

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

TC Ravenswood, LLC)	
)	
Complainant,)	
)	
v.)	
)	Docket No. EL10-70-000
New York Independent System)	
Operator, Inc.)	
)	
Respondent.)	

**RESPONSE OF
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.
TO TC RAVENSWOOD, LLC**

Pursuant to Rules 212 and 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213 (2006), the New York Independent System Operator, Inc. (“NYISO”) respectfully responds to the August 2, 2010 *Motion for Leave to File Answer and Answer of TC Ravenswood, LLC* (“TCR August Answer”) filed in this docket. TC Ravenswood, LLC (“TCR”) previously agreed that this response should be deemed to be timely by the Commission.¹

The TCR August Answer seeks to strike the June 28, 2010 affidavit, filed as an attachment to the *Answer of the New York Independent System Operator, Inc.*, by Dr. David

¹ The NYISO is filing at this time pursuant to its: i) August 16, 2010 *Motion to Hold Proceedings in Abeyance, Request to Suspend Filing Deadlines, and Request for Expedited Action* (to which TC Ravenswood subsequently agreed - *See*: TC Ravenswood, LLC’s Response to the New York Independent System Operator Inc.’s Motion to Hold Proceedings in Abeyance . . . filed August 18, 2010); ii) TCR’s September 28, 2010 letter request that the Commission act expeditiously on its complaint in this docket and; iii) TCR’s October 1, 2010 request that FERC establish September 29, 2010 as the start day for the 15-day response deadline.

Patton, President of Potomac Economics the NYISO's Market Monitoring Unit.² The NYISO's June Answer was filed in response to the May 27, 2010 *Complaint of TC Ravenswood* in this docket.³ Dr. Patton explained that the additional 2009 costs for which TCR sought compensation pursuant to the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") Section 4.1.8,⁴ either were not variable operating costs or were so imprecisely defined that they could not be considered variable operating costs. In either case, Dr. Patton determined they were not the variable operating costs that were recoverable under the terms of Services Tariff Section 4.1.8.⁵

Although TCR neither captioned its August Answer as containing a motion to strike, nor sought a Commission order striking the Patton Affidavit in its prayer for relief, the Commission should treat the portions of the TCR Answer that address the MMU's affidavit as tantamount to a motion to strike and show it the same disfavor that is normally affords such pleadings. The NYISO's June Answer has already refuted all of the allegations and arguments contained in the TCR August Answer. Therefore, the NYISO limits this response to TCR's arguments that the Patton Affidavit should be stricken from the record in this docket.⁶

² See: *Answer of the New York Independent System Operator*, filed in this docket June 28 2010 ("June Answer") and the attached *Affidavit of David B. Patton, P.H.D.* ("Affidavit"). The NYISO will herein refer to Dr. Patton either by name or as the "NYISO's MMU," and to his affidavit as the "Patton Affidavit."

³ See: *Complaint of TC Ravenswood, LLC and Request for Confidential Treatment*, filed May 27, 2010 in this docket ("TCR Complaint").

⁴ The NYISO's e-tariff submittal of its Services Tariff renumbered Section 4.1.7a as Section 4.1.8. Dr. Patton's referral in his affidavit to Section 4.1.7a should be updated by the reader to Section 4.1.8.

⁵ See: Patton Affidavit, PP 15 - 26.

⁶ The NYISO does not respond to TCR's argument that Dr. Patton's Affidavit should be accorded little weight. The NYISO assumes that the Commission will accord appropriate weight to Dr. Patton's testimony, so long as the Commission considers Dr. Patton's testimony in its deliberations.

I. TC Ravenswood Has Failed To Satisfy the Commission's Requirements for Striking Testimony

TCR has failed to meet its burden of proof in arguing the Commission should strike the Patton Affidavit. The Commission has previously found that “a motion to strike is not favored and carries a heavy burden to be granted” and that “material will not be struck ‘unless the matters sought to be omitted from the record have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party.’”⁷ TCR’s unsupported claims that the MMU is not authorized to submit an affidavit under these circumstances, that Dr. Patton somehow acted outside his purview as a member of the MMU, and particularly that Dr. Patton acted under the influence of the NYISO and without adequate independence⁸ are completely without foundation and as such serve to prejudice the NYISO and confuse the issues that are appropriately before the Commission in this docket. More importantly, the Patton Affidavit provides information and analysis that goes to the heart of the controversy in this proceeding, whether TCR’s claimed 2009 costs are recoverable under Section 4.1.8 of the NYISO Services tariff. As such, this evidence bears a close relationship to the issues that confront the Commission in this docket and it should not be struck.

