UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Light Power & Gas of NY LLC	)	
	)	
Complainant	)	**Docket No. EL19-39-000**
	)	
v.	)	
	)	
New York Independent System Operator, Inc.	)	
	)	
Respondent	)	

ANSWER OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, the New York Independent System Operator, Inc. ("NYISO") respectfully submits this answer to the Complaint filed in the above-captioned docket by Light Power & Gas of NY LLC ("LPG") on January 29, 2019 (the "Complaint").

The Complaint asks the Commission to allow LPG's principals to re-enter the NYISO-administered markets without first paying the debts incurred by a now-bankrupt prior venture, North Energy Power LLC ("North Energy"). That prior venture was engaged in the same business and served the same customers that LPG has indicated it plans to pursue now. LPG began pursuing operation as an energy service company ("ESCO") promptly following the bankruptcy of North Energy. LPG would have the NYISO ignore indisputable facts that clearly show that LPG and North Energy are, for all purposes relevant to the NYISO's credit requirements, one and the same. LPG argues that the NYISO must allow it to enter the market based on a narrow and formalistic interpretation of the NYISO tariff and of the filed-rate doctrine. LPG's interpretation would enable LPG's principals to evade a tariff requirement that

defaulting customers cure their defaults before returning to the market. It would also enable other Market Participants[1] to use the same tactic in the future, preventing the NYISO from fulfilling its obligations to protect Market Participants from unreasonable credit risks. Nothing in NYISO's tariff requires it to dispense with common sense when applying its terms.

As is explained below, the NYISO has authority under its tariff to recognize LPG's close links to North Energy and prevent the former from entering the market until the latter's debts are paid in full.[2] The NYISO has not violated any provision of its tariff, including its bad debt loss provisions, and has not engaged in undue discrimination.[3] Even if the Commission were to conclude that the tariff is ambiguous regarding the NYISO's authority to hold LPG accountable for North Energy's debt, Commission precedent clearly favors the NYISO's tariff interpretation over LPG's.[4] Commission policy and the need to protect Market Participants from unreasonable credit risk likewise overwhelmingly support the NYISO's decision not to register LPG.[5] There is no basis for LPG's allegations that the NYISO acted inappropriately or out of a supposed "bias."[6] Finally, contrary to what the Complaint claims, the NYISO's position is in no way dependent on common law "successor liability" principles and the NYISO has not impermissibly "imported" any such principles into its tariff.[7]

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[1] All capitalized terms in this Answer will have the meanings set forth in the Open Access Transmission Tariff ("OATT") or the Market Administration and Control Area Services Tariff ("Services Tariff"), unless otherwise specified.

[2] *See* Section II.A below.

[3] *See* Section II.D below.

[4] *See* Section II.B below.

[5] *See* Section II.C below.

[6] *Id.*

[7] See Section II.E below.

In short, there is no merit to LPG's claims and it has failed to meet its burden of proof under the Federal Power Act ("FPA").[8] The Complaint must therefore be denied.

I. BACKGROUND

This is a straightforward case of the NYISO exercising its authority under its OATT in good faith to protect Market Participants from unreasonable costs and associated credit risks that LPG would inappropriately shift to them. As discussed in the attached supporting affidavits,[9] LPG has the same principals, the same business model, and apparently seeks to serve the very same customers as North Energy, a former Market Participant that defaulted on its obligations to the NYISO and declared bankruptcy in September 2018.

As LPG's own exhibits demonstrate, the NYISO terminated North Energy from the NYISO-administered markets in October 2018 as a result of North Energy's default on its obligations.[10] The NYISO subsequently obtained an order from the Bankruptcy Court of the United States District Court for the Eastern District of New York allowing the NYISO to access collateral that North Energy had posted.[11] That collateral, however, falls short of what North

[8] The Commission recently reiterated that complainants have the burden of initially providing sufficient evidence to establish a *prima facie* case and will prevail only if the preponderance of evidence supports their position. *See City of Oakland City of Oakland, California v. Pacific Gas and Electric* Company, 165 FERC ¶ 61,249 at PP 24-25 (2018). The same standard applies to complaints filed under Sections 206 or 306 of the FPA. *Id.* (LPG filed its complaint under both provision although it appears that Section 206 is not implicated because LPG is not challenging the justness and reasonableness of existing NYISO tariff provisions.)

[9] *See* the attached supporting affidavits of Ms. Sheri Prevratil ("Attachment II") and Ms. Jennifer Davies ("Attachment III").

[10] Complaint at Attachment 1, Exhibit K (October 10, 2018 letter from NYISO to the Commission providing notice of termination of North Energy from the NYISO-administered markets).

