

163 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

New York Independent System Operator, Inc.

Docket Nos. ER16-120-004
EL15-37-003

ORDER ON CLARIFICATION AND REHEARING

(Issued April 23, 2018)

1. On February 19, 2015, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)¹ to direct the New York Independent System Operator, Inc. (NYISO) to submit tariff revisions governing the retention of and compensation to generating units needed for reliability, including procedures for designating such resources, the rates, terms, and conditions for reliability must run (RMR) service, provisions for the allocation of costs of RMR service, and a *pro forma* agreement for RMR service.² On April 21, 2016, the Commission accepted in part, subject to condition, and rejected in part NYISO's first compliance filing, and directed further compliance.³ On November 16, 2017, the Commission accepted, subject to condition, NYISO's second compliance filing, and directed further compliance.⁴ This order addresses Entergy Nuclear Power Marketing, LLC's (Entergy) request for clarification or, in the alternative, rehearing, of the Second Compliance Order. As discussed below, we grant in part, and deny in part, clarification and rehearing. We also direct NYISO to submit a further compliance filing, within 30 days of the date of this order, as discussed below.

¹ 16 U.S.C. § 824e (2012).

² *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, at P 4 (2015) (RMR Order), *order on reh'g & compliance*, 155 FERC ¶ 61,076 (2016) (First Compliance Order), *order on reh'g & compliance*, 161 FERC ¶ 61,189 (2017) (Second Compliance Order).

³ First Compliance Order, 155 FERC ¶ 61,076 at P 1.

⁴ Second Compliance Order, 161 FERC ¶ 61,189 at P 1.

I. Background

2. In the RMR Order, the Commission, acting under FPA section 206, found that NYISO's Market Administration and Control Area Services Tariff (Services Tariff) is unjust and unreasonable because it does not contain provisions governing the retention of and compensation to generating units needed for reliability.⁵ The Commission stated that it was "fundamental to the proper and efficient operation of NYISO's markets" for the rates, terms, and conditions for services provided under RMR agreements to be on file.⁶ Among other things, the Commission directed NYISO to establish "a clear timeline by which NYISO will notify the generation owner that its unit is required for reliability, or, alternatively, determine that the deactivation will not impact reliability and the unit can be deactivated as planned."⁷

3. In the First Compliance Order, the Commission accepted in part, subject to condition, and rejected in part NYISO's first compliance filing, and directed further compliance.⁸ Relevant here, the Commission rejected NYISO's proposed timeline for its RMR process in light of rejecting NYISO's proposal to situate its RMR process within an existing reliability planning process (i.e., the Gap Solution process). The Commission therefore directed NYISO to propose a new timeline, and stated that it would "address outstanding concerns regarding the timeline for the RMR process . . . when NYISO's revised proposal is before the Commission."⁹ In addition, the Commission accepted NYISO's proposal to require deactivating generators to provide certain financial information at the same time that they submit their generator deactivation notice, reasoning that the information requirements are consistent with those "NYISO currently imposes on deactivating generators so NYISO can analyze market power considerations."¹⁰ The Commission noted that NYISO proposed to use the information "to monitor its markets and competitive market behavior."¹¹

4. In the Second Compliance Order, the Commission accepted, subject to condition, NYISO's second compliance filing establishing the Generator Deactivation Process

⁵ RMR Order, 150 FERC ¶ 61,116 at PP 1, 4.

⁶ *Id.* P 9.

⁷ *Id.* P 13 (citations omitted).

⁸ First Compliance Order, 155 FERC ¶ 61,076 at P 1.

⁹ *Id.* P 63.

¹⁰ *Id.* P 64 (citations omitted).

¹¹ *Id.*

(NYISO's RMR process), and directed further compliance.¹² With regard to the timeline, the Commission accepted NYISO's proposal to require deactivating generators to provide a minimum of 365 days' notice of deactivation.¹³ In addition, the Commission addressed NYISO's request for clarification of how it should proceed if it received a generator deactivation notice between the First Compliance Order (issued in April 2016) and when it submitted its second compliance filing (in September 2016). NYISO proposed to "generally follow the timetable and procedures for evaluating generator deactivation notices that it proposed in its [first] compliance filing," including "tak[ing] up to 120 days to review market power concerns."¹⁴ The Commission ruled that NYISO's request for clarification was rendered moot by the Second Compliance Order, which accepted the majority of NYISO's Generator Deactivation Process. The Commission went on to note, however, that "to the extent NYISO has received a generator deactivation notice between the Commission's issuance of the [First Compliance] Order and this order . . . NYISO's proposed interim process is appropriate."¹⁵

