

128 FERC ¶ 61,221  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Astoria Gas Turbine Power LLC,

Docket No. EL09-57-000

Complainant

v.

New York Independent System Operator, Inc.,

Respondent

ORDER ON COMPLAINT

(Issued September 3, 2009)

1. This order denies the complaint filed on June 2, 2009, pursuant to section 206 of the Federal Power Act (FPA),<sup>1</sup> by Astoria Gas Turbine Power LLC (NRG) against the New York Independent System Operator, Inc. (NYISO). The complaint alleges that NYISO wrongfully excluded one of NRG's proposed generation projects from the Class Year 2009 interconnection study process, further detailed below. We will deny the complaint but direct NYISO to file clarifying tariff revisions.

**I. Background**

2. Attachment S to NYISO's Open Access Transmission Tariff (OATT) establishes the procedures under which proposed interconnection projects undergo the Annual Transmission Reliability Assessment to determine costs of System Upgrade Facilities and System Deliverability Upgrades (i.e., transmission system network upgrades) necessary

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<sup>1</sup> 16 U.S.C. § 824e (2006).

to reliably interconnect with the New York State transmission system.<sup>2</sup> This assessment, or study, is performed annually on a consolidated basis for a group, or “Class Year” of proposed projects. Each project in a Class Year shares in the then currently available electrical capability of the transmission system and in the cost of System Upgrade Facilities and System Deliverability Upgrades that would not have been required “but for” the relevant interconnection request.<sup>3</sup> Attachment S also details the requirements and procedures under which project developers accept or decline responsibility for the determined interconnection upgrades.

3. At issue in this proceeding are the requirements for placement in a Class Year study. According to Attachment S,<sup>4</sup> a project shall be included in a given Class Year, if:

(a) the [NYISO] Operating Committee has approved the Interconnection System Reliability Impact Study for the project, and (b) state regulators have determined that the Article X, Article VII or comparable permitting application for the project is complete before the NYISO Staff begins the Annual Transmission Reliability Assessment on March 1 each year.

4. Article X referenced above in Attachment S was a New York Public Service Law governing permit requirements for major electric generating facility projects.<sup>5</sup> Article X expired in 2003.<sup>6</sup> In 2004, in light of the expiration of Article X, NYISO issued Technical Bulletin No. 129. Technical Bulletin No. 129<sup>7</sup> provides, in relevant part:

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<sup>2</sup> NYISO, FERC Electric Tariff, Original Volume No. 1, Attachment S (Rules to Allocate Responsibility for the Costs of New Interconnection Facilities).

<sup>3</sup> See, e.g., NYISO OATT Attachment S, Section I.A at Sub Fourth Revised Sheet No. 653A.

<sup>4</sup> NYISO OATT, Attachment S, Section VI.B.3.a, at Sub Fifth Revised Sheet No. 674. The pleadings refer to this as section IV.F.5.a; however, recently effective revisions to Attachment S of the OATT resulted in changes to the section numbers for these provisions.

<sup>5</sup> N.Y. COMP. CODES R. & REGS. tit. 16, §§ 1000-1003 (1997).

<sup>6</sup> See <http://www.dps.state.ny.us/articlex.htm>.

<sup>7</sup> Technical Bulletin No. 129 – Cost Allocation Class Year Eligibility Requirements (May 28, 2004) at <http://www.nyiso.com/public/documents/tech-bulletings/index.jsp>.

For purposes of meeting the Class Year entry requirement, the NYISO will consider an application for a New York State Department of Environmental Conservation (DEC) air or water discharge permit to be a “permitting application” comparable to an Article X application. As evidence that the application is complete, the NYISO will accept a “Notice of Completion” issued by the DEC in connection with such application.

## **II. Pleadings**

### **A. The Complaint**

5. As set forth in its complaint, NRG proposes to retire approximately 600 MW of existing simple cycle combustion turbine units in New York City and replace them with 1040 MW of natural gas capacity, for a net increase of 440 MW, which it refers to as the Astoria Repowering Project.<sup>8</sup> The complaint is based upon NRG’s allegation that NYISO wrongfully excluded the Astoria Repowering Project from the Class Year 2009 Annual Transmission Reliability Assessment, and thereby prevented NRG from moving forward with the project in an efficient and economical manner.

