UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	**)**	**Docket Nos. ER16-120-001**
	)	**ER16-120-003**
	)	**EL15-37-003**
	)	

REQUEST FOR LEAVE TO ANSWER AND ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

In accordance with Rule 213 of the Commission's 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 December 18, 2017 *Request of Entergy Nuclear Power Marketing, LLC for Clarification or, in the Alternative, Rehearing* (the "Request for Clarification"). Entergy Nuclear Power Marketing, LLC ("Entergy Nuclear") asks the Commission to "clarify" that the November 2017 Order[2] dictates that the "deadline for the NYISO to complete its final market power review of the Indian Point deactivation notice (if such a review is deemed warranted) shall be no later than March 13, 2018."[3] In the alternative, Entergy Nuclear seeks rehearing on the theory that the "NYISO's Generator Deactivation Process cannot be just and reasonable without a clear deadline set early in the overall process for the NYISO to complete any final market power review deemed warranted."[4]

For the reasons set forth below, the Commission should deny both clarification and rehearing. Entergy Nuclear's request is inconsistent with the NYISO's Market Administration

[1] 18 C.F.R. § 385.213 (2017)

[2] *New York Independent System Operator, Inc.*, 161 FERC ¶ 61,189 at P 103 (2017) (November 2017 Order).

[3] Request for Clarification at 1.

[4] *Id*. at 3-4.

and Control Area Services Tariff ("Services Tariff"). None of the NYISO's filings in this proceeding included tariff language that would impose a 120-day deadline on market power review or the issuance of final withholding determinations. Entergy Nuclear's request also mischaracterizes past statements by the NYISO that addressed circumstances very different from those presented by the proposed deactivation of Entergy's Indian Point units.

The independent Market Monitoring Unit for the NYISO, *i.e.*, Potomac Economics, Ltd., has authorized the NYISO to state that it has reviewed the Request for Clarification, shares the NYISO's concerns, and supports this answer.

I. REQUEST FOR LEAVE TO ANSWER

The NYISO is authorized to answer Entergy Nuclear's Request for Clarification.[5] The Commission also has discretion[6] to accept answers to requests for rehearing and has done so when they help to clarify complex issues, provide additional information, or are otherwise helpful to its decision-making process.[7] The Commission should accept the NYISO's answer in this instance. The Request for Clarification mischaracterizes certain statements made by the NYISO and makes no mention of a tariff provision that is directly relevant to the issues it raises. Consequently, the Commission should allow the NYISO to answer in order to ensure that there is a complete and accurate record in this proceeding.

II. ANSWER

Entergy Nuclear asks the Commission to clarify that the NYISO is bound to meet a 120-day deadline for conducting a final market power review, which encompasses physical

[5] Rule 213(a)(3) authorizes parties to answer all pleadings except for those specifically enumerated in Section 213(a)(2).

[6] *See* 18 C.F.R. § 385.213(a)(2).

[7] *See, e.g., Cal. Indep. Sys. Operator Corp.*, 129 FERC ¶ 61,241 at P 16 (2009); *PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,188 at P 6 (2009); *Missouri Interstate Gas, LLC et al.*, 127 FERC ¶ 61,011 at P 8 (2009).

withholding analyses, of deactivating generators. In doing so, Entergy Nuclear is seeking to compel the NYISO to complete a final market power analysis and issue a final withholding determination for Indian Point Units 2 and 3 by March 13, 2018 because the deactivation notices for those units were deemed to be complete by the NYISO on November 13, 2017. Entergy Nuclear would require this notwithstanding the fact that the Indian Point units asked to deactivate on, and are not expected to deactivate before, April 30, 2020 and 2021 respectively.[8]

The Commission should deny the requested clarification, as well as the related request for rehearing. Requiring the NYISO to complete market power analyses so far in advance of the units' expected withdrawal from the market is not required by the tariff language the NYISO submitted in this proceeding, is inconsistent with and cannot be justified by reference to prior NYISO statements, and is contrary to the existing Services Tariff. It would be unreasonable for the Commission to create such a requirement, particularly given the facts and circumstances of this proceeding.

