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

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| **Light Power & Gas of NY LLC** | ) | |
| **Complainant** | ) | **Docket No. EL19-39-000** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **New York Independent System Operator, Inc.** | ) | |
| **Respondent** | ) | |

**MOTION TO REJECT OF THE**
**NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

In accordance with Rule 212 of the Commission's Rules of Practice and Procedure,[1] the New York Independent System Operator, Inc. respectfully moves that the Commission reject Light Power & Gas of NY LLC's ("LPG") untimely[2] *Answer in Opposition to Answer of the New York Independent System Operator, Inc.* ("LPG Answer"). The Commission only permits answers to answers that provide information that will assist the Commission, clarify the issues in a proceeding, correct inaccuracies, or otherwise aid the development of the record.[3] The LPG Answer patently fails to meet these standards. The NYISO highlights several of its most serious defects below.[4] Because the LPG Answer only serves to obfuscate the issues and distort the record in this proceeding, it should be rejected.

[1] 18 C.F.R. §385.212 (2018).

[2] The LPG Answer was filed sixty five days after the NYISO filing that it addresses (the LPG Answer is dated April 24 but was assigned an April 25 filing date). LPG has offered no explanation for its delay.

[3] *See, e.g., New York Independent System Operator Inc.*, 133 FERC ¶ 61, 178 at P 11 (2011) (allowing answers to answers and protests "because they have provided information that have assisted [the Commission] in [its] decision-making process"); *Morgan Stanley Capital Group, Inc. v, New York Independent System Operator, Inc.*, 93 FERC ¶ 61,036 (2000) (accepting an answer that was "helpful in the development of the record…"); *Cent. Hudson Gas & Elec. Corp.*, 88 FERC ¶ 61,138, at 61,381 (1999) (accepting otherwise prohibited pleadings because they helped to clarify complex issues).

[4] The fact that the NYISO has not identified all of the LPG Answer's many defects in this motion should not be construed as agreement with or acceptance of any of LPG's arguments or assertions.

The LPG Answer makes multiple claims that are based on fundamental legal errors. For example, LPG wrongly asserts that it has been treated unfairly because the NYISO's February 19 Answer to its complaint ("NYISO Answer") included points that the NYISO had not discussed with LPG before this proceeding began.[5] But the NYISO, like any other potential respondent to a complaint, is under no obligation to make its case in advance. The NYISO is not a governmental entity and is not required to provide "administrative due process"[6] in its communications with stakeholders. To the contrary, respondents are required to dispute factual allegations and raise legal defenses in their answers;[7] not before. Beyond having no basis in Commission procedure or practice, it would be unjust to punish the NYISO's good faith attempts to informally discuss LPG's concerns before LPG filed a complaint by estopping the NYISO from defending itself in its answer. Precedents holding that the Commission's orders may not be upheld by appellate courts based solely on "*post hoc rationalizations*" offered for the first time on appeal plainly do not apply to answers to complaints.[8] Decisions rejecting attempts to raise arguments for the first time at the rehearing stage of a proceeding are likewise inapplicable to answers to complaints.[9]

[5] *See, e.g.,* LPG Answer at 3.

[6] *See LPG Answer* at 4, 6, 9, 31.

[7] *See* 18 C.F.R. §385.213(c) (2018).

[8] *See* LPG Answer at 1, Courts reject "post hoc rationalizations" advanced for the first time by agency counsel on appeal because federal agencies have an obligation under the Administrative Procedure Act to include reasoned explanations of their decisions in their orders. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (limiting a reviewing court to "the grounds invoked by the agency" when judging the "propriety" of a "determination or judgment which the administrative agency alone is authorized to make"). By contrast, the NYISO Answer is a pleading that the Commission will consider before issuing an order.

[9] S*ee* LPG Answer at 3.

The LPG Answer also contains many inaccurate assertions and mischaracterizations that confuse, not clarify, the record in this case. It alleges that the NYISO has: (i) sought to "unilaterally impose successor liability principles" under its Open Access Transmission Tariff ("OATT"); (ii) has acted in a "self-interested" manner as both a "creditor" of LPG and an "administrative agency" that failed to provide due process; and (iii) deprived LPG of its right to a jury trial under the Seventh Amendment to the United States Constitution. As the NYISO Answer explained, while the considerations underlying the successor liability doctrine support the NYISO's actions, the NYISO appropriately relied on the plain language of Section 27.4 of the OATT to treat LPG and North Energy as the same Transmission Customer.

