

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

Astoria Gas Turbine Power LLC)	
)	
Complainant)	
)	
v.)	Docket No. EL09-57-000
)	
New York Independent System Operator, Inc.)	
)	
Respondent)	

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

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. §§ 385.212 and 385.213 (2009), the New York Independent System Operator, Inc. (“NYISO”) respectfully submits the following Motion for Leave to Answer and Answer to the Motion for Leave to File Answer and Answer of the NRG Companies (“NRG”) filed on July 7, 2009 in the above-captioned proceeding (“NRG Answer”).¹ The Commission should reject the arguments in the NRG Answer because it makes incorrect claims regarding the NYISO’s determination that the NRG projects were not eligible, per the provisions of the NYISO OATT, for inclusion in Class Year² 2009.³

¹ The title of the NRG Answer refers to the NRG Companies. The NYISO assumes that the NRG Answer was filed by Astoria Gas Turbine Power LLC, the complainant in this proceeding. NRG Companies is neither defined in the NRG Answer nor a party to the instant proceeding.

² Unless otherwise indicated, capitalized terms have the meaning set forth in Article I and Attachment S of the NYISO Open Access Transmission Tariff (“OATT”).

³ The NYISO submitted its answer to the complaint filed in this proceeding on June 22, 2009 (“NYISO Answer”).

I. REQUEST FOR LEAVE TO ANSWER

The Filing Parties recognize that the Commission generally discourages answers to answers.⁴ However, the Commission has the discretion to accept answers to answers, and has done so when they help to clarify complex issues, provide additional information, correct misstatements or mischaracterizations, or are otherwise helpful in the development of the record in a proceeding.⁵ This answer is necessary because it will correct NRG's mischaracterizations of the NYISO's determination regarding the eligibility of NRG's projects for a particular interconnection study as inconsistent with the interconnection and cost allocation procedures contained in the NYISO OATT. This answer will also correct misstatements concerning the NYISO's application of this OATT provision to NRG's project and other projects and thus will provide for a complete and accurate record. Accordingly, the Commission should permit the NYISO to file this answer.

II. ANSWER

A. Mere Acknowledgement of Receipt of an Application Is Not Sufficient to Meet the Tariff Milestone.

NRG incorrectly argues that as long as a permit application, including the Draft Environmental Impact Statement ("DEIS"), was acknowledged as received by the New York State Department of Environmental Conservation ("DEC") by March 1, 2009, the regulatory milestone for Class Year entry is satisfied. NRG states that "[a]ll parties agree" that in order for NRG's projects to be included in Class Year 2009 "the DEC must have acknowledged that

⁴ 18 C.F.R. § 385.213(a)(2) and (3).

⁵ See e.g., *New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 at P 7 (2004) (accepting the NYISO's 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...").

NRG's [*sic*] submitted a complete permit application for the project by March 1, 2009."⁶ This statement is incorrect. As described in the NYISO Answer to NRG's Complaint, the NYISO OATT requires that the applicable permit application be submitted and that regulators determine that the application is complete by March 1 of the applicable year.⁷ A date-stamp, a reply e-mail or a letter simply confirming that the DEC received the documents submitted is not sufficient.

NRG fails to provide any support for its assertion that a mere acknowledgement from the DEC is sufficient. "Acknowledgement" is not a term used in either the relevant portions of the tariff or Technical Bulletin No. 129. An acknowledgement of receipt of a permit application is a different standard than a determination that an application is complete. The NYISO has not accepted an acknowledgement of receipt of an application as sufficient for any other project seeking to enter a Class Year. NRG's interpretation is just inconsistent with the NYISO OATT.

NRG goes to great lengths to establish that the DEIS was, in fact, submitted to the DEC by March 1, 2009.⁸ NRG provides another letter from the DEC, dated July 6, 2009, to support this assertion ("July 6 Letter").⁹ However, mere submission of the DEIS prior to March 1 does not show that the NRG projects have met the regulatory milestone for entry into a Class Year. As was the case with the original three letters from the DEC provided by NRG, nothing in the July 6 Letter indicates that the DEC determined that the permit application or the DEIS was complete or that the permit application satisfied all the requirements under the DEC regulations

⁶ NRG Answer at 5.

⁷ See NYISO OATT Attachment S Section IV.B.3.a at Fifth Revised Sheet No. 674. Under NRG's alternative milestone described here, it is not clear who makes the determination that the permit application is, in fact, complete.

⁸ NRG Answer at 5-9.