6. NRG recognizes that the Astoria Repowering Project needed to meet the requirements of Attachment S in order to be included in Class Year 2009. The complaint assumes that the NYISO Operating Committee had approved a System Reliability Impact Study for the project, as required by Attachment S’s subsection (a). NRG’s complaint thus focuses on NYISO’s application of subsection (b).

7. NRG claims that, consistent with subsection (b), it submitted a complete air discharge permitting application to the DEC by March 1, 2009, but that, nevertheless, NYISO apparently relied on an interpretation outlined in Technical Bulletin 129 (which it states was never filed with the Commission) to deny NRG entry into the 2009 Class Year. NRG observes that Technical Bulletin 129 states, in pertinent part: “As evidence that the application is complete, the NYISO will accept a ‘Notice of Completion’ issued by the DEC in connection with such application.”<sup>9</sup> According to NRG, NYISO based its determination to deny entry to Class Year 2009 on the fact that, consistent with Technical Bulletin No. 129, NRG had not received a DEC-issued Notice of Completion by March 1, 2009, a fact that NRG concedes. However, NRG asserts that the “Notice of

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<sup>8</sup> As further detailed below, what NRG refers to in its complaint as the “Astoria Repowering Project” actually consists of two components, identified as Berrians GT and Berrians III GT. For purposes of our discussion here we will nonetheless refer to the subject matter of the complaint as the “Astoria Repowering Project.”

<sup>9</sup> A copy of Technical Bulletin 129 is appended to the complaint as Attachment C.

Completion” under the DEC process is issued after the DEC substantively considers an application and that, as such, Technical Bulletin 129 is flawed as it does not impose regulatory milestones comparable to those imposed under Article X, as required by the tariff. NRG alleges that NYISO wholly and wrongfully relied on Technical Bulletin No. 129 in excluding the Astoria Repowering Project from Class Year 2009. According to NRG, in order for the bulletin to be binding, it must be, but is not, on file with the Commission as part of NYISO’s OATT.<sup>10</sup> NRG states that an unfiled technical bulletin cannot override the plain language of NYISO’s OATT or change the filed rate.<sup>11</sup> Moreover, NRG asserts that Technical Bulletin No. 129 has never been incorporated into a manual or voted on and accepted by stakeholders, which, according to NRG, is required for all manuals under NYISO’s governance standards.<sup>12</sup>

8. NRG further asserts that the differences between the process previously provided for under Article X (referenced in Attachment S) and the permitting process currently provided for under Technical Bulletin No. 129 violate Attachment S’s requirement that any permitting application used as an alternative to Article X be “comparable.”<sup>13</sup> NRG claims that, per the air discharge permitting process provided for in Technical Bulletin No. 129 and relevant here, the DEC issues a Notice of Completion only after substantive review of an application. This is in contrast, according to NRG, to the process under Article X, whereby the Chairman of the State Siting Board issued a “Completeness Determination”<sup>14</sup> after an initial finding that a developer’s application was complete only in an administrative sense.<sup>15</sup> NRG claims that requiring a Notice of Completion, i.e., substantive review of a permitting application, is at odds with the plain language of Attachment S, which, according to NRG, requires only that an application be administratively complete as a prerequisite to a project’s inclusion in a Class Year

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<sup>10</sup> Complaint at 18.

<sup>11</sup> *Id.* (citing *ISO New England, Inc.*, 113 FERC ¶ 61,157, at P 18 (2005) (“The Commission also agrees with Generators that ISO-NE may not use Manual 20 to support its position. Manual 20, like all of ISO-NE’s manuals, has not been filed with us, and we have neither reviewed nor approved it. Therefore, to the extent that any provision of Manual 20 or any other manual conflicts with ISO-NE’s tariff, the tariff provision controls.”)).

<sup>12</sup> *Id.* at 8.

<sup>13</sup> *Id.* at 10-14.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 11.

study.<sup>16</sup> NRG posits that substantive review can take months longer than administrative review, and thereby force a project developer to assume unnecessary risks and delay.<sup>17</sup>

9. As Attachment S, subsection (b) requires only that an application for an air or water discharge permit be complete in an administrative sense, NRG claims that it has satisfied that requirement. NRG states that it submitted a complete permitting application to the DEC prior to the March 1, 2009 deadline established by Attachment S, and that letters from the DEC to both NRG and NYISO support this finding.<sup>18</sup> NRG argues that while Technical Bulletin No. 129 allows for consideration of a “Notice of Completion” as evidence that a permitting application is complete, the allowance is not exclusive of other evidence.<sup>19</sup> Accordingly, NRG states that the above-referenced letters suffice for purposes of Attachment S.<sup>20</sup> To that end, NRG states that it has satisfied the requirements of Attachment S and that the Astoria Repowering Project should be included in Class Year 2009.

