

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

<b>Astoria Generating Company, L.P and TC Ravenswood, LLC</b>	)	
	)	
	)	
<b>Complainants,</b>	)	<b>Docket No. EL11-50-000</b>
	)	
<b>vs.</b>	)	
	)	
<b>New York Independent System Operator, Inc.</b>	)	
	)	
	)	
<b>Respondent</b>	)	

**LIMITED ANSWER OF THE  
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

In accordance with Rule 213 of the Commission’s Rules of Practice and Procedure,<sup>1</sup> the New York Independent System Operator, Inc. (“NYISO”) respectfully requests leave to submit, and submits, this limited answer to the *Complainants Motion for Leave to Answer and Answer (“Complainants’ Answer”)*<sup>2</sup> filed in this proceeding on August 19, 2011. In deference to the Commission’s rules, and because the NYISO continues to favor expedited action in this case, this pleading addresses only the most fundamental inaccuracies in the Complainants’ Answer and does so as concisely as possible. The NYISO’s silence with respect to all of Complainants’ numerous new assertions and arguments should not be interpreted as agreement with them.

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<sup>1</sup> 18 C.F.R. § 385.213 (2011).

<sup>2</sup> *Complainants’ Motion for Leave to Answer and Answer*, Docket No. EL11-50-000 (filed August 19, 2011) (“Complainants’ Answer”).

## I. REQUEST FOR LEAVE TO ANSWER

The Commission has discretion to accept answers to answers when they are helpful to its decision-making process.<sup>3</sup> The Commission should accept the NYISO's limited answer here because it has been narrowly drawn to help to clarify an important procedural issue and to identify that there are basic factual errors in *Complainants' Answer*.

## II. ANSWER

The NYISO's August 3 *Answer and Request for Expedited Action* ("August 3 Answer") explained that this proceeding raises a difficult procedural issue of first impression. The Commission's resolution of it will establish precedent that is likely to govern future proceedings concerning buyer-side mitigation exemption determinations by the NYISO, and other organized markets. The crux of the difficulty is that challenges to buyer-side mitigation determinations necessarily require a review of extremely sensitive confidential information regarding potential new entrants. The NYISO and the independent Market Monitoring Unit to the NYISO ("MMU") both explained the danger that making such information available to third parties could discourage new entry.<sup>4</sup> The *August 3 Answer* therefore proposed that the Commission approach this proceeding in a manner that reasonably balanced all of the interests concerned.<sup>5</sup>

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<sup>3</sup> See e.g., *New York Independent System Operator Inc.*, 133 FERC ¶ 61,178 at P 11 (2011) (allowing answers to answers and protests "because they have provided information that have assisted [the Commission] in [its] 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.....").

<sup>4</sup> See *Answer and Request for Expedited Action of the New York Independent System Operator, Inc.* at 29-30, Docket No. EL11-50-000 (August 3, 2011) ("August 3 Answer"); *Motion to Intervene Out of Time and Request for Leave to Answer and Answer of the New York ISO's Market Monitoring Unit* at 5-7, Docket No. EL11-50-000 (filed August 9, 2011) ("MMU August 9 Answer").

<sup>5</sup> See August 3 Answer at 2, 24-25.

Complainants mischaracterize the *August 3 Answer* as an attempt to “hide behind assertions that it should be trusted to have properly implemented” the Pre-Amendment Rules.<sup>6</sup> Their assertion is contradicted by the NYISO’s clear statements in the *August 3 Answer*. Specifically, the NYISO proposed that if the Commission did not dismiss the Complaint outright, that the Commission examine the confidential information, and if it deemed necessary investigate, the NYISO’s mitigation exemption determinations.<sup>7</sup> The NYISO also stated it was prepared and willing to make information regarding its determinations available to the full extent that the Commission deems necessary, including by filing a supplemental answer.<sup>8</sup>

Complainants would have the Commission ignore the serious implications for future investments that were identified by the *August 3 Answer*,<sup>9</sup> and by the MMU,<sup>10</sup> and simply find the NYISO in default under Rule 213.<sup>11</sup> Complainants’ argument rests on the faulty premise that Complainants’ have made a *prima facie* showing that the NYISO’s determinations could not possibly have been consistent with the Services Tariff. Complainants’ premise is dependent on their use of carefully selected and erroneous assumptions.

