

130 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket Nos. ER09-1682-000
ER09-1682-001
ER09-1682-002

ORDER ON MOTION FOR STAY AND REQUESTS FOR REHEARING

(Issued January 15, 2010)

1. On September 4, 2009, as corrected on September 30, 2009, the New York Independent System Operator, Inc. (NYISO) submitted a proposed stand-alone Rate Schedule Market Mitigation No. 1 that implements a new market mitigation measure that it intends to apply to three specifically identified generators in response to conduct NYISO identifies as an abuse of market power.¹ In its November 3, 2009 order,² the Commission accepted and suspended the tariff sheets and made them effective subject to refund and subject to conditions, and acted on associated requests for confidentiality. This order denies a motion for stay of a confidentiality ruling in the November 3, 2009 Order and accepts, in part, and denies, in part, requests for rehearing of the November 3, 2009 Order. In addition, this order directs additional compliance filings consistent with the foregoing.

I. Background

A. November 3, 2009 Order

2. On September 4, 2009, NYISO made a Federal Power Act section 205 filing requesting authority to apply new mitigation rules prospectively to three specific, but unnamed, generators. NYISO described the evidence it collected and provided generator-specific details in Attachments C, D, and E to its filing. NYISO requested

¹ New York Independent System Operator, Inc., Rate Schedule Market Mitigation No. 1, Original Sheet Nos. 1-4.

² *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,103 (November 3, 2009 Order).

privileged and confidential treatment of Attachments C, D, and E. The subject generators of Attachments D and E (Generation Owners) and the generator identified in Attachment C (Attachment E Supplier³) filed separate protests and also requested privileged and confidential treatment and exemption from Freedom of Information Act (FOIA)⁴ disclosure. They asserted that their answers and attached exhibits contain commercially sensitive information, the release of which would cause competitive harm.

3. In the November 3, 2009 Order, the Commission granted, in part, and denied, in part, the requests for privileged and confidential treatment and exemption from FOIA disclosure. With regard to the relevant standard, the Commission stated that section 388.107(d) of the Commission's regulations, which implements FOIA exemption 4, provides that (1) trade secrets and commercial or financial information obtained from a person that are privileged or confidential are exempt from disclosure;⁵ (2) FOIA's exemptions are to be narrowly construed so as not to frustrate the underlying policy of disclosure and non-secrecy;⁶ and (3) if only a portion of a record is exempt from disclosure, the non-exempt portion must be disclosed if it is "reasonably segregable."⁷ The Commission also cited a decision by the United States Court of Appeals for the District of Columbia Circuit for the following guidance on determining whether information is confidential:

Commercial or financial matter is 'confidential' . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.⁸

³ Attachment E Supplier refers to itself as such despite the fact that Attachment C to NYISO's September 4, 2009 filing deals with this generator.

⁴ 5 U.S.C. § 552 (2006).

⁵ 18 C.F.R. § 388.107(d) (2009).

⁶ *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

⁷ 5 U.S.C. § 552(b) (2006).

⁸ *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 282 (D.C. Cir. 1987) (citing *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)), *vacated on other grounds*, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992).

4. With particular regard to disclosure of the identities of the three generators, the Commission denied the requests for confidential treatment, reasoning that the names were not themselves trade secrets or financial data and that disclosure of the generators' identities did not reveal otherwise confidential financial or commercial information or permit other market participants to connect generator names with commercially sensitive bid or other data and thus would not cause substantial harm to the competitive positions of the respective generators.⁹

5. With regard to the disclosure of commercially sensitive data, the Commission granted the requests for privileged and confidential treatment of generator or equipment specific data and transmission system information which is commercially valuable, necessary to participation in the marketplace, and not yet public, including bidding strategies generator reference prices, and generator costs. The Commission held that reference prices used as default bids by NYISO are competitive data that should not be revealed to other market participants. In addition, the Commission held that guarantee payments and relevant time periods were to be held in confidential status as they could be used to calculate the underlying Locational Based Marginal Prices (LBMPs), bids, reference prices, and costs.¹⁰

