



## Public Service Commission

Public Service Commission

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November 30, 2015

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. ER16-120-000 - New York Independent  
System Operator, Inc.

Dear Secretary Bose:

For filing, please find 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,

A handwritten signature in blue ink that reads "David G. Drexler".

David G. Drexler  
Assistant Counsel

Attachment

cc: Service List

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System                    )  
Operator, Inc.                                    )

Docket No. ER16-120-000

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

INTRODUCTION AND SUMMARY

On February 19, 2015, FERC directed the New York Independent System Operator, Inc. (NYISO) to amend its tariff to include provisions to: 1) designate generation facilities deemed needed for reliability purposes (referred to as Reliability Must-Run or RMR facilities); 2) allocate and collect charges from ratepayers in order to support designated RMR facilities; and, 3) prescribe rates, terms, and conditions for RMR service.<sup>1</sup> On October 19, 2015, the NYISO filed proposed tariff amendments to comply with the RMR Order (Compliance Filing).

The New York State Public Service Commission (NYPSC) provides the following comments with respect to the NYISO's Compliance Filing. As discussed more fully below, the NYPSC supports the proposed process, including the minimum 12-month

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<sup>1</sup> Docket No. EL15-37, New York Independent System Operator, Inc., Order Instituting Section 206 Proceeding and Directing Filing to Establish Reliability Must Run Tariff Provisions (issued February 19, 2015) (RMR Order). The NYPSC requested rehearing of the RMR Order on March 23, 2015.

notice requirement for generators seeking to retire, which are referred to as Initiating Generators. This period is required to carry out the various responsibilities necessary to assess the reliability implications of a generator retirement, to solicit and evaluate potential alternative solutions, and to ensure any RMR agreement is entered into only as a last resort for a duration that has been minimized to the extent feasible.

Specifically, the 12-month notice period ensures the NYISO and relevant New York Transmission Owner(s) (NYTOs) have 90 days to analyze the reliability implications of a proposed retirement. If the NYISO determines that the Initiating Generator is not needed for reliability, the generator would be allowed to retire after 120 days, subject to State requirements.<sup>2</sup> In situations where the retirement of the Initiating Generator would violate applicable reliability standards, the NYISO would solicit, within 30 days, potential solutions, which could include generation, transmission, and/or demand response proposals. The NYISO would then evaluate within a 120 day period the viability and sufficiency of the proposals, including the backstop solution the Responsible Transmission Owner would

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<sup>22</sup> The NYPSC currently imposes a 180-day minimum notice requirement prior to a generation unit retirement of 80 MW or greater. See, Case 05-E-0889, Policies and Procedures Regarding Generation Unit Retirements, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005). The NYPSC could revisit this requirement pending the outcome of this proceeding.

be required to submit. In the event the NYISO concludes that adequate market-based solutions are available, it may terminate its process in light of those solutions.

However, the NYPSC takes three exceptions to the Compliance Filing, two of which relate to modifications of the 12-month process. In particular, where market-based solutions are inadequate, and the NYISO identifies non-generation solutions that are viable and sufficient, only 120 days of the notice period would remain for the NYPSC to identify a solution that should be implemented to address the reliability need in lieu of a generator RMR agreement. And that period is further constrained by the timing of the filing needed to obtain recovery of the costs of the solution through FERC-approved tariffs, which could take approximately 75 days. Consequently, as currently envisioned, the process could provide the NYPSC with as little as 45 days to perform its review of the viable and sufficient solutions before the NYISO pursues a generation RMR agreement.

Although the NYPSC would endeavor to complete its review and issue a written determination within the period allotted by the NYISO, while considering any public comments that are received, this period may be insufficient to successfully perform the review, especially in circumstances where additional information and analyses are required.

Accordingly, the NYPSC first requests a modification to the NYISO's proposed process, and respectfully asks the Commission to direct the NYISO to expedite its analyses in order to provide additional time, within the 12-month notice period, for the NYPSC to complete its review of alternatives.

