



**Public Service
Commission**

Public Service Commission

Audrey Zibelman

Chair

Patricia L. Acampora

Gregg C. Sayre

Diane X. Burman

Commissioners

Kimberly A. Harriman

General Counsel

Kathleen H. Burgess

Secretary

Three Empire State Plaza, Albany, NY 12223-1350

www.dps.ny.gov

March 23, 2015

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. EL15-37-000 - New York Independent
System Operator, Inc.

Dear Secretary Bose:

For filing, please find the Request for Rehearing of the New York State Public Service Commission in the above-entitled proceeding. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler
Assistant Counsel

Attachment
cc: Service List

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System) Docket No. EL15-37-000
Operator, Inc.)

REQUEST FOR REHEARING OF THE NEW YORK
STATE PUBLIC SERVICE COMMISSION

INTRODUCTION AND SUMMARY

The New York State Public Service Commission (NYPSC) respectfully requests rehearing of the Federal Energy Regulatory Commission's (FERC or Commission) order compelling the New York Independent System Operator, Inc. (NYISO) to amend its tariff to include provisions to: 1) designate generation facilities deemed needed for reliability purposes (referred to as Reliability Must-Run or RMR facilities); 2) allocate and collect charges from ratepayers in order to support designated RMR facilities; and, 3) prescribe rates, terms, and conditions for RMR service.¹ The NYPSC seeks rehearing of the RMR Order pursuant to Section 313 of the Federal Power Act (16 U.S.C. §8251) and Rule 713 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.713).²

¹ Docket No. EL15-37, New York Independent System Operator, Inc., Order Instituting Section 206 Proceeding and Directing Filing to Establish Reliability Must Run Tariff Provisions (issued February 19, 2015) (RMR Order).

² The NYPSC filed a timely Notice of Intervention in this proceeding on March 12, 2015.

The Commission must reconsider the RMR Order because it ignores the fact that the NYPSC has already exercised its authority to ensure the availability of generation facilities needed for reliability, and interferes with the NYPSC's on-going exercise of this authority in approving "Reliability Support Services Agreements" (RSSAs). The NYPSC's authority to undertake these responsibilities and approve RSSAs, which accomplish the same objective as a RMR agreement, is expressly relied upon in the NYISO's existing tariff provisions establishing a reliability planning process.

The Commission failed to address or even acknowledge the existence of the NYISO tariff provisions that already provide an explicit role for the NYPSC in determining whether to retain, and how to compensate, generation facilities needed for reliability. The Commission also failed to provide any evidence, substantial or otherwise, as to why these existing NYISO tariff provisions are unjust and unreasonable. Similarly, the Commission failed to provide evidence that the NYPSC-approved RSSAs were inadequate to the task of addressing the reliability concerns cited in the RMR Order, or that the RSSAs interfere with FERC-jurisdictional wholesale sales of energy. The RMR Order therefore represents an impermissible overreach of the Commission's authority that improperly usurps the role of the NYPSC in acting to preserve reliability when faced with a

potential generator retirement that would have adverse impacts on the public health, safety, and welfare.

The NYPSC urges the Commission to continue the cooperative federal and State jurisdiction approach that is already embodied under the NYISO's tariff instead of propounding a deficient and inadequate "exclusively voluntary RMR regime" that would allow a generator to deactivate absent what the generator deems is "acceptable compensation."³ While the Commission is tied to a "voluntary" regime because it lacks jurisdiction over the abandonment of generation service and cannot compel a generator to operate, the NYPSC does possess the requisite authority under State law to require a generator to continue operating where needed to comply with applicable reliability criteria. The NYPSC's authority ensures that the reliability of the electric system is not held hostage to the caprice of a generator's "voluntary" decisions.

The NYPSC recognizes that FERC has a legitimate role in addressing market power concerns or how generation providers under RSSAs may participate and receive compensation in NYISO markets for any FERC-jurisdictional wholesale sales.⁴ Because the NYPSC ensures, in approving RSSAs, that generators receive

³ RMR Order, at ¶17.

