

129 FERC ¶ 61,103
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

New York Independent System Operator, Inc.

Docket No. ER09-1682-000

ORDER ON REQUESTS FOR CONFIDENTIALITY AND ACCEPTING AND
SUSPENDING TARIFF SHEETS, SUBJECT TO CONDITIONS

(Issued November 3, 2009)

1. On September 4, 2009, as corrected on September 30, 2009, the New York Independent System Operator, Inc. (NYISO) submitted, pursuant to section 3.2.3 of Attachment H of its Market Administration and Control Area Services Tariff (Services Tariff)¹ and section 205 of the Federal Power Act (FPA),² a proposed stand-alone Rate Schedule Market Mitigation No. 1 (Rate Schedule M-1) that implements a new market mitigation measure that it intends to apply to three specifically identified generators in response to conduct NYISO identifies as an abuse of market power.³ NYISO requests that its proposed rate schedule be accepted effective September 8, 2009. NYISO also requests confidential treatment and exemption from Freedom of Information Act (FOIA)⁴ disclosure for certain attachments to its filing.⁵ The three specifically identified generators also request confidential treatment of all or part of their respective pleadings filed in this proceeding. In this order the Commission grants, in part, and denies, in part,

¹ New York Independent System Operator, Inc., FERC Electric Tariff, Original Vol. No. 2.

² 16 U.S.C. § 824d (2006).

³ New York Independent System Operator, Inc., Rate Schedule Market Mitigation No. 1, Original Sheet Nos. 1-4.

⁴ 5 U.S.C. § 552 (2006).

⁵ The Commission has received two FOIA requests for the public release of these documents and of the identities of the generators from non-parties to this proceeding. These requests will be handled separately, consistent with this order.

the requests for confidential treatment. The Commission also grants waiver of the 60-day notice requirement and accepts the proposed rate schedule, suspends its effectiveness for a nominal period to become effective September 8, 2009, subject to refund, conditions, and further orders, and directs NYISO and the three specifically identified generators to submit further filings.

I. Background

2. Sections 3.1 and 3.2 of Attachment H, NYISO's tariff's market power mitigation measures,⁶ respectively, identify the conduct and market impact thresholds used by NYISO to determine whether bids by market participants substantially distort competitive outcomes in the NYISO markets and should be mitigated. Additionally, section 1(b) of Attachment H provides that NYISO monitor its markets for conduct that it determines to be an abuse of market power but that does not trigger the conduct and impact thresholds specified in Attachment H for the imposition of mitigation measures and, if it identifies such conduct that exceeds thresholds set forth in section 3.2.3 on Attachment H, shall make a filing under section 205 to apply appropriate mitigation measures.⁷ Section 3.2.3 of Attachment H requires NYISO to make a section 205 filing with the Commission to seek authorization to apply an appropriate mitigation measure to conduct that departs significantly from conduct that would be expected under competitive market conditions but does not rise to the thresholds specified in sections 3.1.1 through 3.1.3 of Attachment H if that conduct has a significant effect on market prices or guarantee payments.⁸ Section 3.2.3 of Attachment H deems an increase of 100 percent in market prices or guarantee payments to be significant.

3. On September 4, 2009, NYISO made a section 205 filing pursuant to section 3.2.3 requesting authority to impose market mitigation measures with respect to three specific generators on the basis that the conduct of the three generators met the section 3.2.3 criteria with respect to guarantee payments. NYISO proposes Rate Schedule M-1, a new

⁶ Services Tariff, Attachment H.

⁷ *Id.* at Fifth Revised Sheet No. 466.

⁸ Generators may be called upon by NYISO or by the local transmission owner to operate for reliability purposes as a Day-Ahead Reliability Unit (DARU) or through the Supplemental Resource Evaluation (SRE). Generators that operate in this manner do not affect the Location-Based Marginal Price (LBMP) for electricity and are paid a guarantee payment that is the difference between the LBMP that they receive for producing electricity when operating for reliability purposes and their actual bid. *See* Services Tariff, First Revised Sheet No. 33b, Sixth Revised Sheet No. 67a; *See generally*, Attachment C of the Services Tariff.

stand-alone rate schedule. NYISO states that it intends to apply mitigation measures only to the three specifically identified generators. NYISO states that it has identified bidding behavior of the three generators, described confidentially in Attachments C, D, and E of its filing, that, when committed for reliability as Day-Ahead Reliability Units or through Supplemental Resource Evaluation, departs from conduct that would be expected under competitive market conditions. NYISO states that the behavior it has identified has resulted in excessive guarantee uplift payments to these generators in the form of Bid Production Cost Guarantee (BPCG) payments when the generators are committed out-of-market. NYISO further states that the bids received from each of the specifically identified generators significantly exceeded the facility's marginal operating cost, increased the guarantee payment by more than the 100 percent threshold specified in section 3.2.3 of Attachment H, and that these are not attributable to legitimate competitive market forces or incentives.

