UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. ER10-2210-000

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

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"),[1] the New York Independent System Operator, Inc. ("NYISO"), hereby submits this motion for leave to answer and answer to the protest filed by the Incumbent Suppliers[2] and the comments filed by the New York Transmission Owners ("NYTOs")[3] to the NYISO's August 12, 2010 compliance filing ("August Compliance Filing")[4] in response to the Commission's May 20, 2010 order in these proceedings ("May 20 Order").[5]

As is discussed in greater detail below, the Commission should reject the Incumbent Suppliers' protest because it mischaracterizes the Commission directives in the May 20 Order regarding: 1) the penalty for Pivotal Supplier physical withholding for failures to offer Capacity; and 2) the criteria for determining what payments or other benefits should be included in the

---

[1] 18 C.F.R. §§ 385.212, 385.213 (2010).

[2] The Incumbent Suppliers are all owners of existing generation facilities located in New York City. They are: Astoria Generating Company, L.P., a US Power Generating Company; GDF SUEZ Energy North America, Inc.; TransCanada Power Marketing Ltd.; and TC Ravenswood, LLC.

[3] The New York Transmission Owners are: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Long Island Power Authority; New York Power Authority; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation d/b/a National Grid; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

[4] Due to issues with the eTariff software, the August 12, 2010 compliance filing was withdrawn and resubmitted on August 23, 2010. No substantive modifications were made to the contents of the compliance filing.

[5] *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,170 (2010) ("May 20 Order").

Special Case Resource[6] ("SCR") Offer Floor. The Commission should likewise reject the NYTOs' comments regarding the potential for economic withholding in New York City ("In-City") during the winter months. The NYISO possesses the ability to address the NYTOs concerns.

I. Request for Leave to Answer

The NYISO, as a matter of right, may answer the NYTOs comments because the Commission's procedural rules allow responses to comments. However, the NYISO requests leave to answer the Incumbent Suppliers' protest. The Commission has discretion[7] to accept answers to protests, and has done so when such answers help to clarify complex issues, provide additional information, or are otherwise helpful in the Commission's decision-making process.[8] The NYISO submits that the Commission should accept this answer because it corrects mischaracterizations by the Incumbent Suppliers and clarifies issues raised by the NYTOs.

II. Answer

A. The Commission Should Reject the Incumbent Suppliers Protest Because it Mischaracterizes the Commission's Directives in its May 20 Order and the NYISO's Proposed Tariff Modifications on the Penalty for Physical Withholding for Pivotal Supplier Failures to Offer

The Incumbent Suppliers erroneously claim that the NYISO's compliance tariff modifications proposed in an effort to equalize the penalties for uneconomic exports with penalties for physical withholding by a Pivotal Supplier associated with failures to offer are non-

---

[6] Capitalized terms not defined herein shall have the meaning set forth in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff").

[7] *See* 18 C.F.R. § 385.213(a)(2).

[8] *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…").

compliant. The Incumbent Suppliers support this erroneous claim with the rationale that these compliance tariff modifications do not extend the impact threshold applicable to uneconomic exports to encompass failures to offer. The Commission should reject the Incumbent Suppliers' protest because the proposed tariff modifications do in fact comply with the May 20 Order and the Incumbent Suppliers mischaracterize the tariff provisions on the application of penalties for Pivotal Supplier physical withholding due to failure to offer Capacity.

Paragraph 38 of the May 20 Order expressly directed the NYISO to make a very precise tariff change.[9] Specifically, the Commission directed the NYISO to file tariff revisions

> to reflect a penalty for physical withholding through a failure to offer all uncommitted ICAP into the NYISO markets in the amount of 1.5 times the difference between the clearing prices in the New York City Spot Market Auction with and without the amount (in MWs) deemed to be physically withheld from the in-City market.[10]

The NYISO complied with this directive by modifying section 23.4.5.4.2 of Attachment H to the NYISO's Services Tariff to include the specific language prescribed by the Commission.

