UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	)	Docket Nos. EL07-39-002
	)	ER08-695-000
	)	ER08-695-001

TARIFF COMPLIANCE FILING AND REQUEST FOR WAIVER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

The Commission's September 30, 2008 order in the above-captioned proceeding[1] directed the New York Independent System Operator, Inc. ("NYISO") to make certain changes in the tariff language filed in compliance with the Commission's order largely approving the NYISO's proposals for market power mitigation measures for the Installed Capacity market in New York City.[2] The NYISO's compliance filings were made on March 20, 2008 and May 6, 2008. The NYISO submits in this filing the tariff revisions requested by the Commission.[3]

In connection with this filing, for the reasons discussed further below the NYISO requests a waiver of the previously requested effective date of November 1, 2008 for the implementation of the "Affiliated Entity" provisions included in the May 6 compliance filing, with these provisions to become effective on January 1, 2009.

Simultaneously with this filing, the NYISO is also submitting a limited request for rehearing relating to one aspect of the definition of "Control" approved by the Commission in

[1] *N.Y. Indep. Sys. Operator, Inc.*, Order on Rehearing and Further Order on Compliance Tariff Sheets, 124 FERC ¶ 61,301 (2008) ("September 30 Order").

[2] *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 (2008) ("March 7 Order").

[3] Unless otherwise specified, capitalized terms have the meanings specified in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff").

the September 30 Order. The NYISO intends the revisions to the definition of "Control" submitted with this filing to be without prejudice to its requests for rehearing.

I. Communications and Correspondence

Communications regarding this filing should be directed to:

Robert E. Fernandez, General Counsel
Elaine D. Robinson, Director of Regulatory Affairs
New York Independent System Operator, Inc.
10 Krey Boulevard
Rensselaer, NY 12144
Tel: (518) 356-7677
Fax: (518) 356-8825
rfernandez@nyiso.com
erobinson@nyiso.com

*William F. Young, Esq.
J. Christopher Upton, Esq.
Hunton & Williams LLP
1900 K Street, NW
Suite 1200
Washington, DC 20006-1109
Tel: (202) 955-1500
Fax: (202) 778-2201
wyoung@hunton.com
cupton@hunton.com

* Designated to receive service.

II. Documents Included in this Filing

1. This compliance filing;
2. Attachment I: Clean version of revised language for Attachment H to the Services Tariff; and
3. Attachment II: Redlined version of revised language for Attachment H to the Services Tariff.

III. Background

The September 30 Order granted in part and denied in part rehearing of the March 7 Order conditionally approving the NYISO's proposals to strengthen market power mitigation in the New York City ("in-City") Installed Capacity ("ICAP") Market. The Commission also accepted, subject to conditions and effective November 1, 2008, the NYISO's March 20 and May 6 compliance filings of tariff language to implement the mitigation measures. Ordering paragraph (D) directed the NYISO to file tariff sheets containing revised market rules reflecting

the determinations in the September 30 Order within 30 days of the issuance of the Order. This filing submits the tariff sheets directed by ordering paragraph (D). The revisions all appear in Attachment H of the Services Tariff.

IV. Description of Tariff Changes

Net Buyer. The September 30 Order concurred with the NYISO's contention that the mitigation measures for uneconomic entry should not be limited to net buyers of ICAP. Accordingly, the September 30 Order directed that the language included in the May 6 compliance filing to implement a "net buyer" limitation on the application of bid floors be deleted.[4] To implement this revision, the attached tariff language deletes the definition of "Attributable ICAP" in § 2.1 of Attachment H since that definition was only used to implement the "Net Buyer" definition, and the definition of "Net Buyer" has also been deleted. In addition, the substantive provisions implementing the Net Buyer limitation that appeared in § 4.5(g)(vi) of Attachment H have been deleted.

Control. The September 30 Order rejected the NYISO's contention that in order to rebut a presumption of control over ICAP, a supplier must show that is "without any right to revenues or other financial benefits from such Unforced Capacity that would enable the seller to benefit from an increase in the Market-Clearing Price in the New York City Locality."[5] The NYISO continues to believe that not including this requirement will potentially create a significant loophole that would allow a supplier to avoid the Pivotal Supplier test while retaining an interest in capacity that would provide incentives for withholding. The NYISO is accordingly submitting a limited request for rehearing on this aspect of the September 30 Order. In compliance with the

[4] September 30 Order at P 29.

[5] September 30 Order at P 101.

September 30 Order, but without prejudice to its rehearing request, the attached tariff language revises the definition of "Control" in Attachment H to delete the reference to a retention of a right to revenue or other financial benefits from Unforced Capacity. A conforming change is also made to § 4.5(e) of Attachment H.

