

153 FERC ¶ 61,274
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Astoria Generating Company, L.P. and
TC Ravenswood LLC

Docket No. EL11-50-002

v.

New York Independent System Operator, Inc.

ORDER DENYING REHEARING

(Issued December 4, 2015)

1. On May 15, 2015, Indicated New York Transmission Owners' (NYTOs)¹ sought rehearing of the Commission's order on rehearing issued in this proceeding on April 16, 2015.² NYTOs contend that the April 16 Order failed to address NYTOs' argument that the Commission's initial Complaint Order³ in this proceeding improperly assigned to the Astoria Energy II LLC (Astoria II) generating facility costs associated with shared interconnection facilities that had previously been incurred by Astoria Energy I LLC (Astoria I). As discussed below, we deny NYTOs' request for rehearing.

¹ Indicated New York Transmission Owners include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York Power Authority, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., Power Supply Long Island and Rochester Gas and Electric Corporation.

² *Astoria Generating Co. L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,044 (2015) (April 16 Order).

³ *Astoria Generating Co. L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 (2012) (Complaint Order).

I. Background

A. Complaint and Complaint Order

2. On July 11, 2011, Astoria Generating Company, L.P. and TC Ravenswood, LLC (Complainants) filed a complaint against the New York Independent System Operator, Inc. (NYISO), alleging that NYISO improperly implemented its buyer-side market power mitigation rules in the New York City installed capacity (ICAP) market and violated its Market Administration and Control Area Services Tariff (Services Tariff).⁴ Complainants alleged that NYISO permitted Astoria II to offer into the July 2011 ICAP auction at a price that was below competitive levels and below Astoria II's estimated costs. As relevant here, Complainants asserted that NYISO erred when it excluded from the calculation of Unit Net Cost of New Entry (CONE) the \$120 million that Astoria II paid to Astoria I for shared interconnection facilities on the grounds that those costs were sunk because Astoria I had already incurred them.⁵ Complainants argued that the costs at issue were recoverable and therefore do not qualify as sunk costs that can properly be excluded from the costs of this project. According to Complainants, excluding such costs from the calculation of Astoria II Unit Net CONE resulted in the exemption of Astoria II from the offer floor.⁶

3. In the Complaint Order, issued September 10, 2012, the Commission found, *inter alia*, that it was improper for NYISO to exclude from its calculation of Astoria II's Unit Net CONE the costs associated with the facilities it shared with Astoria I.⁷

⁴ *Id.* P 7-14. Within the ICAP market, NYISO administers market power mitigation measures to determine whether new entrants are economic and should be allowed to bid their costs or whether they are uneconomic and should be required to be mitigated such that they must bid their ICAP at a price no lower than the applicable offer floor. NYISO, Services Tariff, § 23.4.5.

⁵ Complaint Order, 140 FERC ¶ 61,189 at PP 50, 106. As noted in the Complaint Order, Astoria I and Astoria II are affiliated but legally separate and distinct entities with different ownership. *See id.* P 106.

⁶ *Id.* P 50.

⁷ *Id.* P 121.

The Commission held that the Pre-Amendment Rules⁸ and NYISO's tariff define Unit Net CONE as the "localized, levelized embedded costs of a specified Installed Capacity supplier, including interconnection costs . . . net of likely projected annual Energy and Ancillary Services revenues"⁹ and that "embedded costs" include all costs that have been incurred in the past whether the associated costs have opportunity costs or market value.¹⁰ Since Astoria II paid for the use of the shared facilities, the Commission concluded that the amount paid by the Astoria II developers should be included in the Astoria II's Unit Net CONE.¹¹

B. April 16 Order

4. On April 16, 2015, the Commission granted clarification in part, and granted in part, and denied in part, rehearing of the Complaint Order.¹² As relevant here, the Commission denied rehearing on the above-referenced issue regarding embedded or sunk costs, reaffirming its finding that the Unit Net CONE calculation of the Astoria II project must include the embedded costs associated with the interconnection facilities it shares with Astoria I. In doing so, the Commission reiterated that the NYISO Tariff defines Unit Net CONE as the "localized levelized embedded costs . . . net of likely projected annual Energy and Ancillary Services revenues."¹³ Moreover, the Commission stated that the common industry meaning of the term "embedded costs" includes historical, incurred, accounting and total costs, which are essentially "sunk costs."¹⁴ The Commission found that nothing in the NYISO Tariff, or in the common industry meaning of the term, would define "embedded costs" to exclude such sunk costs.

