UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Astoria Generating Company, L.P. and	**)**	
TC Ravenswood, LLC	**)**	
	)	
Complainants	**)**	
	)	
v.	**)**	**Docket No. EL11-50-000**
	)	
New York Independent System Operator, Inc.	**)**	
	)	
Respondent	**)**	

INITIAL ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC. IN OPPOSITION TO REQUEST FOR SHORTENED ANSWER PERIOD AND FOR "EMERGENCY" INTERIM RELIEF

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure,[1] the New York Independent System Operator, Inc. ("NYISO") respectfully submits this Initial Answer to the *Complaint Requesting Fast Track Processing, Emergency Interim Relief, and Shortened Comment Period* ("Complaint") that was submitted in this proceeding on July 11, 2011.[2] This Initial Answer is limited to stating the NYISO's initial objections to the Complaint's requests for: (i) a shortened answer period; and (ii) extraordinary interim relief including the imposition of market power mitigation measures. The Complainants'[3] requests are not justified, and are unreasonable and unnecessary. In addition, Complainants' requests are not supported by the NYISO's independent Market Monitoring Unit ("MMU").[4] As explained below, the

[1] 18 C.F.R. § 385.213 (2011).

[2] *Complaint Requesting Fast Track Processing, Emergency Interim Relief and Shortened Comment Period*, Docket No. EL11-50-000 (filed July 11, 2011) ("Complaint").

[3] Complainants are Astoria Generating Company, L.P. and TC Ravenswood, LLC. Both of these entities are also Complainants in Docket No. EL11-42-000.

[4] The MMU is Potomac Economics, Ltd.

Complainants have once again requested "fast-track" processing when it is not appropriate in light of the complexity and importance of the issues. Complainants have also failed to justify the extraordinary relief that they seek. Therefore, the NYISO respectfully asks the Commission to deny Complainants' requests for a shortened answer period and interim action. The NYISO will supplement this Initial Answer with a full response to the Complaint by whatever deadline is established by the Commission.

I. COMMUNICATIONS

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II. ANSWER IN OPPOSITION TO SHORTENED COMMENT PERIOD AND TO "EMERGENCY" REQUEST FOR INTERIM RELIEF

A. COMPLAINANTS' REQUESTS ARE NOT REASONABLE

As they have done twice before in Docket No. EL11-42-000, the Complainants request "fast-track processing" of the Complaint to substantially reduce the normal twenty day response period under Rule 206(f).[5] This time, however, the Complainants attempt to characterize their

[5] As the NYISO stated in its *Preliminary Answer* in Docket No. EL11-42-000 on June 6, 2011, it would have no objection if the Commission were to decide for its own reasons to act on the Complaint in this proceeding faster than is contemplated under its "standard" complaint resolution path. *See* <*http://www.ferc.gov/legal/complaints/form-comp/comp-resolution.asp*>. Complainants have failed, however, to justify their request that the standard twenty day answer period be shortened.

request as more limited in scope. They assert that they are only seeking a seven day answer period with respect to their emergency request for interim relief and imply that the other "elements" of the Complaint could be addressed on a more traditional timetable.[6]

In reality, the interim relief "element" cannot be considered separately from the other components of the Complaint. The request for interim relief is based on Complainants' unproven, and invalid, premise that the NYISO has violated the "buyer-side capacity mitigation" provisions of its Market Administration and Control Area Services Tariff ("Services Tariff"), or, alternatively, that existing Services Tariff provisions are unjust and unreasonable. In order to even consider whether the Complaint's request for interim relief is warranted, that premise would have to be demonstrated to be valid. There has been no such demonstration. To divorce the request for interim relief from the remainder of the Complaint would therefore be to allow Complainants to avoid proving the very allegations they must prove under Sections 206 and 306 of the Federal Power Act. The NYISO, and, presumably, other interested parties, cannot effectively object to the request for interim relief without also addressing the substance of Complainants' claims. Establishing a shortened answer period with respect to the Complainants' request for interim relief would therefore be tantamount to shortening the time for responding to the entire Complaint.