Going-Forward Costs. The September 30 Order granted a supplier's request for rehearing to the extent of directing that "all non-discretionary capital expenditures such as those necessary to comply with federal or state regulations for environmental, safety, or reliability reasons be included as going-forward costs," but noted that to be included as such a cost "must not only be necessary to comply with federal or state regulations, but also must be necessary to make the unit available in the ICAP market."[6] The NYISO believes that the inclusion of these costs is consistent with the definition of "Going-Forward Costs" previously submitted. Accordingly, the attached tariff revisions adds language to the definition of "Going-Forward Costs" to make clear that those costs include, but are not limited to, the capital expenditures specified in the September 30 Order.

Special Case Resources. The September 30 Order rejected the NYISO's proposal to exempt Special Case Resources ("SCRs") from the mitigation measures for uneconomic entry, stating that "we will require SCRs to comply with [the] NYISO's in-City mitigation rules as approved herein."[7] In complying with this directive, the NYISO submits that certain distinctions between SCRs and traditional generator sources of Installed Capacity must be recognized. First, SCR ICAP comes from numerous small sources, which in many instances may be aggregated at a single ICAP injection and tracking point, or PTID. Second, as noted in the September 30

[6] September 30 Order at P 50.

[7] September 30 Order at P 41.

Order, SCRs "are usually industrial or commercial companies that, in exchange for an advanced payment, agree to curtail power usage, usually by shutting down, when requested to do so by the NYISO."[8] Thus, in a finding not overturned by the September 30 Order, the Commission has "concluded that there is no basis to establish an offer floor for demand response resources based on the cost of new generation entry because there is not necessarily any connection between net CONE by generation and net CONE by demand response resources."[9] The implications of these practical realities for this compliance filing are discussed further below.

The first revisions to implement the inclusion of SCRs in the mitigation measures for uneconomic entry appear in the definition of "Offer Floor" In § 2.1 of Attachment H. These revisions recognize that the Net CONE test for determining Offer Floors for generators would, for the reasons articulated above by the Commission, be essentially a *non sequitur* if applied to SCRs. Instead, Offer Floor rules specific to SCRs are set forth in the revisions to § 4.5 (g)(v) of Attachment H.

In § 4.5(g)(v), the exemption for SCRs has been deleted and replaced with appropriate Offer Floor provisions. Consistent with the uneconomic entry mitigation measures for generators, the Offer Floor provisions are applicable to SCRs that are new entrants into the capacity market. In addition, the revisions recognize that since capacity is not the primary business of a SCR, a given SCR may leave and later reenter the capacity market. After some period of time, such reentry would in effect be a form of new entry. The revisions propose that a SCR offer be treated as coming from a new entrant if the SCR has never participated in the capacity market, or has not participated for a year or more. Offers from a SCR that was subject

[8] September 30 Order at P 39, n.27.

[9] September 30 Order at P 39 (citing March 7 Order at P 120).

to mitigation would be subject to mitigation for a 12 month period commencing with the month in which offers subject to an Offer Floor were first made. This is a reasonable period for the application of Offer Floors, given the facility with which Special Case Resources can enter and leave a capacity market, and corresponds to the 12 month period for determining whether a Special Case Resource should be considered a new entrant.

The Offer Floor for a SCR would be based on the amount of the per month minimum payment that is payable to the SCR by its Responsible Interface Party ("RIP"), as the best available proxy for the SCRs' costs of providing capacity. As unrelated parties presumably dealing at arm's length, a RIP and its SCRs should negotiate payments to the SCR that reflect at least the minimum amount at which the SCR would expect to recover its costs of providing capacity, and there is no legitimate economic reason why a RIP should be willing to offer capacity for less than what is it paying a SCR to provide the capacity. At the same time, given the variety of primary businesses in which SCRs may be engaged, there is no equivalent to the proxy generating unit that is used as the basis for the Net CONE determination for generators, and thus no ready basis for determining a broadly applicable bid floor threshold for all SCRs. Using the RIP payments would result in Offer Floors tailored to each SCR.

To be comprehensive, any such Offer Floor would have to be inclusive of any subsidies or other benefits, for example from the host LSE, meant to encourage SCRs to provide capacity. In addition, the Offer Floor is set at the minimum monthly amount payable to the SCR, in order to accommodate arrangements in which the SCR is paid a percentage of the monthly market-clearing price. While the NYISO understands that SCR payments based on a percentage of the market-clearing price are relatively common, the NYISO believes that few if any would obligate a SCR to provide capacity in a given month without a minimum payment protection, and the

minimum payment at which the SCR is willing to provide capacity would provide the appropriate proxy for a cost-based Offer Floor. If, however, a SCR were willing to undertake a capacity obligation on a percentage basis without minimum payment protection, then presumably its costs of providing capacity are very low and its Offer Floor would and should be permitted to sink to that level.

