

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

New York Independent System Operator, Inc.)))	Docket No. ER11-4338-001
---	-------------	---------------------------------

**ANSWER OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

In accordance with Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),¹ the New York Independent System Operator, Inc. (“NYISO”) respectfully submits this answer to: (i) the motion to strike included in the *Motion to Strike and, in the Alternative, Motion for Leave to Answer and Answer of Occidental Chemical Corporation* (“Motion to Strike”); and (ii) a single assertion in the *Answer of the New York Association of Public Power to Requests for Clarification and Waiver* (“NYAPP Answer”). For the reasons set forth below, there is no justification for striking the *Request for Rehearing and Alternative Requests for Expedited Clarification and Compliance Waiver of the New York Independent System Operator, Inc.* (“Rehearing Request”). Nor is there any basis for any party to claim that the NYISO is not working in good faith to comply with the cost allocation requirements of the May 16 Order² addressing the NYISO’s compliance with Order No. 745.³

¹ 18 C.F.R. §§ 385.212, 213.

² See *New York Independent System Operator, Inc. Order on Compliance Filing*, 143 FERC ¶ 61,134 (2013) (“May 16 Order”).

³ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187 (March 15, 2011) (“Order No. 745”); *reh’g denied*, Order No. 745-A, 137 FERC ¶ 61, 215 (Dec. 15, 2011) (“Order No 745-A”); *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012).

I. PROCEDURAL MATTERS

Under Rule 213, the NYISO is entitled to answer motions, including the Motion to Strike, as a matter of right.⁴ In deference to the Commission's preference that parties not file answers to answers, the NYISO is not responding to the alternative answer that accompanies the Motion to Strike. The NYISO's silence regarding the assertions and characterizations included in the alternative answer should not be construed as agreement with them.

The NYISO also respectfully seeks leave to respond to the NYAPP Answer to the extent that it suggests that the NYISO is not working diligently to comply with the cost allocation requirements of the May 16 Order. The NYISO explains in Section II.B below that any such claim is incorrect. The Commission has the discretion to accept answers to answers when they help to clarify the record.⁵ Permitting the NYISO to answer this one aspect of the NYAPP Answer will ensure that a misleading suggestion is corrected. As with the NYISO's response to the Motion to Strike, the fact that the NYISO has refrained, out of respect for the Commission's procedural rules, from addressing other statements in the NYAPP Answer should not be construed as agreement with them.

II. ANSWER

A. Answer to Motion to Strike

The Motion to Strike argues that the Rehearing Request should be rejected because what it characterizes as "[l]arge segments" of the pleading are allegedly based on new arguments or

⁴ See Rule 213(a)(3).

⁵ See e.g., *New York Independent System Operator Inc.*, 133 FERC ¶ 61,178 at P 11 (2011) (allowing answers to answers and protests "because they have provided information that have assisted [the Commission] in [its] 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...").

evidence that the NYISO “could have raised before, but did not.”⁶ These assertions are not correct. The arguments made in the Rehearing Request were either made earlier in this proceeding or address issues that the NYISO did not anticipate, and could not have reasonably anticipated, prior to the May 16 Order. Moreover, the arguments and evidence that the Motion to Strike contends are impermissible are a relatively minor part, not a “large segment” of the Rehearing Request.⁷

The NYISO’s August 2011 Compliance Filing in this proceeding argued that its cost allocation proposal satisfied the requirements of Order No. 745.⁸ The NYISO’s September 2011 Answer defended that cost allocation proposal against claims that it was non-compliant “because it allocates costs to customers who have bilateral contracts for energy” which it was argued did not “purchase in the relevant energy market” and thus were supposedly “not beneficiaries of the dispatch of cost-effective demand response.”⁹ These are the very arguments that were accepted by the May 16 Order and that are challenged by the Rehearing Request. The September 11 Answer also argued that: (i) bilateral contracts were “a part of the larger New York Market, even if the contract price is not directly derived from the NYISO market clearing prices;” (ii) customers with bilateral contracts benefitted “from the trends in the New York electricity markets over time, whether or not those benefits accrue immediately under the terms of those

⁶ Motion to Strike at 2.

⁷ Rehearing Request arguments that are not challenged on procedural grounds by the Motion to Strike include arguments that the May 16 Order: adopted an unnecessarily narrow interpretation of Order No. 745 (Rehearing Request at 11-13), caused an incompatibility between the NYISO’s Net Benefits Test and cost allocation rules (Rehearing Request at 14-15), and was inconsistent with Commission decisions addressing comparable Order No. 745 compliance filings (Rehearing Request at 18-19).

⁸ *New York Independent System Operator Inc.*, Compliance Filing re: Demand Response Compensation in Organized Wholesale Energy Markets at 10, Docket No. RM10-17-000 (Aug. 19, 2011).

