UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. ER10-3043-001

REQUEST 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") submits this request for leave to answer, and its answer to, the *Request for Clarification, or in the Alternative, Rehearing, of the New York City Suppliers* ("*Request for Clarification*"). The "NYC Suppliers"[2] challenge the Commission's February 2, 2011 *Order on Compliance Filing* ("February Order's")[3] approval of the NYISO's use of a "Three Year Rule"[4] instead of the previous "Reasonably Anticipated Entry Date Rule"[5] when examining facilities under its In-City[6] buyer- mitigation measures. For the reasons set forth below, the *Request for Clarification* should be rejected in its entirety.

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

[2] The "NYC Suppliers" are incumbent generation owners in New York City that would stand to benefit economically from the imposition of Offer Floor mitigation on new entrants into the New York City ICAP market. They are Astoria Generating Company, L.P., the NRG Companies, and TC Ravenswood, LLC.

[3] *New York Independent System Operator, Inc*., 134 FERC ¶ 61,083 (2011).

[4] Under the Three Year Rule, the NYISO would use ICAP Spot Market Auction prices for future Capability Periods beginning with the Summer Capability Period that commences three years from the start of a proposed facility's Class Year when conducting Offer Floor exemption analyses under Attachment H to its Market Administration and Control Area Services Tariff ("Services Tariff"). The NYISO first proposed the Three Year Look-Ahead Rule in its September 27, 2010 filing proposing enhancements to its In-City Buyer Side Market Power Mitigation Measures ("September 27 Filing."). In its November 26 Order, *New York Independent System Operator, Inc.,* the NYISO was directed to provide additional support for the rule, which it did in its *Initial Compliance Filing and Request for Expedited Action No Later Than December 14, 2010*, Docket No. ER10-3043-001 (December 7, 2010) ("*Initial Compliance Filing*").

[5] Prior to the adoption of the Three Year Look-Ahead Rule, section 23.4.5.7.2 of the Services Tariff specified that the NYISO was to evaluate possible exemptions from Offer Floor mitigation using

I. REQUEST FOR LEAVE TO ANSWER

Rule 213 authorizes parties to answer requests for clarification, including those that are combined with alternative requests for rehearing.[7] Therefore the NYISO believes that it may submit this answer as a matter of right. Nevertheless, in the event that the Commission deems this answer to be partially in response to the NYC Suppliers' alternative requests for rehearing, the NYISO requests leave to answer to the extent necessary. The Commission has discretion to accept answers to requests for rehearing[8] and has done so when they help to clarify complex issues, provide additional information, or are otherwise helpful in the Commission's decision-making process.[9] The Commission should follow its precedent and accept the NYISO's answer in this instance because it will clarify the record by highlighting the extent to which the *Request for Clarification* is based entirely on arguments that the Commission has already addressed, and speculation concerning future market outcomes.

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price data from the two Capability Periods beginning with the Capability Period in which an ICAP Supplier was "reasonably anticipated" to offer to supply Unforced Capacity ("UCAP")).

[6] Capitalized terms that are not otherwise defined herein shall have the meaning specified in Attachment H to the NYISO's Services Tariff or Attachment S to the NYISO's Open Access Transmission Tariff ("OATT").

[7] *See, e.g.*, *Transcontinental Gas Pipe Line Corp.,* 113 FERC ¶ 61,129 at P 11 (2005) (accepting a response where an applicant "filed its pleading as a request for clarification, to which answers lie, and only asked that it be considered a request for rehearing in the alternative"); *New England, Inc.,* 120 FERC ¶ 61,122 at P 46 (2007*)* (stating that "unlike answers to requests for rehearing, answers to requests for clarification are not prohibited under the Commission's Rules of Practice and Procedure").

[8] *See* 18 C.F.R. §385.213(a)(2).

[9] *See Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042 at P 14 (2008) (accepting answer to rehearing request because the Commission determined that it has "assisted us in our decision-making process."); *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289 at P 12 (2008) (accepting "PJM's and FPL's answers [to rehearing requests], because they have provided information that assisted us in our decision-making process"); *New York Independent System Operator, Inc.*, 123 FERC ¶ 61,044 at P 39 (2008) (accepting answers to answers because they provided information that aided the Commission's decision-making process); *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 ..... ").

