

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

New York Independent System Operator, Inc.) Docket No. ER12-89-000

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

Pursuant to Rules 212 and 213 of the Commission’s Rules of Practice and Procedure,¹ the New York Independent System Operator, Inc. (“NYISO”) respectfully requests leave to answer, and answers,² certain protests to and comments on the NYISO’s proposed revisions to Rate Schedule 1 of its Open Access Transmission Tariff (“OATT”) that it filed on October 14, 2011, in the above-captioned proceeding.³ The NYISO’s proposed revisions would amend Section 6.1.2 of Rate Schedule 1 to change the allocation among NYISO market participants of the NYISO’s budgeted annual operating costs and Commission-assessed regulatory fees (“Operating Costs”).⁴

As discussed in greater detail below, the Commission should reject Protesters’ arguments because the NYISO’s proposed cost allocation (i) was developed in accordance with specific requirements set forth in Rate Schedule 1 of the NYISO OATT, (ii) is a just and reasonable allocation of the NYISO’s Operating Costs, and (iii) will have a minimal impact on Suppliers (as defined below). In addition, the NYISO clarifies Protesters’ mischaracterization of

¹ 18 CFR §§385.212, 385.213.

² If the Commission were to deem any part of this answer untimely under Rule 213(d), the NYISO respectfully requests that the Commission exercise its discretion and accept that portion out of time. *See, e.g., California Independent System Operator, Inc.*, 127 FERC ¶ 61,207 at P 11 (2009) (accepting a late filed answer because it aided the Commission in its decision-making).

³ Motions and protests were filed by the following parties: Independent Power Producers of New York, Inc., R.E. Ginna Nuclear Power Plant, LLC and Nine Mile Point Nuclear Station, LLC, and Entergy Nuclear Power Marketing, LLC. (collectively, “Protesters”). Comments in support of the NYISO’s proposed revisions were filed by the New York Transmission Owners and Multiple Intervenors.

⁴ The NYISO’s proposed revisions would also amend the rates that are used to calculate the portion of the Operating Costs paid by market participants engaging in non-physical transactions, Special Case Resources (“SCR”), and Emergency Demand Response Program (“EDRP”) participants, which are then rebated back to Load and Suppliers. In addition, the proposed cost allocation would be maintained for a period of at least five years.

the NYISO Board of Director's ("Board's") determination regarding the proposed cost allocation.

I. Request for Leave to Answer

The NYISO recognizes that the Commission generally discourages answers to protests. However, the Commission has the discretion to accept answers to protests, and has done so when those answers help to clarify complex issues, provide additional information, or are otherwise helpful in the development of the record in a proceeding.⁵ The NYISO's answer satisfies those standards as it responds only to specific arguments raised by the Protesters and provides additional information that the Commission needs to fairly evaluate the arguments. The NYISO, therefore, respectfully requests that the Commission accept this answer.

II. Answer

A. Background

Section 6.1.2.3 of Rate Schedule 1 of the OATT establishes the process by which NYISO stakeholders determine whether to initiate a new study of the allocation of the NYISO's Operating Costs among market participants and, if warranted by the results of the study, revise the existing cost allocation. Section 6.1.2.3(i) expressly eliminates the requirement that stakeholders identify a material change as a prerequisite for reviewing and modifying the existing allocation of the NYISO's Operating Costs.

On July 21, 2010, 67.75% of the stakeholder Management Committee voted pursuant to Section 6.1.2.3 to initiate a new study of the allocation of the NYISO's Operating Costs. In the August and September 2010 stakeholder Budget & Priorities Working Group ("BPWG")

⁵ 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...").

meetings, the NYISO presented a draft study scope to stakeholders for their review and comments in accordance with the requirements in Section 6.1.2.3(iv)(b) of Rate Schedule 1.⁶ Based on the input received in these meetings, the NYISO retained Black & Veatch (“B&V”) to perform a new, independent study of the allocation of the NYISO’s Operating Costs. B&V met extensively with NYISO stakeholders and NYISO staff to conduct surveys, discuss study parameters, and review interim study results. Based on the results of the B&V study and extensive discussions among the NYISO and stakeholders, the NYISO proposed, and 67.03% of the stakeholder Management Committee approved, a new allocation for the NYISO’s Operating Costs on July 27, 2011. The new allocation approved by stakeholders will replace the current allocation by which the NYISO recovers 80% of its Operating Costs from market participants that physically withdraw energy in New York (“Loads”) and 20% from market participants that physically supply energy in New York (“Suppliers”) with a new 72%/28% allocation.⁷ On October 14, 2011, the NYISO filed proposed tariff revisions with the Commission to accept the new cost allocation.⁸

