

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Light Power & Gas of NY LLC

Docket No. EL19-39-000

v.

New York Independent System Operator, Inc.

ORDER DENYING COMPLAINT

(Issued June 20, 2019)

■ On January 29, 2019, pursuant to sections 206 and 306 of the Federal Power Act (FPA),¹ and Rule 206 of the Commission’s Rules of Practice and Procedure,² Light Power & Gas of NY LLC (LPGNY) filed a complaint (Complaint) against New York Independent System Operator, Inc. (NYISO). LPGNY alleges that NYISO violated its Open Access Transmission Tariff (OATT) by attributing to LPGNY the outstanding debts of North Energy Power LLC (North Energy), a bankrupt former NYISO market participant, for purposes of considering LPGNY’s application for registration in NYISO’s markets. For the reasons discussed below, we deny LPGNY’s Complaint.

I. Background

A. LPGNY and North Energy

■ LPGNY states that it is a New York limited liability company that was formed on or about February 28, 2014, as part of a larger “Light Power & Gas” brand created to market retail electricity and natural gas to customers in various states/markets. According to LPGNY, its business was never advanced in New York, although the intent was for it to operate as a retail electricity seller in New York since it was created back in 2014.

¹ 16 U.S.C. §§ 824e, 825e (2012).

² 18 C.F.R. § 385.206 (2018).

(continued ...)

LPGNY explains that in the fall of 2018, the New York Public Service Commission (New York Commission) authorized LPGNY to operate as an energy service company to provide electric supply service to New York retail customers. LPGNY states that it must register with NYISO to participate in NYISO's wholesale electricity markets.³

■ LPGNY states that North Energy, a separately owned and operated limited liability company, was an energy service company providing electric supply service to New York retail customers until September 17, 2018, when it filed for Chapter 11 bankruptcy due to unanticipated events involving the separate bankruptcy of its creditor and vendor, Big Apple Energy, LLC.⁴ According to LPGNY, following North Energy's bankruptcy, NYISO asserted claims against North Energy for various unpaid amounts related to its purchases in NYISO's markets, which exceeded North Energy's collateral held by NYISO. LPGNY states that NYISO subsequently obtained an order from the bankruptcy court granting relief from the automatic stay so that NYISO could terminate North Energy's ability to participate in NYISO's electricity markets, and NYISO could set off North Energy's collateral against NYISO's claims for unpaid amounts.⁵

B. Section 27 of NYISO's OATT

■ Section 27 of NYISO's OATT discusses the declaration and recovery of bad debt losses and sets forth the process that NYISO uses to recover defaults that are owed under both NYISO's OATT and Market Administration and Control Area Services Tariff (Services Tariff).⁶ Under Section 27.4 of NYISO's OATT, a Transmission Customer⁷

³ Complaint at 4-5, Attachment 1 Leiber Aff. ¶¶ 3-10, 15.

⁴ *Id.* at 6, Attachment 1 Leiber Aff. ¶¶ 22-23.

⁵ *Id.* at 6-7, Attachment 1 Leiber Aff. ¶¶ 24-25, Ex. J.

⁶ NYISO, OATT, Attachment U, § 27 (0.0.0). The procedures set forth in Section 27 include the processes NYISO must use to notify market participants of the declaration of a bad debt loss (Section 27.2), the formula that is used to charge Transmission Customers for bad debt losses (Section 27.3), and the requirements for re-entry of a Transmission Customer that had its bad debt loss charged to other Transmission Customers (Section 27.4).

⁷ NYISO's OATT defines a Transmission Customer as: "Any Eligible Customer (or its designated agent) that (i) executes a Service Agreement, or (ii) requests in writing that the ISO file with the Commission a proposed unexecuted Service Agreement to receive Transmission Service under Part 3, 4 and/or 5 of the Tariff." *Id.* § 1.20 (0.0.0). An Eligible Customer, as used in the definition of Transmission Customer, is defined as: "(i) An entity that is engaged, or proposes to engage, in the wholesale or retail electric power business (continued ...)"

whose previous default resulted in a Schedule 1 bad debt loss charge to other Transmission Customers may not reenter the market until it has (1) cured such default by paying all outstanding obligations and (2) met “all ISO minimum participation criteria, registration requirements, and creditworthiness requirements, including posting of required collateral, prior to being re-admitted by the ISO to participate in the New York wholesale energy markets.”⁸

C. LPGNY’s Application for NYISO Registration

■ On November 26, 2018, LPGNY completed its application for registration with NYISO to participate in NYISO’s markets.⁹ On December 21, 2018, NYISO issued a letter notifying LPGNY that it would hold LPGNY’s application in abeyance pending payment by another market participant—North Energy—of its outstanding and unpaid obligations to NYISO under Section 27.4 of NYISO’s OATT.¹⁰ The letter stated that NYISO determined that LPGNY is a continuation of North Energy, with successor liability for North Energy’s debts to NYISO and that, pursuant to Section 27.4 of NYISO’s OATT, a Transmission Customer that defaults on a payment obligation to NYISO must cure the default and make payment in full prior to being re-admitted to participate in NYISO’s markets.¹¹ NYISO’s letter to LPGNY further stated that NYISO

including any electric utility, power marketer, Federal power marketing agency, or any person generating Energy for sale for resale is an Eligible Customer under the Tariff. Electric energy sold or produced by such entity may be electric energy produced in the United States, Canada or Mexico. However, with respect to transmission service that the Commission is prohibited from ordering by Section 212(h) of the Federal Power Act, such entity is eligible only if the service is provided pursuant to a state requirement that the Transmission Owner offer the unbundled Transmission Service, or pursuant to a voluntary offer of such service by the Transmission Owner. (ii) Any retail customer taking unbundled transmission service pursuant to a state requirement that the Transmission Owner offer the transmission service, or pursuant to a voluntary offer of such service by the Transmission Owner, is an Eligible Customer under the Tariff.” *Id.* § 1.5 (13.0.0).