6. The Commission denied requests for confidentiality of arguments and testimony that (1) do not reveal specific bid data or pricing, (2) concern previously publicly released bidding strategies, or (3) consist of information that is general or hypothetical in nature as disclosure of such arguments and testimony would not cause harm to the commercial position of the generators or to the NYISO market. The Commission stated that public disclosure of the foregoing arguments and testimony (with any confidential bid data, etc. redacted) comports with the FOIA policy of broad disclosure¹¹ and a presumption of openness¹² and is, therefore, in the public interest.¹³

7. Accordingly, the Commission directed NYISO and the Generation Owners and Attachment E Supplier to submit revised, redacted versions of their respective filings and pleadings by December 3, 2009, consistent with the foregoing rulings.

⁹ November 3, 2009 Order, 129 FERC ¶ 61,103 at P 29.

¹⁰ *Id.* P 30.

¹¹ *Id.* P 31 (citing *FBI v. Abramson*, 456 U.S. 615, 621 (1982)).

¹² *Id.* (citing Office of the Attorney General, Memorandum for Heads of Executive Departments and Agencies at 1 (March 19, 2009)).

¹³ *Id.*

B. Subsequent Pleadings

8. On November 25, 2009, Generation Owners submitted a request for stay and rehearing of the compliance obligation of the November 3, 2009 Order regarding the release of their identities. The New York Public Service Commission (NYPSC) also filed for rehearing of the November 3, 2009 Order and the Generation Owners and Attachment E Supplier each filed a separate request for clarification of that order. On November 18, 2009, the New York State Consumer Protection Board (Consumer Protection Board) submitted a request for clarification that the Commission intends in the future to render a determination on its request for public disclosure of the period in which the three generators are alleged to have abused market power and to release the total amount of excess guarantee payments received by each of the generators.¹⁴ On December 1, 2009, Attachment E Supplier submitted a request for clarification that, if the Commission grants Generation Owners' motion for a stay, then any relief granted will apply with equal force to Attachment E Supplier.¹⁵

II. Requests for Stay and Rehearing

A. Generation Owners' Motion for Stay and Request for Rehearing

9. On November 25, 2009, Generation Owners filed a motion for stay pending rehearing, and a request for rehearing of the November 3, 2009 Order to the extent the order requires the release of the Generation Owners' identities. However, notwithstanding the foregoing, Generator Owners also state that they seek stay until at least after the Commission has made a finding that the generators' behavior departed from that which would be found in a competitive market, the standard set forth in section 3.2.3 of Attachment H to NYISO's Market Administration and Control Area Services tariff (section 3.2.3).¹⁶ Generation Owners argue that under section 705 of the Administrative Procedures Act,¹⁷ the Commission may enjoin action when it finds that "justice so requires" and that the standards for granting injunctive relief are: (1) the likelihood of success on the merits, (2) whether irreparable injury to the complainant will

¹⁴ The Commission issues such a determination in the instant order, thus Consumer Protection Board's motion for clarification is dismissed as moot.

¹⁵ Because the Commission denies stay in the instant order, Attachment E Supplier's motion for clarification is dismissed as moot.

¹⁶ Generation Owners November 25, 2009 Motion/Request at 9.

¹⁷ 5 U.S.C. § 705 (2006).

occur if the relief is not granted, (3) whether the injury outweighs harm to the respondent or other parties if the relief is granted, and (4) whether the relief is in the public interest.¹⁸

10. Generation Owners contend that they are likely to succeed on the merits and they incorporate by reference the arguments they made in their September 25, 2009 protest in this proceeding. They assert that they have done nothing wrong and have bid in accordance with NYISO's existing Market Services Tariff, and releasing their identities will cause them irreparable harm. Generation Owners contend that the courts have developed several principles to guide them in the determination of whether irreparable harm will occur, i.e., harm must be "certain and great," and "actual and not theoretical." Generation Owners further contend that there must be a "clear and present need" for equitable relief, and the harm must be "certain to occur in the near future." In addition Generation Owners argue that, while economic loss does not, in and of itself, constitute irreparable harm, the Commission has found irreparable harm where no viable post hoc remedy existed.

