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THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350
www.dps.ny.gov

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April 14, 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. EL13-62-000 – *Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc.*

Dear Secretary Bose,

For filing, please find the Answer and Protest of the New York State Public Service Commission to the Motion to Amend and Amendment in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-4953.

Very truly yours,


Theodore F. Kelly
Assistant Counsel

Attachment

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

Independent Power Producers)	
of New York, Inc.)	
)	
v.)	Docket No. EL13-62-000
)	
New York Independent System)	
Operator, Inc.)	

**ANSWER AND PROTEST OF THE NEW YORK STATE
PUBLIC SERVICE COMMISSION
TO MOTION TO AMEND AND AMENDMENT**

INTRODUCTION

On March 25, 2014, Independent Power Producers of New York, Inc. (IPPNY) filed a Motion to Amend and Amendment to its Complaint in the above-captioned proceeding (IPPNY Filing). IPPNY's initial complaint (IPPNY Complaint), filed on May 10, 2013, alleged that certain Reliability Support Services (RSS) agreements that were implemented to ensure reliability are artificially suppressing Installed Capacity (ICAP) prices because they constitute "out-of-market" payments, and thus warrant mitigation. In its Motion to Amend and Amendment, IPPNY argues that a recently proposed agreement related to the refueling¹ of the Dunkirk generating facility, which is currently

¹ In this Protest, "refueling" refers to the process of modifying a coal-fired power generating unit to convert it to a natural gas-fired power generating unit.

pending before the New York State Public Service Commission (NYPSC), similarly warrants mitigation.

The NYPSC hereby submits its Answer and Protest to the IPPNY Filing pursuant to Rules 211, 212, and 215 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or Commission) and the Commission's Notice of Amendment to Complaint, issued March 28, 2014. The NYPSC previously filed a Motion of Intervention and Protest (NYPSC Protest) in this matter on May 30, 2013, responding to IPPNY's initial complaint. As more fully discussed in the NYPSC Protest, it is the position of the NYPSC that IPPNY's Complaint should be rejected.

In this Answer and Protest, NYPSC argues that IPPNY's Motion to Amend should be rejected or, in the alternative, the claims described in the proposed amendment should be dismissed. IPPNY's Motion to Amend should be rejected because the proposed amendment focuses on issues not sufficiently related to the complaint. Alternatively, the claims discussed in IPPNY's proposed amendment should be summarily dismissed because they are not ripe for decision by the Commission and because IPPNY is attempting to circumvent the stakeholder process established by the New York Independent System Operator (NYISO). The relief requested in IPPNY's proposed amendment should be denied because buyer-side ICAP market mitigation should not be imposed on

generators that have been identified as needed for reliability purposes.

BACKGROUND

New York State Public Service Law assigns the NYPSC responsibility for, inter alia, ensuring safe and adequate service for ratepayers.² In order to fulfill that responsibility, protect New York's citizens, and protect New York ratepayers against power system failures, the NYPSC oversees the reliability of the New York State power system. As discussed in the NYPSC Protest, the NYPSC takes an active role in ensuring that the retirements of independently-owned generation resources do not threaten the continued provision of reliable electric service. The proposed retirements of the Dunkirk and Cayuga plants created reliability concerns identified by the NYPSC, the NYISO, and the owners of New York's transmission systems (Transmission Owners). As discussed in IPPNY's Complaint and NYPSC's Protest, the Transmission Owners and NYPSC responded to the immediate reliability concerns through Reliability Support Services (RSS) agreements with the owners of those plants.

On January 18, 2013, the NYPSC instituted a proceeding to consider the best method to fulfill long-term reliability

² New York Public Service Law §65.

needs in the affected areas.³ The NYPSC directed particular focus towards two alternatives for preventing adverse reliability impacts: transmission system upgrades; and refueling coal-fired power plants in areas of concern.⁴ Niagara Mohawk Power Corporation d/b/a National Grid (National Grid), the Transmission Owner for one affected area, entered into discussions with Dunkirk Power, LLC (Dunkirk), the owner of a coal-fired power plant, to explore the costs and benefits of refueling.⁵ These discussions led to an agreement on terms for a refueling contract between National Grid and Dunkirk.⁶ The NYPSC subsequently directed the companies to file terms of the proposed agreement.⁷

On February 13, 2014, National Grid submitted a Term Sheet reflecting the agreement between it and Dunkirk.⁸ The Term Sheet contemplates refueling three units at Dunkirk to natural gas, with a total anticipated capacity of 435 MW and a targeted in-service date of September 1, 2015.⁹ The Term Sheet has no

³ Case 12-E-0577, Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements, Order Instituting Proceeding and Requiring Evaluation of Generation Repowering (issued January 18, 2013).

⁴ Id.

⁵ Case 12-E-0577, Term Sheet and Statement in Support (filed February 13, 2014).