5. According to the provisions in NYISO's Open Access Transmission Tariff (OATT) that the Commission has accepted, a deactivating generator must provide NYISO with at least 365 days' notice of deactivation.¹⁶ NYISO will notify a deactivating generator within 90 days of its notice being complete whether deactivating would create a reliability need.¹⁷ If deactivating would not create a reliability need, or any need created could be addressed in NYISO's biennial reliability planning process, the Generator Deactivation Process "will conclude."¹⁸ If such a generator wants to deactivate earlier than the end of the 365-day notice period, it can do so once NYISO notifies it that it has "completed all required [NYISO] administrative processes and procedures" (but no earlier than day 91).¹⁹

¹² Second Compliance Order, 161 FERC ¶ 61,189 at P 1.

¹³ *Id.* P 29.

¹⁴ *Id.* P 102.

¹⁵ *Id.* P 103.

¹⁶ NYISO, OATT, Attach. FF, § 38.3.1 (0.0.0).

¹⁷ *Id.* § 38.3.4.3.

¹⁸ *Id.*

¹⁹ *Id.* § 38.3.6; *see also* Second Compliance Order, 161 FERC ¶ 61,189 at P 33 (accepting this proposed "off ramp").

6. Until deactivation, the deactivating generator has a continuing obligation to submit additional information to NYISO in connection with its “assessment of market impacts under Section 23 of Attachment H of the ISO Services Tariff,” which governs market power reviews of deactivating generators and generators seeking to de-rate their available capacity.²⁰ Section 23.4.5.6 of the Services Tariff provides that any proposal to deactivate an installed capacity supplier, or to de-rate available capacity, where that generator is located in the zones subject to NYISO’s capacity market power mitigation measures, “may be subject to audit and review by the ISO if the ISO determines that such action could reasonably be expected to affect” market clearing prices in the New York City capacity market.²¹ In other words, NYISO has discretion in determining whether to complete a market power review. If NYISO decides to complete a market power review, such “review shall assess whether the proposal or decision has a legitimate economic justification or is based on an effort to withhold Installed Capacity physically in order to affect prices.”²² If NYISO determines that the generator is physically withholding capacity, and that behavior would increase market clearing prices in the New York City capacity market by five percent or more (and is at least \$0.50/kW-month), NYISO will assess “an amount up to 1.5 times the market clearing price . . . for each month during which Installed Capacity was withheld, times the total of (1) the number of [MW] withheld in each month and (2) all other [MW] of Installed Capacity in the New York City [capacity market] under common Control with such withheld [MW].”²³ The generator must continue to pay such amounts until it demonstrates that the deactivation or de-rate is justified by economic considerations other than the effect of such action on market clearing prices in the New York City capacity market.

II. Request for Clarification or, in the Alternative, Rehearing

7. On December 18, 2017, Entergy filed a request for clarification or, in the alternative, rehearing of the Second Compliance Order. Entergy explains that, on January 8, 2017, it entered into a settlement agreement with the State of New York and other parties that defines the timing, terms, and conditions for the deactivation of the Indian Point Energy Center (Indian Point) by April 30, 2020 (Unit 2) and April 30, 2021 (Unit 3). Entergy states that, to provide for the orderly shutdown of these nuclear facilities and to give NYISO and stakeholders the opportunity to make plans in response, Entergy submitted a generator deactivation notice for Indian Point to NYISO well in advance of NYISO’s required 365-day notice requirement. According to Entergy,

²⁰ NYISO, OATT, Attach. FF, § 38.3.1.6 (0.0.0).

²¹ NYISO, Services Tariff, Attach. H, § 23.4.5.6 (0.0.0).

²² *Id.*

²³ *Id.*

NYISO deemed the generator deactivation notice complete on November 13, 2017, three days before the Commission issued the Second Compliance Order.²⁴ Entergy explains that, on December 13, 2017, NYISO issued its reliability assessment of the Indian Point deactivation, which found no reliability need for Indian Point if Entergy deactivates the units as planned. The reliability assessment states that “Entergy has satisfied the applicable requirements under” NYISO’s Generator Deactivation Process to retire “on or after its requested deactivation date,” and “[t]his concludes the” Generator Deactivation Process.²⁵ In a footnote, the reliability assessment notes that Entergy “must complete all required NYISO administrative processes and procedures prior to deactivation” and is not relieved “of any obligations it has with respect to its participation in the NYISO’s markets.”²⁶

