

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

New York Independent System Operator, Inc.) **Docket No. ER00-3740-000**
)

**NEW YORK INDEPENDENT SYSTEM OPERATOR INC.'S
REQUEST FOR LEAVE TO ANSWER ONE DAY OUT OF TIME, AND
ANSWER TO COMMENTS**

Pursuant to Rules 212 and 213(a)(2) of the Commission's Rules of Practice and Procedure,¹ the New York Independent System Operator, Inc. (the "NYISO") hereby respectfully requests permission to submit an Answer one day out of time to, and answers, the October 13, 2000 Motion to Intervene and Comment of New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Rochester Gas & Electric Corporation, and Central Hudson Gas & Electric Corporation (the "Motion"). The NYISO respectfully asks the Commission to reject the Motion and approve NYISO's original filing in this proceeding (the "September 22 Filing"), including the proposed modifications to Section 5.12.7 of the NYISO's Market Administration and Control Area Services Tariff (the "NYISO Services Tariff").

The NYISO makes this filing for the limited purpose of addressing new issues that were introduced in the Motion and clarifying certain factual matters.

I. Request for Leave to Answer One Day Out of Time

The NYISO recognizes that the Commission generally discourages parties from filing answers to protests and comments, and does not wish to burden the Commission with an extraneous answer. The Commission has, however, allowed answers to help clarify complex

¹ 18 C.F.R. §§ 385.212, 385.213(a)(2) (2000).

issues, provide additional information that will assist the Commission, or develop the record in a proceeding.²

In their Motion, New York State Electric & Gas Corporation (“NYSEG”), Niagara Mohawk Power Corporation (“Niagara”), Rochester Gas and Electric Corporation (“Rochester”), and Central Hudson Gas & Electric Corporation (“Central Hudson”) (together, the “Companies”) (1) ask the Commission to consider issues the Companies did not raise in the broad consultative process initiated by the NYISO to prepare the September 22 Filing, and (2) oppose modifications that were widely supported by the Market Participants, including the Companies themselves, within NYISO’s governance process. The NYISO cannot remain silent while the Companies attempt to circumvent this governance process. The NYISO respectfully requests that the Commission accept this proffered Answer to help clarify certain issues and facts surrounding the Motion.

The NYISO also respectfully requests the Commission to allow it to file one day out of time. The significant number of contested filings recently have resulted in a heavy workload for the NYISO Staff and their consultants. At the same time, the NYISO is actively involved in a time-intensive review process of its market design with a number of Market Participants. The NYISO regrets any inconvenience the delay in filing may have caused the Commission or any Market Participant. The NYISO respectfully submits that the filing of this Answer one day out of time will not prejudice Market Participants.

II. Answer

² See, e.g., *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 63,017, *slip op.* at 6 (accepting an answer that was “helpful in the development of the record”) (2000); *New York Independent System Operator, Inc.*, 91 FERC ¶ 61,218 at 61,797 (allowing an answer deemed “useful in addressing the issues arising in these proceedings”) (2000); *Central Hudson Gas & Electric Corp.*, 88 FERC ¶ 61,137, 61,381 (1999) (accepting prohibited pleadings (continued))

A. The September 22 Filing does not impose new information requirements on External Resources

The Companies request that the Commission direct the NYISO not “to impose the requirements of Section 5.12.1(iii) and (vi) on external resources but, rather, develop a more practical solution” (Motion, 15). Clearly, the Companies have misconstrued the September 22 Filing. Under the NYISO Services Tariff, External Resources that want to qualify as Installed Capacity Suppliers must comply with certification requirements in accordance with the ISO Procedures (Section 5.12.1). The purpose of the September 22 Filing is to make those requirements subject to the sanctions provided in Section 5.12.9, not to modify the requirements.

After extensive meetings among the Market Participants and NYISO Staff through numerous NYISO committees, it is hard to understand how the Companies can be confused about such a basic issue. The governance structure serves as an open and transparent peer review process where issues are vigorously discussed among the NYISO and other Market Participants. The Companies had the opportunity to ask questions about the proposed modifications to Section 5.12.9 during numerous meetings that records show they attended prior to the September 22 Filing.

B. The Commission should reject the Companies’ proposed modifications regarding Qualifying Facilities

1. The Companies’ proposed modifications were not approved by any NYISO Committee and may affect other Market Participants that have not been consulted

The Companies argue that the NYISO should not impose Installed Capacity requirements or sanctions on qualifying facilities or LSEs that purchase Installed Capacity from them under

because they helped to clarify the issues and because of the complex nature of the proceeding).