⁸ *Id.* § 27.4 (0.0.0).

⁹ NYISO Answer, Attachment III Davies Aff. ¶ 6.

¹⁰ Complaint, Ex. H.

¹¹ *Id.*

(continued ...)

will resume its evaluation of LPGNY's application once North Energy has paid all outstanding amounts owed to NYISO.¹²

■ Shortly after it received the December 21, 2018 letter, LPGNY states that its counsel contacted NYISO's counsel in an attempt to understand the basis for NYISO's legal position and resolve the dispute, but they did not resolve the dispute.¹³ LPGNY states that NYISO also indicated that dispute resolution under NYISO's tariffs would not be productive because NYISO would not change its legal position.¹⁴

II. Complaint

■ LPGNY requests that the Commission find that: (1) NYISO violated its OATT by holding LPGNY's registration application in abeyance pending payment by North Energy of its outstanding and unpaid obligations to NYISO under Section 27.4 of NYISO's OATT; (2) NYISO unreasonably, unlawfully, and unduly discriminated against LPGNY by refusing to process its application for registration based on an unwritten successor liability policy; (3) NYISO violated FPA section 205 by failing to include its unwritten successor liability policy in its filed OATT; (4) any determination of successor liability should be made by a court, not NYISO; and (5) NYISO failed to follow its bad debt and re-entry provisions for defaulting Transmission Customers under Section 27 of NYISO's OATT.¹⁵ LPGNY asks that the Commission direct NYISO to expeditiously process LPGNY's application without further delay, and provide such further relief as the Commission deems necessary. LPGNY also requests, under Rule 206(b)(11),¹⁶ that the Commission fast track the disposition of this proceeding based on the pleadings because it asserts that there are no issues of material fact in dispute regarding NYISO's actions and the relevant terms of NYISO's OATT.¹⁷

¹² *Id.*

¹³ Complaint at 7-8.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 1-2.

¹⁶ 18 C.F.R. § 385.206(b)(11) (2018).

¹⁷ Complaint at 17-18.

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■ LPGNY claims that NYISO ignored the plain language of NYISO’s OATT by importing a standard of common law successor liability into the OATT.¹⁸ LPGNY explains that Commission precedent requires independent system operators (ISOs) to abide by the express terms of their tariffs.¹⁹ LPGNY argues that a review of Section 27.4, the definition of Transmission Customer used in that section, and the definition of Eligible Customer as used in the definition of Transmission Customer shows that NYISO’s OATT does not contain any language that references a “continuation,” “mere continuation,” or successor liability of any kind.²⁰ LPGNY therefore asserts that NYISO violated its OATT by applying a successor liability policy, and unduly discriminated against LPGNY by prohibiting its participation in NYISO’s markets for the purpose of applying misplaced leverage against North Energy, an unrelated entity.²¹ LPGNY also argues that NYISO’s unwritten successor liability policy significantly affects the terms and conditions of service under NYISO’s OATT, and is unenforceable because the policy has not been filed with the Commission under FPA section 205.²²

■ LPGNY argues that as a matter of policy, the Commission should find that imputing a successor liability standard into the OATT is unreasonable and unduly discriminatory because successor liability is a question that should be determined by a court, rather than NYISO or the Commission.²³ In particular, LPGNY asserts that such determinations should be made by neutral judges, rather than “biased” NYISO

¹⁸ *Id.* at 2, 11-12.

¹⁹ *Id.* at 9-10 (citing *PPL EnergyPlus, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,383, at P 28 (2006) (finding that NYISO violated its Services Tariff by awarding import rights based on an “unreasonable and illogical” distinction that the customer had no reason to know based on NYISO’s Services Tariff and installed capacity manual); *City of Anaheim v. Cal. Indep. Sys. Operator Corp.*, 94 FERC ¶ 61,268, *order on reh’g*, 95 FERC ¶ 61,197 (2001)); *see also id.* at 9 n.7 (citing additional precedent).

²⁰ *Id.* at 11-12.

²¹ *Id.* at 12.

²² *Id.* at 15-16 (citing, e.g., *PJM Demand Response Coalition v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,061, at P 17 (2013) (footnote omitted) (“The FPA requires all practices that significantly affect rates, terms and conditions of service to be on file with the Commission, and these practices must be included in a Commission-accepted tariff rather than other documents.”)).

²³ *Id.* at 13.

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administrators.²⁴ LPGNY notes that NYISO has failed to provide a written legal basis or explanation for its finding of successor liability.²⁵

■ Finally, LPGNY asserts that NYISO failed to follow the bad debt procedures outlined in Section 27 of its OATT. Specifically, LPGNY argues that, even if there were a basis to treat LPGNY as a successor to North Energy, NYISO first has to follow the steps required by Section 27, including declaring a bad debt under Section 27.1, providing notice of the bad debt as required in Section 27.2, and allocating the bad debt loss as a Schedule 1 charge pursuant to Section 27.3.²⁶ LPGNY notes that NYISO has admitted that it has not declared a bad debt loss by North Energy.²⁷ LPGNY asserts that even if North Energy were seeking re-entry into NYISO's markets under Section 27.4 of NYISO's OATT, NYISO would not have a basis to bar its re-entry because the bad debt procedures of Section 27 have not been followed.²⁸

III. Notice and Responsive Pleadings

■ Notice of the Complaint was published in the *Federal Register*, 84 Fed. Reg. 1720 (2019), with NYISO's answer and all interventions or protests due on or before February 19, 2019. NYISO filed a timely answer. PJM Interconnection, L.L.C. (PJM) and the New York Transmission Owners (NYTOs)²⁹ filed timely interventions and comments opposing the Complaint.³⁰ The Maryland Public Service Commission

²⁴ *Id.* at 14.