[11] Complaint at Attachment 1, Exhibit J (October 11, 2018 order of the United States Bankruptcy Court for the Eastern District of New York permitting the NYISO to access North Energy's collateral). The fact that LPG has such ready access to, and attaches to its Complaint, a number of the documents produced in the North Energy bankruptcy proceeding belies its claim to be separate and distinct from North Energy.

Energy currently owes for its activities in the NYISO-administered markets, and other Market Participants will be left to bear that obligation if it is not paid.

The NYISO OATT expressly and indisputably bars North Energy from re-entering the market until it has paid its debts. LPG and North Energy are separate limited liability companies ("LLCs"), but for all purposes relevant to Section 27.4 of the OATT they are, and should be treated as, the same entity. LPG was created several years ago, but has existed as an inactive shell LLC for nearly all of its existence.[12] On August 27, 2018, the entity that had been financing North Energy, Big Apple Energy, LLC, filed for bankruptcy. North Energy's financial viability rapidly weakened thereafter, culminating in it defaulting on its NYISO financial obligations and filing its own Chapter 11 bankruptcy case on September 17, 2018.[13]

A week after the North Energy creditor's bankruptcy filing, one of North Energy's principals, now operating through LPG, first contacted the NYISO about registering LPG as a Market Participant.[14] In September 2018, LPG initiated its application to register as an ESCO with the State of New York Public Service Commission.[15] These activities appear to have been LPG's first discernible business activities since its creation and only took place after North Energy's creditor filed bankruptcy and North Energy was in dire financial straits.[16]

[12] *See* Complaint at Attachment 1, Leiber Affidavit at P 8 where Mr. Leiber concedes that the LPG "business was never advanced in New York through the various approval processes needed to become fully operational."

[13] *See* Attachment II at P 6.

[14] *See* Attachment III at P 6.

[15] *See* Complaint at Attachment 1, Exhibit F (November 26, 2018 letter from State of New York, Department of Public Service to LPG on Energy Services Company application).

[16] *See* Attachment III at P 6.

On September 17, 2018, North Energy defaulted on its payment obligations to the NYISO.[17] The NYISO ultimately obtained permission from the bankruptcy court to terminate North Energy's participation in the NYISO market on October 10, 2018.[18] On October 17, North Energy's principals, operating through LPG, initiated a formal application with the NYISO to register LPG.[19] As discussed in the supporting affidavits, the NYISO identified a close factual overlap between LPG and North Energy. The same individuals are principal figures in both companies, the two LLCs have similar addresses, they seek to pursue the same business in the same territory, and it appears that LPG is pursuing the same customers that Energy North served.[20] In essence, the North Energy principals, no longer able to conduct business in the NYISO markets through North Energy, quickly reappeared as LPG, seeking to engage in the very same business as North Energy.[21]

The LPG/North Energy principals argue that the NYISO is obligated to allow them to continue operating in the NYISO-administered markets through LPG simply because LPG and North Energy are separate LLCs.[22] The NYISO and Market Participants would be left to bear the obligations that LPG's principals previously incurred through North Energy if their prior default is not cured. LPG essentially argues that it should be permitted to leave the other Market Participants liable for North Energy's unpaid financial obligations.

[17] *Id*.

[18] *See* Complaint at Attachment 1, Exhibit J.

[19] *See* Attachment III at P 6.

[20] *See* Attachment II at P 10.

[21] *See* Attachment II at PP 9-10; Attachment III at P 13.

[22] *See* Attachment II at PP 9-10; Attachment III at P 13. *See also* Complaint at Attachment 1, Exhibit H.

The NYISO has refused to accept this outcome. The NYISO has a responsibility to administer its tariffs in a common sense manner, and to protect its Market Participants from unreasonable credit risks and associated costs. Neither the OATT, the filed rate doctrine, nor Commission policy should be misinterpreted to allow Market Participants to evade their overdue financial obligations simply by changing corporate form. The Complaint would have the Commission override the NYISO's decision to protect other Market Participants from unreasonable credit risks.

II. ARGUMENT

A. The NYISO's Refusal to Allow LPG to Enter the Market Until Its Principals Cure their Recent Default Is Authorized Under Section 27.4 of the NYISO OATT

Section 27.4 of the NYISO OATT is the basis for the NYISO's insistence that LPG pay all outstanding amounts owed by North Energy before LPG will be allowed to participate in the NYISO-administered markets. It provides that "a Transmission Customer whose previous default resulted in a Schedule 1 bad debt loss[23] charge to other Transmission Customers must (i) cure such default by payment to the ISO of all outstanding and unpaid obligations and (ii) meet all ISO minimum participation criteria, registration requirements, and creditworthiness requirements, including posting of required collateral, prior to being re-admitted by the ISO to participate in the New York wholesale energy markets."