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<sup>16</sup> Complaint at 15.

<sup>17</sup> *Id.* at 20 (“[S]ubstantive review substantially delays completion of final cost estimates that are necessary for a project developer to make the final commitments associated with financing and ordering long lead-time equipment for the project. A project developer is required to enter the Class Year interconnection study queue before determining its cost responsibility for network upgrades and interconnection facilities. The reality is that a project must commit to and make economic decisions based upon interconnections costs and permitting limitations/determinations.”).

<sup>18</sup> Complaint Attachment D, DEC’s February 27, 2009 letter to NYISO (February 27, 2009 Letter) (“To date, the project sponsor has provided all of the narrative portions of the DEIS . . . . We expect the DEIS, including all appendices to be provided next week. On February 20, 2009, the applicant submitted Permit Modification Applications for Title IV and Title V Permits, and Emission Reduction Credits associated with the retirement of one existing generation unit. On February 26, 2009, an Industrial . . . Permit Modification Application was received by the DEC. These applications are currently under review by the [DEC].”). Complaint Attachment E, DEC’s February 27, 2009 letter to Air Resources Group, LLC (the DEC is “in receipt of [the listed] draft sections of the [DEIS] for the proposed action” and the “documents are currently undergoing review by the DEC.”).

<sup>19</sup> Complaint at 18.

<sup>20</sup> *Id.*

**B. NYISO's Answer**

10. On June 22, 2009, NYISO filed its answer to the complaint. As an initial matter, NYISO expresses confusion as to the exact project or projects at issue. Noting that the complaint describes the proposed project as the "Astoria Repowering Project," totaling 1040 MW, NYISO states that a project named Astoria Repowering had been in the NYISO queue but was withdrawn.<sup>21</sup> NYISO claims that there are three NRG projects in the queue: (1) Berrians GT (summer maximum 200 MW); (2) Berrians II GT (summer maximum 256 MW); and (3) Berrians III GT (summer maximum 789 MW).<sup>22</sup> NYISO states that Berrians GT and Berrians III GT each has an approved System Reliability Impact Study (as required by Attachment S, subsection (a)), and that Berrians II GT has a System Reliability Impact Study in progress.<sup>23</sup> Since Berrians II GT would otherwise be ineligible for Class Year 2009 status because it does not have an approved System Reliability Impact Study, NYISO assumes that NRG's complaint concerns only the Berrians GT and Berrians III projects.<sup>24</sup>

11. In any case, NYISO states that none of NRG's proposed projects satisfied the OATT's regulatory milestones for entry into Class Year 2009. NYISO asserts that, contrary to NRG's complaint, NYISO did not rely only on Technical Bulletin No. 129 in excluding any proposed project from Class Year 2009.<sup>25</sup> NYISO asserts that the exclusion was based on one finding, namely, lack of evidence that a state regulator determined by March 1, 2009 that NRG's permitting application was complete, as required under Attachment S.<sup>26</sup>

12. More specifically, NYISO claims that NRG failed to timely submit a Draft Environmental Impact Statement (DEIS) to the DEC, which NYISO states is an essential component of an air permitting application.<sup>27</sup> NYISO disputes NRG's assertion that the February 27, 2009 Letter from the DEC to NYISO demonstrates that NRG's permitting application was complete. NYISO asserts that the February 27, 2009 Letter shows that

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<sup>21</sup> NYISO answer at 5 n.13.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 8.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 7.

NRG submitted a permitting application on February 20, 2009, but that the application was missing a critical component, i.e., the DEIS. NYISO argues that, as of February 27, 2009, the DEC had expected NRG to submit the DEIS, including all appendices, the following week - after the March 1, 2009 deadline.<sup>28</sup> While a later, March 9, 2009 letter from the DEC indicates that the DEC “determined that [NRG’s] application contains the required information to commence the process of building a draft permit,”<sup>29</sup> NYISO dismisses that letter as untimely – as it was after the March 1, 2009 deadline.

