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January 19, 2016

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 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

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

COMMENTS OF THE NEW YORK STATE  
PUBLIC SERVICE COMMISSION

BACKGROUND

On March 19, 2015, the Federal Energy Regulatory Commission (FERC or Commission) directed the New York Independent System Operator, Inc. (NYISO) to consider certain questions amongst its stakeholder, including:

(1) whether there are circumstances that warrant the adoption of buyer-side mitigation [(BSM)] rules in the rest-of-state [(ROS) market]; and,

(2) whether resources under repowering agreements similar to Dunkirk's have the characteristics of new rather than existing resources, triggering a buyer-side market power evaluation because of their potential to suppress prices in the capacity market and what mitigation measures need to be in place to address such concerns.<sup>1</sup>

On June 17, 2015, the NYISO submitted its report in compliance with the March 2015 Order by setting forth the NYISO's analysis of whether BSM rules for new entry are warranted in the ROS

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<sup>1</sup> Docket No. EL13-62-000, Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc., Order Denying Complaint, 150 FERC ¶61,214 at ¶71 (issued March 19, 2015 Order) (March 2015 Order).

Installed Capacity (ICAP) market (June 2015 Compliance Filing). The NYISO's analyses indicated that buyer-side market power mitigation measures for new entrants were not warranted in the ROS ICAP market. The NYISO's report also indicated that it was premature to address the need for BSM rules to address concerns with repowering and uneconomic retention. The NYISO recommended that consideration of those issues should await the outcome of the NYISO's compliance filing in response to the Commission's February 2015 Order, which directed the NYISO to include Reliability Must-Run (RMR) provisions in its tariff.<sup>2</sup>

On November 16, 2015, the Commission's Division of Electric Power Regulation (Staff) requested additional information concerning the NYISO's June 2015 Compliance Report. The NYISO provided its response to Staff's inquiry on December 16, 2015, and advised that it continues to recommend that BSM measures should not be adopted for "new entry" in the ROS market (December 2015 Compliance Filing). However, the NYISO recommended that it continue to monitor potential exercises of buyer-side market power surrounding "uneconomic retention" and "repowering," similar to the Dunkirk Repowering Agreement, and

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<sup>2</sup> Docket No. EL15-37-000, New York Independent System Operator, Inc., Order Instituting Section 206 Proceeding and Directing Filing to Establish Reliability Must Run Tariff Provisions, 150 FERC ¶61,116 (issued February 19, 2015) (February 2015 Order).

refer potential matters to the Commission's Office of Enforcement to address such concerns.<sup>3</sup>

### DISCUSSION

The New York State Public Service Commission (NYPSC) hereby submits its comments on the NYISO's December 2015 Compliance Filing pursuant to the Commission's Notice of Extension of Time, issued on December 28, 2015.<sup>4</sup> In sum, the NYPSC supports the NYISO's recommendations and conclusions that mitigation of new entry in the ROS market is not needed at this time. The NYISO's updated analyses bolster its prior conclusion that mitigation measures are not warranted at this time. Moreover, the NYISO's analyses include conservative assumptions that tend to overstate the possible exercise of buyer-side market power. These assumptions are identified below.

However, with respect to "uneconomic" retention and repowering agreements, the NYSPC does not support the NYISO's conclusions and recommendation to screen and monitor for suspicious behavior that would be referred to FERC's Office of

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<sup>3</sup> On January 11, 2016, the NYISO's Market Monitoring Unit (MMU) filed comments on the December 2015 Compliance Filing. The NYPSC is currently reviewing these comments and expects to seek leave to file an answer in order to address several concerns raised by the MMU's filing.

<sup>4</sup> 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.

