



**Public Service
Commission**

Public Service Commission

Audrey Zibelman

Chair

Patricia L. Acampora

Gregg C. Sayre

Diane X. Burman

Commissioners

Kimberly A. Harriman

General Counsel

Kathleen H. Burgess

Secretary

Three Empire State Plaza, Albany, NY 12223-1350
www.dps.ny.gov

February 24, 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 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

Acting Managing Attorney

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.)	

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

INTRODUCTION

On December 16, 2015, the New York Independent System Operator, Inc. (NYISO) filed a report with the Federal Energy Regulatory Commission (FERC or Commission) updating the analysis requested by the Commission regarding:

(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.¹

The NYISO's updated report advised that it continues to recommend that Buyer-Side Mitigation measures should not be adopted for "new entry" in the Rest-Of-State market. However,

¹ 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).

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 refer potential matters to the Commission's Office of Enforcement to address such concerns. The New York State Public Service Commission (NYPSC) filed comments on January 11, 2016, which addressed the NYISO's analysis and explained why no further tariff provisions were necessary to address "uneconomic retention" and "repowering."

On January 11, 2016, the NYISO's Market Monitoring Unit (MMU), Potomac Economics, filed comments maintaining that tariff-based market power mitigation measures should be implemented to "impose an offer floor on a generator (at its [Going-Forward Cost (GFC)] level) if the NYISO determines that the generator would likely have retired but for an above market contract." On January 19, 2016, Independent Power Producers of New York, Inc. (IPPNY) filed a Protest asserting that "the State and State-regulated [Load-Serving Entities (LSEs)] have an incentive to support new entry with out-of-market compensation to artificially suppress prices in the ROS."² IPPNY thus seeks BSM measures to apply to the ROS market.

² IPPNY Protest, p. 5.

MOTION TO FILE ANSWER

The NYPSC respectfully requests leave to answer the contentions raised by the MMU and IPPNY. The NYPSC submits its Motion To File Answer (Motion) and Answer in the above-captioned proceeding pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure (18 C.F.R. §§385.212 and 385.213).³ 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.⁴ For these reasons, the Commission should grant the NYPSC's Motion.

³ 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.

⁴ 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).

DISCUSSION

I. The Commission Should Reject The MMU's Claims, Which Merely Presume An Attempt To Exercise Market Power And Fail To Justify The Imposition Of Mitigation Measures

In its comments, the MMU criticizes the NYISO's proposed remedy because it is not confident that uneconomic retention would qualify as a market violation that would be subject to the Commission's enforcement authority, and thus subject to a sanction by the Commission. The MMU therefore recommends an expansion of the NYISO's BSM measures to apply to the uneconomic retention of existing resources. However, nowhere does the MMU attempt to explain why the imposition of mitigation on behavior that is not judged to be a market violation is justified. Likewise, the MMU does not attempt to explain the legal rationale for the Commission to impose "enforcement" through the NYISO's tariffs on matters that would not be directly subject to Commission sanction through its current enforcement authority. There is simply no justification to support either approach.

Moreover, the MMU fails to justify the imposition of mitigation without due process afforded via referral to the Commission's Office of Enforcement. Contracts can be complex and unique, and attempting to design tariffs that anticipate how the NYISO would view and account for all of the unique

provisions that might appear in a contract would be impossible to craft. The imposition of unwarranted mitigation on a generator due to a contract that merely "appears to have been entered into at a price exceeding competitive levels" could irreparably harm contracting parties.⁵ The Commission should recognize that contracting is a fundamental feature of markets, and the MMU's proposal would likely have the effect of discouraging and/or distorting bilateral contracting in the NYISO markets.

Most troubling is the MMU's assertion that it is possible for the NYISO to distinguish between market power and legitimate hedging simply by comparing contract terms to futures prices at the time a contract is entered into.⁶ This approach simply glosses over the fact that non-price factors may be important to contracting parties and may affect the resulting contractual price. However, the MMU would simply presume any contract above futures prices to be an illegitimate exercise of market power. The Commission should not adopt this type of "guilty until proven innocent" approach.