The Incumbent Suppliers are seeking to expand the scope of P 38's mandate by revising it to also require that the NYISO apply an impact threshold on penalties for a failure to offer.[11] The Commission's May 20 Order directed no such modification, requiring only the specific tariff modification that the NYISO proposed in the August Compliance Filing. The May 20 Order, in its discussion directing the tariff changes, refers to P 163 of the September 2008 Order, which

---

[9] May 20 Order at P 38.

[10] *Id.*

[11] Specifically, the Incumbent Suppliers state that the NYISO should require that penalties for physical withholding by Pivotal Suppliers due to failures to offer only be assessed where the conduct "caused or contributed to an increase in UCAP prices in NYC greater than or equal to 15% provided such increase is at least $2.00 per kW-month." Incumbent Suppliers Protest at 20.

only discusses the method for calculating penalties, not the application of an impact threshold for the assessment of penalties.[12]

Further, the penalty for a failure to offer, as accepted by the Commission, has always been triggered solely by a Pivotal Supplier's failure to offer all applicable MWs of Capacity. If the Incumbent Suppliers are asserting that the May 20 Order should have required that an impact threshold must be applied before a penalty can be assessed, they should have requested rehearing of the Commission's determination. The Incumbent Suppliers' protest is an impermissible collateral attack on the Commission's prior determinations in these proceedings and should be rejected.

Further, the NYISO respectfully submits that a directive requiring it to apply the impact threshold before imposing penalties for failure to offer would be ill-advised because it would undermine the effectiveness of that penalty rule. The penalty for a failure to offer, as accepted by the Commission, has always been triggered solely by a Pivotal Supplier's failure to offer all applicable MW of Capacity. Adding an impact test to this existing "must offer" requirement would not impose the penalty in cases that did not meet the threshold and doing so would eviscerate the penalty, and undermine the intent of it, because any withholding by a Pivotal Supplier can have a significant adverse impact on the Capacity market.[13] The Commission accepted tariff provisions assessing penalties for any withholding through failure to offer by Pivotal Suppliers, regardless of impact.

---

[12] May 20 Order at P 38. Further, it should be noted that the May 20 Order specifically discussed the conduct and impact thresholds to be applied in determining whether to assess penalties for physical withholding through uneconomic exports, without directing the NYISO to adopt similar provisions for physical withholding by Pivotal Suppliers for failure to offer Capacity. *See New York Independent System Operator, Inc.*, 124 FERC ¶ 61,301 at PP 67-74 (2008).

[13] *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 at P 65 (2008).

B. The Commission Should Reject the Incumbent Suppliers Protest Because it Mischaracterizes the NYISO's Proposed Modifications on the Special Case Resource Offer Floor Criteria and Erroneously Asserts that the Commission's May 20 Order Required the NYISO to Analyze the Legitimacy of State Programs

The Incumbent Suppliers mischaracterize the NYISO's statements regarding its proposed tariff modifications to address the Commission's directives on the SCR Offer Floor calculation criteria.[14] The Incumbent Suppliers also incorrectly claim that the NYISO did not conduct an analysis to support its conclusion that current programs did not have an effect on the market.[15]

As the NYISO explained in its request for clarification,[16] it does not believe that the May 20 Order could reasonably be interpreted to require the NYISO to formulate criteria to assess whether state programs advance legitimate state policy goals. The Commission itself has indicated that its intention was to not "interfere with state programs that further specific legitimate policy goals"[17] and the NYISO does not believe that the May 20 Order can be read as requiring the NYISO to do something which the Commission stated it did not intend to do. As the NYISO has previously noted, such a requirement would place the NYISO in the legally untenable position of engaging in a quasi-judicial inquiry regarding whether various state initiatives "designed to achieve the important policy objectives of bolstering reliability and

[14] May 20 Order at P 136.