PURPA³ contracts (the “Qualifying Facilities”). According to the Companies, Qualifying Facilities would not and could not satisfy NYISO’s bidding requirements. The Companies also argue that purchasers of Installed Capacity from Qualifying Facilities “in many cases” would not be able to require those Qualifying Facilities to bid into the Day-Ahead Energy Market, or to bid on their behalf (Motion at 13).

Without regard to the validity of the Companies’ position regarding Qualifying Facilities, the NYISO is compelled to observe, first, that the issue of Qualifying Facilities has nothing, or very little, to do with the September 22 Filing. The Companies’ statement that “some of these Qualifying Facilities are External Resources” (*id.*) is a poor attempt to establish such a relationship. As stated in the previous section of this Answer, only existing requirements applicable to Installed Capacity Suppliers (Section 5.12.1) are subject to the sanctions raised in the September 22 Filing.

Second, the NYISO believes that the Companies’ approach does violence to the NYISO governance process, which the Companies pledged to support through their signature of the NYISO Agreement, and which this Commission approved.⁴ Moreover, the Companies have been militant in their insistence that the NYISO governance is a participatory process, and have been vocal in their criticism when they believed the ISO Board of Staff proceeded on their own. This Motion by the Companies is inconsistent with their behavior within the NYISO governance committees. To the best of NYISO’s knowledge and according to all records consulted, the Companies (and the Qualifying Facilities for that matter) never submitted any suggestions regarding the requirements applicable to Qualifying Facilities during the discussions leading to

³ Public Utilities Regulatory Policy Act of 1978, Pub.L. No. 95-617.

⁴ NYISO Agreement, § 19.01, http://www.nyiso.com/services/documents/filings/pdf/iso_agreement/agreement_rev_7_28_00.pdf. Each company has individually signed the NYISO Agreement.

the September 22 Filing. Opportunities for making such recommendations were plentiful; the NYISO circulated drafts of the September 22 Filing as early as July 2000. The Companies should not be heard to raise objections now which they failed to raise during the very governance process they claim to protect.

The Companies' delay in making their concerns known now prevents the NYISO from soliciting the views of other Market Participants, to subject the Companies' proposals to peer review and develop a consensus on the Companies' proposals, as required by Section 19.01 of the NYISO Agreement.⁵ As the Commission stated recently, the NYISO governance process allows input from various Market Participants prior to decisions being reached:

NYISO has a governance process through which its actions are approved and this process allows market participants to have input prior to a decision being made. If a party is dissatisfied with the outcome it can use the NYISO appeals process to raise its issue(s).⁶

Thus, the NYISO respectfully submits that the Companies ought to propose these NYISO Services Tariff Modifications affecting Qualifying Facilities to the Installed Capacity Working Group, which is the proper forum under the NYISO Agreement to deal with this issue. The Companies, the Market Participants and the NYISO have been engaged for months in the process of reviewing the entire Installed Capacity market design to establish a "Stage II/Permanent Market Design," which should be filed with the Commission before January 2001. The Companies have attended those meetings but have not submitted their suggestions on the Qualifying Facilities that are raised in their Motion to the Commission. The Companies should

⁵ Section 19.01 of the NYISO Agreement provides that "any proposed amendment to ... the ISO Services Tariff ... must be submitted to both the ISO Management Committee and the ISO Board" before the NYISO files "the proposed amendment with the Commission." *Id.*

⁶ *Morgan Stanley Capital Group Inc.*, 93 FERC ¶ 61,058 (2000), at 5.

not be allowed to ignore NYISO's governance process by taking issues that could easily be vetted through the NYISO Committees directly to the Commission.⁷

2. The Companies' proposed modifications regarding Qualifying Facilities are inappropriate and premature

Under the NYISO Services Tariff, Qualifying Facilities are "Generators." Qualifying Facilities can therefore qualify as Installed Capacity Suppliers if they meet the requirements of Section 5.12.1 of the NYISO Services Tariff. Contrary to the Companies' position, Qualifying Facilities actually do and can comply with the bidding requirements of Section 5.12.1.⁸ For this reason, the NYISO believes that the Companies' proposed modifications are inappropriate.