⁶ Id.

⁷ Case 12-E-0577, Notice of Filing Deadline (issued December 23, 2013).

⁸ Case 12-E-0577, Term Sheet and Statement in Support.

⁹ Id.

effect without NYPSC action.¹⁰ The NYPSC has not yet acted on National Grid's filing.¹¹

DISCUSSION

I. The Commission Should Reject IPPNY's Motion to Amend Because the Proposed Amendment Is Not Sufficiently Related to the Complaint

The Commission has rejected motions to amend where permitting the proposed amendment would result in confusion or inefficiency in the proceeding or would be unjust to other parties.¹² Proposed amendments should be rejected when they focus on claims that do not arise out of the same transaction or occurrence as the complaint.¹³ Motions to amend may also be denied to avoid unreasonably burdening opposing parties or delaying the proceeding.¹⁴

IPPNY's initial complaint focused entirely on RSS agreements approved by the NYPSC to address immediate reliability concerns while a long-term solution was developed. The RSS agreements were already in effect when IPPNY filed its complaint and IPPNY argued that they had already impacted prices in the capacity market. Furthermore, IPPNY argued that its

¹⁰ Id.

¹¹ Case 12-E-0577.

¹² Missouri Basin Municipal Power Agency v. Midwest Energy Company, 55 FERC 61,464 (1991); Grynberg Production Company v. Mountain Fuel Resources, 42 FERC 61,061 (1988).

¹³ 42 FERC 61,061 at 61,301-03.

¹⁴ 55 FERC 61,464 at 62,533 (finding amendment improper because the proceeding was sufficiently advanced).

requested relief was immediately necessary to respond to those price impacts.

By contrast, the proposed amendment addresses a Term Sheet related to refueling that is pending before the NYPSC. While it shares the same parties, the Term Sheet is not part of the same transaction or occurrence as the RSS agreements. The capacity contemplated in the Term Sheet is not yet online and is not anticipated to be online for more than a year.¹⁵ IPPNY makes no claim that the Term Sheet has already impacted capacity prices. As further discussed below, the Term Sheet is pending before the NYPSC so its effects are not certain and the harms alleged by IPPNY are hypothetical and speculative. See infra Discussion § 3. For these reasons, the issues presented in the proposed amendment should not be considered in the same proceeding as the issues presented in the Complaint. Combining these dissimilar topics in one case would confuse the proceeding and would not promote efficiency.¹⁶ Furthermore, adding these new and unrelated matters to the proceeding almost one year after the filing of the complaint would unnecessarily delay the proceeding.¹⁷ For these reasons, the Commission should reject IPPNY's motion to amend.

¹⁵ Case 12-E-0577, Term Sheet and Statement in Support.

¹⁶ Cf. 42 FERC 61,061.

¹⁷ Cf. 55 FERC 61,464.

II. The Commission Should Reject IPPNY's Motion to Amend or Dismiss the Issues Raised in the Amendment Because IPPNY Is Attempting to Circumvent the Stakeholder Process

The Commission has consistently encouraged parties to attempt to resolve tariff-related disputes through independent system operators' stakeholder processes before filing a complaint with the Commission. This serves several purposes: it promotes efficient use of Commission resources, by only requiring Commission intervention for disputes that cannot be resolved at a local level;¹⁸ it ensures that all interested stakeholders are fully aware of the proposal and have the opportunity to participate in its consideration;¹⁹ it creates a full record for any eventual Commission consideration;²⁰ and it allows stakeholders to choose in the first instance between the variety of permissible market designs, with the Commission serving as a backstop preventing or reversing decisions that will lead to unjust or unreasonable rates.²¹ Where parties have come to the Commission without first engaging in the stakeholder process, the Commission has regularly dismissed their complaints

¹⁸ FirstEnergy Solutions Corp. v. PJM Interconnection, L.L.C., 138 FERC 61,158 at 61,642 (2012).

¹⁹ New York Independent System Operator, Inc., 126 FERC 61,046 at 61,411 (2009).

²⁰ ISO New England, Inc., 128 FERC 61,266 at 62,261, 62,263-64 (2009).

²¹ 126 FERC 61,046 at 61,411.

or otherwise referred their concerns back to the stakeholder process.²²

The issue of refueling is under active consideration before NYISO stakeholder groups, with the participation of IPPNY and its members. However, IPPNY has chosen to unilaterally petition for Commission intervention rather than engaging in the stakeholder process to its conclusion. In response to similar criticism of its initial complaint,²³ IPPNY explained that (a) the market impact of the RSS agreements required quicker action than the stakeholder process allowed and (b) the results of preliminary discussions among stakeholders had led it to believe its proposed tariff amendments had little chance of success.²⁴

Regardless of whether these explanations supported IPPNY's initial complaint, neither applies here. The Term Sheet is not certain to take effect and, if it does, is not expected to result in increased capacity for more than a year.²⁵ The question of how refueled generators should be treated in NYISO markets, including the ICAP market, is a matter under active discussion among NYISO stakeholders, and no final decision has

²² Southwest Power Pool, Inc., 141 FERC 61,048 at 61,274 (2012); 138 FERC 61,158 at 61,642; 126 FERC 61,046 at 61,411; 128 FERC 61,266 at 62,261, 62,263-64.