Complainants also ignore the fact that the *August 3 Answer* sought a waiver of Rule 213’s requirements, to the extent necessary, “so that its decision to await Commission guidance on whether it is necessary to submit a confidential supplement is not construed as a failure to answer

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<sup>6</sup> Complainants’ Answer at 4. *Complainants’ Answer* also misstates and mischaracterizes other plain and publicly available facts. For example, Complainants’ statement that “Astoria II changed the interconnection point for the Astoria II Project in 2010” is directly contradicted by the NYISO’s interconnection queue, among other information.

<sup>7</sup> August 3 Answer at 1-2, 24-25, 27-34.

<sup>8</sup> *Id.* at 33-34.

<sup>9</sup> *Id.* at 29-30.

<sup>10</sup> MMU August 9 Answer at 5-7.

<sup>11</sup> Complainants’ Answer at 16.

any element of the Complaint.”<sup>12</sup> If the Commission were to conclude that Complainants have made a *prima facie* case, which it should not, it should grant the NYISO’s pending request. Neither Complainants’ nor any other party has opposed the request for a waiver should it be determined to be necessary. Moreover, granting it would not materially harm Complainants, or materially delay Commission action because the NYISO would submit its confidential supplement to the *August 3 Answer* if directed to do so.<sup>13</sup> At the same time, summarily granting even the interim relief requested by the Complainants would harm new entrants,<sup>14</sup> and consumers, by subjecting economic new entry to mitigation until a “full evidentiary hearing” was completed.<sup>15</sup> It would also harm the entire market due to the uncertainty it would create.

Complainants’ attacks on the integrity of the Commission’s investigation procedures, and their potential suitability for use in this case, are without merit. Indeed, Complainants appear to take the untenable position that *all* confidential investigations are unlawful because they contravene the Commission’s *ex parte* regulations.<sup>16</sup> The reality is that the Commission has ample discretion to use its confidential investigation procedures in this, and future exemption determination cases. Nothing in the *West Deptford*<sup>17</sup> decision prevents the Commission from

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<sup>12</sup> August 3 Answer at n. 70.

<sup>13</sup> Complainants could not legitimately claim that the fact that the information was not included in the *August 3 Answer* somehow violated their due process rights because they were not entitled to answer that pleading under Rule 213.

<sup>14</sup> See, e.g., *Motion to Intervene and Protest of the New York Power Authority, City of New York, Metropolitan Transportation Authority, The Port Authority of New York and New Jersey, New York State Office of General Services, and New York City Housing Authority*, Docket No. EL11-50-000 (filed August 3, 2011); *Protest of Bayonne Energy Center, LLC*, Docket No. EL11-50-000 (filed August 3, 2011).

<sup>15</sup> See Complainants’ Answer at 30.

<sup>16</sup> See Complainants’ Answer at 33. Complainants’ also appear to imply that the Commission might use an investigation to engage in improper communications with the NYISO. It is certainly not the NYISO’s expectation that the Commission would do so.

<sup>17</sup> *West Deptford Energy, LLC*, 134 FERC ¶ 61,189 (2011).

taking this approach when it is warranted. Complainants' opposition to a confidential review once again reveals their desire to function as *de facto* market monitors and to make themselves responsible for determining "whether the NYISO's decision to exempt the Astoria II and Bayonne Projects from mitigation was correct" based on their own "full examination of the actual data used by the NYISO."<sup>18</sup> Complainants' do, however, concede that an expedited paper hearing would be the best way to resolve this proceeding if the Commission does not dismiss the Complaint based solely on the pleadings and if it declines to initiate a confidential investigation. They expressly acknowledge that a paper hearing would allow for timely Commission action.<sup>19</sup>

### III. CONCLUSION

The NYISO respectfully requests that the Commission accept this limited answer and renews its request that the Commission either deny the Complaint based solely on the pleadings or, in the alternative, that the Commission conduct a confidential review using the procedures outlined in the *August 3 Answer*.

Respectfully submitted,

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<sup>18</sup> Complainants' Answer at n. 122. Such statements, along with Complainants' renunciation of their previous insistence that they do not seek access to confidential information, once again betray their desire to systematically review and second-guess exemption determinations after they are made by the NYISO with the MMU's input. Allowing market participants to play such a role would be inappropriate and problematic for the reasons specified in the NYISO's earlier pleadings.

<sup>19</sup> Complainants' Answer at 31.

**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 31<sup>st</sup> day of August, 2011.

/s/ Joy Kimberlin

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