The Complaint raises exactly the kind of complex questions that Commission precedent specifies are not suited for fast-track processing.[7] Complainants have not disputed the NYISO's twice-stated position in Docket No. EL11-42-000 that issues concerning the administration of

[6] *See* Complaint at 8, 25.

[7] *See Preliminary Answer of the New York Independent System Operator, Inc.*, Docket No. EL11-42-000 at 2-3 (filed June 6, 2011) ("Preliminary Answer to Complaint"), *citing Amoco Energy Trading Corp., et al.*, 89 FERC ¶ 61,165 (1999).

"buyer-side capacity market mitigation tariff provisions"[8] are inherently complex and should not be "fast tracked."[9] The NYISO's answer will need to address various alleged tariff violations and refute Complainants' suggestion of how Offer Floor and mitigation exemption analyses should be conducted. The NYISO's answer must fully satisfy the requirements of Rule 213 while still protecting confidential market monitoring information. It must do so in the course of responding to a Complaint that has been structured in a manner that would tend to prompt the disclosure of such information.[10]

The relief request by Complainants, and the issues implicated by their requests are of potentially enormous importance to the entire market. Complainants are attempting, as the NYISO has surmised they would,[11] to insert themselves into the market power mitigation process. They would substitute their own interpretations of the buyer-side capacity market mitigation tariff provisions for the NYISO's, and apply their version of the mitigation measures

[8] For purposes of this Initial Answer, references to the "buyer-side capacity market mitigation tariff provisions" should be understood as encompassing both: (i) the "In-City Buyer Side Mitigation Measures," *i.e.*, the currently effective buyer-side capacity market mitigation provisions set forth in Attachment H to its Services Tariff (including the revisions accepted by the Commission in its orders in Docket No. ER10-3043) which are now at issue in Docket No. EL11-42-000; and (ii) the earlier version of those provisions in Attachment H.

[9] *See* Preliminary Answer to Complaint at 3-4, *Preliminary Answer of the New York Independent System Operator, Inc. to Amendment to Complaint*, Docket No. EL11-42 at 5-6 (filed June 16, 2011) ("Preliminary Answer to Amendment").

[10] Specifically, Complainants argue that the NYISO has violated its tariff to the extent that it has: (i) concluded that "new entry" has not occurred; (ii) misapplied the previously effective version of its buyer-side mitigation measures; or (iii) misapplied the currently effective "In-City Buyer-Side Mitigation Measures." *See* Complaint at 26-42. As the NYISO has previously explained, its long-established practice is to preserve the confidentiality of the occurrence and outcome of buyer-side mitigation determinations. *See Answer of the New York Independent System Operator, Inc.*, Docket No. EL11-42-000 at 14-17 (filed July 6, 2011, as modified on July 7, 2011) ("NYISO Answer"). The Commission's procedural rules, however, require the NYISO to admit or deny all material allegations. *See* Rule 213(c)(2)(i). Thus, by accusing the NYISO of committing multiple possible violation of its rules, the Complainants appear to be seeking to force the NYISO to disclose information about its mitigation examinations and determinations for other entities, which is confidential information that the NYISO cannot disclose and that Complainants and other market participants should not be privy to.

[11] NYISO Answer at 63-67.

in an attempt to overturn capacity market outcomes that the NYISO considers to be contrary to the tariff. Moreover the MMU has authorized the NYISO to state that it reviewed and commented on the NYISO's market mitigation evaluations and did not identify any tariff violations. Complainants would impose mitigation not just on the entities that they claim to have a reason to suspect may not have been properly mitigated but on all other potential new entrants.[12] Specifically, Complainants would have the Commission, as part of the request for interim relief, require all projects that received mitigation determinations prior to November 27, 2010 to be mitigated to 75% of Mitigation Net CONE.[13] They would base this sweeping new rule not on the tariff but solely on their suspicions that the NYISO's overall administration of the buyer-side capacity market mitigation tariff provisions has been faulty. Complainants' proposals raise fundamental questions concerning the Commission's market monitoring policies and the rights of the entities that might be the subject to Complainant's preferred form of mitigation. Complainants ignore these issues while insisting that a failure to grant the relief they seek would deprive them of their statutory and Constitutional rights.

