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 Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure,[1] the New York Independent System Operator, Inc. ("NYISO") respectfully submits this request for leave to answer and answer to the *Request for Clarification or in the Alternative Rehearing* ("Request") submitted by the Incumbent In-City Generators[2] in response to the November Order[3] in this proceeding. The Request should be rejected because it mischaracterizes both the November Order and earlier Commission precedent and misrepresents Commission-accepted tariff provisions, and their meaning and impact.

I. REQUEST FOR LEAVE TO ANSWER

The Commission's procedural rules allow answers to motions, including motions for clarification,[4] as a matter of right. The Commission also has discretion[5] to accept answers to rehearing requests and has done so when such answers help to clarify complex issues, provide additional information, or are otherwise helpful in the Commission's decision-making process.[6]

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

[2] Astoria Generating Company, L.P., a U.S. Power Generating Company, the NRG Companies, and TC Ravenswood, LLC.

[3] *New York Independent System Operator, Inc.*, 133 FERC ¶ 61,178 (2010) ("November Order").

[4] *See* 18 C.F.R. § 385.213(a)(3).

[5] *See* 18 C.F.R. § 385.213(a)(2).

[6] *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

The Commission should follow its precedent and accept the entirety of the NYISO's Answer in this instance because it corrects mischaracterizations and therefore will both clarify the record and help the Commission to reach an informed decision.[7]

II. ANSWER

The Request pertains to Paragraph 71 of the November Order which accepted the NYISO's proposed enhancements to its Offer Floor[8] exemption process, subject to certain conditions that are not the subject of the Request. Paragraph 71 also stated that:

> It is reasonable for NYISO to provide an exemption test before a supplier begins construction of a new resource, as NYISO's tariff current[ly] provides, and to apply such a test to all new entrants. An entity whose resource is forecast to be economic at the time its construction begins is not attempting to artificially depress market prices through uneconomic entry. Thus, it would not be reasonable to impose an offer floor on such a resource that prevented it from clearing in the capacity auction if market conditions unexpectedly worsened by the time that construction is completed.[9]

The Request claims that this language was intended to "reaffirm" a prior Commission determination supposedly holding that all Offer Floor mitigation exemption decisions must take place before a developer's "investment decision," which the Request does not define, is made.[10] It therefore asks for clarification that "the NYISO must continue to conduct a supplier's exemption test '<u>before a supplier begins construction of a new resource</u>.'"[11] The Commission

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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..... ").

[7] In addition, if the Commission deems Rule 385.213(d)(1) to be applicable the NYISO respectfully requests that the Commission exercise its discretion and accept this Answer one day out-of-time.

[8] Capitalized terms that are not otherwise defined herein shall have the meaning specified in Section 2 of the NYISO Market Administration and Control Area Services Tariff ("Services Tariff") or Section 23.2.1 of Attachment H to the Services tariff, or Attachment S to the NYISO's Open Access Transmission Tariff ("OATT")

[9] November Order at P 71.

[10] Request at 3.

[11] Request at 4 (Emphasis supplied by In-City Incumbent Generators).

should not grant any such request, or approve any such interpretation whether as a clarification or on rehearing, because to do so would contradict both the Commission's orders[12] addressing the In-City buyer side mitigation measures,[13] including the tariff provisions accepted by the November Order. The interpretations that the Request proposes would also be contrary to the Federal Power Act. Finally, the In-City Incumbent Generators inaccurately claim that the Commission-accepted tariff revisions it challenges would allow gaming of the Offer Floor exemption analysis through "Class Year Shopping" and their argument should be rejected.

