

134 FERC ¶ 61,083
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

New York Independent System Operator, Inc.

Docket No. ER10-3043-001

ORDER ON COMPLIANCE FILING

(Issued February 2, 2011)

1. On December 7, 2010, the New York Independent System Operator, Inc. (NYISO) submitted a compliance filing, pursuant to the Commission's November 26, 2010 order,¹ to provide support for its proposed revisions to the New York City (in-City) Installed Capacity (ICAP) exemption test regarding the period for which prices must be projected. In this order, the Commission accepts the December 7, 2010 filing as in compliance with the November 26, 2010 Order, and accepts the proposed tariff revisions, effective November 27, 2010, subject to the conditions of this order, as discussed below.

I. Background

2. Attachment H (section 23) to NYISO's Market Services Tariff² establishes, among other things, market power mitigation measures that are applicable to the in-City ICAP market that NYISO administers. One of the purposes of the mitigation measures is to guard against the exercise of market power by those who buy ICAP and who thus benefit from a low price. This is commonly referred to as "buyer side mitigation."

3. On September 27, 2010, NYISO submitted, pursuant to section 205 of the Federal Power Act (FPA),³ proposed revisions to its market power mitigation measures applicable to the in-City ICAP market. As relevant here, among other changes, NYISO

¹ *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178 (2010) (November 26, 2010 Order).

² New York Independent System Operator FERC Tariff, Original Vol. 2 (Services Tariff).

³ 16 U.S.C. § 824d (2006).

proposed to revise the offer floor exemption process provided in section 23.4.5.7.2 of its Services Tariff. The exemption test in section 23.4.5.7.2 prior to NYISO's proposed revisions, used price data in the two capability periods beginning with the first capability period in which an ICAP supplier "is reasonably anticipated to offer to supply [Unforced Capacity (UCAP)]" (Reasonably Anticipated Entry Date Rule). NYISO proposed, to change section 23.4.5.7.2 to provide that this period is to commence with "the summer capability period commencing three years from the start of the year of the Class Year" (Three-Year Rule). Hudson Transmission Partners, LLC (Hudson Transmission) protested this aspect of NYISO's filing, inter alia, on the basis that the proposal assumes an arbitrary and inaccurate starting date for each facility of three years after the Class Year.

4. In the November 26, 2010 Order, the Commission accepted, in part, and rejected, in part, NYISO's proposed revisions effective November 27, 2010, subject to conditions. However, based on Hudson Transmission's statement that its High Voltage Direct Current (HVDC) line would be assumed to enter the market in 2011 rather than its actual projected date of 2013 and due to NYISO's failure to provide sufficient support for this assumption, the Commission directed NYISO to either provide support for its proposed Three-Year Rule or to eliminate this provision in a compliance filing within sixty days of the date of the November 26, 2010 Order.⁴

II. Notice of Filing, Interventions, Comments, Protests and Answers

5. Notice of NYISO's December 7, 2010 filing was published in the *Federal Register*, 75 Fed. Reg. 79,363 (2010) with interventions and protests due on or before December 14, 2010. By notice of December 14, 2010, the comment period was extended to and including December 21, 2010.

6. Astoria Generating Company, L.P., the NRG Companies, and TC Ravenswood, LLC (collectively New York City Suppliers); and Hudson Transmission filed motions to intervene, comments, and protests.

7. On December 14, 2010, NYISO filed an answer to the New York City Suppliers' motion for extension of time to comment. On December 28, 2010, NYISO filed an answer to the protests of Hudson Transmission and New York City Suppliers.

⁴ November 26, 2010 Order, 133 FERC ¶ 61,178 at P 73. The November 26, 2010 Order included a number of other compliance obligations. NYISO states that it will address the Commission's other directives no later than the January 25, 2011 deadline.

III. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

1. NYISO's Filing

10. NYISO states that this initial compliance filing addresses a single issue in compliance with paragraph 73 and Ordering Paragraph (B) of the November 26, 2010 Order. NYISO states that it provides additional support for the use, in NYISO's mitigation exemption analysis, of ICAP spot market prices for future capability periods beginning with the summer capability period that commences three years from the start of a proposed facility's Class Year, i.e., the Three-Year Rule. NYISO asserts that the proposed Three-Year Rule is an improvement over the Reasonably Anticipated Entry Date Rule and should be accepted by the Commission for the following reasons.

