

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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Secretary

July 20, 2012

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. ER12-360-001 - New York Independent
System Operator, Inc.

Dear Secretary Bose:

For filing, please find the Notice of Intervention and Protest 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) Docket No. ER12-360-001
Operator, Inc.)

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

NOTICE OF INTERVENTION

On June 29, 2012, the New York Independent System Operator, Inc. (NYISO) filed proposed market mitigation measures that would apply to any newly created zone (i.e., "market") for Installed Capacity (ICAP) (NYISO Filing). The New York State Public Service Commission (NYPSC) hereby submits its Notice of Intervention and Protest regarding the NYISO Filing pursuant to the Federal Energy Regulatory Commission's (FERC or Commission) Combined Notice of Filings #1, issued July 2, 2012, and Rules 211 and 214 (18 C.F.R. §§385.211 and 385.214) of the Commission's Rules of Practice and Procedure.

Copies of all correspondence and pleadings should be addressed to:

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BACKGROUND

On January 4, 2011, the NYISO and the New York Transmission Owners submitted proposed "criteria," as well as additional analytical "considerations," to govern the evaluation and potential creation of new ICAP zones (i.e., "markets") in the New York Control Area. One of the proposed "considerations" included an analysis of market power in the form of buyer and seller market concentration, and whether one or more ICAP suppliers would be a Pivotal Supplier in the proposed new capacity zone. Based on this analysis, the NYISO stated that it would identify any market power issues, and propose mitigation measures, if necessary.¹ The NYISO indicated that any market power mitigation issues will be identified on a "case-by-case basis after the evaluation of the potential exercise of market power in each potential new Capacity zone was completed."²

On September 8, 2011, the Commission accepted the NYISO's proposed "criteria," subject to modification, while rejecting the proposed additional "considerations."³ The

¹ Docket ER04-449, New York Independent System Operator, Inc. and New York Transmission Owners, January 4, 2011 NYISO Filing, p. 9.

² Id.

³ Docket No. ER04-449, New York Independent System Operator, Inc. and New York Transmission Owners, Order on Compliance Filing, 136 F.E.R.C. ¶61,165 (issued September 8, 2011) (September 8, 2011 Order).

Commission expressed its agreement with the NYISO that "market power concentration studies may be necessary *after* a new zone is determined to be needed, and that additional market power mitigation measures *may* be needed for an established new capacity zone."⁴ However, the Commission indicated that it "will not prejudge these yet-to-be-developed measures, and reject[ed] NYISO's proposal that they should be used to determine whether or not to create a new capacity zone."⁵

The June 29, 2012 NYISO Filing seeks to implement "both buyer-side and supplier side mitigation measures for [new ICAP zones] using the same conceptual framework of the existing market mitigation measures currently applicable to the New York City (NYC) Locality."⁶ The NYISO concludes that the "potential market power increases" and an expectation of insufficient amounts of surplus capacity, with regard to yet-to-be-determined ICAP zones, warrants the imposition of NYC-based mitigation measures to any such zones at this time.⁷ The NYISO maintains that applying the NYC mitigation measures to any new ICAP zones that are created will provide consistent application of

⁴ Id. (emphasis added).

⁵ Id. at ¶ 64.

⁶ NYISO Filing at p. 1.

⁷ Id. at pp. 2-3.

mitigation rules and help reduce future market uncertainty, and thereby "facilitate long-term investment and contracting decisions, which is the primary purpose of the ICAP Market."⁸

SUMMARY

The NYPSC opposes the NYISO Filing because it prematurely imposes mitigation measures upon any new ICAP zones/markets. The automatic imposition of mitigation measures on any newly-created ICAP market is unjust and unreasonable, given that it ignores the actual structural competitiveness within a yet-to-be-determined zone, and improperly presumes that mitigation measures are warranted therein. As a result, the NYISO's presumption in favor of mitigation will deter new entry and act contrary to its suggestion that it will reduce market uncertainty and facilitate long-term investment decisions.

In addition, the NYISO's current proposal inappropriately departs from the approach the NYISO presented in its January 4, 2011 filing, which proposed that market power mitigation issues should be identified on a case-by-case basis following an established need for a new ICAP zone/market. The NYISO's current proposal is also contrary to the Commission's indication that it would not prejudge mitigation measures that

⁸ Id. at p. 3.

"may be needed for an established new capacity zone," as determined based on market power concentration studies.

