

140 FERC ¶ 61,179
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Astoria Generating Company, L.P.

v.

Docket No. EL12-58-000

New York Independent System Operator Inc.

ORDER DENYING COMPLAINT

(Issued September 5, 2012)

1. On April 20, 2012, Astoria Generating Company, L.P. (Astoria) filed a complaint (Complaint) against the New York Independent System Operator Inc. (NYISO) pursuant to sections 206 and 306 of the Federal Power Act (FPA),¹ alleging that NYISO has violated the NYISO Market Administration and Control Area Services Tariff (Services Tariff) by refusing to issue going-forward cost determinations for all of Astoria's generating units for the March, April, and May 2012 Installed Capacity (ICAP) spot market auctions. In particular, Astoria asks the Commission to direct NYISO to resume issuing going-forward determinations for each of Astoria's generating units. In this order the Commission denies the Complaint.

I. Background

2. NYISO administers market power mitigation rules set forth in section 23 (Attachment H) of its Services Tariff that are intended to mitigate the market effects of any conduct that would substantially distort competitive outcomes in its markets.² Under

¹ 16 U.S.C. §§ 824e, 825e (2006).

² NYISO Services Tariff § 23.1.1.

these rules, a supplier deemed to be pivotal³ must offer its capacity into an ICAP spot market auction⁴ and is subject to an offer cap set at “the higher of (a) the UCAP Offer Reference Level for the applicable ICAP Spot Market Auction, or (b) the Going-Forward Costs of the Installed Capacity Supplier supplying the Mitigated UCAP.”⁵

3. With respect to the determination of going-forward costs, the Services Tariff provides:

An Installed Capacity Supplier’s Going-Forward Costs for an ICAP Spot Market Auction shall be determined upon the request of the Responsible Market Party for that Installed Capacity Supplier. The Going-Forward Costs shall be determined by the ISO after consultation with the Responsible Market Party, provided such consultation is requested by the Responsible Market Party not later than 50 business days prior to the deadline for offers to sell Unforced Capacity in such auction, and provided

³ A pivotal supplier is defined as “a Market Party that, together with any of its Affiliated Entities, (a) controls 500 MW or more of Unforced Capacity [UCAP], and (b) Controls Unforced Capacity some portion of which is necessary to meet the New York City Locational Minimum Installed Capacity Requirement in an ICAP Spot Market Auction.” NYISO Services Tariff § 23.2.1.

⁴NYISO Services Tariff §23.4.5.4.

⁵ NYISO Services Tariff § 23.4.5.2. Going-forward costs are defined in section 23.2.1 of the Services Tariff as:

either (a) the costs, including but not limited to mandatory capital expenditures necessary to comply with federal or state environmental, safety or reliability requirements that must be met in order to supply Installed Capacity, net of anticipated energy and ancillary services revenues, as determined by the ISO as specified in Section 23.4.5.3, for each of the following instances, as applicable, of supplying Installed Capacity that could be avoided if an Installed Capacity Supplier otherwise capable of supplying Installed Capacity were either (1) to cease supplying Installed Capacity and Energy for a period of one year or more while retaining the ability to re-enter such markets, or (2) to retire permanently from supplying Installed Capacity and Energy; or (b) the opportunity costs of foregone sales outside of the New York City Locality, net of costs that would have been incurred as a result of the foregone sale if it had taken place.

such request is supported by a submission showing the Installed Capacity Supplier's relevant costs in accordance with specifications provided by the ISO. Such submission shall show (1) the nature, amount and determination of any claimed Going-Forward Cost, and (2) that the cost would be avoided if the Installed Capacity Supplier is taken out of service or retired, as applicable. . . . A Responsible Market Party shall request an updated determination of an Installed Capacity Supplier's Going-Forward Costs not less often than annually, in the absence of which request the Installed Capacity Supplier's offer cap shall revert to the UCAP Offer Reference Level. An updated determination of Going-Forward Costs may be undertaken by the ISO at any time on its own initiative after consulting with the Responsible Market Party. Any redetermination of an Installed Capacity Supplier's Going-Forward Costs shall conform to the consultation and determination schedule specified in this paragraph. The costs that an Installed Capacity Supplier would avoid as a result of retiring should only be included in its Going-Forward Costs if the owner or operator of that Installed Capacity Supplier actually plans to mothball or retire it if the Installed Capacity revenues it receives are not sufficient to cover those costs.⁶

