

Peter McGowan
General Counsel
Public Service Commission
of the State of New York

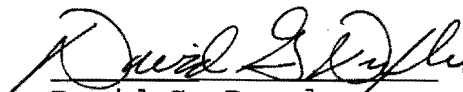
By: David G. Drexler
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

Dated: August 3, 2011
Albany, New York

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: Albany, New York
August 3, 2011



David G. Drexley
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

