UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. ER10-3043-001

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

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure,[1] the New York Independent System Operator, Inc. ("NYISO") submits this request for leave to answer, and its answer to, the *Limited Protest of Hudson Transmission Partners, LLC* ("HTP Protest") and the *Protest of the New York City Suppliers* ("Incumbent Generators' Protest") in the above-captioned proceeding. As discussed below, HTP is no longer objecting to the general applicability of the proposed "Three-Year Look-Ahead Rule" which is the only pending issue in this sub-docket.[2] By contrast, the Incumbent Generators' Protest raises untimely and meritless objections to the Three-Year Look-Ahead Rule for the first time. The Incumbent Generators also seek to renew irrelevant procedural arguments that the NYISO has already addressed,[3] and improperly seek a role in the administration of the NYISO's market power mitigation measures. The Commission should therefore act expeditiously and issue an order accepting the Three-Year

[1] 18 C.F.R. §§ 385.212 and 385.213 (2010).

[2] Under the Three-Year Look-Ahead Rule, the NYISO would use ICAP Spot Market Auction prices for future Capability Periods beginning with the Summer Capability Period that commences three years from the start of a proposed facility's Class Year when conducting Offer Floor exemption analyses under Attachment H to its Market Administration and Control Area Services Tariff ("Services Tariff"). The NYISO first proposed the Three-Year Look-Ahead Rule in its September 27, 2010 filing proposing enhancements to its In-City Buyer Side Market Power Mitigation Measures ("September 27 Filing."). In the November 26 Order in this proceeding, the NYISO was directed to provide additional support for the rule, which it did in its *Initial Compliance Filing and Request for Expedited Action No Later Than December 14, 2010*, Docket No. ER10-3043-001 (December 7, 2010) ("*Initial Compliance Filing*").

[3] *See Request for Leave to Answer and Answer of the New York Independent System Operator, Inc.*, Docket No. ER10-3043-001 (December 14, 2010) ("NYISO December 14 Answer").

Look-Ahead Rule for the reasons that were set forth in both the September 27 Filing and the *Initial Compliance Filing*.

I. REQUEST FOR LEAVE TO ANSWER

The Commission has discretion[4] to accept answers to responsive pleadings, and has done so when they help to clarify complex issues, provide additional information, or are otherwise helpful in the Commission's decision-making process.[5] The Commission should follow its precedent and accept the NYISO's answer in this instance. This answer will clarify the NYISO's position with respect to the HTP Protest and the potential implications of the Commission's response to HTP's request for relief. This answer will also identify the misstatements, mischaracterizations, and assumptions in the Incumbent Generators' Protest that are contrary to Commission policy and precedent.

II. ANSWER

A. Answer to HTP

HTP was the only party in this proceeding to timely raise an objection to the Three-Year Look-Ahead Rule. The HTP Protest offers no new objections. HTP now "takes no position on the reasonableness of the Three-Year Look-Ahead Rule "as a general matter" so long as it is not applied to HTP's proposed Hudson Transmission Project.[6] HTP argues that the Hudson

[4] *See* 18 C.F.R. § 385.213(a)(2).

[5] *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"); *New York Independent 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); *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 at 61,036 (2000) (accepting an answer that was "helpful in the development of the record. . . .").

[6] HTP Protest at 2-3.

Transmission Project has a variety of characteristics that distinguish it from other new entrants and militate in favor of the project being treated differently.

The NYISO is taking no position at this time on HTP's request that its project be analyzed based on its "actual projected start date of 2013."[7] If the Commission grants HTP's request, however, it should be clear that its action is narrow in scope and based solely on the one factor that appears to truly distinguish HTP from other potential new entrants into the In-City ICAP market: HTP is in a Class Year[8] for which the cost allocation process was completed well before the September 27 Filing formally proposed the Three-Year Look-Ahead Rule.[9] The NYISO does not believe that any other potential new entrant could be excluded from the Three-Year Look-Ahead Rule on this basis. [10]

Granting HTP relief for the other reasons it offers would undermine the Three-Year Look-Ahead Rule by subverting the very predictability that it and the other components of the September 27 Filing are intended to foster.[11] If the Commission were to issue an order accepting or otherwise crediting HTP's other proffered rationales for different treatment, other proposed projects might also try to argue that their expected entry dates might not fall three years after their Class Year. Permitting such claims would open the door to the controversy, uncertainty,

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[7] *Id.* at 5.