Not only is Dr. Patton authorized by the NYISO Tariffs to evaluate NYISO tariff provisions and market rules and, as necessary, recommend changes, the NYISO’s Services tariff contemplates that Dr. Patton will provide expert testimony in connection with legal or regulatory

⁷ Central Hudson Gas & Electric Corp., et. al, 92 FERC ¶63,004 at 65,008 (2000), citing Power Mining Inc., 45 FERC ¶61,311, at 61,972 n.1 (1988); San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange Corporation, 114 FERC ¶61,070 at P 20 (2006) (same)

⁸ See: TCR August Answer, p. 42.

proceedings on matters involving the NYISO and its markets.⁹ TCR's arguments fail to support the relief it requests and the Commission should dismiss its request to strike the Patton Affidavit.

II. The Market Monitoring Unit Is Permitted to Provide an Opinion On the Nature of Fixed and Variable Costs, and Whether the Costs TCR Seeks to Recover are Fixed or Variable Costs

While TCR correctly quotes the Commission's Order 719 admonition to Market Monitoring Units that they are precluded from "participat[ing] in the administration of the Commission-approved independent system operator's or regional transmission organization's tariff,"¹⁰ except in limited circumstances,¹¹ TCR is incorrect in concluding that Dr. Patton's participation in this case is such a prohibited activity.¹² On the contrary, Dr. Patton's affidavit is the direct result of his pursuit of a Commission-approved core function to evaluate market rules and tariff provisions and to report on his conclusions.

A. Evaluating Tariff Provisions is a Core Function of the Market Monitoring Unit

Section 35.28(g)(ii)(A) of the Commission's Regulations states that one of the Market Monitoring Unit's Core Functions is to:

Evaluate existing and proposed market rules, *tariff provisions* and market design elements and recommend proposed rule and tariff changes to the [ISO], to the Commission's Office of Energy Market Regulation staff and to other interested entities....
(Emphasis added.)¹³

⁹ See: NYISO Services Tariff, Attachment O, Sections 30.4.3.5 and 30.4.5.

¹⁰ 18 CFR § 35.28(g)(3)(iii)(A).

¹¹ The Market Monitoring Unit is permitted to participate in the development of "the inputs required for the Commission-approved independent system operator or regional transmission organization to conduct prospective mitigation, including, but not limited to, reference levels, identification of system constraints, *and cost calculations*." See 18 CFR § 35.28(g)(3)(iii)(B) (emphasis added).

¹² See TCR Answer, p. 41.

¹³ 18 CFR § 35.28(g)(3)(ii)(A) (emphasis added).

Consistent with this Core Function, the NYISO asked its Market Monitoring Unit to review and provide its independent evaluation of how Section 4.1.8 of its Services Tariff should be applied to the facts and circumstances presented in the TCR Complaint.

Under the Commission's regulations, Market Monitoring Units are expected and required to evaluate existing tariff provisions and, when the Market Monitoring Unit believes changes are needed, to propose changes to existing tariff language. TCR has it exactly backwards when it argues that Dr. Patton should not be advocating a position "about how the NYISO should interpret tariff provisions related to cost-based services" or that the Market Monitoring Unit is precluded from submitting a filing that indicates that the Market Monitoring Unit agrees with or supports an existing tariff rule, or supports the NYISO's implementation of a particular tariff rule.¹⁴ Evaluating tariff provisions would be an incomplete exercise without also developing an opinion on how such provisions should (and do) work and providing such information to the NYISO. Permitting the Market Monitoring Unit to opine on a particular tariff rule or market design element and how it is applied is just as important as reporting on those tariff rules that do not work well and should be changed.

It would make little sense to limit the Market Monitoring Unit's authority in the manner TCR suggests. Market Monitoring Units are expected and required to evaluate tariff provisions and to make their conclusions and recommendations available to the ISO based on their independent evaluation. The independent nature of the Market Monitoring Unit's evaluation is addressed below.

¹⁴ TCR Answer p. 42.

B. Potomac Economics Did Not Participate In the Administration of the NYISO's Tariffs

Dr. Patton's Affidavit in this proceeding (a) identifies the qualities of fixed and variable operating costs, (b) defines variable operating costs, and (c) applies the definition of variable operating costs he proposes to the costs that TCR seeks to recover. The Affidavit explains why Dr. Patton agreed with the NYISO that the 2009 costs for which TCR claims compensation were not variable operating costs. Dr. Patton's advice on the NYISO's interpretation of its tariffs, including the opinions he shared in his affidavit, are not evidence of participation in the NYISO's administration of its tariffs. The fact that the MMU independently exercised its discretion to offer a view consistent with the NYISO's does not make the MMU "subordinate" to the NYISO or create the kinds of conflicts of interest that Order No. 719's policy against MMU participation in tariff administration was designed to discourage.