11. According to NYISO, the Reasonably Anticipated Entry Date Rule is not transparent or predictable enough because developer's plans are not always clear and are subject to change. NYISO attaches the affidavit of its Manager of Auxiliary Market Products, David Lawrence, which states that experience confirms that in-service dates identified by developers for purposes of the Interconnection Queue do change significantly throughout the time a project is in the queue.⁵ Further, NYISO states that exactly when a potential ICAP supplier anticipates first offering UCAP is open to disagreement and, thus, to controversy. NYISO states that a potential ICAP supplier will have a substantial influence over the definition of the "reasonably anticipated" date and an incentive to define it in a manner conducive to a favorable exemption.

12. By contrast, according to NYISO, the Three-Year Rule is based on actual entry date experience and is consistent for all projects, which eliminates forecasting uncertainty. In

⁵ Mr. Lawrence attaches a table that tracks changes in the service dates for active projects in NYISO's queue since February 2008.

addition, NYISO asserts that three years is a reasonable approximation of the length of time between the Class Year cost allocation process and when the developer can be reasonably expected to enter the market. NYISO adds that this approximation is based in part on the length of time it has actually taken in-City projects to enter into service in recent years.⁶

13. NYISO also explains that it considered other alternatives to the Three-Year Rule such as developing entry date assumptions that varied based on the technologies used in particular projects. However, according to NYISO, it determined in discussions with stakeholders, that using different start times did not necessarily lead to more accurate exemption determinations and may lead to disputes among stakeholders. NYISO recognizes that the Three-Year Rule is not perfect, but it believes that it is a substantial improvement over the current Reasonably Anticipated Entry Date Rule.

2. Comments

14. Hudson Transmission states that it takes no position on the reasonableness of the Three-Year Rule generally, but it argues that the proposed rule should not apply to its Hudson Transmission HVDC project (Hudson Project) because it is a member of the Class Year 2008 and it has accepted its system upgrade cost allocation under Attachment S to NYISO's tariff. Hudson Transmission states that it anticipates a 27 month construction schedule beginning in the first quarter of 2011 with a projected start of operation in 2013. Therefore, Hudson Transmission notes that applying the Three-Year Rule to its project would result in analysis that assumes operations starting in 2011 (three years after the Class Year), which is an obvious error. Accordingly, Hudson Transmission requests that the Commission grant it specific relief such that NYISO will use its actual projected start date of 2013 under the existing rules instead of applying the new rules using a projected start date of 2011.

15. Hudson Transmission contends that the Commission has good cause to grant such relief because (1) the Hudson Project has been in the Interconnection Queue since 2005, before NYISO's in-City market mitigation rules and before NYISO's proposal to adopt the Three-Year Rule; (2) Hudson Transmission has already completed and accepted its cost allocation under NYISO's Attachment S requirements and does not have the opportunity to use the new information to change its decisions regarding the Class Year process; (3) the Hudson Project is the only controllable, scheduled transmission line into Zone J that is in NYISO's Class Year 2008; (4) the Hudson Project is an interregional transmission project and the Commission has recognized that these lines face greater challenges than other projects and has indicated that NYISO should take steps to

⁶ NYISO December 7, 2010 Filing at 3 (citing attached affidavit of David Lawrence at P 12-13).

accommodate these lines; and (5) Hudson Transmission's start date is not hypothetical and speculative as may be the case for projects that have yet to complete the Class Year cost allocation process.

16. In their protest, New York City Suppliers state that they submitted to NYISO a list of written questions on December 3, 2010, including one on the Three-Year Rule, to understand how NYISO was proposing to apply the mitigation exemption test to Class Year 2009 and 2010 participants. New York City Suppliers also attached these questions to their protest. New York City Suppliers inquire which facilities will be analyzed for exemption as part of Class Year 2009 and which will be analyzed as part of Class Year 2010, and they request specific assumptions that will be a part of the analysis, such as whether all of a class year will be assumed operating when calculating Net Energy and Ancillary Service revenues, the net Cost of New Entry (CONE) escalation rate for each year, the capacity level for each year, and the process for calculating each facility's net CONE. Because NYISO has not responded to the New York City Suppliers' questions, they assert that the Commission does not have adequate information to determine whether or not the proposed Three-Year Rule is a good rule.

