

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

New York Independent System Operator, Inc.) Docket No. ER14-____-000

**NOTIFICATION OF TARIFF IMPLEMENTATION ERROR
AND REQUEST FOR LIMITED TARIFF WAIVERS OF
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

The New York Independent System Operator, Inc. (“NYISO”) submits this Notification of Tariff Implementation Error and Request for Limited Tariff Waivers (“Waiver Request”) in order to: (i) formally notify¹ the Federal Energy Regulatory Commission (“Commission”) that one of several tools the NYISO previously used to screen for possible physical withholding of New York Control Area (“NYCA”) generation portfolios was only partially effective; (ii) inform the Commission that the NYISO worked with its independent, external Market Monitoring Unit, Potomac Economics (hereafter, the “MMU”) to review possible instances of portfolio withholding that might have occurred between April 1, 2012 and April 8, 2013, and did not identify any instances in which it failed to assess a physical withholding sanction that it should have assessed; (iii) inform the Commission of the steps that the NYISO has taken to resolve the concern it identified; and (iv) request Tariff waivers to excuse the NYISO from reviewing any possible instances of portfolio physical withholding that might have occurred prior to April 1, 2012 to determine if available megawatts (“MW”) were withheld without a valid competitive justification, that had a market impact sufficient to justify the imposition of a financial sanction. For the reasons explained below, it is extremely unlikely that any such conduct occurred that would not have been identified by other processes that the NYISO and its MMU employed.

¹ The NYISO promptly informed the Commission’s Enforcement Staff and its Market Participants of this issue when it was discovered.

I. Correspondence

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II. Attached Documents

The NYISO has attached to this Waiver Request two presentations that its MMU gave to the NYISO's Market Issues Working Group:

1. The MMU's May 3, 2013 presentation to the NYISO's Market Issues Working Group entitled *Evaluation of the Potential Market Problem: Screens to Identify Potential Physical Withholding* (Attachment I); and
2. The MMU's May 6, 2014 presentation to the NYISO's Market Issues Working Group entitled *MMU Evaluation of Impact: Insufficient Screening for Physical Withholding* (Attachment II).

III. Background

A. Portfolio Withholding Conduct and Impact Thresholds

Section 23.3.1.1.1(iii) and (iv) of the NYISO's Market Power Mitigation Measures ("Mitigation Measures")² require the NYISO to look for instances where five percent (or more) or 200 MW (or more)³ of the total capability of a Market Party⁴ and its affiliates might have been withheld from the NYISO's Day-Ahead or Real-Time Energy Markets, and to determine if such withholding had a market impact. The NYISO refers to this as the "portfolio" withholding standard to differentiate it from the NYISO's generator-specific screening of each and every NYCA generator to ensure that each generator's Energy is being offered into the NYISO's Day-Ahead Market and Real-Time Market whenever it is available.⁵

The Mitigation Measures require the NYISO to apply a financial sanction for portfolio withholding when the NYISO determines that the following three requirements are met:

- (a) Available⁶ MWs exceeding the conduct thresholds were, in fact, withheld⁷;
- (b) the withholding would not be in the economic interest of the Market Party or its affiliates in the absence of market power (*i.e.*, the failure to offer is not competitively justified)⁸; and

² The Mitigation Measures are set forth in Section 23 of (Attachment H to) the NYISO's Market Administration and Control Area Services Tariff.

³ For generation portfolios located in the New York City Constrained Area, the MW threshold is tightened to withholding 100 MW (or more).

⁴ Capitalized terms that are not defined in this Waiver Request have the meaning ascribed to them in the Mitigation Measures or in the NYISO's Market Administration and Control Area Services Tariff.

⁵ The NYISO's generator-specific screens were developed to achieve compliance with Section 23.3.1.1.1(i) and (ii) of the Mitigation Measures.

⁶ MWs that are legitimately unavailable due to a scheduled maintenance outage or forced outage are not subject to penalties for possible physical withholding. *See* Section 23.3.1.1.2 of the Mitigation Measures.

⁷ *See* Sections 23.2.4.1.1 and 23.3.1.1 of the Mitigation Measures.

⁸ *See* Section 23.2.4.1.1(ii) of the Mitigation Measures.

(c) the withholding caused a market clearing price or guarantee payment impact that exceeds the applicable impact threshold.⁹

A financial sanction cannot be applied until the NYISO provides a Market Party the opportunity to explain the reasons why it did not offer its generating capacity into the market.