⁴ The compensation provided under NYPSC-approved RSSAs is designed to ensure generators needed for reliability are merely available to operate, and thus, is not intended to interfere with any subsequent FERC-jurisdictional sales.

at least the going forward costs that are the just and reasonable level of compensation to which they are entitled, the RSSAs do not intrude upon FERC jurisdiction. FERC should pursue its oversight of wholesale markets without hindering the NYPSC's exercise of its authority to ensure generators do not retire when needed for reliability and to determine the appropriate level of compensation under an RSSA.

Moreover, the Commission also proposes to require in RMRs an excessive full cost-of-service (COS) rate (including attaching a lucrative and excessive rate of return (ROR) to the COS rate), to the detriment of consumers. Full COS rates are neither required, nor just and reasonable, where the provider of a public service intends to abandon that service. Indeed, it has long been a well-accepted regulatory principle that a public service provider may not abandon service, and must continue service even at less than COS rates until the abandonment is authorized.

Finally, full COS rates are unjust and reasonable, not only because they are inconsistent with relevant law, but also because they overcompensate generators by shifting all fixed costs and risks to ratepayers. Instead, generators should be compensated for their going-forward or incremental costs, while recognizing the value of any FERC-jurisdictional wholesale sales. The going-forward rate should appropriately match the

incremental costs a generator would incur because it remains in operation instead of abandoning service by retiring or mothballing its facility.

The Commission should revise the RMR Order to preserve the NYPSC's authority over generation facilities, resource adequacy determinations, and local reliability standards, as is already reflected in Attachment Y of the NYISO's tariff. The NYPSC possesses the requisite authority to prevent a generator from "electing" to deactivate to the detriment of reliability, and must not be precluded from exercising that authority through approving the RSSAs that ensure the continued availability of generation facilities needed for reliability. The NYPSC's exercise of its authority will ensure system reliability, while appropriately compensating generators for their going-forward costs. This will protect consumers and obviate the need for FERC to induce generators to "voluntarily" remain available by awarding them excessive rates.

REQUEST FOR REHEARING

I. STATEMENT OF ISSUES

- A. Whether the RMR Order fails to address existing tariff provisions for selecting and compensating generators needed for reliability, and impermissibly interferes with the NYPSC's on-going exercise of its authority to make resource adequacy determinations and select generating facilities needed for reliability.⁵
- B. Whether the Commission's rationale for the RMR Order was arbitrary and capricious because reliability cannot be preserved if generation facilities needed for reliability can be retired or "deactivated" upon the "voluntary" decision of the generators, while failing to recognize that the power to order "mandatory" retention of those generation facilities is a power reserved to the States.⁶
- C. Whether the RMR Order provides for unjust and unreasonable rates, in awarding up to full COS rates upon a "voluntary" continuation of service, and requiring those rates upon a "mandatory" continuation of service, when the just and reasonable standard is to set rates at a going-forward cost standard.⁷

II. DISCUSSION

A. The RMR Order Interferes With the NYPSC's Continuing Exercise of Authority Over Matters Affecting Generation Facilities, Resource Adequacy, and Reliability

Rather than engaging in protracted litigation, the NYPSC seeks to forge a cooperative relationship with FERC that promotes system reliability and consumer interests, while

⁵ In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,...or, unsupported by substantial evidence." 5 U.S.C. §706.

⁶ Id.

⁷ Id.; 16 U.S.C. §824d.

preserving the respective jurisdictional boundaries of each regulatory commission. FERC should therefore respect the NYPSC's authority to regulate generation facilities and to make resource adequacy determinations, including selecting among alternative resources needed for reliability.

The NYPSC recognizes that FERC has a legitimate role in addressing market power concerns or how generation providers under RSSAs may participate and receive compensation in NYISO markets for any FERC-jurisdictional wholesale sales.⁸ FERC may pursue those matters without hindering the NYPSC's exercise of its authority to ensure a generator does not deactivate or retire when needed for reliability and to determine the appropriate level of compensation for a generator that is directed to remain available because it is needed to ensure reliability. The NYISO tariff already reflects an approach for cooperative jurisdiction that respects State jurisdiction in circumstances where generation facilities may be needed for reliability purposes.