The NYISO reasonably concluded that, under the circumstances present in this case, LPG and North Energy should be treated as the same "Transmission Customer" under Section 27.4 Accordingly, LPG should not be allowed to participate in the NYISO-administered markets until the outstanding amounts owed by North Energy have been paid.

[23] The NYISO discusses its compliance with its bad debt loss rules and procedures below in Section II.D.

In interpreting a tariff, the Commission looks first to its plain language to determine whether there is any ambiguity, or whether the language is clear.[24] Furthermore, "tariffs must have a reasonable construction and should be interpreted in such a way as to avoid unfair, unusual, absurd or improbable results."[25] Ignoring the obvious connections between LPG and North Energy would clearly be "unusual, absurd or improbable" and would be unfair to other Market Participants.

The NYISO submits that under the specific circumstances of this case, LPG and North Energy must be viewed as the same Transmission Customer under OATT Section 27.4. As described above and in the NYISO's supporting affidavits, LPG has the same principals as North Energy, engages in the same business as North Energy, and is apparently seeking to serve the same customers that North Energy had.[26] LPG was established as a corporate entity several years ago, but based on LPG's own statements, it appears that LPG existed as corporate shell for most of that time, part of a broader set of similar shell companies owned and controlled by LPG's principals.[27] LPG does not appear to have engaged in any business until North Energy defaulted on its NYISO obligations, and left the NYISO-administered markets.[28]

Under these facts, there is no practical difference between LPG and North Energy for purposes of OATT Section 27.4. The North Energy principals, having lost the ability to participate in the NYISO markets through North Energy, simply activated the LPG shell, and

[24] *See, e.g., Southwest Power Pool*, 160 FERC ¶ 61,115 at P 45 (2017).

[25] *Monterey MA, LLC v. PJM Interconnection, L.L.C.*, 165 FERC ¶ 61,201 at P 45 (2018). *See also Penn Cent. Co. v. Gen. Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. 1971); *Southwest Power Pool, Inc.*, 163 FERC ¶ 61,063, at P 26 (2018); *AEP Generating Co.*, Opinion No. 266-A, 39 FERC ¶ 61,158, at 61,626 (1987) (citing *Penn Central*, 439 F.2d at 1340-41).

[26] *See* Attachment III at PP 7-13.

[27] *See C*omplaint at Attachment 1, Leiber Affidavit at P 8.

[28] *Id.*

now seek to return through LPG. For these reasons, LPG and North Energy should be treated as the same "Transmission Customer" within the meaning of OATT Section 27.4.

To conclude otherwise would subject the NYISO and its other Market Participants to unreasonable costs and related credit risks. It is a very simple matter to establish a new LLC in New York; all that is required is the perfunctory filing of the necessary paperwork with the appropriate agencies, and the payment of a relatively minor fee.[29] If the term "Transmission Customer" in Section 27.4 could not encompass separate corporate entities that are identical in every relevant respect to a defaulting entity except for corporate form, the NYISO would face substantial additional credit risks, as well as associated challenges in settling and collecting overdue financial obligations. The principals of Market Participants that owe money to the NYISO could evade those obligations by filing for bankruptcy, forming a new LLC, and then re-entering the NYISO markets to continue on as before. Allowing such conduct would subject the NYISO and its Market Participants to an unreasonable degree of credit risk, drive up the costs of doing business in the NYISO markets, and, if the conduct became widespread, potentially undermine the integrity of the markets.

Contrary to LPG's assertions, the filed rate doctrine does not support LPG's contrived interpretation of OATT Section 27.4. Nothing in the FPA, the Commission's "rule of reason," or associated doctrines precludes the application of simple common sense when interpreting and applying tariff language. The NYISO is mindful of the fact that LPG and North Energy are separate LLCs. The NYISO would not treat separate entities as the same Transmission Customer in an ordinary case. But under the exceptional facts of this case it would be

[29] *See* N.Y. Limited Liability Company Law Article II (Formation). All that is required is a relatively perfunctory filing of articles of organization with the New York Department of State, and the payment of several hundred dollars in fees.

irresponsible for the NYISO to ignore the obvious (*i.e.*, that LPG and North Energy are practically identical for credit purposes) and allow the LPG principals to participate in the NYISO markets without first paying the debts that they previously incurred.

These conclusions are supported, not undermined, by the cases cited by LPG in its Complaint. In each of those cases, the tariff interpretation adopted by the Commission was based on both the language of the applicable tariff and a common sense reading of it. For example, in *PPL Energy Plus* the Commission adopted a strict interpretation of a NYISO tariff provision when it was "unreasonable and illogical" for Market Participants to expect there to be any other meaning and the NYISO itself had made informal statements endorsing the strict interpretation.[30] By contrast, no reasonable Market Participant would legitimately expect to be able to game corporate forms to escape debts and the NYISO has certainly never suggested that this would be permissible.