In the past, Qualifying Facilities have found it difficult to avoid operational and performance penalties in generating power. The NYISO and the Members of the Transmission Owners Committee of the State of New York proposed an amendment to the NYISO Services Tariff to create an exemption in favor of Qualifying Facilities from regulation penalties.⁹ In its January 12, 2000 Order, the Commission rejected the proposal regarding regulation penalties "without prejudice to refile the proposal in a separate docket including appropriate justification and cost support."¹⁰

⁷ See, e.g., *PJM Interconnection, L.L.C.*, 87 FERC ¶ 61,054 at 61,220 (1999) ("We believe as a general proposition that full and open discussion among interested parties often leads to better and more reasonable decisions. We intend for ISOs . . . to be a forum in the first instance for stakeholders to work out their differences, whenever possible so that they need not come to the Commission.").

⁸ The Qualified Facilities are independently represented in the Governance process of the NYISO. If there was a problem that required an immediate change to the NYISO Services Tariff, it is reasonable to assume that the Qualified Facilities would have directly raised the issue.

⁹ See *New York Independent Operator System, Inc., et al.*, 90 FERC ¶ 61,015 (2000).

¹⁰ *Id.* at 10.

As a result of the Commission's January 12, 2000 Order, the NYISO issued *Technical Bulletin #16* in July 2000 ("*Bulletin #16*").¹¹ *Bulletin #16* provides relief for Qualifying Facilities under specific circumstances. The NYISO will gather information within the next four months on how *Bulletin #16* has been applied. The Market Participants and the NYISO will then agree on the next steps, which could include filing a proposal with the Commission, supported by the appropriate data, seeking permission to exempt the Qualifying Facilities permanently. Presumably, the Companies would agree with such a proposal. It would be premature to make these decisions at this time in the context of the Companies' Motion, without the data to support the proposal.

C. The Modifications to the recall bids procedures proposed by the NYISO are reasonable

1. All four Companies voted in favor of NYISO's proposed modifications to the recall bids procedures

The Companies request that the Commission order NYISO to implement the NYSEG alternative energy pricing proposal instead of the amendments to the recall bids procedures proposed in the September 22 filing (Motion at 15). In the alternative, the Companies propose substantive changes to NYISO's recall bid procedures (Motion at 15).

All four Companies participated in the development of the recall procedures they now oppose, and voted in favor of Section 5.12.7 as amended in the September 22 Filing at the August 25, 2000 NYISO Management Committee meeting.¹²

¹¹ *NYISO Technical Bulletin #16*, July 24, 2000, http://www.nyiso.com/services/documents/techbulletins/pdf/tb16_pur_new.pdf.

¹² The minutes of the August 25, 2000 Management Committee meeting reflect NYSEG's representative's statement that "NYSEG's support of this motion was subject to the subsequent revision of the ICAP manual to reflect the approved change." Final Minutes of August 25, 2000 Meeting of the Management Committee, <http://www.nyiso.com/services/>
(continued . . .)

2. The Commission should defer to the NYISO's governance process

The Commission stated in its March 29, 2000 Order that energy should be recalled on a “least bid-cost basis,”¹³ and the NYISO submitted a compliance filing to the Commission on April 28, 2000 that proposed to do exactly that.¹⁴ It was only after the NYISO attempted to implement Section 5.12.7 pursuant to the Commission's March 29, 2000 Order that the NYISO realized the extent of the technical difficulties associated with actually recalling energy on a least bid-cost basis. After numerous internal consultations among NYISO staff members, the NYISO concluded that it would not be possible to implement Section 5.12.7 as then written until an automated evaluation of recall bids is available.

When the NYISO reached this conclusion, it informed the members of the Installed Capacity Working Group accordingly, and solicited their views on the appropriate approach to adopt.¹⁵ The NYISO and other Market Participants reviewed, as part of this process, NYSEG's February 22, 2000 alternative pricing proposal.¹⁶ In general, many Market Participants and the

documents/groups/mgmt_comm/meeting _materials.html. The members of the Management Committee approved these minutes in their entirety on September 7, 2000.

According to the voting record kept by the NYISO, both NYSEG and Central Hudson also voted in favor of the proposed changes to the recall bids procedures at the Business Issues Committee meeting on August 16, 2000, with Rochester abstaining and Niagara opposing the relevant motion. Motions and Voting Results of August 16, 2000 NYISO Business Issues Committee Meeting at http://www.nyiso.com/services/documents/groups/bus_issue_comm/08_16_00/bic_081600_motions_votingresults.pdf. Niagara actually supported another motion that would have included in Section 5.12.7 the substance of the modification proposed for Section 4 of the Installed Capacity Manual. That motion failed.

