

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

New York Independent System Operator, Inc.) Docket No. ER04-1144-000

ORIGINAL
FILED
OFFICE OF THE
SECRETARY
2004 DEC -6 P 1:08
FEDERAL ENERGY
REGULATORY COMMISSION

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

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 212, 213 (2004), the New York Independent System Operator, Inc., ("NYISO") hereby respectfully requests leave to answer, and answers, the Protest of Calpine Corporation filed in this docket on November 19, 2004.

On August 20, 2004, the NYISO proposed tariff amendments to the NYISO Open Access Transmission Tariff ("OATT") by adding Attachment Y to establish a comprehensive planning process for reliability needs for New York (hereafter "Comprehensive Planning Process"). Calpine did not file a responsive pleading. On October 29, 2004, the NYISO responded to a deficiency letter issued by the Commission Staff. On November 4, 2004, the Commission issued a public notice of the NYISO's response. Calpine's November 19 filing purports to respond to the November 4, 2004 notice.

Introduction

Calpine's Protest does not present any justification for rejecting any part of the NYISO's Comprehensive Planning Process ("CPP") filing. Contrary to Calpine's claim that the process is "biased" in favor of regulated projects, the CPP provides for a neutral evaluation of both market-based and regulated solutions to reliability shortfalls. Calpine's arguments about the construction of the base case to be used in the NYISO's reliability determinations are both premature and faulty. Finally, Calpine's assertions that the NYISO's UCAP markets do not

provide the proper signals to investors do not belong in this docket. For these reasons, and for the reasons provided below, the Commission should reject Calpine's request for relief.

I. Motion for Leave to Answer

The NYISO recognizes that the Commission generally discourages answers to responsive pleadings. The Commission has, however, allowed such answers when they help to clarify complex issues, provide additional information that will assist the Commission, correct inaccurate statements, or are otherwise helpful in the development of the record in a proceeding.¹ The NYISO's answer satisfies this standard because it responds only to specific arguments raised by Calpine and provides additional information that the Commission needs to fairly evaluate them. The Commission should therefore grant the NYISO leave to answer.

An answer is especially appropriate here in that Calpine has responded, presumably pursuant to the notice of the NYISO's response to a deficiency letter. Although that response may technically be considered an amendment to the NYISO's August 20, 2004 filing in this docket, the response did not modify any of the tariff provisions previously submitted nor did the response provide any additional information upon which Calpine has relied in submitting its Protest.

¹ 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 . . ."); *New York Independent System Operator, Inc.*, 91 FERC ¶ 61,218 at 61,797 (2000) (allowing an answer deemed "useful in addressing the issues arising in these proceedings . . .").

II. Answer

A. The Comprehensive Planning Process Does Not Favor Regulated Solutions

Despite Calpine's assertions,² the Comprehensive Planning Process is expressly structured to facilitate the identification of *market solutions* to meet previously documented reliability needs. It requires the NYISO to solicit and then evaluate both market-based proposals and backstop regulated proposals. The NYISO will review all proposals according to the same criteria regardless of their financing or the nature of the sponsoring entities. Indeed, the NYISO will request implementation of a Transmission Owner's regulated solution only if "the NYISO determines that a market-based solution will not be available in time to meet a Reliability Need, and finds that it is necessary to take action to ensure reliability."³ The Comprehensive Planning Process thus leaves maximum room for market forces to work and produce viable solutions provided that they will permit the system to remain reliable. Nothing in the CPP "will tend to promote the regulated solutions selected by the Transmission Owners over solutions possible from the market," as alleged by Calpine.⁴

B. The Base Case Assumptions Will Be Developed with Stakeholder Input

Calpine argues that the "wrong" base case assumptions will tilt the playing field in favor of regulated solutions, and points to the NYISO's recent Final Draft of the Electric System Planning Process Initial Planning Report ("Initial Planning Report") as evidence that the base case will be biased. Calpine then complains that the construction of the base case should not be left to the NYISO's discretion. Calpine has misread the NYISO's filing on this point.

² See Motion to Intervene and Protest of Calpine Corporation ("Calpine Protest") at 1, 3.