11. Generation Owners assert that the Commission has previously kept information obtained on allegations of market manipulation confidential because the Commission recognized the potential harm to persons who might be erroneously implicated or adversely affected by simply being associated with an investigation. Generation Owners assert that the same reasoning applies here, in that release of their identities will cause just such irreparable harm to their economic interests and reputations. Generation Owners contend that generation facilities are always a potential acquisition target for other operators, that reputation has a direct impact on the value of these facilities, and that the release of their identities would reduce the value of their facilities, albeit by an amount that is difficult to precisely calculate.

12. Generation Owners also state that the release of their identities may negatively affect their ability to market wholesale power through bilateral agreements, and that this loss of goodwill resulting from unfounded allegations of an exercise of market power is not an injury that can be easily remedied after-the-fact. Generation Owners state that the potential harm is actual and not theoretical, given the seriousness of the accusations found in the pleadings. Generation Owners assert that because the threatened harm is real, certain, and cannot be easily remedied, it is an irreparable harm and therefore the Commission should issue a stay of its order and grant rehearing on this issue. Generation Owners add that staying the Commission's order pending rehearing does not harm other parties and is in the public interest. Generation Owners add that if, after due review, the

¹⁸ *Citing Wisconsin Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 673-74 (D.C. Cir. 1985); *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Ameren Servs. Co., et al.*, 127 FERC ¶ 61,121, at P 44-45 (2009).

Commission determines that the behavior of the generators at issue here departed from that which would be found in a competitive market, there will be ample opportunity for their identities to be disclosed.

B. NYPSC's Request for Rehearing

13. On December 2, 2009, the NYPSC filed a request for rehearing of the November 3, 2009 Order. The NYPSC states that the November 3, 2009 Order did not explain how the release of aggregate data concerning the extent and magnitude of the anticompetitive behavior could be used to calculate underlying LBMPs, bids, reference prices, and costs. The NYPSC seeks release of aggregate data and asserts that the District of Columbia Circuit Court of Appeals found in a similar case that, at a minimum, a coherent explanation of why disclosure of the requested aggregate data would reveal that proprietary information was necessary.¹⁹

14. Regarding the extent of the anticompetitive harm, the NYPSC requests that the Commission provide for the disclosure of the dates when such harm commenced and ceased, or, in the event the specific dates cannot be disclosed, the NYPSC requests the approximate time frames. The NYPSC contends that this disclosure may highlight the need for additional tariff language to protect consumers during any potentially lengthy periods between when the behavior first occurs and when such behavior can be remedied. The NYPSC also contends that allowing market participants to collect excessive charges as a result of their exercise of market power, while an appropriate remedy is formulated, will undermine consumer confidence in the market and the Commission's ability to ensure just and reasonable rates. Regarding the magnitude of the anticompetitive harm, the NYPSC seeks the release of the total excess payments to each generator.

III. Commission Determination

15. We grant, in part, and deny, in part, the requests for rehearing and deny the request for stay regarding the release of the names of the Generation Owners and Attachment E Supplier.²⁰ As discussed below, consistent with our action on rehearing and stay, we direct further compliance filings.²¹

¹⁹ NYPSC December 2, 2009 Filing at 8 (citing *Mudge Rose Guthrie Alexander & Ferdon v. U.S. International Trade Comm'n*, 846 F.2d 1527, 1532 (D.C. Cir. 1988)).

²⁰ As noted earlier, at P 9, although Generation Owners state that they request a stay "pending rehearing" of the November 3, 2009 Order, which this order denying rehearing on the issue of the release of their identities renders moot, as noted above, Generation Owners also state that they seek stay until at least after the Commission finds that the generators' behavior departed from that which would be found in a competitive
(continued...)