Similarly, in *Cities of Anaheim*, the issue was involved the nature of applicable caps on "neutrality adjustment charges" that the California Independent System Operator Corporation ("CAISO") collected from its Scheduling Coordinators. The CAISO tariff stated clearly that the neutrality adjustment charge "shall not exceed $0.095/MWh." However, faced with substantial out-of-market ("OOM") energy procurement costs that resulted from the 2000-01 California energy crisis, the CAISO attempted to allocate to Scheduling Coordinators, through the neutrality adjustment charge, higher costs during certain intervals. The Commission held that the cap was clearly intended to be applied to hourly energy charges (and not on an annual basis, as the CAISO had argued), and that the CAISO's imposition of hourly charges in excess of the $0.095/MWh cap violated this tariff provision. By contrast, there is no similar expectation or

[30] *PPL EnergyPlus, LLC v. New York Independent System Operator, Inc.*, 115 FERC ¶ 61,383 at PP 28-29 (2006).

intent that principals of Market Participants that declare bankruptcy should be allowed to re-enter the NYISO markets simply by creating a new LLC, if they do not pay their delinquent financial obligations.

In sum, LPG is practically identical to North Energy for purposes of Section 27.4. It has the same principals, the same business line, and seeks to serve the same customers. The principals of LPG attempted to use the shell entity as a vehicle for participating in the NYISO-administered markets only after North Energy's participation was terminated because it failed to pay its financial obligations. Under these specific circumstances, there is no basis for allowing LPG's principals to use formalistic corporate distinctions to evade financial obligations, and to impose unreasonable credit risks on the NYISO and other Market Participants. OATT Section 27.4 requires that the LPG principals pay North Energy's past-due financial obligations before they may re-enter the NYISO-administered markets.

B. If the Commission Determines that Section 27.4 Is Ambiguous then the Only Reasonable Interpretation Is that the NYISO's Refusal to Register LPG Was Justified

If the Commission determines that the NYISO's rejection of LPG's registration request is not clearly authorized under Section 27.4, the Commission would then need to apply its precedents concerning ambiguous tariff provisions and assess whether the NYISO's application of Section 27.4 was reasonable given the specific facts of this case. The NYISO submits that its interpretation of Section 27.4 is reasonable and should be upheld under directly applicable precedent and Commission policy.

Commission precedent is clear that:

> [W]hen presented with a dispute concerning the interpretation of a tariff or contract, the Commission looks first to the language of the tariff or contract itself, and only if it cannot discern the meaning of the contract or tariff from the language of the contract or tariff, will it look to extrinsic evidence. Extrinsic

> evidence (which may include the parties' course of performance) is admissible to ascertain the intent of the parties when the intent has been imperfectly expressed in ambiguous contract language, but is not admissible either to contradict or alter express terms.[31]

There are at least two principles relevant to the application of this standard in this case. The first is the need to consider the underlying purpose of an ambiguous tariff provision. The second is that just as the Commission itself sometimes looks through corporate forms when necessary to get at the underlying reality of a situation, the tariff should not be interpreted in a way that would require the NYISO to ignore the reality of the connection between LPG and North Energy.

With respect to the first principle, when the Commission has evaluated "ambiguous" tariff provisions, the "extrinsic evidence" it has considered includes not just evidence of the parties' intent but also of the underlying purpose of the tariff. The Commission's 2010 Poletti Decision is an example of this type of tariff interpretation and is directly relevant to this case.

In the Poletti Decision the Commission had to determine whether an ambiguous contractual termination provision tied to the "retirement" of the Charles Poletti Power Plant ("Poletti Plant") was triggered when the original plant ceased to operate and was replaced by a newer facility at the same site. In that case, the NYISO OATT granted certain Grandfathered Transmission Congestion Contracts ("TCCs") to the New York Power Authority ("NYPA"), and incorporated by reference certain pre-existing point-to-point transmission service agreements ("Pre-existing PTP Agreements") that NYPA had executed. Those agreements contained language stating that the TCCs would terminate upon the retirement of the Poletti Plant. The

[31] *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,032 at P 30 (2010) (the "Poletti Decision").

question was whether the retirement of the original plant served to trigger this provision, and thus to terminate NYPA's Grandfathered TCCs.

