UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. EL06-57-000

REQUEST FOR LEAVE TO ANSWER AND ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

In accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2005), the New York Independent System Operator, Inc. ("NYISO"), respectfully requests leave to answer, and answers, certain comments submitted in response to the NYISO's March 3, 2006 filing ("March 3 Filing") in the above-captioned proceeding. In particular, the NYISO opposes the New York Transmission Owners' ("NYTOs") argument that the Commission cannot direct the NYISO to submit a just and reasonable Voltage Support Service ("VSS") rate through a compliance filing. In the absence of an order from the Commission to conduct an independent study to establish an appropriate VSS rate and rate methodology, with full stakeholder input but without the pre-filing requirement of governance committee approval, the NYISO believes that the Market Participants will continue to deadlock over VSS rate issues.

I. Statement of Issues

In compliance with Order No. 663,[1] the NYISO respectfully identifies the following issues that are raised in this answer:

1. *Should the Commission exercise its discretion to allow the NYISO to file an answer?* The NYISO submits that the answer is "yes." In support of an order allowing the answer, the NYISO relies on the Commission's authority under 18 C.F.R. §385.213 (2005) and precedent interpreting it. *See, e.g., New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 at P 7 (2004) and other authority cited in n.3 below.

[1] *Revision of Rules of Practice and Procedure Regarding Issue Identification*, 112 FERC ¶ 61,297 (2005).

2. *May the Commission direct the NYISO to independently develop and submit a just and reasonable VSS rate and cost allocation methodology in the form of a compliance filing?* The NYISO submits that the answer is "yes." The Commission has previously directed the NYISO to make compliance filings without having to obtain stakeholder concurrence. *See, e.g., KeySpan Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002), *order denying reh'g*, 107 FERC ¶ 61,142 (2004), *appeal pending, Niagara Mohawk Power Corp., et al. v. FERC*, Case No. 04-1227, *et al.* Moreover, the Commission can require compliance filings that are more than simply "ministerial" in scope. *See id.*; *see also New York Independent System Operator, Inc.*, 97 FERC ¶ 61,242 (2001). Precedents suggesting that rates may only be changed through Section 205 filings are inapplicable because they do not account for the Commission's statutory authority to require compliance filings or the fact that stakeholders have been on notice that the VSS rate was tentative and subject to retroactive revision. *See New York Independent System Operator, Inc.*, 113 FERC ¶ 61,340 at P 19 (2005). Finally, requiring the NYISO to submit a compliance filing would not undermine the NYISO's stakeholder governance process but would recognize the reality that stakeholders have been unable to resolve VSS issues and that the deadlock will continue unless the NYISO is directed to make a VSS filing that reflects its independent, expert judgment, and that does not require stakeholder approval.

II. Request for Leave to Answer

The Commission normally allows answers to pleadings styled as "comments" but generally discourages answers to "protests."[2] Because the NYTOs' pleading is styled as "comments," the NYISO believes that it may answer as a matter of right. If, however, the Commission concludes that the NYTOs' pleading is tantamount to a protest, the NYISO respectfully asks that the Commission exercise its discretion and grant it leave to answer. The Commission has allowed answers to protests when they help to clarify complex issues, provide additional information that will assist the Commission, or are otherwise helpful in the development of the record in a proceeding.[3]

[2] 18 C.F.R. § 385.213 (2005).

[3] *See, e.g., New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 at P 7 (2004) (accepting NYISO 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 . . .").

In this instance, allowing the NYISO to answer will complete the record because it will establish that the NYTOs' argument on the legality of making a compliance filing is contradicted by earlier Commission rulings on the subject. It will also complete the record by identifying the problems that would result if stakeholders were allowed to determine the scope and outcome of what is supposed to be an independent rate study.

Out of deference to the Commission's procedural rules and in view of the NYISO's earlier request for expedited action in this proceeding, the NYISO has limited its answer to this single point. The NYISO's silence on other arguments raised by commenters and protestors should not be construed as agreement with them or as waiving the NYISO's right to address them in the future.

III. Answer

A. The Commission Has Authority to Direct the NYISO to Develop and File Just and Reasonable VSS Rates

There is no merit to the NYTOs' claim that the Commission may not lawfully require the NYISO to submit a just and reasonable VSS rate by making a compliance filing. While the *Independent System Operator Agreement* ("*ISO Agreement*") places limits on the NYISO's ability to submit Section 205 filings, those restrictions do not apply to compliance filings. Indeed, they could not lawfully apply because if they did they would give the NYISO's stakeholders the ability to prevent the NYISO from complying with Commission orders.