²⁵ *Id.*

²⁶ *Id.* at 12-13.

²⁷ *Id.* at 13.

²⁸ *Id.*

²⁹ NYTOs consist of: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Niagara Mohawk Power Corporation d/b/a National Grid; New York Power Authority; New York State Electric & Gas Corporation; Orange and Rockland Utilities, Inc.; Power Supply Long Island; and Rochester Gas and Electric Corporation.

³⁰ Exelon Corporation (Exelon) also filed a timely motion to intervene, which LPGNY opposed. Exelon subsequently withdrew its motion to intervene. Pursuant to Rule 216(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.216(b)

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(Maryland Commission) filed a timely notice of intervention taking no substantive position.³¹

■ On March 6, 2019, LPGNY submitted answers opposing the interventions by PJM, the Maryland Commission, and NYTOs. On March 8 and 19, 2019, respectively, the Maryland Commission and NYTOs filed answers to LPGNY's answers in opposition to their interventions.

■ On April 24, 2019, LPGNY filed an answer to NYISO's answer.

■ On May 20, 2019, NYISO filed a second answer to LPGNY, and subsequently, on June 4, 2019, LPGNY filed a second answer to NYISO.

A. NYISO's Answer to the Complaint

■ NYISO argues that under the specific circumstances of this case, it reasonably concluded that LPGNY and North Energy are the same entity or "Transmission Customer" under Section 27.4 of its OATT.³² NYISO provides two affidavits to support its contention that LPGNY and North Energy are essentially the same entity operating in NYISO's markets.³³ NYISO states that LPGNY was a "shell company" that was only activated once North Energy filed for bankruptcy and that the timeline of these events supports the conclusion that LPGNY's principals are attempting to skirt North Energy's debt obligations to NYISO and re-enter NYISO's markets without settling these obligations.³⁴ NYISO states that North Energy currently owes an estimated \$692,186.74, subject to the invoice true-up process, which will be complete in July 2019.³⁵

(2018), the withdrawal of Exelon's pleading became effective at the end of 15 days from the date of Exelon's filing of the notice of withdrawal.

³¹ We note that the Maryland Commission styled its intervention as a motion to intervene. Because this intervention was timely filed and filed by a State Commission, we treat the Maryland Commission's motion to intervene as a notice of intervention in accordance with Rule 214(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(a)(2) (2018).

³² NYISO Answer at 6-8, 10.

³³ *Id.* at 3, 5, Attachment II Prevratil Aff., Attachment III Davies Aff.

³⁴ *Id.* at 4-5, 7-8, 10.

³⁵ *Id.*, Attachment II Prevratil Aff. ¶ 7.

(continued ...)

■ NYISO argues that LPGNY's first discernable business activities (to register LPGNY as an energy service company with the New York Commission in September 2018, and to contact NYISO to register as a market participant in NYISO's markets) only took place after North Energy was in dire financial straits.³⁶ NYISO states that on August 27, 2018, Big Apple Energy, LLC, which was financing North Energy, filed for bankruptcy.³⁷ NYISO states that North Energy defaulted on its obligations to NYISO and filed its own Chapter 11 bankruptcy case on September 17, 2018.³⁸ NYISO states that on October 10, 2018, it received permission from the bankruptcy court to terminate North Energy's participation in NYISO's markets and to access North Energy's collateral for its obligations in NYISO's markets.³⁹ NYISO states that a week later, on October 17, 2018, one of North Energy's principals, operating through LPGNY, initiated a formal application with NYISO to register LPGNY as a market participant in NYISO's markets, and LPGNY completed that application on November 26, 2018.⁴⁰ NYISO states that it identified a close factual overlap between LPGNY and North Energy including shared principals, the same business model, similar addresses, the same service territory, and the same customers.⁴¹

■ NYISO explains that North Energy's collateral was not sufficient to cover its obligations in NYISO's markets, and if this obligation is not repaid, other market participants will be left to bear that obligation.⁴² NYISO contends that it has a responsibility to administer its tariffs in a common sense manner, and to protect market participants from unreasonable credit risks and associated costs.⁴³ NYISO further argues that neither the OATT, the filed rate doctrine, nor Commission policy should allow

³⁶ *Id.* at 4.

³⁷ *Id.*, Attachment II Prevratil Aff. ¶ 6.

³⁸ *Id.*

³⁹ NYISO Answer at 3, 5.

⁴⁰ *Id.* at 5, Attachment III Davies Aff. ¶ 6.

⁴¹ *Id.* at 5, Attachment II Prevratil Aff. ¶¶ 9-11, Attachment III Davies Aff. ¶¶ 7-12.

⁴² *Id.* at 3-4.

⁴³ *Id.* at 6.