The Commission considered, and relied substantially on, the underlying purpose of the OATT provisions granting NYPA Grandfathered TCCs, and the OATT's incorporation of the Pre-existing PTP Agreements to govern the terms of those Grandfathered TCCs. The Commission found that the underlying goal of those provisions was to allow NYPA to continue to protect its customers in Southeast New York against congestion charges, and that the continued existence of the Poletti Plant was assumed to be consistent with a continued obligation on the part of NYPA to serve load in Southeast New York. Furthermore, the Commission noted that NYPA had replaced the original Poletti Plant solely due to environmental factors, and not because NYPA no longer needed power from the plant. Under those circumstances, the Commission interpreted "the clause 'when…the Charles Poletti Power Plant [is] retired' to refer to the cessation of all generation on the Poletti site rather than merely the cessation of operations of the original generating unit."[32] In light of the underlying purpose of the applicable tariff provision, the most reasonable reading of that provision was to allow NYPA to retain its Grandfathered TCCs.

The Commission also looked to the underlying purpose when interpreting ambiguous tariff language in a recent ruling involving the Southwest Power Pool ("SPP").[33] The issue in that proceeding involved an old transmission service agreement (the "1977 Agreement"), under which certain utilities took long-term firm transmission service over facilities owned by a public power entity. When SPP converted from a physical rights system to a financial rights system,

[32] *Id.* at P 39.

[33] *Southwest Power Pool, Inc.*, 160 FERC ¶ 61,115 (2017), *order denying reh'g.*, 163 FERC ¶ 61,063 (2018) (the "SPP Decision").

there was a dispute about whether the 1977 Agreement would be subject to congestion and marginal loss charges. SPP determined that the relevant service under the agreement should be subject to such charges because it was not expressly carved out as it was for certain other grandfathered agreements ("GFAs").

In resolving this issue, the Commission determined that it was necessary to examine "the full context in which GFA carve-out treatment under the SPP Tariff was established . . . ."[34] The Commission found that this context favored SPP's interpretation and that excluding the 1977 Agreement was consistent with SPP's intended purpose of narrowing GFA carve outs to the greatest extent practicable. The Commission also rejected the application of the doctrine of *contra preferentum* – the common law presumption that a contract should be construed against the party that drafted it – to SPP and placed much greater importance on the need to interpret tariffs in a way that avoid unfair results. The Commission stated:

> The Commission has rejected the treatment of this canon of construction as a strict rule, and it has instead supported the course of action adopted here, i.e., consideration of extrinsic evidence of intent, as the means for dealing with ambiguous language. In addition, the Commission has noted that strict construction against the drafter of a tariff is not justified if it ignores an alternate, reasonable construction that conforms to practical application and the intent of the drafters or if there are other rules of tariff construction that outweigh construing language against the drafter. The Commission's construction here is consistent with SPP's intent, and it is consistent with the canon of construction that specifies that a tariff should not be interpreted in a way that produces, among other things, unfair results.[35]

In a conclusion that is especially relevant to the facts of this proceeding, the Commission stated that "if Rehearing Parties are not responsible for congestion costs and marginal losses connected

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[34] 163 FERC ¶ 61,063 at P 14.

[35] *Id.* at P 26; *see also Miss. River Transmission Corp.*, 96 FERC ¶ 61,185 (2005) (holding that ambiguity in a tariff must not automatically be construed against the tariff's drafter); *see also Keyspan-Ravenswood LLC v. N.Y. Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,089, at P 27 (2007) (accepting independent system operator's interpretation of ambiguous language in its own tariff).

with their transactions, then other SPP members will become responsible for them through uplift costs. This would be an unfair result given the choice by Rehearing Parties to join SPP after commencement of the Integrated Marketplace."[36]

Both the Poletti Decision and the SPP Decision highlight the importance of reading a tariff provision in a manner that upholds its underlying purpose, and that minimizes arbitrary and unfair results. A comparable review of the underlying purposes of OATT Section 27.4 strongly supports interpreting that provision to require LPG's principals to pay the outstanding debts incurred by North Energy before LPG is allowed to enter the markets. As outlined below, OATT Section 27.4 is part of a broader set of credit risk management provisions that are intended to limit the exposure of Market Participants to unreasonable risks of defaults and losses. When a Market Participant fails to pay its financial obligations, those obligations must be assumed by the NYISO and all other Market Participants. It is not reasonable or consistent with the purpose of the NYISO's credit requirements to allow the individuals responsible for North Energy's default to re-enter the market without paying those debts simply by using a different LLC. The Poletti Decision's held that a newly constructed power plant should be treated as though it were the same facility as a retired plant when doing so was consistent with the purpose of the tariff. The SPP Decision held that excluding a GFA from carved-out treatment was consistent with underlying purpose of tariff language limiting the scope of carved-out treatment. Both decisions support the conclusion that it was both permissible and reasonable for the NYISO to treat LPG and North Energy as the same Transmission Customer for purposes of applying Section 27.4.

