UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Astoria Gas Turbine Power LLC,	)	
Complainant	)	
	)	
v.	)	**Docket No. EL09-57-001**
	)	
New York Independent System	)	
Operator, Inc.	)	
Respondent	)	

MOTION 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"), 18 C.F.R. §§ 385.212 and 385.213 (2009), the New York Independent System Operator, Inc. ("NYISO") submits a motion for leave to answer, and an answer to, the request for rehearing of the Commission's September 3, 2009 order ("September Order"),[1] filed on October 5, 2009 by Astoria Gas Turbine Power LLC ("NRG") in the above captioned proceeding. The Commission should affirm the September Order and deny NRG's request for rehearing.[2]

I. REQUEST FOR LEAVE TO FILE ANSWER

The NYISO recognizes that the Commission generally discourages answers to requests for rehearing.[3] Nonetheless, the Commission has the discretion to accept answers to rehearing requests, and has done so when those answers help to clarify complex issues, provide additional

[1] Astoria Gas Turbine Power LLC v. New York Independent System Operator, Inc., 128 FERC ¶ 61,221 (2009) ("September Order").

[2] Capitalized terms not otherwise defined have the meaning ascribed to them in the NYISO Open Access Transmission Tariff.

[3] *See* 18 C.F.R. § 385.213(a)(2) (2009).

information, or are otherwise helpful in the Commission's decision-making process.[4] In this case, NRG's rehearing request mischaracterizes the applicable tariff provisions and impermissibly raises arguments for the first time on rehearing.[5] The NYISO submits that this answer will assist the Commission in its decision-making process and respectfully requests leave to answer.

Additionally, although the NRG pleading is styled as a request for rehearing, it raises a new issue by requesting that the Commission waive the tariff provisions regarding the eligibility for inclusion in a Class Year. To the extent that NRG's pleading is a request for a tariff waiver, the NYISO submits that, as a matter of right it may submit this answer.[6]

II. ANSWER

In the September Order, the Commission denied the complaint filed by NRG. The Commission determined that the NRG projects did not satisfy the regulatory milestone, contained in Attachment S of the NYISO OATT, for entry into Class Year 2009. NRG is requesting rehearing of that conclusion and, alternatively, a waiver of the tariff language containing the regulatory milestone.

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[4] *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 decisionmaking 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").

[5] See, *e.g.*, San Diego Gas and Electric Company, Complainant v. Sellers of Market Energy and Ancillary Services Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange Corporation, 127 FERC ¶ 61,269 at P 291 (2009) (finding that "[a]bsent good cause, the Commission looks with disfavor on parties raising new issues on rehearing, particularly in cases where the issues could have and should have been raised at an earlier point in the proceeding. Permitting parties to raise new issues for the first time on rehearing would have the effect of creating a moving target for parties and would be disruptive to the administrative process, given that parties have no opportunity to respond to rehearing requests").

[6] The Commission generally provides parties with 21 days to submit comments to a request for tariff waiver. *See, e.g., New York Independent System Operator, Inc.*, 128 FERC ¶ 61,086 (2009); *New York Independent System Operator, Inc.*, 126 FERC ¶ 61,100 (2009); and *Southwest Power Pool, Inc.*, 126 FERC ¶ 61,012 (2009). The NYISO, therefore, submits that this answer is timely, because it is an answer to a request for tariff waiver. However, to the extent that the Commission deems the NYISO to have submitted this answer after the applicable deadline, the NYISO respectfully seeks permission to file this answer out-of-time.

A. The Commission's September Order Correctly Concluded that the Letters from the DEC did not Constitute a Determination Prior to March 1, 2009

NRG challenges the Commission's conclusion that the letters provided by the DEC did not satisfy the regulatory milestone for entry into Class Year 2009. NRG, however, fails to present any new argument that would justify a reversal of the September Order.

NRG argues that the Commission erred by concluding that the DEC letter to the NYISO dated February 27, 2009 ("First February Letter") did not contain the requisite determination of a complete application.[7] NRG is relying on the sentence in the letter that states that the permit applications "are currently under review by the Department." There is no indication in that letter that the air permit application was complete or that the applicable filing requirements were satisfied. Therefore, the Commission has correctly determined that the First February Letter does not constitute the requisite determination.[8]

NRG further argues that two of the letters provided by the DEC, when read together, constitute an official determination prior to the March 1 deadline that the air permit application was complete.[9] NRG asserts that the Commission failed to adequately consider the letter dated February 27, 2009 to Mr. David Alexander (the "Second February Letter") in conjunction with the First February Letter. The Second February Letter states that "[t]he DEC is in receipt of the following draft sections of the Draft Environmental Impact Statement . . ." and provides a list of appendices. The DEC makes no statement in that letter that the submitted documents complete the Draft Environmental Impact Statement ("DEIS"), only an indication that the DEC is

[7] *Astoria Gas Turbine Power LLC v. New York Independent System Operator, Inc*, Docket No. EL09-57, Request for Expedited Rehearing of Astoria Gas Turbine Power LLC at 6 (filed October 5, 2009) ("Rehearing Request").

[8] The NYISO has provided other reasons why the First February Letter is not a determination that satisfies the regulatory milestone for Class Year 2009. The NYISO will not repeat those in this answer. See *Astoria Gas Turbine Power LLC v. New York Independent System Operator, Inc*, Docket No. EL09-57, Answer of the New York Independent System Operator, Inc. to Complaint of Astoria Gas Turbine Power, LLC at 7 (filed June 22, 2009).