³ NYISO OATT, Attachment Y, Section 7.3(c).

⁴ Calpine Protest at 3.

It goes without saying that the base case should support an “accurate”⁵ prediction of the availability of generating resources to meet reliability needs. However, while the NYISO agrees with Calpine that an over-inclusive representation might understate reliability needs, the approach that Calpine would impose is likely to result in far more additional capacity than is actually required.⁶ Striking the right balance of the uncertainties involved in developing system projections should be left to the NYISO stakeholder process, as the NYISO has proposed to do. Calpine is simply wrong to suggest that the criteria for establishing the base case will be determined by the NYISO itself without the input of its stakeholders.⁷ The clear meaning of the cross reference in Section 4.3(b) of Attachment Y to the preceding Section 3 is that the NYISO will incorporate the procedures for the development of the base case in its procedural manuals. Those manuals will be developed by the NYISO in consultation with its stakeholders and adopted with the approval of the relevant stakeholder committees. Calpine, which has been an active participant in those discussions, will have ample opportunity to convince other stakeholders of the merits of its position. The NYISO does not need “immediate direction” from

⁵ *Id.* at 4.

⁶ The NYISO also agrees with Calpine that resources facing imminent retirement should be excluded from the base case, but does not agree that existing resources should be excluded simply because they choose to sell their output in the short-term markets. The considerations for determining whether a proposed plant can be financed are totally different from those that determine whether an existing facility can continue to operate profitably. A decision to drop an operating facility from the base case should only be made when there is sufficiently firm evidence that the retirement is pending. The NYISO’s tariffs and procedures do not presently include rules requiring generators to report on planned retirements.

⁷ Calpine Protest at 7.

the Commission,⁸ especially if that direction were to follow Calpine's recommendations to short circuit the NYISO stakeholder governance procedures.

Commission intervention at this stage would impact other ongoing stakeholder deliberations on closely-related issues. The Commission should note that, as a result of the Commission's approval of the Settlement Agreement in Docket No. EL02-125-000, the NYISO and its stakeholders will be discussing approaches to the modeling assumptions used in the cost allocation process set out in Attachment S of the NYISO OATT. The NYISO expects these deliberations to take place early in the coming year. Market Participants may well conclude, in looking at both aspects of the NYISO's planning functions, that the assumptions used in projecting system needs for cost allocation purposes should match those made for reliability planning purposes; they are very likely to determine that the base cases should at least be consistent with each other. In addition, both Attachment S and the Comprehensive Planning Process contemplate the coordination of the NYISO's planning activities with those of the North American Electric Reliability Council, the Northeast Power Coordinating Council, and other regional reliability organizations so as to develop consistency in planning decisions. The Commission should allow the NYISO and its stakeholders to define the base case for use in the CPP in the context of these related deliberations.

Calpine makes two other errors in its Protest. Calpine argues that the more detailed procedures should be filed with the Commission.⁹ Because the planning criteria will be included

⁸ *Id.* at 8.

⁹ *Id.*

in the NYISO's manuals, which are published on the NYISO's website, they typically need not be filed with the Commission.¹⁰

Second, Calpine is incorrect in assuming that the NYISO will in the future follow the same base case assumptions as in the Initial Planning Report.¹¹ The assumptions underlying the Initial Planning Report were developed, and the study underway, before the tariff provisions describing the Comprehensive Planning Process were submitted in this docket. As the NYISO has proposed, the base case to be used for future reliability determinations under the CPP, when approved, will be developed through stakeholder discussions.

C. The Commission Has No Basis for Adopting Calpine's Proposals Without Substantial Further Analysis

As indicated above, the details of the development of the "Five Year Base Case" will be the subject of a stakeholder process. If the Commission rejects that approach and concludes, as Calpine recommends, that it should provide "guidance ... on the assumptions of what resources are reflected in the CRP [Comprehensive Reliability Plan] report base case and ultimately on all of the details that go into selecting resources,"¹² the NYISO submits that the Calpine proposal offers no useful guidance.

