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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. ER16-120-000 - New York Independent  
System Operator, Inc.

Dear Secretary Bose:

For filing, please find the Motion to File Answer and Answer 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

New York Independent System            )           Docket No. ER16-120-000  
Operator, Inc.                            )

MOTION TO FILE ANSWER AND ANSWER OF THE NEW YORK  
STATE PUBLIC SERVICE COMMISSION

INTRODUCTION AND SUMMARY

On February 19, 2015, the Federal Energy Regulatory Commission (FERC or Commission) directed the New York Independent System Operator, Inc. (NYISO) to include new provisions in its tariff that provide for: 1) designating generation facilities deemed needed for reliability purposes (referred to as Reliability Must-Run (RMR) units); 2) allocating and collecting charges from ratepayers in order to support designated RMR units; and, 3) establishing rates, terms, and conditions for RMR service.<sup>1</sup>

On October 19, 2015, the NYISO filed proposed tariff amendments to comply with the RMR Order (Compliance Filing). The pending Compliance Filing includes a 12-month process for identifying and addressing any reliability needs that would arise due to the unavailability of a particular generator that

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<sup>1</sup> Docket No. EL15-37, New York Independent System Operator, Inc., Order Instituting Section 206 Proceeding and Directing Filing to Establish Reliability Must Run Tariff Provisions (issued February 19, 2015) (RMR Order). On March 23, 2015, the NYPSC requested rehearing of the RMR Order.

intends to retire, which is referred to as the Initiating Generator. If the NYISO determines, in consultation with the affected Transmission Owner(s), that the Initiating Generator is not needed for reliability, the generator would be allowed to retire, subject to the New York State Public Service Commission's (NYPSC) notice requirements.<sup>2</sup>

In situations where the NYISO identifies a reliability need associated with the Initiating Generator, the Compliance Filing provides that the NYISO would solicit potential alternative regulated solutions, which could include generation, transmission, and/or demand response proposals. Any proposed regulated solutions and identified market-based projects would be evaluated by the NYISO to determine whether they would be "viable and sufficient" to meet applicable reliability standards.

In the absence of sufficient market-based projects, a regulated solution would be pursued. The Compliance Filing provides that the NYISO would identify any viable and sufficient transmission or demand response alternatives for the NYPSC to

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<sup>2</sup> The NYPSC currently imposes a 180-day minimum notice requirement prior to a generation unit retirement of 80 MW or greater. See, Case 05-E-0889, Policies and Procedures Regarding Generation Unit Retirements, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

consider as part of its regulatory responsibilities.<sup>3</sup> While the NYPSC would select any alternative solution that should be pursued, the NYISO would seek an RMR agreement with the Initiating Generator as a last resort at the end of the 12 months in the absence of a sufficient alternative regulated solution or market-based project. The pro forma RMR agreement allows the NYISO to limit the duration of the agreement until an alternative solution is implemented.<sup>4</sup>

On November 30, 2015, a group of generation owners, including NRG Companies (NRG), Entergy Nuclear Power Marketing, Inc. (Entergy), and Independent Power Producers of New York, Inc./Electric Power Supply Association (IPPNY) (collectively, the Generators) filed Protests to the Compliance Filing. Among various other matters, the Generators object to the NYPSC's planning responsibilities with respect to identifying alternative reliability solutions to an RMR Unit.<sup>5</sup> The Generators raise three basic allegations, including: 1) the NYPSC's responsibilities are inconsistent with the RMR Order; 2)

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<sup>3</sup> On November 30, 2015, the NYPSC filed initial comments objecting to the NYISO's selection amongst generation solutions. The NYPSC seeks to ensure that it may also consider any generation alternatives that may exist to an RMR agreement with the Initiating Generator.

<sup>4</sup> NYISO Compliance Filing, Attachment I, Appendix G - Form of Reliability Must Run Agreement, Section 2.2 - Termination.

<sup>5</sup> The NYISO's Compliance Filing defines the Initiating Generator as the generator that submits a notice of its intent to retire generating units.

the NYPSC's responsibilities are an improper delegation of the NYISO's authority; and, 3) the NYPSC's responsibilities are inconsistent with the NYISO's transmission planning processes.

The NYPSC respectfully seeks leave to answer the Generator's claims in order to correct and clarify the record in this proceeding. As discussed below, the Generator's claims are misplaced and misguided. The Generators mistakenly suggest that the NYPSC's evaluation of alternatives to the RMR unit is inconsistent with the RMR Order. The NYPSC's planning activities identified in the Compliance Filing, including consideration and selection of an adequate resource amongst the alternatives, would be consistent with the Commission's desire for an open and transparent process. The Compliance Filing meets the further directives of the RMR Order by assigning the NYISO responsibility to designate an RMR unit needed for reliability, and ensures that any RMR agreement is a last resort and for a limited duration.