4. Rate Schedule M-1 would be triggered by bidding conduct that exceeds the applicable reference level by specified amounts that have been determined to be significant by the Market Monitoring Department and the Independent Market Advisor. Specifically, under proposed Schedule M-1, mitigation of the applicable specifically identified generator would be triggered if the generator's bid or bid component: (a) exceeds the minimum generation bid reference level by the greater of 10 percent or \$10/MWh; or (b) exceeds the incremental energy bid by the greater of 10 percent or \$10/MWh; or (c) exceeds the start-up bid reference level by 10 percent; or (d) exceeds the minimum run time reference level by more than 1 hour; or (e) exceeds the minimum generation megawatt reference level by more than 10 percent.⁹ NYISO states that if one of these thresholds is met, it will substitute the reference level default bid when determining the generator's guarantee payment. Proposed Schedule M-1 also provides that NYISO will notify the generator if NYISO determines mitigation is required and the generator will have an opportunity to challenge the Market Monitoring Department's determination.¹⁰ NYISO states that it intends to apply proposed Rate Schedule M-1 only to the specifically identified generators and only when the particular generator is the only alternative available to NYISO to solve a particular reliability constraint.

5. NYISO requests that the Commission grant waiver of the 60-day notice requirement and accept its proposed Rate Schedule M-1 effective September 8, 2009. NYISO states that unless it is instructed to do otherwise by the Commission, on the morning of September 8, 2009, it will begin taking all of the actions necessary for it to ensure that the provisions of proposed Rate Schedule M-1 are applied to the three

⁹ Proposed Rate Schedule Market Mitigation No. 1, Original Sheet No. 3.

¹⁰ Proposed Rate Schedule Market Mitigation No. 1, Original Sheet No. 4.

specified generators.¹¹ NYISO further states that should the Commission later determine it must reject NYISO's proposed rate schedule, NYISO will be able to retroactively "undo" any mitigation it has imposed.¹² NYISO requests waiver of the six-month limit on the application of mitigation that is set forth in section 4.7 of Attachment H.¹³ Protests and comments were filed on the merits of NYISO's filing in addition to the protests and comments that were filed in response to the requests for privileged and confidential treatment.

II. Requests for Privileged and Confidential Treatment

A. NYISO's Request for Confidential Treatment

6. NYISO requests confidential treatment of Attachments C, D, and E to its September 4, 2009 filing in accordance with sections 388.107 and 388.112 of the Commission's regulations,¹⁴ Article 6 of the Services Tariff,¹⁵ and sections 1.0(4) and 4.0 of NYISO's Code of Conduct.¹⁶ NYISO also requests that the identified attachments be exempted from public disclosure under FOIA, and NYISO requests waiver of the obligation to file redacted versions of these attachments. In addition, NYISO requests confidential treatment for certain redacted portions of the supplemental affidavits attached to its October 13, 2009 answer.

7. NYISO states that Attachments C, D, and E to NYISO's filing are the Market Monitoring and Performance Department determinations that the relevant thresholds have been exceeded by three specifically identified generators. NYISO states that these attachments contain confidential, proprietary, and commercially sensitive information, that is not made public by NYISO, including: (a) the identity of specific generators to which NYISO proposes to apply Rate Schedule M-1; (b) descriptions and analyses by NYISO's Market Monitoring Department of the conduct of the specified generator that gives rise to this filing; (c) a description of the evidence and arguments presented by the specifically identified generators in support of claims that their bids did not violate

¹¹ NYISO September 4, 2009 Filing at 4.

¹² *Id.*

¹³ Services Tariff, Attachment H, Sixth Revised Sheet No. 477.

¹⁴ 18 C.F.R. §§ 388.107, 388.112 (2009).

¹⁵ Market Services Tariff, Third Revised Sheet No. 181.