B. The Portfolio Screening Software

The screening software that the NYISO had in place from 2005 to April 8, 2013 (the “Portfolio Screening Software”) that was intended to screen for portfolio withholding reported useful information, including: (1) the total number of generators included in each portfolio; (2) the total ICAP sold from each portfolio; (3) the total number of hours in which there were MWs withheld in excess of the generator-specific conduct screen from generators in the portfolio; and (4) the number of portfolio generators that failed the generator-specific conduct screen. However, the screening test that the Portfolio Screening Software performed did not conform to the portfolio physical withholding conduct test specified in the Mitigation Measures. The Portfolio Screening Software took the total MWs that were not offered over the course of the day from a portfolio, divided that total by the number of generator-hours in which MW were withheld, and reported the result. The Portfolio Screening Software did not always identify the hours in which five percent or more of the total MW capability included in a portfolio was not offered, or the hours when the total number of MWs not offered from a portfolio exceeded 200 MW (100 MW in the Constrained Area), which are the conduct thresholds specified in the Mitigation Measures.¹⁰

⁹ See Section 23.3.2.1 of the Mitigation Measures.

¹⁰ Identifying instances in which an applicable conduct threshold is exceeded is a useful screening tool. However, the Mitigation Measures only permit the NYISO to apply a financial sanction when a Market Participant’s failure to offer its generators violates both the conduct and market impact thresholds. There must be both non-competitive conduct and a market clearing price or guarantee payment impact for a financial sanction to be applied.

As implemented, the Portfolio Screening Software was not an adequate stand-alone tool to identify possible violations of the portfolio physical withholding conduct threshold. Despite its shortcomings, the Portfolio Screening Software was partially effective; it successfully identified some instances of possible portfolio withholding.¹¹ Instances of possible portfolio physical withholding identified by the Portfolio Screening Software were reviewed by the NYISO in a manner that was consistent with the requirements of the Mitigation Measures.

On April 8, 2013 the NYISO identified an instance in which more than five percent of a Market Party's portfolio was not offered into the Real-Time Market, but the Portfolio Screening Software did not flag the behavior as a possible violation of the physical withholding conduct threshold. The NYISO immediately investigated to determine why the behavior was not flagged for further review, and discovered that the screening performed by the Portfolio Screening Software diverges from the portfolio physical withholding conduct tests set forth in the Mitigation Measures.

On April 9, 2013 the NYISO instituted a Tariff-compliant manual screening process that reviews, for each hour of the Day-Ahead Market and the Real-Time Market, whether a Market Party failed to offer five percent or more of, or 200 or more MW from (100 MW in the Constrained Area), the available generation in its portfolio. On February 13, 2014 the NYISO deployed and began using new, Tariff-compliant screening software to identify possible portfolio physical withholding. From April 9, 2013 forward, the NYISO's screening of portfolio physical withholding has been Tariff-compliant.

Upon discovering the issue, the NYISO informed its stakeholders and Commission Staff in an expeditious manner. The Commission's Office of Enforcement Staff was informed on

¹¹ The Portfolio Screening Software tended to under-report possible physical withholding conduct. The instances Portfolio Screening Software identified were legitimate candidates for further investigation.

April 12, 2013, and the MMU presented the concern to the NYISO's stakeholders at the May 3, 2013 Market Issues Working Group meeting.¹² The NYISO and the MMU then re-screened the offering behavior that occurred between April 1, 2012 and April 8, 2013 using corrected software to determine if the NYISO had failed to apply a financial sanction for portfolio physical withholding that the Mitigation Measures require the NYISO to apply.

C. NYISO Uses Multiple Methods to Screen for Possible Physical Withholding

The partially effective Portfolio Screening Software was only one of several tools that the NYISO and the MMU use to determine if available NYCA generators were being withheld from the NYISO's Day-Ahead Market or its Real-Time Market. Other methods the NYISO has employed since 2005 to ensure available generation is offered into its markets are described below.

First, in addition to identifying possible portfolio withholding, the Mitigation Measures require the NYISO to look for generator-specific physical withholding. The NYISO has screening tools in place to identify generator-specific withholding from both its Day-Ahead Market and its Real-Time Market. If a Market Party fails to offer 10 percent or more of, or 100 MW or more of, a generator's capability into the NYISO's Day-Ahead Market or Real-Time Market, then the NYISO's generator-specific physical withholding screen identifies that generator for further evaluation.¹³ Should the NYISO determine that a Market Party failed to offer available MWs from a generator, and that the failure to offer caused a Day-Ahead Market or Real-Time Market impact then, following consultation with the Market Party, the NYISO is required to assess a financial sanction. The NYISO's generator-specific physical withholding

¹² See Attachment I to this Waiver Request.