⁹ *New York Independent System Operator, Inc.*, Motion for Leave to Answer and Answer of the New York Independent System Operator, Inc. at 10, Docket No. ER11-4338-000 (September 26, 2011) (“September 2011 Answer”).

contracts;” and (iii) the NYISO’s proposal “reasonably apportions the costs of demand response.”¹⁰ The Motion to Strike does not dispute that these arguments are part of the record in this proceeding and does not appear to contest that they can properly be renewed in a request for rehearing.

The Rehearing Request made two other arguments that could not have been made before the issuance of the May 16 Order. First, it explained that the May 16 Order was inconsistent with Commission rulings on other Order No. 745 compliance filings.¹¹ Second, it argued that the May 16 Order’s conditional acceptance of the NYISO’s Net Benefits Test coupled with its rejection of the cost allocation proposal created fundamental inconsistencies that would result in inefficient and inequitable cost allocations. As was the case with respect to arguments made in the September 2011 Answer (above), the Motion to Strike does not contend that these arguments are impermissible.

Instead, the Motion to Strike takes issue with the Rehearing Request’s argument that “changes in the Transmission Usage Charge (“TUC”) and Ancillary Services prices from reduced Locational Marginal Price (“LMP”) resulting from the dispatch of Demand Response would provide a benefit to Load in the NYISO served by bilateral contracts.”¹² The Motion to Strike acknowledges that the September 2011 Answer made “general assertions”¹³ relevant to this issue but argues that the entire Rehearing Request should be rejected because the September 2011 Answer did not specifically mention the TUC or Ancillary Services price impacts.

The Motion to Strike’s position that the NYISO may not refine or further substantiate an argument on rehearing is a distortion of Commission precedent which discourages parties from

¹⁰ September 2011 Answer at 10-11.

¹¹ See Rehearing Request at Section III.E.

¹² See Motion to Strike at 3.

¹³ *Id.* at 4.

raising new issues or evidence on rehearing. The Motion to Strike is effectively contending that the NYISO is limited to repeating previous arguments verbatim, despite the fact that the Commission has held that rehearing requests will be denied if they “raise essentially the same issues and merely repeat essentially the same arguments, reiterating their dissatisfaction with our previous decisions”¹⁴ This position is unreasonable, inconsistent with Commission practice,¹⁵ and should be rejected.

The Motion to Strike’s only other objections are directed against the affidavits that were attached to the Rehearing Request. It claims that they are “objectionable because they introduce new evidence into the proceeding after the record is closed and there is no reason that they could not have been presented in the NYISO’s prior filings.”¹⁶ This is untrue.

The *Confirming Affidavit of Robert Pike and Christopher Russell* is confined, as its title indicates and as the Motion to Strike acknowledges,¹⁷ to confirming the veracity of statements included in the Rehearing Request. The affidavit makes no assertions that are not contained in the pleading. As explained above, none of the statements in the Rehearing Request are impermissible because they all relate to issues that the NYISO had previously raised or could not have raised before the May 16 Order was issued. There is thus no basis for rejecting the affidavit.

¹⁴ *Northern Natural Gas Co.*, 87 FERC ¶ 61,272 (1999); *see also e.g. San Diego Gas & Electric Co.*, 139 FERC ¶ 61,212 (2012), *State of Connecticut*, 118 FERC ¶61,205 (2007), *Removal of Outdated Regulations Pertaining to the Sales of Natural Gas Production*, 69 FERC ¶ 61,342 (1994), *Pacific Gas Transmission Co.*, 62 FERC ¶ 61,243 at 62,604-05 (1993).

¹⁵ *See, e.g., ExxonMobil Chemical Co.*, 112 FERC ¶ 61,255 at P 10 (2005) (rejecting rehearing request that incorporates previous filings by reference because practice does not inform Commission of relevant arguments “nor indicates how arguments may have changed in light of our final order.”).

¹⁶ Motion to Strike at 3.

¹⁷ *Id.*

The *Joint Affidavit of Scott M. Harvey and William W. Hogan* is likewise related to issues that the NYISO previously raised.¹⁸ It also directly supports points in the Rehearing Request that the NYISO could not have made prior to the May 16 Order, *i.e.*, its objection to the “fundamental inconsistency” between the May 16 Order’s approach to the Net Benefits Test and to cost allocation and its unnecessarily narrow interpretation of section 35.28(v)(B) of the Commission’s regulations.¹⁹ More generally, the affidavit does not provide the kind of detailed new factual evidence that could not be accepted without materially disadvantaging other parties.

The NYISO also takes exception to the Motion to Strike’s insinuation that it has sought to “sandbag” other parties or somehow abuse the administrative process. The NYISO has not sought an unfair advantage. It has simply exercised its right to challenge a Commission ruling based on issues that it previously raised, or could not have raised prior to the May 16 Order. Nor is there any possibility that the NYISO will gain an unfair advantage in this proceeding. The Motion to Strike includes an alternate answer that is longer than the substantive portion of the Rehearing Request.²⁰ To the extent that the Commission were to conclude (which it should not) that the Rehearing Request gave the NYISO an unfair advantage it is reasonable to expect that the Commission would exercise its discretion to accept the alternate answer to the extent necessary to eliminate any unfairness.²¹

¹⁸ The affidavit refers to potential implementation difficulties and costs under the May 16 Order’s cost allocation directive. Rehearing Request at Attachment I at PP 18-23. The September 2011 Answer identified the burdens of “monitoring and scrutinizing contracts” as a potential concern. September 2011 Answer at 10. Therefore, PP 18-23 of the affidavit are directly related to an issue that is in the record in this proceeding.