The NYISO administers its tariffs. An example of tariff administration is the NYISO's response to TCR's request for compensation for costs incurred in providing Minimum Oil Burn Service in 2009, the topic of the underlying issues in this case. Rendering advice and opinion is not tariff administration – paying claims and responding to Market Participant inquiries is tariff administration. As the Commission itself noted, the MMU's function of evaluating existing market rules, tariff provisions and market design elements, and recommending proposed rule and tariff changes to the RTO or ISO, the Commission, and other interested entities and market participants, carries with it the appropriate caveat that "the MMU is not to effectuate its proposed market design itself (a task belonging to the RTO or ISO)."¹⁵ Dr. Patton has not effectuated his evaluation in this instance; he has merely provided his opinion.

¹⁵ Order 719, pp 354.

Moreover, the NYISO disagrees with TCR's unsupported suggestion that the NYISO is precluded from consulting with its Market Monitoring Unit before the NYISO decides how best to implement the requirements of its tariffs.¹⁶ In order to ensure that the NYISO made an informed decision, the NYISO discussed the nature of fixed and variable costs with its MMU, and considered its input in reaching a decision on accepting or rejecting TC Ravenswood's claimed compensation. These discussions evidence the NYISO's request for precisely the type of independent analysis that Market Monitoring Units are encouraged to provide to ISOs and RTOs.¹⁷ MMU advice can inform the ISOs' and RTOs' administration of their Tariffs, and avoid preventable Market Violations.¹⁸ The NYISO considered the arguments that TCR advanced in this proceeding as well as the advice of its MMU in determining whether the costs TCR was seeking as additional 2009 compensation were reimbursable under the Services tariff Section 4.1.8 as variable operating costs. The eventual decision that they were not reimbursable was the NYISO's determination, as the administrator of its tariffs, not Dr. Patton's.

Similarly, Order No. 719 in no way prevents consultations and collaboration between ISOs/RTOs and their independent MMUs on a particular issue. Order No. 719 goes so far as to expressly allow ISOs/RTOs to establish reasonable mechanisms to review and comment on draft MMU reports. If that degree of collaboration is permissible then there could be nothing impermissible about the NYISO's decision to seek the MMU's views on the issue in this proceeding, or the MMU's decision to support the NYISO.

¹⁶ See: TCR Answer p. 41 "[Dr. Patton] is prohibited from coordinating with the NYISO in *its* administration or interpretation of its Services Tariff..." Emphasis added.

¹⁷ Order 719, discussion at PP. 353 – 357.

¹⁸ While a Core Function of Market Monitoring Units is reporting possible Market Violations to the Commission's Office of Enforcement, the mission and goal of Market Monitoring Units is to protect consumers and market participants. See 18 CFR § 35.28(g)(3),(i)(F). The Market Monitoring Unit's mission is best accomplished by providing timely advice that may prevent a Market Violation from occurring—not by waiting for a Market Violation to occur, and then reporting it to the Commission.

III. Neither Order No. 719 Nor Any Other Commission Precedent Prevents MMUs from Taking Positions that Support the ISOs/RTOs Whose Markets They Monitor

TCR provides absolutely no support for its argument that an MMU presumptively lacks independence if its opinion on a tariff provision is in accord with an ISO's/RTO's opinion.¹⁹ TCR's position would effectively diminish the independence of MMUs by suppressing their voices when they agreed with an ISO/RTO and permitting them to be heard only when they disagreed. The TCR approach would turn an MMU's core function of evaluating existing and proposed market rules, tariff provisions and market design elements on its head. An MMU *because of its independence*, is encouraged to provide advice no matter whether such advice supports the NYISO's administration of its tariff provisions or supports a change therein. To assume that only advice that disagrees with an ISO's interpretation of its tariff can be provided by an independent MMU, is absurd.

Of particular concern to the NYISO is TCR's baseless claim that Dr. Patton arrived at his position based on the NYISO's "undue influence."²⁰ One need only read the MMU's ten Annual State of the Market Reports to find where it has openly and independently questioned the NYISO's positions, decisions and market design approaches.²¹

¹⁹ TCR Answer at 42 ("How independent can the filed testimony be . . . ?)

²⁰ *Id.*: "As an independent market monitor, Dr. Patton's thoughts and positions should be arrived at without coordination or undue influence from the NYISO." *Id.*

²¹ See: http://www.nyiso.com/public/markets_operations/documents/studies_reports/index.jsp for the 2000 to 2009 *State of the Market Reports*.

IV. CONCLUSION

WHEREFORE, the New York Independent System Operator, Inc. respectfully requests that the Commission deny TC Ravenswood's motion to strike Dr. Patton's affidavit filed June 28, 2010 by the NYISO in this docket.

Respectfully submitted,

/s/ Mollie Lampi

Mollie Lampi

Assistant General Counsel

Alex M. Schnell

New York Independent System Operator, Inc.

Dated: October 13, 2010

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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 13th day of October, 2010

/s/ Joy A. Zimmerlin

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