

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent System Operator, Inc.) Docket No. ER04-449-019

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.
AND THE NEW YORK TRANSMISSION OWNERS**

Pursuant to Rules 212 and 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213 (2008), the New York Independent System Operator, Inc. (“NYISO”) and the New York Transmission Owners (collectively “Joint Filing Parties”) respectfully request leave to answer, and submit an answer to, certain protests to the compliance filing that the Joint Filing Parties submitted on May 4, 2009 (“Compliance Filing”). Specifically, the Joint Filing Parties seek to address concerns raised about the proposal in the Compliance Filing to grandfather in the deliverability test certain import capability into the New York Control Area (“NYCA”), and to correct certain misunderstandings regarding the Joint Filing Parties’ External CRIS Rights Proposal.

I. Request for Leave to Answer

The Joint Filing Parties recognize that the Commission generally discourages answers to protests.¹ However, the Commission has the discretion to accept answers to protests, and has done so when those answers help to clarify complex issues, provide additional information, or are otherwise helpful in the development of the record in a proceeding.² This answer is intended to assist the Commission by clarifying certain issues related to the grandfathering of capacity

¹ 18 C.F.R. § 385.213(a)(2) and (3).

² See e.g., *New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 at P 7 (2004) (accepting the NYISO’s answer to protests because it provided information that aided the Commission in better understanding the matters at issue in the proceeding); *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...”).

over the Quebec (via Chateauguay) interface, and by correcting certain misunderstandings of the External CRIS Rights Proposal. For these reasons, the Joint Filing Parties respectfully request that the Commission accept this answer.³

II. Answer

A. The proposal to grandfather 1090 MW of capacity over the Quebec (via Chateauguay) interface represents a reasonable interim mechanism that is responsive to the concerns expressed in the January 15, 2009 order

Most of the objections to the Compliance Filing center on the proposal to grandfather in the deliverability test 1090 MW of capacity over the Quebec (via Chateauguay) interface. These objections ignore the fact that this proposal is only an interim mechanism to afford a subset of external capacity that has long supplied the NYISO's markets with treatment comparable to the treatment provided to existing internal generators, while the NYISO and its stakeholders develop the tariff language necessary to implement the External CRIS Rights Proposal.

1. The Compliance Filing addresses the issues raised by the Commission regarding treatment of external capacity resources, as well as the need to implement the deliverability standard

In the Commission's January 15, 2009 order conditionally accepting the proposed tariff sheets implementing the deliverability standard, *New York Independent System Operator, Inc.*, 126 FERC ¶ 61,046 (2009) ("January 15 Order"), the Commission raised issues regarding treatment of external resources that have long supplied capacity to the NYISO. The Commission noted that the tariff language reflected the language of the Consensus Deliverability Plan providing that "deliverability of external capacity resources will be determined by NYISO through the annual process of setting import rights while honoring grandfathered import contract

³ The Joint Filing Parties believe that this answer is being submitted within the time period prescribed by Rule 213(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(d). However, to the extent that the Commission deems the Joint Filing Parties to have submitted this answer after the applicable deadline, the Joint Filing Parties respectfully request permission to file this answer one day out-of-time.

rights and emergency assistance.”⁴ The Commission also noted, however, that “[b]y comparison, the deliverability test for internal resources . . . is conducted during the interconnection study process and does not require internal resources to be retested on an annual basis.”⁵ The Commission expressed concern “that a new interconnection customer internal to NYISO may be able to use system headroom and be considered deliverable while an existing external capacity supplier would be required to pay for System Deliverability Upgrades in order to continue supplying capacity to the NYISO market,” and asked the Joint Filing Parties to address more robustly “the issue of priority rights between new internal and existing external resources.”⁶ The Commission stated further that the treatment of external resources should not establish “a situation that discourages the development or use of external resources to satisfy installed capacity requirements in the NYISO market.”⁷

The interim proposal to grandfather 1090 MW over the Quebec (via Chateaugay) interface is intended to address the Commission’s concerns with respect to potentially disparate treatment of external resources. As the Joint Filing Parties explained in the Compliance Filing, the proposal arises out of a comprehensive review of the treatment of external resources in response to the January 15 Order, and a determination that additional grandfathering of specified external capacity would address the express concerns of certain stakeholders and the Commission. The original deliverability proposal, as reflected in the Consensus Deliverability Plan approved by the Commission in March 2008,⁸ would have grandfathered only the External

⁴ January 15 Order at P 76.

⁵ *Id.* at P 76.

⁶ *Id.*

⁷ *Id.* at P 78.

⁸ See *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,267 (2008) (“CDP Order”).

Installed Capacity agreements listed in Appendix E of the NYISO Installed Capacity Manual. In response to the January 15 Order and stakeholder concerns raised after the August 2008 compliance filing was made, it became clear that certain additional external capacity should receive similar grandfathered treatment, at least for an interim period until the External CRIS Rights Proposal is implemented. The grandfathering of 1090 MW over the Quebec (Chateaugay) interface will only continue beyond the 2010 Summer Capability Period if an entity makes a long-term commitment to supply capacity and converts the grandfathered rights into External CRIS Rights.