[8] Capitalized terms that are not otherwise defined herein shall have the meaning specified in Section 23.2.1 of Attachment H to the NYISO's Services Tariff in Attachment S to the NYISO OATT or in the *Initial Compliance Filing.*

[9] *Id.* at 4.

[10] HTP has publicly disclosed that an exemption determination had not been made as to it. *See* HTP Protest at 1; *Motion to Intervene and Protest of Hudson Transmission Partners, LLC,* Docket No. ER10-3043-000 at 3 (October 22, 2010). No inference should be drawn from this pleading that it is appropriate for the NYISO to disclose whether or when an Offer Floor or exemption determination has been requested, or made, or to reveal the results of the NYISO's analyses. All such information is highly confidential.

[11] As the NYISO has previously explained, the overall purpose of the proposed enhancements to the In-City Buyer Side Mitigation Measures that were included in the September 27 Filing, including the Three-Year Look-Ahead Rule, was to increase transparency for all Market Participants and to provide greater certainty and predictability to potential new entrants. *See, e.g.*, September 27 Filing at 2; *Initial Compliance Filing* at 2.

and possible gamesmanship that the Three-Year Look-Ahead Rule is intended to prevent. It would likewise be inappropriate to create a separate rule for interregional transmission projects given that the NYISO and its stakeholders have already decided, for the reasons specified in the *Initial Compliance Filing*, to adopt a "technology-neutral" approach.[12]

B. Answer to the Incumbent Generators

1. The Commission Should Ignore Arguments that Have Already Been Refuted by the NYISO

As a preliminary matter, the Incumbent Generators continue to imply that it was somehow inappropriate for the NYISO to submit the *Initial Compliance Filing* without first conducting a stakeholder process.[13] As the NYISO has previously explained,[14] it is neither required nor customary for the NYISO to seek stakeholder approvals of filings such as the *Initial Compliance Filing* that include no new tariff provisions, are limited to responding to a specific Commission request regarding tariff provisions that were previously approved by the NYISO's stakeholders, and that are time sensitive. The Incumbent Generators cite no precedent to support their view, relying solely on a mischaracterization of the NYISO's past practices.[15]

Similarly, the Incumbent Generators continue to claim that the written questions they submitted to the NYISO must be answered before the Commission may act upon the *Initial Compliance Filing*.[16] The NYISO has already explained that there is no connection between those questions, which have to do with other aspects of the administration of the Offer Floor exemption test, and the merits of the Three-Year Look-Ahead Rule. The Incumbent Generators'

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[12] *See Initial Compliance Filing* at 3-4 at and *Affidavit of David Lawrence* at PP 9-10.

[13] Incumbent Generators' Protest at 2, n. 16.

[14] NYISO December 14 Answer at 2.

[15] Contrary to footnote 4 of the Incumbent Suppliers' Protest, the NYISO does not conduct a stakeholder process before making filings with the characteristics of the *Initial Compliance Filing* "in the normal course."

[16] Incumbent Generators' Protest at 7.

Protest makes no effort to show that there is such a connection beyond asserting that the answers are somehow "critical."[17] Instead, the Incumbent Generators suggest that because the Three-Year Look-Ahead Rule is a component of the Offer Floor exemption analysis the Commission may not address it until all of their questions about the broader exemption analysis have been addressed, even though those questions are not related to the merits of the rule.[18]

Such reasoning is spurious on its face and would be in any context. It is especially unreasonable here, however, because the NYISO cannot answer some of the questions until it knows whether or not the Commission has accepted the Three-Year Look-Ahead Rule. For example, Question No. 4 asks the NYISO to "confirm the start date that will be assumed for each Examined Facility for the Net Energy and Ancillary Services analysis and for the forecast capacity price analysis."[19] Thus, far from making the case for delaying action, the Incumbent Generators' questions actually demonstrate the need for the Commission to grant the NYISO's request for a prompt order in response to the *Initial Compliance Filing*.

