UNITED STATE OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	Docket Nos. ER09-1682-000 ER09-1682-004 ER09-1682-005 ER09-1682-006

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"),[1] the New York Independent System Operator, Inc. ("NYISO") submits a motion for leave to answer, and an answer to, the requests filed in the above dockets by the Electric Power Supply Association ("EPSA") and the Independent Power Producers of New York, Inc. ("IPPNY") ("EPSA and IPPNY Filings") for clarification or in the alternative rehearing of the Commission's Order on Proposed Application of Mitigation Measures and Compliance Filings issued on May 20, 2010.[2] The EPSA and IPPNY Filings add nothing to the arguments already rejected by the Commission. Accordingly, the requests in both filings should be denied.

I. REQUEST FOR LEAVE TO FILE ANSWER

The EPSA and IPPNY Filings are styled as requests for both clarification and rehearing, and the NYISO has a right to answer requests for clarification.[3] The IPPNY Filing also makes a

---

1 18 C.F.R. §§ 385.212 and 385.218.

2 *N. Y. Indep. Sys. Operator, Inc.*, 131 FERC 61,169 (2010) ("May 20 Order").

3 *See e.g., ISO New England, Inc.,* 120 FERC ¶ 61,122 at P 46 (2007) ("unlike answers to requests for rehearing, answers to requests for clarification are not prohibited under the Commission's Rules of Practice and Procedure").

demand for affirmative relief, to which the NYISO is also entitled to respond.[4] With respect to the requests for rehearing, the NYISO recognizes that the Commission generally discourages answers to rehearing requests.[5] 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 information, or are otherwise helpful in the Commission's decision-making process.[6]

The NYISO's answer is limited to a few key points on which the NYISO, as the administrator of the relevant markets, has a unique perspective on the deficiencies in the EPSA and IPPNY Filings that will assist the Commission in its decision-making.[7] Accordingly, the NYISO respectfully requests leave to answer the EPSA and IPPNY Filings.

II. ANSWER

1. The Commission's Articulation of the Relevant Economic Principles.

Both the EPSA and IPPNY Filings contend that the Commission should clarify that the May 20 Order, including its articulation of the economic principles supporting approval of Rate

---

[4] IPPNY Filing at 12 *et seq.* (requesting that the NYISO be ordered to make a compliance filing with a fixed costs recovery mechanism).

[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 assisted us in our decision-making process"); *N. Y. Indep. 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).

[7] By its silence, the NYISO does not concur in any other grounds advanced in the EPSA and IPPNY Filings for clarification or rehearing, all of which ignore critical portions of the record evidence and arguments considered by the Commission. *See*, *e.g.*, IPPNY Filing at 7 *et seq*. (repeating arguments about the calculation of the impact test).

Schedule M-1, is narrowly limited to the three named units.[8] Since the May 20 Order by its terms approved a rate schedule that would apply only to the three named generators, these EPSA and IPPNY requests are on their face *non sequiturs*. In reality, they are a transparent attempt to try to reargue the fundamental principles governing the markets administered by the NYISO as established in a number of prior Commission orders.

Even though the tariff at issue in the May 20 Order applies only to three specific units, it is necessarily and appropriately grounded in the broader economic structure and theories underpinning the NYISO markets. Those principles were correctly articulated by the Commission in the May 20 Order and applied to the three generators. In order to avoid this appropriate analysis, the EPSA and IPPNY Filings would have to show—but cannot—that a unique economic analysis should apply to the three named units, divorced from the principles governing the New York markets generally. Thus, clarification, and much less rehearing, are not warranted.

The EPSA and IPPNY Filings also contend that intervenors were somehow disadvantaged in commenting on the economic principles underlying Rate Schedule M-1 because they did not have access to certain confidential data.[9] That data, however, relates only to whether or to what extent those principles should be applied in particular cases, not to whether the principles themselves are a valid basis for market power mitigation in the NYISO markets. The EPSA and IPPNY Filings do not show, through hypothetical or other examples, how knowledge of confidential data about certain generators could have affected the EPSA and IPPNY arguments. Their contentions about confidential data are little more than make-weights.

---

[8] EPSA Filing at 5; IPPNY Filing at 5-6.

[9] EPSA Filing at 4-5; IPPNY Filing at 5.