13. NYISO additionally argues that, as a general matter, Technical Bulletin No. 129 identifies an appropriate milestone (i.e., obtaining a DEC-issued Notice of Completion) that is consistent with Attachment S.<sup>30</sup> NYISO challenges NRG’s assertion that awaiting a Notice of Completion may take months longer than awaiting the completion letter, or “Completeness Determination,”<sup>31</sup> previously required under Article X. NYISO states that the Article X process included a specific step at which the Chairman of the Board on Electric Generation Siting issued a letter indicating that a permitting application was in compliance with applicable procedures and could proceed to hearing.<sup>32</sup> According to NYISO, the time period necessary for a project to obtain such an Article X completion letter varied greatly and, by NYISO’s calculations, could have taken as long as 221 days.<sup>33</sup>

14. Finally, contrary to NRG’s complaint, NYISO claims that Technical Bulletin No. 129 was indeed developed through a stakeholder process to clearly identify the “comparable permitting application” to that of Article X, in order to satisfy the regulatory milestone in the OATT. NYISO states that any issues with the bulletin should have been raised at that time. NYISO asserts that NRG’s complaint appears to be directed at

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<sup>28</sup> NYISO answer at 8. According to NYISO, it appears that NRG submitted the DEIS on March 6, 2009.

<sup>29</sup> Complaint Attachment F.

<sup>30</sup> NYISO states that the Notice of Completion is a public notice issued by the DEC pursuant to detailed regulations. NYISO Answer at 10 citing N.Y. COMP. CODES R. & REGS. tit. 6, § 621.7 (2009).

<sup>31</sup> Complaint at 7.

<sup>32</sup> NYISO answer at 9.

<sup>33</sup> *Id.* at 11.

NYISO's OATT, in which case, NRG must, but has failed to, argue that the OATT is unjust and unreasonable under section 206 of the FPA.<sup>34</sup>

### C. NRG's Answer

15. On July 7, 2009, NRG submitted an answer to NYISO's answer, in which NRG clarifies that its complaint pertains to the Berrians GT and Berrians III GT components of what it refers to as the Astoria Repowering Project.<sup>35</sup> In its answer, NRG also included additional evidence purporting to show that NRG had submitted a complete DEIS to the DEC by March 1, 2009. This evidence includes a July 6, 2009 letter from the DEC stating that the DEC "was in receipt of an electronic version of the draft EIS for the [Astoria Repowering Project] on February 27, 2009 as noted in the [February 27 Letter]. The March 6, 2009 date . . . was the date that a paper copy of the document, in bound format, was received by the [DEC]."<sup>36</sup> Also attached to NRG's answer is an affidavit, in which an NRG consultant attests to working with the DEC for over 18 months, in order to ensure that the DEC would acknowledge receipt of NRG's completed application prior to the March 1, 2009 deadline.<sup>37</sup>

16. NRG's reply further alleges that NYISO admitted another project – the CPV Valley Energy Center (CPV) – into Class Year 2009, despite evidence purporting to show that CPV did not receive a Notice of Completion by March 1, 2009.<sup>38</sup> Given that CPV

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<sup>34</sup> The NYISO further alleges that, even if NRG had made such arguments, the Commission can provide only prospective relief under section 206 of the FPA, 16 U.S.C. § 824e (2006).

<sup>35</sup> NRG should have made the identity of the subject project clear in its Complaint rather than waiting until its Answer.

<sup>36</sup> NRG's answer, Exhibit A.

<sup>37</sup> NRG's answer Exhibit B.

<sup>38</sup> NRG's answer at 13. NRG refers to statements in Exhibit D of its answer, a February 26, 2009 letter from the DEC to NYISO concerning CPV's DEIS (February 26, 2009 Letter) ("In order for the [DEC] to finalize the draft permit it needs to be provided conditions related to Prevention of Significant Deterioration . . . under federal regulations by the Environmental Protection Agency . . . . The [DEC], upon receipt of an EPA determination, will incorporate the PSD related conditions as appropriate and then make the draft permit available for public comment."). NRG also refers to Exhibit E of its answer, an April 22, 2009 letter from the DEC to Ann Yates, Chairperson of the Town of Wawayanda Planning Board, discussing CPV's DEIS (April 22, 2009 Letter).

was placed in Class Year 2009 and the Astoria Repowering Project was not, NRG contends that NYISO has failed to uniformly apply its OATT and has acted in a discriminatory manner, in violation of section 206 of the FPA.<sup>39</sup>

**D. NYISO's Second Answer**

17. On July 22, 2009, NYISO filed an answer to NRG's answer, in which NYISO disputes NRG's allegations concerning CPV. Contrary to NRG's characterization, NYISO describes the February 26, 2009 and April 22, 2009 Letters as supporting a finding that CPV had indeed submitted a complete DEIS to the DEC.<sup>40</sup>

18. Moreover, NYISO asserts that CPV is not similarly situated to the Astoria Repowering Project. NYISO contends that DEC regulations indicate that an air discharge permitting application will be deemed complete if the DEC has failed to issue a notice of incomplete application within 60 days of filing for the permit.<sup>41</sup> NYISO states that CPV submitted its air permit application to the DEC on December 18, 2008, and the DEC did not issue a notice of an incomplete application within 60 days.

