

I. EXPLANATION OF RIGHT TO RESPOND AND REQUEST FOR LEAVE TO SUBMIT RESPONSE

The NYISO recognizes that the Commission generally discourages responses to protests. The NRG Filing, however, seek affirmative relief from the Commission in response to an informational filing by requesting the Commission to “direct the NYISO to settle the market based on the applicable tariff and processes in effect at the time of the bid.”² The Commission’s Rules of Practice and Procedure therefore permit the NYISO to respond to the NRG Filing.³

To the extent that the NYISO’s response is not expressly permitted under Rule 213, the NYISO respectfully requests leave to submit this response. The Commission has allowed such responses when they help to clarify complex issues, provide additional information that will assist the Commission, correct inaccurate statements, or are otherwise helpful in developing the record in a proceeding.⁴ The NYISO’s response meets this standard. The NYISO’s response is submitted for the limited purpose of clarifying certain factual matters and correcting inaccurate or misleading statements in the NRG Filing, thereby assisting the Commission in its review and consideration of the issues presented in this proceeding. The NYISO therefore respectfully requests that the Commission exercise its discretion and accept the NYISO’s response.

² NRG Filing, at 1.

³ Rule 213(a)(3) of the Commission’s Rules of Practice and Procedure allows an answer to filings seeking affirmative relief from the Commission. 18 C.F.R. § 385.213(a)(3).

⁴ See, e.g., *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 at 61,036 (2000) (accepting an answer that was “helpful in the development of the record”); *New York Independent System Operator, Inc.*, 91 FERC ¶ 61,218 at 61,797 (2000) (allowing “the NYISO’s Answer of April 27, 2000, [because it was deemed] useful in addressing the issues arising in these proceedings”); *Central Hudson Gas & Electric Corp.*, 88 FERC ¶ 61,138 at 61,381 (1999) (accepting prohibited pleadings because they helped to clarify the issues and because of the complex nature of the proceeding).

II. RESPONSE

The NRG Filing is not timely filed in response to the September 5, 2006 Filing, is almost entirely a collateral attack on the Commission's April 7, 2006 Order Granting Tariff Waiver in this Docket,⁵ is based on misrepresentations of the NYISO's filings in this Docket and a fundamental misunderstanding of the requirements of the NYISO's tariff, and seeks to avoid the legitimate imposition of Bid Production Cost Guarantee Payment ("BPCG") mitigation in accordance with the thresholds long established in the NYISO tariff.⁶ Accordingly, the NRG Filing should be rejected in its entirety.

A. The NRG Filing Was Not Timely Filed in Response to the September 5, 2006 Filing

Pursuant to the Combined Notice of Filings issued by the Commission on September 11, 2006, filings in response to the NYISO's September 5, 2006 Filing were due by 5:00 p.m. Eastern Time on Tuesday, September 26, 2006. The NRG Filing is dated October 12, 2006. Moreover, the NRG Companies were parties to a timely joint protest of the NYISO's September 5, 2006 Filing with Astoria Generating Company LLP. By submitting this second and untimely pleading the NRG Companies are seeking to be heard twice on the same issues. Accordingly, the NRG Filing should not be accepted on any issues that were or could have been raised in response to the September 5, 2006 Filing.

⁵ *New York Independent System Operator, Inc.*, 115 FERC ¶ 61,026 (2006) ("April 7 Order").

⁶ Capitalized terms not defined herein shall have the meaning ascribed to them in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff").

B. The NRG Filing is a Collateral Attack on the Commission's Prior Order

As the NYISO explained in its October 17, 2006 submission in this Docket,⁷ the NYISO Filings were made in response to Ordering Paragraph (B) in the Commission's April 7, 2006 Order, which states that:

The Commission hereby grants NYISO's request to correct errors it made in its computation of Guarantees, but not LBMPs, while implementing the mitigation measures in its Market Administration and Control Area Services Tariff, for the period from February 1, 2005 to the present, subject to the condition that NYISO provide the Commission with details of the settlement corrections, consistent with the Staff data request of January 6, 2006.⁸

Like the timely responses to the NYISO's September 5, 2006 Filing, the NRG Filing does not contest any of the "details of the settlement corrections," nor does it seek to show that the settlement corrections were based on erroneous data or calculations. Rather, it seeks to contest the underlying authority for making the corrections, by claiming that the NYISO is attempting to impose "retroactive" mitigation, or otherwise not complying with its tariff,⁹ particularly §3.2.2 of the NYISO's Market Mitigation Measures ("MMM").¹⁰ Whether the NYISO's proposed BPCG mitigation involves "retroactive" mitigation, or whether the proposed mitigation is not in compliance with the NYISO's tariff, were decided in the April 7 Order, which states:

[W]e agree with NYISO's response that it is not in fact proposing any rate changes to its filed rate schedules nor is it issuing refunds. For the most part, the various mitigation errors that NYISO seeks to correct in this filing are the result of NYISO failing to compute Guarantee compensation in accordance with the

⁷ *New York Independent System Operator, Inc.*, Response of the New York Independent System Operator, Inc. to Protests of Astoria Generating Company, L.P., NRG Companies and the Independent Power Producers of New York, Docket No. ER06-185-002 (October 17, 2006), at 3.

⁸ April 7 Order, at Ordering ¶ (B).

⁹ See NRG Filing, at 6-7.

¹⁰ Attachment H to the Services Tariff.

filed rate schedule's rates, terms, and conditions, specifically newly modified mitigation measures, because of software implementation errors. Thus, rates are not being changed retroactively, nor is NYSIO making refunds. To the contrary, NYISO is attempting to ensure that final bills, as far as possible, conform to its filed rate schedules.¹¹

In the April 7 Order, the Commission also stated that it concurred in the NYISO's position that

the recalculation of Guarantees does not require any retroactive recalculation of market-clearing prices, but rather, individual unit Guarantee payments. The recalculation of Guarantees does not involve refunds, and can be performed with certainty. The billing procedures for these underlying obligations are not yet finalized, and remain subject to final determination, consistent with NYISO's tariff.¹²

The April 7 Order also made clear that the Commission was approving both the correction of prior erroneous mitigation and the imposition of mitigation:

NYISO explains that, for those generating units that were mitigated, an upward adjustment of the Guarantee will occur if the bid passes the conduct and impact test and no previous adjustment has already taken place. A downward adjustment will occur for those generating units not mitigated if they are found to fail the conduct and impact test and no previous adjustment has been made.¹³

The NYISO's November 8, 2005 filing in this Docket,¹⁴ which gave rise to the April 7 Order, made clear that the corrections for the period from February 1, 2005 forward would include downward adjustments for BPCG mitigation; this was also discussed in the NYISO's February 6, 2006 response to the Staff Data Request dated January 6, 2006.¹⁵

¹¹ April 7 Order, at P 45.

¹² *Id.*, at P 58.

¹³ *Id.*, at P 36.

¹⁴ Report of Tariff Implementation Errors and Request for Limited Tariff Waivers of the New York Independent System Operator, Inc. (Nov. 8, 2005) ("November 8, 2005 Filing")

¹⁵ November 8, 2005 Filing, at 12; February 6, 2006 Response to Staff Data Request, at 11-12.

Thus, the NRG Filing does not raise issues that are responsive to the NYISO Filings. Rather, it seeks to resurrect issues as to the authority to impose the BPCG corrections, and the compliance of those corrections with the NYISO's Tariff. Those issues were decided in the April 7 Order. The NRG Companies did not seek rehearing of that Order, which has long been final. Commission precedent precludes this sort of collateral attack on issues that have already been decided.¹⁶ Any assertions that the BPCG corrections are "retroactive" or do not comply with some provision of the tariff, such as §3.2.2 of the MMM, are now foreclosed.

The need for the Commission to enforce its long-standing prohibition on after-the-fact collateral attacks on prior orders is not just a matter of procedural niceties. The NYISO would note that in order to implement BPCG mitigation in accordance with the filings that were approved in the April 7 Order, the NYISO has expended over 6900 person-hours developing the software described in the filings. This substantial expenditure of time and resources underscores the need for the NRG Companies to respect the Commission's rules on presenting issues to the Commission in a timely manner.

¹⁶ See, e.g., *New York Independent System Operator, Inc.* 103 FERC ¶ 61,291, at P 17 n.11 (2003) (dismissing arguments raised in a rehearing request in a docket involving the NYISO's market mitigation measures because "[t]he Commission has approved specific NYISO market mitigation measures, including reference prices and conduct and impact criteria. KeySpan's arguments regarding reference prices and conduct and impact criteria are a collateral attack on these orders."); *Florida Power & Light Co.*, 31 FERC ¶ 61,169 (1985) (holding that intervenors could not relitigate issues that had been decided by the Commission in the absence of a change in factual circumstances); and *Richard Blumenthal, et al.*, 117 FERC ¶ 61,038 (2006) (dismissing a complaint by the Attorney General of Connecticut attacking the use of LBMP pricing in New England on, among other grounds, a finding that it constituted a collateral attack on prior Commission decisions).