As the NYISO appropriately recognized, there may be "uneconomic contracts [that] could be the result of other legitimate reasons besides hedging, including legitimate public

⁵ MMU comments, p. 5 (emphasis added).

⁶ MMU Comments, p. 6.

policy measures that are motivated by factors such as direct economic benefits, deferred investment, fuel diversity, and reduced emissions.”⁷ The NYPSC supported this list of considerations and identified various other legitimate interests that may also drive the need for a bilateral contract.⁸

Therefore, the NYISO properly concluded that “[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.”⁹

Furthermore, it would be unreasonable and inappropriate to apply mitigation to matters that indirectly affect ICAP prices, such as a state’s fuel diversity objectives. As the Supreme Court recently noted, the Commission’s jurisdiction over wholesale rates is limited to rules or practices that “directly” affect those rates.¹⁰ Further, the incidental impacts on wholesale prices were illustrated by the Third Circuit Court of Appeals, which noted that “[t]he states may select the type of generation to be built—wind or solar, gas

⁷ NYISO compliance filing, Attachment II, p. 17 (filed December 16, 2015).

⁸ NYPSC Comments, p 9 (filed January 19, 2016).

⁹ NYISO compliance filing, Attachment II, p. 17 (filed December 16, 2015).

¹⁰ FERC v. Elec. Power Supply Assn., 136 S. Ct. 760 (2016).

or coal—and where to build the facility.”¹¹ This regulatory framework is embodied in the Federal Power Act’s reservation of jurisdiction to the states, and recognition of a legitimate state role, to determine adequate levels and types of generation capacity.¹²

II. The Commission Should Reject IPPNY’s Claims, Which Are Based On Numerous Erroneous Assumptions

As an initial matter, IPPNY’s presumption and conspiracy theory that the State’s goal is to harm generators by exerting market power and suppressing prices is incorrect and misleading. IPPNY’s consultant, Mr. Younger, points to the Dunkirk generating facility as supposed proof of the State’s motivations to suppress prices. This claim is patently incorrect and designed to bias the Commission.

In fact, the NYPSC’s consideration in accepting the Dunkirk repowering proposal recognized the numerous benefits of

¹¹ PPL EnergyPlus, LLC v. Solomon, 766 F.3d 241, 255 (3rd Cir. 2014) (citing Nw. Cent. Pipeline Corp. v. State Corp. Comm’n, 489 U.S. 493, 514 (1989) as basis for finding that “[w]hen a state regulates within its sphere of authority, the regulation’s incidental effect on interstate commerce does not render the regulation invalid”).

¹² See, 16 U.S.C. §824(b) (reserving jurisdiction over “facilities used for the generation of electric energy” to the States); see also, Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 212 (discussing power regulation in general and indicating that “[s]tates exercise their traditional authority over the need for additional generating capacity, [and] the type of generating facilities to be licensed”).

repowering that were in the public interest, such as mitigating the impacts that would attend constructing additional transmission, reducing transmission congestion and allowing existing facilities to dispatch greater generation from renewable-fueled hydro facilities, and allowing for greater flexibility in operating the transmission system in a more efficient manner.¹³ Contrary to Mr. Younger's accusations that the State is exerting market power to suppress capacity prices, the facts demonstrate that State policies may have precisely the opposite impact, such as environmental policies that have led to numerous retirements and resulted in increased capacity prices.

IPPNY further attempts to bias the Commission by complaining that the "Dunkirk pattern" of supposed improper State action is evidenced by New York Governor Andrew M. Cuomo's recent suggestion that "two remaining coal plants in the State be either closed or repowered."¹⁴ However, IPPNY fails to acknowledge that Governor Cuomo was addressing the State's environmental policies in order to address climate change. It is alarming that IPPNY would ask the Commission to discourage

¹³ Case 12-E-0577, Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements, Order Addressing Repowering Issues and Cost Allocation and Recovery (issued June 13, 2014).