¹⁶ New York Independent System Operator, Inc., FERC Electric Tariff, Original Volume No. 1, Attachment F., First Revised Sheet No. 368.

sections 1(b) and 3.2.3 of Attachment H; and (d) specifying the impact that the bids submitted for each generator had on the guarantee payments to that generator. NYISO states that commercially sensitive generator-specific information included in each attachment includes a list of reliability commitment days, generator-specific reference levels¹⁷ and the bids submitted for the identified generators (all of which are less than three months old¹⁸), as well as the guarantee payments on a daily basis to each of the generators. NYISO states that public disclosure of this information could cause competitive harm to each entity to which it relates and could facilitate collusion in the NYISO markets. NYISO states that the described categories of commercially sensitive information are exempt from disclosure under FOIA.¹⁹

8. NYISO also states that because its filing letter recounts all of the information contained in Attachments C, D, and E that is suitable for publication, it requests waiver of any obligation it may have under the Commission's regulations or the Secretary's rules to submit redacted copies of Attachments C, D, and E. NYISO also asserts that each Market Party that is financially responsible for the generator to which a confidential attachment relates has been served with a copy of that attachment, and that, since each attachment is specific to a particular generator and not relied upon for mitigation action against any other generator, further access to the confidential attachments is neither necessary nor appropriate.

¹⁷ Bid Reference Levels used to serve as default bids, are determined by NYISO (in consultation with the affected party) in accordance with Attachment H of the Services Tariff, are based on previous accepted bids and estimates of unit specific costs and are designed to reflect a generator's marginal cost.

¹⁸ Section 6.3 of the Services Tariff provides:

Pursuant to Commission requirements, the ISO shall make public Bid information from the Energy, Capacity and Ancillary Services markets (but not the names of the bidders making these Bids) six-months after the Bids are submitted. The ISO shall post the data in a way that permits third parties to track each individual bidder's bids over time. Prior to such disclosure, Bid information submitted to the ISO by Market Participants shall be considered Confidential Information.

NYISO also cites *Central Hudson Gas & Electric*, 86 FERC ¶ 61,062, at 61,224, 61,228, 61,231 (1999) (stating that keeping bid data confidential for six months is to prevent collusive behavior).

¹⁹ Citing 5 U.S.C. § 552(b)(4) (2006).

9. On October 13, 2009, NYISO filed an answer to certain protests filed in this docket and a request for privileged treatment and exemption from FOIA disclosure with regard to redacted confidential portions of Attachments B and C to its October 13, 2009 filing. Attachment B is a supplemental affidavit from the Market Monitoring Department, and Attachment C is a response to protests from NYISO's Vice-President of Operations. NYISO's justification for privileged treatment and exemption from FOIA disclosure reiterates the reasons given in its September 4, 2009 filing, including its list of commercially sensitive information enumerated in Paragraph 4 above. NYISO adds generators' bidding strategies and generators' costs and operating data to this list and adds the assertion that disclosure of this information could cause commercial harm to each entity to which it relates and could harm markets administered by NYISO. NYISO attached a redacted, public version of these attachments.

B. Protestors' Requests for Confidentiality

10. On September 25, 2009, the generators identified in Attachments D and E to NYISO's filing (Generation Owners) and the generator identified in attachment C to NYISO's September 4, 2009 filing (Attachment E Supplier²⁰) filed separate protests and also request privileged and confidential treatment. Generation Owners request privileged and confidential treatment of the filing in its entirety. They assert that their answer and exhibits contain commercially sensitive information, the release of which would cause competitive harm. They state that the NYISO filing considered the identity of the affected generation owners to be confidential and they request similar treatment and request waivers necessary to accomplish this. Generation Owners include in their filing a proposed protective order.

11. Attachment E Supplier submitted both a redacted, public version of its answer and a non-public version. Attachment E Supplier requests confidential treatment, and exemption from public disclosure under FOIA, of portions of its protest for the reasons stated in NYISO's September 4, 2009 filing and because it contains commercially sensitive information, including: (a) the identity of the Attachment E Supplier and counsel, and (b) the evidence and arguments presented by the Attachment E Supplier in its protest. It asserts that the details contained in the protest would cause significant competitive harm to Attachment E Supplier if publicly disclosed.