B. The Proposed Cost Allocation Was Developed Pursuant to Specific NYISO Tariff Requirements

Protesters argue that the proposed cost allocation is not appropriate as there have not been significant changes to the NYISO’s market design and administration since the last change to the

⁶ Section 6.1.2.3(iv)(b) of Rate Schedule 1 of the OATT (“If, and when, the Management Committee determines a study shall be conducted . . . (b) The ISO will present a draft study scope to Market Participants for consideration and comment before the ISO issues the study scope as part of its Request For Proposal process to retain a consultant to perform the study. A meeting shall be held with Market Participants to discuss the components (e.g., categories of costs considered, allocation of benefits, unbundling, etc.) that should be included in the draft study scope before the draft is issued by the ISO.”).

⁷ The NYISO currently rebates the Operating Costs that it recovers from market participants engaging in non-physical transactions, SCRs, and EDRP participants back to Loads and Suppliers on an 80/20 basis, which results in a targeted allocation of Operating Costs to Loads and Suppliers of 75% to Loads and 19% to Suppliers. Under the proposed tariff revisions, the cost allocation to Loads and Suppliers after the rebate amount will be targeted to be 67% to Loads and 27% to Suppliers.

cost allocation in 2005 to support revising this cost allocation.⁹ However, stakeholders initiated the study of the allocation of the NYISO's Operating Costs and approved the new cost allocation pursuant to a specific process for revising the cost allocation set forth in Rate Schedule 1, which expressly eliminates the requirement that a material change be identified as a prerequisite for revising the cost allocation.¹⁰

As described above, Section 6.1.2.3 of Rate Schedule 1 establishes the process by which stakeholders vote to initiate a new study of the allocation of the NYISO's Operating Costs and, if warranted by the results of the study, revise the cost allocation. When the NYISO implemented the current 80/20 allocation in 2005, the Rate Schedule 1 provisions provided that the 80/20 allocation would remain in place for a minimum of five years - through December 31, 2009 - and that the allocation would be reviewed in late 2008 if "significant market changes" had occurred to merit a review.¹¹ In 2008, the NYISO and stakeholders determined that a significant change had not occurred to warrant a review at that time and that the 80/20 allocation should be extended for an additional two years - through December 31, 2011.¹² As part of the extension of the 80/20 allocation, stakeholders established the current process in Section 6.1.2.3 of Rate Schedule 1 for determining when to review and, if warranted by the review, to modify the cost

⁸ *New York Independent System Operator, Inc.'s Proposed Tariff Revisions Regarding the Allocation of Its Operating Costs Among Market Participants*, Docket No. ER12-89-000 (October 14, 2011) ("NYISO October 14 Filing").

⁹ *See Motion to Intervene and Protest of Independent Power Producers of New York, Inc.*, Docket No. ER12-89-000 (November 4, 2011) at p. 7 ("IPPNY Protest").

¹⁰ *See* Section 6.1.2.3 of Rate Schedule 1 of the OATT.

¹¹ *See New York Independent System Operator Inc.*, Filing of Tariff Revisions to Modify Recovery of Certain Charges Assessed under Rate Schedule 1 of Its Open-Access Transmission Tariff and Market Administration and Control Area Services Tariff, Docket No. ER04-1229-000 (September 15, 2004); *see also New York Independent System Operator, Inc.*, 109 FERC ¶ 61,161 (2004).

¹² *See New York Independent System Operator, Inc.*, Proposed Tariff Revisions Regarding the Recovery of Certain Charges Assessed under the Appropriate Schedules of Its Open-Access Transmission Tariff and Its Market Administration and Control Area Services Tariff, Docket No. ER09-971-000 (April 8, 2009); *see also* Commission letter order, Docket No. ER09-971-000 (May 15, 2009).

allocation going forward.¹³ This stakeholder process, approved by a substantial majority of stakeholders, expressly eliminates the requirement that a material change be identified as a prerequisite for reviewing the existing cost allocation.¹⁴

In accordance with the requirements in Section 6.1.2.3(i) of Rate Schedule 1, 67.75% of the stakeholder Management Committee voted on July 21, 2010 to initiate a new study.