The NYPSC's authority to undertake these planning activities is vested under New York State law, and is separate and independent from the NYISO's authority. The Generator's claims that the NYISO is "improperly delegating" authority are baseless given the NYPSC's independent authority. In addition, the RMR Order recognized that the NYISO may "include a process for it to take into consideration the relevant reliability

studies and evaluations made by the [NYPSC]."<sup>6</sup> Moreover, the activities that the NYPSC would undertake are already reflected within the NYISO tariff as part of the "Gap Solution" process. The Generator's objections are therefore a collateral attack on the Commission's prior orders accepting those tariff provisions.

The Commission should also dismiss the Generator's claims that the NYPSC's resource planning determinations may lead to unduly prolonged RMR agreements or less efficient outcomes in the NYISO's transmission planning process. These claims are mere speculation. The NYPSC's identification of an alternative that should be pursued should help to avoid delays and inefficiencies by preliminarily identifying any environmental or other siting issues that are likely to arise. For all of the above reasons, the Commission should accept the NYPSC's planning role specified in the Compliance Filing. Finally, the Commission should reject IPPNY's arguments that misstate the rate setting principles articulated by the U.S. Supreme Court in Market Street Railway.<sup>7</sup>

#### **MOTION TO FILE ANSWER**

The NYPSC submits its Motion To File Answer (Motion) and Answer in the above-captioned proceeding pursuant to Rules

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<sup>6</sup> Id. at ¶14.

<sup>7</sup> Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548 (1945).

212 and 213 of the Commission's Rules of Practice and Procedure (18 C.F.R. §§385.212 and 385.213).<sup>8</sup> There is good cause for the Commission to grant the NYPSC's Motion and accept the Answer contained herein because it will contribute to the development of a complete and accurate record. The Commission has granted motions to file Answers based on similar grounds.<sup>9</sup> For these reasons, the Commission should grant the NYPSC's Motion.

#### ANSWER

I. The Commission Should Determine That The Compliance Filing Is Consistent With The Requirements Of The RMR Order

In its Protest, IPPNY argues that the NYPSC's role in evaluating and identifying alternatives to an RMR Unit is in "direct contravention of the express provisions of the RMR

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<sup>8</sup> The NYPSC submitted a timely Notice of Intervention and Comments in this proceeding on November 30, 2015. 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.

<sup>9</sup> See, Docket No. CP11-56-000, Texas Eastern Transmission, LP, et al., Order Approving Certificates and Approving Abandonment, 139 FERC ¶61,138 (2012) (accepting answer that ensures a complete and accurate record); Docket No. CP06-335-000, et al., Maritimes & Northeast Pipeline, LLC, Order Issuing Certificate and Amending Presidential Permit, 118 FERC ¶61,137 (2007) (finding good cause to allow an answer "in order to insure a complete and accurate record"); and, Docket No. IN08-3-001, Edison Mission, Order Denying Motions to Intervene And Dismissing Requests For Clarification And Rehearing of Order Approving Stipulation And Consent Agreement, 125 FERC ¶61,020 (2008) (accepting answer because it assisted in FERC's decision-making process).

Order."<sup>10</sup> IPPNY argues that under the RMR Order, "[t]he NYISO must be the entity designated to fully administer the RMR process by selecting the solution from all RMR alternatives presented..."<sup>11</sup>

Contrary to IPPNY's arguments, the RMR Order explicitly prescribes a very limited role for the NYISO. In particular, FERC directed the NYISO to "evaluate alternatives for addressing the identified reliability need" and to "explain its process for identifying RMR alternatives in detail, including how the process will ensure a thorough consideration of all types of RMR alternatives in an open and transparent manner."<sup>12</sup> However, this language does not direct the NYISO to select among the alternatives to the designated RMR unit, but rather, that the NYISO describe the process that will be used.<sup>13</sup> The NYISO's Compliance Filing satisfies these directives of the RMR Order by referring to the Gap Solution process that includes the NYPSC's consideration of alternatives.

The Generators also claim that the NYPSC's consideration of alternatives does not qualify as an "open and

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<sup>10</sup> IPPNY Protest, p. 22.

<sup>11</sup> IPPNY Protest, p. 7.

<sup>12</sup> RMR Order, ¶16.