12. Attachment E Supplier likewise requested privileged and confidential treatment of certain information contained in its answer to NYISO's answer. Attachment E Supplier states that the commercially sensitive information in its answer includes the identity of Attachment E Supplier and information concerning bids and the consultations between

²⁰ Attachment E Supplier refers to itself as such despite the fact that Attachment C to NYISO's September 4, 2009 filing deals with this generator.

NYISO and Attachment E Supplier. It adds that this information falls squarely within the definition of Confidential Information as defined in NYISO's Code of Conduct and in the Commission's Order No. 719.²¹

13. Generation Owners' October 23 answer, filed as a public document, asserts that among the factors used to determine confidentiality are whether release of the information could cause competitive harm to submitters.²² They further assert that Commission precedent recognizes that harm can occur in a competitive market place if bidding parties have knowledge of other bidding parties' strategies and behavior and that, for example unmasking parties' bids could result in market-damaging collusion.²³ Generation Owners contend that this proceeding centers on location and bidding strategy, the disclosure of which would cause substantial competitive injury and market disruption, that the Commission forbids market participants from sharing information that would affect the functioning of the markets, and that, as stated by NYISO, releasing this information would negatively affect the competitive markets.

III. Notice of Filing and Responsive Pleadings

14. Notice of NYISO's September 4, 2009 filing was published in the *Federal Register*, 74 FR 48254 (2009) with interventions, and protests due on or before September 25, 2009. Notice of NYISO's September 30, 2009 correction to its confidential filing was published in the *Federal Register*, 74 FR 51843 (2009) with comments due on or before October 21, 2009. Multiple Intervenors;²⁴ JP Morgan Ventures Energy Corporation; New York Association of Public Power (NYAPP); American Public Power Association (APPA); Shell Energy North America (US), L.P.;

²¹ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 FR 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) *order on reh'g*, Order No. 719-A, 74 FR 37776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292 at P 157 (2009).

²² *Citing Critical Energy Infrastructure Information*, Order No. 630, FERC Stats. & Regs. ¶ 31,140 at 30,284–85 (2003) (citing *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and *Critical Mass Energy Project v. Nuclear Regulatory Comm.*, 975 F.2d 871 (D.C. Cir. 1992)).

²³ *Citing Order No. 719 at P 432; Cent. Hudson Gas & Elec.*, 86 FERC ¶ 61,062, at P 61,204 (1999); *PJM Interconnection, L.L.C.*, 86 FERC ¶ 61,247, at P 61,890 (1999).

²⁴ Multiple Intervenors is an unincorporated association of approximately 45 large industrial, commercial and institutional energy consumers with manufacturing and other facilities that are located throughout New York State.

Mirant Parties; NRG Companies; Falcon Power Operating Company; and NextEra Energy Resources, LLC filed timely motions to intervene.

15. Independent Power Producers of New York, Inc. (IPPNY); AES Eastern Energy, L.P. (AES); Electric Power Supply Association (EPSA); PSEG Energy Resources & Trade LLC and PSEG Power New York LLC (collectively PSEG); TransCanada Power Marketing Ltd. and TC Ravenswood, LLC (collectively, TransCanada); New York Municipal Power Agency and the Municipal Electric Utilities Association of New York State filed motions to intervene and comments.

16. The New York State Consumer Protection Board (Consumer Protection Board); The New York Transmission Owners;²⁵ Generation Owners; and Attachment E Supplier filed motions to intervene and protests.

17. The New York State Public Service Commission (New York Commission) filed a notice of intervention and comments.

18. On October 13, 2009, as clarified on October 15, 2009, APPA filed a response to Generation Owners' Request for Confidential Treatment and IPPNY's Comments. NYAPP filed an answer to Generation Owners' and Attachment E Supplier's requests for confidential treatment. On October 13, 2009, NYISO filed a response to certain protests and comments and a request for confidential treatment and exemption from FOIA disclosure with regard to certain attachments to its response. On October 23, 2009, Attachment E Supplier filed an answer to NYISO's October 13, 2009 answer and a request for confidential treatment and exemption from FOIA disclosure. Also on October 23, 2009, Generation Owners filed an answer to the answers of APPA, NYAPP and NYISO. On October 28, 2009, IPPNY and TransCanada filed answers. On November 2, 2009 Generation Owners filed a motion for expedited action, a supplemental answer, and a request for confidential treatment.