¹⁴ IPPNY Protest, p. 12.

the State from improving the health, welfare, and safety of its citizens by imposing potentially costly mitigation measures.

Contrary to the supposed belief that imposing BSM rules are needed to "protect the market," the reality is that these rules simply frustrate New York's legitimate efforts to meet public policy needs, such as complying with the N.Y. State Energy Plan and the U.S. Environmental Protection Agency's Clean Power Plan, which is currently stayed pending federal court review.

IPPNY's proposal to screen existing generators for "out-of-market payments" and impose BSM measures upon them is unprecedented. The NYPSC is unaware of any such measures being imposed in other Independent System Operator or Regional Transmission Organization-administered markets. Accordingly, generators in these other markets may be repowered without any such intrusive actions.

In its attempt to show that mitigation is needed in the ROS market, IPPNY's consultant, Mr. Younger, makes several erroneous assumptions and includes charts that reflect those erroneous assumptions. Many of these assumptions either ignore reality or rely on incorrect premises, and should therefore be disregarded.

In particular, IPPNY's major assumption, which essentially renders any other assumption meaningless, is the erroneous assumption that 73% of the ROS capacity can participate in exerting buyer market power. Again, this assumption is premised upon the presence of improper state action which is not present here, and legitimate state actions to achieve environmental or other public policy goals should not be subject to sanctions in the NYISO markets.

Mr. Younger also uses an erroneous set of assumptions that the price "suppression" would last either three, five, or seven years. Although the NYISO produced analysis that pointed to three years as the historic period of price response in the market, actual experience has demonstrated that it may be much less than three years, and as short as a few months. Upon the entry of new generation in New York City (NYC) (i.e., Astoria Energy 2), units in NYC decided to either exit the market, or to not repair, which occurred within a few months. Furthermore, many market participants and the NYISO have praised the establishment of the lower Hudson Valley New Capacity Zone, which established a price signal that the market responded to almost immediately. Therefore, Mr. Younger's assumption should be rejected.

Mr. Younger also points to the NYISO's assumption of \$28.80/kW-year capacity prices as "extremely low prices that cannot be maintained," and suggests the use of a much higher number, such as \$42/kW-year or \$48/kW-year.¹⁵ Again, this suggestion ignores history and the facts. The last 10 years of ROS annual capacity prices per kW/year are as follows: \$31.94, \$54.17, \$49.68, \$16.70, \$3.47, \$17.68, \$26.67, \$26.05, \$31.31, \$26.60.¹⁶ Not only is the NYISO calculated price of \$28.80 a fair representation of historic prices, it is almost identical to the 10 year average of \$28.43. It is worth noting that the average ROS capacity spot market price over the last 15 years was \$22.49, which is even lower than the price used by the NYISO in the analysis and is approximately half the price suggested by Mr. Younger.

Given the wide breadth of misstatements and factual inaccuracies contained in Mr. Younger's affidavit, the Commission should entirely disregard the assumptions and conclusions contained therein. Moreover, the Commission should not be distracted or persuaded by IPPNY's self-serving attempts to protect existing generators from competition.

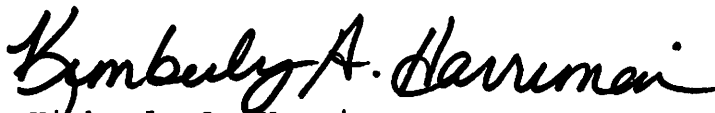
¹⁵ IPPNY Protest, Affidavit of Mark Younger, p. 10.

¹⁶ http://icap.nyiso.com/ucap/public/auc_view_spot_selection.do

CONCLUSION

In accordance with the foregoing discussion, the NYPSC respectfully requests that the Commission grant the foregoing Motion to File Answer and Answer, and reject the claims raised in the MMU's comments and IPPNY's Protest.

Respectfully submitted,




Kimberly A. Harriman
General Counsel
Public Service Commission
of the State of New York
By: David G. Drexler
Acting Managing Attorney
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

Dated: February 24, 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
February 24, 2016


David G. Drexler
Acting Managing Attorney
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178