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<sup>39</sup> Moreover, NRG posits that NYISO relied on information from NRG's competitor – Astoria Energy II – in finding that NRG failed to meet the March 1, 2009 deadline. NRG states that Astoria Energy II is a competitor because its project and NRG's proposed project both are located in a power plant industrial park in the northern part of Queens, New York; both are seeking to serve the same in-city market; and both are seeking interconnection to the same open access transmission facilities, i.e., the Q35L and Q35M cables and the 345 kV substation currently utilized by the soon-to-be-retired New York Power Authority Poletti facility. According to NRG, the existing substation cannot support both projects as currently configured. If both projects are included, the 345 kV substation will need to be significantly upgraded, and both projects would share those costs. Therefore, concludes NRG, if Astoria Energy II is successful in delaying NRG's proposed project by one or more years, Astoria Energy II will substantially decrease its interconnection costs. NRG's answer at 10-11.

<sup>40</sup> NYISO refers to statements in the February 26, 2009 Letter (“The [DEC] has made a determination that [CPV] has submitted all the information required to be submitted pursuant to this above referenced section.”) and the April 22, 2009 Letter (“The DEIS was accepted by the Wawayanda Planning Board, Lead Agency for the coordinated environmental review . . . on February 23, 2009.”).

<sup>41</sup> Citing N.Y. Env'tl. Conserv. § 70-0109(1)(b) (2009); N.Y. COMP. CODES R. & REGS. tit. 6, § 621.6(h) (2009).

### **III. Notice of the Complaint and Intervenors' Comments**

19. Notice of the complaint was published in the *Federal Register*, with interventions and protests due on or before June 22, 2009.<sup>42</sup> A notice of intervention was filed by the New York State Public Service Commission, and timely motions to intervene were filed by the New York Power Authority, the Indicated New York Transmission Owners,<sup>43</sup> US Power Generating Company, and Exelon Corporation. Bayonne Energy Center (Bayonne) and Astoria Energy II LLC (Astoria Energy II) each filed a timely motion to intervene and opposition to the complaint. On July 22, 2009, Astoria Energy II filed a reply to NRG's reply.

20. For substantially the same reasons set forth in NYISO's answer, Bayonne and Astoria Energy II seek denial of the complaint.<sup>44</sup> They agree with NYISO that the DEC letters submitted by NRG essentially contradict NRG's claim that it had submitted a complete permitting application by March 1, 2009. Astoria Energy II adds that, on April 22, 2009, the DEC sent it an e-mail noting that NRG did not submit the requisite DEIS until March 6, 2009. The email further states that, as of April 22, 2009 - almost two months after the March 1, 2009 deadline - a Notice of Completion had not been issued.

21. Consolidated Edison Company of New York and Orange and Rockland Utilities (jointly, ConEdison) together filed supplemental comments. Contrary to NRG's position, ConEdison asserts that the Notice of Completion referred to in Technical Bulletin No. 129 is similar to the former permitting process under Article X. ConEdison argues that a "determination of completeness" under Article X indeed represented a substantive determination (not merely an administrative determination), and therefore, is comparable to a Notice of Completion.

22. On July 22, 2009, Astoria Energy II submitted a reply to NRG's reply, which essentially reiterates the arguments in NYISO's reply and states that, in any case, NRG's reply is not allowed and should be rejected.

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<sup>42</sup> 74 Fed. Reg. 28,044 (June 5, 2009).

<sup>43</sup> The New York Indicated Transmission Owners include: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Long Island Power Authority; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

<sup>44</sup> In the alternative, Bayonne seeks an evidentiary hearing.

#### **IV. Procedural Matters**

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

24. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers to answers submitted by NRG, NYISO and Astoria Energy II, because they have provided information that has assisted us in the decision-making process.