IV. Comments and Protests on Confidentiality

19. Consumer Protection Board argues that New York's electric consumers and NYISO's market participants are entitled to know the extent to which unnecessary costs were incurred and the identity of the companies that caused the problem. It notes that the public version of NYISO's filing neither identifies the three generators nor reveals the

²⁵ The New York Transmission Owners consist of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

cost of the market power abuse borne by ratepayers. Specifically, Consumer Protection Board seeks public disclosure of the identity of the generators, the period in which they each abused market power, and the total amount of excess guarantee payments received by each of the three generators.

20. The New York Commission argues that the Commission should make the non-commercially sensitive information contained in Attachments C, D, and E to NYISO's September 4, 2009 filing publicly available, such as the identities of the three generators, to ensure sufficient market transparency. Similarly, according to the New York Commission, the Commission should release details regarding the extent and magnitude of the anticompetitive behavior so that market participants can fully understand the magnitude of the harm to consumers and work with NYISO to craft solutions to prevent such harm from occurring in the future.

21. TransCanada Power Marketing states that, because most of the September 4, 2009 filing is confidential, it is difficult to determine if the proposed new mitigation rules are just and reasonable or how NYISO reached its conclusions. It states that to the extent information could be redacted instead of held completely confidential, it would provide market participants transparency into how NYISO interprets and implements its Services Tariff and would give market participants insight into market rules and potential NYISO actions that is required before making investments.

22. APPA asserts that the requests for confidential treatment of the identities of the three generators and the underlying bid data must be denied, because the requests are unsupported, other than with the general claim of being "commercially sensitive information." APPA contends that a well-functioning market requires open and transparent information and the public release of bidding information in a timely manner, especially where allegations of market power are concerned. APPA requests that the Commission disclose the identities of the three generators, and require NYISO to disclose the amounts of the fixed costs these generators recovered in their guarantee payments, as well as other bidding information relevant to this dispute. APPA argues that nothing under FOIA prevents this disclosure, particularly in light of the Attorney General's March 2009 Memorandum with respect to FOIA requests explaining that "in the face of doubt, openness prevails."²⁶ APPA states that it has consistently argued that, the more information available, and the more timely that information is available, the greater the benefit to the markets. It states that a study prepared in support of its Electric Market

²⁶ *Citing* Office of the Attorney General, Memorandum for Heads of Executive Departments and Agencies at 1 (March 19, 2009).

Reform Initiative²⁷ presents the view that rapid release of unmasked data could facilitate review of how Regional Transmission Organizations (RTOs) and Independent system Operators (ISOs) actually operate the markets; the bidding behavior of market participants; and the work of the market monitors, and all of these reviews could lead to more confidence in the markets. The study asserts that the benefits to be obtained by rapid release²⁸ of such data far exceed the risk of collusion by market participants. APPA asserts that the request to keep the identities of the three generators secret runs contrary to this philosophy, and granting the request reinforces the conviction among load-side interests that generators are free under the current RTO market regimes to exercise market power in RTO markets and will not be disciplined for doing so. APPA argues that one of the primary reasons for collecting offer and bid data is to ensure that the market behavior follows a competitive model and release of data here where there are concerns regarding the exercise of market power would promote such policy. APPA concludes that the public interest requires public access to bid data that could help identify and determine exercises of market power and deter future acts.

23. NYAPP states that under 18 C.F.R. § 388.112 (2009), a person claiming that some or all of the information in its filing is exempt from the mandatory public disclosure requirement of FOIA must file a written statement requesting privileged treatment for some or all of the information and the justification for special treatment of the information. NYAPP contends that it is not sufficient to simply state that the information is “commercially sensitive.” NYAPP states that Commission Order No. 630 and relevant case law make clear that a commercial or financial matter is “confidential” if disclosure is like to “(1) impair the Government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.”²⁹ NYAPP states that the three generators cannot claim that their entire argument should be kept confidential and that parties deserve to know the specific arguments and the evidence used to support those arguments. It contends that

²⁷ William H. Dunn, Data Required for Market Oversight – a Concept Paper for the Electric Market Reform Initiative *available at*: <http://www.mresearch.com/pdfs/410.pdf>.

²⁸ According to APPA, the study recommends, *inter alia*, that unmasked RTO electricity market offer and bid data should be released on the day after the operating day, and that unmasked physical operating characteristics of generation resources should be publicly available.