¹³ See Mitigation Measures Section 23.3.1.1.1(i) and (ii).

screens functioned appropriately while the flawed Portfolio Screening Software was in place. Although it would be possible to intentionally engage in portfolio withholding that does not trip the generator-specific withholding screen, the NYISO's and the MMU's review of the affected time period indicated that behavior that did not also violate the generator-specific conduct screen was easily explained¹⁴ and unlikely to cause an Energy market impact.

Second, the (approximately) 99 percent of NYCA generators that sell unforced capacity ("UCAP") to the NYISO are required to either offer their Energy into the Day-Ahead Market, or to be scheduled to supply a Bilateral Transaction, or to declare that the generator is unavailable due to a maintenance outage or a forced outage.¹⁵ UCAP suppliers that fail to satisfy this "bid, schedule or notify" requirement are subject to a financial sanction that is different from the penalty that applies to physical withholding from the Energy market.¹⁶ The NYISO rigorously polices and enforces compliance with the UCAP bid, schedule or notify requirement, which also ensures that UCAP suppliers offer their available Energy into the Day-Ahead Market.

Third, the NYISO uses Generator Availability Data Systems ("GADS") reporting to determine generator availability for purposes of calculating how much UCAP can be sold from each NYCA generator. In order to ensure that GADS data is reported accurately, the NYISO reviews generator outage logs to ensure consistency between reported data and outage scheduling rules. The NYISO looks for possible discrepancies and audits a subset of generators each year to ensure that outage data is being reported accurately.

¹⁴ Instances of possible portfolio withholding that did not also exceed the generator-specific thresholds could often be explained by ambient temperature derates, inability to procure fuel, and other offering behavior that accurately reflected physical limitations on generator operation.

¹⁵ See Section 5.12.7 of the NYISO's Market Administration and Control Area Services Tariff.

¹⁶ See Services Tariff Section 5.12.12.2.

Finally, in addition to the monitoring performed by the NYISO, the MMU reviews Real-Time Market outcomes and investigates instances where LBMPs or uplift payments deviate significantly from the competitive range that would be expected given system conditions. When such anomalous market outcomes occur, the MMU screens for unoffered capacity, which may represent physical withholding. Unoffered capacity is further screened for potential market impact. The MMU assesses whether generator conduct that is identified by these screens is likely to have a competitive justification. Finally, candidates for potential mitigation are discussed with the NYISO.

As explained below, the NYISO's and MMU's review of possible instances of portfolio withholding that occurred between April 1, 2012 and April 8, 2013 did not identify any instances in which the NYISO failed to assess a physical withholding sanction that it should have assessed. A key reason the NYISO did not fail to assess a required sanction was because the NYISO had several, overlapping monitoring methods in place to identify possible physical withholding, and was not relying solely on the portfolio screen in the Portfolio Screening Software to identify possible physical withholding.

D. NYISO and MMU Tariff Compliance Review

To determine whether the insufficient physical withholding Portfolio Screening Software failed to identify sanctionable conduct, the NYISO worked with the MMU to re-screen the 12 months from April 1, 2012 to April 8, 2013 using corrected software. Before performing a detailed review of the screened conduct, the NYISO excluded conduct that was unlikely to constitute physical withholding that would meet the tariff-defined price impact thresholds. The NYISO excluded:

- Conduct that the partially effective Portfolio Screening Software successfully identified, and the NYISO reviewed;
- Rest-of-state conduct that occurred during hours when there was not at least one Load Zone with an LBMP above \$150/MWh¹⁷; and
- Constrained Area conduct that occurred during hours when there were no active New York City load pocket constraints and there was not at least one New York State Load Zone with an LBMP above \$150/MWh.