The Commission has previously addressed this issue. In *KeySpan Ravenswood, Inc. v. New York Independent System Operator, Inc.*, ("*KeySpan*"),[4] the Commission required the NYISO to make a compliance filing proposing a just and reasonable "station power" policy, after

[4] 101 FERC ¶ 61,230 (2002), *order denying reh'g*, 107 FERC ¶ 61,142 (2004).

finding that the prior policy was not just and reasonable, but did not offer specific guidance as to what the compliance filing should contain. The NYISO subsequently submitted a compliance filing based on station power principles that the Commission had accepted in other proceedings. The NYTOs objected, claiming that the NYISO's filing was not a compliance filing but a Section 205 filing that required NYISO stakeholder approval. In rejecting this argument, the Commission concluded:

> In the May 15 Order acting on KeySpan's complaint, we found that NYISO's approach to station power was unjust and unreasonable, and ordered NYISO to provide a remedy. We find that NYISO has done so in a comprehensive and reasonable manner by proposing tariff revisions that have been vetted before the Commission in this proceeding. The fact that the Commission did not require specific language certainly does not make the compliance filing at issue here infirm or preclude NYISO from taking guidance from the Commission's prior orders. Additionally, even though NYISO's governance rules do not require the Management Committee's approval of a Commission-directed compliance filing, NYISO ensured that its compliance filing reflects stakeholder input by holding stakeholder meetings, soliciting comments, and briefing NYISO's Scheduling and Pricing Working Group and the Management Committee.[5]

The NYISO's proposal in this proceeding is entirely consistent with *KeySpan* since the NYISO intends to solicit and consider stakeholder views as it develops an appropriate VSS rate. By contrast, the NYTOs' argument on this score is an impermissible collateral attack on *KeySpan*,[6] since the Commission squarely addressed their argument when they raised it in that proceeding.[7]

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[5] *KeySpan*, 101 FERC at P 29.

[6] The *KeySpan* orders are currently on appeal before the D.C. Circuit Court of Appeals in Case No. 04-1227, *et al.*

[7] *See, e.g., Entergy Nuclear Operations, Inc., et al. v. Consolidated Edison Co. of New York, Inc.*, 112 FERC ¶ 61,117 at P 12 (2005) ("Collateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged.") (*citing KeySpan*, 107 FERC at P 25).

The *KeySpan* order, along with the Commission's rulings in a number of other cases, refute the NYTOs' contention that compliance filings can only be "ministerial" in character.[8] *KeySpan* expressly noted that the Commission had *not* ordered the NYISO to adopt specific language. Previously, the Commission directed the NYISO to develop and file its market power monitoring rules, and its comprehensive market power mitigation measures, without specifying what the compliance filings should include, leaving it to the NYISO to develop and propose the details.[9] Similarly, the Commission directed the PJM Interconnection, LLC to submit a new generator retirement policy in a compliance filing, without specifying what the content of that filing should be.[10] In each of these instances, the Commission required compliance filings dealing with significant and complex issues but left the details to the filing party (in consultation with its stakeholders).

Finally, unlike the typical scenario where previously accepted rates are changed through a Section 205 filing, this case involves a VSS rate that the Commission has expressly put in effect on an interim and tentative basis and potentially subject to retroactive change.[11] The notice and ratepayer protection considerations that would normally militate in favor of only allowing rate changes pursuant to Section 205 filings therefore do not apply here.

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[8] NYTO Comments at 9.

[9] *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,242 (2001); *New York Independent System Operator, Inc.*, 86 FERC ¶ 61,062 at 61,238 and Ordering Paragraph (N) (1999).

[10] *See, e.g., PJM Interconnection, LLC*, 107 FERC ¶ 61,112 at 61,368 (2004), *order on reh'g*, 110 FERC ¶ 61,053, *order on reh'g*, 112 FERC ¶ 61,031 (2005).

[11] *New York Independent System Operator, Inc.*, 113 FERC ¶ 61,340 at P 19 (2005) (putting parties "on notice" that the interim VSS rates are subject to change, retroactive to January 1, 2006).

B. Directing the NYISO to Submit a Just and Reasonable VSS Rate Through a Compliance Filing Is Necessary to Avoid Further Delays

The NYTOs incorrectly suggest that the NYISO's proposal is an attempt to make an end-run around its stakeholder governance system and accepting it will somehow undermine the stakeholder process. The reality is that the NYISO proposed a compliance filing only after the NYISO's governance process indisputably failed to resolve VSS rate issues, and only after the Commission's Dispute Resolution Service ("DRS") was further unable to forge an agreement.