²⁹ NYAPP answer at 4, note 12, *citing Critical Energy Infrastructure Information*, Order No. 630, FERC Stats. & Regs. ¶ 31,140 at 30,284–85 (2003) (*citing National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and *Critical Mass Energy Project v. Nuclear Regulatory Comm.*, 975 F.2d 871 (D.C. Cir. 1992)).

this blanket request is unduly prejudicial to the other interested parties in the case and it runs counter to the trust and transparency required for competitive markets. NYAPP states that it specifically seeks the identities of the three generators, the timeframe in which they exercised market power, and the total amount of excess guarantee payments received by each of the three generators.

V. Discussion

A. Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009) prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Commission Determination

1. Requests for Confidentiality

26. In this order we respond to requests for confidentiality of: (1) Attachments C, D, and E to NYISO's September 4, 2009 filing; (2) redacted portions of Attachments B and C of NYISO's October 13, 2009 filing, as amended on September 30, 2009; (3) Generation Owners' September 25, 2009 filing; and (4) redacted portions of Attachment E Supplier's September 25, 2009 filing under FOIA exemption 4 and under section 388.107(d) of the Commission's Regulations, which is modeled after FOIA Exemption 4. Disclosure of the identity of the generators is also separately requested. We grant, in part, and deny, in part, the requests for privileged and confidential treatment and exemption from FOIA disclosure, as discussed below.

a. Relevant Standards

27. Section 388.107(d) of the Commission's regulations, which implements FOIA exemption 4, provides that trade secrets and commercial or financial information obtained from a person that are privileged or confidential are exempt from disclosure.³⁰ FOIA's exemptions are to be narrowly construed so as not to frustrate the underlying

³⁰ 18 C.F.R. § 388.107(d) (2009).

policy of disclosure and non-secrecy.³¹ In addition, if only a portion of a record is exempt from disclosure, the non-exempt portion must be disclosed if it is “reasonably segregable.”³²

28. In determining whether information is confidential, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) stated:

Commercial or financial matter is 'confidential' . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.³³

Further, NYISO’s tariff’s Code of Conduct defines Confidential Information, in relevant part, as:

any commercially sensitive information including, without limitation, trade secrets, equipment specific information (e.g., generator specific data such as heat rates, etc.), and business strategies, affirmatively designated as Confidential Information by its supplier or owner; and (3) Transmission System Information (“TSI”) that has not yet been posted on the OASIS or provided in some public forum such as a FERC filing. TSI is information: (1) that is commercially valuable and (2) access to which is necessary to buy, sell or schedule Energy, Capacity, Ancillary Services or Transmission Service.³⁴

b. Disclosure of Names

29. With regard to the identities of the three generators, the identity of each specified generator is neither a trade secret nor financial data and can only fall within the exemption if it is “commercial” information. While the generator is clearly a commercial

³¹ *Department of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001).

³² 5 U.S.C. § 552(b).

³³ *Critical Mass Energy Project, v. Nuclear Regulatory Comm’n*, 830 F.2d 278, 282 (citing *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)), *vacated on other grounds*, *Critical Mass Energy Project v. Nuclear Regulatory Comm’n.*, 975 F.2d 871 (D.C. Cir. 1992).

³⁴ New York Independent System Operator, Inc., FERC Electric Tariff, Original Volume No. 1, Attachment F, First Revised Sheet No. 368.

enterprise, and therefore its identity arguably is “commercial” information, the generator’s name in and of itself does not constitute confidential information. Disclosure of the generators’ names will not impair our ability to obtain necessary information in the future. That prong of the D.C. Circuit’s definition of confidential would apply, for example, to information voluntarily supplied with a request for confidential treatment when the supplier of the information had no obligation to submit such information in the first place.³⁵ Here, the information was not voluntarily submitted to NYISO, as the generators had an obligation to submit it. In addition, we do not believe that disclosure of the identities of the generators that NYISO proposes to mitigate will cause substantial harm to the competitive positions of the respective generators. Disclosure of the names does not reveal otherwise confidential financial or commercial information or permit other market participants to connect their names to commercially sensitive bid or other data since we determine below that such data is privileged and will not be released. Accordingly, we deny the requests that the names of the subject three generators be withheld. NYISO and the generators are directed to submit revised, redacted public versions of their filings and pleadings, as directed below.