II. ANSWER

A. The New York City Suppliers' Proposed New "Transitional Rule" Should Be Rejected

The *Request for Clarification* asks the Commission to determine that the Reasonably Anticipated Entry Date Rule be "retained for the Class Year 2009 and Class Year 2010 projects as a transitional rule with the Three Year Rule becoming effective with the Class Year 2011 projects."[10] They argue that retaining it is appropriate because some projects in those Class Years "have already completed substantial construction activities" and thus that some projects may not have "unpredictable" service dates.[11]

The NYC Suppliers' request should be rejected because the February Order rejected essentially identical arguments that they previously made against the adoption of the Three Year Rule. The *Request for Clarification* offers nothing new and provides no basis to undermine the Commission's reasoning. Indeed, granting the NYC Suppliers' request would subvert the very benefits that the Three Year Rule is intended to bring.

1. The February Order's Acceptance of the Three Year Rule Was Just and Reasonable

The February Order agreed with the NYISO that "the Three Year Rule is an improvement over the Reasonably Anticipated [Entry] Date Rule because it is more transparent, predictable, and less prone to manipulation by the project developer."[12] It accepted the evidence that the NYISO had presented to demonstrate that "reliance upon self-identified in-service dates is misplaced and should be replaced by some other reasonable period for evaluating the mitigation

[10] *Request for Clarification* at 8.

[11] *Id.* at 7-8.

[12] *Id.* at P 23.

exemption."[13] The February Order acknowledged the arguments that the NYC Suppliers had made against applying the Three Year Rule, which included all of the substantive arguments presented in the *Request for Clarification*, but reasonably concluded that "there was no need for a transition period for Class Year 2009 and Class Year 2010 . . . , even though those projects may have commenced."[14]

The NYC Suppliers claim that the Commission's reasoning was somehow "arbitrary and capricious." In reality, it was just and reasonable for the Commission to recognize the need, which the NYISO demonstrated, to improve upon the Reasonably Anticipated Entry Date Rule. It was also entirely appropriate for the Commission to accept the Three Year Rule as just and reasonable. The evidence in the record fully supported that conclusion. The Three Year Rule was endorsed by the NYISO's stakeholders after a thorough review process. Even the NYC Suppliers continue to acknowledge that the Three Year Rule may be superior to the Reasonably Anticipated Entry Date Rule as a general matter.[15] Judicial precedent is clear that Commission need not determine that a proposed tariff change will result in a new rule that will work perfectly in all conceivable circumstances, or even in a new rule that is demonstrably superior to the rule that it replaces.[16] The Commission need only find that a proposed tariff change is just and reasonable. The February Order made this finding based on more than sufficient evidence.

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[13] *Id.*

[14] *Id.* at P 25.

[15] *Request for Clarification* at 2 (stating that "New York City Suppliers generally believe that the Three Year Rule may prove to be a well-structured approach over the long term").

[16] *See, e.g., New England Power Co.,* 52 FERC ¶61,090, at p. 61,336 (1990), *aff'd, Town of Norwood v. FERC,* 962 F.2d 20 (D.C. Cir. 1992) (finding that a proposed rate design does not have to be perfect, only just and reasonable), (*citing Cities of Bethany, et al. v. FERC,* 727 F.2d 1131, 1136 (D.C. Cir.) (finding that the Commission reviews rates to determine whether those "proposed by a utility are just and reasonable … not … to determin[e] whether a proposed rate schedule is more or less reasonable than alternative rate designs"); *American Elec. Power Serv. Corp. v. FERC*, 116 FERC ¶61,179 at P 25

The only argument that the *Request for Clarification* makes against the application of the Three Year Rule is that it *might* result in the NYISO conducting the Offer Floor exemption analysis for certain entrants using data for a year other than from their actual year of entry. The same possibility unquestionably existed under the Reasonably Anticipated Entry Date Rule. The NYC Suppliers have made no attempt to show that this issue is more likely to arise under the Three Year Rule. Nor does the *Request for Clarification* make any attempt to dispute that the Three Year Rule will have the benefit of promoting greater transparency and predictability while being less prone to potential manipulation. They have thus failed to offer any reason to question the justness or reasonableness of the February Order. Their continued objections that the Three Year Rule will not work perfectly in every case, a point that the NYISO has previously acknowledged,[17] has no bearing on the question of whether the Three Year Rule is just and reasonable.