In addition, the NYISO has not acted in a "self-interested" way. The NYISO is a neutral, not-for-profit market administrator that does not have a traditional creditor-debtor relationship with LPG or any financial "self-interest" relative to LPG. Its sole interest in this context is in protecting other market participants from unreasonable credit risks, such as shifting a bad debt loss from a defaulting market participant like North Energy to non-defaulting participants. As noted, the NYISO is not a government agency, let alone a "self-interested" one. LPG has no right to a jury trial on tariff interpretation issues that fall within the Commission's jurisdiction and that LPG itself has presented to the Commission by filing its complaint.

Finally, there is no merit to LPG's claim that the NYISO Answer violated an "interpretative rule" that requires a party to concede that a tariff provision is ambiguous before offering extrinsic evidence to help the Commission resolve a potential ambiguity. LPG's position is based on its interpretation of a 1991 Commission order concerning a disputed rate settlement.[10] That order provided general guidance that parties to contractual disputes before the

[10] *See* LPG Answer at 14-15 and n. 34.

Commission should indicate whether they believed particular contractual language was clear or ambiguous and promptly make their case.[11] To the extent that this guidance even applies in the context of this proceeding,[12] the NYISO has done exactly what the 1991 order suggested. The NYISO Answer explained that the NYISO believed that its tariff authority was clear and that its actions were justified based on the express language of its tariff (without any need for extrinsic evidence).[13] The NYISO specified that it was entirely appropriate to treat LPG and North Energy, LLC as the same "Transmission Customer" under Section 27.4 of the NYISO OATT because LPG had the same principals, sought to enter the same business, and was pursuing the same customers as North Energy. In particular, the NYISO showed, and the LPG Answer does not deny, that LPG's principal stated that he was seeking to re-enter the market "to get my customers back."[14] The NYISO then, appropriately, argued in the alternative that if the Commission took a different view and concluded that Section 27.4 was ambiguous as to whether

[11] *See South Carolina Elec. & Gas Co.*, 56 FERC ¶ 61,379 at 62,440 (1991) ("One additional comment of a general nature for the guidance of parties to future cases is in order. In the future, if parties believe that a contract or particular contractual language in dispute is unambiguous, we will expect them to clearly say so and so state why they believe it to be so. Likewise, if they instead believe that that there is such an ambiguity, we will expect them to clearly say so and to state why they believe it to be so. Moreover, we will expect parties to immediately proffer the extrinsic evidence they believe supports their view.")

[12] Shortly after it issued the 1991 order, the Commission clarified in the same proceeding that a principal purpose of its 1991 guidance was to "to advise parties that if they desire a trial-type evidentiary hearing concerning a contract's interpretation, they must clearly state that the contract at issue is ambiguous, necessitating a trial-type evidentiary hearing, and they must submit sufficient extrinsic evidence in support so that the Commission can determine that there are, in fact, genuine issues of material fact in dispute warranting such a hearing." *South Carolina Elec. & Gas Co.*, 59 FERC ¶ 61,050 at 61,119 (1992). The Commission also noted that its guidance "simply requires that, at the pleading stage of a proceeding, a party provide what it is relying upon in support of its interpretation as the basis for a trial-type evidentiary hearing (rather than make vague or unsupported allegations), so that the Commission may properly determine whether such a hearing is truly warranted." *Id.* at 61,220. The underlying concern that parties seeking trial type hearings over contract disputes must first make an adequate showing that such a process is not implicated by the NYISO Answer.

[13] *See* NYISO Answer at Section II.A.

[14] *See* NYISO Answer at Attachment II (the Prevratil Affidavit) at PP 10 and 11.

the NYISO had authority to treat LPG and North Energy as the same "Transmission Customer" that it should, consistent with its precedent, look to extrinsic evidence.[15] The NYISO then explained why extrinsic evidence overwhelmingly supported the NYISO's position. It is common for parties to make arguments in the alternative in Commission proceedings and it was entirely appropriate for the NYISO to do so here. Contrary to what LPG claims, there is no prohibition against this practice and the Commission's 1991 guidance should not be misconstrued as barring the NYISO from making an argument in the alternative.

In short, the LPG Answer is replete with legal errors and factual misstatements. It falls far short of satisfying the standards that the Commission requires of answers to answers. Indeed, it only serves to distort, not enhance, the record. The NYISO therefore respectfully moves that the LPG Answer be rejected.

Respectfully Submitted,

*/s/ Ted J. Murphy*

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Dated: May 20, 2019

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[15] *See* NYISO Answer at Section II.B.

**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.

Dated at Rensselaer, NY this 20th day of May, 2019.

*/s/ Mohsana Akter*

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