II. Complaint

4. Astoria asserts that NYISO has refused to issue going-forward cost determinations for any of Astoria's 53 units for the ICAP spot market auctions for March 2012, April 2012, and May 2012, despite having properly issued going-forward cost determinations for all of Astoria's generating units for the preceding five ICAP spot market auctions. Astoria further asserts that NYISO either offers no explanation or alleges that Astoria has failed to provide certain cost support or other information concerning its costs. According to Astoria, even if these claims are true, they do not justify NYISO's refusal to issue going-forward cost determinations. Accordingly, on this basis, Astoria requests that the Commission order NYISO to resume issuing going-forward determinations for Astoria's generating units.

5. More specifically, Astoria states that on July 8, 2011, and July 15, 2011, it requested that NYISO determine going-forward costs for all of its generating units beginning with the October 2011 auction. Astoria adds that its request was made at least 50 days prior to the deadline for offering capacity into the October 2011 auction and was supported by a submission showing the relevant costs for its generating units. Astoria states that over a month later it received a letter from NYISO requesting additional

⁶ Services Tariff section 23.4.5.3.

information, which Astoria submitted on August 31, 2011. Astoria further states that on September 23, 2011, NYISO provided going-forward determinations for each of Astoria's generating units for the October 2011 auction, and NYISO stated that it would take a month-by-month approach to determining Astoria's going-forward costs. According to Astoria, NYISO's justification for this approach is unclear because the Services Tariff contemplates that going-forward costs will be determined annually and adjusted seasonally within the year.⁷ Astoria acknowledges that NYISO may undertake an updated determination of going-forward costs at any time on its own initiative but asserts that this is clearly supposed to be an exception to the rule. Astoria maintains that, nonetheless, it has worked in good faith to augment its earlier submissions by responding to numerous information requests from both NYISO and the Marketing Monitoring Unit (MMU) with substantial supplemental data.

6. Astoria asserts that NYISO subsequently issued going-forward determinations for Astoria's units for the ICAP spot market auctions for November 2011, December 2011, January 2012, and February 2012. Astoria states that NYISO made what appear to have been primarily seasonal adjustments to the going-forward costs beginning with the November 2011 auction. Astoria further states that other than changes to the going-forward costs for two of its 53 units beginning with the January 2012 auction, the NYISO-determined going-forward costs did not change between the November 2011 auction and the February 2012 auction.

7. Astoria explains that it was engaged in a "routine exercise" of responding to information requests from NYISO to augment its prior submissions. Astoria contends that on February 17, 2012, NYISO informed Astoria that it would not be issuing going-forward cost determinations for any of Astoria's units for the March 2012 auction. Accordingly, Astoria states it requested NYISO identify any open issues as soon as possible. However, Astoria claims NYISO did not identify the information that it claimed was insufficient until March 5, 2012, more than a week after the deadline for making offers into the March 2012 auction. Astoria further states that it provided NYISO with the requested additional data on March 14, 2012, and on March 20, 2012, NYISO once again refused to issue going-forward cost determinations for the April 2012 auction. Astoria adds that on April 18, 2012, NYISO, in a one-sentence email, informed Astoria that it would not be issuing going-forward cost determinations for the May 2012 auction and provided no explanation.