Complainants also attack the NYISO's independence and integrity. They make baseless, inflammatory, claims that the NYISO is part of a supposed conspiracy to "suppress" capacity prices.[14] They also falsely accuse the NYISO of making misleading statements regarding its application of the In-City Buyer Side Mitigation Measures. Complainants' make those statements in spite of the fact that the NYISO repeatedly made clear that those tariff provisions were not applicable to any buyer-side mitigation determinations that predated their adoption.[15]

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[12] Complaint at 7.

[13] *See id.* at 7-8, 18, 23.

[14] *Id.* at 5-6.

[15] *See* NYISO Answer at n. 39, 163, citing, *Proposed Enhancements to In-City Buyer-Side Capacity Mitigation Measures, Request for Expedited Commission Action, and Contingent Request for*

In short, the Complaint raises complex and important issues. It is not reasonable to expect the NYISO and other interested parties to address Complainants' request for interim relief without addressing them. Therefore, the request for a shortened comment period should be denied.

B. COMPLAINANTS' REQUESTS ARE NOT JUSTIFIED

Complainants have not justified depriving the NYISO and other interested parties of a reasonable time to prepare a well-developed response to their allegations. Complainants also have not justified the extraordinary interim measures that they ask the Commission to take. They wrongly conclude that the fact that prices were lower than they anticipated in the July In-City ICAP auction must mean that the Services Tariff has been violated or is somehow unjust, unreasonable, and unduly discriminatory.[16] But falling prices, like rising prices, are not necessarily a sign of market inefficiency, let alone market abuses. Complainants may not simply presume that falling capacity prices represent a legally cognizable harm to them.

Moreover, as they did in Docket No. EL11-42-000, Complainants are seeking injunctive relief without adequate justification. In that proceeding, Complainants failed to specify what standards they believed governed their demand that the NYISO's Class Year Facilities Study process be "held in abeyance" let alone show how requisite standards had been satisfied.[17] In

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Waiver of Prior Notice Requirement, Docket No. ER10-3043-000 at 14 (September 27, 2010) ("September Filing") (stating that "any exemption or Offer Floor determinations" under the version of Attachment H effective prior to the effectiveness of the revisions that it proposed "would not be altered or affected by the amendments proposed in this filing") and *Request for Leave to Answer and Answer of the New York Independent System Operator, Inc.*, filed November 1, 2010 ("November Answer") at 14, n. 39, Docket No. ER10-3043-000.

[16] Complaint at 17-22.

[17] *See* NYISO Answer at 58-63.

this proceeding, Complainants acknowledge that "emergency rate relief is not granted lightly"[18] but once again fail to invoke any recognizable standard.

Complainants appear to argue, based on a handful of inapplicable interim rate relief cases,[19] that a showing that they may face severe financial consequences is sufficient to justify extraordinary Commission action. There is no valid basis for applying such a "standard" in this context and the Commission should not adopt it for the first time here.

Complainants go on to deny that the rules governing requests for stays of Commission orders are applicable in this proceeding but assert that they would meet those criteria if they did apply.[20] They rely on several judicial decisions that do not involve Commission proceedings to support this claim,[21] presumably because they understand that their position is inconsistent with well-settled Commission precedent. The Commission does not issue stays absent a clear showing of "irreparable injury."[22] It is well established that a claim of economic loss, in and of

[18] Complaint at 24.