A. The Services Tariff Does Not Establish, and the NYISO Has Never Proposed, a 120-Day Deadline for Completing Market Power Analyses for Deactivating Generators

As Entergy Nuclear acknowledges, neither the NYISO's Initial Compliance Filing[9] nor its Second Compliance Filing[10] included tariff language that would impose a 120-day deadline on market power review or the issuance of final withholding determinations for Generator deactivations. The NYISO has never proposed such a deadline, and it cannot be found in the

[8] *See Posting of Completed Generator Deactivation Notice*, November 13, 2017 at: http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Documents_and_Resources/Planned_Generation_Retirements/Planned_Retirement_Notices/Posting-of-Completed-Generator-Deactivation-Notice-Indian-Point%20Units-2-and-3-11-13-17.pdf.

[9] New York Independent System Operator, Inc., *Compliance Filing*, Docket No. ER16-120-003 (October 19, 2015) ("Initial Compliance Filing").

[10] New York Independent System Operator, Inc., *Compliance Filing*, Docket No. ER16-120-003 (September 19, 2016) ("Second Compliance Filing").

Services Tariff or in any other NYISO document. There is thus no tariff basis for Entergy Nuclear's position.

The Request for Clarification suggests that Entergy Nuclear has only recently "discovered" the absence of deadline language in the tariff. Energy Nuclear implies that an express deadline for physical withholding analyses was omitted unintentionally from the filed tariff language.[11] In reality, the NYISO never sought to establish a 120-day deadline; such a deadline was never proposed, and no such deadline has ever existed in the NYISO's tariff. The NYISO is opposed to Entergy Nuclear's attempt to introduce a deadline now.

B. The NYISO's and the Commission's Past Statements Do Not Support the Request for Clarification

Entergy Nuclear tries to use several past NYISO statements to support its desired deadline. First, the NYISO's May 2016 request for clarification in this proceeding explained that the Commission's April 2016 Order[12] had created uncertainty by requiring the NYISO to re-submit numerous tariff revisions governing its proposed generator deactivation review process. The April 2016 Order raised the question of how the NYISO, "should proceed if it receives a Generator Deactivation Notice before it submits a second compliance filing that contains the revised deactivation review process tariff rules."[13] The NYISO stated that "under the circumstances" it believed the "most reasonable interim approach would be for it to generally follow the timetable and procedures for evaluating Generator deactivation notices that was proposed in its original Compliance Filing" such as taking "up to 120 days to review market

[11] Request for Clarification at 4, 6 n. 14.

[12] *New York Independent System Operator, Inc.*, 155 FERC ¶ 61,076 (2016) ("April 2016 Order").

[13] New York Independent System Operator, Inc., *Request for Rehearing and Clarification*, Docket No. ER16-120-001, EL15-37-002 (May 23, 2016) ("NYISO Clarification") at 15.

power concerns . . . ."[14] The November 2017 Order accepted the Second Compliance Filing and held that the NYISO's concerns had thereby been "rendered moot." It added that the NYISO's proposed interim process would be "appropriate" to the extent that the NYISO "has received a generator deactivation notice between the Commission's issuance of the [April 2016 Order] and this order . . . ."[15]

Entergy Nuclear claims that the NYISO Clarification and November 2017 Order obligates the NYISO to complete a final physical withholding analysis for the Indian Point units within 120 days. Entergy Nuclear's claim is incorrect. The NYISO's references to completing market power reviews within 120 days throughout this proceeding and the related stakeholder process were intended to address circumstances where a generator proposed to deactivate by providing 365 days' notice. This focus on generators deactivating in 365 days, and the NYISO's rationale for proposing this timeframe as the minimum notice period, is abundantly clear in all of the NYISO's stakeholder presentations and all of its filings in this proceeding. The NYISO's statements regarding the timing of market power reviews were never intended to create a binding deadline. They were not focused on all potential deactivation scenarios, including those such as Entergy Nuclear's in which a generator is planning on continuing to operate for a lengthy period and then deactivate years after the conclusion of the 365-day Generator Deactivation Process review period.