A. Neither the Commission's March 2008 Order Nor the Previously Effective Version of the NYISO's Offer Floor Exemption Tariff Provisions Provide that All Exemption Determinations Must Be Made Prior to the "Commencement of Construction" or Before an "Investment Decision" Is Made

The Request wrongly asserts that the Commission's March 2008 Order[14] accepting an earlier version of the NYISO's exemption and Offer Floor tariff provisions supports the In-City Incumbent Generators' interpretation of the November Order. The In-City Incumbent Generators point to language in March 2008 Order which stated that "[t]o ensure that mitigation rules do not deter economic entry, the Commission agrees that units should be exempted when their decision to enter was based on price signals that the market sent indicating that entry was needed."[15] It omits other language from that order, however, which clearly indicates that the Commission's intent was not to dictate when the exemption analysis would be conducted but to

[12] To the extent that the Request attempts to modify the Commission's March 2008 Order and the In-City buyer side mitigation measures in effect prior to the November Order, such request should be summarily rejected as a *de facto* untimely request for rehearing

[13] Such measures are set forth in Services tariff Attachment H § 23.4.5 and in accordance with the November Order ("In-City Buyer Side Mitigation Measures").

[14] *New York Independent System Operator, Inc.* 122 FERC ¶ 61,211 (2008).

[15] *Id.* at P 117.

ensure that the rules did not result in an economic entrant being "penalized after-the-fact for a decision to build that was economically rational at the time the decision was made."[16]

The Request likewise ignores the fact that the previously effective version of the NYISO's exemption and Offer Floor tariff language stated only that new entrants "may request" the NYISO to make exemption determinations upon the execution of all necessary Interconnection Facilities Study Agreements. The Commission-accepted tariff language contained no other requirements regarding the timing of the exemption analysis. It did not establish a requirement that new entrants that had made some unspecified level of investment, or "commenced construction" to some unspecified degree were no longer eligible for an exemption determination. Accepting the In-City Incumbent Generator's interpretation that the Commission-accepted tariff provisions did, would be contrary to the Commission's desire to avoid discouraging new entry.

The Request is also misleading to the extent that it tries to use statements by the NYISO's then-market advisor, and current independent Market Monitoring Unit ("MMU") that were made before the March 2008 Order to suggest that the MMU supports the proposition that the exemption test must be conducted before construction begins.[17] Any such suggestion is belied by the MMU's endorsement of the NYISO's previously effective tariff language and continued support for the NYISO proposals that were accepted by the November Order.

[16] *Id*.

[17] Request at 7-8, 14-15.

B. The November Order Accepted the Proposed Enhancements to the NYISO's Offer Floor Exemption Process Including the Linkage of the Timing of the Attachment H Exemption and Offer Floor Analyses to Project Cost Allocation Decisions Under the Attachment S Class Year Process

The purpose of the NYISO's proposed enhancements to its Offer Floor exemption process was to increase transparency and certainty for the benefit of all NYISO stakeholders, including "potential new entrants evaluating the applicability of the Offer Floor to a project."[18] Another key goal was to better align the Offer Floor and exemption analysis provisions in Attachment H of the Services Tariff with the cost allocation procedures and timetables in the "Class Year" provision of Attachment S to the NYISO OATT. The NYISO's September 27, 2010 filing which initiated the above-captioned proceeding ("September 27 Filing") was quite clear that this meant that the NYISO would "provide potential new entrants with the results of the NYISO's exemption and Offer Floor analyses before they must make the critical decision of whether to accept a Class Year allocation of interconnection project costs (specifically, System Deliverability Upgrade costs ["SDUs"])."[19] There was no indication in the filing letter, or in the text of the proposed tariff revisions, that the Attachment H analyses would instead be conducted prior to when a project began construction.

Paragraph 71 of the November Order clearly accepted this proposed framework. If the Commission had intended otherwise it would have used language expressly rejecting the NYISO's tariff revisions and directing adjustments in a compliance filing, exactly as was done in

[18] *See* September 27 Filing at 10.

[19] *Id*. *See also, id.* at 14 (stating that the then-proposed tariff revisions would more "clearly establish that potential entrants will receive exemption and Offer Floor information that may be critical to their project development decisions in advance of the deadline for deciding whether to accept Project Cost Allocations, or Revised Project Cost Allocations, under OATT Attachment S").

every other instance where the November Order required modifications to the NYISO's proposals.[20]

Given the November Order's acceptance of the proposed linkage between the Attachment H and Attachment S processes, Paragraph 71's suggestion that the mitigation exemption analysis must be conducted "before a supplier begins construction of a new resource" must be read in a manner consistent with the NYISO's proposal. The NYISO understands Paragraph 71 to mean that it must complete the exemption analysis before a new entrant makes the "critical decision" to accept a Project Cost Allocation (as described in the September 27 Filing).[21] Although Paragraph 71 did not repeat the wording of the NYISO's filing letter verbatim, its intent seems clear.