[19] *See id.* at n. 54, citing, *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,022 (2005) (distinguishable because it involved a request for interim rate relief allowing an entity to pay the prior, lower, rate subject to finalization of proposed rates), *Devon Power LLC*, 102 FERC ¶ 61,314 (2003) (distinguishable because it involved a grant of interim rate relief to a generator needed for reliability and subject to a reliability must run agreement which required that certain costs be recovered in order to perform required maintenance to keep the facility operational), *Transwestern Pipeline Co.*, 50 FERC ¶ 61,223 (1990) (distinguishable because it involved an unopposed request for interim relief to a pipeline from its own rate schedules pending Commission action on that same pipeline's request for rehearing on an order denying the proposal to eliminate the rate schedule and a filing proposing to amend the rates in question), *American Resources Management Corporation*, 22 FERC ¶ 62,224 (1983) (distinguishable because it concerned a request for interim rate relief of a requirement that retroactive collections not begin until 45 days after an eligibility determination, where an entity sought to make retroactive collections from a buyer who was willing to make such payments immediately).

[20] Complaint at 24, n. 59.

[21] *Id.* at n. 59.

[22] *See, e.g., Northern Indiana Public Service Company v. Midwest Independent Transmission System Operator, Inc.*, 127 FERC ¶ 61,121 at P 45 (2009) ("*NIPSCO v. MISO*"); *Mirant Delta LLC and Mirant Potrero, LLC v. California Independent System Operator Corporation*, 100 FERC ¶ 61,271 at P 11 (2002) ("*Mirant v. CAISO*").

itself, does not suffice to support a stay.[23] Instead, there must be proof that the claimed harm is "certain and great; . . ." "actual and not theoretical," and that there is a "clear and present" need for equitable relief to address harm that is "certain to occur in the near future."[24] Complainants have made no such showing. In particular, their claim that Astoria Generating "may" have to "consider" seeking bankruptcy protection in the future is predicated on various assumptions, including with respect to the timing of Commission action on the pending ICAP Demand Curve compliance filings, and ICAP auction forecasts for the next several months.[25] This falls well short of the kind of proof of truly imminent harm that would be required to justify a stay.[26]

Complainants likewise failed to show that extraordinary interim relief is necessary to protect their legitimate interests. They acknowledge that the Commission has authority to immediately establish a refund effective date and to enforce the filed rate to the extent that it determines there has been a violation.[27] Notwithstanding their rhetoric, Complainants have not shown that their interpretation of the buyer-side capacity mitigation measures is appropriate, nor have they shown that the NYISO's is inconsistent with the measures or the NYISO's other tariff obligations. They have also not demonstrated why their interpretation should prevail over the NYISO's. Nor have they justified imposing their preferred mitigation scheme on any of their actual or potential competitors, especially those which they do not even claim may have

[23] *Id.*

[24] *See, NIPSCO v. MISO* at P 45, citing *Wisconsin Gas v. FERC*, 758 F.2d 669 at 674 (stating that "the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weights heavily against a claim of irreparable harm").

[25] *See, e.g.*, Complaint at 6, 46, n. 58 and Affidavit of Mark R. Sudbey.

[26] Complainants have not argued that their request for interim relief satisfies the Commission's criteria for granting tariff waivers. Such an argument could not prevail because the extraordinary measures that Complainants would impose would harm third parties.

[27] Complaint at 40.

benefitted from a supposed NYISO tariff violation. Complainants' requests for interim relief should therefore be denied.

III. CONCLUSION

For the reasons set forth above the NYISO respectfully requests that the Commission decline to: (i) impose a shortened answer period on the NYISO or other parties; and (ii) grant Complainants' request for interim relief, or take any action, until it has the benefit of reviewing answers prepared by all interested parties.

Respectfully submitted,

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July 12, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served on the official service list compiled by the Secretary in this proceeding and in Docket No. EL11-42.

Dated at Washington, DC, this 12th day of July, 2011.

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