Second, Entergy Nuclear cites NYISO statements found in its December 2015 Answer in this proceeding. In that pleading the NYISO stated that it would "begin performing its analysis regarding whether a Generator's proposed deactivation raises market power concerns or constitutes conduct inconsistent with competitive behavior promptly following a Generator's

[14] *Id.*

[15] November 2017 Order at P 103.

submission of its completed Generator Deactivation Notice."[16] It also said that the withholding analysis "must be performed at the start of the process to provide transparency regarding potential penalties that the Generator could be subject to if it were to deactivate and to enable the NYISO to address any market power concerns."[17]

These statements were all made in the context of the NYISO's plans for generators seeking to deactivate within the NYISO's proposed minimum notice period, *i.e.*, 365 days (or on an expedited basis, where permitted, in less than 365 days). Indeed, immediately before the statements quoted by Entergy Nuclear, the NYISO emphasized that its "ability to timely perform its responsibilities as required within the limited 365-day notice period would be significantly impeded if it were unable to obtain the information required by Appendix F at the start of the process."[18] The December 15 Answer did not address the timing of market power analyses for generators that intended to deactivate years in the future. This is hardly surprising given the amount of attention dedicated in this proceeding to the rationale for, and details of, the NYISO's minimum 365-day notice period.

Third, Entergy Nuclear points to three presentations that the NYISO made to its stakeholders in 2015 during the development of its generator deactivation proposal.[19] Just as with the December 2015 Answer, each of these presentations was concerned chiefly with issues pertaining to generators that wished to deactivate within 365 days. Their references to the timing of market power determinations were illustrative and intended to demonstrate why 365 days'

[16] See New York Independent System Operator, Inc., *Request for Leave to Answer and Answer of New York Independent System Operator, Inc.*, Docket No. ERl6-120-000 (December 21, 2015) ("December 2015 Answer") at 27.

[17] *Id.*

[18] *Id.* at 26.

[19] *See* Request for Clarification at 5-6.

notice was the minimum appropriate period. They were not intended to address or limit situations where the generator requested far longer than 365 days and, importantly, none of the presentations specified that the NYISO would adhere to a 120-day deadline in all cases. Entergy Nuclear highlights language in one of the presentations which indicated that the NYISO would "require a minimum of 4 months after submission of a complete notice to . . . review for possible physical withholding."[20] But even that reference clearly stated that the NYISO would require a "minimum of" four months which is not the same as applying a 120-day deadline to all scenarios.

Fourth and finally, Entergy Nuclear claims that the NYISO's Initial Compliance Filing "confirmed" that the NYISO "would evaluate the economic justification of deactivation requests received from generators in a Mitigated Capacity Zone within 120 days of the Generator Deactivation Assessment Start Date."[21] In fact, the Initial Compliance Filing makes no such binding commitment but rather suggests that the NYISO would be conducting its "evaluation of the economic justification of the deactivation of Generators in Mitigated Capacity Zones" concurrent with other early steps in its Generator Deactivation Process. Once again this statement was made in the context of a discussion of the NYISO's then-proposed minimum 365-day notice period, and neither asserts, nor suggests, the existence of a "deadline" by which the NYISO would complete its market power evaluation. It is not a "confirmation" that the NYISO intended to conduct market power analyses in the same timeframe for generators planning to deactivate years in the future.

[20] Request for Clarification at 13.

[21] Request for Clarification at 6; *citing* Initial Compliance Filing at 16.