C. The NYISO Filings Do Not Apply “Retroactive” Mitigation

The NRG Filing repeatedly asserts that the “NYISO is attempting to retroactively mitigate generators using a new computer model.”¹⁷ This is not an accurate characterization of BPCG mitigation, and again raises issues that have already been resolved in this Docket.

As explained in the NYISO’s November 8, 2005 Filing:

A BPCG is paid if a unit’s total as-bid costs are greater than its revenues for an operating day. While LBMP prices are established by the market clearing price for a given geographic market area, BPCGs are necessarily determined on a unit-by-unit basis. Moreover, the level of a unit’s BPCG cannot be determined until the results of a full day’s operations are available, since only then can the unit’s revenues be determined. As a result, BPCGs are ultimately determined in the billing and settlement process for each unit, and only affect that unit.¹⁸

As the NYISO explained in response to the prior attacks on the September 5, 2006 Filing, the rules for calculating BPCG payments are set forth in Attachment C to the NYISO’s Services Tariff, and the conduct and impact thresholds for mitigating BPCG payments are specified in the NYISO’s Market Mitigation Measures (“MMM”), Attachment H to the Services Tariff. The formulae set forth in Attachment C make clear that BPCGs are calculated over a 24 hour day.¹⁹ Because BPCG payments are (i) calculated and paid over 24 hours, (ii) depend on the bids submitted and LBMP and Ancillary Service revenues received over the course of a 24 hour operating day, and (iii) are only paid to compensate generators to the extent their legitimate Minimum Generation, Start-up and Energy costs (as reflected in a unit’s bids) are not recovered via LBMP or Ancillary Service revenues in the operating day, BPCG impact can only be tested at the end of each operating day. The BPCG impact test measures the increase in a unit’s BPCG

¹⁷ NRG Filing, at 2; *see also* NRG Filing, at 1, 7

¹⁸ November 8, 2005 Filing, at 2-3.

¹⁹ See Services Tariff, Attachment C, First Revised Sheet No. 422A (definition of variable “N”).

payments resulting from bids that exceed the relevant conduct test.²⁰ The NYISO must wait until the end of the market day to apply the BPCG impact test, so that two sets of daily BPCG payments can be calculated, first using the as-submitted bids, and a second time substituting mitigated bids for the conduct test-failing bids that the generator submitted. The two sets of bids are then compared to determine if the BPCG payment based on the as-submitted bids fails the BPCG impact test.²¹ This is true whether the assessment of the mitigation thresholds is done manually or on an automated basis; either way, the test must account for accepted bids and revenues in all 24 hours of the day in order to accurately test BPCG impact. Thus, the fact that BPCG mitigation is not determined until after the completion of the operating day arises from the fundamental fact that the BPCG payments subject to potential mitigation cannot themselves be determined until after completion of the operating day.

The NRG Companies claim that the BPCG mitigation described in the NYISO Filings is somehow inconsistent with §3.2.2(b) of the MMM and thus involves a change in rates after the fact, which the NRG Companies call the “essence of retroactive ratemaking.”²² The NRG Companies’ assertions are based on distorted or selective readings of both §3.2.2(b) and the filings in this Docket. The NRG Filing acknowledges that §3.2.2(b) of the MMM says that the NYISO will use the “best available” data and methods “[p]ending development of the capability to use automated market models”²³ Yet the NRG Companies just ignore the fact that §3.2.2(b) specifically instructs the NYISO to use the “best available” data and methods. As the

²⁰ Services Tariff, Attachment H §3.2.1(2); September 5 Filing, at 7-9.

²¹ Services Tariff, Attachment H §3.2.1(2); September 5 Filing, at 8-9.

²² NRG Filing, at 6.

²³ Services Tariff, Attachment H §3.2.2(b), *quoted in* NRG Filing, at 4.

filings by the NYISO and the April 7 Order make clear, the “best available” method for applying the tariff requirements for BPCG mitigation is now the software described in the September 5 and September 21, 2006 Filings. Thus, contrary to the express requirements of §3.2.2(b), the NRG Companies are seeking to benefit from the inadequacies of the methods available earlier.²⁴ This is not what the tariff, and §3.2.2(b) of the MMM in particular, contemplate.