The NYPSC also seeks a second modification to the process, to the extent the NYISO seeks to select among alternative generators, other than the Initiating Generator, which are presently in an outage state but capable of returning to service to address reliability needs. Delegating such a selection to the NYISO impermissibly interferes with the NYPSC's responsibilities under the New York Public Service Law (NYPSL), which encompasses the provision of "safe and adequate" service from generation facilities and consideration of broad public interests such as the "economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources."<sup>3</sup> Allowing the NYISO to select a generator other than the Initiating Generator would place the NYISO in a regulatory role that affects complex matters that are a State responsibility, such as permissible environmental impacts, the selection and suitability of types and fuel sources, and the acceptable location of generators (these may potentially be within Environmental Justice

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<sup>3</sup> NYPSL §§5(2), 65(1), and 66(2).

communities). Furthermore, this role would contravene the reservation of generation adequacy matters to the purview of the States under the Federal Power Act (FPA).<sup>4</sup> Because the proposed process would impermissibly intrude upon State matters, the Commission should direct the NYISO to only pursue an RMR agreement with the Initiating Generator and to identify all other alternative resources that are available for the NYPSC's consideration and potential selection.

Finally, the NYPSC's third exception concerns the level of compensation that should be allowed for a generator under an RMR agreement. Commission should preclude a generator under such an agreement from proposing a full Cost-of-Service (COS) rate to FERC if it is unsatisfied with the NYISO's Going-Forward Cost (GFC) rate plus performance incentives. Full COS rates are neither required, nor just and reasonable, where the provider of a public service intends to abandon that service. Indeed, it has long been a well-accepted regulatory principle that a public service provider may not abandon service, and must continue service even at less than COS rates, until the abandonment is authorized. Full COS rates are therefore outside the zone of reasonableness, and should be rejected as a matter of right.

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<sup>4</sup> 16 U.S.C. §824(b)(1).

## NOTICE OF INTERVENTION

The NYPSC submits its Notice of Intervention in the above-captioned pursuant to the Federal Energy Regulatory Commission (FERC or Commission) Notice of Extension of Time, issued on October 29, 2015, and Rule 214(a)(2) of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.214(a)(2)).<sup>5</sup>

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## DISCUSSION

### I. The Commission Should Approve The NYISO's Proposed Process And 12-Month Notice Requirement, With Two Limited Modifications

The NYPSC supports the NYISO's proposed process and 12-month notice requirement, which ensures that: 1) the NYISO

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<sup>5</sup> The NYPSC is a regulatory body established under the laws of the State of New York with jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State, and is therefore a State Commission as defined in section 3(15) of the Federal Power Act (FPA) (16 U.S.C. §796(15)). The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to Section 12 of the New York Public Service Law, the Chair of the NYPSC is authorized to direct this filing on behalf of the NYPSC.

and appropriate NYTO(s) can adequately assess the bulk and local-system reliability impacts of retiring an Initiating Generator; 2) the NYISO can solicit solutions from all potential resources (i.e., generation, transmission, and/or demand response), and then evaluate the viability and sufficiency of such alternative solutions to meet an identified reliability need; and, 3) the NYPSC can identify any alternative solution(s) that should be implemented instead of an RMR agreement with the Initiating Generator. The 12-month timeline is reasonable to accomplish these responsibilities, while allowing the Initiating Generator to retire after only four months if it is determined that it is not needed for reliability purposes. Where a reliability need arises, the process ensures an RMR agreement is only implemented as a last resort and is limited to the period needed to install a permanent solution.

The proposed process, however, should be modified in two respects. These revisions, as follows, would ensure that the NYPSC has sufficient time to carry out its review, and can consider alternative generation solutions to the Initiating Generator, consistent with the State's planning and generation adequacy responsibilities.



**A. The Commission Should Ensure That The NYPSC May Select Solutions Amongst Any Available Generation Alternatives To The Initiating Generator**

The Compliance Filing indicates that "[t]he NYISO would also consider Generators that are currently in an outage state and may be capable of addressing in whole or in part the Reliability Need."<sup>6</sup> The NYISO contends that the RMR Order assigned it responsibility to select a generation resource among the Initiating Generator and any alternatives generator(s) that may also address the reliability need.<sup>7</sup> The NYPSC disputes the NYISO's contention and views the RMR Order as pertaining solely to the NYISO's designation of an Initiating Generator as an RMR unit where there is no other alternative.

The NYPSC's position is consistent with its responsibilities under the NYPSL, which encompasses broad public interest matters such as the provision of "safe and adequate" service, considering the "economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources."<sup>8</sup> The NYISO, however, seeks to supplant itself as the regulatory body capable of arbitrating such issues. But, the NYISO is neither suited nor authorized to make any such determinations affecting the environment,

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<sup>6</sup> Compliance Filing, p. 8.

<sup>7</sup> Compliance Filing, p. 24.