¹³ *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,319 (2000) (March 29 Order), at 11.

¹⁴ *Compliance Filing of New York Independent System Operator, Inc.*, Docket No. ER00-1482-00 (April 28, 2000).

¹⁵ On July 26, 2000, the NYISO sent to all members of the Technical Information Exchange list a draft of proposed changes it planned to make to the transitional Installed Capacity market design. That draft expressly brought to the attention of the Market Participants the need to revise Section 5.12.7 to address the problems the NYISO experienced.

¹⁶ *See, Motion of New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation*,
(continued . . .)

NYISO are under the impression that Installed Capacity Suppliers currently submit recall bids taking into account liquidated damages they would incur as a result of the recall. In essence, therefore, NYSEG's alternative pricing proposal is fundamentally very similar to the recall bid procedures of Section 5.12.7.

NYSEG's proposal is not free from any difficulties. Despite NYSEG's allegations, the NYISO is not aware of any "standard" formulation common to the wholesale energy markets for liquidated damages.¹⁷ This makes NYSEG's proposal difficult to implement. Most likely, the NYISO would have to assess the liquidated damages clauses on a contract by contract basis, and make the appropriate calculations. This process would be burdensome, and involve an Orwellian level of monitoring and regulation of bilateral contractual agreements, inconsistent generally with the NYISO's practices to date and the Commissions' principles of deregulation.

As noted in the September 22 Filing and earlier in this proffered Answer, the discussion regarding Section 5.12.7 resulted in a consensus reached around the modification of NYISO's Installed Capacity Manual.¹⁸ In prior cases, the Commission has deferred to decisions made by approved, independent ISO governance institutions,¹⁹ and by other representative regional

Rochester Gas & Electric Corporation and Central Hudson Gas & Electric Corporation To Intervene, (Docket No. ER00-1483-000) (February 22, 2000).

¹⁷ The NYISO notes that the Companies failed to ever formally propose at the Installed Capacity Working Group a uniform liquidated damages formula to determine these liquidated damages.

¹⁸ The proposed modifications to Section 4 of the Installed Capacity Manual are posted as item 8 for the Business Issues Committee Meeting of August 16, 2000. See SERVICES, Business Issues Committee, Meeting Materials at http://www.nyiso.com/services/documents/groups/bus_issue_comm/meeting_materials.html.

¹⁹ See, e.g., *PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,212 at 62,035 (1998) (“[W]e emphasize that in accepting PJM’s proposed revisions . . . we deferred to the judgment of the PJM ISO and its Board concerning a regional solution to an identified regional problem based on what we understand is a broad, if not unanimous, consensus.”); *Pennsylvania-New Jersey-Maryland Interconnection, et. al.*, 81 FERC ¶ 61,257 at 62,262-65 (1997), *clarified*, 82 FERC ¶ 61,068 (1998); *reh’g pending*.

bodies,²⁰ when those decisions enjoy broad stakeholder support. The modifications to Section 5.12.7 proposed by the NYISO in the September 22 Filing were approved by (1) the NYISO Business Issues Committee by a vote of 78% on August 16, 2000; and (2) the NYISO Management Committee by a unanimous show of hands on August 25, 2000. The September 22 Filing thus clearly enjoys broad stakeholder support and is worthy of Commission deference. While an adverse decision during the governance process should not bar a participant from an appeal to the Commission, no participant should be permitted to ignore that process, to the detriment of other participants, and then bring the issue to the Commission.

3. The Companies’ proposal regarding payment for costs associated with purchasing recall energy and emergency energy should be rejected

The Companies also request that “the additional cost associated with purchasing Recall Energy and emergency energy” be recovered from the Market Participants “whose actions prompted the NYISO to make such purchases” (Motion at 10). This modification would essentially implement the cost causation principle, which is theoretically desirable to foster the development of a robust wholesale electric competition.

Notwithstanding the potential merit of the Companies’ proposed modification, the NYISO must object to it because, again, (1) this is the first time the Companies have ever submitted this proposal and (2) the NYISO Board of Directors and the NYISO Management Committee have not approved it as required by Section 19.01 of the NYISO Agreement.²¹ The

²⁰ See, e.g., *Western Systems Coordinating Council*, 87 FERC ¶ 61,060 (1999) (“The Commission has determined, in other contexts, that it is reasonable to defer to the findings of broadly-based regional organizations whose governance procedures are fair.”); *Pacificorp, et. al.*, 69 FERC ¶ 61,099, *order on reh’g*, 69 FERC ¶ 61,352 (1994) (conditionally approving Western Regional Transmission Association as a regional transmission group.)