The offers submitted for SCRs by RIPs may aggregate a number of SCRs behind a single PTID. In order to avoid having an Offer Floor attributable to one SCR being nullified by offers from other SCRs with which it is aggregated, tlus allowing an uneconomic offer to escape mitigation, the revisions in § 4.5(g)(v) specify that offers by a RIP at a given PTID may not be lower than the highest Offer Floor applicable to a SCR providing ICAP at that PTID.

As noted above, there may be hundreds of SCRs participating in the in-City capacity market at any given time. At present, the NYISO has neither the software nor the other resources necessary to evaluate and apply Offer Floors across the inventory of SCRs prior to each monthly ICAP Spot Auction. Accordingly, the revisions in § 4.5(g)(v) would enforce the Offer Floor requirement through an *ex poste* audit and penalty procedure, similar to that applicable to physical withholding, with thresholds and penalty amounts paralleling those used elsewhere in the ICAP mitigation measures. With the benefit of experience and the availability of sufficient resources, it may be possible to develop an *ex ante* procedure for the application of Offer Floors to SCRs, but an *ex ante* procedure is just not feasible today. In order to prevent gaming of the Offer Floor requirement by setting up subsidiaries or affiliates to avoid the mitigation thresholds, the *ex poste* examination can include a Responsible Interface Party and its Affiliated Entities, a defined term used for similar purposes in the application of the in-City ICAP mitigation measures. The price impact test is set at the lower of the thresholds used

elsewhere in the in-City ICAP mitigation measures, in recognition of the reality that Responsible Interface Parties should be able to determine the applicable Offer Floors at the time of their bids with relative certainty.

Capacity Retirements. The clarifying language required by P 134 of the September 30 Order relating to the verification of a planned Installed Capacity Supplier retirement has been added to § 4.5(c). As a result of a stakeholder comment, a reference to mothballing a unit has been added to the language previously proposed by the NYISO as a clarifying revision to avoid any negative inference that the concept of avoided Going-Forward Costs applies only to unit retirements.

Exports. The September 30 Order directed the NYISO to make several changes in its proposed measures for mitigating capacity exports that constitute physical withholding of the exported capacity from New York City. In P 161, the Commission directed that the impact test threshold for determining the effect on in-City capacity prices that would trigger a penalty be revised upward to the greater of $2/kW-month and 15%. This change is included in the revised language of §4.5(d)(ii) of Attachment H.

In P 162, the Commission determined that it was not reasonable to determine whether an export was a legitimate response to higher prices in an external market by comparing the price for an annual product with the price of the New York monthly product. Instead, the Commission stated that: "One way to make the comparison reasonable would be to compare (i) the net revenue that could have been received from the New York City market over the comparable period for which the supplier's capacity was committed in the export market with (ii) the net

revenue that was actually received in the export market during that period."[10] Tariff revisions in compliance with this directive are set forth in § 4.5(d)(i).

In making these revisions, the NYISO reiterates its position, noted with apparent approval in the September 30 Order, that

> mitigation turns on a supplier's conduct in the shortest term, organized external market that is closest in time to an in-City auction in which exported capacity was not offered, and correspondingly, a supplier would not be subject to mitigation because of a decision to sell capacity into a three-year forward external market.[11]

As the September 30 Order notes,

> if capacity is available in a short term external market at a price below the inCity spot auction price, there is no economic justification for a Pivotal Supplier not to take advantage of the lower-priced capacity to satisfy its external obligations, unless the Pivotal Supplier were seeking to use its market power to raise capacity prices in New York City.[12]

These considerations necessarily inform the tariff revisions implementing the net revenue comparison directed by the Commission. The tariff revisions specify that an export can be deemed to constitute physical withholding if (a) the Responsible Market Party could have bought out of its export obligation through participation in an external reconfiguration auction, and (b) the net revenues that could have been earned in New York over the period covered by the commitment period for reconfiguration auction purchases would have been greater, subject to an appropriate bandwidth, then the revenues the exporter did earn over the period covered by the reconfiguration auction.

---

[10] September 30 Order at P 162.

[11] September 30 Order at P 154.

[12] *Id*.