The NRG Companies’ elliptical reading of §3.2.2(b) notwithstanding, the central purpose of the NYISO Filings is the implementation of the very kind of software contemplated by that section, as applied to BPCG mitigation, in order to remedy the shortcomings of the previously available data and methods. This is made clear both by the part of the NYISO’s November 8, 2005 Filing that the NRG Companies quote, and by the very next sentence in that filing, which the NRG Companies neglect to quote. As the NRG Filing points out, the NYISO’s November 8, 2005 Filing stated that the NYISO “undertook to monitor the in-City SRE and OOM, as well as other units that might earn BPCG, on a manual ‘best efforts’ basis, in accordance with Section 3.2.2 (b) of the MMM, *with the expectation that BPCG impact test software will be developed in the near future and that BPCG payments can be computed in the billing and settlement process on a unit-by-unit basis.*”²⁵ The very next sentence of the November 8, 2005 Filing states: “The NYISO expects that software development requirements for calculating Real-Time BPCG impacts, and a schedule for implementing the software, can be developed during the first quarter of 2006, *with BPCG payments redetermined prior to the final billing and settlement process for*

²⁴ While the NRG Companies may want to avoid application of the conduct and impact tests for mitigation to their BPCG revenues for February, March and April of 2005, the NYISO notes that, after extensive consultations, the NRG Companies have not identified any instances in which the reference levels used, or the NYISO’s determination or computation of the NRG Companies’ BPCG mitigation for those months, were inaccurate or overstated.

²⁵ November 8, 2005 Filing, at 11-12 (emphasis supplied); *quoted in* NRG Filing, at 6.

*period from February 2005 forward.*²⁶ The November 8, 2005 Filing and the NYISO Filings thus make clear that the earlier “best efforts” methods were at best interim and incomplete measures for use “pending development of the capability” described in the NYISO Filings. The NYISO was and is relying on the correction software described in its filings as the appropriate method to apply the tariff requirements for BPCG mitigation. The BPCG mitigation described in the NYISO Filings is precisely the type of mitigation that the April 7 Order posits that the NYISO would be implementing, and is fully consistent with §3.2.2(b) of the MMM. The argument of the NRG Companies is not supported by the authority on which they rely.

D. The NYISO Is Not Applying New Mitigation Standards, but the Conduct and Impact Tests for BPCG Mitigation Long Specified in the Services Tariff

The NRG Filing contends that the software described in the NYISO Filings “applies an additional level of mitigation.”²⁷ This is also simply not true. The April 7 Order states, with specific reference to the period after February, 2005, that the Order grants the “NYISO’s request to correct errors in its computation of Guarantees, but not LBMPs, *while implementing the mitigation measures in its Services Tariff.*”²⁸ The April 7 Order further states that “we agree with NYISO’s response that it is not in fact proposing any rate changes to its filed rate schedules nor is it issuing refunds,”²⁹ referring to the NYISO’s response to the Motion to Intervene and

²⁶ *Id.*, at 12 (emphasis supplied).

²⁷ NRG Filing, at 3; *see also* NRG Filing, at 10.

²⁸ April 7 Order, at P 47 (emphasis supplied).

²⁹ *Id.*, at P 45.

Protest of the New York Transmission Owners (“NYISO Response to TOs”).³⁰ The NYISO Response to TOs states that “the November 8 Filing described the NYISO’s intention to correct certain initial BPCG calculations in the ordinary course of its final bill close-out process to bring those calculations into compliance with the guarantee payment mitigation provisions of the Services Tariff.”³¹ The NYISO’s September 5, 2006 Filing also makes clear that it brings the mitigation of BPCG payments into compliance with the conduct and impact tests for BPCG mitigation specified in the Services Tariff.³² The NRG Companies contention that there is some “additional level” of mitigation being applied, or that the NYISO Filings do not comply with the BPCG mitigation required by the NYISO’s filed rates, is just not correct.