²¹ § 19.01, NYISO Agreement, *supra* note 5.

Companies do not claim that any emergency exists which might justify bypassing these bodies and taking the expedited actions that they propose.

The NYISO believes that referring this proposed modification to the Management Committee and, by implication, the Business Issues Committee and its Installed Capacity Working Group, is desirable. The exact identification of the Market Participants “whose actions prompted the NYISO to make such purchases” is more complex to apply in practice than it is to describe in theory. In addition, the NYISO believes that it is reasonable to expect some Market Participants to have views on this proposed modification that diverge from those articulated by the Companies. Those Market Participants ought to have the opportunity to peer review the proposal through the NYISO governance process.

4. The NYISO has provided the Market Participants with sufficient information regarding the recall bids procedures

The NYISO disagrees with the Companies’ assertion that additional information should be included in the NYISO Services Tariff regarding the implementation of the recall bids procedures. In response to the Commission’s March 29, 2000 Order,²² the NYISO included additional information in its April 28 compliance filing.²³ The NYISO respectfully submits that the Companies are demanding a level of technical detail far greater than should be expected in a Tariff filing. Recall bids procedures have been on the agenda of NYISO Committee meetings since NYISO’s February 1, 2000 filing, and Market Participants are well aware of their implementation by the NYISO. Recall bids procedures are exceptional in nature, and the NYISO

²² *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,319 (2000) (March 29 Order).

²³ Compliance Filing of New York Independent System Operator, Inc., Docket No. ER00-1482-00, at 6 (April 28, 2000). Per the Commission’s March 29, 2000 Order, NYISO’s April 28, 2000 compliance filing, Section 5.12.7 as modified by the September 22, 2000 Filing, and Section 4.4.5 of the Installed Capacity Manual also state that recall bids will not be used to set the LBMP. *See id.* and *supra* note 17.

rarely invokes them. Providing the level of detail in the NYISO Services Tariff or in the NYISO Procedures requested by the Companies would prevent the NYISO from administering emergency procedures in a flexible manner, and in a way that ensures the reliability of the New York State power system.

III. Conclusion

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc., respectfully asks that the Commission: (i) grant the NYISO's request for leave to submit an Answer one day out of time in this proceeding; (ii) reject the relief requested in the Motion submitted by the Companies; and (iii) authorize the NYISO to implement the proposed modifications to the NYISO Services Tariff as described in the September 22 Filing.

Respectfully submitted,

NEW YORK INDEPENDENT
SYSTEM OPERATOR, INC.

By _____
Counsel

Kathy Robb
Hunton & Williams
200 Park Avenue
New York, NY
10166-0136

October 31, 2000

cc: Mr. Daniel L. Larcamp, Director Office of Markets, Tariffs and Rates,
Room 8A-01, Tel. (202) 208-2088

Ms. Alice M. Fernandez, Director Office of Markets, Tariffs and Rates – East
Division, Room 82-15, Tel. (202) 208-0089

Ms. Andrea Wolfman, Office of the General Counsel , Room 101-29,
Tel. (202) 208-2097

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. ER00-3740-000 in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure 18 C.F.R. § 2010 (1999).

Dated at Washington, D.C. this 31st day of October, 2000.

Edwin G. Kichline
Hunton & Williams
1900 K Street, N.W.
Washington, D.C. 20006-1109
(202) 955-1595

KATHY ROBB
DIRECT DIAL: 212 • 309 • 1128
EMAIL: krobb@hunton.com

October 31, 2000

FILE NO: 55430.000028.NY83341

BYHAND

The Honorable David P. Boergers
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

Docket No. ER00-3740-000

New York Independent System Operator, Inc.
Request for Leave to Answer One Day Out of Time and Answer to Comments

Dear Mr. Boergers,

I enclose on behalf of the New York Independent System Operator, Inc. a request for leave to answer one day out of time, and an Answer to the motion filed on October 13, 2000 by New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Rochester Gas & Electric Corporation, and Central Hudson Gas & Electric Corporation.

Respectfully submitted,

Kathy Robb
Counsel for
New York Independent System Operator, Inc.

Attachments

cc: Each person designated on the official service list compiled by the Secretary in Docket No. ER00-3740-000