



**Public Service
Commission**

Public Service Commission

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January 30, 2017

SENT VIA ELECTRONIC FILING

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. EL13-62-002 - Independent Power
Producers of New York, Inc. v. New York
Independent System Operator, Inc.

Dear Secretary Bose:

Attached for filing in the above-referenced proceeding, please find the Motion for leave to Answer of the New York State Public Service Commission. The parties have also been provided a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions regarding the attached, please feel free to contact me at (518) 402-1537.

Very truly yours,

S. Jay Goodman

S. Jay Goodman, Esq.
Assistant Counsel

Attachment
cc: Service List

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Independent Power Producers)	
of New York, Inc.,)	
)	
Complainant,)	
)	
v.)	Docket No. EL13-62-002
)	
New York Independent System)	
Operator, Inc.,)	
)	
Respondent.)	

MOTION FOR LEAVE TO ANSWER OF THE NEW YORK STATE
PUBLIC SERVICE COMMISSION

INTRODUCTION

On January 9, 2017, the Electric Power Supply Association (EPSA) filed a motion asking the Federal Energy Regulatory Commission (Commission) to direct tariff amendments that expand the NYISO's buyer-side mitigation rules to ROS (Motion).¹ EPSA's Motion claims that urgent relief is needed to counter two recent developments, including: (a) the Dunkirk repowering project, which EPSA argues is "poised to resume;"² and, (b) the New York Public Service Commission's (NYPSC)

¹ Although styled as a "request" for expedited action, EPSA's pleading was submitted pursuant to 18 C.F.R. §385.212 (Rule 212 of the Commission's Rules of Practice and Procedures), which pertains to motions.

² Motion at 9.

recently-approved Clean Energy Standard (CES) that includes a Zero Emissions Credit (ZEC) program designed to compensate for the environmental attributes of nuclear generating capacity, and thereby further multiple state policy objectives.³

The NYPSC seeks leave to answer EPSA's Motion, which is procedurally and substantively defective.⁴ EPSA's Motion inappropriately attempts to raise issues that are not sufficiently related to IPPNY's Complaint. Assuming the Commission considers the merits of EPSA's Motion, the Commission should deny the relief sought by EPSA because market mitigation should not be imposed on the NYPSC's program that provides compensation for environmental attributes. The Commission should therefore reject the Motion.

MOTION FOR LEAVE TO ANSWER

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure (18 C.F.R. §§385.212 and 385.213), the NYPSC hereby submits its Motion for Leave to Answer EPSA's Motion. The NYPSC requests that the Commission

³ Cases 15-E-0302 et al., Large-Scale Renewable Program and Clean Energy Standard, Order Adopting a Clean Energy Standard (issued August 1, 2016) (CES Order). The order was included as an attachment to EPSA's Motion.

⁴ The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to Section 12 of the New York Public Service Law, the Chair of the NYPSC is authorized to direct this filing on behalf of the NYPSC.

accept this Answer because it presents information that clarifies procedural and factual matters in the record. These clarifications are needed to ensure that the Commission avoids reaching a determination that is procedurally improper and based on factual inaccuracies and mischaracterizations presented by other parties. The Commission should also accept this Answer so that the NYPSC can respond to arguments advanced for the first time in EPSA's Motion. It would be prejudicial for the Commission to consider such arguments without providing interested parties with the ability to present opposing viewpoints.

Further, EPSA consented to extend the deadline to answer its Motion by six days (i.e., to January 30, 2016).⁵ EPSA, therefore, will not be prejudiced by accepting this Answer within the timeframe to which it consented.

Although answers to answers are generally discouraged, the Commission has accepted answers, similar to those provided here by the NYPSC, because they clarify the record and provide

⁵ Docket No. EL13-62-002, Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc., Motion of Exelon Corporation for Extension of Time (dated January 11, 2017) (stating that "EPSA has informed Exelon that it consents to this request for an extension of time"). No party opposed Exelon's Motion.

information that will assist the Commission in its decision making process.⁶

BACKGROUND

On May 10, 2013, the Independent Power Producers of New York, Inc. (IPPNY) filed a complaint alleging that the New York Independent System Operator, Inc. (NYISO) tariff fails to properly mitigate certain generation resources that would be “mothballed” but for financial support that those resources receive in return for assisting in the preservation of electric system reliability (Complaint). IPPNY subsequently filed a Motion to Amend and Amendment to its Complaint (Motion to Amend) on March 25, 2014, seeking to include in its Complaint a proposed agreement between National Grid and Dunkirk Power, LLC for repowering the Dunkirk generating facility (Dunkirk repowering proposal).