Contrary to the arguments advanced by AES Eastern Energy, L.P., Constellation Energy Nuclear Group, LLC, *et al.* (“Suppliers”), such capacity -- because of its consistent supply to New York over many years and the associated construction of transmission to accommodate that capacity -- has characteristics that, for purposes of the deliverability analysis, justify at least some grandfathered treatment of external capacity resources under the deliverability requirement. Indeed, H.Q. Energy Services (U.S.), Inc. notes in its comments on the Compliance Filing that the Chateaugay interface with New York was built for the purpose of permitting New York to import substantial quantities of power from Canada during the summer months, and Canadian utilities have provided capacity and energy to New York for decades. No comparable showing has been made for any of the NYISO’s other external interfaces other than with respect to suppliers with long-term contracts or tariff rights that also are grandfathered. Accordingly, the proposal to grandfather 1090 MW over the Quebec (via Chateaugay) interface, is just, reasonable, and not unduly discriminatory, and should be accepted by the Commission.⁹

⁹ As noted above, the 1090 MW will continue to be grandfathered in the deliverability test after the interim period ends as long as the external capacity using those 1090 MW provides the level of long-term commitment to

2. The proposal to grandfather 1090 MW of capacity on the Quebec (via Chateauguay) interface was properly included in the Compliance Filing

Both Dynegy and the Suppliers erroneously contend that the proposal to grandfather 1090 MW over the Quebec (via Chateauguay) interface is an impermissible collateral attack on the CDP Order, and otherwise exceeds the permissible scope of a compliance filing in response to the January 15 Order. The standard for a compliance filing is whether it addresses the directives set forth in the order to which it is responsive.¹⁰ Furthermore, a filing is only an impermissible collateral attack on a Commission order if that order is final and clearly binding.¹¹

As outlined above, the January 15 Order expressed concern “that a new interconnection customer internal to NYISO may be able to use system headroom and be considered deliverable while an existing external capacity supplier would be required to pay for System Deliverability Upgrades in order to continue supplying capacity to the NYISO market.”¹² Furthermore, the Commission held that “inconsistencies exist between paragraph 18 of the Consensus Deliverability Plan, which states external capacity will be re-evaluated annually and paragraphs 13 and 14, which state generators qualifying for Capacity Resources Interconnection Service will retain their deliverability status.”¹³ Finally, as also noted above, the Commission not only

the NYISO markets contemplated under the External CRIS Rights Proposal and otherwise satisfies the requirements for External CRIS Rights (which are currently being developed in the NYISO stakeholder process). However, if any portion of that 1090 MW is used after the interim period by an external resource that does not satisfy the requirements for External CRIS Rights, then that portion of the 1090 MW will be subject to the deliverability test.

¹⁰ See *Niagara Mohawk Power Corporation, et al.*, 121 FERC ¶ 61,275 at P 38 (2007) (“The purpose of a compliance filing is to make the directed changes and the Commission's focus in reviewing them is whether they comply with the Commission's previously stated directives.”).

¹¹ *Cf. Arizona Public Service Company, et al.*, 125 FERC ¶ 61,177 at P 18 (2008) (“Collateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.”).

¹² January 15 Order at P 78.

¹³ *Id.* at P 77.

ordered the Joint Filing Parties to provide further explanation of why their treatment of external resources satisfies the independent entity variation standard, but also cautioned that the treatment of external resources should not establish “a situation that discourages the development or use of external resources to satisfy installed capacity requirements in the NYISO market.”¹⁴ Most of the rehearing requests of the January 15 Order remain pending before the Commission.

Given that the January 15 Order clearly asked the Joint Filing Parties to explain whether the proposal in the Consensus Deliverability Plan to subject external capacity to the deliverability standard on an annual basis is consistent with the independent entity variation standard, and given the Commission’s directive to ensure that the use of external resources is not discouraged, the proposal regarding the Quebec (via Chateaugay) is appropriate. In fact, the January 15 Order required the Joint Filing Parties to address fully the Commission’s concerns. Therefore, the grandfathering proposal is well within the scope of a permissible compliance filing, and is not a collateral attack on the CDP Order.

B. Entities securing grandfathered capacity over the Quebec (via Chateaugay) interface will not have an unfair advantage in securing access to that capacity under the External CRIS Rights Proposal

Brookfield misreads the External CRIS Rights Proposal to provide that only those entities that are allocated some of the 1090 MW over the Quebec (via Chateaugay) interface during the grandfathering period can secure long-term rights to that capacity under the External CRIS Rights Proposal. This is not the case. While the allocation of that capacity during the grandfathering period -- through the 2010 Summer Capability Period -- will be performed on a first-come, first-served basis via the faxing of reservations to the NYISO by eligible suppliers, the allocation of that capacity available for conversion to External CRIS Rights will be

¹⁴ *Id.* at P 78.

conducted using a different methodology that is currently being developed. This methodology will be discussed during upcoming stakeholder meetings, and Brookfield may participate in those meetings and comment on the proposed allocation methodology. While the methodology is currently being developed, it is not anticipated that the eligibility to request conversion of the 1090 MW to External CRIS Rights will be limited or influenced by the first-come, first-served allocation of the 1090 MW that will occur through the 2010 Summer Capability Period. In other words, entities do not need to be awarded rights through the first-come, first-served allocation in order to be eligible to request conversion of all or some of the 1090 MW to External CRIS Rights. Accordingly, Brookfield's argument that capacity over the Quebec (via Chateauguay) interface should be allocated on a pro rata basis should be rejected.

III. Conclusion

For the reasons set forth above, the arguments of the Suppliers, Dynegy, and Brookfield challenging the Compliance Filing's proposal to grandfather temporarily 1090 MW over the Quebec (via Chateauguay) interface should be rejected.

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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 these proceedings in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Washington, D.C., this 3rd day of June, 2009.

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