<sup>8</sup> NYPSL §§5(2), 65(1), and 66(2).

selection of fuel sources, and the acceptable location of generators, which may potentially raise Environmental Justice concerns.

Furthermore, this role would contravene the reservation of generation adequacy matters to the purview of the States under the Federal Power Act (FPA).<sup>9</sup> The FPA explicitly provides that the Commission "shall not have jurisdiction, except as specifically provided in [the FPA], over facilities used for the generation of electric energy or over facilities used in local distribution."<sup>10</sup> The Commission's authority to approve "reliability standards" reiterates these exclusions from its jurisdiction, by explicitly excluding Commission jurisdiction to "set and enforce compliance with standards for [the] adequacy or safety of electric facilities or services."<sup>11</sup>

The NYISO's purported authority to select among viable and sufficient generation resources goes directly to the regulation of adequate generation facilities to comply with reliability standards, and constitutes a generation resource adequacy determination, which is a matter reserved to the States under the FPA. The proper allocation of responsibility is for the NYISO, as FERC has authorized, to assess if the reliability

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<sup>9</sup> 16 U.S.C. §824(b)(1).

<sup>10</sup> 16 U.S.C. §824(b)(1).

<sup>11</sup> 16 U.S.C. §824o(i)(2).

of the bulk transmission system subject to FERC jurisdiction may be compromised by the Initiating Generator. If NYISO can find a transmission solution, then that solution is implemented through NYISO tariffs. But if an alternative generation solution may be needed, then jurisdiction must be shared with the States as the FPA envisions. FERC should therefore recognize the NYPSC's authority to regulate generation facilities and to make resource adequacy determinations, by directing the NYISO to modify its tariff to provide for the NYPSC to select among generation resources, if more than one is available, as the alternative to meet a reliability need.

**B. The Commission Should Direct The NYISO To Provide The NYPSC With Additional Time To Complete Its Review of Alternatives**

The proposed timeline in the Compliance Filing is heavily weighted towards the NYISO, which affords it eight months to evaluate whether a reliability need exists with respect to the Initiating Generator, and to identify viable and sufficient alternatives. This leaves the NYPSC with only four months, further constrained by the timing of the filing needed to obtain recovery of the costs of the solution through FERC-approved tariffs, to complete its review and identify a preferred alternative to the Initiating Generator. If a filing with the Commission is to be timely made, this period amounts to about 45 days, representing a less than adequate time to conduct

a review even where no issues are raised, much less to consider public comments, and to issue a written determination.

Additional time will be needed for NYPSC to undertake its responsibilities where more information needs be collected and further studies must be performed to ensure a proper evaluation.

In order to allocate sufficient time to the NYPSC for it to perform its responsibilities, the Commission should direct the NYISO to modify the process timelines and expedite its performance of its responsibilities. While the NYISO proposes to conduct its needs assessment for the Initiating Generator within a 90 day period after receiving notice, and solicit solutions if a need is identified within 30 days thereafter, this schedule shortchanges the solicitation process. Instead, the needs assessment should be concluded within 75 days, rather than the proposed 90 days, leaving 45 days to solicit and receive alternative solutions, instead of the proposed 30 days.

Following the receipt of alternative solutions, NYISO would reserve 120 days to assess their viability and sufficiency. After a period of that length, only 120 days would remain in the year long notice period. Although the Compliance Filing does not specify the time in which the Commission would act to ensure a generator RMR agreement is in place by the end of the 12-month timeframe, the NYPSC estimates it would take approximately 75 of the remaining 120 days. Consequently, NYPSC

would have as little as 45 days to review the results of the NYISO's viability and sufficiency analysis and to issue a written determination. That period is plainly inadequate.

In order to ensure the NYPSC can conclude its review in a timely manner, the NYISO should be directed to conclude its analysis of the viability and sufficiency of alternatives within 60 days, instead of 120 days. This would, in effect, extend the period for NYPSC review of the NYISO's analysis and selection of alternatives to about 110 days, ending at about 290 days into the 12-month process. The 75 days that remain should be sufficient to allow for commencement of an RMR agreement if needed because a solution other than generation is not viable.<sup>12</sup>

## **II. The Commission Should Eliminate The Automatic Right Of Generators To Propose Full Cost-Of-Service Rates**

The NYISO's Compliance Filing suffers from the same flaw as the RMR Order by authorizing generation owners to develop their own rates that may encompass full COS recovery, including a return on investment. This approach fails to recognize that compensation based on GFCs, with additional compensation as may be justified on a case-by-case basis,

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<sup>12</sup> The Commission should accept any RMR Agreement that unreasonably deviates from GFC rates subject to refund. The use of GFC rates would also trigger the NYISO's "toggling" provisions, addressing those concerns; the NYISO, nor FERC, have proposed any provisions to prevent "toggling" between market-based rates and full COS rates.

represent the just and reasonable rate in situations where a generator is uneconomic and seeks to retire.