On March 19, 2015, the Commission issued an order denying IPPNY’s complaint because it failed to demonstrate that the NYISO’s tariff “is unjust and unreasonable for not imposing

⁶ See, e.g., Entergy Louisiana, LLC, 156 FERC ¶61,146 (issued August 31, 2016) at P5, 15 (accepting an Answer to a Motion for Leave to Answer because it provides information that assisted the Commission in its decision-making process); see also Michigan Electric Transmission Company, 156 FERC ¶61,025 (issued July 8, 2016) at P6, 14; Midcontinent Independent System Operator, Inc., 155 FERC ¶61,130 (issued May 3, 2016) at P7, 25.

minimum bid requirements for existing resources needed for short-term reliability in NYISO's rest-of-state [ROS] capacity market."⁷ In considering whether circumstances warranted the imposition of market power mitigation rules on resources located in ROS, the Commission concluded that a decision could not be reached without a "fully developed factual record and a stakeholder process."⁸ The Commission thus directed the NYISO to engage with stakeholders, conduct additional analyses, and submit a compliance filing that summarized the results of those efforts. On June 17, 2016, the NYISO submitted a Compliance Filing, as instructed in the Order Denying Complaint.⁹

DISCUSSION

I. The Commission Should Deny EPSA's Motion Because It Is Procedurally Flawed

The Commission has rejected motions where the issues raised would result in confusion or inefficiency in the

⁷ Docket No. EL13-62-000, Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc., Order Denying Complaint (issued March 19, 2015) (Order Denying Complaint), ¶¶64-65.

⁸ Order Denying Complaint at ¶71.

⁹ The Compliance Filing was subject to a notice and comment period. The New York Public Service Commission and other stakeholders filed comments on the Compliance Filing, which currently is pending before the Commission.

proceeding or would be unjust to other parties.¹⁰ In particular, motions should be rejected when they focus on claims that do not arise out of the same transaction or occurrence as the complaint.¹¹ Motions may also be denied to avoid unreasonably burdening opposing parties or delaying a proceeding.¹²

IPPNY's Complaint was initially focused on RSS agreements approved by the NYPSC to address immediate reliability concerns. The RSS agreements were already in effect when IPPNY filed its Complaint and IPPNY argued that they had already impacted prices in the capacity market. IPPNY asserted, in essence, that the NYISO's tariff rules were unreasonable because they did not provide for the mitigation of capacity associated with generation resources needed to meet reliability needs.

In contrast, EPSA's Motion seeks to draw the Commission into a different issue and a different set of facts. The NYPSC Order approving the CES/ZEC program resulted from a State initiative to obtain "50% of New York's electricity from renewable sources by 2030 as part of a strategy to reduce

¹⁰ Missouri Basin Municipal Power Agency v. Midwest Energy Company, 55 FERC ¶61,464 (1991); Grynberg Production Company v. Mountain Fuel Resources, 42 FERC ¶61,061 (1988).

¹¹ 42 FERC ¶61,061 at ¶¶61,301-03.

¹² 55 FERC ¶61,464 at ¶62,533 (finding amendment improper because the proceeding was sufficiently advanced).

statewide greenhouse gas emissions by 40% by 2030.”¹³ Thus, the CES/ZEC program is not part of the same transaction or occurrence as the RSS agreements. For these reasons, the potential questions presented by the NYPSC order adopting the CES should not be considered in the same proceeding as the issues presented in the IPPNY Complaint. Combining these dissimilar topics in one case would cause confusion in the proceeding and would not promote efficiency.¹⁴ Furthermore, adding these new and unrelated matters to the proceeding almost four years after the filing of the Complaint would unnecessarily delay the proceeding.¹⁵

Moreover, EPSA’s Motion fails to provide any substantive or compelling reason for the Commission to expedite its resolution of the NYISO’s Compliance Filing. EPSA instead specifies two “subsequent developments” that purportedly justify the request for expedited action, but have no bearing on the timing of Commission action on the Compliance Filing. EPSA also attempts to justify its request with a distorted and self-serving synopsis of the CES program that is similarly irrelevant to the timing of Commission action.

¹³ CES Order at 2.

¹⁴ Cf. 42 FERC ¶61,061.

¹⁵ Cf. 55 FERC ¶61,464.

Whether or not the Dunkirk repowering is “poised to resume,” as EPSA claims, there has been no change in the regulatory status of this project that would justify expedited Commission action. EPSA’s claim relies on two newspaper articles, neither of which state that NRG Energy (NRG) (i.e., the owner of the Dunkirk facility) will move forward with the project. Rather, the Buffalo News reports that NRG might resume planning and development work when it is “practical” to do so.¹⁶ The articles provide no indication of how long this process might take or even when it will start, although Power Magazine reports that the project would take approximately two years to complete once NRG has received all necessary permits and approvals.¹⁷ The reports cited by EPSA thus provide no clarity on when (or whether) NRG might revive the Dunkirk repowering project. Consequently, the articles do not provide any basis for expedited action.

¹⁶ David Robinson, NRG ready to revive Dunkirk power plant project, Buffalo News (Nov. 22, 2016).

¹⁷ Sonal Patel, Long-Stalled New York Repowering Project Is Revived, Power (Nov. 22, 2016).