A significant number of hours still required review after this initial screening was conducted. In total, 746 GWh of potential portfolio physical withholding conduct was subject to a more detailed review. The more detailed assessment that was performed to review the remaining 746 GWh determined:

- 29 percent of the 746 GWh were likely attributable to ambient temperature deratings and units offering at their normal upper operating limit rather than their emergency upper operating limit;
- 27 percent of the GWh involved units that logged a maintenance outage by e-mail rather than using the NYISO's automated system;
- 21 percent involved energy limited and/or intermittent resources that are not expected to offer in all hours of the day;
- 11 percent were on peaking units that provided a competitive justification that was deemed legitimate by the NYISO;

¹⁷ Section 23.3.2.2.4 of the Mitigation Measures instructs the NYISO not to apply automated mitigation (AMP) "if evaluation of unmitigated Bids results in prices at levels at which it is unlikely that the threshold for Bid mitigation will be triggered." The NYISO has required a \$150/MWh minimum LBMP threshold to activate AMP in the Constrained Area since 1999 or 2000. The NYISO used the same \$150/MWh LBMP screening threshold to identify hours in which it is unlikely that the failure to offer Energy from one or more generators in a portfolio would cause LBMPs to increase by at least 200 percent or \$100/MWh.

- four percent of the GWh were on units with Public Utility Regulatory Policies Act of 1978 (“PURPA”) contracts that must operate consistent with their regulatory and contractual obligations, and the needs of their steam host.

For the remaining 69 GWh (or eight percent of 746 GWh), the NYISO determined (and the MMU concurred) that the conduct had a competitive justification or that the conduct did not have sufficient market impact to warrant a financial sanction. Competitive justifications that adequately explained Market Parties failure to offer some of the generation included:

- Instances where a Market Party that controls a significant number of GTs located in close proximity to each other did not offer a small number of GTs in an hour when the Market Party did offer a significantly larger number of GTs with similar operating characteristics at the same location in the same hour that were offered competitively and not dispatched; and
- Instances where the reference levels used to perform the screen did not reflect gas-balancing charges that would have applied if the generators were committed or dispatched above their Day-Ahead schedules after the intraday gas nomination window had closed.

After completing their review, the NYISO and the MMU each concluded that the deficiencies in the Portfolio Screening Software did not cause the NYISO to fail to sanction physical withholding conduct that would have been sanctioned if the Portfolio Screening Software had accurately replicated the conduct tests set forth in the Mitigation Measures.¹⁸

¹⁸ See Attachment II to this Waiver Request at 6.

IV. Corrective Actions

On April 9, 2013, the day after it discovered an inconsistency between the conduct thresholds specified in the Mitigation Measures and the output of the NYISO's Portfolio Screening Software, the NYISO implemented a manual screening process to ensure full Tariff compliance on a going-forward basis. The NYISO quickly informed the MMU and Commission Office of Enforcement Staff of the concern it identified.¹⁹ On February 13, 2014 the NYISO deployed and began using new, Tariff-compliant screening software to identify possible portfolio physical withholding. Finally, as explained above, the NYISO and its MMU re-performed the physical withholding portfolio screen for the April 1, 2012 to April 8, 2013 period and determined that, for the period reviewed, the NYISO is not required to assess any additional financial sanctions for portfolio physical withholding in order to comply with the Mitigation Measures.

V. Market Impacts

From April 1, 2012 to date, the NYISO has applied all of the financial sanctions for portfolio physical withholding that it was required to apply under the Mitigation Measures. The NYISO does not have discretion to assess financial sanctions for portfolio physical withholding beyond the sanctions it is required to assess. For the period of time the NYISO and the MMU reviewed, there was no market impact.

VI. Request for Waivers

The NYISO respectfully requests that, for the period from February 1, 2005 to March 31, 2012, the Commission grant such waivers as may be necessary to excuse the NYISO from going back and reviewing offering behavior to identify violations of the portfolio physical withholding

¹⁹ The NYISO informed the Commission Office of Energy Market Regulation Staff of the Tariff compliance concern on April 12, 2013.

conduct thresholds, performing market impact assessments, and imposing financial sanctions for portfolio physical withholding.²⁰ The Commission should grant the requested waiver for the following reasons:

(A) The NYISO had a process in place for reviewing possible instances of portfolio physical withholding. Although the Portfolio Software Screen that the NYISO employed was flawed, it identified some potential portfolio physical withholding conduct for further investigation and the NYISO reviewed those cases.

(B) The portfolio screen is only one of several methods the NYISO and the MMU use to identify possible instances of physical withholding. As explained in Section II.C of this Waiver Request, the NYISO also screens for generator-specific physical withholding and imposes penalties when UCAP suppliers fail to offer its generator into the Day-Ahead Market, schedule a Bilateral Transaction, or notify the NYISO of a generator outage. In addition to NYISO screening, the MMU screens for unoffered capacity when LBMPs or uplift payments deviate significantly from the competitive range that would be expected given system conditions.