[15] Incumbent Suppliers Protest at 14, 16.

[16] *New York Independent System Operator, Inc.*, Request for Clarification of the New York Independent System Operator, Inc., Docket Nos. EL07-39, *et al.* and ER08-695, *et al.* (filed June 21, 2010) ("NYISO Request for Clarification"). The NYISO's request for clarification is currently pending.

[17] May 20 Order at 137.

reducing peak demand by increasing the available of demand response resources"[18] are legitimate or effective.[19]

Consequently, the August Compliance Filing proposed to modify Attachment H of the Services Tariff to apply one criterion for determining which payments or other benefits to SCRs should be included in the Offer Floor. Specifically, the proposed modification provides that:

> The Offer Floor calculation shall include any payment or the value of other benefits that are awarded for offering or supplying In-City Capacity, except for payments or the value of other benefits provided under programs administered or approved by New York State or a government instrumentality of New York State.

Under the proposed compliance language, the NYISO would include in the Offer Floor calculation any payments under third party programs that are not administered or approved by a state entity and would avoid situations where it would be required to determine whether the intentions, and policies of the programs themselves, are legitimate. Because the Incumbent Suppliers would have the NYISO engage in exactly such an evaluation, their protest should be rejected.

The Incumbent Suppliers also claim that the NYISO contradicts itself by explaining that it should not be required to evaluate the legitimacy of state programs, but then, supposedly, offers to propose appropriate tariff changes if such programs prove to actually harm the Capacity markets. In reality, the NYISO has not indicated that it will propose tariff changes to implement generic criteria to judge the legitimacy of state programs. Rather, the August Compliance Filing

---

[18] *New York Independent System Operator, Inc.*, Protest of the New York State Public Service Commission at 2-3, Docket Nos. EL07-39, *et al.* and ER08-695 (filed December 2, 2008).

[19] As explained in the NYISO's request for clarification: "Even a federal court engaged in such a review would be bound by decades of precedent establishing that state socioeconomic policies are presumed to be valid so long as 'there is any reasonably conceive state of facts' that could provide a 'rational basis' for them …[and] [i]t would be a radical departure for the NYISO, as a non-governmental entity, to engage in a more searching review of the motivations underlying state policies than a federal court." NYISO Request for Clarification at 5.

explains that in the event a program has a detrimental impact on the market, the NYISO will propose necessary modifications consistent with its obligations under the tariff.

Further, the Incumbent Suppliers claim that the NYISO did not base its criterion on any analyses. However, as the NYISO noted in its August Compliance Filing, the NYISO conducted an evaluation and found that current programs were not having a harmful impact on the Capacity market. The intent of including third party payments in the SCR Offer Floor is to prevent future uneconomic conduct from depressing market prices,[20] and the NYISO has found no adverse effects, at this time, with existing programs.[21] Allowing the NYISO to wait until a potential issue arises with respect to such a program, before proposing necessary tariff modifications is reasonable and was endorsed by the NYISO's Market Monitoring Unit ("MMU"). The NYISO's proposal will ensure that any modifications will actually address the issues created by such a program, without necessitating a review of the legitimacy of the state goals advancing the program.

In light of the foregoing demonstrating that the August Compliance Filing's proposal to exclude all current state sponsored payments or benefits in the calculation of the Offer Floor is consistent with the May 20 Order, the Commission should reject the Incumbent Suppliers' protest.[22]

---

[20] May 20 Order at P 132.

[21] As the NYISO noted in its August Compliance Filing, "the level of new SCRs sold by any one RIP has not exceeded the impact threshold … [so] even if every new SCR added by a single RIP was offered in an ICAP Auction at a level below the SCRs' respective Offer Floors, including payments and other benefits from state programs the currently-defined SCR uneconomic impact threshold would not be reached." August Compliance Filing at 13.