The Commission erroneously concluded that the NYISO's tariff "does not contain provisions concerning the retention of

⁸ Since an RSSA may merely require only that the generator be available in order to meet a reliability design criterion, without actually requiring it to operate, if the generator is then never called upon to operate it never makes a wholesale sale and FERC jurisdiction over those sales is never implicated.

and compensation to generating units needed for reliability.”⁹ In reaching this conclusion, the Commission failed to address, or even acknowledge, the existing NYISO reliability planning process, which already provides a mechanism for retaining and compensating generation facilities needed for reliability. In fact, the Commission has already accepted tariff provisions that set forth a process for addressing reliability needs, including an explicit role for the NYPSC.

Pursuant to Attachment Y of the NYISO tariff, if the NYISO determines that market-based proposals and regulated proposals will not satisfy a reliability need, the NYISO will determine, in its Comprehensive Reliability Plan, that a Gap Solution is necessary. Gap Solutions may include generation, transmission, or demand side resources. If there is an imminent threat to the reliability of the New York State Power System, a Gap Solution may be presented outside of the normal planning cycle for consideration by the NYISO and the New York Department of Public Service (NYDPS).¹⁰ Furthermore, the NYISO tariff expressly provides that the “costs related to regulated non-transmission reliability projects will be recovered by Responsible Transmission Owners, Transmission Owners and Other Developers in accordance with the provisions of New York Public

⁹ RMR Order, at ¶4.

¹⁰ NYISO OATT, Attachment Y, §31.2.10.

Service Law, New York Public Authorities Law, or other applicable state law."¹¹

These provisions already address the reliability issue FERC cites -- a need for service from a generator that intends to cease providing service. The RMR Order was therefore arbitrary and capricious and lacked substantial evidence as to why the NYISO's existing tariff provisions are unjust and unreasonable.

Moreover, the existing NYISO Attachment Y process has worked well, dovetailing effectively with the NYPSC's jurisdiction over the retirement of generation facilities. Since the NYPSC first authorized a lightened ratemaking regime for the new owners of generation facilities purchased from New York's vertically integrated utilities, the NYPSC has pursued a policy of preserving its authority to address reliability matters.¹² Recognizing that generator retirements could raise reliability implications, and that it alone has jurisdiction to direct continuation of service notwithstanding a generator's desire to abandon it, the NYPSC issued an order in 2005

¹¹ NYISO OATT, Attachment Y, §31.5.1.6.

¹² See, Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing for Lightened Regulation (issued April 23, 1999); Case 99-E-0148, AES Eastern Energy, L.P. and AES Creative Resources, L.P., Order Providing For Lightened Regulation (issued April 23, 1999) (holding that generators subject to lightened ratemaking remain subject to the PSL with respect to matters such as enforcement, investigation, safety, reliability, and system improvement).

requiring generation owners to provide notice before proceeding with an abandonment.¹³ In doing so, NYPSC reserved its authority to address reliability questions, while continuing its policy of limiting its regulation of generators to that consist with their participation in competitive markets.

Under the NYPSC's order, a generator must provide notice at least 180 days prior to the time a retirement would be effectuated, for a facility sized at 80 MW or more. This approximately six-month period equates with the minimum period that NYISO has indicated as adequate to identify and resolve reliability concerns. Once notice is provided, the NYPSC, in coordination with the NYISO and any affected Transmission Owners, evaluates the impact of the retirement on reliability. This process complements the NYISO's Comprehensive Reliability Planning Process by providing information that may be reflected in the NYISO's Reliability Needs Assessment, and may be considered in devising what the NYISO describes as backstop or Gap Solutions. This process is nearly identical to that