2. Fixed Costs Recovery.

Contrary to arguing that the Commission should clarify that this proceeding is limited to the three named units, the IPPNY Filing also claims that the NYISO should be required in this docket to submit a mechanism for recovery of fixed costs for the three generators. [10] Similarly, EPSA claims that Rate Schedule M-1 is deficient because it does not provide an opportunity for generators "to recover all of their costs, including a return of and on their fixed costs."[11] Neither IPPNY nor EPSA shows that any of the three named units do not have an adequate opportunity to recover their fixed costs. As stated by Dr. Patton in his Supplemental Affidavit in support of the NYISO's filing: "None of the suppliers in question have presented data showing that the current energy, ancillary services, and capacity markets do not cover the going-forward fixed costs of the resources in question."[12] That continues to be true. None of the three named suppliers have sought clarification or rehearing nor have they elected to furnish data to the Commission showing that they are not recovering their fixed costs. Instead, EPSA and IPPNY rehash arguments and offer speculations already rejected by the Commission, and that the three generators did not submit any evidence to substantiate.

3. Opportunity Costs.

The same flaw of speculation underlies the assertions in the EPSA Filing that Rate Schedule M-1 would improperly exclude consideration of opportunity costs.[13] Nowhere in the EPSA Filing, or anywhere else in the record, is there any evidence that the relevant offers of the

---

[10] IPPNY Filing at 12-14.

[11] EPSA Filing at 7.

[12] Supplemental Affidavit of David B. Patton, Ph.D. ¶15.

[13] EPSA Filing at 7.

three named generators were based on opportunities to sell in other markets, or that they had such opportunities that were negated by the imposition of mitigation. Indeed, if any of the named generators had such opportunities, one might ask why they did not take advantage of them, when faced with operating on the basis of mitigated guarantee payments in New York. The NYISO's Market Monitoring and Analysis Department ("MMA") is expressly permitted to consider opportunity costs, both in setting generator reference levels and as part of the consultation process. None of the generators demonstrated opportunities that justified their offering behavior as competitive.

EPSA's argument ignores the NYISO's obligation to consult with a market participant before imposing Rate Schedule M-1 mitigation. As Dr. Patton stated in his initial Affidavit in support of the NYISO's filing: "The manual nature of the mitigation that the NYISO proposes to apply allows time for this consultation process by providing market participants an opportunity to explain their offers."[14] The NYISO's market design recognizes that competitive offers can include valid opportunity costs.[15] Under Market Mitigation Measures Section 3.2.3, which is the basis for Rate Schedule M-1, mitigation would not be imposed if the NYISO "determines, from information provided by the Market Party . . . that the conduct and associated price or guarantee payments are attributable to legitimate competitive market forces or incentives."

4. Scarcity Pricing.

The EPSA Filing contends that the May 20 Order does not comport with established economic principles because it does not recognize the potential for scarcity prices.[16] EPSA's

---

[14] Affidavit of David B. Patton, Ph.D. ¶ 45.

[15] *See, e.g.*, Market Administration and Control Area Services Tariff, Attachment H ("Market Mitigation Measures"), definition of "Going-Forward Costs."

[16] EPSA Filing at 8.

argument, however, fails to make a necessary distinction between legitimate scarcity attributable to a true lack of resources and artificial scarcity resulting from economic withholding. EPSA claims that: "It is fundamental economics that bidding and prices above short-run marginal cost can simply be evidence of scarcity conditions rather than market power."[17] EPSA's statement recognizes that bidding above short-run marginal cost can, in fact, be evidence of market power. In this case, the pivotal supplier determination required by Rate Schedule M-1 provides the necessary market power predicate for the imposition of mitigation measures.[18] While scarcity is a legitimate pricing consideration, the EPSA argument fails to distinguish between true scarcity and scarcity resulting from an abuse of market power.

In addition, EPSA cites no evidence that there is in fact a scarcity problem underlying any of the reliability needs at issue in this docket. To the contrary, as indicated by the affidavits of Mr. Boles and Mr. Gonzales in support of the NYISO's filings in this docket, the commitment of each of the three generators solves the reliability need that it is committed to address.[19] Indeed, because of minimum generation requirements, the committed MWs in each case are often more than what is needed to meet the reliability requirement.