2. Compelling the NYISO to Answer the Incumbent Generators' Questions Is Both Unnecessary and Contrary to Commission Precedent

Contrary to what the Incumbent Generators' imply, the NYISO has not taken unreasonably long to prepare responses to their questions. The NYISO intends to respond without compulsion and in good faith, just as it would to any other stakeholder request. As was noted above, however it is not possible for the NYISO to answer the questions "in a matter of

[17] *Id.* at 9.

[18] *See Id.* at 7 (arguing that the questions are necessary to ascertaining whether the entire "rule set, inclusive of the Three Year Rule" is just and reasonable.)

[19] *See* Incumbent Generators' Protest at Attachment 1. The Incumbent Generators indicate that one of their questions "involves" the Three-Year Look-Ahead Rule without specifying which one. *See* Incumbent Generators' Protest at 7. It appears that they must be referencing Question No. 4, the very question that the NYISO cannot answer definitively until the Commission acts on the *Initial Compliance Filing.*

days"[20] because some of them cannot be answered until after the Commission acts on the *Initial Compliance* Filing. Other questions, or aspects of them, call for confidential information that is competitively sensitive to potential entrants that would be competing with the Incumbent Generators. For example, the Incumbent Generators ask for a list of all the costs of each Examined Facility that will be considered.[21] This question has no relationship to the Incumbent Generators' ability to comment on the *Initial Compliance Filing*, but does seek access to competitors' sensitive market information to which they are not otherwise entitled.

Once the Commission has acted on the *Initial Compliance Filing*, the NYISO will need a reasonable time to prepare answers that account for confidentiality considerations. Assuming that an order is issued in early January, the NYISO would anticipate answering the questions in time for the next regularly scheduled meeting of the ICAP Working Group. The next meeting is scheduled for January 19 and ICAP Working Group meetings generally occur twice, and never less than once per month. Moreover, the ICAP Working Group meeting will provide a venue for the NYISO to respond to the questions and discuss with all stakeholders both its answers to them and to any follow up questions. Thus, there is no need for the Commission to issue an order compelling the NYISO to answer the Incumbent Generators' questions.

Such an order would be contrary to Commission policy and precedent for at least two reasons. First, it would effectively convert a set of informal questions presented during the normal course of the NYISO stakeholder process into a binding discovery request. The Commission does not ordinarily allow discovery prior to the commencement of a hearing.[22]

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[20] *See* Incumbent Generators' Protest at n. 18.

[21] *See Id.* at Attachment 1, Question No. 7.

[22] *See, e.g.*, *Tarkington Independent School District*, 44 FERC ¶ 61,043 (1988) (finding that Rule 401(a), which permits discovery requests, only "applies to discovery in proceedings which have been set for hearing"); *Transcontinental Gas Pipe Line Corp.*, 119 FERC ¶ 61,039 (2007) (internal citations omitted) (finding that formal discovery is not available in proceedings that have not yet been set for hearing"); *Alcoa Power Generating, Inc.*,

Although exceptions have been granted in rare circumstances, the Incumbent Generators have not attempted to make the required showing.[23] Given that the questions have no direct connection to the merits of the Three-Year Look-Ahead Rule, it would be singularly inappropriate to make an exception for them.

Second, granting the Incumbent Generators' request would undermine the NYISO "shared governance" system and impede the Commission's efficient processing of filings developed through it. The Incumbent Generators had every opportunity to raise their questions during the numerous ICAP Working Group meetings in which the tariff revisions that were the subject of the September 27 Filing were developed or in a timely response to that filing. The fact that the Incumbent Generators failed to do so until now does not mean that the NYISO will not voluntarily answer their questions, but it ought to preclude the Incumbent Generators from using the questions to delay action on the *Initial Compliance Filing*. If the Commission were to grant the Incumbent Generators' request for relief it would effectively reward their untimeliness.

In addition, it would give other stakeholders an incentive to employ similar tactics. It would also discourage full participation in stakeholder discussions and reduce the effectiveness of such discussions at narrowing differences and resolving disputes before they reach the Commission. Other stakeholders would be encouraged to try to draw the Commission into the details of stakeholder debates which would tend to add more formality, and more posturing with an eye on the possibility of future litigation, into the stakeholder process. The NYISO

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121 FERC ¶61,279 (2007) (stating that "[w]e have made clear that the discovery rules apply only to trial-type hearings established under Subpart E of our regulations, and not to 'paper' hearings such as this one").