C. The Request for Clarification Is Inconsistent with Section 23.4.5.6.1 of the Currently Effective Services Tariff

The Services Tariff includes language that directly contradicts Entergy Nuclear's position. Services Tariff Section 23.4.5.6.1 (Attachment H)) expressly establishes that retirement and de-rating decisions are subject to NYISO audit and review at any time. The provision reads:

> Any proposal or decision by a Market Participant to retire or otherwise remove an Installed Capacity Supplier from a Mitigated Capacity Zone Unforced Capacity market, or to de-rate the amount of Installed Capacity available from such supplier, may be subject to audit and review by the ISO if the ISO determines that such action could reasonably be expected to affect Market-Clearing Prices in one or more ICAP Spot Market Auctions for a Mitigated Capacity Zone in which the Resource(s) that is the subject of the proposal or decision is located, subsequent to such action; provided, however, no audit and review shall be necessary if the Installed Capacity Supplier is a Generator that is being retired or removed from a Mitigated Capacity Zone as the result of a Forced Outage that began on or after May 1, 2015 that was determined by the ISO to be a Catastrophic Failure. Such an audit or review shall assess whether the proposal or decision has a legitimate economic justification or is based on an effort to withhold Installed Capacity physically in order to affect prices. The ISO shall provide the preliminary results of its audit or review to the Market Monitoring Unit for its review and comment. The responsibilities of the Market Monitoring Unit that are addressed in this section of the Mitigation Measures are also addressed in Section 30.4.6.2.10 of Attachment O to this Services Tariff.

Entergy Nuclear would have the Commission read this provision out of the Tariff, and read in its preferred 120-day deadline, based on Entergy Nuclear's interpretation of the NYISO statements referenced above. Even if the NYISO had made those statements with the intent that Entergy Nuclear ascribes to it, the NYISO could not have overridden Services Tariff 23.4.5.6.1 simply by saying that it intended to, even in a filing to the Commission. As noted above, the NYISO never proposed, and the Commission has never accepted, tariff revisions that would nullify Section 23.4.5.6.1 of the Services Tariff.

D. It Would Be Unreasonable for the Commission to Impose a 120-Day Deadline for Market Power Reviews

As noted above, the NYISO's process for conducting physical withholding analyses is well settled in the Services Tariff. The relevant provision does not include a time limit. Entergy Nuclear is effectively attempting to restrict the NYISO's flexibility by artificially locking it into conducting deactivation-related physical withholding analyses at a prescribed time.

Requiring the NYISO to complete physical withholding analyses years in advance of generator deactivation would clearly be unreasonable and unjustified on equitable or policy grounds. Market conditions could change dramatically over a two or three year period, as could a generator owner's business plans as well as the plans of other generators.[22] For example, other resources might give notice of their intent to deactivate and then deactivate before a multi-year notice period runs. Decisions that appear, or that do not appear, to raise market power concerns within 120 days of the Generator Deactivation Assessment Start Date could thus look very different in the future. A lengthy delay between the completion of a physical withholding analysis and a generator's actual deactivation raises the possibility that a generator's ownership and affiliations might change in ways that would be significant to a market power evaluation. In addition, generators with distant deactivation dates might decide to extend their participation in the market beyond those dates. The combination of potential changes in ownership, affiliations, and incentives that exist when years separate a Generator Deactivation Notice from the generator's deactivation also gives rise to gaming concerns. It would be unreasonable to compel the NYISO to complete its market power reviews for units years before their actual deactivation.

Moreover, although the data necessary to determine that a Generator Deactivation Notice is complete may also be needed to perform a withholding analysis, it does not necessarily

[22] Indeed, a rational actor behaving in a competitive manner should be expected to incorporate new information about market conditions into its business plans as that information becomes available.

represent all of the data required to perform such an analysis. Specifically, the data used to evaluate the completeness of a deactivation notice does not require all of the information needed to make the Services Tariff's required determination of whether there is a "legitimate economic justification"[23] for the generator's proposal or decision. Therefore, it would not be reasonable to tie a deadline for NYISO's completion of this review to a milestone that would not ensure that the deactivating generator has provided all necessary data for the NYISO to complete its review.