(continued ...)

market participants to evade their overdue financial obligations by simply changing corporate form.⁴⁴

■ NYISO argues that Section 27.4 of the OATT authorizes NYISO to refuse registration of LPGNY until its principals settle North Energy's debt obligations under Section 27.4 of the OATT.⁴⁵ NYISO explains that, while it would not normally consider separate LLCs to be the same Transmission Customer, treating LPGNY and North Energy as the same Transmission Customer under Section 27.4 is reasonable based on the exceptional facts of this case, which indicate that there is no practical difference between LPGNY and North Energy.⁴⁶ NYISO also asserts that establishing a new LLC in New York is relatively easy and inexpensive, and that without interpreting the term "Transmission Customer" as it has, NYISO and its market participants would face substantial additional credit risks.⁴⁷

■ NYISO asserts that, even if the Commission were to find Section 27.4 to be ambiguous, the Commission should find that NYISO's application of Section 27.4 was reasonable given the specific facts of the case, precedent, and Commission policy. NYISO argues that Commission precedent applicable to disputes concerning ambiguous tariff provisions require consideration of at least two principles applicable to this case: (1) the underlying purpose of the ambiguous tariff provision; and (2) whether disregarding the corporate form is in the interest of public convenience, fairness, or equity.⁴⁸ NYISO

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 7-9.

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 11-15 (citing *N.Y. Indep. Sys., Operator, Inc.*, 131 FERC ¶ 61,032 (2010) (where the tariff language is ambiguous, the Commission will consider extrinsic evidence, including the underlying purpose of the tariff provision); *Sw. Power Pool, Inc.*, 160 FERC ¶ 61,115 (2017) (same), *order denying reh'g*, 163 FERC ¶ 61,063 (2018), *pet. denied sub nom. Mo. River Energy Servs. v. FERC*, 918 F.3d 954 (D.C. Cir. 2019); *Town of Highlands v. Nantahala Power & Light Co.*, 37 FERC ¶ 61,149, at 61,356 (1986) (*Town of Highlands*) (finding that an "agency may disregard the corporate form in the interest of public convenience, fairness, or equity" and "[t]his principle of allowing agencies to disregard corporate form is flexible and practical in nature"), *reh'g denied*, 38 FERC ¶ 61,052 (1987), *aff'd sub nom. Nantahala Power & Light Co. v. FERC*, 840 F.2d 11 (4th Cir. 1988); *Transcontinental Gas Pipeline Corp. v. FERC*, 998 F.2d 1313, 1321 (5th Cir. 1993) (stating that where the statutory purpose could thus be easily frustrated through the use of separate corporate entities, an agency is entitled to look (continued ...)

asserts that applying these principles would lead the Commission to conclude that NYISO acted reasonably in determining that LPGNY and North Energy should be considered the same Transmission Customer for the purposes of Section 27.4. NYISO states that interpreting Section 27.4 in a way that adheres to formalistic distinctions based on corporate form and ignores the obvious connections between LPGNY and North Energy would have “unfair, unusual, absurd or improbable results.”⁴⁹

■ NYISO further argues that its application of Section 27.4, which is part of a broader set of credit risk management provisions intended to limit the exposure of market participants to unreasonable risks of default and losses, is consistent with the Commission’s credit policy and the FPA’s overarching consumer protection goals.⁵⁰ NYISO states that its actions are necessary to avoid imposing unreasonable credit risks on its market participants.⁵¹

■ NYISO argues that it followed its OATT provisions and did not unduly discriminate against LPGNY. NYISO states that LPGNY is incorrect to claim that NYISO must declare a bad debt loss before it may require LPGNY to pay North Energy’s financial obligations to NYISO. NYISO states that it has followed the applicable OATT procedures, including declaring North Energy in default and terminating North Energy’s participation in NYISO’s markets. NYISO explains that it has not yet formally declared a bad debt loss for North Energy because it cannot know the precise amount of the debt until its true-up process and schedule are complete in July 2019.⁵² NYISO states that it would be an unreasonable result if NYISO could only protect other market participants

through corporate form and treat the separate entities as one and the same for purposes of regulation)).

⁴⁹ *Id.* at 7-8, 15 (citing *Monterey MA, LLC v. PJM Interconnection, L.L.C.*, 165 FERC ¶ 61,201, at P 45 (2018) (stating that tariffs must have a reasonable construction and should be interpreted in such a way as to avoid “unfair, unusual, absurd or improbable results”)).

⁵⁰ *Id.* at 16-17 (citing *Policy Statement on Electric Creditworthiness*, 109 FERC ¶ 61,186, at P 1 (2004); *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 133 FERC ¶ 61,060, at P 2 (2010), *order on reh’g*, Order No. 741-A, 134 FERC ¶ 61,126, *reh’g denied*, Order No. 741-B, 135 FERC ¶ 61,242 (2011)).

⁵¹ *Id.* at 17-18.

⁵² *Id.* at 19, *Prevratil Aff.* ¶ 7.

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by prematurely declaring the bad debt loss amount before the final amount can be confirmed.⁵³

■ Finally, NYISO explains that its decision does not rely on common law successor liability principles, but on the express language of OATT Section 27.4, the application of that language to the facts here, and NYISO's understanding of the Commission's credit policies and NYISO's own responsibilities.⁵⁴ Nevertheless, NYISO points out that there is a similar concept embedded in the assignment provision of the *pro forma* services agreement under NYISO's Services Tariff, and thus the concept of holding successors accountable for an obligation of their predecessors is consistent with NYISO's overall tariff framework.⁵⁵

B. LPGNY's Answer to NYISO

■ LPGNY argues that NYISO's answer significantly changes NYISO's previously stated reasons for holding LPGNY's registration application and raises various issues for the first time.⁵⁶ LPGNY asserts that this is a moving target⁵⁷ because prior to its answer, NYISO did not state that it was relying on the interpretation of its OATT, point to LPGNY's principals as being responsible for North Energy's debts, state that it had concerns with LPGNY's ability to meet NYISO's creditworthiness requirements, or note concerns regarding impacts on other market participants.⁵⁸ In addition, LPGNY contends that NYISO's answer also expands its new creditworthiness concerns into speculative concerns about practices in the market that are beyond the scope of the Complaint.⁵⁹

⁵³ *Id.* at 19.

