

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

New York Independent System Operator, Inc.)))	Docket No. ER11-4338-001
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**REQUEST FOR LEAVE TO ANSWER AND ANSWER OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),¹ the New York Independent System Operator, Inc. (“NYISO”) respectfully submits this motion for leave to answer, and answers, the request for rehearing filed in the above-captioned proceeding on June 17, 2013, by EnerNOC, Inc., Viridity, Inc., Wal-Mart Stores, Inc., Comverge, Inc., the American Forest and Paper Association, and EnergyConnect, a Johnson Controls Company (collectively, the “Demand Response Supporters”).² The Demand Response Supporters request rehearing of the Commission’s determination regarding behind-the-meter generation in its May 16, 2013, order addressing the NYISO’s compliance with Order No. 745³ (“May 16 Order”).⁴ Specifically, the Demand Response Supporters allege that the May 16 Order erred by not finding that Order No. 745 requires the NYISO to allow behind-the-meter generation to participate as Demand Side

¹ 18 C.F.R. §§ 385.212, 213.

² *New York Independent System Operator, Inc.*, Request for Rehearing of Demand Response Supporters, Docket No. ER11-4338-001 (June 17, 2013) (“Demand Response Supporters Request”).

³ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187 (March 15, 2011) (“Order No. 745”); *reh’g denied*, Order No. 745-A, 137 FERC ¶ 61,215 (Dec. 15, 2011) (“Order No. 745-A”); *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012).

⁴ *New York Independent System Operator, Inc. Order on Compliance Filing*, 143 FERC ¶ 61,134 (2013) (“May 16 Order”).

Resources⁵ in the NYISO's Day-Ahead Demand Response Program ("DADRP") and receive the Locational Based Marginal Price ("LBMP")⁶ for the demand reduction that it facilitates.⁷

The Commission should deny the Demand Response Supporters' request for rehearing. The May 16 Order's determination regarding behind-the-meter generation is consistent with Order No. 745. The Commission has been clear that Order No. 745 does not require Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs") to make any changes to the eligibility of behind-the-meter generation for demand response compensation. It has been equally clear that to the extent that ISOs/RTOs and their stakeholders desire to make such changes they should do so through a separate proceeding.⁸ The NYISO is already exploring with its stakeholders the development of new market rules that would incorporate behind-the-meter generation into a revised NYISO economic demand response program. Granting rehearing would needlessly preempt this stakeholder process.

I. REQUEST FOR LEAVE TO ANSWER

The NYISO recognizes that the Commission generally discourages answers to requests for rehearing.⁹ Nonetheless, the Commission has the discretion to accept answers to rehearing

⁵ Capitalized terms not otherwise defined herein shall have the meaning specified in the NYISO's Market Administration and Control Area Services Tariff.

⁶ For purposes of this proceeding, LBMP and locational marginal price ("LMP") are comparable and are referred to interchangeably.

⁷ See Demand Response Supporters Request at p 3.

⁸ Demand Response Supporters, consisting of substantially the same parties that submitted the Demand Response Supporters Request, filed a complaint under Section 206 of the Federal Power Act on June 17, 2013, in FERC Docket No. EL13-74 requesting that the Commission require the NYISO to revise its tariffs to allow demand response facilitated by behind-the-meter generation to be compensated at full LMP. The NYISO will address Demand Response Supporters' allegations in its answer to the complaint.

⁹ See 18 C.F.R. § 385.213(a)(2).

requests 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 or assist in its decision making process.¹⁰ The NYISO's answer satisfies these standards and should be accepted because it addresses inaccurate or incomplete statements and provides additional information that the Commission needs to fully evaluate the arguments in this proceeding.

II. BACKGROUND

The May 16 Order denied requests by the Demand Response Supporters¹¹ and Joint Commenters¹² to find that the NYISO is required under Order No. 745 to allow behind-the-meter generation to participate as a Demand Side Resource in the DADRP and receive LBMP for the demand reduction that it facilitates.¹³ The Commission determined that such a finding was outside of the scope of Order No. 745. Specifically, the Commission stated:

In Order No. 745, the Commission did not require an RTO or ISO to differentiate between demand response resources for which demand response is facilitated by behind-the-meter generation and other demand response resources. Order No. 745 also did not prohibit such differentiation. If NYISO or its stakeholders determine that changes are warranted with respect to NYISO's existing practices in this area, such changes should be presented to the Commission in a separate proceeding.¹⁴

¹⁰ See, e.g., *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 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”).

¹¹ Demand Response Supporters consisted of: Demand Response Partners, Energy Curtailment Specialists, Inc., Energy Spectrum, Inc., EnerNOC, Inc., Viridity, Inc., Wal-Mart Stores, Inc., Comverge, Inc., and EnergyConnect, a Johnson Controls Company.

¹² Joint Commenters consisted of: the American Council for an Energy Efficient Economy, American Forest & Paper Association, Industrial Energy Consumers of America, and U.S. Clean Heat & Power Association.

¹³ May 16 Order at P 101.

¹⁴ *Id.*

In their request for rehearing, Demand Response Supporters argue that the Commission erred in this determination and request that the Commission grant rehearing on this matter and impose certain revisions to the NYISO's tariffs to allow behind-the-meter generation to participate as a Demand Side Resource in the DADRP and receive LBMP compensation for the demand reduction that it facilitates.