It is well settled law that a full COS rate is not required when a service is abandoned because it is no longer financially viable. The due process clause of the U.S. Constitution does not ensure values, nor require restoration of values, which have been lost by the operation of economic forces (akin to what a generator claims when they propose to abandon service). Instead, the constitutionally required rate is that which recognizes the risks and circumstances facing the owner of the service to be abandoned.<sup>13</sup> A utility service provider may be compelled to continue operations even at a loss when the public interest so requires.<sup>14</sup> In Market Street Railway, the U.S. Supreme Court considered the compensation that a utility whose operations have become uneconomic because of market forces must be provided in order to pass Constitutional muster.<sup>15</sup> Reviewing

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<sup>13</sup> Market Street Railway Co. v. Railroad Commission of California, 24 U.S. 548 (1945).

<sup>14</sup> Lehigh and New England Railway Co. v. Interstate Commerce Commission, 540 F.2d 71 (3<sup>rd</sup> Cir. 1976); Gibbons v. Interstate Commerce Commission, 660 F.2d 1227 (7<sup>th</sup> Cir. 1981) ((finding that the failure to pay rent (i.e., provide for recovery of fixed costs) does not constitute a taking).

<sup>15</sup> Market St. Ry. Co. v. R.R. Comm'n of California, 324 U.S. 548 (1945). Although a generator may be lightly-regulated by the NYPSC while participating in competitive wholesale markets because competition limited its potential market power, a potential reliability need arising from an announced retirement provides the generator utility with monopolistic power to influence the market and seek out-of-market payments

and distinguishing prior precedent, the Court explained that those decisions do not ensure that regulated businesses facing their demise because of economic forces must earn a profit.<sup>16</sup> Since the U.S. Constitution does not require that an uneconomic generator seeking to deactivate be paid its full COS for reliability services provided, a rate based on GFC is constitutionally adequate, and any higher rate than that constitutionally required would be unjust and unreasonable.

The Market Street Railway Court ruled that the due process clause cannot "be applied to insure values or to restore values that have been lost by the operation of economic forces."<sup>17</sup> A company engaged in public service "cannot be said to suffer injury" if it receives a rate for a temporary period "which probably will produce a fair return on the present fair value of their property."<sup>18</sup> The "fair value" may be a return based on the scrap or salvage value of the subject property, if that amount represents its present worth.<sup>19</sup>

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from customers. This would subject the utility to increased regulatory scrutiny, which is provided here by the RMR process. Compensation owed to uneconomic utility operations is the exact scenario addressed by the cases discussed herein.

<sup>16</sup> Id. at 566 (citations omitted).

<sup>17</sup> Id.

<sup>18</sup> Id. It is indisputable that a generator needed for reliable transmission system operation is providing an essential public service. A contrary finding would eviscerate the entire justification for RMR agreements.

<sup>19</sup> Id.

Significantly, because RMR compensation that substantially exceeds a generator's GFCs would be inconsistent with Market Street Railway, a contrary Commission determination would be subject to reversal upon judicial review. The D.C. Circuit Court of Appeals overturned a rate decision made by the Washington Metropolitan Area Transit Commission (Transit) because it ignored Market Street Railway.<sup>20</sup> Speaking directly to the circumstances present with an RMR, Transit had approved a rate that guaranteed a return in exchange for a public service that was uneconomic.

The D.C. Circuit explained that Market Street Railway demonstrates that "there is no requirement that regulation be used to bolster and make profitable a company which would not otherwise be successful."<sup>21</sup> The Court further explained that Transit "acted on the erroneous postulate" that rates must guarantee profit.<sup>22</sup> The Court concluded that this "incorrect postulate" had "infected [Transit's] whole thinking and its ratemaking process."<sup>23</sup> This error formed the "core" of the challenged rate order, and invalidated it.<sup>24</sup> Extending a similar

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<sup>20</sup> Democratic Central Committee of the Dist. of Columbia v. Washington Metropolitan Area Transit Comm'n, 485 F.2d 886 (D.C. Cir. 1973).