⁵⁴ *Id.* at 21.

⁵⁵ *Id.*

⁵⁶ LPGNY Answer at 1-4, 6-8.

⁵⁷ *Id.* at 3 (citing, e.g., *Baltimore Gas & Elec. Co.*, 91 FERC ¶ 61,270, at 61,922 (2000) (footnotes omitted) ("We look with disfavor on parties raising on rehearing issues that should have been raised earlier. Such behavior is disruptive of the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.")).

⁵⁸ *Id.* at 6-13.

⁵⁹ *Id.* at 9.

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■ LPGNY also argues that NYISO failed to definitively state that its OATT is ambiguous, as required by Commission precedent, before considering extrinsic evidence.⁶⁰ In addition, LPGNY states that the defined term “Transmission Customer” does not mention successors, principals, or corporate form, and that NYISO is impermissibly using extrinsic evidence, such as NYISO’s credit practices, to alter the express terms of the OATT.⁶¹ LPGNY contends that NYISO’s OATT is not ambiguous and the Commission has previously rejected the use of extrinsic evidence where the tariff was found to be unambiguous.⁶² LPGNY further asserts that the Commission should reject NYISO’s arguments that its unfiled successor liability policy should be upheld because, among other reasons, NYISO’s conduct is discriminatory and NYISO does not have a written policy or tariff language that states the factors that will be considered in determining whether an entity is a successor.⁶³

■ LPGNY further asserts that the due process requirements of administrative agencies should be applied to NYISO, and that NYISO is prohibited from engaging in *post hoc* rationalizations under those requirements.⁶⁴ LPGNY claims that NYISO’s determination should be rejected because it purports to establish successor liability without due process and without applying New York state law, and impinges on LPGNY’s Seventh Amendment right under the U.S. Constitution to a jury trial.⁶⁵ LPGNY also asserts that NYISO refers to North Energy, LPGNY, and LPGNY’s principals interchangeably despite having no factual findings or evidentiary basis to support such a finding.⁶⁶

⁶⁰ *Id.* at 14 (citing, e.g., *S.C. Elec. & Gas Co.*, 56 FERC ¶ 61,379, at 62,440 (1991)).

⁶¹ *Id.* at 16.

⁶² *Id.* at 21.

⁶³ *Id.* at 25-28.

⁶⁴ *Id.* at 4-6.

⁶⁵ *Id.* at 2, 28-32.

⁶⁶ *Id.* at 9, 12, 33.

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C. Interventions, Comments, and Answers

1. PJM Comments and LPGNY Answer

■ PJM requests that the Commission deny the Complaint. PJM adds that, if the Commission does not conclude that NYISO's actions were clearly authorized under the plain language of NYISO's OATT, then the Commission should determine that NYISO's interpretation of its OATT was reasonable and consistent with Commission policy and precedent.⁶⁷ PJM states that the Complaint "implicates broader and common policy issues regarding whether the tariff rules" of regional transmission organizations (RTOs) and ISOs permit them to deny a new member's or market participant's application based on prior negative enforcement history of such an entity and its principals, officers, employees, and agents which indicate that the entity is an unacceptable risk.⁶⁸ PJM explains that in order to protect the interests of the ISO/RTO members, ISOs/RTOs should be permitted to look into the history of both the entity applying for membership and the individuals who control or are associated with the applicant.⁶⁹

■ PJM further states that ISOs/RTOs should be permitted to prevent individuals from posing risks to the ISO/RTO markets by simply establishing a new entity with the same individuals who may be subject to prior or ongoing violations or settlements of investigations by Federal or State regulatory agencies or courts.⁷⁰ In addition, PJM argues that the Commission's anti-manipulation provisions and rules concerning interlocking directorates do not allow individuals to hide behind corporate entities.⁷¹ Thus, PJM asserts, the Commission may similarly concern itself with individual actions and past behaviors pursuant to its authority under FPA section 205 to the extent that provisions under ISO/RTO tariffs related to registration applications to participate in the ISO/RTO markets are filed pursuant to that section.⁷² Finally, PJM states that the instant proceeding presents an example of an ISO/RTO reasonably applying authority under its tariff to deny membership to an entity controlled by principals who defaulted in a prior corporate venture, and that a denial of a registration application under circumstances

⁶⁷ PJM Comments at 4-5.

⁶⁸ *Id.* at 1.

⁶⁹ *Id.* at 3.

⁷⁰ *Id.* at 3-4.

⁷¹ *Id.*

⁷² *Id.* at 4.