Enforcement. The NYISO's analyses include the same conservative assumptions that overstate the potential for market power abuse. The NYISO correctly notes that "uneconomic contracts could be the result of other legitimate reasons besides hedging, including legitimate public policy measures that are motivated by factors such as direct economic benefits, deferred investment, fuel diversity, and reduced emissions."<sup>5</sup> The NYPSC supports this list of considerations and identifies various other legitimate interests below that may also drive the need for a bilateral contract. As the NYISO concludes, "[i]t would be unreasonable to have the NYISO apply mitigation to this behavior without determining whether or not the behavior is reflective of an exercise of market power."<sup>6</sup> Importantly, "any analytical approach developed by the NYISO would not be able to account for all of the elements that may be considered by an [Load-Serving Entity (LSE)] when entering into an agreement."<sup>7</sup>

Given the numerous legitimate reasons for an LSE to enter into a bilateral contract, and the practical difficulties and limitations of evaluating that behavior, the automatic imposition of an offer floor is clearly inappropriate. Although the NYISO's proposal to refer suspicious behavior to FERC

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<sup>5</sup> December 2015 Compliance Filing, Attachment II, p. 17.

<sup>6</sup> Id.

<sup>7</sup> Id.

appears reasonable, the entire monitoring process envisioned by the NYISO is excessive in nature and has not been shown to be necessary or appropriate. Because the NYISO tariff already requires the NYISO to refer suspicious market behavior to FERC, the Commission does not need to take any further action regarding mitigation at this time.<sup>8</sup>

#### **I. ROS New Entry Mitigation**

As stated in the NYPSC's July 17, 2015 comments on the NYISO's June 2015 Compliance Filing, the NYPSC agrees with the NYISO's conclusion that mitigation measures for new entry are not warranted in the ROS market at this time. The NYISO's December 2015 Compliance Filing reinforces that conclusion along with our previously stated points in that regard. In fact, NYISO's December 2015 Compliance Filing demonstrates that the potential for the profitable exercise of price suppression is even more remote than suggested in its earlier analysis.

The NYISO's conclusion was reached despite using extremely conservative assumptions that overstate the potential for market power abuse. For instance, the NYISO's assumption of collusion between the two largest LSEs is still not supported, and use of the 19.8% market share of the single largest LSE

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<sup>8</sup> See, NYISO Market Administration and Control Area Services Tariff, Attachment H - ISO Market Power Mitigation Measures, §23.1.2.

should be used in place of 30%. Given that LSEs typically hedge approximately 40-50% of their load, a net market share of approximately 10% would be more appropriate for this analysis. Furthermore, given the prohibition on anti-competitive behavior/market collusion between LSEs, as per 18 C.F.R. §1c.2, the assumed market share should not exceed that of a single LSE.

In addition, the assumption that it would take three years for a full supply response to a price change continues to be conservative. As the NYISO's data shows, there is considerable price elasticity in the ROS market to support this assumption as realistic. In particular, this data indicates that price decreases would result in an increase in unoffered capacity, and would thus result in an increase in ROS prices.

Due to the risks associated with any attempt to suppress prices, such as unanticipated retirements, unexpected load growth, and potential market design changes, the viability of any new entry price suppression scheme is highly questionable. Rather than presuming an attempt to manipulate markets, the intent to suppress prices should be clearly demonstrated before any mitigation action is pursued.

## **II. Uneconomic Retention and Repowering**

The same analytical issues noted above, with respect to market share, hedging, and uncertainty, also apply to the

NYISO's repowering and uneconomic retention analyses. Even assuming, arguendo, that a large LSE had an incentive to lower capacity prices, there is no such incentive for smaller LSEs. For example, an LSE with an 11% market share will have market purchases of around 6% after accounting for bilateral hedges. According to the NYISO's December 2015 Compliance Filing, the profitability of the strategy is only slightly positive in the 5-6% range.<sup>9</sup> After accounting for the uncertainty and risk, there would be no incentive to exercise market power. It should also be noted that LSEs compete against each other and that such a strategy would put such an LSE at a competitive disadvantage.

In addition, the NYISO's analysis of the hedging activity of National Grid, the largest LSE in the ROS market, showed that National Grid in aggregate did not pay above market costs as part of its hedging strategy. Hence, there has been no clear showing that any further market monitoring or mitigation measures are required at this time.