[22] The Incumbent Suppliers' appear to be concerned that the lack of criteria would lead to a situation where entities could "game" the system. The NYISO does not believe this concern is warranted. However, the NYISO submits that if an entity's intent is to participate in the behavior that the Incumbent Suppliers fear, it would follow that establishing criteria in advance would be counter productive, since it would allow the entities to tailor any new programs to specifically circumvent the criteria.

C. The NYISO Has Sufficient "Tools" at its Disposal to Address the NYTOs Concerns

The May 20 Order directed the NYISO to "review the merits" of the existing 500 MW exemption from the definition of "Pivotal Supplier" in light of the Commission's directives with respect to the definition of "Control" and to report on whether the exemption should be retained.[23] In its August Compliance Filing, the NYISO reported that it had conducted that review and found that the exemption should be retained.

In their comments, the NYTOs support the NYISO's decision to preserve the 500 MW exemption during the summer months[24] but do not agree that the exemption should be retained during the winter. The NYTOs assert that in five of the twelve winter months included in the NYISO's analysis, entities falling below the 500 MW threshold could potentially benefit from withholding, even after taking into account the fact that winter In-City ICAP prices during this period were sometimes set by the ICAP Demand Curve for the New York Control Area.[25] The NYTOs claim that the "tools" at the NYISO's disposal to deter withholding may not be sufficient to address the potential for economic withholding in these circumstances.[26]

The NYISO disagrees. While there is some theoretical possibility that entities might engage in economic withholding during the winter months, existing tariff provisions do allow the NYISO to address such conduct in the unlikely event it were to arise. The NYTOs focus on Section 23.4.5.6 of the Attachment H to the Services Tariff, arguing that because that provision

---

[23] May 20 Order at P 23.

[24] The NYTOs state that they "agree that, given market conditions in recent years, it would not have been profitable for an entity with a 500 MW portfolio of [In-City] ICAP to withhold during summer months." NYTOs Comments at 3.

[25] *Id.* at 3.

[26] *Id.*

is limited to physical withholding it could not be used to address the economic withholding scenarios that cause them concern. In reality, the NYISO and the MMU are obligated under the tariff to continuously monitor the market for conduct which may constitute an abuse of market power but does not trigger any of the established thresholds for mitigation.[27] Any such conduct identified by the NYISO is reported to the MMU, who will report violations that impair or threaten to impair market competitiveness or economic efficiency.[28] The NYISO and the MMU also have an obligation develop and propose new market mitigation measures when needed[29] and the NYISO is responsible for making a filing under Section 205 of the Federal Power Act requesting Commission authorization to adopt appropriate market mitigation measures.[30]

In addition, as part of its proposal to retain the existing 500 MW exemption, the NYISO will be reporting additional withholding information in its Annual Demand Curve reports.[31] Specifically, the NYISO will include information on potential withholding behavior, including data on the amount of unoffered, and offered but unsold, Capacity in the New York City Locality. The NYISO believes that this added transparency will further reduce the likelihood that entities will engage in the type of conduct about which the NYTOs are concerned.

Therefore, the Commission should accept the NYISO's proposal to retain the 500 MW exemption in all months and reject the NYTOs comments, as the NYISO has sufficient tools to deter the economic withholding identified by the NYTOs.

---

[27] Section 30.4.6.2.1 of Attachment O of the Services Tariff.

[28] *Id.* at Section 30.1.1.

[29] *Id.* at Section 30.8.

[30] *Id.* at Section 30.4.6.2.1.

[31] In its August Compliance Filing, the NYISO made a commitment to include this information in its annual report filed with the Commission on December 20 of each year. *See* August Compliance Filing at 16.

III. Conclusion

For the reasons set forth above, the NYISO respectfully requests that the Commission take action as specified herein.

Respectfully submitted,

/s/ Ted J. Murphy
Ted J. Murphy
Counsel for the
New York Independent System Operator, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, DC, this 17th day of September, 2010.

/s/Vanessa A. Colón
Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20426
(202) 955-1500