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THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

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October 7, 2014

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. ER14-2518-000 - New York Independent
System Operator, Inc.

Dear Secretary Bose:

For filing, please find the Comments of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler
Assistant Counsel

Attachment

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent System)
Operator, Inc.) Docket No. ER14-2518

**COMMENTS OF THE NEW YORK STATE
PUBLIC SERVICE COMMISSION**

INTRODUCTION

On July 28, 2014, the New York Independent System Operator, Inc. (NYISO) filed proposed tariff revisions that, in relevant part, define various generator outage states and clarify that generators classified under certain outage states are ineligible to participate in the Installed Capacity market.¹ The revisions also provide that a Transmission Owner may temporarily use a generator's interconnection point during a generator outage in order to implement a transmission solution that has been selected as either a Gap Solution or to resolve a reliability issue arising on the non-bulk power system.

The NYISO also proposed tariff amendments that address circumstances where a generator has been selected as either a Gap Solution or to resolve a reliability issue arising on the non-bulk power system. The amendments specify that such a generator shall return to service in a timely manner where they

¹ Capitalized terms, which are not otherwise defined herein, have the meanings specified in the NYISO tariffs.

have received a Compensation Order from an applicable regulatory agency.² In the event a generation owner does not meet its obligation to return its generator to service, and causes a Transmission Owner to incur costs installing an alternative transmission reliability solution at the generator's interconnection point, the generator would then be responsible for such costs if it seeks to return to service prior to the expiration of its outage.

On September 2, 2014, several parties submitted interventions, comments, and protests with respect the NYISO's proposed tariff revisions.³ Independent Power Producers of New York, Inc. (IPPNY) filed a Protest, which contended, in part, that: 1) the Federal Energy Regulatory Commission (FERC or Commission) has exclusive jurisdiction to issue any Compensation Order related to a generator needed to be available for reliability purposes; and, 2) the temporary use of a generator's interconnection point by a Transmission Owner "constitutes a taking without just compensation under the Fifth Amendment to the U.S. Constitution."⁴ Astoria Generating Company, L.P. (Astoria Generating) also filed a Protest, which supported

² As the NYISO notes in its filing, the New York Public Service Commission (NYPSC) has approved several reliability service agreements.

³ The NYPSC submitted its Notice of Intervention in this proceeding on September 2, 2014.

⁴ IPPNY Protest p. 14.

IPPNY's arguments and provided further claims with respect to generator interconnection rights.

On September 16, 2014, the NYISO resubmitted its proposed tariff amendments, without any modifications, but requested an amended effective date of February 1, 2015. The Commission issued a Combined Notice of Filings #2 on September 16, 2014, and established a comment deadline of October 7, 2014 on the NYISO's resubmission and amended effective date. Pursuant to the Commission's Combined Notice of Filings #2, the NYPSC hereby submits its comments on the NYISO's proposed tariff amendments and addresses certain arguments made in the Protests filed by IPPNY and Astoria Generating.

SUMMARY OF COMMENTS

As discussed below, the New York State Public Service Law (NYS PSL) assigns the NYPSC responsibility for, inter alia, ensuring "safe and adequate service" by "electric corporations," which include independently-owned generation owners.⁵ In order to fulfill that responsibility, the NYPSC oversees the reliability of the New York State power system. In particular, the NYPSC takes an active role in reviewing whether the proposed retirement of independently-owned generation facilities may adversely affect reliability, and thereafter ensuring the

⁵ NYS PSL §§2(13) and 65.

maintenance of adequate levels of generation facilities needed to maintain reliability. This includes providing for compensation to such generators that are needed to provide reliability support services until a long-term solution is implemented.⁶

The NYPSC's reliability oversight functions in these regards are consistent with the recognition in the NYISO tariff that "[t]he appropriate governmental agency(ies) and/or authority(ies) with jurisdiction over the implementation or siting of Gap Solutions will determine whether the Gap Solution or an alternative Gap Solution will be implemented to address the identified Reliability Need."⁷ Furthermore, the NYISO tariff provides that the "[c]osts related to regulated non-transmission reliability projects will be recovered by Responsible Transmission Owners, Transmission Owners and Other Developers in accordance with the provisions of New York Public Service Law, New York Public Authorities Law, or other applicable state law."⁸ The NYPSC's authority to select a generation facility as either a Gap Solution or to address a non-bulk transmission system

⁶ See, e.g., NYPSC Case 12-E-0136, Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements, Order Deciding Reliability Need Issues and Addressing Cost Allocation And Recovery (issued May 20, 2013).

⁷ NYISO Open Access Transmission Tariff (OATT), Attachment Y, §31.2.10.4.