III. ANSWER

The Commission should deny Demand Response Supporters' request. The May 16 Order's determination regarding behind-the-meter generation is consistent with Order No. 745. The Commission has been clear that ISOs/RTOs are not required under Order No. 745 to make changes to the eligibility of behind-the-meter generation for demand response compensation. The Commission has stated that Order No. 745 "focused exclusively on the amount of payment demand response would receive and did not require any changes with respect to whether load relying on behind-the-meter generation would be entitled to demand response compensation."¹⁵ For this reason, the Commission has rejected, as outside the scope of Order No. 745, changes to the eligibility of behind-the-meter generation for demand response compensation.¹⁶ The NYISO's DADRP does not provide for the participation of behind-the-meter generation and does not provide demand response compensation to such resources. Consistent with the Commission's clear statements regarding the scope of Order No. 745, the NYISO was not

¹⁵ *Midwest Independent Transmission System Operator, Inc.*, Order on Rehearing and Compliance, 140 FERC ¶ 61,059 (2012) at P 29.

¹⁶ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, Order on Compliance Filing, 137 FERC ¶ 61,212 (2011) at P 71, *on reh'g*, Order on Rehearing and Compliance, 140 FERC ¶ 61,059 (2012) at P 29 (rejecting a change in behind-the-meter generation's eligibility to receive demand response compensation as outside the scope of Order No. 745); *PJM Interconnection, L.L.C.*, Order on Compliance Filing, 137 FERC ¶ 61,216 (2011) at P 94 (rejecting protesters' arguments for the elimination of demand response compensation to demand response customers with behind-the-meter generation as not required under Order No. 745).

required to include in its compliance filing revisions to its DADRP to allow behind-the-meter generation to participate in the program and receive LBMP for the demand reduction that it facilitates.

Demand Response Supporters' claims that the May 16 Order is somehow inconsistent with unrelated Commission orders¹⁷ or with Order No. 745 compliance approaches that were chosen by ISOs/RTOs facing factual circumstances different than the NYISO's¹⁸ are irrelevant. Demand Response Supporters' objection to the fact that Order No. 745 did not require ISOs/RTOs to change eligibility rules applicable to behind-the-meter generation is an untimely collateral attack on Order No. 745.¹⁹

The Commission has indicated that any such changes to the eligibility requirements should be presented to the Commission in a separate proceeding.²⁰ As the Commission stated in its May 16 Order, "[i]f NYISO or its stakeholders determine that changes are warranted with respect to NYISO's existing practices in this area, such changes should be presented to the Commission in a separate proceeding."²¹ A robust stakeholder process is necessary to determine to what further extent behind-the-meter generation may participate in the NYISO demand

¹⁷ See Demand Response Supporters Request at pp 11-12.

¹⁸ See *id.* at pp 8-10.

¹⁹ See, e.g., *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 134 FERC ¶ 61,229 at P 15 (2011) ("[collateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged."] (citing *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co.*, 112 FERC ¶ 61,117, at P 12 (2005)); see also *EPIC Merchant Energy NJ/PA, LP v. PJM Interconnection, LLC*, 131 FERC ¶ 61,130 (2010) (dismissing as an impermissible collateral attack a complaint that merely sought to re-litigate the same issues that were raised in the prior case citing no new evidence or changed circumstances).

²⁰ May 16 Order at P 101.

²¹ *Id.*

response programs.²² The eligibility and size requirements for behind-the-meter generation, measurement and verification protocols, and related issues such as addressing air emissions, energy injections and double counting are complex and require further evaluation and discussion.

The NYISO is already in the process of exploring with its stakeholders new market rules that would, among other things, incorporate behind-the-meter generation into a revised economic demand response program that will facilitate demand response resources directly participating in both the day-ahead and real-time energy markets.²³ As part of this process, the NYISO began work in June 2013 on a study on distributed energy resources to determine their current penetration, anticipated development, meter configuration, and other information that will inform the development of requirements for the participation of behind-the-meter generation in a revised economic demand response program. The NYISO has informed stakeholders of this study and is currently planning a workshop involving the consultant performing the study and stakeholders to identify issues regarding behind-the-meter generation that should be addressed in the study's scope.

The Commission should not preempt this process and act inconsistently with Order No. 745 by requiring the NYISO to include behind-the-meter generation in the DADRP. Such

²² Behind-the-meter generation is eligible to participate in the NYISO's reliability demand response programs.

²³ In 2012 the NYISO proposed and brought through its governance process its conceptual design for a dispatchable demand response program. This concept will ultimately supplant the NYISO's DADRP program and will allow all demand response resources that qualify to bid directly into the day-ahead and real-time energy markets. The NYISO anticipates engaging in a discussion with stakeholders regarding the market rules for this dispatchable demand response program during this second half of 2013. The NYISO expects that these discussions will explore market rule changes that will enable behind-the-meter generation to participate in this program. *See* NYISO's December 5, 2012, Business Issues Committee presentation entitled "Market Design Concepts for Demand Response in the Real-Time Energy Market," available at: http://www.nyiso.com/public/webdocs/markets_operations/committees/bic/meeting_materials/2012-12-05/agenda_08_Demand_Response_in_the_Real-Time_Energy_Market-for_12-5-12_BIC.pdf.

action cannot simply be accomplished by adopting new tariff language, such as the language proposed by Demand Response Supporters, but would, instead, require a careful evaluation of market and reliability impacts, measurement and verification processes, the input of NYISO stakeholders, and the development and implementation of revised market rules. The NYISO should be permitted to continue to work with its stakeholders to address these issues as it develops the market rules for a revised NYISO economic demand response program.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the NYISO respectfully requests that the Commission grant its motion for leave to answer, accept this answer, and deny Demand Response Supporters' request for rehearing.

Respectfully submitted,

/s/ Michael J. Messonnier, Jr.

Michael J. Messonnier, Jr.

Counsel for the

New York Independent System Operator, Inc.

July 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served 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 Commission Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2013).

Dated at Washington, D.C. this 2nd day of July 2013.

/s/ Catherine Karimi

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