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FILE NO. 5543000045

January 9, 2002

Via Electronic Filing

The Honorable Linwood A. Watson, Jr.
Acting Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

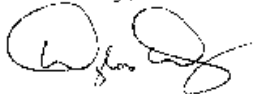
Re: NYISO Answer to Aquila Motion to Hold in Abeyance

Dear Acting Secretary Watson:

Attached is the *Request for Leave to Submit Answer Out-of-Time and Answer of New York Independent System Operator, Inc.* in Docket No. EL01-19-000.

Please contact me if you have any questions or concerns. Thank you.

Sincerely,



Douglas Dziak

Enclosures

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

H.Q. Energy Services (US), Inc.)	
)	
v.)	Docket No. EL01-19-000
)	
New York Independent System Operator, Inc.)	

**REQUEST FOR LEAVE TO SUBMIT ANSWER OUT OF TIME AND
ANSWER OF NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rule 213(a)(3) of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure,¹ the New York Independent System Operator, Inc., hereby respectfully submits its answer to a portion of Aquila Energy Marketing Corporation's ("Aquila") December 19, 2001 *Request for Rehearing and Motion to Intervene Out-of-Time* requesting that the Commission hold in abeyance any further order in this proceeding.

The NYISO requests permission to submit its answer to Aquila's request out-of-time. Due to the holidays, NYISO counsel did not receive this motion until December 27, 2001, and it has taken the NYISO several days to review and respond to Aquila's motion, preventing NYISO counsel from making the filing prior to the January 4, 2002 expiration of the normal fifteen day answer period.

The NYISO is entitled to answer this pleading pursuant to Rule 213(a)(3) because, despite Aquila's self-serving caption, it is not only a motion to intervene out-of-time, filed after the relevant order, and a request for rehearing, but also a motion to "hold in abeyance any further

¹ 18 C.F.R. § 385.213(a)(3) (2000).

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order regarding the issuance of the Extraordinary Corrective Actions ("ECA") on May 8 and 9, 2001 [sic], until the pending arbitration between Aquila and the New York Independent System Operator Inc. ("NYISO") is completed."² The NYISO's answer will facilitate the Commission's review of the issues in this proceeding, and will address certain factual and legal issues that underlie the request.

I. ANSWER TO MOTION TO REQUEST TO STAY PROCEEDING

A. The Commission is the Proper Venue for Any Decision Regarding the Events of May 8 and 9, 2000.

Aquila's request that the Commission allow it to intervene out-of-time to request that this proceeding be held in abeyance pending the outcome of the arbitration currently being conducted by the American Arbitration Association is without merit.³ This dispute, the events of which occurred almost two years ago when the NYISO invoked its Temporary Extraordinary Procedures ("TEP")s authority to issue the May 8 and 9, 2000 ECA to correct a market design flaw, relates to policy issues regarding the interpretation of a NYISO tariff that affects all participants in the NYISO markets. This dispute does not involve any facts or legal issues unique to Aquila. Moreover, the relevant legal and policy issues are ripe for the Commission's decision. Indeed, on November 20, 2001 the Commission issued an order finding that it "believed that the bidding rules' inability to allow pump storage units to reflect their operational

² *Request for Rehearing and Motion to Intervene Out-of-Time*, Aquila Energy Marketing Corp., at 2-3.

³ *See* *Aquila Energy Marketing Corp. v. New York Independent System Operator, Inc.*, American Arbitration Association Case No. 71 Y 198 0071 01.

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constraints, and instead force such an entity to guess at a bid level that would be high enough to avoid dispatch, is a market design flaw."⁴

Aquila requests that the Commission require issues of interpretation and application of a NYISO tariff that affects all market participants to be determined on the basis of an arbitration proceeding to which these market participants are not, and cannot be involved, and in which Aquila has no unique or special interest. From the onset of the Aquila-initiated arbitration, the NYISO has maintained that questions regarding issuance of the ECA must be answered by the Commission because any determination will affect the rights and obligations of all of the market participants in the NYISO administered markets on May 8 and 9, 2000.

In fact, the Commission has already answered the question of whether the NYISO was within its TEP authority when it issued the ECA. Just because Aquila initiated the dispute resolution process,⁵ does not make it appropriate for the decision of an arbitrator in a bilateral proceeding to be substituted for a decision of that of the Commission interpreting a jurisdictional tariff, particularly after the Commission has issued an Order. Thus, the proper outcome, given the nature of the issues, is for the arbitration proceeding to be terminated in light of the Commission's resolution of the issues.