2. The Proposed Transitional Rule Is Not Just and Reasonable and Its Adoption Would Undermine the Three Year Rule

The NYC Suppliers have not shown that their proposed transitional rule would itself be just and reasonable, or even a workable complement to the Three Year Rule. First and foremost, the scope of their proposal is unclear. Some references appear to limit the proposal to Class Year 2009 and 2010 members for which there is "verifiable, public information concerning substantial construction and in service dates for facilities that are coming on line close in time."[18] Other references indicate that the NYC Suppliers intend for the transitional rule to apply to "the Class

(2006) (stating that proposed rates "need be neither perfect nor even the most desirable; they need only be just and reasonable and not unduly discriminatory or preferential").

[17] *See Initial Compliance Filing* at 4.

[18] *Request for Clarification* at 8.

Year 2009 and Class Year 2010 projects" without limitation.[19] Their Protest appeared to contemplate that the transitional rule would cover all members of Class Year 2009 and Class Year 2010.[20] The NYC Suppliers' use of ambiguous terms such as "substantial construction:" and "close in time"[21] only compounds the difficulty of understanding what they are proposing.

Moreover, contrary to what the NYC Suppliers' imply, it is far from clear that those members of the Class Years of 2009 and 2010 that may have already "commenced construction" will necessarily enter service soon. As the NYISO has previously stated in this proceeding:

> "Commencement of construction" is a highly subjective term that is susceptible to many different meanings including simply obtaining a permit or clearing land, and it is commonly know that projects can "commence construction" prior to obtaining financing. Further, permitting and construction delays, and a host of other potential hurdles can delay the actual entry of these projects regardless of assumptions made for planning or interconnection purposes.[22]

The NYISO proposed the Three Year Rule to establish a clear and objective standard that would permit the efficient and timely administration of the In-City market power mitigation measures without disputes over entry dates or "commencement of construction dates." The Three Year Rule would allow all stakeholders, including all ICAP buyers and sellers, consumers, and regulators, an opportunity to develop their own forecasts and make decisions based on them. Granting the *Request for Clarification* would eliminate these benefits for Class Years 2009 and 2010 by opening the door to disputes over which projects had "commenced construction." As

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[19] *Id.* at 2, 8.

[20] *See Protest of the New York City Suppliers* at 4, Docket No. ER10-3043-001 (filed December 21, 2010) ("*NYC Suppliers' Protest*") (arguing that the NYISO should "continue to apply the Reasonably Anticipated Entry Date Rule] to the Class Year 2009 and Class Year 2010 participants, with any proposed revisions to this rule to be applied prospectively in future class year analyses that are begun after Commission action on the Three Year Rule").

[21] *See Request for Clarification* at 7-8.

[22] *Request for Leave to Answer and Answer of the New York Independent System Operator, Inc.* at 8-9, Docket No. ER10-3043-001 (filed December 28, 2010) ("*NYISO Answer*").

was noted above, there would be further controversy concerning whether the transitional rule applied only to those projects that had "commenced construction," however that term was defined, or encompassed all members of Class Years 2009 and 2010.[23] A Commission ruling in favor of the NYC Suppliers could also become a precedent for future entrants seeking "commencement of construction exceptions" for Class Years 2011 and beyond. Allowing such exceptions for Class Years 2009 and 2010 would thus threaten to eviscerate the Three Year Rule both now and in the future.