⁹ NRG Answer at Exhibit A, July 6, 2009 Letter from Jack A. Nasca, Chief, Bureau of Energy Projects & Management, Division of Environmental Permits, to E. Gail Suchman.

for a complete application.¹⁰ Instead, the July 6 Letter simply confirms that the DEC received the e-mails with the DEIS attached before March 1, 2009.

NRG alleges that the NYISO was somehow swayed in its decision by an e-mail from a competitor of NRG in its determination of the NRG projects' eligibility for Class Year 2009.¹¹ However, this argument is just a distraction from the clear facts. The NYISO did not need to, nor did it, rely on any information provided by NRG's competitor in reaching that conclusion. The NYISO provided NRG with every reasonable opportunity to present supporting information regarding the regulatory milestone. The information provided by NRG, and the applicable DEC regulations, simply contain no basis to conclude that the DEC determined by March 1, 2009 that NRG's permitting application was complete.

B. The CPV Valley Project Is Not Similarly-Situated to NRG's Projects.

NRG alleges that the NYISO acted in a discriminatory manner because the NYISO permitted another project, CPV Valley,¹² to enter Class Year 2009 without a Notice of Completion.¹³ NRG argues that its projects and the CPV Valley project are in the same stage of the air permitting process before the DEC. NRG is incorrect. The NYISO appropriately concluded that the CPV Valley project satisfied the regulatory milestone, while NRG's projects did not.

Specifically, CPV Valley's air permit application was deemed complete as a matter of law prior to March 1, 2009, under applicable statutes and implementing DEC regulations. As described in the NYISO Answer,¹⁴ DEC regulations indicate that a permit application will be

¹⁰ See 6 N.Y. COMP. CODES R. & REGS. § 621.

¹¹ *Id.* at 2 and 6, fn. 14.

¹² The CPV Valley project has Queue Position 251 in the NYISO interconnection queue.

¹³ NRG Answer at 3 and 12.

¹⁴ See NYISO Answer at 10, fn 26.

deemed complete if the DEC has failed to issue a notice of incomplete application within a specified time period (which is within 60 days of filing for an air permit).¹⁵ CPV Valley submitted its air permit application to the DEC on December 18, 2008. The DEC did not issue a notice of an incomplete application in the specified time period. Therefore, under the requirements of the applicable statutes and regulations, CPV Valley's application was deemed complete prior to March 1, 2009.

NRG's only response on this issue is to argue that a letter from the DEC indicates "that additional information was needed as recently as April 22, 2009" regarding CPV Valley's DEIS.¹⁶ However, NRG misstates the status of CPV Valley's DEIS and misconstrues the comments on that DEIS by the DEC. First, as recognized by the DEC,¹⁷ the lead agency for CPV Valley's DEIS determined on February 23, 2009, that the DEIS is complete and ready for public review. NRG implies that because the DEC had subsequent comments on the DEIS, the DEIS must be considered incomplete. NRG entirely misconstrues the point of those comments. The April 22, 2009, letter from the DEC commenting on the CPV Valley DEIS explicitly states that the comments are to be used in developing the Final EIS.¹⁸ The fact that the DEC has comments that are intended to be included in the Final EIS does not undo the determination of the lead agency regarding the completeness of the DEIS. It also does not change the fact that under the DEC's regulations, CPV Valley's air permit application has been deemed complete.

¹⁵ N.Y. ENVTL. CONSERV. § 70-0109(1)(b) (2009); 6 N.Y. COMP. CODES R. & REGS. § 621.6(h) (2009). *See also, Matter of Benlevi Obedian & Benlevi, et al. v. NYS Dept. of Envtl Conserv.*, 144 A.D.2d 358, 361 (2d Dept. 1988) (finding that, since the DEC failed to send a notice of incomplete application within the applicable time period, the application must be deemed to be complete).

¹⁶ NRG Answer at fn. 26.

¹⁷ February 26, 2009, Letter from the DEC to the NYISO concerning the status of the CPV Valley project (attached as Exhibit D to the NRG Answer).

¹⁸ "The [DEC] submits the following comments for consideration by the Planning Board for use in the development of a Final Environmental Impact Statement . . ." April 22, 2009 Letter from the DEC to the Town of Waywayanda Planning Board (attached as Exhibit E to the NRG Answer).

III. CONCLUSION

WHEREFORE, for the reasons stated herein, the NYISO respectfully requests that the Commission reject the arguments raised in the NRG Answer and deny NRG's complaint in its entirety.

Respectfully submitted,

/s/ Karen Georgenson Gach _____
Karen Georgenson Gach
Senior Attorney
New York Independent System Operator, Inc.

Date: July 22, 2009

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 (2009).

Dated at Washington, DC this 22nd day of July, 2009.

By: /s/ Vanessa A. Colón
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