With respect to the second principle, the Commission ordinarily respects distinctions between different corporate entities, as does the NYISO. However, as the courts and

[36] 163 FERC ¶ 61,063 at P 26.

Commission have recognized on multiple occasions, where the overall regulatory "purpose could . . . be easily frustrated through the use of separate corporate entities, the Commission is entitled to look through corporate form and treat the separate entities as one and the same for purposes of regulation."[37] An "agency may disregard the corporate form in the interest of public convenience, fairness, or equity" and "[t]his principle of allowing agencies to disregard corporate forms is flexible and practical in nature."[38] The Commission has made clear in many different contexts that it will look past corporate form, or otherwise eschew overly formalistic approaches to regulatory issues, where an undue focus on corporate form or formalism would frustrate the Commission's basic regulatory obligations.[39] The NYISO should likewise not be compelled to blindly adhere to formalistic distinctions based on corporate form when doing so would lead to "unfair, unusual, absurd or improbable results," that the Commission itself would not accept.

By contrast, LPG's overly formalistic and simplistic interpretation of Section 27.4 would contravene both of these tariff interpretation principles. LPG would have the NYISO ignore the obvious facts presented to it during LPG's registration process, and allow the North Energy/LPG principals to continue operating in the NYISO markets, while leaving other Market Participants to bear the debts they incurred through North Energy. Such a reading would completely defeat the credit risk management purpose of OATT Section 27.4 (and related provisions) and is wholly unreasonable. On the specific facts of this case, the Commission should support the NYISO's interpretation that Section 27.4 authorizes it to make a decision based on the substance of the

[37] *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1321 (5th Cir. 1993).

[38] *Town of Highlands, N.C. v. Nantahala Power & Light Company*, 37 FERC ¶ 61,149, 61,356 (1986).

[39] The Commission ignores formalities and looks to the substance of transactions in other contexts, in order to avoid frustration of important regulatory goals. For example, in determining whether a person holds Interlocking Directorate positions within the meaning of FPA Section 305(b), the Commission looks not to job title, but to the substance of the job being held – *i.e.*, whether the job is "invested with executive authority." 18 C.F.R. § 45.2(a).

relationship between LPG and North Energy rather than adopting an unreasonable interpretation based merely on the fact that they are separate corporate entities.

C. Granting LPG's Complaint Would Defeat the Purpose of the NYISO's Credit Rules and Expose Other Market Participants to Unreasonable Credit Risks

The Complaint alleges not only that the NYISO violated its OATT by refusing to register LPG, but also that such a requirement is unjust, unreasonable, and unduly discriminatory. The NYISO strongly disputes these contentions. There is nothing unjust, unreasonable, or discriminatory about requiring delinquent Market Participants to pay their debts before they are allowed back into the markets.

OATT Section 27.4's requirement that delinquent Market Participants pay past due amounts before being allowed back into the markets is part of a comprehensive package of NYISO credit requirements. These rules were adopted in response to Commission policies aimed at protecting other Market Participants, and markets as a whole, from unreasonable credit risks. For example, the Commission's 2004 policy statement on credit-related issues, which is cited with approval by the Complaint,[40] emphasized that Commission policy aimed to "to reduce the risk and impact of a default by a market participant on individual market participants and the market as a whole."[41]

Similarly, in Order No. 741, the Commission explained that:

> The management of risk and credit necessarily involves balance. If access to credit is too restrictive, competition suffers because fewer entities are eligible to participate, which can potentially reduce competition. Conversely, if more risk is tolerated and access to credit is too easy to obtain, then the market is more susceptible to defaults and customers bear the burden of the costs that flow from

[40] *See* Complaint at n. 15.

[41] *Policy Statement on Electric Creditworthiness*, 109 FERC ¶ 61,186 at P 1 (2004).

> such defaults. In organized wholesale electric markets, defaults not supported by collateral are socialized among all other market participants.[42]

These rules are rooted in the consumer protection goals of the FPA. Indeed, it "is long-established that the primary aim [of the FPA] is the protection of consumers from excessive rates and charges."[43] The Commission's credit policies, reflected in the NYISO's credit rules, are to allow for participation in organized markets, but in a manner that is reasonably calculated to protect customers against having to bear unnecessary costs.

The overarching purpose of the NYISO's credit rules, as is the case with all other Commission-jurisdictional ISOs/RTOs, is to give Market Participants confidence that: (1) they will be paid for the products that they sell, and (2) they will not incur unnecessary or unjustified costs as a result of delinquencies by other Market Participants. OATT Section 27.4 helps to achieve this purpose by minimizing, where possible, the amount of unpaid obligations to the NYISO.