8. Entergy requests clarification that the deadline for NYISO to complete its final market power review of the Indian Point deactivation (if deemed warranted) is March 13, 2018 (i.e., 120 days after receiving the complete generator deactivation notice). Entergy argues that requiring NYISO to complete the final market power review of the Indian Point deactivation within 120 days is consistent with: NYISO’s express statements concerning the point in the process when it plans to conduct, and the time it requires to complete, this analysis; the Commission’s orders in this proceeding; and the Commission’s policy objective of ensuring an orderly, well-defined, and transparent procedure for generator deactivations in New York.²⁷

9. With regard to NYISO’s statements, Entergy states that NYISO presented its proposal regarding final market power reviews in three stakeholder meetings, during which NYISO described the need for certain financial information and the process it would undertake to complete final market power reviews, and explained that these reviews would only apply to generators in mitigated capacity zones.²⁸ Entergy points

²⁴ Entergy Request for Rehearing at 2, 9–10.

²⁵ *Id.* at 11 (quoting NYISO, *Generator Deactivation Assessment: Indian Point Energy Center*, at 5 (Dec. 13, 2017), available at http://www.nyiso.com/public/webdocs/media_room/press_releases/2017/Child-Indian-Point-Energy-Center-Retirement-Analysis/Indian_Point_Generator_Deactivation_Assessment_2017-12-13.pdf).

²⁶ *Id.* (quoting NYISO, *Generator Deactivation Assessment: Indian Point Energy Center*, at 5 n.7 (Dec. 13, 2017), available at http://www.nyiso.com/public/webdocs/media_room/press_releases/2017/Child-Indian-Point-Energy-Center-Retirement-Analysis/Indian_Point_Generator_Deactivation_Assessment_2017-12-13.pdf).

²⁷ *Id.* at 3.

out that, in one presentation NYISO made before submitting its first compliance filing, NYISO stated that it “requires a minimum of 4 months after the submission of a complete notice to perform the [reliability] assessment and to review for possible physical withholding.”²⁹ According to Entergy, in its first compliance filing, NYISO confirmed that it would perform final market power reviews within 120 days of the generator deactivation notice, emphasizing in response to protests that it was an integral part of the Generator Deactivation Process and must be completed within the first 120 days “to provide transparency regarding potential penalties that the Generator could be subject to if it were to deactivate and to enable the NYISO to address any market power concerns.”³⁰ Entergy states that NYISO specified that it would “begin performing its analysis regarding whether a Generator’s proposed deactivation raises market power concerns . . . promptly following a Generator’s submission of its completed” generator deactivation notice.³¹ Entergy notes that NYISO did not incorporate the 120-day deadline into its “extensive tariff revisions” in its first compliance filing.³² Entergy then points to NYISO’s request for clarification of the First Compliance Order, in which Entergy contends that NYISO sought acceptance of a 120-day period to complete final market power reviews for generator deactivation notices received in the interim.³³

10. Entergy contends that the Commission accepted the 120-day deadline in both the First and Second Compliance Orders, and determined that NYISO’s proposed interim process (which included the 120-day deadline) was appropriate.³⁴ Entergy points out that the Commission explicitly accepted NYISO’s proposed financial information requirements, effective October 20, 2015, and argues that, while not named specifically, Commission approval of the reliability assessment and market power review provisions “derives from the references to the purposes of these provisions and from the Commission’s blanket approval statement addressing the” first compliance filing.³⁵

²⁸ *Id.* at 5–6. Entergy attached the relevant NYISO presentations to its request as part of Appendix A.

²⁹ *Id.* at 12 (quoting NYISO, Presentation, *NYISO’s Reliability Must Run Compliance Filing: NYISO Proposal*, at 9 (June 24, 2015)).

³⁰ *Id.* at 6 (quoting NYISO December 21, 2015 Answer at 27).

³¹ *Id.* at 6–7 (quoting NYISO December 21, 2015 Answer at 27 n.84).

³² *Id.* at 6 n.14.

³³ *Id.* at 12 (citing NYISO May 23, 2016 Request for Rehearing and Clarification at 15).

³⁴ *Id.* at 13.