[23] *Arlington Storage Co., LLC*, 125 FERC ¶ 61,306 (2008) (stating that "under [Rule 401(a)], … discovery is not permitted unless the proceeding has been set for evidentiary hearing, or the Commission has otherwise authorized discovery").

respectfully submits that all of these developments would be undesirable and that all can be avoided by rejecting the Incumbent Generators' Protest.

3. There Is No Merit to Incumbent Generators' Untimely Objections to the *Initial Compliance Filing*

The Incumbent Generators' Protest offers certain new objections to the Three Year Look-Ahead Rule. That proposed rule has not changed since it was first proposed in the September 27 Filing. Comments and protests on that filing were due on October 22. The Incumbent Generators submitted in their 111-page protest by that deadline but were silent regarding the Three-Year Look-Ahead Rule. Their objections are thus two months late. The Incumbent Generators likewise failed to raise any of their concerns during the NYISO stakeholder process, which is where the information restated in the Initial Compliance Filing was originally proposed, discussed, and developed. Indeed, the Incumbent Generators were generally supportive of the Three-Year Look-Ahead Rule at that time.[24] Their objections ought to be rejected for these reasons alone.

Even if they had been timely, however, the Incumbent Generators' objections would still be without merit. First, although they concede that the Three-Year Look-Ahead Rule may be an improvement over the currently effective "Reasonably Anticipated Entry Date Rule" they argue that its acceptance should be delayed until the NYISO addresses their concern that a "transition period" may be warranted for Class Years 2009 and 2010.

The NYISO disagrees that a transition period is appropriate simply because certain members of the Class Years of 2009 and 2010 may have already commenced construction. "Commencement of construction" is a highly subjective term that is susceptible to many

[24] As identified in the December 14 Answer, the Incumbent Generators' participated in the stakeholder discussions and appeared to support the decisions that are described in the *Initial Compliance Filing*. *See* December 14 Answer at 2**.**

different meanings, including simply obtaining a permit or clearing land, and it is commonly known that projects can "commence construction" prior to obtaining financing. Further, permitting and construction delays, and a host of other potential hurdles can delay the actual entry of these projects regardless of assumptions made for planning or interconnection purposes.[25] The NYISO proposed, and its stakeholders endorsed, the Three-Year Look-Ahead rule because it is a clear objective standard that would permit the efficient and timely administration of the In-City Buyer Side Mitigation Measures. Most importantly, it would allow all stakeholders – including all ICAP buyers and sellers, end use customers, and regulators – an opportunity to develop their own forecasts and make decisions based on them.

In addition, the Three-Year Look-Ahead Rule avoids the need to devote time and resources to disputes over anticipated entry dates. The mere fact that a project has "commenced construction" does not mean that there is no longer an opportunity for such disputes. Nor is there any guarantee that such disputes will inevitably result in the use of the correct entry date for every entrant. Even a universally agreed upon "reasonably anticipated" date could ultimately prove to be wrong. In short, the Incumbent Generators' argument for a transition period reduces to a claim that the Three-Year Look-Ahead Rule will not work perfectly in every case, a point that the NYISO has previously acknowledged.[26] The Incumbent Generators ignore the fact that the existing "Reasonably Anticipated Entry Date Rule" is even more imprecise, does not have the added advantage of objectivity, and transparency to all stakeholders, and also does not avoid entry date disputes.

[25] *See* Incumbent Generators' Protest at n. 21.

[26] *See Initial Compliance Filing* at 4.

Second, the Incumbent Generators' claim that Mr. Lawrence's affidavit in support of the *Initial Compliance Filing* may not be "statistically valid"[27] is a red herring. Mr. Lawrence has compiled all available information on project entry from the past five years. Whether or not statisticians could argue over whether it is "statistically valid", it is the best evidence, and only evidence, from which the reasonableness of the Three-Year Look-Ahead Rule could and should be evaluated.

Finally, the Incumbent Generators argue that it is unclear how the Three-Year Look-Ahead Rule would apply to projects that actually enter service sooner than three years after their Class Year. They urge that the NYISO be required to make another compliance filing to address this single point. There is no need for such a filing. To the extent that it was not already apparent from past filings, and the stakeholder discussions – all of which the Incumbent Generators' representatives participated in, the results of the NYISO's Offer Floor and exemption analyses under the proposed Three-Year Look-Ahead Rule would not change based on actual entry dates. This would be true regardless of whether the actual entry date came sooner or later than the Three-Year Look-Ahead Rule assumed. To do otherwise would undermine the predictability that the Three-Year Look-Ahead Rule is intended to promote by shifting disputes over entry dates from the time that an investment decision is made to the time that a project actually enters service.