¹³ Case 05-E-0089, Policies and Procedures Regarding Generation Unit Retirements, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

directed in the RMR Order, except that it properly recognizes NYPSC's jurisdiction.¹⁴

Under the NYPSC's existing process outlined above, where the generator is needed for reliability, the NYPSC has acted to ensure the generation owner is adequately compensated under an RSSA, and is prevented from abandoning service until adequate substitutes for preserving reliability are in-place. For example, the NYPSC has approved RSSAs between Transmission Owners that are also distribution utilities, and generation facility owners, in order to retain the availability of generators for reliability purposes and to provide compensation for the period during which service must continue.¹⁵ The RSSA rates adequately compensate generators for remaining available, while leaving any FERC-jurisdictional wholesale sales to regulation under the NYISO tariff.

The NYPSC's approval of the RSSAs comports with the NYISO tariff provisions, which recognize the NYPSC's

¹⁴ The Commission directed the NYISO to include a schedule by which: 1) a generation owner must notify NYISO that it intends to deactivate, 2) the NYISO or affected Transmission Owner conducts a reliability analysis (including NYSRC and other local reliability standards and utility-specific planning criteria); and, 3) the NYISO determines whether a generation owner is required/not required for reliability.

¹⁵ The NYPSC has, to date, accepted RSSAs with two generation owners, namely Dunkirk Power LLC and Cayuga Operating Company, LLC, while a third RSSA with R.E. Ginna Nuclear Power Plant LLC is pending.

responsibility to select among non-transmission alternatives and to determine compensation under State law.¹⁶ Because the RSSAs NYPSC has approved addressed local reliability needs clearly outside of FERC's jurisdiction, but in so doing also resolved bulk system needs, the NYISO did not need to trigger a Gap Solution. This result, however, does not suggest that the NYISO's tariff is somehow broken, or is unjust and unreasonable. Only minor modifications to the NYISO's Attachment Y are needed to explicitly coordinate the NYISO's response to generation retirements with the NYPSC process for RSSAs. FERC should find that RSSAs so arrived at serve the same purpose as RMRs and therefore separate RMR agreements are not needed.

Moreover, in recognizing RSSAs, the Commission would avoid the question of its lack of jurisdiction to require RMRs. The FPA explicitly provides that the Commission "shall not have jurisdiction, except as specifically provided in [the FPA], over facilities used for the generation of electric energy or over facilities used in local distribution."¹⁷ The Commission's authority to approve "reliability standards" reiterates these exclusions from FERC's jurisdiction, by explicitly excluding Commission jurisdiction to "set and enforce compliance with

¹⁶ NYISO, Attachment Y, §31.5.1.6.

¹⁷ 16 U.S.C. §824(b)(1).

standards for [the] adequacy or safety of electric facilities or services."¹⁸

The Commission's directives in the RMR Order go directly to the regulation of generation facilities, resource adequacy determinations, and reliability matters, which are all matters reserved to the States under the FPA. In particular, the Commission attempts to compel the NYISO to regulate resource adequacy by "determin[ing] whether a specific generator is needed to ensure reliable transmission service," and then designating a particular facility as an RMR unit.¹⁹ Furthermore, FERC impermissibly seeks to enforce local reliability standards outside its jurisdiction by referring to the NYISO for its consideration reliability studies and evaluations made by the NYPSC or the New York State Reliability Council.²⁰

Although FERC cannot compel generators to operate when they propose to "deactivate" (a euphuism for retirement, mothballing or other form of service abandonment), its purported delegation of authority to the NYISO to select generators as "must-run" impermissibly attempts to achieve indirectly through the NYISO what FERC lacks authority to do directly. The

¹⁸ 16 U.S.C. §824o(i)(2).

¹⁹ RMR Order, at ¶15.