<sup>13</sup> To the extent FERC believes the Generator's interpretation is correct, the RMR Order would represent an impermissible over-reach in the Commission's jurisdiction, as discussed in the following section.



transparent" process. These claims lack merit, given that the NYPSC would provide for public notice and comment, and would issue a written determination explaining why particular resources should or should not be pursued. In particular, under the Compliance Filing, the NYISO's submission to the NYPSC of any viable and sufficient transmission or demand response alternatives would result in: 1) the NYPSC initiating a proceeding, and 2) submitting for publication a notice in New York's State Register soliciting public input on the filing within 45 days. After conducting a thorough hearing on the written submissions and considering any such input, the NYPSC would issue a written determination explaining its decision in accordance with applicable legal requirements and standards, and subject to judicial scrutiny upon appeal. The Commission should find that these procedures are adequately open and transparent.

The Generators further suggest that the RMR Order required the NYISO to "select" the "least-cost" solution among all available alternatives, and that the NYPSC's process could result in a more expensive option being chosen. This suggestion mischaracterizes the RMR Order, as the order did not impose such a "least cost" limitation. Moreover, using cost as the sole criteria for selection would be inappropriate because it could result in the utilization of resources that operate contrary to the public interest.

In suggesting that the Compliance Filing fails to further the Commission's goal of limiting RMR agreements to a last-resort, the Generators are again incorrect. Their arguments fail to recognize that the NYISO's analysis and the NYPSC's review of potential alternatives to the RMR unit, including transmission or demand response,<sup>14</sup> will elicit the broadest array of solutions, thereby affording the greatest opportunity to avoid RMR agreements, or, minimize their duration. In addition, the pro forma RMR agreement would ensure that, upon providing sufficient notice, the NYISO may unilaterally terminate the agreement when an alternative solution is implemented, thereby furthering the opportunity to limit the duration of the agreement.<sup>15</sup> Consequently, contrary to IPPNY's claims, NYPSC involvement will not result in RMR agreements in other than last resort circumstances.

**II. The Commission Should Recognize The NYPSC's Authority To Undertake The Electric System Planning Actions Identified In The Compliance Filing**

According to IPPNY, the NYISO "impermissibly seeks to delegate vital decision-making aspects of the process's

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<sup>14</sup> The NYPSC's initial comments, filed on November 30, 2015, sought modifications to the NYISO's Compliance Filing to ensure that the NYPSC may select from among the viable and sufficient generation alternatives in the event the Initiating Generator is designated as an RMR unit.

<sup>15</sup> NYISO Compliance Filing, Attachment I, Appendix G - Form of Reliability Must Run Agreement, Section 2.2 - Termination.

administration to the NYPSC."<sup>16</sup> Similarly, NRG questions whether the NYISO or FERC have "authority to delegate reliability determinations over to a state agency."<sup>17</sup> The Commission should reject these claims for the following reasons.

Despite the Generator's suggestions, the NYISO's Compliance Filing does not inappropriately "cede" planning decisions to the NYPSC. As an initial matter, the RMR Order recognized that the NYISO may "include a process for it to take into consideration the relevant reliability studies and evaluations made by the [NYPSC]."<sup>18</sup> The NYPSC's evaluation and identification of alternatives to an RMR unit, as noted in the Compliance Filing, is consistent with the Commission's recognition that the NYPSC may play a legitimate role in the process.

Regardless, the Generator's claims that the NYISO is somehow "improperly delegating" or "ceding authority" to the NYPSC are baseless given the NYPSC's independent authority under State law to undertake the reliability and planning responsibilities identified in the Compliance Filing. Specifically, the New York Public Service Law (NYPSL) authorizes the NYPSC to "encourage all persons and corporations subject to

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<sup>16</sup> IPPNY Protest, p. 21.

<sup>17</sup> NRG Protest, p. 14.

<sup>18</sup> RMR Order, ¶14.

its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources."<sup>19</sup>

Further, the NYPSL provides the NYPSC with authority to pursue alternative resources by "order[ing] such reasonable improvements as will best promote the public interest, preserve the public health...and have power to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of...electric corporations."<sup>20</sup> Because these matters fall outside the scope of the Federal Power Act, they are reserved to the NYPSC.

Nor is the role the NYPSC will fulfill under the RMR tariff unique or even unusual. That role is almost identical to the role NYPSC plays in the "Gap Solution" process also within the NYISO tariff. FERC previously approved that process explicitly over objections from generators, similar to their

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<sup>19</sup> NYPSL §5(2).

