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Public Service Commission

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February 17, 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. EL15-33 – TDI USA Holdings Corp. v. New York
Independent System Operator, Inc.

Dear Secretary Bose,

For filing, please find the Request for Leave to Answer and Limited Answer 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) 473-4953.

Very truly yours,

Theodore F. Kelly
Assistant Counsel

Attachment

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

TDI USA Holdings Corp.)	
)	
v.)	Docket No. EL15-33
)	
New York Independent System)	
Operator, Inc.)	

**REQUEST FOR LEAVE TO ANSWER AND LIMITED ANSWER
OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION**

In accordance with Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or the Commission),¹ the New York State Public Service Commission (NYPSC) hereby respectfully request leave to answer, and submits this answer to portions of the pleading filed by the Independent Power Producers of New York, Inc. (IPPNY) in the above-captioned proceeding on January 15, 2015. This answer supplements the comments previously filed by the NYPSC supporting the Complaint and Request for Fast Track Processing of TDI USA Holdings Corp. (TDI).²

This filing responds to IPPNY's mischaracterization of the NYPSC's statements in a transmission siting proceeding that resulted in the issuance of a Certificate of Environmental Compatibility and Public Need to Champlain Hudson Power Express,

¹ 18 C.F.R. §§385.212, 385.213.

² Docket No. EL15-33, TDI USA Holdings Corp. v. New York Independent System Operator, Inc., Notice of Intervention and Comments of the New York State Public Service Commission (filed January 15, 2015).

Inc. and CHPE Properties, Inc. (collectively, CHPE).³ In particular, the NYPSC seeks to correct IPPNY's mischaracterization that the NYPSC concluded buyer-side mitigation should be applied to CHPE's project.

Contrary to IPPNY's claims, the NYPSC's position in this proceeding is consistent with its prior statements in the siting proceeding. The NYPSC continues to recognize, as it did in the siting proceeding, that buyer-side mitigation rules are available to address inappropriate abuses of market power. However, the mitigation of TDI is not appropriate given that it is a competitive entrant that lacks the ability and incentive to exert market power. It would be unjust and unreasonable to deny TDI an exemption based on IPPNY's bald assertion that the project is "uneconomic," because such a contention is not relevant in determining whether mitigation is necessary to address TDI's potential abuse of market power.

REQUEST FOR LEAVE TO ANSWER

While the Commission's Rules of Practice and Procedure do not permit answers to comments, protests, or answers as a matter of right, the Commission has discretion under Rule 213(a)(2) to accept such pleadings. The Commission has accepted such pleadings where they provide information that will

³ Although this filing does not address other arguments made in IPPNY's protest, or in any other comment or protest filed in this docket, it should not be interpreted as agreement with those arguments.

supplement or clarify the record or assist the Commission in making a decision.⁴

The NYPSC's Answer meets these standards because it provides clarifying information within the purview of the NYPSC that will ensure a complete and accurate record, and will assist the Commission in its decision making process. IPPNY's Protest makes misleading assertions regarding the NYPSC's position and mischaracterizes the NYPSC's prior orders to serve its own pecuniary interests. For those reasons, the Commission should permit the NYPSC to correct the record by accepting this Limited Answer.

BACKGROUND

In 2010, CHPE applied to the NYPSC for a Certificate of Environmental Compatibility and Public Need pursuant to Article VII of the New York State Public Service Law (PSL) (Article VII Certificate).⁵ An Article VII Certificate is required for the construction and operation of "major"

⁴ See PJM Interconnection, LLC, 117 FERC ¶ 61,168 (2006) (accepting an answer to a protest because it contained information helpful to the Commission's decision-making process), p. 29; Midwest Indep. Transmission Sys. Operator, Inc., 108 FERC ¶ 61,027 (2004); PJM Interconnection, L.L.C., 104 FERC ¶ 61,309 (2003); Michigan Electric Transmission Co., LLC, 104 FERC ¶ 61,236 (2003); Portland Natural Gas Transmission System, 105 FERC ¶ 61,169 (2003); Morgan Stanley Capital Group, Inc. v. New York Indep. Sys. Operator, Inc., 93 FERC ¶ 61,017 at 61,036 (2000) (accepting an answer as helpful in the development of the record).

⁵ NYPSC Case 10-T-0139, Application of Champlain Hudson Power Express, Inc., Application (filed March 30, 2010).

transmission facilities in New York State, as defined under the PSL. The NYPSC may not issue an Article VII Certificate unless it makes certain findings, including a determination that construction of the project will serve the public interest.⁶

The NYPSC issued an order granting an Article VII Certificate to CHPE on April 18, 2013 (the Certificate Order).⁷ Entergy Nuclear Marketing, LLC and Entergy Nuclear Fitzpatrick, LLC (collectively, Entergy) requested rehearing on the Certificate Order, which the NYPSC denied on September 24, 2013 (the Rehearing Order).⁸ Entergy petitioned the Appellate Division of the New York Supreme Court (Court) requesting review of the Certificate Order and the Rehearing Order (collectively, the NYPSC Orders). The Court determined that the NYPSC's decisions were sufficiently supported by evidence in the record such that no further review was necessary.⁹

IPPNY discusses the Court proceeding and the NYPSC Orders in its protest. In particular, IPPNY argues that:

. . . TDI's request for an exemption from the [Buyer-Side Mitigation (BSM)] Measures is barred by the doctrine of judicial estoppel. [CHPE] represented to [NYPSC] in its transmission line siting case that its entry could not harm

⁶ PSL §126.

⁷ NYPSC Case 10-T-0139, supra, Order Granting Certificate of Environmental Compatibility and Public Need (issued April 18, 2013).