For the most part, the NYISO's governance process has worked well. Since its inception, the NYISO and its stakeholders have rarely come across intractable problems. The effort to establish a just and reasonable VSS rate, however, has been a very unusual exception. Since 2002**,** stakeholders have been unable to come to agreement on a permanent VSS rate methodology. The controversy revolves around financial issues, and the stakeholders have been naturally acting in accordance with their own financial interests.[12] The Commission has previously recognized that certain issues can be ill-suited for resolution through stakeholder processes and that it is sometimes necessary to direct Independent System Operators and Regional Transmission Organizations to make filings in order to end an impasse.[13]

As the NYISO has previously explained, the VSS rate has been $3919/MVar/year since 2002. Every year since, stakeholders have been unable to agree on a revised rate and have had to

[12] Even the NYTOs concede in their comments that the issue has had a "tortured history." NYTO Comments at 5.

[13] *See, e.g.*, *New England Power Pool, et al.*, 111 FERC ¶ 61,132 at P 37 (2005) (stating that if ISO-NE, NEPOOL and stakeholders could not agree on capacity credit values for the "2006/2007 Power Year," then ISO-NE "is directed to file supporting studies and details no later than October 1, 2005."). *Cf. USGen NE, Inc.*, 90 FERC ¶ 61,323 at 62,091 (2000) (expressing frustration with the lack of progress by stakeholders in resolving black start service issues and informing NEPOOL that it should be prepared to submit a filing within 45 days).

request one year extensions. By the end of 2005, no significant progress on the appropriate VSS rate had been made. With stakeholders still deadlocked, and recognizing that expiration of the existing rate was imminent, the NYISO submitted its "exigent circumstances" filing[14] to gain more time to try to reach a negotiated compromise. Despite the able assistance of the DRS, no agreement has been achieved.

In short, the NYISO and its stakeholders are no closer to a resolution now than they were in 2002. There is no reason to believe that a requirement to seek stakeholder approval will result in anything other than additional years of delay in the implementation of a just and reasonable VSS rate. A Commission order directing the NYISO to break the logjam by making a compliance filing would not be an end-run around, or in any way harm the integrity of the stakeholder process. Rather, it would simply recognize the reality that the stakeholder process has run its course and that action needs to be taken.

The fact that the NYISO has waited so long for as stakeholder resolution should allay any concerns that it is inclined to act unilaterally. Indeed, the NYISO is hardly proposing to bypass its stakeholders, including the NYTOs, even now. The NYISO will consult with its stakeholders and carefully consider their input as it develops a rate proposal. It is simply proposing that the stakeholders not be given the opportunity to veto that proposal given the delays that have occurred to date.

Nevertheless, if the VSS rate methodology that results from the NYISO's study cannot be submitted to the Commission in the absence of governance committee approval, deadlock will

[14] The *ISO Agreement* at Section 19.01 provides that the NYISO may submit a unilateral "exigent circumstances" filing. However, a proposed rate filed under this provision "shall contain an expiration of no later than one hundred and twenty (120) days after it was filed with FERC…."

continue to result. The stalemate that would arise is illustrated by the filing stakeholders' divergent views on how the VSS rate study must be conducted. The NYTOs have proposed that a VSS rate can be based only upon an analysis of each generator's documented costs of service, and that the VSS rate can only be decided after determining whether the generation Demand Curve price included any or all of the cost of a generator supplying reactive power.[15] In opposition, merchant generators argue that the VSS rate should be established based upon the avoided cost of generation that would have to be built and operated if the generators did not supply reactive power.[16] Such differences are unlikely to be forded even with unlimited time for debate.

Although the NYISO will invite and listen to all stakeholder comments (including the New York State Public Service Commission) and strive to craft a proposal that enjoys the widest possible support, at the end of the day the NYISO will be able to resolve the VSS rate issues only if it has the independent discretion to conduct the study with a consultant, and to file to results at the Commission. Stakeholders will then be able to bring any disagreements with the proposed VSS rate or methodology to the Commission's attention as protests to the compliance filing. If such objections are filed, the Commission will at least have before it an empirical basis to form a record for further action.

IV. Conclusion

In conclusion, for the reasons set forth above, the Commission should accept the NYISO's March 3 Filing, and require the NYISO to make a future compliance filing proposing a

[15] *See* NYTO Comments at 12-14.

[16] *See, e.g., Motion to Intervene and Comments of the Independent Power Producers of New York, Inc.*, Docket No. EL06-57-000, at 13-17 (March 13, 2006).

just and reasonable VSS rate. As it requested in the March 3 Filing, the NYISO respectfully asks that the Commission act expeditiously, since the currently effective interim rate will expire on April 4, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served the foregoing document on the official service list compiled by the Secretary in this docket, in accordance with the requirements of 18 C.F.R. § 385.2010 (2005).

Dated at Washington, DC, this 17th day of March 2006.

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