17. New York City Suppliers state that the Three-Year Rule may be a reasonable approach over the long-term, but assert that NYISO's filing leaves a number of questions unanswered, including, but not limited to whether a transition period is needed before the Three-Year Rule is put into effect. New York City Suppliers contend that there are projects under construction in Class Years 2009 and 2010 so the in-service dates are not uncertain and may support a transition period to the new rule in order to prevent unjust or unreasonable results. New York City Suppliers note that many of the projects cited in Mr. Lawrence's affidavit as having multi-year changes in their respective original and modified in-service dates have been withdrawn. They argue that Mr. Lawrence's table, therefore, may not be statistically valid and thus, warrants additional review.

18. New York City Suppliers assert that NYISO has not addressed how any exemption granted using the Three-Year Rule would then be applied. New York City Suppliers cite the hypothetical project tested in 2010 with the assumption it will begin in 2013 but then it comes on line earlier, for example, in 2011. They assert that NYISO's filing is silent on whether the hypothetical project will still be exempt in 2011.

19. Therefore, the New York City Suppliers request that the Commission: (1) issue a deficiency letter concerning NYISO's filing; (2) direct NYISO to file written responses to New York City Suppliers' questions in this proceeding; (3) direct NYISO to submit an additional compliance filing to address the open issues with the Three-Year Rule identified in New York City Suppliers' comments; and (4) direct NYISO to confirm how the mitigation exemption test rules are to be applied or alternatively, direct NYISO to continue to apply the existing rule to Class Years 2009 and 2010 participants so that any revisions are applied prospectively to future class year analyses after the Commission action on the Three-Year Rule.

3. NYISO's Answer

20. In response to Hudson Transmission's comments, NYISO states that while it takes no position at this time on Hudson Transmission's request that the Three-Year Rule not apply to the proposed Hudson Transmission Project, NYISO requests that the Commission make it clear that, if the request is granted, it only apply for the Class Year for which the cost allocation process was completed before the September 27, 2010 filing. NYISO states its belief that only Hudson Transmission's project could be excluded by exempting Class Years for which the cost allocation was completed before the September 27, 2010 filing. NYISO asserts that granting Hudson Transmission's request for other reasons, such as expected entry dates for projects that are not three years after their Class Year, will undermine the predictability that the Three-Year Rule is intended to promote. Further, NYISO asserts that it would be inappropriate to create a separate rule for interregional transmission projects, like Hudson Transmission's project, given that its stakeholders have already decided to adopt a "technology-neutral" approach.

21. In response to the New York City Suppliers' protest, NYISO states that the New York City Suppliers' protest raises untimely, meritless objections to the Three-Year Rule for the first time and seeks to renew procedural arguments that NYISO has already addressed. First, NYISO asserts that New York City Suppliers imply that it was somehow inappropriate for NYISO to submit its compliance filing without first conducting a stakeholder process. NYISO answers that its filing only provides further support for an already proposed tariff revision, with no new tariff provisions, and therefore, a separate stakeholder process was not required prior to making its compliance filing in this proceeding. NYISO also submits that there is no connection between the New York City Suppliers' questions and the merits of the Three-Year Rule. In any event, NYISO asserts that it cannot answer some of the questions raised by the New York City Suppliers until it knows whether or not the Commission has accepted the Three-Year Rule. NYISO states that it intends to answer the questions like it would any other stakeholder request and, thus, there is no reason for the Commission to order it to do so as that would conflict with its stakeholder, shared governance processes.

22. NYISO also asserts that that there is no merit to the New York City Suppliers' untimely objections to the subject compliance filing. Among other things, NYISO states that the New York City Suppliers concede that the revisions may be an improvement but argue that acceptance should be delayed until the Commission addresses their concern that a transition period may be warranted for Class Years 2009 and 2010. NYISO disagrees that a transition period is warranted simply because members of Class Years 2009 and 2010 may have already commenced construction. NYISO asserts that "commencement of construction" is a highly subjective term, susceptible to many meanings. It asserts that the Three-Year Rule is a clear, objective standard that permits all stakeholders to develop their own forecasts and make decisions based on them.

Further, NYISO states that the Three-Year Rule avoids the need to devote time and resources to disputes over anticipated entry dates, in contrast to the Reasonably Anticipated Entry Date Rule. In response to the New York City Suppliers' claim that Mr. Lawrence's affidavit may not be "statistically valid," NYISO states that Mr. Lawrence compiled all available data on project entry over the last five years and, whether or not statisticians may argue over whether it is "statistically valid," it is the best evidence to evaluate the reasonableness of the Three-Year Rule.