8. Astoria argues that NYISO's refusal to continue issuing going-forward cost determinations for Astoria's units violates section 23.4.5.3 of the Services Tariff given that Astoria satisfied the Services Tariff's objective criteria for the issuance of the

⁷ Complaint at 11 (citing NYISO Services Tariff section 23.4.5.3).

determinations, i.e., it requested a determination 50 business days in advance and provided relevant cost support showing: (1) the nature, amount and determination of its claimed going-forward costs; and (2) that the costs would be avoided by mothballing or retiring.

9. Astoria asserts that nothing in the Services Tariff suggests that a supplier's submission showing its relevant costs must be satisfactory to NYISO in order to obtain going-forward cost determinations when a supplier has met these objective criteria. To the contrary, according to Astoria, once a supplier has made a timely request with relevant cost support, the Services Tariff makes clear that it need only request an updated determination of its going-forward costs not less often than annually in order to continue receiving going-forward cost determinations.⁸ Astoria adds that the fact that NYISO may undertake "an updated determination of going-forward costs at any time on its own initiative after consulting with the responsible market party" only underscores that NYISO is not empowered to withhold going-forward cost determinations when a supplier has made a timely request and provided relevant cost support, in that "*issuing*" an "updated determination" is entirely different from "*refusing to issue*" going-forward cost determinations altogether.⁹

10. Astoria acknowledges that NYISO has discretion to reduce or even completely exclude a given cost element if NYISO reasonably concludes that the supplier would not avoid that particular cost by mothballing or retiring, but Astoria argues that questions about whether certain costs should be reduced or excluded do not provide grounds for withholding going-forward cost determinations altogether. Astoria states that even assuming that the relevant language of the Services Tariff is ambiguous, the parties' course of performance demonstrates that both parties understood that the objective Services Tariff criteria had been satisfied and that NYISO was required to continue to issue going-forward costs. Astoria adds that NYISO's issuance of going-forward cost determinations for all of Astoria's units for each of the October 2011 through February 2012 auctions, confirms that Astoria had satisfied both objective criteria set forth in the Services Tariff.

11. Likewise, Astoria argues that NYISO's issuance of those going-forward cost determinations demonstrates that Astoria clearly satisfied any subjective or discretionary criteria. Astoria adds that it provided even more support for these determinations by providing supplemental information. Further, according to Astoria, there have been no material changes in fact relevant to Astoria's going-forward costs since September

⁸ *Id.* at 16 (citing NYISO Services Tariff, section 23.4.5.3).

⁹ *Id.*

of 2011 when NYISO began issuing going-forward cost determinations that would warrant any reduction in the going-forward costs of any of Astoria's units. Thus, Astoria argues, NYISO cannot reasonably have concluded that it somehow lacked sufficient information as to each and every component of such costs so as to be unable to continue to issue going-forward cost determinations for any of those units beginning with the March 2012 auction.

12. Astoria contends that for NYISO to withhold going-forward cost determinations entirely under any sort of subjective standard it would need to have concluded that each of the numerous cost elements included in the going-forward cost determinations for each of Astoria's 53 units issued for five consecutive ICAP spot market auctions was now zero. Astoria argues that such a notion is all the more implausible when one considers that prior to the March 2012 auction, NYISO had identified only a single element, relating to just one unit, of the previously-determined going-forward cost determinations that it believed to have been overstated, and on that basis, had reduced the going-forward costs for that unit accordingly beginning with the January 2012 auction.

13. Astoria states that eliminating the ability of suppliers to offer capacity into ICAP spot market auctions at their going-forward costs will artificially suppress clearing prices if, and to the extent that, the suppliers would offer capacity at those going-forward costs and such costs exceed the clearing price. Moreover, according to Astoria, the supplier will be forced to offer to provide capacity below its going-forward costs.

III. Notice of Filings and Responsive Pleadings

14. Notice of the Complaint was published in the *Federal Register*, 77 Fed. Reg. 25,162 (2012), with interventions and protests due on or before May 21, 2012. TC Ravenswood, LLC; Exelon Corporation, NRG Companies, and the New York Transmission Owners filed motions to intervene. The New York State Public Service Commission filed a notice of intervention. On May 21, 2012, NYISO filed an answer to the Complaint.