II. Assuming, Arguendo, That The Commission Considers the Merits of EPSA's Motion, The Commission Should Reject the Relief Sought by EPSA Because Mitigation Is Not Warranted With Respect to State Payments for Environmental Attributes

Assuming the Commission considers the merits of EPSA's Motion, the Commission should deny the relief sought because market mitigation should not be imposed with respect to the CES/ZEC program. EPSA's presentation of the CES program suffers from two fatal defects and lacks a sufficient justification warranting relief. As an initial matter, it should be noted that EPSA is not asking the Commission to make any findings relative to the CES program. EPSA instead presents a wholly-inaccurate and self-serving description of the CES program and urges the Commission to rush an expansion of buyer-side mitigation measures based on that distorted program synopsis.

The Motion casts the ZEC program as an insidious attempt to suppress wholesale capacity prices, thereby ignoring extensive discussion in the CES Order explaining that the initiative was designed exclusively to further legitimate state policy objectives. For instance, EPSA ignores the facts that the CES program was designed to stay within the state's jurisdictional boundaries while (i) preserving the zero-emissions benefits of nuclear generation resources so as to avoid backsliding on carbon emissions that would impede progress towards the State's emissions reductions goal, (ii) reducing

greenhouse gas emissions by increasing reliance on renewable generation, and (iii) increasing fuel diversity. Each goal is a legitimate state policy objective that is within the state's jurisdictional right to pursue. EPSA's misrepresentation of a major state policy initiative cannot justify expedited action on the Compliance Filing.

Furthermore, the Commission previously declined to rule on whether market power mitigation rules should be imposed on the ROS because it found that "mitigation proposals must have the support of a fully developed factual record and a stakeholder process..."¹⁸ EPSA's distorted and self-serving synopsis of the CES program constitutes the entirety of the "factual" record presently before the Commission on this State policy initiative. Further, there has been no stakeholder process to consider whether a program designed to further legitimate state policy objectives reserved to state jurisdiction by the Federal Power Act warrants an unprecedented expansion of market power mitigation rules in New York. The CES program, therefore, cannot be used to justify, directly or indirectly, EPSA's request for such an expansion.

The Federal Power Act delineates federal and state authority by granting the Commission jurisdiction to regulate sales of electric energy for resale in interstate commerce while

¹⁸ Order Denying Complaint at 71.

granting states the exclusive authority to regulate any other sale.¹⁹ The Federal Power Act similarly preserves the states' exclusive authority to regulate "facilities used for the generation of electric energy."²⁰ Through the CES Order, the NYPSC exercised these reserved state powers by compensating nuclear generating units for the environmental benefits of their operation (i.e., zero emissions).

ZECs were modeled on renewable energy certificates (RECs) that New York uses to compensate renewable energy generators for the environmental benefits of their operation. The Commission has held that RECs are "state-created and state-issued instruments certifying that electric energy was generated pursuant to certain requirements and standards."²¹ In so ruling, the Commission explained that RECs "do[] not constitute the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce" and, therefore, "RECs and contracts for the sale of RECs are not ... facilities subject to [Commission] jurisdiction under" the Federal Power Act.²² Consequently, the Commission concluded that

¹⁹ 16 U.S.C. §824(b)(1). See also EPSCA FERC v. Elec. Power Supply Assoc'n, 136 S.Ct. 760, 766 (2016) (quoting 16 U.S.C. §824[b][1]).

²⁰ 16 U.S.C. §824(b)(1).

²¹ Docket No. ER12-1144, WSPP Inc., 139 FERC ¶61,061, P21 (2012).

²² WSPP Inc. at ¶21 (citing 16 U.S.C. § 824[b][1]).

"the unbundled REC transaction does not affect wholesale electricity rates, and the charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity."²³

ZECs similarly are an instrument created by the state to secure the environmental benefits associated with zero emissions electric generation units. The ZEC program was designed to further policy objectives that are reserved to state authority by the Federal Power Act.

The Commission has also recognized that the mere fact that an action could lower capacity prices does not mean that the action constitutes unlawful price suppression.²⁴ The Commission has repeatedly stated that state actions motivated by legitimate policy goals do not constitute price suppression merely because they might reduce capacity prices.²⁵ Despite the fact that some subsidized generators may bid into a market, it does not mean that the market is ineffective or that the rates produced by

²³ Id. at 24.

²⁴ See, e.g., Order Conditionally Accepting in Part, and Rejecting in Part, Proposed Tariff Revisions, 143 FERC ¶61,090 (recognizing that not all subsidized entry into a market constituted unlawful price suppression). Courts upholding Commission decisions have also made this point. See, e.g., Connecticut Department of Public Utility Control v. FERC, 569 F.3d 477, 481 (D.C. Cir. 2009).

²⁵ Id.

that market are unjust or unreasonable.²⁶ Accordingly, the relief sought by EPSA is unwarranted and inappropriate.

CONCLUSION

For the reasons detailed herein, the NYPSC respectfully urges the Commission to reject EPSA's Motion.

Respectfully submitted,

/s/ Paul Agresta

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Dated: January 30, 2017
Albany, New York

²⁶ Id.

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.

Dated: Albany, New York
January 30, 2017

/s/ S. Jay Goodman

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