(continued ...)

similar to those in this proceeding is not unduly discriminatory and is just and reasonable.⁷³

■ In its answer opposing PJM's motion to intervene, LPGNY requests that the Commission deny the motion to intervene because PJM has failed to establish a direct interest in the outcome of this proceeding as required by Rule 214(b)(2) and Commission precedent. In addition, LPGNY argues that PJM has other procedural options that it can utilize to make its positions known or to seek a ruling specific to its interests.⁷⁴

2. NYTOs' Comments and Answers

■ NYTOs request that the Commission reject the Complaint. NYTOs argue that, if the Complaint is granted, the amounts owed by LPGNY would likely be shifted to end-use NYTO customers and increase the risk of additional payment defaults for such customers.⁷⁵ NYTOs further contend that any purposeful shifting of market obligations is unjust and unreasonable and would create dangerous precedent if accepted by the Commission.⁷⁶ NYTOs assert that LPGNY's arguments ignore the policy issues at the heart of the Commission's statutory obligations, which are to protect electric customers from unjust and unreasonable rates, terms, and conditions.⁷⁷ NYTOs explain that NYISO should be permitted to take the actions necessary to protect customers if LPGNY's attempt to re-enter the NYISO markets is a scheme to inappropriately shift costs and risk to New York customers, and assert that an entity's ability to meet the financial obligations associated with participation in the NYISO markets is within the scope of NYISO's registration application process.⁷⁸ NYTOs further state that the reported actions of LPGNY's principals raise a serious question of conduct and motives.⁷⁹

⁷³ *Id.* at 5.

⁷⁴ LPGNY Answer to PJM Intervention at 2-4 (citing 18 C.F.R. § 385.214(b)(2) (2018)).

⁷⁵ NYTOs Comments at 2.

⁷⁶ *Id.*

⁷⁷ *Id.* at 3 (citing 16 U.S.C. §§ 824d, 824e (2012)).

⁷⁸ *Id.*

⁷⁹ *Id.*

(continued ...)

■ In its answer opposing NYTOs' intervention, LPGNY asserts that the motion to intervene lacks sufficient factual detail to demonstrate NYTOs' interest, relies on conclusory statements, and fails to establish a direct interest in the outcome of this proceeding as required by Rule 214(b). LPGNY contends that Rule 214 lists four such interests as the interests of a consumer, customer, competitor, or security holder, and that NYTOs do not fit into any of these interest categories. LPGNY further states that NYTOs' interest in this case—that this case could create precedent—is not sufficient to show that NYTOs will be directly affected by the outcome of this case.⁸⁰

■ In response, NYTOs state that LPGNY's answer mischaracterizes NYTOs' motion to intervene. NYTOs contend that, contrary to LPGNY's assertions, NYTOs did not state that their basis for intervention is the possible precedential effect of the Commission's decision.⁸¹ NYTOs further contend that LPGNY's statement that NYTOs' interest in this proceeding is an indirect interest of NYTOs' customers is incorrect. NYTOs counter that their motion to intervene states that NYTOs are directly affected by this proceeding due to their numerous roles in the NYISO markets, which include the fact that NYTOs own transmission facilities operated by the NYISO, NYTOs recover the costs of operating their transmission facilities under NYISO's OATT, and NYTOs are load serving entities that purchase energy, capacity, and ancillary services for themselves and on behalf of customers in the NYISO markets governed by NYISO's Services Tariff. NYTOs assert that any unpaid costs in the NYISO markets may ultimately be paid by other registered market participants, including NYTOs and their customers. Finally, NYTOs state that, contrary to LPGNY's statements, the Commission's regulations do not limit intervention to specific classes of entities.⁸²

3. Maryland Commission's Notice of Intervention and Answers

■ The Maryland Commission filed a notice of intervention stating that, as an agency of the State of Maryland, it is intervening in the proceeding because the Commission's decision in this case may impact PJM's markets.

■ LPGNY filed an answer opposing the Maryland Commission's notice of intervention. LPGNY contends that the Commission should deny the notice of intervention because the Maryland Commission has failed to establish a direct interest in the outcome of this proceeding as required by Rule 214(b)(2) and Commission precedent.

⁸⁰ LPGNY Answer to NYTOs Intervention at 2-3 (citing 18 C.F.R. § 214(b)(2) (2018)).

⁸¹ NYTOs Answer at 3.

⁸² *Id.* at 3-5.

(continued ...)

In addition, LPGNY argues that the Maryland Commission has other procedural options to monitor the proceeding and/or address its concerns.⁸³

■ In response, the Maryland Commission filed an answer asserting its right to intervene as a State Commission in this proceeding under Rule 214(a)(2). Consistent with Rule 214(a)(2), the Maryland Commission further contends that, because its intervention was timely, an explanation of its interest in the proceeding is not necessary.⁸⁴

IV. Discussion

A. Procedural Matters

■ Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁸⁵ notwithstanding LPGNY's opposition, the timely notice of intervention filed by the Maryland Commission serves to make the Maryland Commission a party, and we grant the timely motions to intervene filed by PJM and NYTOs. The Maryland Commission is a State Commission and its timely notice of intervention makes it a party to this proceeding pursuant to Rules 1.101(k) and 214(a)(2) of the Commission's Rules of Practice and Procedure.⁸⁶ PJM and NYTOs have expressed interests in the outcome of this proceeding that are not represented by any other party, and the proceeding is at an early stage and their intervention will not create an undue burden. Accordingly, we find that it is in the public interest to grant PJM's and NYTOs' interventions.

■ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to an answer unless otherwise ordered by the decisional authority.⁸⁷ We accept the answers submitted by LPGNY on March 6 and April 24, 2019, and the answers submitted by the Maryland Commission and NYTOs, because they have provided information that assisted us in our decision-making process. However, we are not persuaded to accept NYISO's May 20, 2019 answer and LPGNY's June 4, 2019 answer and, therefore, reject them.

⁸³ LPGNY Answer to Maryland Commission Intervention at 2-4 (citing 18 C.F.R. § 214(b)(2) (2018)).

⁸⁴ Maryland Commission Answer at 2-3 (citing 18 C.F.R. § 214(a)(2) (2018)).

⁸⁵ 18 C.F.R. § 385.214 (2018).