15. In its May 21, 2012 Answer, NYISO states that the Complaint should be dismissed because Astoria has not demonstrated that NYISO violated the Services Tariff or otherwise acted unreasonably. NYISO states that Astoria failed to provide all of the data requested by NYISO and failed to satisfy concerns about the data that it did submit. NYISO states that two of Astoria's generating units are now mothballed and Astoria could remedy the remaining deficiency by responding to outstanding data requests.¹⁰

¹⁰ NYISO May 21, 2012 Answer at Attachments 8 and 9 (Notice of Mothballing on April 11, 2012, and April 18, 2012, for Units 20 and 40 respectively).

NYISO states that if Astoria were to provide complete information in support of going-forward cost requests, it would be prepared to issue going-forward costs for the remaining 51 units. Thus, according to NYISO the Complaint is moot and there is no need for the relief that Astoria requested.

16. According to NYISO, the Services Tariff authorizes NYISO to not issue a going-forward cost determination if adequate information is not provided. NYISO therefore asserts that Astoria's reading of the Services Tariff is neither correct nor reasonable. NYISO asserts that the Services Tariff is clear that NYISO is to issue a going-forward cost determination "provided" that the ICAP supplier's request is adequately supported.¹¹ NYISO contends that deficient replies do not satisfy the Services Tariff requirement that triggers NYISO's obligation to issue going-forward costs. NYISO argues that the Services Tariff clearly authorizes NYISO to require ICAP suppliers to submit information so that it may make updated going-forward cost determinations. According to NYISO, the Services Tariff requires that a party must request an updated determination on "at least" (i.e., no less frequently than) an annual basis.¹² NYISO adds that this is not a limitation on its authority to undertake an updated determination "at any time on its own initiative."¹³

17. NYISO contends its decision not to issue going-forward cost determinations was reasonable. NYISO asserts Astoria's data submissions were incomplete, as shown by NYISO's requests for information in a series of letters sent to Astoria. NYISO states that Astoria's responses were often unclear, inconsistent, and in some cases, completely unresponsive. With respect to certain units, NYISO states that Astoria provided no response to NYISO's February 2012 or March 2012 requests and thus, left pertinent questions unanswered. NYISO contends that this information gap justified NYISO declining to issue going-forward costs until its questions were addressed. NYISO adds that it could not determine that the costs Astoria was requesting to include satisfied the Services Tariff requirement of section 23.4.5.3 and accordingly, it did not, and could not, issue going-forward costs to Astoria for March, April, or May of 2012. NYISO states that it is not authorized to provide an opportunity for a pivotal supplier to offer capacity above the default offer cap if there is not a reasonable demonstration that the Services Tariff's requirements for issuing going-forward costs have been met.

¹¹ NYISO May 21, 2012 Answer at 12 (quoting Services Tariff section 23.4.5.3).

¹² *Id.* at 13 (citing Services Tariff section 23.4.5.3).

¹³ *Id.*

18. NYISO also states that it consulted closely with the MMU throughout the review process and the MMU agreed with NYISO that Astoria's February and March submissions were unacceptable, and supported NYISO's refusal to issue going-forward costs for the March, April, and May 2012 ICAP spot market auctions.

19. NYISO argues that the Commission must reject Astoria's claim that NYISO's issuance of going-forward costs for months prior to March somehow made the subsequent denial to issue going-forward cost determinations unreasonable. NYISO states that the circumstances and the information provided to NYISO regarding certain units changed significantly between the time of the first determination of going-forward costs and February 2012. According to NYISO, the changes and inconsistencies prompted it to seek additional information and Astoria failed to submit responsive information.

20. Finally, NYISO notes that its denial of going-forward cost determinations for Astoria's units had no impact on ICAP spot market clearing prices in the March, April, or May 2012 ICAP spot market auctions. This assertion is uncontroverted.