Following extensive discussions of the study results among the NYISO, stakeholders, and B&V, approximately two-thirds of NYISO stakeholders and the NYISO Board determined that changes to the cost allocation were warranted by the results of the study and approved the proposed cost allocation.

C. B&V's Method for Assigning Costs Among Market Participants Results in a Just and Reasonable Allocation

Protesters argue that the B&V study is flawed because it does not provide adequate justification for how it assigns costs among market participants.¹⁵ Specifically, Protesters argue that B&V has not provided support for the difference between its method for assigning direct and shared costs among Loads and Suppliers and the method used by R.J. Rudden Associates, Inc. ("Rudden") in a previous cost allocation study commissioned by the NYISO in 2004.¹⁶ The Rudden study called for a 77/23 split between Loads and Suppliers, and was used by the NYISO and stakeholders in negotiating the current 80/20 allocation.

As described above, NYISO stakeholders voted pursuant to the express requirements in Section 6.1.2.3 of Rate Schedule 1 to conduct a new cost allocation study. Nothing in Section 6.1.2.3 requires that the new study revisit the results of the previous, seven-year-old study or

¹³ See *id.*

¹⁴ See *id.* at p. 4 ("The proposed tariff revisions were approved by the Management Committee with a majority vote based upon a show of hands at its January 27, 2009 meeting. The approval was widely supported by a diversity of market sectors with only four Market Participants opposing and only four Market Participants abstaining."). None of the Protesters in this proceeding opposed or abstained from these revisions.

¹⁵ See IPPNY Protest at p. 10.

have to justify any departure from the methodology used in an old study. In addition, the stakeholders participated in the development of the study's scope in the August and September 2010 BPWG meetings. The predominant feedback received by the NYISO at those meetings was to perform a new, independent study. For this reason, the NYISO retained B&V to perform a new, independent study of the allocation of the NYISO's Operating Costs. B&V was not asked to undertake a detailed review or comparison of the Rudden study.¹⁷

B&V independently assigned components of the NYISO's Operating Costs among Loads and Suppliers following an extensive process pursuant to which it undertook detailed discussions with NYISO staff and stakeholders, received input from stakeholders through surveys and mini-sector meetings, reviewed NYISO historical cost data, conducted interviews with NYISO management, and undertook a detailed review of the cost allocation at other RTOs and ISOs. B&V's assignment of the NYISO's Operating Costs necessarily included a subjective element and involved a degree of professional judgment. However, B&V's determinations in these instances were informed by its extensive development process described above. In their protests and comments, Protesters have not provided a basis for the Commission to find that the B&V study is flawed or that the proposed cost allocation is not just and reasonable. Protesters have shown only that B&V, after undertaking an extensive study process and exercising reasonable professional judgment, came to different conclusions than a seven-year-old study that it was not required or expected to mimic. Given the difficulty in precisely assigning many of the NYISO's

¹⁶ *See id.*

¹⁷ IPPNY did indicate to the NYISO during the stakeholder discussions regarding the B&V study results that it would like a comparison of the B&V study and the Rudden study. Although such a comparison was outside of the scope of the B&V study established by the NYISO and stakeholders, the NYISO agreed to have B&V perform a high-level comparison of the studies during discussions in the May 18, 2011, BPWG meeting. IPPNY agreed with this approach. B&V prepared this comparison, which was distributed to stakeholders on May 25, 2011, and placed on the agenda of the June 23, 2011, BPWG meeting for discussion. There was no discussion regarding the comparison as stakeholders did not provide comments or concerns. *See* comparison at

Operating Costs, there may be more than one reasonable cost allocation, and the difference in study results is not surprising. However, the Commission is only required to determine under Section 205 of the Federal Power Act that the NYISO's proposed cost allocation is just and reasonable, not that the proposed allocation is superior to other potential cost allocations or that the current cost allocation is unjust and unreasonable.¹⁸