By contrast, the In-City Incumbent Generators' proposed interpretation is at odds with the proposals accepted by Paragraph 71 and with Paragraph 74's clear rejection of the In-City Incumbent Generator's' protest against them.[22] Accepting the Request would also place the NYISO in the position of having to evaluate developer plans that are not always clear and that can be subject to change. The question of when a potential ICAP Supplier has made "an investment decision" or "commenced construction" will often not have a clear-cut answer. Subjective evaluations of information that potential ICAP Suppliers have considerable ability to influence are inherently difficult and generate controversy. As the NYISO has explained in other

[20] *See, e.g.,* November Order at PP 47, 48, 51.

[21] The NYISO reads paragraph 71's reference to the previous version of the Services Tariff calling for an exemption test to be undertaken before construction occurs as a reference to the language quoted in Section A, above, specifying that new entrants "may" request exemptions upon the execution of all necessary Interconnection Facilities Study Agreements. As was previously noted, that is the only provision in the previous version of the Services Tariff that paragraph 71 could be referring to.

[22] *See, e.g., New York Independent System Operator, Inc.*, Comments and Protest of the New York City Suppliers at 4, 39-43 (filed October 22, 2010). *See also,* Section II.D, below.

filings in these proceedings[23] the NYISO's proposed enhancements to the In-City Buyer Side Mitigation Measures were intended to avoid these kinds of potentially time-consuming and resource-intensive inquiries by establishing objective standards that could be more efficiently administered. In this context, that would be achieved by linking the timing of the mitigation analysis to the timing of an entrant's Project Cost Allocation decision. Adopting the Request's interpretation would completely defeat this objective.

Finally, the NYISO would note that performing the exemption test after some level of investment has been made, or some preliminary construction work has been done, does not mean that uneconomic entry will be allowed. Rather a potential entrant's willingness to take such steps prior to the time that it receives its Project Cost Allocation simply signals that it is sufficiently confident that its entry will prove to be economic or that it is prepared to bear the risk of taking such early actions.

C. The Request's Proposed Interpretation of Paragraph 71 Would Be Inconsistent with the Federal Power Act

As was noted above, neither the previously nor currently effective versions of the NYISO tariff provision that govern its Offer Floor and exemption analyses specify that exemption determinations must be made before a potential new entrant "commences construction." Nor do they say that the analysis must be performed before such an entity makes any kind of investment decisions other than the "crucial decision" to accept or reject a Project Cost Allocation described in the September 27 Filing. The NYISO did not propose tariff language to establish the deadlines that the In-City Incumbent Generators assert they perceive in either 2007 or in the September 27 Filing.

[23] *See, e.g., New York Independent System Operator, Inc.*, Initial Compliance Filing at 2-3, Docket No. ER10-3043-001 (filed December 7, 2010).

Consequently, the Request is effectively asking the Commission to revise the Offer Floor and exemption provisions of the Services Tariff to establish deadlines that the In-City Incumbent Generators favor but that has no basis in the Commission-accepted text. That request would be at odds with the filed rate and thus inconsistent with Section 205 of the Federal Power Act.

D. The Request Misrepresents the Nature and Impact of the Commission-Accepted Enhancements to the NYISO's Offer Floor Exemption Process

The Request mischaracterizes the Commission-accepted enhancements to the Offer Floor exemption process as an "Expanded Exemption Testing Proposal" that would "change the current rule and allow a new entrant to repeatedly test for a mitigation exemption even though it had already made its investment decision and potentially even after the unit had already commenced construction."[24] According to the Request, the accepted rules would allow new entrants to game the In-City Buyer Side Mitigation Measures by engaging in "Class Year Shopping."[25] Such claims have no merit and should be rejected for the reasons set forth below.