¹⁹ Rehearing Request at Attachment I at PP 14-17.

²⁰ Compare Motion to Strike at 6-22 (16 pages) and Rehearing Request at 10-19 (9 pages).

²¹ See *e.g.* *Missouri Interstate Gas, LLC*, 122 FERC ¶61,136 (2008), *Wisconsin Public Power, Inc.*, 95 FERC ¶61,412 (2001), *Great Lakes Gas Transmission Limited Partnership*, 66 FERC ¶61,226 (1994).

To the extent that the Commission were to conclude that some portion of the Rehearing Request (or of an affidavit) introduced new issues or factual evidence it should exercise its discretion to accept it. The Commission has previously done so when circumstances warranted.²² Making an exception would be appropriate here given that the challenged arguments in the Rehearing Request are closely related to issues that the NYISO previously raised and are limited in scope. Similarly, to the extent that either affidavit is found to impermissibly present new factual evidence that content would be outweighed by material that is unquestionably permissible to raise on rehearing.

Finally, and in the alternative, if the Commission were to conclude that it could not accept a portion of the Rehearing Request or an affidavit it should reject only that portion. Striking the entire Rehearing Request, including the substantial portions that even the Motion to Strike does not contend are impermissible, would be unreasonable, seriously prejudicial to the NYISO,²³ and inconsistent with Commission precedent.²⁴

²² See, e.g., *PJM Interconnection LLC*, 107 FERC ¶ 61,105 (2004) and 108 FERC ¶ 61,187 (2004), *Algonquin Gas Transmission Company*, 93 FERC ¶61,163 at n. 2 (2000) (denying request to reopen record to include supporting affidavits on grounds that “[t]he motion is unnecessary and the affidavits will be received as part of the request for rehearing.”), *PSI Energy Inc.*, 52 FERC ¶61,260 (1990), *CP National Corp.*, 49 FERC ¶61,309 (1989) (reviewing documents in rehearing request even though those documents did not fall within the parameters of Rule 713(c)(3)).

²³ See e.g. *Municipal Electric Utilities Association of the State of New York*, 23 FERC ¶ 61,064 (1983) (calling a request to deny rehearing and ignore the merits of rehearing petitions “an extraordinary remedy that would have substantially interfered with the rights of opposing parties and could have harmed not only their private interests but the public interest as well”).

²⁴ See e.g. *Primary Power, LLC*, 140 FERC ¶ 61,052 (2012) and *Transmission Relay Loadability Reliability Standard*, 136 FERC ¶ 61,185 (2011) (rejecting affidavits filed in support of a rehearing request but still considering the request); see also *Great Lakes Gas Transmission L.P.*, 62 FERC ¶ 61,102 (1993) (noting that even where the Commission did not consider affidavit supporting rehearing request, the Commission will consider petitioner argument “in the same manner it considers arguments in every other rehearing request; namely as legal argument—not evidence.”).

B. Answer to the NYAPP Answer

The NYAPP Answer implies that the NYISO is not working in good faith to comply with the cost allocation requirements of the May 16 Order.²⁵ This is simply not the case. Notwithstanding the serious concerns that the NYISO raised in the Request for Rehearing, and the NYISO's continued hope that the Commission will modify the May 16 Order, the NYISO has been working diligently to meet its August 14 compliance filing deadline. To be clear, implementing a compliance proposal that would make the NYISO's cost allocation rules fundamentally inconsistent with its Net Benefits Test will likely result in the inefficiency and inequity described in the Rehearing Request. Nevertheless, the NYISO is doing its best to develop a compliance proposal that could be implemented and that would ameliorate these adverse consequences to the extent practicable. The NYISO has scheduled multiple additional stakeholder meetings between now and August 14 at which it will discuss its compliance proposal with its stakeholders.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the NYISO respectfully requests that the Commission reject the Motion to Strike and accept its answer to the NYAPP Answer's inaccurate assertion regarding alleged NYISO non-compliance with the May 16 Order.

Respectfully submitted,

/s/ Ted J. Murphy
Hunton & Williams, LLP
Counsel for
New York Independent System Operator, Inc.

July 17, 2013

²⁵ See NYAPP Answer at 4.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served 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 Commission Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2013).

Dated at Washington, D.C. this 17th day of July 2013.

/s/ Catherine Karimi

Catherine Karimi
Sr. Professional Assistant
Hunton & Williams LLP
2200 Pennsylvania Ave, NW
Washington, DC 20037
Tel: (202) 955-1500
Fax: (202) 778-2201
E-mail: ckarimi@hunton.com