4. The Incumbent Generators Must Not Be Permitted to Interfere with the NYISO's Independent Administration of its In-City Buyer Side Mitigation Measures

The Incumbent Generators warn that the erroneous exemption of a new entrant from Offer Floor mitigation could have long-term "price suppressive" effects on the In-City ICAP

[27] *See* Incumbent Generators' Protest at 9.

market. They also profess to support the NYISO's objective of making the administration of the In-City Buyer Side Mitigation Measures more transparent.[28] They contend that, therefore, the Offer Floor exemption rules "must be reviewed carefully to ensure that they function properly together *and have been applied correctly*."[29] They also assert that the rules should "allow *Market Participants* and the Commission to confirm that the tests *were applied in accordance with the rules*"[30] and that both Market Participants and the Commission should be able to confirm that they would produce "just and reasonable results. . . ."[31]

The Incumbent Generators, along with all stakeholders, have a legitimate and important role in developing NYISO market rules, including market power mitigation measures.[32] They are entitled to object to proposed tariff revisions, to challenge Commission orders approving them, and to seek Commission relief if they believe that they are not being implemented properly. They should not, however, be directly involved in the administration of market power mitigation measures. The NYISO is the independent entity responsible for applying the market power mitigation measures in Attachment H. The independent MMU is responsible for monitoring for potential tariff violations. As market participants with a clear incentive to oppose entry by new competitors, the Incumbent Generators lack the independence necessary to directly participate in these functions.[33] The Commission should therefore be wary of any attempt by the

[28] *Id.* at 4, 6.

[29] *Id.* at 3, 5, 6 (Emphasis Added).

[30] *Id.* at 6 (Emphasis Added).

[31] *Id.* at 7.

[32] Note that a unilateral filing may sometimes be necessary, to allow the NYISO and MMU to act quickly, in instances where emergencies or concerns that informing market participants would invite further manipulation are present. *See* Services Tariff at Attachment O Section 30.4.6.2.1.

[33] The Commission has been clear since its earliest orders that market monitoring should be performed by independent parties, and that both the NYISO and the MMU must be independent from market participants. *See, e.g.,. Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 at PP 310, 35, 317, 380 (2008), *order on reh'g*, Order No. 719-A,

Incumbent Generators to set themselves up as the *de facto* co-implementers of the In-City Buyer Side Mitigation Measures. Nor should the Commission permit them to use those provisions to try to discourage, or to delay, new entry.

III. CONCLUSION

For the reasons set forth above, the Commission should grant the NYISO leave to answer, not take any action in response to the HTP Protest that would undermine the Three-Year Look-Ahead Rule, and reject the Incumbent Generators' Protest in its entirety. The Commission should also act expeditiously to accept the proposed Three-Year Look-Ahead Rule for the reasons specified in both the September 27 Filing and the *Initial Compliance Filing*.

Respectfully Submitted,

/s/Ted J. Murphy
Ted J. Murphy
Counsel to the
New York Independent System Operator, Inc.

December 28, 2010

cc: Michael A. Bardee
Connie Caldwell
Jignasa Gadani
Jeffrey Honeycutt
Kathleen E. Nieman
Rachel Spiker
Gregory Berson
Anna Cochrane
Lance Hinrichs
Michael Mc Laughlin
Daniel Nowak

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74 Fed. Reg. 37776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009) (finding that the Final Rule seeks to achieve the independence of the MMU and providing a code of ethics to be applied to the MMU to preserve its independence); *See also*, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at P 239, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group*, 225 F.3d 667, *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)) (requiring ISOs to be independent from market participants); *New York Independent System Operator, Inc.*, 89 FERC ¶ 61,196 (1999), *order on reh'g*, 90 FERC ¶ 61,317 (2000) (accepting the NYISO's market monitoring plan).

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 28th day of December, 2010.

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/s/Ted J. Murphy
Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20006
(202) 955-1500