1. The Accepted Provisions Allow the Application of the Exemption Test to All New Entrants to the Capacity Market

The In-City Incumbent Generators inaccurately and misleadingly describe the accepted tariff testing provisions.[26] They also use phrases that are not operative in the Buyer-Side Mitigation Tariff revisions, such as project's decision to "go forward" or its "investment decision."[27] The accepted changes to the exemption test are designed to ensure that all potential new entrants to the Capacity market are evaluated under the exemption test. The Commission-accepted revisions allow the evaluation of projects that: (1) are currently proposed and are well

[24] Request at 3.

[25] *Id*.

[26] *Id.* at 4.

[27] *See, e.g., id.* at 4, 7, 9, 14-15.

into their development stages; and (2) are ERIS only, and pursuant to OATT Attachment S provisions, request to be evaluated for CRIS.

The November Order correctly accepted the enhancements, which created an objective test so that all projects are evaluated prior to entry in the Capacity market. Under the accepted provisions, for the purposes of the exemption analysis, the NYISO's determination is made in relation to a project's acceptance of its SDU cost allocation and thus when it obtains CRIS. Since evaluation within a Class Year is required before a proposed project subject to the NYISO interconnection rules can begin operation,[28] concurrent with a proposed project's initial Class Year evaluation, all costs of new entry would be evaluated, including accepted SDU costs allocated to participants of that particular Class Year.

When the NYISO makes an Offer Floor exemption determination for a project that re-enters a new Class Year and requests CRIS, the NYISO includes in its analyses the projects' costs, which it provided prior to entering the initial Class Year, along with the SDU costs of the then-current Class Year cost allocation. The In-City Incumbent Generators' proposal, however, would obligate the NYISO to include in its Offer Floor and exemption determination, an SDU costs allocation which the projected rejected in a prior Class Year. This is unreasonable, as Class Year SDU costs vary widely and can change based on retirements or different deliverability solutions, and depending on which other projects are in the Class Year. Further, rejected SDU costs are not used for any other purposes and are only costs which a developer is not willing to incur to enter the Capacity market.

Also, adoption of the In-City Incumbent Generators' proposal would require the inclusion, in the forecast used for the exemption analysis, of the MW of all projects evaluated in

[28] Projects that do not go through the NYISO's interconnection process are evaluated in the same general time frame as projects that go through the Class Year process.

a Class Year, even those that do not accept their SDU cost allocation. It is unreasonable and unfair to the projects that do accept their SDU cost allocations in a Class Year to include in the forecast for purposes of the exemption and Offer Floor test, the MW of projects that do not accept SDUs. Projects that do not accept their SDU cost allocations are precluded under the tariff from offering Capacity, even if constructed and authorized to sell energy (*i.e.*, approved for ERIS).[29] An ERIS only project that did not have any CRIS eligible MW, would not be allowed to sell its MW, therefore, its Capacity is not properly included in the forecast. The accepted enhancements allow the NYISO to correctly represent the amount of Capacity added by new entry in the forecast used for the exemption analysis, and are therefore reasonable.

The In-City Incumbent Generators' are also incorrect when they attempt to characterize the test and determination as a "pass/fail." The test makes an exemption determination, and if the project is not exempt, then the NYISO determines the project's Offer Floor. The NYISO issues revised determinations based upon the new information in each successive round of the Class Year process.[30] In accordance with the tariff revisions approved by the November Order, the NYISO gathered the data from each of the units that are going to go through the 2009 or 2010 Class Year process.

2. The Commission-Accepted Enhancements Do Not Provide an Incentive for Uneconomic Entrants

The In-City Generators argue that the enhanced exemption test will allow the NYC market to "become unnecessarily flooded with uneconomic entrants requesting mitigation exemption tests whenever the market fluctuates"[31] and that projects that are uneconomic would

[29] Participation in the NYISO ICAP market in NYC requires that a project be found to be deliverable or that it pay for SDU costs to that make the Capacity deliverable.

[30] *See* Attachment H § 23.4.5.7.3.3, which specifies that the NYISO issues its exemption or Offer Floor determinations before the Class Year process, and revises it prior to successive rounds of the Class Year process.

[31] Request at 18.

enter in "anticipation of their ability to be tested later and ultimately qualify for an exemption despite the continued uneconomic nature of their facilities."[32] These arguments must be rejected, as the risks faced by projects who would seek to game the system by delaying entry in order to obtain an exemption, or a more favorable Offer Floor determination, are significant and would serve to deter such behavior.