Entergy contends that, in its second compliance filing, NYISO did not seek to modify the reliability assessment or the market power review deadlines that the Commission approved in the First Compliance Order.³⁶

11. Alternatively, Entergy seeks rehearing, arguing that NYISO's Generator Deactivation Process cannot be just and reasonable without a clear deadline set early in the overall process for NYISO to complete any final market power review deemed warranted.³⁷ Entergy points to the Commission's statements in the RMR Order that NYISO must propose a transparent RMR process.³⁸ Entergy also cites to NYISO statements that final market power reviews must be performed at the start of the Generator Deactivation Process so that deactivating generators can assess their exposure to potential penalties and NYISO can address any market power concerns.³⁹

III. Procedural Matters

12. Rule 713(d) of the Commission's Rules of Practice and Procedure⁴⁰ prohibits an answer to a request for rehearing. Accordingly, we deny NYISO's and Independent Power Producers of New York, Inc.'s motions to answer and reject their answers to Entergy's request for clarification or, in the alternative, rehearing, and deny Entergy's motion to answer and reject its answer to NYISO's answer.

IV. Substantive Matters

13. We grant in part, and deny in part, clarification and rehearing, and require NYISO to submit a compliance filing, as discussed below. We grant in part clarification and clarify that the interim process applies to the Indian Point deactivation, but deny in part clarification insofar as Entergy asks that the Commission require NYISO to complete the final market power review of the Indian Point deactivation, if needed, by March 13, 2018 (i.e., 120 days after receiving the complete generator deactivation notice). As explained further below, there is neither a 120-day deadline in the interim process nor in the Generator Deactivation Process. However, while the interim process does not contain a

³⁵ *Id.* at 7 & n.17 (citing First Compliance Order, 155 FERC ¶ 61,076 at PP 15, 63–64).

³⁶ *Id.* at 9 (citing NYISO September 19, 2016 Compliance Filing at 3, 14).

³⁷ *Id.* at 3–4.

³⁸ *Id.* at 14 (citing RMR Order, 150 FERC ¶ 61,116 at P 13).

³⁹ *Id.* at 15 (citing NYISO December 21, 2015 Answer at 27 & n.84).

⁴⁰ 18 C.F.R. § 385.713(d) (2017).

120-day deadline, we are persuaded that there is a need for clarity and transparency surrounding final market power reviews. Thus, we grant in part rehearing to require NYISO to propose revisions to its OATT and/or Services Tariff to establish a timeline for completing final market power reviews of deactivating generators, if needed, as part of its Generator Deactivation Process. We direct NYISO to submit a further compliance filing, within 30 days of the date of this order, consistent with the guidance below.

14. First, we acknowledge that the Second Compliance Order was unclear as to when the interim process would apply and thus, we clarify that the interim process applies to the Indian Point deactivation. In particular, in its request for clarification, NYISO described the interim process as applying between the First Compliance Order (issued April 21, 2016) and when NYISO made its second compliance filing (filed September 19, 2016).⁴¹ In the Second Compliance Order, however, the Commission described the interim process as applying “between the Commission’s issuance of the [First Compliance Order] and this order” (meaning the Second Compliance Order).⁴² We clarify here that the relevant time period is between the First and Second Compliance Orders because that is the time period between the Commission’s acceptance of a portion of NYISO’s Generator Deactivation Process and the Commission’s acceptance of the majority of NYISO’s Generator Deactivation Process. Entergy submitted the Indian Point generator deactivation notice during this time period, and therefore, the interim process applies to the Indian Point deactivation.

15. Nevertheless, we deny in part clarification and rehearing insofar as Entergy asks that the Commission require NYISO to complete the final market power review of the Indian Point deactivation, if needed, by March 13, 2018 (i.e., 120 days after receiving the complete generator deactivation notice) because there is neither a 120-day deadline in the interim process nor in the Generator Deactivation Process. In its first compliance filing, citing to existing Services Tariff section 23.4.5.6, NYISO stated that it would “evaluate the economic justification of the deactivation of Generators in Mitigated Capacity Zones” (i.e., complete a final market power review, if needed) concurrently with evaluating alternatives to entering into an RMR agreement, which NYISO stated would require 120 days.⁴³ In its request for clarification of the First Compliance Order, NYISO proposed as an interim process “to generally follow the timetable and procedures . . . that was proposed in its original Compliance Filing[, t]hat is, the NYISO would . . . take

⁴¹ NYISO May 23, 2016 Request for Rehearing and Clarification at 15 (“This raises the question of how NYISO should proceed if it receives a Generator Deactivation Notice before it submits a second compliance filing that contains the revised deactivation review process tariff rules.”).

⁴² Second Compliance Order, 161 FERC ¶ 61,189 at P 103.

⁴³ NYISO October 19, 2015 Compliance Filing at 16.

up to 120 days to review market power concerns”⁴⁴ In neither instance did NYISO describe the 120 days as a deadline, and, more importantly, NYISO never proposed to put this timeline into its OATT or Services Tariff. Commission precedent holds that in the event of a conflict between pleadings and proposed tariff language, the tariff language controls.⁴⁵ For these reasons, we find that there is not a 120-day deadline in the interim process or in the Generator Deactivation Process.