As interpreted and applied by the NYISO, Section 27.4 prevents Market Participants from gaming the NYISO's credit requirements to escape payment obligations. Adopting LPG's position would not just allow its principals to escape their responsibilities, but would permit those principals to avoid their debts and leave Market Participants with the bill by declaring bankruptcy and then re-entering the market via a different LLC. This would increase costs and risks to Market Participants that did not engage in such behavior. Such an outcome would substantially undermine the NYISO's credit rules and prevent it from protecting against unreasonable credit risks.

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[42] *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 133 FERC ¶ 61,060 at P 2 (2010).

[43] *Xcel Energy Servs. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016) (citations omitted).

Recent developments in other regions clearly demonstrate the severity of the problems that can result when ISO/RTO market participants are exposed to defaults by parties that evade credit requirements.[44] The rules that LPG seeks to evade and the underlying principles at stake here, are critically important. The concerns recently expressed by Commissioner Glick about the dangers posed by "market participants that engage in market manipulation or fraud, but are then able to return to the market, unencumbered by their past behavior" should also apply to entities or individuals that seek to return to markets without paying their debts.[45]

The NYISO is protecting Market Participants from these risks by requiring North Energy's outstanding financial obligations to be paid before LPG's principals are allowed to re-enter the NYISO markets through LPG. The NYISO's approach is wholly consistent with the Commission's credit policy, as well as the FPA's overarching consumer protection goals.

D. The NYISO Did Not Violate Any Provision of its Tariff or Engage in Undue Discrimination

Beyond its claims regarding OATT Section 27.4, LPG asserts that the NYISO "failed to comply with the requirements of Section 27 - Attachment U - Declaration and Recovery of Bad Debt Losses . . . [mandating] the NYISO's Chief Financial Officer to declare a 'bad debt loss' that would be recovered by the NYISO through a Schedule 1 charge."[46] LPG also asserts that the NYISO is "biased" against it and has engaged in undue discrimination.[47]

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[44] *See Joint Request for Waiver of PJM Interconnection, L.L.C., et al under ER18-1972*, Docket No. ER18-1972-000 (July 7, 2018); *See also Request of PJM Interconnection, L.L.C. for a Waiver Effective July 27, 2018*, ER18-2068-000 (July 26, 2018).

[45] Comm'r Richard Glick, *Statement Regarding Green Hat and Orange Avenue Waiver Orders*, FEDERAL ENERGY REGULATORY COMMISSION (Feb. 14, 2010, 5:38 PM), https://www.ferc.gov/media/statements-speeches/glick/2019/01-30-19-glick.asp?csrt=5062972102951865870#.XGPwuZWWz4c.

[46] Complaint at 12.

[47] Complaint at 2, 13-14.

LPG is incorrect to claim that the NYISO must initiate this process before it may require LPG to pay North Energy's financial obligations. The NYISO has followed all applicable procedures regarding the North Energy default. Indeed, the NYISO declared North Energy to be in default, and then terminated North Energy's participation in the NYISO-administered markets, in full compliance with the tariffs. The NYISO has not yet formally declared a "bad debt loss" for North Energy because it cannot know the precise amount of the debt until its true-up process and schedule are complete. The Complaint would prevent the NYISO from protecting other Market Participants against unreasonable credit risks unless it acted prematurely to declare a loss before the final amount could be confirmed. LPG would also have the NYISO go through the additional, and entirely unnecessary, step of collecting the amount of the North Energy default from other Market Participants before then recovering that amount from LPG, and then reimbursing the Market Participants for their payment. The Complaint would permit the principals of any bankrupt entity to avoid liability for past debts if they simply apply for re-entry to the NYISO's markets.

There is no basis for this illogical and unreasonable result. LPG, which is the same entity as North Energy for purposes of the credit rules, seeks to re-enter the NYISO's markets. For the reasons outlined above, it is both fully consistent with the NYISO tariffs, and just and reasonable, for the NYISO to insist that LPG pay the NYISO for North Energy's full default in order to be allowed into the NYISO-administered markets.

Furthermore, the NYISO did not engage in undue discrimination by requiring that the LPG principals pay North Energy's debts before being allowed back into the NYISO-administered markets. The Commission has consistently held that "discrimination" between

different entities is not "undue" when factual differences justify disparities in treatment.[48] The question, ultimately, is whether LPG is similarly situated to other Market Participants that have not had to pay for outstanding financial obligations before entering or re-entering the NYISO-administered markets. The NYISO can recall no such similar instance and LPG cites to none. As the NYISO notes above, the clear overlap between North Energy and LPG were impossible to overlook or ignore. LPG is certainly not similarly situated to any other new registrant or other Market Participant, and there was therefore no undue discrimination against LPG.[49]