c. Disclosure of Commercially Sensitive Data

30. We agree with NYISO that generator or equipment specific data, and transmission system information which is commercially valuable, necessary to participation in the marketplace, and not yet public is confidential. This includes bidding strategies that have not yet been made public,³⁶ generator reference prices, and generator costs. Accordingly, we grant petitioners’ requests for privileged and confidential treatment of this information. The Commission also continues to recognize the confidential nature of bid data and continues to recognize concerns regarding entities that may use this information to gain competitive advantage. The Commission recently stated in Order Nos. 719³⁷ and

³⁵ Such voluntarily supplied information would be held confidential “if it customarily would not be released to the public by the person from whom it was obtained.” *Critical Energy Infrastructure Information*, Order No. 630, FERC Stats. & Regs. ¶ 31,140 at 30,284–85 (2003).

³⁶ In the transmittal letter to its September 4, 2009 filing, NYISO has publicly disclosed the three generators’ strategy of bidding at levels substantially in excess of their marginal costs and reference prices in order to recover fixed costs. Further, NYISO disclosed that by such conduct the three generators exceeded one of the two impact thresholds of section 3.2.3, i.e., a 100 percent increase in guarantee payments. *See* September 4, 2009 filing Transmittal Letter at 6 and 13. Any references to that strategy or impact, as well as any arguments and testimony related thereto, are not confidential and must be disclosed.

³⁷ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 423.

719-A³⁸ that it will retain the policy in use by ISOs to mask bid data from the identities of the bidders. With regard to reference prices used as default bids by NYISO, as they reflect generator specific costs, are determined within a collaborative process between NYISO and the relevant party, and are known only by those parties, we agree that this information represents competitive data that should not be revealed to other market participants. Further, the guarantee payments and the time periods at issue here are to be held in confidential status as they could be used to calculate the underlying LBMPs, bids, reference prices, and costs.

31. We deny petitioners' requests for confidentiality to the extent below. Arguments and testimony that (1) do not reveal specific bid data or pricing, (2) concern previously publicly released bidding strategies, or (3) consist of information that is general or hypothetical in nature are not confidential in that their disclosure would not cause harm to the commercial position of the generators or to the NYISO market. Further, public disclosure of the foregoing arguments and testimony (with any confidential bid data, etc. redacted) comports with the FOIA policy of broad disclosure³⁹ and a presumption of openness⁴⁰ and is, therefore, in the public interest. NYISO and the generators are directed to submit revised, redacted public versions of their filings and pleadings consistent with this order within 30 days of this order.

2. NYISO's Market Mitigation Proposal

32. The protests and comments have raised issues regarding the merits of NYISO's market mitigation proposal. Based upon a review of the filing, the Commission finds that the proposed tariff sheets in Attachment A to NYISO's September 4, 2009 filing have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, we accept the filing, for good cause shown grant waiver of the sixty day prior notice requirement, and suspend its effectiveness for a nominal period to become effective September 8, 2009, as requested, subject to refund and conditions of this order and subject to further orders. We direct NYISO to make an additional filing as discussed below within 30 days of the date of this order.

33. Each Table 1 of Attachments C, D, & E of the September 4, 2009 filing lacks the LBMPs used to calculate the Bid Production Cost Guarantee Payments at bid and at

³⁸ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 157.

³⁹ *FBI v. Abramson*, 456 U.S. 615, 621 (1982).

⁴⁰ Office of the Attorney General, Memorandum for Heads of Executive Departments and Agencies at 1 (March 19, 2009).

reference level. NYISO should provide all of the LBMPs used to make the Table 1 calculations, the mathematical formulas, and all information necessary for the Commission to replicate the calculations presented by NYISO's Witness Boles. NYISO should include the foregoing data as a confidential attachment to the redacted filing it must make within 30 days of this order as directed above.

The Commission orders:

(A) Petitioners' requests for confidential treatment and exemption from FOIA disclosure are hereby granted, in part, and denied, in part, as discussed in the body of this order.

(B) The tariff sheets contained in NYISO's September 4, 2009 filing as listed in footnote 3 above are accepted for filing and suspended, to be effective September 8, 2009, subject to refund and the conditions of this order, and subject to further orders.

(C) NYISO is hereby directed to submit a further filing, within 30 days of the date of this order, as discussed in the body of this order.

(D) Generation Owners and Attachment E Suppliers are hereby directed to submit revised, redacted versions of their pleadings, within 30 days of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.