16. Although we find that there is no 120-day deadline for NYISO to perform final market power reviews of deactivating generators, we grant in part rehearing to require NYISO to propose revisions to its OATT and/or Services Tariff to establish a timeline for completing final market power reviews (if needed) to provide greater transparency and certainty to deactivating generators and the NYISO-administered wholesale markets, consistent with the purpose of this proceeding. The Commission has emphasized throughout this proceeding the need for a clear and transparent Generator Deactivation

⁴⁴ NYISO May 23, 2016 Request for Rehearing and Clarification at 15.

⁴⁵ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,149, at P 25 (2013) (citations omitted).

Process.⁴⁶ In particular, in the initial RMR Order, the Commission required NYISO to “include a clear timeline by which NYISO will notify the generation owner that its unit is required for reliability, or alternatively, determine that the deactivation will not impact reliability *and the unit can be deactivated as planned.*”⁴⁷ NYISO has failed to do the latter because, although NYISO’s OATT states that it will determine whether a generator is needed for reliability within the first 90 days after the generator gives notice of its intent to deactivate,⁴⁸ neither NYISO’s OATT nor Services Tariff provide a timeline for NYISO to complete a final market power review (if needed), which impacts the ability of that generator to “be deactivated as planned.” The inability of a deactivating generator to know the point at which NYISO will complete the final market power review (if needed), and therefore assess the likelihood that it will be subject to charges under Services Tariff section 23.4.5.6, could impede the generator’s ability to make informed decisions about deactivating.⁴⁹

17. We require NYISO to propose a reasonable timeline for completing final market power reviews (if needed), as the 120-day timeline is not supported in the record. This timeline will not apply to the Indian Point deactivation because, as clarified herein, Entergy submitted the generator deactivation notice for Indian Point when the interim process was in effect. In recognition of the variability in the amount of advance notice

⁴⁶ RMR Order, 150 FERC ¶ 61,116 at P 3 (“The uncertainty created for resources by the lack of clear tariff provisions has the potential to exacerbate the very concerns an RMR service is meant to address – ensuring the continued reliable and efficient operation of the grid, and of NYISO’s markets.”).

⁴⁷ *Id.* P 13 (emphasis added); *see also* First Compliance Order, 155 FERC ¶ 61,076 at P 63 (directing NYISO to propose a “timeline that reflects the new RMR process” required by that order and stating that the Commission would “address outstanding concerns regarding the timeline for the RMR process . . . when NYISO’s revised proposal is before the Commission”); Second Compliance Order, 161 FERC ¶ 61,189 at PP 29, 33 (discussing NYISO’s proposed 365-day notice period and “off ramp” for deactivating generators not needed for reliability to deactivate before the end of the 365-day notice period).

⁴⁸ NYISO, OATT, Attach. FF, § 38.3.4.3 (0.0.0).

⁴⁹ Until deactivation, the deactivating generator has a continuing obligation to submit additional information to NYISO in connection with its “assessment of market impacts under Section 23 of Attachment H of the ISO Services Tariff,” including section 23.4.5.6, which could subject the deactivating generator to charges. NYISO, OATT, Attach. FF, § 38.3.1.6 (0.0.0); *see also* NYISO, Services Tariff, Attach. H, § 23.4.5.6 (0.0.0).

a generator may give of its planned deactivation,⁵⁰ and the need to ensure that the data used in the market power review reasonably reflects the market conditions at the time of deactivation, NYISO should set a deadline for completing final market power reviews (if needed) working back from the proposed deactivation date rather than starting from the submission of a complete generator deactivation notice. This is because the final market power review may be less effective with data and assumptions too far removed from a generator's actual deactivation date. If the data and assumptions do not reflect the market conditions close to the time of deactivation, NYISO will be unable to properly "assess whether the proposal or decision has a legitimate economic justification or is based on an effort to withhold Installed Capacity physically in order to affect prices."⁵¹

The Commission orders:

(A) The request for clarification or, in the alternative, rehearing is granted in part, and denied in part, as discussed in the body of this order.

(B) NYISO is hereby directed to submit a further compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁰ A deactivating generator must provide NYISO with at least 365 days' notice of deactivation, but there is no limit on how far in advance a generator can provide this notice. NYISO, OATT, Attach. FF, § 38.3.1 (0.0.0).

⁵¹ NYISO, Services Tariff, Attach. H, § 23.4.5.6 (0.0.0).