E. The Bids of the NRG Companies Were Not Previously Subject to Conduct and Impact BPCG Mitigation

Similarly unsubstantiated is the assertion in the NRG Filing that the “NYISO is attempting to mitigate bids that previously met the conduct and impact thresholds.”³³ The November 8, 2005 Filing made it perfectly clear that without the software that is now in place as described in the NYISO Filings, the NYISO was not able to apply the impact test for BPCG mitigation:

On February 1, 2005, the RTS improvements to the Real-Time Market were put in place. In conjunction with the RTS implementation, the application of the ConEd SRE/OOM mitigation measures was discontinued as not compliant with

³⁰ *New York Independent System Operator, Inc.*, Response of the New York Independent System Operator, Inc. to Request of the New York Transmission Owners to Hold Proceedings in Abeyance, Docket No. ER06-185 (December 12, 2005) (“NYISO Response to TOs”).

³¹ NYISO Response to TOs, at 4.

³² See September 5 Filing at 8-9 (describing in detail the application of the conduct and impact tests for BPCG mitigation specified in the tariff).

³³ NRG Filing, at 1.

the Services Tariff, *but the software required to perform the Real-Time BPCG impact test had not been developed.* Accordingly, the MMP undertook to monitor in-City SRE and OOM, as well as other units that might earn BPCG payments, on a manual “best efforts” basis, in accordance with § 3.2.2(b) of the MMM, *with the expectation that BPCG impact test software will be developed in the near future and that BPCG payments can be computed and corrected in the billing and settlement process on a unit-by-unit basis.*³⁴

The whole point of the NYISO Filings is to bring BPCG mitigation into compliance with the conduct and impact tests specified in the Services Tariff, and it is plain from those filings and the November 8, 2005 Filing that those tests, in particular the impact test, had not been applied to BPCG payments after February 1, 2005. To the extent the NYISO Filings apply to the NRG Companies, it is only because in those instances the NRG Companies’ bids and resulting BPCG payments fail, and would have failed, the conduct and impact tests. The NRG Companies complain that the impact of BPCG mitigation is \$600,000 for March 2005 alone,³⁵ but imposing BPCG costs on ratepayers that exceed competitive levels by that amount as determined by the conduct and impact tests is equally not inconsequential. The NYISO Filings would properly bring the NRG Companies’ bids into compliance with the Services Tariff.

F. The NYISO Is Fulfilling Its Obligations to Consult with the Affected Market Participants, Including the NRG Companies

The NRG Filing alleges that in footnote 2 of its September 21, 2006 Filing, the NYISO falsely stated that it had “completed the process of consulting with potentially mitigated generators for March 2005, so the Privileged and Confidential data that the NYISO is providing reflects post-consultation RTGP mitigation results.”³⁶ The NYISO reasonably believed this

³⁴ November 8, 2005 Filing at 11-12 (emphasis supplied).

³⁵ NRG Filing, at 8.

³⁶ NRG Filing, at 7.

statement to be correct when it was made. On August 30, 2006, the NYISO sent emails to the NRG Companies, and all other owners of generation potentially subject to mitigation, notifying them that their March 2005 Real-Time BPCG mitigation data was available in the NYISO's Decision Support System ("DSS") data warehouse, and asking the NRG Companies (and the other suppliers) to contact their NYISO Customer Relations representative if they desired to schedule a consultation with the NYISO's Market Monitoring and Performance department ("MMP") regarding the proposed mitigation after they reviewed their DSS data. All of the potentially affected entities that desired to initiate consultation promptly responded to this notice, except the NRG Companies.

On September 28, 2006, almost a month after the NYISO extended an invitation to initiate consultation and a week after the NYISO's September 21, 2006 Filing, the NRG Companies first informed the NYISO that they desired to consult regarding their February, March and April 2005 reference levels.³⁷ At that time, the NRG Companies made a blanket request for consultation, but were not able to identify any specific issues with the reference levels the NYISO applied to test the NRG Companies' Bids, or the NYISO's calculations, or the NYISO's implementation of the mitigation methodology described on pages 7-10 of its September 5, 2006 Filing. In order to accommodate NRG's request, the NYISO was forced to declare an "extraordinary circumstance" and postpone the March 2005 final bill close-out for all of its Market Participants. NRG has since agreed to release all of the monthly BPCG mitigation results without modification, subject to its filings in this docket.

The NYISO also disagrees with the NRG Companies' claim that the one sentence of footnote 2 in the September 21, 2006 Filing was meant to "suggest[] that market participants

³⁷ February 2005 mitigation data was first provided to NRG on August 8, 2006.

Connie Caldwell
Dean Wight
Lance Hinrichs

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated at Washington, DC this 27th day of October, 2006.

/s/
William F. Young
Susan E. Dove
Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1500