Thus, to assert that the NYISO must issue a determination by a prescribed deadline would be both unreasonable and contrary to the long-standing tariff provisions governing market power examinations and determinations. There is likewise no basis for revising Section 23.4.5.6.1 of the Services Tariff to establish specific deadlines for completing market power reviews associated with generator deactivations. If the NYISO were compelled to conduct physical withholding analyses using information remote in time from a generator's actual deactivation there would be a substantial risk of both under- and over-mitigation.[24] As long as generators have the freedom to request deactivation far in advance of their proposed deactivation the NYISO will need to retain comparable flexibility to conduct market power analyses at reasonably appropriate times on a case-by-case basis. Entergy Nuclear is effectively attempting to restrict the NYISO's flexibility by artificially locking it into conducting deactivation-related physical withholding analyses at a prescribed time.

[23] *See* Services Tariff Section 23.4.5.6.1 (discussed above in Section II.C.).

[24] The Commission has consistently emphasized that it is critically important to guard against both over- and under-mitigation in cases involving buyer-side market power mitigation measures. *See, e.g., New York State Public Service Commission, et al. v. New York Independent System Operator, Inc.* 158 FERC ¶ 61,137 (2015) at P 34 ("[T]he Commission seeks to ensure that buyer-side market power mitigation rules strike a careful balance between over-mitigating and under-mitigating new capacity resources.") The same concerns are relevant to this proceeding.

E. If the Commission Concludes that the November 2017 Order Established an "Interim Process" with a 120-Day Deadline that Deadline Should Cease to Apply After November 16, 2017

In the alternative, if the Commission were to decide that the November 2017 Order obliges the NYISO to follow the interim process proposed by the NYISO Clarification, then it should also clarify that the interim process was only in effect until the issuance of the Compliance Order on November 16, 2017. In that case, the interim rules, including any 120-day deadline, would no longer apply to Entergy Nuclear because they would have only been in effect for the three days after Entergy Nuclear submitted a completed Generator Deactivation Notice. Even if the Commission somehow found that the Clarification request bound the NYISO to complete the physical withholding analysis in 120 days, such requirement would now be moot and inapplicable to Entergy's pending request. The "interim process" proposed in the NYISO Clarification was just that – a process for the interim period only. It was meant to avoid protracted uncertainty regarding the treatment of deactivation notices at a time when it was unclear which tariff rules would apply to them.[25] The NYISO's issuance of Entergy Nuclear's deactivation notice was completed three days before the issuance of the November 2017 Order. By accepting the Second Compliance Filing (effective October 20, 2015) that order eliminated all doubt regarding the processing of deactivation requests.[26] The mere fact that the Indian Point deactivation requests were completed just a few days before the November 2017 Order would

[25] Furthermore, the NYISO Clarification was clear that the NYISO only intended to make an "interim process" available to deactivation requests that were submitted before the Second Compliance Filing was made, *i.e.*, before September 16, 2016, and not before the Commission acted on that filing. The NYISO's intent was to address any deactivation requests received between the submission of the Second Compliance Filing and a Commission order under the tariff provisions included in the Second Compliance Filing. The November 16 Order was therefore not accurate when it stated that the interim period was intended to run until the issuance of a Commission order.

[26] The Request for Clarification acknowledges (at n. 1) that although the November 2017 Order "was issued subject to limited condition, the issues that remain to be resolved in these proceedings are not germane to this request.")

not be a reasonable basis for handling them under an alternative rule set not reflected in the effective tariff language.

III. CONCLUSION

In conclusion, the Commission should deny both clarification and rehearing and take no other action in this proceeding.

Respectfully submitted,

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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 2nd day of January 2018.

/s/ Joy A. Zimberlin

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