⁸ NYPSC Case 10-T-0139, supra, Order Denying Petition for Rehearing (issued September 24, 2014).

⁹ Entergy Nuclear Power Marketing, LLC v. New York State Public Service Commission, 2014 N.Y. App. Div. LEXIS 7708, 2014 NY Slip Op 07711 (N.Y. App. Div. 3d Dep't November 13, 2014).

competitive markets because it would be subject to the BSM Measures, which are the mechanism that prevents uneconomic entry. The NYPSC relied, in part, on this representation in granting a siting certificate to [CHPE]. [CHPE] cannot now be granted an exemption from the same measures that the NYPSC relied upon in granting the siting certificate.¹⁰

IPPNY further elaborates on this argument later in its filing, and claims that "NYPSC's order granting the [Article VII] certificate relied specifically on TDI's arguments that [CHPE] would be subject to the BSM Measures and that the market would be protected from artificial price suppression by the imposition of an offer floor should [CHPE] fail to pass the MET [Mitigation Exemption Test]."¹¹

ANSWER OF THE NYPSC

The claims made by IPPNY misrepresent both the nature of the statements made by CHPE in the proceeding and the basis for the NYPSC's decisions. While the NYPSC Orders do discuss the buyer-side mitigation provisions enforced by the New York Independent System Operator, Inc. (NYISO), they do so in order to specifically respond to concerns that CHPE could secure overpayments from a buyer-side entity attempting to exercise

¹⁰ Docket No. EL15-33, TDI USA Holdings Corp. v. New York Independent System Operator, Inc., Protest of Independent Power Producers of New York (filed January 15, 2015), p. 3.

¹¹ Id. at 13-16.

buyer market power.¹² Contrary to IPPNY's representations, the NYPSC Orders do not mention the Mitigation Exemption Test or otherwise suggest that the NYPSC accepts that test as a proper means for determining when mitigation should be triggered.

The NYPSC Orders are consistent with the arguments made by NYPSC in this docket and in its comments in Docket No. EL15-26, which support the adoption of a Competitive Entry Exemption to buyer-side mitigation rules.¹³ The NYPSC Orders, like those comments, merely acknowledge and rely on the stated and intended purpose of such rules, which is to prevent the abuse of buyer market power.¹⁴ Well-designed buyer-side mitigation rules would only mitigate projects obtaining subsidies from those buyer-side entities that have the ability to exert market power and see an incentive for doing so, while exempting merchant projects that rely for their financial support on the independent determinations of investors willing to risk their capital. Those investors may rely on analyses that diverge from predictions made by the NYISO or competitors.

¹² NYPSC Case 10-T-0139, supra, Order Granting Certificate of Environmental Compatibility and Public Need, pp. 50-52; Order Denying Petition for Rehearing, p. 18.

¹³ Docket No. EL15-26, Consolidated Edison of New York et al. v. New York Independent System Operator, Inc., Notice of Intervention and Comments of the New York State Public Service Commission (filed January 15, 2015).

¹⁴ Case 10-T-0139, supra, Order Granting Certificate of Environmental Compatibility and Public Need, pp. 50-52; Order Denying Petition for Rehearing, p. 18.

In taking that approach to buyer-side mitigation, and contrary to IPPNY's assertions, the NYPSC has never relied on or expressed support for the mitigation of a project solely based on an arbitrary test that substitutes the NYISO's judgment, as restricted by its tariff, for that of independent market actors and investors. Indeed, the Certificate Order itself states competitive markets will suffer significant harm if new entry is prevented or restricted absent sound and compelling reasons.¹⁵ The NYPSC Orders simply rely on the existence of buyer-side mitigation measures generally in addressing the concern, raised there by IPPNY and others, that TDI's Project could pose the potential for an abuse of buyer market power even though no concrete reason was given for believing the Project would be able to participate in such an abuse.¹⁶

TDI's Complaint in this docket demonstrates that the planned construction of CHPE cannot possibly represent an exercise of buyer market power. Furthermore, IPPNY presents no evidence that an exemption for CHPE will "harm competitive markets" other than its self-interested assertion that the project is "uneconomic." IPPNY inappropriately attempts to distort the NYPSC's Orders in order to keep TDI, a potential competitive new entrant, from entering the market. Preventing

¹⁵ NYPSC Case 10-T-0139, supra, Order Granting Certificate of Environmental Compatibility and Public Need, p. 50.

¹⁶ NYPSC Case 10-T-0139, supra, Order Granting Certificate of Environmental Compatibility and Public Need, pp. 50-52; Order Denying Petition for Rehearing, p. 18.

that entry serves its members' pecuniary interests by vitiating normally-expected competitive market forces that could displace some incumbent suppliers or constrain prices paid to them. For these reasons, TDI's request for an exemption from buyer-side mitigation rules is wholly consistent with the NYPSC Orders and with longstanding NYPSC policy supporting competitive markets.

CONCLUSION

In accordance with the NYPSC's Comments that were previously filed in this docket and the foregoing Limited Answer, the Commission should issue an order granting the relief requested in TDI's Complaint.

Respectfully submitted,

Kimberly A. Harriman (SH)

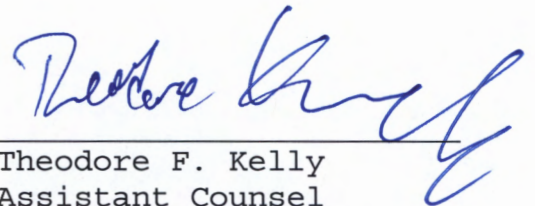
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Dated: February 17, 2015
Albany, New York

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: February 17, 2015
Albany, New York

A handwritten signature in blue ink, appearing to read "Theodore Kelly", written over a horizontal line.

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