The NYISO's potential screening and monitoring approaches would be costly and intrusive, and are unnecessary. Both the supplier-side and buyer-side methods would be excessively costly to both the NYISO and market participants. Ultimately, ratepayers would be asked to pay NYISO's increased costs. The burden on market participants would likely be

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<sup>9</sup> December 2015 Compliance Filing, Attachment II, p. 4.

detrimental to their financial well-being and to participation in the NYISO markets. As the NYISO admits, this process would be "much more intrusive to Market Participants than any other mitigation process the NYISO currently administers."<sup>10</sup> It would also, to our knowledge, be the most intrusive monitoring anywhere in the country.

The proposed screening methods would ultimately prove to be inconclusive. As the NYISO acknowledges, it "does not have a specific analytical approach for distinguishing between legitimate hedging behavior and the inappropriate exercise of market power to put forth at this time."<sup>11</sup> While NYISO suggests that it might be able to quantify "risk aversion" given certain data including LSEs' and Generators' market expectations, it does not provide any indication how such information could be reliably gathered. The NYISO also concedes that it is not clear whether such a methodology could produce meaningful results in practice.

In reality, many practical considerations beyond those contemplated by the NYISO's analysis play into market participants' hedging and contracting decisions. The NYISO notes that some of these include deferred investment, fuel diversity, and environmental benefits. However, there are

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<sup>10</sup> December 2015 Compliance Filing, Attachment II, p. 15.

<sup>11</sup> Id.

various others. The following categories of economic, reliability, and environmental considerations should be acknowledged.

**Economics**

- Relief/Elimination of system congestion
- Production cost savings
- Capacity resource cost savings
- Deferred Distribution and/or Transmission Investments
- Avoided Reliability Must-Run contract costs
- Bilateral Agreements for legitimate hedging purposes
- Direct Economic Benefits (Examples: economic development; jobs/labor, and material and service expenditures; support local and state tax revenues)

**Reliability**

- Transmission security and resource adequacy
- Fuel diversity
- Operational flexibility for operation and maintenance, and generation dispatch including imports
- System stability
- Deferred reliability need dates/Mitigate reliability risks

**Environmental**

- Reduced emission through dispatch of cleaner/zero-emissions resources, and renewables

These considerations will likely become more pronounced in response to requirements to comply with the U.S. Environmental Protection Agency's Clean Power Plan and other environmental standards. However, the NYISO is not in a position to evaluate the value of such a myriad of legitimate considerations to any given market participant.

Finally, as the NYISO notes, IPPNY has suggested mitigation rules that would impose an offer floor whenever a

supplier's compensation is received through a non-bypassable charge.<sup>12</sup> This proposal suffers the same flaws in that it requires the NYISO to make judgments regarding the terms of contracts that it is not in a position to make. Arrangements involving non-bypassable charges would presumably take place under the auspices of the NYPSC under a thoroughly transparent process, whereby any party who is aggrieved by the result is free to file its own complaint with FERC based on the specific facts and circumstances of that arrangement.

#### CONCLUSION

The recommendations and conclusions reached in the NYISO's December 2015 Compliance Filing regarding new entry are appropriate and reasonable. However, the NYPSC does not agree with the conclusion reached or the proposed remedy for "uneconomic" entry and repowering. While the NYISO should continue to monitor potential exercises of buyer-side market power and refer specific matters surrounding "uneconomic retention" and "repowering" to the Commission, no new tariff provisions are necessary. Accordingly, the Commission should

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<sup>12</sup> December 2015 Compliance Filing, Attachment II, p. 18.

accept the NYISO's June and December 2015 Compliance Filings as compliant with the March 2015 Order.

Respectfully submitted,

*Kimberly A. Harriman / dld*

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of the State of New York

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Dated: January 19, 2016  
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  
January 19, 2016



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