²³ National Grid Motion to Dismiss and Protest (filed May 30, 2013); Answer of the New York Independent System Operator (filed May 30, 2013).

²⁴ IPPNY Request for Leave to Answer and Answer (filed June 14, 2013).

²⁵ Case 12-E-0577, Term Sheet and Statement in Support.

yet been made.²⁶ IPPNY makes no claim that there is a current market impact requiring an immediate remedy.

IPPNY also acknowledges in its amendment that there may be several different permissible ways to address the issues it raises. Despite this, IPPNY requests that the Commission enforce IPPNY's preferred tariff language without a full opportunity for stakeholder engagement. IPPNY should instead engage with the stakeholder process to address its concerns, and only request Commission action if the final decision will lead to unjust and unreasonable rates. For these reasons, the Commission should reject IPPNY's proposed amendment or, in the alternative, dismiss the matters raised in the amendment.

III. The Commission Should Reject IPPNY's Motion to Amend or Dismiss the Issues Raised in the Amendment Because Those Issues Are Not Ripe for Commission Consideration

Commission intervention is appropriate to remedy a present harm or a certainly and immediately threatened harm, not to provide an advisory opinion or a preliminary injunction based on an inchoate threat. Complaints which allege only threatened or possible future action are premature and not ripe for Commission review.²⁷ In particular, the Commission has declined

²⁶ See Docket No. ER12-360-001, New York Independent System Operator, Inc., Order Conditionally Accepting Proposed Tariff Revisions (issued June 6, 2013).

²⁷ CSOLAR IV South, LLC v. California Independent System Operator Corporation, 142 FERC 61,250 at 62,590-92 (2013); Chevron Products Company v. SFPP, L.P., 138 FERC 61,115 at 61,493

to act where the harm is contingent on a future discretionary action of a state agency or an independent system operator.²⁸ Similarly, the Commission has required complainants to provide evidence of actual harm, rather than accepting mere speculation that an action will cause harm when taken and requiring respondents to prove a negative.²⁹ Premature and unripe complaints should be dismissed to avoid waste of Commission resources, issuance of advisory opinions, and excessive burdens on respondents.

IPPNY's amendment is premature for several reasons. First, the Term Sheet is pending before the NYPSC. If the NYPSC rejects or alters the Term Sheet, IPPNY's concerns may be mooted. Second, NYISO has not yet had cause or opportunity to fully address the treatment of refueled plants in general or the refueling of Dunkirk pursuant to the Term Sheet in particular. There is no present market deficiency that NYISO has failed to address to justify Commission action. Third, even if the Term Sheet is approved, the refueling will take at least a year and a half, so IPPNY's claims of market effects are highly

(2012); Port Jefferson v. National Grid Generation LLC, 141 FERC 61,123 at 61,652 (2012).

²⁸ Seneca Power Partners, L.P. v. New York Independent System Operator, Inc., 138 FERC 61,207 at 61,944 (2012); Louisiana Public Service Commission v. Entergy Corporation Entergy Services, Inc., 132 FERC 61,104 at 61,539-540 (2010).

²⁹ Entergy Services, Inc., 145 FERC 61,247 at 62,356, 62,367 (2013).

speculative. A Commission Order addressing the Term Sheet could quickly become an advisory opinion if the NYPSC rejects or alters the agreement, if NYISO responds to refueling concerns in a different manner, if IPPNY's forecast of the refueling's effect is incorrect, or if intervening forces over the next year and a half alter the market. For these reasons, IPPNY's Motion to Amend should be rejected or, in the alternative, the issues contained in the amendment should be dismissed as premature and unripe.

IV. **The Commission Should Reject IPPNY's Complaint and Not Impose ICAP Market Mitigation Upon Generators That Have Been Identified As Needed For Reliability Purposes**

The NYPSC cannot fully address the substantive claims made by IPPNY about the proposed refueling at this time. The agreement presented in the Term Sheet is under active consideration and the NYPSC has not yet determined whether the agreement is an appropriate solution for the reliability issues that have been identified. The NYPSC may accept, reject, or alter the Term Sheet. If the Commission intends to continue to consider issues related to the refueling in this proceeding, the NYPSC requests the opportunity to provide the Commission with further briefing subsequent to its decision on the Term Sheet.