⁸ Pre-Amendment Rules refer to the rules initially in place prior to NYISO's revisions to its market mitigation provisions that became effective November 27, 2010. *N.Y. Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178 (2010), *order on compliance*, 134 FERC ¶ 61,083, *order on reh'g*, 136 FERC ¶ 61,077 (2011); *see also* Complaint Order, 140 FERC ¶ 61,189 at P 3.

⁹ NYISO, Services Tariff, § 23.2.1.

¹⁰ Complaint Order, 140 FERC ¶ 61,189 at P 121.

¹¹ *Id.*

¹² April 16 Order, 151 FERC ¶ 61,044 at P 1.

¹³ *Id.* P 74.

¹⁴ *Id.* PP 74-75 (citing Complaint Order, 140 FERC ¶ 61,189 at P 121, n.152).

5. The Commission stated that the purpose of NYISO's mitigation exemption test is to determine whether a project will be economic at the time the project enters into NYISO's capacity market. One way NYISO does this, the Commission noted, is to compare the specific cost of the new unit with expected capacity market prices.¹⁵ The Commission added that, the determination of whether an investment is "economic" is based on the new entrant's embedded cost, as stated in the NYISO Tariff, "not on the basis of some other type of costs that exclude sunk costs."¹⁶

C. NYTOs' Rehearing Request

6. NYTOs argue that the April 16 Order did not address their argument that the Complaint Order inappropriately assigned to Astoria II embedded costs that Astoria I had incurred first. In particular, NYTOs state that although the sunk costs at issue may be "embedded costs," as that term is used in NYISO tariff, the disputed costs are embedded costs as to Astoria I, not Astoria II.¹⁷ NYTOs state that the embedded costs at issue were incurred first by the developers of Astoria I, not Astoria II, and that Astoria II did not incur any additional costs for any improvement or modification of those shared facilities.¹⁸ NYTOs argue that, because Astoria I incurred these embedded costs first and prior to Astoria II entering into an agreement to assume a portion of the sunk costs, none of those costs have any market value or associated opportunity costs.¹⁹ As such, NYTOs assert that the embedded costs are mere "transfer payments," moving "funds from one entity to another, benefitting the latter and harming the former in equal measure, with no net impact on social welfare."²⁰ Thus, NYTOs contend that such "transfer payments" should not be included in the Astoria II Unit Net CONE calculation because including transfer payments in these calculations may lead to an erroneous conclusion that the new entrant is not economically justified, thereby subjecting it to offer floor mitigation when it is not warranted.²¹

¹⁵ *Id.* P 75.

¹⁶ *Id.*

¹⁷ NYTOs May 15, 2015, Request for Rehearing at 7.

¹⁸ *Id.* at 7-8.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 8-9.

²¹ *Id.* at 9.

7. Additionally, NYTOs claim that the Commission's holding regarding sunk costs in this proceeding is contrary to its recent acceptance of NYISO's tariff provision in Docket No. ER15-1281-000.²² In that filing, NYISO proposed tariff revisions regarding the treatment of sunk costs associated with the expansion of existing generators that seek to sell additional ICAP following a request for additional Capacity Resource Interconnection Service (CRIS). NYTOs state that the tariff revision bars the attribution of embedded or sunk costs from an existing generator to a project for the expansion of that generator's capacity deliverability rights.²³ Alleging similarities between the two issues, NYTOs argue that the treatment of sunk or embedded costs associated with a new generator that shares some facilities with a previously constructed generator should be consistent with the treatment of these costs for purposes of a generator seeking to sell additional capacity under the Services Tariff. Moreover, NYTOs claim that generators that were in service on or before March 7, 2008 are exempt from offer floor mitigation under Services Tariff, section 23.4.5.7.7(a).²⁴ Thus, NYTOs contend that, "since Astoria I entered service on April 1, 2006, consistent with the approach used for [a]dditional CRIS requires that costs already incurred to build Astoria I be excluded from the Unit Net CONE for Astoria II."²⁵