A. Disclosure of Identities**1. Rehearing**

16. Although Generation Owners state that they seek rehearing of the November 3, 2009 Order's ruling directing the disclosure of their identities, Generation Owners do not make any specific arguments to support a grant of rehearing. The entirety of their pleading consists of arguments supporting stay of the requirement to release their identities until the Commission acts on the merits of NYISO's mitigation proposal filing and then only if the Commission determines that the Generation Owners' conduct departed from that which would be found in a competitive market, i.e., the section 3.2.3 tariff standard for imposing mitigation. Importantly, they do not claim that the Commission erred in its analysis of whether the release of their identities meets the statutory and regulatory standards for the release of information claimed to be of a proprietary or confidential nature.²² Moreover, potential harm to reputation or goodwill, which Generation Owners claim in their motion for stay will result from release, is not a standard for reviewing release under FOIA, the Commission's FOIA regulations, or the NYISO tariff's confidentiality standards, which we considered and applied in the November 3, 2009 Order.²³ Further, generalized allegations of competitive harm are

market. We are treating the motion as requesting stay until such time as, and only in the event that, the Commission accepts NYISO's mitigation proposal.

²¹ As noted in the November 3, 2009 Order, the Commission has received two FOIA requests for public release of these documents and of the identities of the generators from non-parties to this proceeding. These requests will be handled separately, consistent with this order.

²² See November 3, 2009 Order, 129 FERC ¶ 61,103 at P 29 (applying *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 282 (citing *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)), *vacated on other grounds*, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992)).

²³ November 3, 2009 Order, 129 FERC ¶ 61,103 at P 27-29.

insufficient to support a decision to withhold documents,²⁴ and FOIA's exemptions are to be narrowly construed so as not to frustrate the underlying policy of disclosure and non-secrecy.²⁵

17. To promote market participant and public confidence that wholesale power markets are operating fairly, especially when there are allegations that there has been an exercise of market power, it is in the public interest to provide for the fullest possible public disclosure. In contrast, it is not in the public interest in a proceeding such as this to allow the administrative and due process difficulties which result from having to deal with wholly or partially redacted filings and pleadings. To the extent that Generation Owners' request for rehearing can be read as seeking rehearing only on the timing of the Commission's directive to release the identities before the Commission acts on the merits of NYISO's mitigation proposal, we deny rehearing not only for reasons given here and in the November 3, 2009 Order, but also for the reasons set forth below in our discussion of the motion for stay.

18. Accordingly, we deny rehearing of the directive of the November 3, 2009 Order to release the identities of the subject generators, including both Generation Owners and Attachment E Supplier.

2. Stay

19. To assure definiteness and finality in Commission proceedings, the Commission typically does not stay its order.²⁶ We are not persuaded that we should take a different approach and stay the confidentiality ruling of the November 3, 2009 Order. Accordingly, for the reasons discussed below, we will deny the request for stay.

20. As Generation Owners acknowledge, the statutory standard for ordering stay of a Commission order is whether "justice so requires." In this case, we find that justice does not so require and hence we deny stay of the requirement to release their (and Attachment E Supplier's) identities here. In addressing requests for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether

²⁴ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *accord Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985).

²⁵ *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

²⁶ *E.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,142, at P 17-18 (2005).

issuing a stay will substantially harm other parties; and (3) whether a stay is in the public interest.²⁷ Generation Owners' claims of irreparable harm to their goodwill and ability to market their capacity, (essentially harm to their reputation) are speculative, and the potential impact of the allegations on the value of their physical facilities is likewise speculative.

21. Further, as we discussed earlier, claims as to potential harm to reputation do not overcome the public interest in public proceedings and are not, in any event, one of the standards laid out in FOIA, the Commission's FOIA regulations, or the tariff to be applied in reviewing whether to release information claimed to be confidential. In this regard, we find irrelevant the fact that, on occasion, the Commission has kept confidential the identities of entities that are the subject of investigations of allegations of market manipulation that carry with them the potential for significant penalties and which would be the subject of investigations conducted by the Commission's Office of Enforcement; the proceeding here is not such a case. We also find that, as section 3.2.3 requires a section 205 filing when NYISO believes that conduct addressed by that section has occurred, such filing is intended to be public, at least insofar as the identities of the subject entities are concerned. Finally, identities are routinely revealed in publicly-filed complaints or petitions for declaratory order which accuse entities of conduct that, just as Generation Owners assert here, might harm their reputation prior to the Commission finding that such alleged conduct did in fact occur. The alleged conduct of Generation Owners could have generated such complaints or petitions for declaratory order independently of NYISO's mitigation proposal.