Moreover, the NYISO Filing seeks to impose the same highly-contentious and highly-litigated mitigation measures that were imposed upon the tightly constrained New York City (NYC) ICAP market. This approach will undoubtedly lead to the same types of complaints already voiced by incumbent generators with regard to the NYC ICAP market, and attract various challenges from new entrants with respect to the application of mandatory bid requirements to their projects. For example, new entrants that are constructing their projects on a merchant basis, but are nonetheless subjected to mandatory bid offer floors by the NYISO, may likely argue that it is unjust and unreasonable to impose an offer floor upon them because they lack the incentive to suppress market prices, which was the Commission's rationale for adopting bid floors in the first place. These actions will serve to create greater market uncertainty. For all of these reasons, the NYPSC requests that the Commission reject the NYISO Filing, without prejudice, until such time as a new capacity market is determined to be warranted and any necessary market power mitigation measures have been properly identified and

supported based upon the established zone and a market power analysis.⁹

DISCUSSION AND PROTEST

The Commission Should Reject The NYISO Filing, Without Prejudice, Pending The Evaluation and Identification Of Market Power Issues Within Any New Capacity Zone Markets

As a general matter, where structural competition is present, it is more efficient and effective to rely upon competitive market forces to send appropriate price signals than to rely upon administrative mitigation measures. For instance, market prices in the NYISO's Rest-Of-State ICAP market, which lacks the ability of market participants to improperly exercise market power, have reflected the relative levels of supply and demand, thereby helping to retain existing generation, incent new entry when needed, and encourage retirements when appropriate. These market outcomes resulting from effective price signals are evidence of a successful capacity market.

⁹ In the event the Commission deems the imposition of mitigation measures warranted at this time, the Commission should also indicate that the NYPSC may seek an exemption from the mitigation measures with regard to projects pursued for legitimate state objectives, consistent with the Commission's order on the NYC ICAP market. Docket No. EL07-39-002 et al., New York Independent System Operator, Inc., Order on Rehearing and Further Order on Tariff Compliance Sheets (issued September 30, 2008), ¶ 38.

Unfortunately, because not all markets are entirely competitive, mitigation rules may be necessary in some markets.

The NYPSC recognizes that where the ability to improperly exercise market power exists, effective mitigation rules are needed to help ensure that competitive outcomes are obtained. However, a detailed market power analysis of a defined market is necessary before concluding that such ability exists. Furthermore, the mitigation measures should be narrowly tailored to not impede efficient entry and efficient exit.

The NYISO's proposal to automatically apply both buyer-side and seller-side mitigation rules to any new capacity zone is harmful to the public interest and unwarranted without a supporting market power analysis that such rules are necessary. The NYISO Filing is unwarranted because it prejudices the structural competitiveness of any yet-to-be-created ICAP market by presuming it requires mitigation. Similarly, the NYISO Filing is harmful because inappropriate mitigation rules may restrict the competitiveness of any new zone and discourage potential new market participants from entering the market.

The NYISO also incorrectly suggests that the NYISO Filing constitutes "compliance" with the Commission's September 8, 2011 Order. In fact, the Commission's September 8, 2011 Order is reasonably interpreted as supporting the opposite of the NYISO Filing - i.e., market power mitigation measures should

be developed, as appropriate, after the establishment of a new ICAP zone. In addition, the NYISO improperly ignores its prior position that "[b]ecause each potential new Capacity zone could present unique issues, which may not be identified or fully understood until after a full analysis of the candidate new Capacity zone was complete, no specific proposed market power parameters or measures [should] be included."¹⁰

There have been various disputes before the Commission and in courts over virtually every aspect of the NYC mitigation rules. The automatic application of these same rules to all new capacity zones, regardless of whether or not they are needed, is inviting future complaints and litigation which will only serve to undermine confidence in the markets and deter new entrants. While the NYISO seeks to achieve "market certainty" and ease its administrative burdens, the NYISO Filing would likely have the opposite effect. For all of the above reasons, the NYISO Filing is unjust and unreasonable and should be rejected at this time.

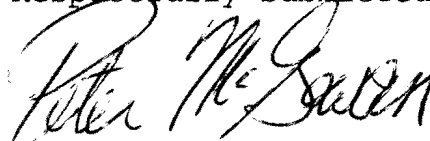
CONCLUSION

In accordance with the foregoing discussion, the Commission should reject the NYISO Filing, without prejudice,

¹⁰ Docket No. ER04-449-023, New York Independent System Operator, Inc. and New York Transmission Owners, January 4, 2011 NYISO Filing, p. 9.

until such time as a need for new mitigation measures can be adequately justified by the NYISO.

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".

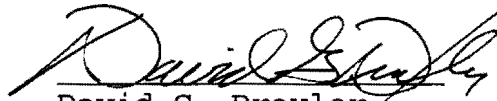
Peter McGowan
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Public Service Commission
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By: David G. Drexler
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(518) 473-8178

Dated: July 20, 2012
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
July 20, 2012



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