⁸ NYISO OATT, Attachment Y, §31.5.1.6.

need, and to issue a Compensation Order that ensures the recovery of the associated costs, is clearly established under the NY PSL and prior NYPSC decisions.⁹

The NYISO's proposed tariff amendments are generally consistent with the NYPSC's established generator retirement review process and the NYPSC's authority to ensure that retirements do not harm system reliability. While the NYISO seeks to clarify that a generator subject to a Compensation Order is obligated to operate, the NYPSC maintains that the requisite authority to order a generation facility to operate is reserved to the states under the Federal Power Act. Therefore, a State order on the compensation owed to a generation facility owner upon imposition of a requirement that it continue to operate would be enforced or challenged under State law, rather than the NYISO tariff. Because the NYISO's authority is limited to conducting planning studies and administering markets, it does not have the affirmative power to order generators to operate. The Commission should clarify, therefore, that the NYISO's proposed tariff language does not imbue the NYISO with authority to order a generator to operate. Similarly, the NYPSC maintains that a remedy for failure to comply with a State order

⁹ NY PSL §§65-66 and 150-173 (Article 10); See, e.g., NYPSC Case 12-E-0136, *Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements, Order Deciding Reliability Need Issues and Addressing Cost Allocation And Recovery* (issued May 20, 2013).

directing a generator to operate would be available under State law, irrespective of whether the NYISO may order the recovery of the costs that a generator caused a Transmission Owner to incur upon installation of an alternative transmission reliability solution at a generator's interconnection point.

The IPPNY and Astoria Generating Protests challenge the NYPSC's well-understood and long-established reliability-review functions. Contrary to the Protests' implication, the NYPSC's functions are independent of the implementation of the NYISO's proposed tariff amendments. As a result, the Protests object to a NYPSC function which is not, and indeed could not be, impacted by the amendments. On the other hand, the NYISO's proposed amendments neither encroach upon, nor expand, the NYPSC's existing authority to resolve threats to reliability, and if accepted will not result in a conflict between NYISO and NYPSC rules. For the following reasons, the arguments of IPPNY and Astoria Generating contesting the NYPSC's jurisdiction and authority lack merit and also constitute an impermissible collateral attack upon the NYISO's tariff provisions governing Gap Solutions. Therefore, the assertions raised by IPPNY and Astoria Generating should be rejected.

Further, the Commission should reject the claims of IPPNY and Astoria Generating that a Transmission Owners' temporary use of a generator interconnection point, while a

generator is under an outage, constitutes an impermissible taking without compensation under the Fifth Amendment of the U.S. Constitution. A Transmission Owners' temporary use of interconnection facilities it owns in order to maintain safe and reliable service does not qualify as such a taking.

DISCUSSION

A. Contrary to IPPNY's Claims, The NYPSC Has the Authority to Review Generator Retirements and to Take Action Where Needed for Reliability

IPPNY maintains that the NYISO tariff should be interpreted such that the NYPSC lacks the authority to issue a Compensation Order instructing a generator to operate for reliability purposes, and that it is instead the Commission that must issue any such order. Such an interpretation would be contrary to both law and practice. While the NYPSC possesses clearly established authority to order a generator to remain in-service, or to resume service for reliability reasons, neither the Federal Power Act nor any other provision of federal law grants such authority to the Commission or restricts its exercise by the state.

The NYS PSL authorizes the NYPSC to ensure the provision of safe and adequate service by electric corporations,

including independent generation owners.¹⁰ Under this authority, the NYPSC considers, approves, conditions, or rejects plans for any changes of ownership an electric corporation might propose.¹¹ That jurisdiction has been interpreted as extending to authority over abandonments, including abandonment of property and abandonment of service through retirement.¹²

In exercising its jurisdiction, the NYPSC has required generation owners to provide notice of a proposed retirement at least 180-days in advance for generating units sized 80 MWs or more, or 90-days in advance for generators greater than 2 MW but less than 80 MWs.¹³ Where proposed retirements have threatened to adversely affect reliability, the NYPSC has worked with the applicable generation owners, Transmission Owner(s), and the NYISO to ensure that an appropriate solution for preserving reliability is found. Such solutions have included the

¹⁰ NYS PSL §4.

¹¹ NYS PSL §70.

¹² NYPSC Case 05-E-0889, Proceeding on Motion of the Commission to Establish Policies and Procedures Regarding Generation Unit Retirements, Order Instituting Proceeding (issued July 27, 2005).

¹³ NYPSC Case 05-E-0889, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

procurement of reliability support services from independent generation owners needed for system reliability.¹⁴

The NYPSC's exercise of this jurisdiction does not conflict with the Federal Power Act or FERC's jurisdiction. Under the Federal Power Act, the Commission has exclusive jurisdiction over rates for the wholesale sale of energy, which includes jurisdiction over markets whose purpose is to direct the setting of those jurisdictional wholesale rates.¹⁵ However, the Commission does not possess the power to require generators to run. States retain authority over "facilities used for the generation of electric energy" and the ability "to take action to ensure the safety, adequacy, and reliability of electric service within that State."¹⁶ In reviewing retirement notices and taking action, as necessary, to respond with solutions to potential threats to reliability, the NYPSC is acting wholly within that well-established authority.