22. Further, Generation Owners' claim that no party will be harmed is unsupported. Finally, as to public interest considerations, as discussed above, we find that it is generally in the public interest to require the fullest possible disclosure,²⁸ and it is particularly not in the public interest in a proceeding like this one to withhold the

²⁷ *Ameren Servs. Co.*, 127 FERC ¶ 61,121, at P 44 (2009) (citing [Pinnacle West Capital Corp.](#), 115 FERC ¶ 61,064, at P 8 (2006)); see also *Columbia Gas Transmission LLC*, 129 FERC ¶ 61,021, at P 6 (2009); *Cal. Indep. Sys. Operator, Corp.*, 127 FERC ¶ 61,177, at P 39 (2009).

²⁸ See November 3, 2009 Order, 129 FERC ¶ 61,103 at P 31 & n.40 (citing Office of the Attorney General, Memorandum for Heads of Executive Departments and Agencies (March 19, 2009) (FOIA "should be administered with a clear presumption: [i]n the face of doubt, openness prevails.")); see also 18 C.F.R. § 388.112(c)(i) (2009), which states in part that the "Commission retains the right to make determinations with regard to any claim of privilege . . . and the discretion to release information as necessary to carry out its jurisdictional responsibilities."

identities and to allow the administrative and due process difficulties which result from having to deal with wholly or partially redacted filings and pleadings.

23. Accordingly, the motion for stay is denied. The Generation Owners and Attachment E Supplier shall file a public document in this docket revealing their identities within 5 days of this order.

B. Disclosure of Additional Data and Information

24. We grant, in part, and deny, in part rehearing with regard to the disclosure of certain additional data and information. In the November 3, 2009 Order, the Commission recognized the confidential nature of certain types of information that could be used to gain competitive advantage, such as bids and individual generators' costs.²⁹ However, the Commission denied requests for confidentiality with regard to those portions of the arguments and testimony that do not reveal specific bid data or pricing or that is general in nature as this release would not cause competitive harm to the commercial position of the generators or the NYISO market.³⁰

25. We find that the public release of aggregated data showing the total dollar value of Bid Production Cost Guarantee payments above reference prices received by each generator during the period of the claimed conduct, as shown in Table 1 of each of the Boles affidavits contained in NYISO's September 4, 2009 filing, will not impair the government's ability to obtain necessary information in the future and will not cause substantial harm to the competitive position of the generators or harm to the markets in which they operate.³¹ The redacted tables in Attachments C, D, and E of that filing primarily contain individual bid, reference price, and cost data on a day-by-day basis for each generator, the public release of which could cause competitive harm to the generators. However, the public release of an aggregation of the Bid Production Cost Guarantee payment data would provide parties with the magnitude of the effect that the generators' conduct had during the period in question without violating confidentiality requirements. Further, although we find that the public release of the exact dates of the claimed conduct could possibly lead to disclosure of confidential information regarding

²⁹ November 3, 2009 Order, 129 FERC ¶ 61,103 at P 30.

³⁰ *Id.* at P 31.

³¹ See November 3, 2009 Order, 129 FERC ¶ 61,103 at P 29 (citing *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 282 (citing *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)), *vacated on other grounds*, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992)).

confidential bids and bidding strategies, we find that the public release of the beginning and ending dates of the period in which the alleged conduct occurred and the total number of days within that period when the alleged conduct occurred will not violate confidentiality requirements and should sufficiently satisfy the NYPSC's request.³²

26. Accordingly, we grant rehearing in part and direct NYISO to make a further public compliance filing within 5 days from the date of this order that provides aggregated Bid Production Cost Guarantee payment data for each generator, and the calendar period and the total number of days within which the alleged conduct occurred, as discussed above.

The Commission orders:

(A) The requests for rehearing are hereby denied, in part, and granted, in part, as discussed in the body of this order.

(B) The motion for stay is hereby denied, as discussed in the body of this order.

(C) Generation Owners, Attachment E Supplier, and NYISO are directed to make the compliance filings as directed above within 5 days of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³² *Id.*