<sup>21</sup> Id. at 911.

<sup>22</sup> Id. at 912.

<sup>23</sup> Id. at 913.

<sup>24</sup> Id.



guarantee to any generator retirement would suffer a similar fate.

An RMR agreement is predicated upon a facility being uneconomic to operate in the future. If the Commission determines that a facility must continue operating to provide an essential public service (i.e., transmission system reliability), then it has become a monopoly service provider planning to abandon service that is subject to the strictures of Market Street Railway and Democratic National Committee.

Instead of guaranteeing the facility a profit, these decisions provide that RMR compensation that includes a profit, and/or makes an uneconomic company profitable, exceeds what the Constitution requires, and is not justified by the Constitutional principles announced by the Supreme Court. Since no reason has been given for awarding full COS, other than an assumption that the Constitution requires it, there is no basis for allowing generators proposing to retire to seek up to full COS rates.

Finally, full COS rates are unjust and reasonable, not only because they are inconsistent with relevant law, but also because they overcompensate generators by shifting all fixed costs and risks to ratepayers. Instead, generators should be compensated for their going-forward or incremental costs, with additional compensation as may be justified on a case-by-case

basis, while recognizing the value of any FERC-jurisdictional wholesale sales. The going-forward rate should appropriately match the incremental costs a generator would incur because it remains in operation instead of abandoning service by retiring or mothballing its facility. For FERC to find otherwise is arbitrary, irrational, and contrary to the public interest.

Therefore, under the circumstances present within the RMR process, the appropriate rate should be based on GFCs, with any additional compensation that may be justified under the particular circumstances. For example, a nuclear generation facility that is obligated to remain in service for several years may face much greater risk than a gas-fired combined cycle facility that remains operational for several months, and thus the nuclear facility may warrant a higher level of compensation. The Commission, however, has already prejudged the appropriate level of compensation under any RMR agreement by authorizing a generation owner to propose up to full COS rates. The NYISO compounds this error by stating that an RMR generator is "free to propose rates at whatever compensation level they can support."<sup>25</sup>

As FERC itself has found in addressing abandonment circumstances where it does have jurisdiction concerning interstate pipelines, the rate paid while abandonment is held in

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<sup>25</sup> Compliance Filing, p.11.

abeyance is not the full COS rate.<sup>26</sup> Paying generators a full embedded COS rate, which includes costs beyond those incurred because a planned retirement or deactivation is postponed, is excessive, unjust, and unreasonable.<sup>27</sup> A full COS rate inappropriately shifts all risk from a generator to ratepayers. Having participated in a competitive market and reaped its benefits, a generator need not be awarded additional compensation when needed for reliability beyond the costs incurred to provide that reliability. Therefore, FERC should preclude RMR generators from filing a full COS rate and instead require them to begin with GFCs and justify any compensation above that level with a full analysis of the risks, and the costs of meeting those risks, that the generator confronts.

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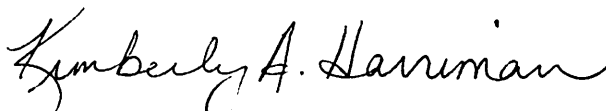
<sup>26</sup> Gulf South Pipeline Company, L.P., 145 FERC at ¶126: "[Rate] issues that are appropriately addressed in the context of a Section 4 rate case where rates can be established based on current costs and billing determinants and a rate of return can be allowed based on the [existing] financial and business risks."

<sup>27</sup> The significance of this rate-setting issue can be illustrated by the COS rate R.E. Ginna Nuclear Power Plant LLC Ginna filed at FERC of about \$73/MWh, whereas the RSSA they signed, and is pending before the NYPSC, translates to about \$50/MWh. See, Docket No. ER15-1047, R.E. Ginna Nuclear Power Plant, LLC, Settlement Agreement and Offer of Settlement (filed October 21, 2015); see also, NYPSC Case 14-E-0270, R.E. Ginna Nuclear Power Plant, LLC, Joint Proposal (filed October 21, 2015).

**CONCLUSION**

In accordance with the foregoing discussion, the NYPSC respectfully requests that the Commission accept, in part, the NYISO's Compliance Filing, and direct the NYISO to incorporate the modifications indicated above into its tariff.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kimberly A. Harriman".

Kimberly A. Harriman  
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: November 30, 2015  
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  
November 30, 2015



David G. Drexler  
Assistant Counsel  
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