IV. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

22. We deny the Complaint for the reasons discussed below. Two of Astoria's generating units, Unit 20 and 40, are currently mothballed. Although we believe NYISO was justified in not issuing going forward determinations for Units 20 and 40 for March and April 2012, we find the issue is now moot with respect to these units because they are mothballed. The Commission cannot direct NYISO to resume issuing going-forward cost determinations for units that are no longer in the market. With respect to the remaining units, we find that NYISO was justified in not issuing going-forward determinations.

23. Section 23.4.5.3 of the Services Tariff provides that going-forward costs are to be determined by NYISO upon the supplier's request, provided that the request is made at least 50 business days prior to the deadline for offering capacity into the auction. Second, the request must be supported by a submission of the ICAP supplier's relevant costs. The Services Tariff specifies that such a submission must show: (1) the nature, amount, and determination of any claimed going-forward cost; and (2) that the cost would be avoided if the ICAP supplier is taken out of service or retired. If the requirements for requesting going-forward cost determinations are met, the tariff states

that NYISO is obligated to issue the determination no later than seven days prior to the deadline for submitting offers to sell UCAP in such auction. Although going forward cost determinations may be requested no less often than annually by the supplier, the Services Tariff does not limit how often on its own initiative NYISO may undertake such determination.

24. We concur with NYISO and the MMU that Astoria did not provide a complete and responsive set of data to a series of questions beginning in February 2012. In NYISO's confidential answer, NYISO provides examples of inconsistencies in Astoria's submissions and of Astoria's failure to reconcile the discrepancies.¹⁴ Further, NYISO's decision not to issue going-forward costs is supported by the MMU. In addition, given that the circumstances and information that was provided to NYISO changed significantly between the time that NYISO provided going-forward cost determinations and February 2012, we agree that NYISO could not determine that the costs Astoria was requesting to include satisfied the requirements of section 23.4.5.3 of the Services Tariff.

25. Astoria asserts that it met what it terms the "objective criteria" of the Services Tariff, i.e., it asserts that it submitted its request for consultation at least 50 business days prior to the applicable deadline and it provided cost support. Astoria argues that the imperative "shall" in section 23.4.5.3 of the Services Tariff requires NYISO to issue going-forward cost determinations once these two conditions are met. According to Astoria, while NYISO is allowed to reduce or exclude a particular cost element, it cannot withhold going-forward cost determinations altogether. As noted above, Astoria's submissions were inconsistent and incomplete. NYISO is under no obligation to issue going-forward cost determinations based upon inconsistent or incomplete information. Indeed, requiring NYISO to issue a going-forward cost determination regardless of deficiencies in the data submitted would undermine the effectiveness of the mitigation measures contained in section 23.4.5.2 of the Services Tariff.

26. Astoria also argues that even if NYISO has discretion to judge Astoria's submissions, NYISO's grant of going-forward cost determinations for the prior five months is evidence that Astoria's submissions were sufficient. We disagree. First, the Services Tariff, as Astoria acknowledges, grants NYISO the authority to make an updated determination of Astoria's going-forward costs at any time. Further, in this case, there were material changes of fact with respect to Astoria's decision to mothball two units. Moreover, given that those changes could effect the going-forward costs of the remaining units in operation, it was reasonable for NYISO to request additional

¹⁴ *Id.* at 2.

information with respect to the remaining units and unreasonable and inconsistent with the Services Tariff for Astoria not to provide the requested information.

27. Thus, for the foregoing reasons, we find that Astoria has not met its burden of proof to show that NYISO's refusal to issue going forward cost determinations for March, April and May 2012 was in violation its Services Tariff or otherwise unreasonable. We also find that NYISO is under no obligation to resume issuing going-forward determinations for Astoria's remaining units unless and until Astoria provides the requested information. Accordingly, we deny the Complaint.

The Commission orders:

Astoria's Complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.