[9] Rehearing Request at 4-8.

reviewing those documents. The Second February Letter makes no reference at all to the status of the air permit application, of which the DEIS is only one component. For these reasons, the Second February Letter in no way cures the deficiencies of the First February Letter.

NRG also mischaracterizes the contents of the July 6, 2009 Letter from the DEC ("July 6 Letter").[10] NRG states that the July 6 Letter from the DEC was intended to clarify that the Second February Letter was a "completeness determination." However, the July 6 Letter makes no such a clarification. The July 6 letter simply states that the DEIS was submitted by February 27, 2009. The July 6 Letter does not characterize the DEIS as complete or satisfying all filing requirements. The July 6 Letter also makes no mention of the status of the permit application itself.

NRG continues to fail to recognize that the clear language of the tariff requires the determination of completeness occur before March 1, not just the submission of an application. The Commission correctly concluded that the letters issued by the DEC regarding NRG's projects, even when read together, failed to satisfy the regulatory milestone for entry into Class Year 2009.

B. Contrary to NRG's Argument, the Requirement for the NYISO to Modify Its Tariff Language Does Not Impact NRG

NRG argues that the Commission found that the current tariff language was unjust and unreasonable and such language should, therefore, not be applied to NRG's proposed projects.[11] However, NRG mischaracterizes what the Commission actually determined in the September Order. The Commission made clear that its conclusions regarding NRG's projects were based solely on the current tariff language without relying on Technical Bulletin 129. Specifically, the

[10] Rehearing Request at 8-10.

[11] *Id.* at 11-13.

Commission stated "[w]e emphasize that our finding that NRG failed to satisfy the OATT requirements for inclusion in Class Year 2009 is based on the OATT's language (specifically subsection (b))."[12]

The Commission's expressed concern about the current tariff language was specifically related to reliance on a technical bulletin "in lieu of filed tariff language." Since neither the NYISO nor the Commission relied upon a technical bulletin in finding that NRG's projects did not satisfy the regulatory milestone for entry into Class Year 2009, the Commission's requirement for the NYISO to submit clarifying tariff language should not impact the standard applied to NRG for entry into Class Year 2009.

C. NRG's Stated Justification for a Waiver is Misplaced

NRG attempts to argue that the "DEC's failure to issue a determination" was a result of unclear tariff provisions and conflicting guidance from the NYISO. NRG requests a waiver on this basis. However, the statements in the letters from the DEC are, in fact, a reflection of the status of NRG's permitting application under applicable law and DEC regulations, not a result of confusion over the applicable NYISO standard. The DEC regulations clearly indicate what is required in order for a permitting application to be complete.[13] The DEC regulations specify a formal process where completion is publicly noticed and also identifies specific circumstances where an application will be determined to be complete as a matter of law.[14] Neither of these occurred by March 1, 2009 for the NRG projects.

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[12] September Order at P 37.

[13] *See* 6 N.Y. COMP. CODES R. & REGS. § 621.3(a) (2009) (stating that "the application for a permit … must meet the requirements specifically listed in section 621.4 of this Part as well as the following criteria …").

[14] *See* 6 N.Y. COMP. CODES R. & REGS. §§ 621.6(c)(1), 621.6(h) (stating that applications will be "deemed" complete as a matter of law if 15 or 60 calendar days, depending on the type of permit, have passed without the DEC issuing a notice that the application is either incomplete or complete).

Furthermore, even if a non-public letter from the DEC could satisfy the regulatory milestone, the letters from the DEC regarding NRG's projects did not contain an adequate determination.[15] Again, this is not a reflection of the clarity of the NYISO milestone, but of the status of the projects in the permitting process. In a letter written for another project, the DEC clearly indicated that that applicant had provided all the information required under the applicable regulations. Specifically, in the letter for the CPV Valley project,[16] the DEC states the following:

> The [DEC] has determined that CPV Valley has submitted all the information required by 6 NYCRR Part 621 ..... The DEC has made a determination that CPV Valley has submitted all the information required to be submitted pursuant to these above-referenced section.

In contrast, the NRG letters, two of which were issued the day after the CPV Valley letter, only state that certain information had been received and is being reviewed. The difference between the CPV Valley letter and the NRG letters indicates that the DEC viewed the projects as being at different stages in the permitting process. The DEC has shown that it would, where appropriate, issue a letter explicitly stating that the DEC "determined" that a submitted application contains all information required under applicable regulations. DEC simply did not issue such a letter for NRG.

[15] In the September Order, the Commission did not need to address whether a letter that was not publicly noticed would satisfy the regulatory milestone. The Commission stated that "[e]ven assuming that a non-publicly noticed statement from a state regulator suffices, where such statement sets forth the determination that an air discharge permit application is complete (either in an administrative or substantive sense), we find that none was issued by March 1, 2009, the critical deadline..... " September Order at P 37.

[16] See Letter from the New York State Department of Environmental Conservation to Robert Fernandez of the New York Independent System Operator, Inc., dated February 26, 2009 regarding the CPV Valley project, included as Exhibit D in *Astoria Gas Turbine Power LLC v. New York Independent System Operator, Inc*, Docket No. EL09-57, Motion for Leave Answer and File Answer of the NRG Companies (filed July 7, 2009).

III. CONCLUSION

Wherefore, the New York Independent System Operator, Inc., respectfully requests that the Commission grant it leave to answer, accept this answer, and reject the NRG request for rehearing and tariff waiver.

Respectfully submitted,

/s/ Karen Georgenson Gach
Karen Georgenson Gach
Senior Attorney
New York Independent System Operator, Inc.

October 21, 2009

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 these proceedings in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Washington, D.C., this 21st day of October, 2009.

/s/ Vanessa A. Colón

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