E. The NYISO Did Not Impermissibly "Import" "Successor Liability" Principles into the OATT or Rely on Them to Justify its Approach to LPG

Finally, the NYISO denies LPG's assertions that the NYISO has "imported" the concept of "successor liability"[50] into its tariffs and impermissibly applied it when evaluating LPG's registration. This allegation is based on a series of communications between LPG's counsel and the NYISO's counsel in which the NYISO was attempting to understand and resolve LPG's concerns.[51]

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[48] *See, e.g., Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010); *Cities of Newark v. FERC*, 763 F.2d 533, 546 (3d Cir. 1985) ("[D]ifferences in rates are justified where they are predicated upon factual differences between customers . . . ."); *Town of Norwood v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000) ("[D]ifferential treatment does not necessarily amount to undue preference where the difference in treatment can be explained by some factor deemed acceptable by the regulators (and the courts).")

[49] Similarly, the NYISO rejects LPG's assertion that the NYISO has exhibited "bias" against LPG. As the Commission knows, the NYISO is an independent, not-for-profit company charged with administering its tariffs and its markets in an even-handed manner. The NYISO's only interest in this case is to ensure that its Market Participants are protected from unnecessary costs and unreasonable credit risks. Preventing LPG from entering the market until North Energy's debts are paid is entirely consistent with the NYISO's responsibilities and does not involve bias.

[50] *See* Complaint at 2, 12.

[51] NYISO counsel engaged in these communications with LPG counsel in an effort to explain why the NYISO would not accept LPG's registration. Although the discussions were not formally subject to the Commission's settlement rules, the NYISO engaged in them in a good faith attempt to resolve a dispute. LPG's references to and mischaracterization of NYISO counsel's communications in the Complaint are therefore both inaccurate and inappropriate.

To be clear, the NYISO's determination that the LPG and North Energy should be treated as the same "Transmission Customer" for purposes of Section 27.4 is not predicated on, and in no way depends upon, the common law doctrine of "successor liability."[52] The NYISO's decision was based solely on the express language of OATT Section 27.4 and the application of that language to the facts here; namely a transparent attempt by the principals of North Energy to use LPG as a vehicle to re-enter the NYISO markets while avoiding previously incurred financial obligations. The NYISO's actions were also informed by its understanding of the Commission's credit policies, and its responsibilities thereunder, as described above.

Although the efficacy of the NYISO's decision is not dependent on importation of the common law doctrine of successor liability, the considerations underlying it support the NYISO's refusal to register LPG under Section 27.4. The successor liability doctrine was established, in part, to forestall efforts by debtors to avoid their legitimate debts through the artifice of changing corporate form.[53] A similar concept is embedded in the assignment provision of the *pro forma* services agreement under the Services Tariff. That provision specifies that "[o]bligations under the ISO Services Tariff and any Service Agreement shall be binding on the successors and assigns of the Service Agreement" and that no assignment shall relieve these obligations.[54] The NYISO's analysis of LPG's registration request did not rely on this provision, but its existence illustrates that the concept of holding successors accountable for

[52] This is clear from the letter that the NYISO sent to LPG explaining its decision not to allow LPG to register until North Energy's financial obligation was paid. *See* Complaint at Attachment 1, Exhibit H.

[53] *See, e.g., Vicuna v. O.P. Schuman & Sons, Inc.*, 106 F. Supp. 3d 286, 297 (E.D.N.Y. 2015) (In its decision denying a motion for summary judgment on a successor liability claim, the court stated: "Ruling that, as a matter of law, the existence of a paper-only corporation can defeat successor liability would provide an easy avenue for successor corporations to escape their rightful liabilities.").

[54] New York Independent System Operator, Inc., *Market Administration and Control Area Services Tariff* § 14.8.

the obligations of their predecessors is not an alien "import" but is consistent with the overall tariff framework.

III. COMPLIANCE WITH COMMISSION RULE 213(c)(2)(i)

Attachment I to this Answer addresses the formal requirements of Commission Rule 213(c)(2) in order to ensure the NYISO's full compliance with them.

IV. CORRESPONDENCE AND COMMUNICATIONS

Communications regarding this pleading should be addressed to:

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V. LIST OF DOCUMENTS SUBMITTED

The NYISO respectfully submits the following documents with this Answer:

1. Admissions and denials consistent with Commission Rule 213(c)(2) (Attachment I);
2. The Affidavit of Sheri Prevratil (Attachment II); and
3. The Affidavit of Jennifer Davies (Attachment III).

VI. CONCLUSION

For the reasons set forth above, the Complaint should be denied and the Commission should take no further action in response to its claims.

Respectfully Submitted,

*By: /*s*/ Ted J. Murphy*

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Dated: February 19, 2019

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