The *Request for Clarification* contends that absent a transitional rule there may be "inappropriate exemptions," "under-mitigation," and, from the perspective of the NYC Suppliers, "under-compensation."[24] It argues that if a Class Year 2010 project that had already "commenced construction" was subject to the Three Year Rule its exemption eligibility would be determined based on a 2013 load forecast, which would allegedly make its exemption more likely than the use of a 2011 load forecast.[25] This assertion is speculative and overly simplistic. The NYISO's Offer Floor exemption analysis is based on many factors in addition to load forecasts, including the extent to which other entrants opt to reject their allocated portion of System Deliverability Upgrade costs in the Class Year process. The NYC Suppliers acknowledge this fact themselves later on in the *Request for Clarification.*[26] Moreover, even if the NYC Suppliers' assertion were accurate, it would not be just and reasonable for the Commission to require the NYISO to adopt a transitional rule simply because it would be more likely to achieve a result that would be in the NYC Suppliers' economic interest.

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[23] *See Request for Clarification* at 7-8.

[24] *See id. at* 2, 8.

[25] *See id.* at 8.

[26] *Id.* at 9 (stating that "[t]he Mitigation Exemption Test is conducted using a number of variables that change from year to year").

The NYC Suppliers' case for a "transitional rule" is based on nothing more than recycled arguments that the Commission already rejected, and on self-interested speculation that should not be afforded any weight. They have ignored the fact that the existing "Reasonably Anticipated Entry Date Rule" is even more imprecise, does not have the added advantages of objectivity and transparency to stakeholders, and would not avoid disputes over entry dates or commencement of construction dates.

B. The New York City Suppliers' Proposal to Needlessly Delay the Commencement of Offer Floor Mitigation Exemptions Should Be Rejected

The NYC Suppliers ask the Commission to clarify, or alternatively, to establish on rehearing, that any Offer Floor exemption granted under the Three Year Rule would only "begin to apply in the year tested."[27] They assert that their proposal is a "reasonable corollary" to the Three Year Rule because "[f]inding that a project is eligible for an exemption in one year is not probative that such project would also be deemed eligible for an exemption in an earlier year."[28]

This requested clarification would subject new entrants that were determined to be eligible for exemption under the Commission-approved Three Year Rule to Offer Floor mitigation for as long as two years after entering the market. The NYC Suppliers would therefore impose an absolute presumption that all new entry into New York City that occurred sooner than three years after the start of the entrant's Class Year was uneconomic, and thus subject to mitigation. Thus, their proposal would apply to new entrants that are economic. Such a presumption could act as a serious barrier to legitimate entry into the In-City ICAP market. It could also create perverse incentives for new entrants capable of entering the market sooner than three years after the start of their Class Year to delay entry until the third year. The NYC

[27] *Id.* at 9.

[28] *Id.*

Suppliers have certainty not demonstrated that it would be reasonable for the Commission to "err on the side of over-mitigation" in this way. The Three Year Rule utilizes a single, consistent and objective definition of the "time of expected entry." The rule promotes certainty, transparency, and ease of administration. The expected entry date rule is not intended, and should not be allowed to become, a tool to needlessly mitigate, and artificially over-mitigate, efficient new entrants.

C. The Fact that the NYISO Has Not Yet Answered the NYC Suppliers' Questions Provides No Support for the *Request for Clarification*

Finally, the NYC Suppliers complain that it has not yet been possible for the NYISO to answer their written questions regarding the application of the In-City ICAP mitigation measures.[29] The February Order agreed with the NYISO that those questions were wholly irrelevant to the Commission's consideration of the Three Year Rule.[30] The *Request for Clarification* did not dispute this finding. Therefore, the fact that the NYISO has not yet responded to the questions provides no support for the *Request for Clarification's* proposals regarding the implementation of the Three Year Rule. The NYISO has previously explained that it would not be possible to answer the questions until after the issuance of the February Order.[31] The NYISO has been working diligently on its responses in the time since the February Order was issued and expects to share them with the NYC Suppliers, and other stakeholders, in the very near future.

[29] *Request for Clarification* at n. 8 and n. 26.

[30] *See* February Order at P 24.

[31] *NYISO Answer* at 5.

III. CONCLUSION

For the reasons set forth above, the Commission should, to the extent necessary, grant the NYISO leave to answer and reject the *Request for Clarification.*

Respectfully Submitted,

/s/Ted J. Murphy
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March 14, 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.

Dated at Washington, DC, this 14th day of March, 2011.

/s/Ted J. Murphy

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