This Answer and Protest adopts and reaffirms the NYPSC's position in its May 30, 2013 Protest that generators identified as needed for reliability purposes should not be

subjected to buyer-side mitigation. As discussed in that Protest, IPPNY's requests hinge on the description of such generators as "uneconomic," which is inappropriate given that it ignores the reliability benefits provided by the plant. The payments through RSS agreements or other "outside-of-market" measures reflect those benefits and should therefore be included in determining whether a generator is "economic."

The Commission and various independent system operators have recognized that mitigation is not an appropriate response to the subsidization of generation based on genuine state policy goals. The PJM tariff, which was recently revised and approved by the Commission, contains several exemptions to buyer-side mitigation for this reason.³⁰ Those exemptions were adopted in spite of arguments from interest groups in PJM territories similar to the arguments that IPPNY makes in its filings.³¹ For example, the PJM Power Providers Group argued that exempting renewables from buyer-side mitigation would result in price suppression by state-subsidized renewables.³² PJM and the Commission rejected this argument, finding that buyer-side mitigation rules should focus on resources that pose

³⁰ See Order Conditionally Accepting in Part, and Rejecting in Part, Proposed Tariff Revisions, 143 FERC 61,090 at 47-56 (2013).

³¹ Id.; see also Order Accepting Proposed Tariff Revisions, 135 FERC 61,022 at 45 (2011).

³² 135 FERC 61,022 at 45.

a substantial risk of price suppression.³³ NYISO is also considering policy-based exemptions to buyer-side mitigation, including a renewable resource exemption and a refueling exemption.³⁴ The Commission has encouraged consideration of these policies.³⁵

The Commission has also recognized that the mere fact that an action could lower capacity prices does not mean that the action constitutes unlawful price suppression.³⁶ The Commission has repeatedly stated that state actions motivated by legitimate policy goals do not constitute price suppression merely because they might reduce capacity prices.³⁷ The Commission has held that the mere fact that some subsidized generators may bid into a market does not make that market

³³ Id.

³⁴ See Docket No. ER12-360-001, New York Independent System Operator, Inc., Order Conditionally Accepting Proposed Tariff Revisions (issued June 6, 2013); see also Letter from NYISO to FERC Regarding Buyer-Side Mitigation Rules for Small Suppliers, Renewable Resources, and Special Case Resources in New Capacity Zones (filed October 4, 2013).

³⁵ Docket No. ER12-360-001, Order Conditionally Accepting Proposed Tariff Revisions.

³⁶ See, e.g., Order Conditionally Accepting in Part, and Rejecting in Part, Proposed Tariff Revisions, 143 FERC 61,090 (recognizing that not all subsidized entry into a market constituted unlawful price suppression). Courts upholding Commission decisions have also made this point. See, e.g., Connecticut Department of Public Utility Control v. FERC, 569 F.3d 477, 481 (D.C. Cir. 2009)

³⁷ Id.

ineffective or the rates produced by that market unjust or unreasonable.³⁸

IPPNY has a singular motivation: to protect its members' profits by maximizing the value of capacity, including by minimizing the supply of capacity. It has no responsibility to ensure system reliability. IPPNY views any action that could increase supply and thereby lower capacity market prices, from support of renewable energy to protection of reliability needs to the unsubsidized development of merchant plants to building of transmission lines, as illegitimate price suppression.³⁹

IPPNY's proposed tariff amendments effectively serve its singular motivation. However, other organizations, including the Commission, the NYPSC, and the NYISO, have broader responsibilities. These include responsibilities to serve the public interest, to ensure safe and adequate service at just and reasonable rates, to protect consumers, and to support the continued stability, reliability, and improvement of the entire electric system.⁴⁰ Accepting IPPNY's tariff amendments would

³⁸ Id.

³⁹ See, e.g., IPPNY Complaint; IPPNY Filing; Case 10-T-0139, Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need, Recommended Decision (filed December 27, 2012) (describing IPPNY's position on a proposed transmission line).

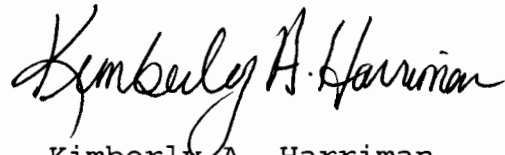
⁴⁰ See generally Federal Power Act; New York State Public Service Law.

serve the interests of IPPNY and its members at the expense of consumers, the general public, and the electric system.

CONCLUSION

For all of the above reasons, the Commission should reject IPPNY's Motion to Amend or, in the alternative, dismiss the issues raised by IPPNY's proposed amendment to its Complaint. Should the Commission continue to consider the issues raised in IPPNY's proposed amendment in this proceeding, the NYPSC requests permission to submit supplemental briefing after its decision in the Term Sheet matter before it.

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: April 14, 2014
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: April 14, 2014
Albany, New York



Theodore F. Kelly
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-4953