⁴ See H.Q. Energy Services (U.S.), Inc. v. New York Independent System Operator, *Order on Complaints*, 83 FERC ¶ 61,218 at p. 10 (2001) (emphasis added).

⁵ Aquila's discussion regarding the initiation of the DRP is misleading. The AAA arbitration request was filed on January 29, 2001, well after this proceeding was initiated at the Commission on December 8, 2000, and after the January 2, 2001 time to intervene had run. Aquila had sufficient knowledge that it had the opportunity to intervene in this docket and the ability to request that the Commission enlarge the scope of the docket to include May 9, 2000.

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B. Delaying an Already Decided Commission Proceeding to Determining the Rights of Third Parties Who are Not Participating in a Collateral Arbitration is not a Proper Use of Arbitration.

Aquila has cited no authority for the proposition that a proceeding in which the Commission has already issued an order, and to which a party did not seek to intervene in, should be delayed so that it can pursue collateral proceedings for the purpose of conducting discovery. The parties to the Commission proceeding, could have, but did not seek discovery despite the fact that the Commission's rules provide for discovery.⁶

Any determination regarding the NYISO's TEP authority pursuant to its tariff belongs only in front of the Commission. Given that the Commission has already decided that the NYISO acted within its tariff authority in a proceeding in which all interested parties were afforded notice and opportunity to participate, it is improper to try use bilateral arbitration proceedings in this matter. The NYISO has always maintained that the Commission is the appropriate forum for determination of a fundamental policy question underlying the dispute related to May 8 and 9, 2000 because the Commission is the only forum in which the resolution of the issue can apply to all participants. It would be fundamentally unfair to the interests of the other market participants affected by the ECA for Aquila to have a unique proceeding where only its interests are represented.

It is paradoxical that Aquila cites Commission Rule 604 as supporting its request to stay this proceeding. Rule 604 is irrelevant to the Aquila-instituted arbitration as Aquila is not before the Commission. Moreover, Rule 604 is very instructive as to why this matter does not belong before an arbitrator in the first instance. Rule 604 authorizes the use of arbitration to resolve controversies between parties. Rule 604, however, prohibits the use of arbitration in situations in

⁶ See 18 C.F.R. §§ 385.401- 385.411.

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which the dispute “significantly affects persons or organizations who are not parties to the proceeding.”⁷ The dispute surrounding the NYISO’s May 8 and 9 ECA is a perfect example of the type of decision that will significantly affect persons and organizations who are not parties to the Aquila arbitration.

C. Aquila Has Shown Nothing Unique to It, Nor Anything to Call Into Question the Factual Record the Commission had Before it that Would Justify Staying this Proceeding.

Aquila’s claim that there are unknown factual issues that must be “developed through the discovery supervised by an arbitrator” is without merit. Nothing in the evidence presented by Aquila in its motion casts doubts on the critical but limited facts relevant to the ECA issued on May 8 and 9, 2000. The affidavit submitted by the New York Power Authority (“NYPA”) makes clear that on May 8 and 9, the NYISO was faced with a situation in which the ostensibly marginal supplier informed the NYISO that it was willing to make its resources available at a lower price, but was effectively precluded from doing so by a defect in the applicable bidding rules. Once this fact became known to the NYISO, it was obligated to fix the defect in the bidding rules and take other remedial actions consistent with dispatch of the lowest-priced available resources. The NYISO had no obligation to second-guess NYPA’s willingness to offer its resources at lower prices if the bidding rules enabled it to do so.⁸ Aquila’s filing, which barely mentions NYPA, contravenes none of these key facts. Furthermore, none of these key facts involves, affects or relates to Aquila in any manner different from any other market

⁷ 18 C.F.R. § 385.604(a)(2)(iv).

⁸ The NYISO filed a tariff amendment to fix this market design flaw and it was approved by the Commission. See Letter to Mr. Ted J. Murphy accepting revisions to NYISO’s Market Administration and Control Area Services Tariff, 96 FERC ¶ 61,225, August 27, 2001.

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participant. There is simply no basis in the Aquila filing to convert this generic tariff proceeding into a bilateral arbitration proceeding.

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II. CONCLUSION

For the foregoing reasons, the NYISO respectfully requests that the Commission deny Aquila Energy Marketing Corp.'s request to stay these proceedings pending its actions in any collateral proceeding.

NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

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Of Counsel

By: 

Counsel

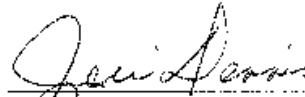
Dated: January 9, 2002

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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 Docket No. ER01-19-000, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 2010 (2001).

Dated at Washington, D.C., this 9th day of January 2002.



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