Calpine addresses both generating resources not yet in operation as well as operating resources. As to the first, Calpine would include "only those new resources that are under

¹⁰ See *Central Hudson Gas & Electric Corp., et al.*, 88 FERC ¶ 61,138 at 61,403 (1999). See also, *New York Independent System Operator, Inc. v. Dynegy Power Marketing, Inc.*, 109 FERC ¶ 61,163 at P 47 (2004).

¹¹ Calpine Protest at 4, 7-8.

¹² *Id.* at 8.

construction or that are under a firm commitment to build within a specified time-frame.”¹³ In today’s environment, Calpine would require that the new resource have executed an initial power purchase agreement of at least ten to fifteen years.¹⁴ However, such a fixed rule is unlikely to be workable, as market conditions and the availability of financing are likely to change over time.

With respect to plants already in existence, Calpine would have the Commission direct the NYISO to include only generation owned by load serving entities or where those entities have purchased the capacity for the entire ten year horizon of the Comprehensive Reliability Plan.¹⁵ Such a proposal could exclude thousands of megawatts of existing capacity where the owners of that capacity have simply decided to rely on the NYISO administered markets rather than on long-term bilateral contracts.

Because the Calpine proposals are premature, the NYISO will not provide a detailed critique, but simply suggest herein the nature of the record the Commission would need before adopting them. The Commission should consider the following:

- (1) Are the problems Calpine is experiencing in financing power plants generally applicable in New York?
- (2) Is the picture Calpine paints a temporary reflection of the excess supply that currently exists in New York and the recent bad experiences of lenders?
- (3) Will the terms on which financing is available improve as load growth reduces the excess supply?

¹³ *Id.* at 4.

¹⁴ *Id.* at 4, 5.

¹⁵ *Id.* at 8.

- (4) Would Calpine's proposal shift the risks from the generators to the loads?¹⁶
- (5) Do Calpine's proposals provide an appropriate role for demand response programs?
- (6) Are Calpine's comments essentially a collateral attack on the NYISO's resource capacity markets rather than a legitimate criticism of the proposed Comprehensive Planning Process?

The Calpine proposals raise too many fundamental questions for the Commission to adopt them without further discussion and analysis and opportunity for input from other stakeholders. The Commission should allow the NYISO and its stakeholders to develop the base case criteria, as the NYISO's filing proposes.

D. Calpine Has Launched an Improper Collateral Attack on the NYISO's UCAP Market

Calpine has argued that inclusion in the base case of new generation without purchase commitments is inconsistent with operation of the NYISO's UCAP market.¹⁷ In reality, Calpine has provided a not so thinly veiled attack on the UCAP market and particularly on the one-month duration of the deficiency auction.¹⁸ This proceeding does not involve the UCAP market and the Commission should reject Calpine's arguments as an improper collateral attack or as beyond the scope of this proceeding.

¹⁶ It is ironic that Calpine acknowledges that, "There is not much interest in forward purchases of capacity to support future generator needs," (Calpine Protest at 9) at the same time as it is insisting that generators demonstrate the existence of such forward purchases.

¹⁷ Calpine Protest at 9.

¹⁸ *Id.* at 9-11.

E. The Tariff Already Requires the NYISO to Address Market Inadequacies

Calpine has ignored two relevant sections in Attachment Y in arguing that the NYISO will fail to encourage market-based solutions.¹⁹ Sections 5.2 and 8.2 of Attachment Y provide exactly what Calpine argues should be included. The first of those sections, in the context of development of the Reliability Needs Assessment ("RNA"), specifically requires that a draft of the RNA be provided to the Independent Market Advisor "for his review and consideration of whether market rules changes are necessary to address an identified failure, if any, in one of the NYISO's competitive markets." The Independent Market Advisor will not hesitate to recommend action where such a failure is identified. Similarly, Section 8.2 requires Independent Market Advisor review of the draft Comprehensive Reliability Plan. Therefore, the Calpine request that the NYISO be directed to evaluate market design deficiencies should be rejected as moot.

WHEREFORE, for the foregoing reasons, the relief requested by Calpine should be denied.

Respectfully submitted,

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December 6, 2004

¹⁹ Calpine Protest at 11-12.

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 this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2004).

Dated at Washington, DC this 6th day of December, 2004.

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