The In-City Incumbent Generators' argument regarding Class Year shopping is premised on the assumption that SDU costs will decrease, so that by not accepting SDU costs in a Class Year they will receive a favorable SDU cost allocation in a later Class Year. However, projects that delay entry into the Capacity market face a risk of incurring higher SDU costs while foregoing Capacity revenues. In order for "class-shopping" to provide any benefit to a project, the SDU cost allocation for the Class Year in which they are initially assessed, would have to be significantly higher than the SDU costs in the subsequent Class Year. The risk that SDU costs would be higher in the subsequent Class Year, however, is not insignificant, as demonstrated by the 2008, 2009, and 2010 Class Year Studies.[33] These studies indicate that SDU cost allocations vary greatly from year to year, even for projects in the same location. The studies also indicate that SDU costs In-City are also highly project specific. Further, SDU costs are established based on the "solution" (*i.e.,* the system upgrade that is needed in order for the system to be deliverable). In order for a project to obtain an exemption or a lower Offer Floor determination in a subsequent Class Year, which offsets the project foregoing Capacity revenues for a year, there would have to be a significant change in the cost allocation which likely would have to

[32] *Id.* at 19

[33] See, Class Year 2008 Facilities Studies - Part 2 Studies (Sections 11, 12, 13 only): Deliverability Study and System Deliverability Upgrade Facilities (SDU), November 2009 available at < http://www.nyiso.com/secure/webdocs/committees/oc/meeting_materials/2009-11-12/CY08_Facilities_Study_Part2_Deliverability_Study_Draft3_clean.pdf>.

mean that the SDU solution proposed to alleviate the deliverability issues would have to be different.

Further, absent significant and unexpected changes in forecasted load and Capacity, an uneconomic project in one year would most likely continue to be uneconomic. Therefore, a decision to not enter the market, and forego Capacity revenues in order to obtain a more favorable determination at a later date would highly risky. It is important to note that, contrary to the In-City Incumbent Generators' assertion, it may very well be a valid economic decision for a project chooses to sell energy only and postpone entering the Capacity market.

Another uncertainty that the project would be bearing if it engaged in purported "class-year shopping" is that its delay of entry in the Capacity market would occur concurrent with the NYISO's ICAP Demand Curve reset process. Thus the project would not only assume the risk that SDUs would increase, it would also be making assumptions regarding the setting of the Demand Curves which in part form the basis for the exemption and Offer Floor determination. The In-City Incumbent Generators' "shopping" theory would require the project to be able to accurately predict the effect and timing of market changes such as: generator retirements, new entry of other Capacity, including demand response, Installed Reserve Margin, the Locational Minimum Installed Capacity Requirement in Zone J, and other changes that would impact Energy and Ancillary Services revenues, and changes to market rules. The project would, therefore, also need to make an assumption that the Demand Curves, which in part form the basis for the mitigation determination, would move in a direction favorable to the unit.

The In-City Incumbent Generators also ignore the November Order's elimination of the three year minimum on the Offer Floor,[34] which allows a project subject to an Offer Floor to be

[34] November Order at PP 51-52.

alleviated of it for the quantity of MW that clear the market in any twelve nonconsecutive months. By delaying its entry in to the market, through "class-year shopping" a project would be foregoing the opportunity to be alleviated of an Offer Floor sooner.

The In-City Incumbent Generators also fail to acknowledge, that even if a project were to reject its SDUs in order to evade the buyer side mitigation rules, there are other existing NYISO tariff provisions, as well as laws and regulations to address such behavior. A project engaging in market manipulation would run the risk of investigation and being held liable for such behavior.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc. respectfully requests that the Commission grant it leave to answer and reject the In-City Incumbent Generators' request for clarification or rehearing.

Respectfully Submitted,

/s/Ted J. Murphy
Ted J. Murphy
Counsel to the
New York Independent System Operator, Inc.

January 7, 2011

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 7th day of January, 2011.

/s/ Ted J. Murphy

Hunton & Williams LLP
1900 K Street, NW
Suite 1200
Washington, DC 20006
(202) 955-1500