(C) When the NYISO and the MMU went back and correctly screened for possible portfolio physical withholding covering the period from April 1, 2012 to April 8, 2013, they did not identify a single instance in which a financial sanction for portfolio physical withholding needed to be imposed. The result of this review suggests that the flawed portfolio screen, combined with the other screening processes that the NYISO and the MMU employ, likely identified all instances of physical withholding that could have caused a significant market impact.

²⁰ Relevant Services Tariff provisions include Mitigation Measures Sections 23.3.1.1.1(iii) and (iv); 23.3.2.1; 23.4.3.2(i).

(D) Finally, asking generation owners to respond to day- and hour-specific questions about the reasons why they did not offer a particular generator into the Day-Ahead or Real-Time Market several years after the market day in question could result in the imposition of penalties simply because the generation owner is no longer able to explain or justify its offering behavior. Given the time frame in question, it is reasonable to expect that changes in personnel within respective suppliers' staffs may hinder the ability of suppliers to reasonably reconstruct why a generator was not offered, or to provide evidence justifying the decision not to offer a generator into the NYISO's markets.

The Commission has previously evaluated a number of issues in determining whether to authorize a tariff waiver to alleviate the effects of an error. These include whether: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) a concrete problem needs to be remedied; and (4) the waiver will not have undesirable consequences, such as harming third parties.²¹

The underlying error was made in good faith. The Portfolio Screening Software was designed to identify portfolio withholding conduct and it does so. Unfortunately, the Portfolio Screening Software was flawed. As soon as the NYISO discovered the problem, it implemented a remedy and promptly notified its Market Participants and Commission Staff.

²¹ See, e.g., *California Independent System Operator Corp.*, 116 FERC ¶ 61,226 at P 8 (2006) (granting limited waiver of tariff provisions governing sanctions for failing to timely submit generator outage and other information in order to allow California ISO to ensure that market participants were not inappropriately penalized); *New York Independent System Operator, Inc.*, 112 FERC ¶ 61,347 at P 7 (2005) (granting the NYISO a discrete tariff waiver in order to recalculate certain charges); *Great Lakes Gas Transmission Limited Partnership*, 102 FERC ¶ 61,331 at P. 16 (2003) ("Great Lakes has shown good cause for its Emergency Waiver request and has shown that the impact on non-exempt customers whose supply may be curtailed will be *de minimus*."); *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330 at P 5 (2003) ("The Commission finds that in this instance, good cause has been shown to waive TransColorado's Fuel Gas Reimbursement provision in Section 12.9 of its FERC Gas Tariff, First Revised Volume I, as requested."); *Northern Border Pipeline Co.*, 76 FERC ¶ 61,141 at 61,780 (1996) (granting one-time waiver request). See also *Wisvest-Connecticut LLC v. ISO-New England, Inc.*, 101 FERC ¶ 61,372 at P 24 (2002) (finding that ISO-NE roles requiring assessment of deficiency penalty should not be applied in this case because market participant's error giving rise to the penalty was "an inadvertent mishap.").

The scope of the requested waivers is limited. It addresses the NYISO's obligation to re-screen for possible physical withholding conduct, to consult with Market Parties to determine if there was a competitive justification for the failure to offer portfolio MWs, to determine if the failure to offer had a substantial market clearing price or guarantee payment impact, and to assess a financial sanction where warranted for the period from February 1, 2005 to March 31, 2012. For the reasons explained above, it is unlikely that, even if the NYISO undertakes to re-review this past period for possible physical withholding, it will identify any financial sanctions it is required to impose.

A concrete problem needs to be remedied. Market outcomes and mitigation results from February 1, 2005 to March 31, 2012 have been long-settled. The NYISO respectfully requests that the Commission not require it to re-review and initiate consultations with Market Parties regarding past market outcomes and mitigation results. Imposing retroactive penalties this long after-the-fact could also prove inequitable because the Market Party did not receive a timely signal that it needed to change its behavior.

Finally, the requested waiver will prevent harm to Market Participants by ensuring that their settled expectations about historic market outcomes are not disrupted and by promoting financial certainty in the NYISO-administered markets.

VII. Service

This filing will be posted on the NYISO's website at www.nyiso.com. The NYISO will send an electronic link to this filing to the official representative of each of its customers, to each participant on its stakeholder committees, to the New York Public Service Commission, and to the New Jersey Board of Public Utilities.

VIII. Conclusion

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc., respectfully requests that the Commission grant the limited tariff waivers requested in Section VI. of this Waiver Request.

Respectfully submitted,

/s/ Alex M. Schnell

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Dated: June 5, 2014