II. Commission Determination

8. We deny NYTOs' request for rehearing. NYTOs argue that the April 16 Order did not address NYTOs' argument that, regardless of the definition of "embedded costs," the sunk costs at issue should not be attributed to Astoria II because such costs were embedded costs incurred first by Astoria I, and not by Astoria II. As such, NYTOs assert, none of the embedded costs at issue have any market value or opportunity costs associated therewith and Astoria II's payment to Astoria I for shared facilities are simply "transfer payments."²⁶ NYTOs' attempt to recharacterize the disputed costs as "transfer

²² *Id.* at 2. In Docket No. ER15-1281-000, NYISO proposed tariff revisions regarding the treatment of sunk costs associated with the expansion of existing generators that seek to sell additional ICAP following a request for additional Capacity Resource Interconnection Service. *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER15-1281-000 (May 6, 2015) (delegated letter order).

²³ NYTOs May 15, 2015, Request for Rehearing at 11.

²⁴ NYISO, Services Tariff, §23.4.5.7.7(a).

²⁵ NYTOs May 15, 2015 Request for Rehearing at 11.

²⁶ *Id.* at 8-9.

payments” provides no basis for reversing the Commission’s ruling regarding the calculation of Unit Net CONE.

9. In the Complaint Order, the Commission found that, in determining whether the costs of the shared facilities should be included in the calculation of Astoria II’s Unit Net CONE, it is irrelevant whether the costs associated with the shared facilities have any market value or opportunity costs.²⁷ As the Commission noted in the April 16 Order, the purpose of NYISO’s mitigation exemption test is to determine whether a project will be economic at the time the project enters the capacity market.²⁸ NYISO makes that determination based on the new entrant’s embedded cost, and these costs—regardless of how NYTOs attempt to label them (i.e., as sunk or some form of transfer payment)—represent the costs necessary for Astoria II to physically interconnect to the transmission system and participate in the capacity market. In other words, the sunk costs at issue that the Commission previously found to be “embedded costs” are not mere “transfer payments.” Rather, these costs are—regardless of labelling—the actual costs that Astoria II was required to incur in order to participate in the capacity market as a separate, distinct supplier and not as part of or as an upgrade to Astoria I. Thus, the embedded costs at issue should be included in the Unit Net CONE calculation for Astoria II.

10. Additionally, we disagree with NYTOs’ assertion that the recently accepted tariff provisions in Docket No. ER15-1281-000 control the outcome of this proceeding. These provisions apply to the expansion of an existing generator, which Astoria II is not. Indeed, NYTOs admit that Astoria II did not incur any additional costs for improvements to or modification of those shared facilities.²⁹ As noted in the Complaint Order, Astoria I and Astoria II are affiliated but legally separate and distinct corporate entities with different ownership.³⁰ Therefore, Astoria II is not an expansion of Astoria I and whether Astoria I was in service prior to March 7, 2008 is irrelevant.

²⁷ Complaint Order, 140 FERC ¶ 61,189 at P 121.

²⁸ April 16 Order, 151 FERC ¶ 61,044 at P 75.

²⁹ NYTOs May 15, 2015 Request for Rehearing at 8.

³⁰ Complaint Order, 140 FERC ¶ 61,189 at P 106; *see also* Complainants Answer, Docket No, EL11-50-000, app. A at 22, (Supplemental Aff. of Mark D. Younger) (filed Aug. 18, 2011).

The Commission orders:

NYTOs' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.