Therefore, contrary to IPPNY's assertion that the Commission has exclusive authority to require a generator to continue or resume service, it is the NYPSC that possesses such authority. The NYPSC also has ample authority to determine the

¹⁴ See, e.g., NYPSC Case 12-E-0136, Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements, Order Deciding Reliability Need Issues and Addressing Cost Allocation And Recovery (issued May 20, 2013).

¹⁵ 16 U.S.C. § 824.

¹⁶ 16 U.S.C. §§ 824, 824d, 824e, 824o.

appropriate level of compensation to be paid to generators for furnishing these reliability support services. To the extent that this compensation has any effect on wholesale rates for energy or capacity, those effects are the incidental results of State action within State-jurisdictional areas. As both the Commission and federal courts have acknowledged, the presence of such incidental effects does not render an action preempted.¹⁷

When the NYPSC reviews and responds to planned generator retirements, it acts within an area of State jurisdiction pursuant to well-established statutory authority. IPPNY should not be allowed to upset these well-understood jurisdictional predicates in the context of this filing, which is premised upon the continuation of the existing regulatory framework.

B. IPPNY's Claim That a Generator Has a Property Interest in Its Interconnection Point Lacks Support

In its Protest, IPPNY argues that generators hold property interests in their interconnection points and that some features of NYISO's proposal would constitute a taking of that property requiring just compensation under the Fifth Amendment of the U.S. Constitution. Because contract rights are a type of

¹⁷ See, e.g., PPL EnergyPlus, LLC v. Solomon, No. 13-4330 (3d Cir. Sept. 11, 2014) ("When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid." (citing Northwest Central Pipeline v. State Corp. Commission of Kansas, 489 U.S. 493 (1989))).

property right, IPPNY is correct in stating that appropriating a generator's contractual right would require just compensation. However, that compensation for contractual rights is only required where the right is appropriated such that the government, instead of the possessor, acquires its benefits, while the possessor is prevented from exercising the right.¹⁸

The NYISO's Standard Large Generator Interconnection Agreement (LGIA) sets out the rights and obligations of the interconnecting customer and the Transmission Owner. The LGIA explicitly recognizes that the Connecting Transmission Owner's right to require a generator to interrupt the production of electricity when "necessary to safely and reliably operate and maintain the New York State Transmission System."¹⁹ Interconnection agreements convey, at most, a right to access a transmission provider's system and to provide power to that system equal to the amount of capacity specified in the contract. They do not convey a physical property interest in the interconnection point, nor do they convey an exclusive right of control over an interconnection point.

The NYISO's proposed tariff amendments would allow a transmission owner to temporarily use the interconnection point when the generator is under an outage. This action would not

¹⁸ Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

¹⁹ NYISO OATT, Attachment X, Appendix 6, §9.6.2.

interfere with the generator's one contractual entitlement (i.e., usage of the interconnection point to provide power to the transmission provider's system). No action taken under these rules would prevent the generator from using or resuming use of its interconnection point, or otherwise interfere with those contractual rights. Moreover, it is clear the "generator does not own facilities that comprise the Point of Interconnection."²⁰ Therefore, the temporary use of Point of Interconnection associated with a generator in order to maintain reliability would not trigger the Fifth Amendment compensation requirement.

Even if the implementation of NYISO rules, in conjunction with Commission or NYPSC orders, interferes with a generator's ability to immediately return to service, no compensation would be necessary. A temporary disruption of a generator's access to the interconnection point due to insufficient capacity represents mere frustration of the generator's interconnection right, not a total appropriation of that right. Where a contractual right is merely frustrated by government action, rather than appropriated, the compensation requirement is not triggered.²¹ Furthermore, interference with a property right for a reasonable period of time during the

²⁰ NYISO Filing (dated July 28, 2014), p. 23.

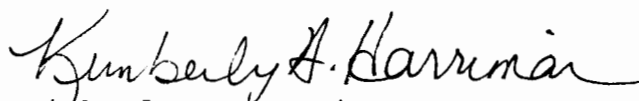
²¹ Id.

pendency of a regulatory process is not a taking requiring compensation.²² Therefore, temporary frustration in the form of a delay in accessing an interconnection point is not a circumstance that would compel or justify awarding compensation.

CONCLUSION

For all of the above reasons, the Commission should reject the Protests filed by IPPNY and Astoria Generating, and accept the NYISO's proposed tariff amendments, while making the clarification noted above.

Respectfully submitted,



Kimberly A. Harriman
General Counsel
Public Service Commission
of the State of New York
By: Theodore F. Kelly
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-4953


Dated: October 7, 2014
Albany, New York

²² Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

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
October 7, 2014



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