UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	**Docket Nos. EL01-19-006, EL02-16-006**

ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC. TO MOTION FOR LEAVE TO REPLY OF PSEG ENERGY RESOURCES & TRADE LLC

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,[1] the New York Independent System Operator, Inc., ("NYISO"), by counsel, hereby respectfully submits its answer to the Motion for Leave to Reply ("PSEG Motion") filed by PSEG Energy Resources & Trade LLC ("PSEG") on August 22, 2005.[2] The Commission should deny the PSEG Motion because it (a) ignores the consent comment schedule in this matter and would prejudice the NYISO by depriving it of an opportunity to reply to new assertions, and (b) presents no evidence on which the Commission could rely in its deliberations. The PSEG Motion thus fails to provide the Commission with good cause to waive the approved comment schedule or the prohibition in Rule 213 on replies to replies.

I. Background

On June 2, 2005, the NYISO filed its Refund Report to comply with the Commission's March 4, 2005 order in the above-captioned dockets.[3] In the report, the

[1] 18 C.F.R. § 385.213.

[2] *See* Motion for Leave to Reply and Reply of PSEG Energy Resources & Trade LLC, Docket Nos. EL01-19-006 *et al.* (Aug. 22, 2005) ("PSEG Motion").

[3] *H.Q. Energy Services (U.S.), Inc. v. New York Independent System Operator, Inc.*, 110 FERC ¶ 61,243 (2005) ("March 4 Order").

NYISO explained the determination of prices but for the Energy Limited Resource Emergency Corrective Action ("ELR ECA") price corrections that the Commission disapproved in its March 4 Order. The Independent Power Producers of New York, Inc. ("IPPNY") filed a motion with the Commission requesting an extension of time to file comments on the NYISO's Refund Report until July 8, 2005.[4] As stated in the filing, the NYISO and IPPNY agreed to a procedural schedule allowing comments by July 8, or 36 days after the filing of the Refund Report, with the NYISO responding to those comments within five days.[5] On June 23, 2005, the Commission issued a notice adopting the agreed procedural schedule, and providing all parties interested in filing comments with an extension of time until July 8.[6]

A number of parties submitted filings with the Commission in accordance with the July 8 deadline.[7] PSEG did not. The NYISO filed its response to these July 8 filings

[4] Motion of Independent Power Producers of New York, Inc. For Extension of Time to File Intervention and Protest and Request for Expeditious Consideration, Docket Nos. EL01-19-006 *et al*. (June 20, 2005). PSEG Power LLC is a member of IPPNY.

[5] *Id.* at P 8.

[6] Notice of Extension of Time, Docket Nos. EL01-19-006 *et al*. (June 23, 2005) ("FERC Notice").

[7] Protest of Independent Power Producers of New York, Inc., Docket Nos. EL01-19-006 *et al.* (July 8, 2005); Protest of KeySpan-Ravenswood, LLC to Refund Report of New York Independent System Operator, Inc., Docket Nos. EL01-19-002 *et al.* (July 8, 2005); Motion to Intervene and Comments of Mirant Americas Energy Marketing, LP, Mirant New York, Inc., Mirant Bowline, LLC, Mirant Lovett, LLC, and Mirant NY-Gen, LLC, Docket Nos. EL01-19-006 *et al.* (July 8, 2005); Supplemental Protest of the New York Transmission Owners, Docket Nos. EL01-19-006 *et al.* (July 8, 2005) (These filings will be referred to collectively as the "July 8 filings").

on July 15, 2005, in accordance with the Commission's procedural schedule.[8] PSEG now files what it calls a Motion for Leave to Reply and Reply, but are really comments on the NYISO's Refund Report filed 45 days after the Commission's July 8 deadline, and 38 days after the NYISO's reply comments. The PSEG Motion includes an affidavit that purportedly now shows, over five years after this proceeding began, that the NYISO and the New York Power Authority ("NYPA"), an agency of the State of New York, "acted in concert" to "manipulate" prices.

II. Answer

A. PSEG's Filing Blatantly Disregards the Filing Schedule for Comments on the ELR ECA Refund Report

The procedural schedule approved by the Commission afforded parties more than a month to prepare comments on the NYISO Refund Report. PSEG's argument that the "press of other business" prevented it from "immediately" responding to the NYISO's Refund Report is disingenuous, because the Commission did not require an "immediate" response. PSEG's argument amounts to little more than an admission that PSEG simply chose to disregard the Commission's schedule in favor of other matters. PSEG never asked for a further extension of time. Rather, PSEG flouted the Commission's schedule by choosing to wait 45 days after the July 8 extended deadline to file its comments, raising new arguments and entering a new affidavit, in response to the Refund Report.[9]

[8] Motion for Leave to Reply and Reply of the New York Independent System Operator, Inc., Docket Nos. EL01-19-006 *et al*. (July 15, 2005) ("NYISO July 15 Filing").