D. The Impacts on Suppliers Will be Minimal, and Suppliers Have Been on Notice of Changes in the Cost Allocation

Protesters assert that the change from a 20% to a 28% allocation of the NYISO's Operating Costs will adversely impact Suppliers by increasing their portion of the NYISO's Operating Costs by 40%.¹⁹ It is important to place the magnitude of this change in perspective. Based on the NYISO's 2010 approximately \$150 million operating budget, the new 72/28 cost allocation would allocate an additional \$12 million of the NYISO's Operating Costs among all Suppliers, with a commensurate decrease in the allocation to Loads. This translates into less than two-tenths of one percent of NYISO's 2010 total market volume of \$7 billion. In addition, as Protesters acknowledge, Suppliers who participate in the spot energy market will be able to recover their additional costs through the market because such costs are allowed to be included in Suppliers' reference levels.²⁰

Protesters also argue that certain Suppliers selling under long-term bilateral contracts may not have the ability to recover the cost increases.²¹ However, Suppliers have been on notice since at least 2004 that the NYISO would from time to time study and adjust the

http://www.nyiso.com/public/webdocs/committees/mc_bpwg/meeting_materials/2011-06-23/Comparison_to_Previous_Study__2_06232011.pdf.

¹⁸ See *Winnfield v. Federal Energy Regulatory Commission*, 744 F.2d 871, 874-875 (D.C. Cir. 1984) ("As is evident, § 205, unlike § 206, allows the Commission to approve rate increases without a showing that current rates are unjust and unreasonable; it need only find the *proposed* rates to be just and reasonable.") (emphasis in original).

¹⁹ See IPPNY Protest at pp. 2, 7.

²⁰ See *id.* at p. 2 fn 3.

²¹ See *id.* at p. 2 fn 3, 4.

allocation of the NYISO's Operating Costs. In addition, in 2009, a substantial majority of stakeholders voted to revise Section 6.1.2.3 of Rate Schedule 1 to provide that stakeholders would vote annually on whether the NYISO should conduct a study and adjust the allocation of the Operating Costs, if warranted by the study.²² As described above, this tariff language removed any requirement for a material change in the NYISO as a prerequisite for initiating this process. Suppliers have, therefore, been on notice regarding the potential for reviewing and adjusting the allocation of the NYISO's Operating Costs. While Protesters make much of the potential inability to capture the increase in their share of Operating Costs under existing bilateral contracts, appellants acknowledged at oral argument before the NYISO Board that the increased costs to Suppliers with bilaterals is not significant.²³

E. The NYISO Board Determined the Proposed Cost Allocation Is Reasonable

Protesters mischaracterize the NYISO Board's determination regarding the proposed cost allocation. Specifically, Protesters argue that rather than the Board determining that the proposed cost allocation was reasonable, it shifted the burden to the Independent Power Producers of New York ("IPPNY") in its appeal to the Board to prove that the proposed cost allocation was improper or unreasonable.²⁴ However, as indicated in the Board's September 28, 2011, decision in response to the IPPNY appeal, the Board did determine that the B&V study is sound and that the proposed cost allocation is reasonable.²⁵ The Board simply indicated in its decision that IPPNY has not provided evidence sufficient to change this determination regarding the reasonableness of proposed cost allocation. On September 28, 2011, the Board voted to

²² See footnote 13 above.

²³ See NYISO October 14 Filing, Attachment II, September 28, 2011 Board Decision at p. 4 ("Indeed, Appellants acknowledged during oral argument that the increased cost to suppliers with bilateral agreements was not significant.")

²⁴ See IPPNY Protest at pp. 5, 8-9, and 9 fn. 27.

²⁵ See NYISO October 14 Filing, Attachment II, September 28, 2011 Board Decision at p. 4 ("We believe the B&V Study is sound and the MC's proposal is reasonable.").

approve the proposed revisions based on its determination that the proposed cost allocation is reasonable and directed NYISO staff to file the revisions with the Commission.

III. Conclusion

For the foregoing reasons, the NYISO respectfully requests that the Commission grant its motion for leave to answer, accept this answer, and reject the protests.

Respectfully submitted,

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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 23rd day of November, 2011.

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