#### **V. Commission Determination**

25. Section 206 of the FPA requires a complainant to show that the rate or practice then in effect is unjust, unreasonable, or unduly discriminatory or preferential.<sup>45</sup> We find that NRG has failed to meet its burden, and, therefore, we will deny its complaint.

26. Our substantive determination begins with an examination of the OATT provision in question, i.e., Attachment S, Section VI.B.3(b). Recalling that, under subsection (b), a project shall be included in a given Class Year if "state regulators have determined that the Article X . . . or comparable permitting application for the project is complete . . . on March 1 each year," we first address the issue of whether the air permit that NRG pursued through the DEC is "comparable" to the type of permit previously provided for by Article X. We find that the two permits are comparable. The purpose of both permits is, or was, to obtain the siting and environmental approvals necessary for construction of, or upgrades to, major electric generating facilities. Both permits are, or were, largely environmental in nature and require applicants to submit a proposed project's potential impact on air quality and other environmental factors. Although the more recent applications require inclusion of a DEIS, and therefore are more extensive than the former applications, we find that nature of NRG's application is, nonetheless, "comparable" to the Article X application, thereby meeting that requirement of subsection (b).

27. We note that the parties appear to have assumed that subsection (b)'s "comparable" applies to what the parties refer to as the "determination of completeness." We disagree. The word "comparable" in subsection (b) only modifies the word "application;" it does not modify the remaining terms of subsection (b), including the "determination of completeness." Thus, the issue of whether NRG's air discharge permit application is comparable to an Article X application is distinguishable from the issue of

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<sup>45</sup> 16 U.S.C. § 824e (2006).

what the “determination of completeness” entails. Much of NRG’s complaint erroneously conflates the two issues. NRG’s arguments concerning the point at which a Notice of Completion was formerly issued under Article X, compared to the point at which some type of completion letter is now issued under the current air permit application process, exemplify that error, and are irrelevant.

28. Having found that an Article X permit application and NRG’s air discharge permit application are comparable for purposes of NYISO’s OATT, we next turn to the question of whether a state regulator, i.e., the DEC, made the requisite “determination” that NRG’s air discharge permit application was “complete” by March 1, 2009. This also requires us to interpret subsection (b). The issue has two parts: (1) what is meant by a “determination”; and (2) what is meant by “complete.” The OATT does not define these terms. While we generally do not interpret state regulations or address in what form a state regulator’s determination should be delivered, and what should be deemed a “complete” application (especially given that neither the state nor the DEC provides their views on these terms), the OATT provision at issue here is subject to our exclusive jurisdiction, and requires that we answer these questions for purposes of applying the OATT.

29. We find that the purpose of this OATT provision is to establish a ministerial test, requiring essentially no subjective judgment on NYISO’s part, to establish whether the March 1 deadline is met. Further, we find that here a “determination” is merely the issuance of some form of written statement by the DEC that the application is complete. As NYISO agrees, it need not be a “Notice of Completion,” although we acknowledge that such a “Notice” would qualify. Second, we find that “complete” applies to an application that the DEC, rather than NYISO, states is “complete” (delivered in the form of a “determination” discussed above). Hence, NYISO need not be put in the position of second-guessing the DEC as to whether an application is complete. In this regard, we disagree with NRG that this process involves a substantive review of the application by the DEC, which effectively lengthens the period before a determination can be made, and thereby, according to NRG, deters projects. We find that, for purposes of the OATT, a completeness determination is merely intended to mean that a state’s *filing* requirements are met so that the DEC may begin to analyze the application, receive public comments, set the application for hearing, or implement other subsequent processes. This is analogous to our requirement that a public utility meet our filing regulations when filing to, e.g., change its rates.<sup>46</sup>

30. Further, we find that it is the DEC “determination” that must occur on or before March 1. Contrary to NRG’s position, that deadline is not met by submitting an application by March 1, even if “complete.” The “determination” by the state regulator

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<sup>46</sup> See 18 C.F.R. Part 35 (2009).

(i.e., the DEC) that it is indeed complete must issue by March 1. With these findings in hand, we now turn to the facts of this case.

31. NRG offers several pieces of correspondence from the DEC purporting to show that NRG had submitted an administratively complete air permitting application that included a complete DEIS by March 1, 2009. We find that the most relevant of these documents is a letter from the DEC to NRG dated March 9, 2009 (March 9, 2009 Letter), which states:

This letter is to provide an update of the State Environmental Quality Review (SEQR) process and Air Permit application review for the proposed [Astoria Repowering Project]. The [DEC] has received the full [DEIS] for the proposed action . . . . DEC is currently reviewing this document for purposes of rendering a decision regarding acceptability for public review. . . . [Division of Air] staff has determined that the application contains the required information to commence the process of building a draft permit.