⁸⁶ *Id.* §§ 1.101(k), 385.214(a)(2).

⁸⁷ *Id.* § 385.213(a)(2).

B. Substantive Matters

■ We deny the Complaint because we find that NYISO did not violate its OATT by attributing to LPGNY the outstanding debts of North Energy, a bankrupt former NYISO market participant, for purposes of considering LPGNY's application for registration in NYISO's markets.

■ As an initial matter, we find that Section 27.4 of NYISO's OATT is silent with respect to the question of whether two different LLCs with close ties can be treated as the same Transmission Customer. Section 27.4 of NYISO's OATT states:

27.4 Re-Entry of Defaulting Transmission Customer

In addition to the provisions for curing a Transmission Customer default contained elsewhere in the ISO Tariffs, a Transmission Customer whose previous default resulted in a Schedule 1 bad debt loss charge to other Transmission Customers must (i) cure such default by payment to the ISO of all outstanding and unpaid obligations and (ii) meet all ISO minimum participation criteria, registration requirements, and creditworthiness requirements, including posting of required collateral, prior to being re-admitted by the ISO to participate in the New York wholesale energy markets.⁸⁸

■ The definition of "Transmission Customer" in NYISO's OATT does not indicate whether and when an entity seeking to register and a previously registered entity should be treated as the same entity.⁸⁹ Thus, we find that Section 27.4 neither explicitly supports nor prohibits NYISO's decision to treat LPGNY and North Energy as the same entity and thus to hold LPGNY's registration request in abeyance pending the resolution of North Energy's debts.

■ However, we may look to relevant Commission precedent addressing the conditions under which the Commission may regard two entities as a single entity—sometimes referred to as the "single entity theory"—to inform our decision. In particular, the Commission has found that:

The general rule applicable to our determination is that an agency may disregard the corporate form in the interest of public convenience, fairness, or equity. This principle of

⁸⁸ NYISO, OATT, Attachment U, § 27.4 (0.0.0).

⁸⁹ *See supra* note 7.

allowing agencies to disregard corporate forms is flexible and practical in nature. Corporations may be regarded as one entity for the purposes with which the agency is immediately concerned even though they are legitimately distinct for other purposes. Moreover, no bad intention on the part of the corporations is necessary; the inquiry is simply a question of whether the statutory purposes would be frustrated by the corporate form.⁹⁰

On this record, we find it reasonable to treat LPGNY as effectively the same entity as North Energy under the single entity theory. Our decision, we emphasize, does not rely on the application of “successor liability” that LPGNY alleges is the basis of NYISO’s actions.

■ LPGNY’s primary argument in defense of its and North Energy being treated separately is that LPGNY and North Energy are separate corporate entities, and NYISO recognizes that LPGNY and North Energy are separate LLCs.⁹¹ However, as explained above, the Commission has disregarded corporate form “in the interest of public convenience, fairness, or equity” and considered two entities as effectively one when necessary to fulfill the Commission’s statutory and regulatory goals. While there is no specific test for when the single entity theory should be employed, the Commission has

⁹⁰ *Town of Highlands*, 37 FERC at 61,356 (footnotes omitted); *see also Transcontinental Gas Pipe Line Corp.*, 58 FERC ¶ 61,023, at 61,045 (1992), *aff’d sub nom. Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d at 1320. In *Town of Highlands*, the Commission rejected a request by Nantahala Power and Light Company (Nantahala), a wholly owned subsidiary of Aluminum Company of America (Alcoa), to reinstate depreciation expenses in its rates, finding that Nantahala failed to show that the expenses remained unrecovered by Alcoa. In making its determination, the Commission expressly rejected arguments that it needed to determine whether it was appropriate to pierce the corporate veil. *Town of Highlands*, 37 FERC at 61,355-56. Rather, the Commission applied the single entity theory, stating, “[o]ur decision on this issue relies instead on the broad authority of an agency to look beyond a subsidiary to its owner to achieve the agency’s statutory mandate and to assure that statutory purposes are not frustrated.” *Id.* at 61,356.

⁹¹ NYISO Answer at 8.

focused on such factors as the interconnectedness of the business relationships.⁹² We find that NYISO's decision to treat LPGNY as the same entity as North Energy is reasonable in light of the record, particularly the close overlap in not only those entities' relevant personnel, but also their business activities. Namely, both entities have the same contacts and administrators, similar addresses, are engaged in the same business in the same territory, and seek to serve the same customers.⁹³ As noted above, NYISO submitted affidavits detailing the roles of the principal figures in both North Energy and LPGNY, stating that Abe Leiber, Jack Klein, and Hindy Gruber are contacts and/or administrators for both companies and have similar roles in each company.⁹⁴ LPGNY does not dispute that it has the same contacts and administrators or that LPGNY intends to serve the same customers in the same market as North Energy.⁹⁵ NYISO also states that, although LPGNY was established as a company several years ago, LPGNY did not begin engaging in business until North Energy defaulted on its NYISO obligations.⁹⁶ Thus, we find that, in these factual circumstances, it is reasonable to disregard North Energy's and LPGNY's separate corporate forms to ensure that an entity that had incurred debts could not shift its business activities into a different corporate entity to continue to do business while avoiding paying those debts.

■ Moreover, treating LPGNY and North Energy as the same Transmission Customer is consistent with the Commission's goals in the *Policy Statement on Electric Creditworthiness*, i.e., to protect the organized wholesale electric markets, and ultimately customers, from default by market participants. In that policy statement, the Commission stated that RTOs and ISOs essentially serve as gatekeepers and that "the goal of reducing [] mutualized

⁹² See, e.g., *Town of Highlands*, 37 FERC at 61,355-56, 61,359; *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d at 1320.