Similar considerations also govern the implementation of an *ex ante* approval process for exports as directed by P 164 of the September 30 Order. An *ex ante* approval process is specified in new subparagraph §4.5(d)(iii). As with the new revenue comparison, the focus is on the participation of a Responsible Market Party in an external reconfiguration auction. The *ex ante* process will allow the Responsible Market Party to request the NYISO, in consultation with its independent Market Advisor, to provide a projection of in-City ICAP Spot Auction prices over the commitment period covered by the external reconfiguration auction. The Responsible Market Party would be exempt from a withholding penalty if it made offers in the external reconfiguration auction that would reasonably be expected to produce net revenues from exports that would exceed the net revenues that would have been realized from in-City sales of the same capacity at the spot auction prices projected by the NYISO over the period corresponding to commitment period specified in the external reconfiguration auction. In effect, the Responsible Market Party would be able to require the NYISO to specify an offer floor for the external reconfiguration auction that, when viewed on a net revenue basis, would provide a safe harbor for participating in the external market. The price projections would be binding on the NYISO in that if the export decision was an economically rational response at the time to higher external revenues when compared to the NYISO's price projections, the NYISO would be precluded from imposing a physical withholding penalty.

Finally, the September 30 Order directed the NYISO "to revise the penalty for physical withholding related to uneconomic exports so that it is 1.5 times the smaller of (i) the difference between the clearing prices in the New York City ICAP Spot Auction with and without the export and (ii) the difference between the New York City ICAP Spot Market Auction clearing

price and the external region clearing price."[13] Revisions to make this change are incorporated in §4.5(d)(ii). In accordance with the factors discussed above, the price comparisons are made on the basis of the commitment period corresponding to the relevant external reconfiguration auction.

V. Request for Waiver

In the May 6 compliance filing, the NYISO explained that the March 20 compliance filing had adopted the existing definition of "Affiliate" in the Services Tariff in connection with determining the portfolio of capacity sources that could be attributed to a Pivotal Supplier. That definition proved to be overly broad, because it included Affiliates that do not do business in the New York markets. Accordingly, the NYISO proposed

> a definition of "Affiliated Entity" that is tailored to the requirements of mitigation of the portfolios of Pivotal Suppliers of capacity. Under the new definition, suppliers would be required to inform the NYISO of all upstream parent entities, but reporting of subsidiaries or affiliates would be limited to persons or entities authorized to participate in a New York capacity market, or that have a relevant interest in an In-City Installed Capacity Supplier. The new definition also clarifies the reporting of bidding agents, and of agreements under which the seller retains Control.

The "Affiliated Entity" definition was generally supported by the Market Participants, and was accepted by the September 30 Order. In the time available after the issuance of the September 30 Order, however, it is not possible to complete the data compilation and software mapping necessary to implement the new definition any earlier than in time for the ICAP Spot Auction for February, which auctions will be held toward the end of January. Accordingly, the NYISO requests a waiver of the November 1 effective date for the Affiliated Entity provisions, with this portion of the compliance filing to become effective on January 1, 2009, which will

[13] September 30 Order at P 163.

make them effective for the ICAP Spot Auction to be held in January for the month of February. In the meantime, the broader definition in the March 20 compliance filing will remain in effect. This waiver will not affect the substantive application of the supplier mitigation measures, but only the administrative burden of implementing them.

VI. Conclusion

WHEREFORE, the NYISO requests that the attached tariff revisions be accepted by the Commission in compliance with the requirements of the September 30 Order.

Respectfully submitted,

NEW YORK INDEPENDENT
SYSTEM OPERATOR, INC.

By_____
Counsel

William F. Young, Esq.
J. Christopher Upton, Esq.
Hunton & Williams LLP
1900 K St., NW
Washington, DC 20006-1109
202-955-1684
wyoung@hunton.com

Dated: October 30, 2008

CERTIFICATE OF SERVICE

=The NYISO will serve this filing on all parties on the official service list compiled by the Secretary in this proceeding. The NYISO will also electronically send a link to this filing to the official representative of each of its customers, to each participant on its stakeholder committees, to the New York Public Service Commission, and to the electric utility regulatory agencies of New Jersey and Pennsylvania. In addition, the complete filing will be posted on the NYISO's website at www.nyiso.com. The NYISO will also make a paper copy available to any interested party that requests one. To the extent necessary, the NYISO requests waiver of the requirements of Section 35.2(d) of the Commission's Regulations (18 C.F.R. § 35.2(d) (2007)) to permit it to provide service in this manner.

Dated at Washington, DC, this 30th day of October, 2008

Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20426
(202) 955-1500