<sup>20</sup> PSL §66(2). New York & Queens Gas Co. v. NYPSC, 245 U.S. 345 (1917) (upholding the NYPSC's authority to order extension of gas mains and service pipes).

equally meritless contentions here.<sup>21</sup> Within that process, the NYPSC's clearly-defined role is to facilitate the determination and selection of the alternative that is the most effective for reliability planning process. At the time the Commission adopted that process, it specifically recognized that "the New York Commission has siting authority and a statutory charge to maintain reliability in New York and thus in the NYISO region, and therefore has a critical part to play in the transmission planning process."<sup>22</sup> As such, the Generator's opposition to the Compliance Filing is little more than a collateral attack on the Commission's prior orders. Therefore, the Commission should reject the Generator's arguments and recognize the NYPSC as the appropriate state entity to conduct a comparative evaluation and identification of alternatives to an RMR unit.

**III. The Commission Should Determine That The NYPSC's Generator Retirement Planning Responsibilities Are Consistent With The NYISO's Transmission Planning Responsibilities**

According to IPPNY, "allowing the NYPSC to select transmission Gap Solutions to meet Reliability Needs on a short-term basis is inconsistent, and potentially interferes, with the NYISO's evaluation and selection of [the

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<sup>21</sup> Docket Nos. ER04-1144-000, et al., New York Independent System Operator, Inc., Order Accepting In Part and Rejecting In Part Tariff Amendments (issued December 28, 2004).

<sup>22</sup> Id. at ¶18.

more efficient or cost-effective] transmission solutions to meet Reliability Needs on a long term basis pursuant to its Attachment Y comprehensive reliability planning process."<sup>23</sup>

IPPNY argues that if the NYPSC does not choose the least-cost transmission solution at the outset, work on that project will not proceed and therefore may affect the ability of that solution to qualify as the permanent solution or could lead to a less efficient result.

IPPNY's allegation that the NYPSC's role in identifying a transmission alternative to the RMR unit could lead to costly and less-efficient long-term solutions is entirely without foundation. Its claims are mere speculation and conjecture, and should be dismissed as such. In fact, the NYPSC's early involvement in the planning process and identification of a preferred alternative is likely to reduce delays and increase efficiencies by helping to identify any environmental or other siting issues that are likely to arise during the permitting process. The Commission should further reject the Generator's inappropriate attempts to establish a new standard for selection based solely on least cost, which clearly unreasonably constrains the breadth of the inquiry and review needed to arrive at the alternative to an RMR unit that best serves the public interest. For the above reasons, the

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<sup>23</sup> IPPNY Protest, p. 25.

Commission should accept the NYPSC's planning role specified in the Compliance Filing.

**IV. The Commission Should Reject IPPNY's Argument That Market Street Railway Does Not Adhere to RMR Agreement Pricing**

In Market Street Railway,<sup>24</sup> the U.S. Supreme Court found that regulated monopoly service providers need not be compensated for the diminution in value resulting from the operation of market forces that lead to abandonment of the service because the monopoly is no longer viable. IPPNY attempts to dismiss Market Street Railway on the theory that an RMR unit is the lowest cost, or sole resource, available to meet a reliability need. IPPNY does no more than concede the RMR unit is exercising monopoly power, in an interim where no alternatives are available, while, in fact, it seeks an agreement that will pay considerably above the market price and price of the alternatives that will supplant it. An RMR unit is therefore in exactly the same position as the service provider in Market Street Railway -- the question is the level of the rates it is entitled to while it winds up its affairs and prepares to abandon service because revenues are insufficient to support its continued operation.

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<sup>24</sup> Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548 (1945).

Seeking to distinguish Market Street Railway from the economic circumstances an RMR unit confronts, IPPNY argues that those circumstances are not the product of market forces but result from "imperfections in the current market design."<sup>25</sup> Like any monopoly provider, however, the owner of an RMR unit confronts the market as it finds it, not as it wishes it would otherwise be. The owner of an RMR unit is abandoning service because of insufficient market revenues just as surely as the service provider in Market Street Railway could no longer function profitably in the market where it found itself. Consequently, IPPNY's arguments are of no avail and should be rejected.

#### CONCLUSION

In accordance with the foregoing discussion, the NYPSC respectfully requests that the Commission grant the Motion to

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<sup>25</sup> IPPNY Motion for Leave to Answer and Answer (filed December 17, 2015), p. 12.



File Answer and reject the Generator's arguments opposing the NYPSC's role under the NYISO's Compliance Filing.<sup>26</sup>

Respectfully submitted,

*Kimberly A. Harriman /dlld*

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Dated: January 19, 2016  
Albany, New York

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<sup>26</sup> The NYPSC's planning role should also include selection amongst generation solutions, as noted in the NYPSC's initial comments filed on November 30, 2015.

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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