Trying to conflate scarcity pricing with market power is not new. As Dr. Patton stated in his Report on Shortage Pricing in response to Order 719,

> some market participants have explicitly proposed that suppliers be allowed to engage in economic withholding to raise energy prices to efficient levels reflecting shortage. Relying on economic withholding to produce efficient prices

---

17 EPSA Filing at 7 n.13.

18 *See* Patton Affidavit ¶¶ 31-32.

19 *See, e.g.,* Affidavit of Joshua A. Boles, Attachment A to NYISO filing of Dec. 3, 2009 ¶ 9.

> during shortage conditions is highly undesirable as a means to achieve efficient shortage pricing for a number of reasons.[20]

In both Orders 719 and 719-A, the Commission emphasized that appropriate scarcity pricing provisions would not displace, but rather must be coupled with, effective market power mitigation measures.[21] Contrary to the conclusion that EPSA would have the Commission draw, "the conduct-and-impact mitigation framework is appropriate and effective for mitigating market power in the energy and reserve markets during both shortage and non-shortage conditions," and will "mitigate withholding that contributes to causing artificial shortages and associated price spikes."[22] By basing mitigation on reference levels that "fully reflect the resources' marginal costs," conduct-and-impact mitigation does not over-mitigate, permitting high cost units to set clearing prices when appropriate.[23] In addition,

> reference prices can increase for a unit's upper output levels in order to reflect the full marginal cost (including increased wear and tear, outage risks and other costs) of pushing units to their maximum production levels. As a result, even base load units can have relatively high reference levels for the top output ranges, and market clearing prices will be set accordingly if it is necessary to dispatch such a unit to those levels in order to meet demand.[24]

---

[20] *Wholesale Competition in Regions with Organized Electric Markets*, Report on Shortage Pricing of Potomac Economics, Ltd., Independent Market Advisor for the New York ISO, Dockets No. ER09-1142 ("Report on Shortage Pricing"), at 11-12 (May 15, 2009).

[21] *Wholesale Competition in Regions with Organized Electric Markets*, Order 719, 125 FERC ¶ 61,071 at PP 195-196 (2008), and Order 719-A, 128 FERC ¶ 61,059 at P 95 (2009).

[22] Report on Shortage Pricing at 11, 12.

[23] *Id.* at 13.

[24] *Id*.

As a result, as David Patton stated in his Report on Shortage Pricing: "ISO markets should naturally produce shortage prices when true shortage conditions arise without suppliers economically or physically withholding resources."[25]

Finally, by positing a conflict between scarcity pricing and market power mitigation that does not exist, EPSA ignores the opportunity for the three generators to benefit from periods of legitimate scarcity in New York. Nothing in the EPSA Filing shows that Rate Schedule M-1 would prevent clearing prices from rising to reflect true shortages, as explained by Dr. Patton. If any of the three generators were committed during periods when a high-cost marginal MW or a true shortage was reflected in the NYISO's co-optimized markets, the generators would have been paid market-clearing prices that reflected the scarcity conditions and would have been evaluated for additional energy commitment above their minimum operating levels.[26] In sum, there is no basis for clarification or rehearing in concerns about "scarcity prices."

III. CONCLUSION

Wherefore, the New York Independent System Operator, Inc., respectfully requests that the Commission grant this motion for leave to answer, accept this answer, and reject the EPSA and IPPNY Filings.

Respectfully submitted,

/s/ *William F. Young*

---

[25] *Id.* at 13.

[26] For example, with the high temperatures prevailing yesterday, July 6, 2010, the LBMP in hour-beginning 14 at the location of Sterling (one of the three named units) rose to $398/MWh. (*See "http://www.nyiso.com/public/markets_operations/market_data/custom_report/index.jsp?report=tw_int_rt_lbmp_gen" for the generator "SITHE___STERLING".*) This LBMP resulted from the triggering of the operating reserves demand curves for the statewide 10-minute reserves requirement and the statewide 30-minute reserves requirement.

Robert E. Fernandez, General Counsel
Alex M. Schnell
New York Independent System Operator, Inc.

William F. Young
Hunton & Williams LLP
Counsel to the New York Independent System Operator, Inc.

July 7, 2010

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 7th day of July, 2010.

/s/ *William F. Young*
William F. Young
Hunton & Williams LLP
1900 K Street, NW Washington, DC 20006
Tel: (202) 955-1500 Fax: (202) 828-3740
E-mail: byoung@hunton.com