²⁰ RMR Order at ¶14. The "local reliability standards" referred to by FERC could also be interpreted to include any standards developed by the New York Transmission Owners.

existence of RMR tariff provisions in other regions, such as PJM Interconnection LLC and Midcontinent Independent System Operator, Inc.,²¹ does not provide a jurisdictional basis for including such provisions within the NYISO tariff. Nor does the existence of these other tariff provisions preclude the NYPSC from challenging their validity as they apply to the NYISO. FERC's attempt at justification for its jurisdictional overreach by distinguishing between rates for "voluntary" and "mandatory" continuation of service is similarly irrational, while evidencing its lack of jurisdiction to require generators to continue service. The RMR Order must therefore be revised to properly address FERC and NYPSC jurisdiction.

B. The Commission's Rationale for the RMR Order was Arbitrary and Capricious Because Generation Facilities Needed to Ensure Reliability Cannot be Retained if a Generator's Decision to Retire or "Deactivate" is "Voluntary" and Because It Disrupts NYPSC Jurisdiction to Mandate Continued Operation

The Commission's rationale for the RMR Order is to ensure reliable and efficient operation of the electric grid. However, the Commission reached the conclusion that the NYISO may "choose an exclusively voluntary RMR regime, under which a

²¹ See, e.g., Midcontinent Independent System Operator, Inc., 148 FERC ¶61,057 (2014) (FERC improperly conflates the obligation to serve with entitlement to full COS rates and glosses over its lack of jurisdiction to direct the continued operation of generation facilities whose owners decline to enter into an RMR).

generator wishing to deactivate could reject the reliability needs determination and continue to deactivate absent the establishment of acceptable compensation.”²² It is illogical for the Commission to conclude that it can achieve its goal of “ensuring” reliability through RMR service when a generator may “voluntarily” ignore the reliability need for its service and deactivate or retire unilaterally. The Commission’s rationale for the RMR Order is therefore arbitrary and capricious.

The implications of the Commission’s position that reliability may depend on a generator’s “voluntary” actions also undermines NYPSC’s legitimate authority to compel continued generator operations.²³ The NYPSC exercises jurisdiction over “electric corporations,” which include electric transmission, distribution, and generation facilities.²⁴ Part of the NYPSC’s responsibility includes ensuring such electric corporations provide reliable, safe, and adequate service.²⁵ As noted above, the NYPSC possesses the requisite authority to ensure generating facilities do not abandon service prematurely and has long exercised its jurisdiction to prevent premature abandonment of a

²² RMR Order, at ¶17.

²³ A generator seeking to cease operations (either temporarily through mothballing or permanently through retirement) is abandoning service, and, if it is needed for reliability, doing so subjects it to NYPSC regulation.

²⁴ PSL §2(13).

²⁵ PSL §65(1), (2), (3); §66(1), (2), (5).

public service.²⁶ FERC should not attempt to allow a generator to "voluntarily" retire in contravention of that NYPSC authority.

While the "voluntary" deactivation provision serves no useful purpose, it does work to disguise the other irrational feature of the RMR Order -- FERC's lack of jurisdiction to mandate that a generator continue to operate. It is well settled that, when there is jurisdiction, a utility service provider may be compelled to continue operations even at a loss when the public interest so requires.²⁷ Indeed, FERC itself requires its permission before interstate pipeline services, over which it does have jurisdiction, may be abandoned, and sets rates accordingly.²⁸

But FERC cannot prevent premature retirement of generators because it cannot order them to remain in service. Instead, it is NYPSC who possesses the authority to do so. It is FERC's lack of jurisdiction that drives it to limit

²⁶ Case 28316, Rochester Gas and Electric Corporation, Opinion and Order Concerning Steam Service and Determining Revenue Requirement, Opinion No. 84-19 (issued July 11, 1984).

²⁷ Lehigh and New England Railway Co. v. Interstate Commerce Commission, 540 F.2d 71 (3rd Cir. 1976); Gibbons v. Interstate Commerce Commission, 660 F.2d 1227 (7th Cir. 1981) ((finding that the failure to pay rent (i.e., provide for recovery of fixed costs) does not constitute a taking).

²⁸ Gulf South Pipeline Company, L.P., 145 FERC ¶61,236 (2013); Northern Natural Gas Company, et al., 135 FERC ¶61,048 (2011).