[9] PSEG has previously been admonished by the Commission for a delayed filing in this proceeding. *See H.Q. Energy Services (U.S.), Inc. v. New York Independent System Operator, Inc.*, 97 FERC ¶ 61,218 at 61,966 (2001) (Commission notes PSEG's

PSEG styles its filing as a "reply," but this is a mischaracterization. PSEG cannot be replying to something the NYISO may have said in its July 15 responsive filing about PSEG's initial comments, because PSEG did not file any initial comments. According to Rule 213(c)(1)(i), the proper role of a reply is to state clearly "[a]ny disputed factual allegations."[10] PSEG cannot satisfy this requirement, because it can have nothing to dispute, to clarify, or to correct in the NYISO's July 15 Filing as a response to anything in the PSEG comments on the Refund Report—there were none. PSEG should not be permitted to come in now and raise new arguments and enter a new affidavit, to which the NYISO is deprived a chance to respond, in the guise of a "reply" to the NYISO's response to the Refund Report comments.

B. PSEG Has Not Shown Good Cause for the Commission to Waive Its Procedural Requirements

The Commission has stated repeatedly that Rule 213 "does not allow answers to protests or replies to answers," but that "[t]his provision may be waived if good cause is shown."[11] The Commission has found good cause to exist when replies to answers help

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18-month delay in filing its initial complaint and states that it wishes to "discourage such delay in the strongest way possible").

[10] 18 C.F.R. § 385.213(c)(1)(i).

[11] *PacifiCorp*, 105 FERC ¶ 63,043 at P 47 n.25 (2003); *Carolina Power & Light Co. and Florida Power Corp.*, 97 FERC ¶ 61,048 at 61,278 (2001) ("The Commission's Rules of Practice and Procedure generally do not permit answers to requests for rehearing. However, in order to insure [*sic*] a complete and accurate record in this case, we find good cause to waive Rule 213 . . . ."); *Cambridge Electric Light Co.*, 86 FERC ¶ 61,222 at 61,794 (1999) ("While Rule 213 . . . does not permit answers to protests or answers to answers, the Commission may waive this where the submission will assist the Commission in understanding the issues and developing a complete record. The Commission finds good cause [exists] . . . ."); *Green Canyon Gathering Co.*, 78 FERC ¶ 61,287 at 62,256 (1997) ("Rule 213 . . . prohibits the filing an answer to a protest;

to clarify complex issues, provide additional information that will assist the Commission, correct inaccurate statements, or are otherwise helpful in developing the record in a proceeding.[12] As shown below, PSEG's Motion does not meet this standard, but rather makes specious claims that will not help the Commission's deliberations.

1. PSEG's *Res Judicata* Argument is Without Merit and Does Not Assist the Commission in its Decision-Making Process

Contrary to PSEG's arguments,[13] the NYISO's recognition in its Refund Report that NYPA's Blenheim-Gilboa ("B-G") facility operated Out-of-Merit ("OOM") is not precluded by the D.C. Circuit's opinion. As recognized in the court's opinion, NYPA's bids for B-G initially set the market clearing price for all hours in which the ELR ECA was applied, and there is no dispute about this fact.[14] The only issue before the court was whether or not the NYISO's issuance of the ELR ECA on the basis of its Temporary Extraordinary Procedures (TEP) authority was a permissible correction of those prices.[15] The court ultimately remanded this issue to the Commission. On remand, the

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however, in the interest of developing a complete record in this case, the Commission finds good cause [exists] to waive rule 213 . . . .").

[12] *See, e.g., 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 "the NYISO's Answer of April 27, 2000, [because it was deemed] useful in addressing the issues arising in these proceedings . . . ."); *Central Hudson Gas & Electric Corp.*, 88 FERC ¶ 61,138 at 61,381 (1999) (accepting prohibited pleadings because they helped to clarify the issues and because of the complex nature of the proceeding).

[13] PSEG Motion at 7-9.

[14] *See PSEG Energy Resources & Trade LLC v. FERC*, 360 F.3d 200, 202 (D.C. Cir. 2004).

[15] *Id.* at 203-06.

Commission disapproved the NYISO's use of its TEP authority and ordered the NYISO to submit a refund report. The NYISO's Refund Report thus presents the entirely new issue of what the prices would have been for the relevant hours had the NYISO not issued an ELR ECA. This issue of the correct prices *but for* the ELR ECA was never before, much less decided by, the court. PSEG's *res judicata* argument therefore has absolutely no basis in the D.C. Circuit's opinion. The argument is without merit and consequently, cannot assist the Commission in its deliberations.

2. PSEG's Conspiracy Theory Rests on Fallacious Premises and Has No Evidentiary Support, and Is Therefore Not Helpful to the Commission

PSEG contends that the NYISO initially asked NYPA directly for a Supplemental Resource Evaluation ("SRE") offer, which NYPA—by implication with a wink and a nod—refused.[16] PSEG contends that NYISO then, a few moments later, called upon NYPA to run its B-G units OOM, to which NYPA agreed.[17] PSEG, in conjunction with Dr. Roy Shanker, patches these two suppositions together and postulates that they describe a "scenario" that "just isn't credible or certainly suggests some attempt to manipulate prices."[18] This allegation, however, is based on two glaring fallacies. First, PSEG incorrectly equates SREs with OOMs. Second, PSEG invents the method and timing of the NYISO's communications.