4. Commission Determination

23. We find that NYISO's December 7, 2010 filing complies with the November 26, 2010 Order. NYISO has provided sufficient support to justify its change from the Reasonably Anticipated Entry Date Rule to the Three Year Rule for the mitigation exemption test. We agree with NYISO that the Three-Year Rule is an improvement over the Reasonably Anticipated Start Date Rule because it is more transparent, predictable and less prone to manipulation by the project developer. In exhibit 1 to its filing, NYISO provides data that show a number of changes to the in-service dates of projects from 2005 to 2010 that reinforce the need to move away from an anticipated date provided by the developer to a standard date easily replicable by all interested parties. We are persuaded by NYISO's assertion that, based on NYISO's experience, three years is a reasonable approximation of the length of time between the Class Year entry and when the developer can be reasonably be expected to begin selling UCAP, and therefore, it is a reasonable time frame to use for the mitigation exemption analysis. We disagree with New York City Suppliers' contention that the table included in the Lawrence affidavit, attached to NYISO's Filing, warrants additional review. Mr. Lawrence's table illustrates the difficulties associated with using self-identified in-service dates for establishing reasonable periods to evaluate the mitigation exemption. If some of those projects, after having identified an in-service date, have then withdrawn from the queue, this only adds support to NYISO's contention that reliance upon self-identified in-service dates is misplaced and should be replaced by some other reasonable period for evaluating the mitigation exemption.

24. We also are not persuaded that it is necessary that NYISO answer the questions posed by the New York City Suppliers in order to make our decision in this matter.⁷ We

⁷ New York City Suppliers argued that various aspects of the exemption test were unclear. They maintained that the NYISO Services Tariff should be clarified to assure that (1) generators are considered for exemptions as part of their designated class year; (2) the mitigation exemption test for any class year correctly accounts for all generation that is under construction and will be entering service; (3) it is clear how multiple generators in a class year would be treated; (4) sequential forecasts for purposes of the mitigation exemption test would not be permitted; and (5) it is clear how retirements will

(continued)

can decide the reasonableness of the Three-Year Rule without the specific details requested by the New York Suppliers regarding other aspects of NYISO's mitigation proposal. The specific details requested by New York Suppliers address the application of the exemption test, not the reasonableness of the assumption used in the exemption mitigation analysis of a market entry date three years after the start of a project's class year.

25. We do, however, find that projects in NYISO's "Class Year 2008" should be evaluated under the existing Reasonably Anticipated Entry Date Rule as cost allocations for that class year were made prior to the existence of the new Three-Year Rule and have been approved by NYISO's Operating Committee.⁸ Further, Class Year 2008 projects accepted their cost allocations under Attachment S before the filing of NYISO's proposed revision to its mitigation exemption,⁹ and therefore, did not have adequate notice of a change in terms and conditions of service. In contrast, it appears that projects in Class Year 2009 or 2010 had not yet accepted their cost allocations before NYISO's September 27, 2010 filing and therefore had adequate notice. Thus, we do not see the need for a transition period for Class Year 2009 and Class Year 2010,¹⁰ as suggested by New York City Suppliers, even though those projects may have commenced.

be modeled in the mitigation exemption test. In the November 26, 2010 Order, the Commission found New York City Suppliers' requested clarifications to the exemption test to be unnecessary, but noted that New York City Suppliers can take up their requests in the ongoing NYISO stakeholder process regarding in-City mitigation. The subject list of questions attached to New York City Suppliers' protest essentially reflects the same previously-rejected requested clarifications. We note that NYISO has committed to responding to all of the New York City Suppliers' questions in a timely manner. NYISO also notes that some of its answers to the requested clarifications will contain confidential and/or competitively sensitive information.

⁸ See NYISO OATT, Attachment S, section 25.8. "Project Cost Allocation Decisions."

⁹ See *id.*

¹⁰ We note that the Interconnection Facilities Study for Class Years 2009 and 2010 will be combined, but the cost allocation for each class year will be done separately. See NYISO OATT, Attachment S, section 25.10.2. ("Combined Study of Class Years 2009 and 2010").

The Commission orders:

NYISO's December 7, 2010 filing is hereby accepted as in compliance with the condition of P 73 of the November 26, 2010 Order and NYISO's proposed revisions to section 23.4.5.7.2 are hereby accepted, effective November 27, 2010, subject to the conditions discussed in the body of this order and to the outcome of further orders in this proceeding.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.