"mandatory" continuation of service to an option, and to price that option at an excessive full COS rate. Instead of pursuing that irrational approach, FERC should properly coordinate its jurisdiction over wholesale rates with NYPSC's jurisdiction over generator reliability and abandonments.

C. FERC Should Direct The NYISO To Recognize The NYPSC's Authority To Approve RSSAs, But In the Alternative, Direct NYISO To Provide For Going-Forward Costs

Assuming, *arguendo*, that FERC has authority to compel the tariff provisions in the RMR Order, the appropriate rate for RSSA service under an RMR process is a going-forward cost standard, not the full embedded COS rate stated in the RMR order. As FERC itself has found in addressing abandonment circumstances where it does have jurisdiction, concerning interstate pipelines, the rate paid while abandonment is held in abeyance is not the full COS rate.²⁹ That FERC finds generators are entitled to full COS rates upon retirement, while interstate pipelines are not, is attributable to FERC's lack of jurisdiction over the former. FERC apparently hopes the excessive, unjust and unreasonable full COS rate payments it

²⁹ Gulf South Pipeline Company, L.P., 145 FERC at ¶126: "[Rate] issues that are appropriately addressed in the context of a Section 4 rate case where rates can be established based on current costs and billing determinants and a rate of return can be allowed based on the [existing] financial and business risks."

proposes will induce those generators to overlook the absence of FERC jurisdiction over their operations.

It is, however, well settled law that a full COS rate is not required when a service is abandoned because it is no longer financially viable. The due process clause of the U.S. Constitution does not ensure values, nor require restoration of values, which have been lost by the operation of economic forces (akin to what the generators claim when they propose to abandon service). Instead, the constitutionally required rate is that which recognizes the risks and circumstances facing the owner of the service to be abandoned.³⁰ Under these circumstances, that rate is found in a going-forward cost standard.

Paying generators a full embedded COS rate, which includes costs beyond those incurred because a planned retirement or deactivation is postponed, is excessive, unjust and unreasonable.³¹ A full COS rate inappropriately shifts all risk from a generator to ratepayers. Having participated in a competitive market and reaped its benefits, a generator need not be awarded additional compensation when needed for reliability beyond the costs incurred to provide that reliability.

³⁰ Market Street Railway Co. v. Railroad Commission of California, 24 U.S. 548 (1945).

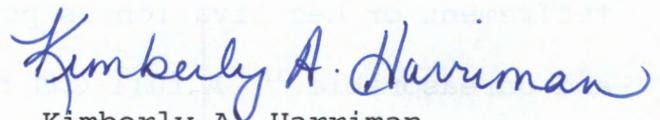
³¹ The significance of this rate-setting issue can be illustrated by the COS rate R.E. Ginna Nuclear Power Plant LLC Ginna filed at FERC of about \$73/MWh, whereas the RSSA they signed, and is pending before the NYPSC, translates to about \$50/MWh.

Therefore, generators seeking to cease operations but directed to continue them because of the public interest in reliable service would be adequately compensated under a going-forward cost standard. Those costs appropriately include the incremental costs a generator incurs because it remains in operation rather than abandoning service. For FERC to find otherwise is arbitrary, irrational, and contrary to the public interest.

CONCLUSION

In accordance with the foregoing discussion, the NYPSC respectfully requests that the Commission grant rehearing and direct the NYISO to make the tariff amendments indicated above.

Respectfully submitted,



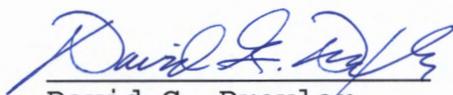
Kimberly A. Harriman
General Counsel
Public Service Commission
of the State of New York
By: David G. Drexler
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

Dated: March 23, 2015
Albany, New York

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
March 23, 2015

A handwritten signature in blue ink, appearing to read "David G. Drexler", is written over a horizontal line.

David G. Drexler
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178