The premise for the inference that PSEG invites the Commission to draw from Dr. Shanker's imagined sequence of events is that a SRE and an OOM are essentially the

[16] *See* PSEG Motion at 9-10.

[17] *Id*. at 10; *see also* Shanker Affidavit at ¶ 14.

[18] *See* PSEG Motion at 10 (citing Shanker Affidavit at ¶ 11).

same. PSEG, however, does not offer any tariff support for this incorrect contention, because there is none. Rather, a SRE involves supplemental, anticipatory commitment of resources in response to an updated load forecast to participate in economic merit order dispatch if needed. A SRE is defined in § 2.176 of the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") to mean: "A determination of the least cost selection of additional Generators, which are to be committed, to meet changed conditions that may cause the original system dispatch to be inadequate to meet Load and/or reliability requirements."[19] The Services Tariff does not preclude a SRE unit from being called on at any time after it is committed, and the unit would be dispatched in economic merit order.

On the other hand, OOM provides for the dispatch of a specific unit in response to an existing system emergency. Section 2.135a of the Services Tariff defines OOM as: "Generators producing at a different level of output than they would produce in a dispatch to meet Load which was not security constrained. Out-of-Merit Generation occurs to maintain system reliability or to provide Ancillary Services." That is, OOM units are called on in response to an existing system condition that dictates a unit's dispatch without regard to its economic merit order. PSEG and Dr. Shanker implicitly recognize this difference between SREs and OOMs when they acknowledge that SRE units would participate in price setting while OOM units would not.[20] PSEG further acknowledges that NYPA only wanted B-G to run in emergency situations, and to do so

[19] *See also* Services Tariff § 5.12.1(ix) (requiring in-day bids from SRE units).

[20] PSEG Motion at 8; Shanker Affidavit at ¶¶ 8-9.

at normal B-G pricing levels.[21] NYPA's actions were entirely consistent with NYPA's objective of supplying energy at reasonable prices during Emergency situations[22] and not in the least suspicious, given the difference between a SRE and an OOM.

Moreover, the "price manipulation" scenario posited by Dr. Shanker is starkly belied by the operator logs cited in the NYISO's July 15 Filing. Dr. Shanker, stepping into the role of a fact witness, hypothesizes that:

> The NYISO goes on the phone to Mr. Rougeux or one of his co-workers, explains there are severe demands on the system and an SRE is called, and the NYPA staff refuses despite their commitment to the reliability of the State of New York. Then, a few moments later, the same, or some other, person at NYPA is contacted by the NYISO and an out of merit call is made, and NYPA is happy to comply?[23]

The operator logs, however, show that the NYISO's SRE call was not directed to NYPA exclusively, but rather, was issued to the entire system, and was made at 7:45 A.M.: "NYISO ISSUED SRE FOR HB 13 THRU HB 18 REQUESTING ENGERY_[*sic*] 10 AND 30 MINUTE RESERVE."[24] The operator logs also show that a request specifically to NYPA to operate B-G as OOM was not made until over six hours later.[25] Moreover, there was no need to commit B-G in advance via an SRE to ensure that it could be available in an emergency situation because, as a hydro unit, B-G does not have a significant start-up time and could be called on Out-of-Merit whenever it was needed.

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[21] PSEG Motion at 5, 9-10.

[22] *See* Motion of the NYISO to Reopen the Record and For Disposition on Remand, Docket Nos. EL01-19-000 *et al*., at 9-10 (Aug. 20, 2004).

[23] Shanker Affidavit at ¶ 14.

[24] NYISO July 15 Filing at 7.

[25] *Id.*

Finally, there is no evidence that B-G's units were not OOM in the intervals in question, and no basis for Dr. Shanker's effort to suggest that there is some issue about this, or that the need for OOM price corrections is a new issue.[26] In fact, the need for OOM price corrections was listed with the Hartshorn/Harvey Memo of May 16, 2000, as discussed in NYISO's Refund Report filed June 2, 2005.

Dr. Shanker's conspiracy theory, and PSEG's assertions based on it, are made out of whole cloth, and bear no relation to the significance of an SRE as compared to an OOM, and bear no relation to the methods and timing of the SRE and OOM calls. PSEG fails to present the Commission with any credible evidence, either direct or circumstantial, on which the Commission could rely in its deliberations. PSEG's Motion should therefore be denied for failure to provide the Commission with good cause to waive its procedural requirements.

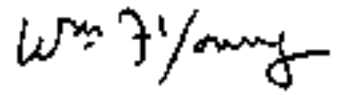
III. Conclusion

Wherefore, for the foregoing reasons, the Commission should deny PSEG's Motion because it violates the Commission-approved schedule, is prejudicial to the

[26] *See* Shanker Affidavit at ¶ 16.

NYISO, and fails to provide the Commission with good cause to waive its procedural requirements.

Respectfully submitted,



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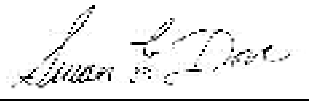
September 6, 2005

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 these proceedings in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated at Washington, DC this 6th day of September, 2005.

By: 

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