⁹³ NYISO Answer at 7, Attachment III Davies Aff. ¶¶ 8-13, Attachment II Prevratil Aff. ¶¶ 9-11.

⁹⁴ *Id.* at 7, Attachment III Davies Aff. ¶¶ 9-11.

⁹⁵ The affidavit submitted by Ms. Sheri Prevratil, the Manager, Corporate Credit in the Finance Department of NYISO, states that Mr. Abe Leiber, who had been one of the contacts for North Energy, expressed a desire to get his customers back during discussions related to LPGNY's registration application. *Id.*, Attachment II Prevratil Aff. ¶¶ 8, 10-11.

⁹⁶ *Id.* at 4, 7, Attachment III Davies Aff. ¶ 6.

default risk is an important one.”⁹⁷ The Commission further stated that ISOs/RTOs are usually non-profit entities that administer the market on behalf of market participants. In those markets, the Commission explained, credit is collectively extended to each individual market participant and, as a result, if one market participant defaults, the other market participants absorb the amount of the default.⁹⁸

■ In NYISO, defaults are socialized to other Transmission Customers pursuant to the formula in Section 27.3 of NYISO’s OATT.⁹⁹ As NYISO observes, if the term Transmission Customer in Section 27.4 of NYISO’s OATT does not include separate corporate entities that are identical “in every relevant respect” to a defaulting entity except for corporate form, then NYISO and its market participants could face additional credit risks.¹⁰⁰ Under Section 27.4 of NYISO’s OATT, defaulting entities are required to settle their outstanding debts before they can re-enter the markets. If North Energy can move on as essentially the same entity and continue participating in the markets as LPGNY without settling its outstanding debts, that is, if defaulting entities could continue doing business while at the same time walking away from their debts, it would evade the very purpose of Section 27.4, and other Transmission Customers would have to cover the losses.

■ We disagree with LPGNY’s argument that NYISO must first follow the bad debt procedures specified in Section 27.1 prior to denying LPGNY entry into the NYISO markets. Section 27 of NYISO’s OATT, which describes the process by which NYISO declares and recovers a bad debt loss, gives NYISO wide latitude in pursuing cost-recovery measures that may minimize or avoid a bad debt loss. NYISO’s OATT states that, when NYISO’s Chief Financial Officer “concludes that the ISO does not reasonably expect payment in full from a defaulting Transmission Customer within an acceptable time period,” then the Chief Financial Officer “shall declare that the net unpaid obligation is a bad debt loss that requires recovery by the ISO . . . through a Schedule 1 charge, and

⁹⁷ *Policy Statement on Electric Creditworthiness*, 109 FERC ¶ 61,186 at PP 18-19 (noting that credit exposure is not truly under a market participant’s control because it is the ISO/RTO that serves as the gatekeeper for the integrity of the markets they administer).

⁹⁸ *Id.* PP 5, 17.

⁹⁹ NYISO, OATT, Attachment U, § 27.3 (0.0.0) (providing that the amount of bad debt loss shall be allocated *pro rata* to all Transmission Customers).

¹⁰⁰ NYISO Answer at 8.

(continued ...)

the ISO shall pursue available remedies for customer defaults under the ISO Tariffs.”¹⁰¹ Next, NYISO must give notice to market participants of its intent to declare a bad debt loss.¹⁰² Although NYISO’s OATT then describes the steps NYISO “will ordinarily take” to recover the bad debt,¹⁰³ the OATT expressly provides that NYISO “may deviate from [this] sequence of steps . . . or pursue alternative cost-recovery measures, if it determines that doing so would be more likely to minimize the size of, or avoid, a bad debt loss.”¹⁰⁴

■ Contrary to LPGNY’s assertions,¹⁰⁵ the prohibition against *post hoc* rationalizations by administrative agencies does not apply to NYISO. The cases LPGNY cites refer to agency action and agency decision-making;¹⁰⁶ as the respondent in a complaint proceeding, NYISO is not held to the “arbitrary and capricious” standard provided in the Administrative Procedure Act.¹⁰⁷ Moreover, LPGNY has had an opportunity to respond to, and has responded to, NYISO’s assertions in this proceeding, providing it with any necessary due process.

■ Finally, to avoid such situations in the future, we encourage NYISO to add language to its OATT to address comparable situations, by setting forth the factors it will consider to determine whether to treat two separate entities as the same entity for purposes of Section 27.4.¹⁰⁸

¹⁰¹ NYISO, OATT, Attachment U, § 27.1 (0.0.0). ¹⁰²

Id. § 27.2.

¹⁰³ These steps include drawing on the defaulting Transmission Customer’s collateral or contributions to NYISO’s Working Capital Fund, or making claims against available loss protection insurance. *Id.* § 27.3.

¹⁰⁴ *Id.*

¹⁰⁵ LPGNY Answer at 4-6.

¹⁰⁶ *Id.* (citing, e.g., *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, at 326, 329 (D.C. Cir. 2006); *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, at 949-50 (D.C. Cir. 2009)).

¹⁰⁷ 5 U.S.C. § 706(2)(A) (2012).

¹⁰⁸ See *Policy Statement on Electric Creditworthiness*, 109 FERC ¶ 61,186 at P 11 (stating that credit criteria used by Transmission Providers should be made available to customers and the Commission to enable a determination whether credit analysis is being conducted in an appropriate and non-discriminatory manner).

The Commission orders:

The Complaint is hereby denied, as discussed in the body of this order. By
the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.