32. We find that the language in the March 9, 2009 Letter reasonably evidences a DEC determination that NRG's permitting application was complete, even if only in the administrative sense. Nevertheless, as noted, the letter is dated March 9, 2009, which is past the critical, bright-line deadline, i.e., March 1, provided for in subsection (b).

33. We find that the February 27, 2009 Letter, upon which NRG heavily relies, is not sufficient evidence of the determination of completeness required by subsection (b). That letter expresses that NRG provided only the "narrative portions" of the DEIS, and further states: "We [the DEC] expect the DEIS, including all appendices to be provided next week." Even assuming that electronic filing was permissible, it is apparent that, by failing to include required appendices, NRG was not yet fully compliant with the DEC's filing requirements as of February 27, 2009. Even if NRG submitted the appendices the next day, or any time prior to March 1, 2009, the February 27, 2009 Letter does not itself sufficiently evidence a state regulator's "determination" that the application was, in fact, "complete" as of February 27, 2009.

34. Moreover, we do not find that the July 6, 2009 Letter from the DEC supports NRG's interpretation of the February 27, 2009 letter. The July 6, 2009 Letter stated that the DEC "was in receipt of an electronic version of the [DEIS] . . . as noted in the [February 27, 2009 Letter]" and that "March 6, 2009 . . . was the date that a paper copy of the document, in a bound format, was received by the [DEC]." The July 6, 2009 Letter only purports to report what the February 27, 2009 Letter said, which, we note above, indicates that required appendices were missing. Thus, the July 6, 2009 Letter cannot be read as recognition that the electronic version of the DEIS was complete, i.e., included the appendices, as of February 27, 2009. Moreover, even if the July 6, 2009 Letter constituted a "determination" that the application was complete, it is dated over four months past the critical March 1 deadline.

35. The Commission is not persuaded by NRG's arguments concerning CPV, and its allegation that NYISO acted in an unduly discriminatory manner by allowing CPV into Class Year 2009. The critical distinction between NRG and CPV is that, on February 26, 2009, the DEC issued a letter to NYISO (February 26, 2009 Letter), which included a full paragraph not found in anything submitted by NRG concerning the Astoria Repowering Project. The February 26, 2009 Letter states:

The [DEC] has determined that CPV Valley has submitted all the information required by 6 NYCRR Part 621 (Uniform Procedures). Specifically, section 621.4(g) outlines the application requirements for an Air Pollution Control Permit "to be furnished to the [DEC] to determine the application is complete." The [DEC] has made a determination that CPV Valley has submitted all the information required to be submitted pursuant to this above-referenced section.

36. While the letter goes on to state that the DEC is awaiting certain information from the United States Environmental Protection Agency before it can make CPV's draft permit available for public comment, the letter otherwise makes clear that CPV has satisfied its obligations.

37. We emphasize that our finding that NRG failed to satisfy the OATT requirements for inclusion in Class Year 2009 is based on the OATT's language (specifically, subsection (b)). Hence, we need not address whether NYISO wholly and erroneously relied upon Technical Bulletin No. 129. Even assuming that a non-publicly noticed statement from a state regulator suffices, where such statement sets forth the determination that an air discharge permit application is complete (either in an administrative or substantive sense), we find that none was issued by March 1, 2009, the critical deadline provided for in subsection (b). However, NYISO should not rely on a Technical Bulletin in lieu of filed tariff language and, to that end, as discussed below, we will direct NYISO to propose clarifying tariff language consistent with our findings herein.

38. Consistent with our findings in this case, we find that subsection (b) should be revised to: (1) delete reference to Article X, a law that has been defunct for several years; (2) clarify what constitutes a "comparable" permit application; (3) define the term "complete"; and (4) define what constitutes a state regulator's "determination" that an application is complete. Accordingly, pursuant to section 206 of the FPA, we will direct NYISO to meet with its stakeholders for the purpose of amending this provision, and to submit a new filing within 90 days hereof.

The Commission orders:

(A) NRG's complaint is denied, as discussed in the body of this order.

(B) NYISO is ordered to meet with its stakeholders and to submit a new filing with a revised subsection (b) within 90 days of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.