

131 FERC ¶ 61,205
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Astoria Gas Turbine Power LLC v. New York
Independent System Operator, Inc.

Docket No. EL09-57-001

ORDER ON REHEARING

(Issued June 1, 2010)

1. This order addresses the request for rehearing submitted by Astoria Gas Turbine Power LLC (NRG) of the Commission's order issued in this proceeding on September 3, 2009.¹ In the September 3, 2009 Order, the Commission denied NRG's complaint against the New York Independent System Operator, Inc. (NYISO), in which NRG alleged that NYISO had wrongfully excluded NRG's proposed "Astoria Repowering Project"² from NYISO's Class Year 2009 interconnection study process. As discussed below, we deny rehearing.

Background

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

¹ *Astoria Gas Turbine LLC v. New York Independent System Operator, Inc.*, 128 FERC ¶ 61,221 (2009) (September 3, 2009 Order).

² According to NRG, the "Astoria Repowering Project" refers to NRG's proposal 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. As noted in the September 3, 2009 Order, the project actually consists of two components, which NYISO referred to as Berrians GT and Berrians III GT.

system.³ 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.⁴ 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 NRG’s complaint are the requirements for placement in the NYISO Class Year 2009 interconnection study as set forth in Attachment S to NYISO’s OATT. As relevant, Attachment S⁵ provides that a project shall be included in a given Class Year if, among other things:

(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. The record reflects that Article X, a provision of New York State environmental law, had expired in 2003 and had been replaced with different provisions, including the requirement to submit a Draft Environmental Impact Statement (DEIS) as part of the state’s permit application process.⁶ The central question addressed in the September 3, 2009 Order was whether, as required by subsection (b), the “state regulators,” in this case the New York State Department of Environmental Conservation (DEC), made a determination by March 1, 2009, that a “comparable permitting application” for the Astoria Repowering Project was “complete.” NRG averred that, as verified by letters from the DEC, NRG had satisfied the subsection (b) requirement by March 1, 2009, and that the Astoria Repowering Project should therefore be included in

³ NYISO, FERC Electric Tariff, Original Volume No. 1, Attachment S (Rules to Allocate Responsibility for the Costs of New Interconnection Facilities).

⁴ *See, e.g.*, NYISO OATT Attachment S, Section I.A at Sub Fourth Revised Sheet No. 653A.

⁵ NYISO OATT, Attachment S, section VI.B.3.a.(b), at Sub Fifth Revised Sheet No. 674 (hereinafter referred to as “subsection (b)”). In its complaint, NRG refers to this provision as section IV.F.5.a.(1) of Attachment S; however, recently effective revisions to Attachment S resulted in the foregoing change to the section number for this provision.

⁶ “Article VII” application procedures apparently were not relevant.

the Class Year 2009 interconnection study process. In its answer to the complaint, NYISO countered, claiming that NRG had not satisfied the subsection (b) requirement because the DEC made no determination of completeness regarding the Astoria Repowering Project by March 1, 2009, and, therefore, NRG's project was properly excluded from that class year.

5. For substantially the same reasons set forth in NYISO's answer, intervenors Bayonne Energy Center (Bayonne), Astoria Energy II LLC (Astoria Energy II) and Consolidated Energy Company of New York and Orange and Rockland Utilities sought denial of the complaint.

6. In the September 3, 2009 Order, based on analysis of the tariff language and documentary evidence submitted by NYISO and NRG, the Commission determined that NRG had not satisfied the subsection (b) requirement for inclusion of the Astoria Repowering Project in Class Year 2009. Accordingly, the Commission denied NRG's complaint. The Commission found that, for purposes of subsection (b): the air discharge permit application NRG submitted to the DEC is "comparable" to an Article X permit application; the permit application must be "complete" in the sense that the state regulators' (i.e., the DEC's) filing requirements are met so that the state regulators may begin to analyze the application, receive public comments, set the application for hearing, or implement other subsequent processes analogous to the Commission's requirement that a public utility meet our filing regulations when filing to, e.g., change its rates (i.e., a determination of completeness does not entail substantive review of the application); and a state regulator's "determination" merely requires the issuance of some form of written statement by the state regulators that the application is "complete" as so defined (i.e., issuance by the state regulators of a formal "Notice of Completion" is not required).⁷ Finally, the Commission found that the state regulators' "determination" of completeness must occur on or before March 1. The Commission found that, contrary to NRG's position, the March 1 deadline is not met by submitting an application by March 1, even if complete.⁸

7. The Commission next determined that the language in a March 9, 2009 letter from the DEC to NRG (March 9, 2009 Letter) reasonably evidenced a DEC "determination" that NRG's permitting application was "complete" in accordance with the Commission's interpretation of the subsection (b) requirements. The March 9, 2009 Letter stated, in relevant part:

⁷ September 3, 2009 Order, 128 FERC ¶ 61,221 at P 28-30.

⁸ *Id.* at P 30.

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 Draft Environmental Impact Statement (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.

Nevertheless, the Commission noted that the March 9, 2009 Letter was dated past the critical, bright-line tariff deadline, i.e., March 1, provided for in subsection (b).⁹

8. The Commission next found that a letter from the DEC dated February 27, 2009 (February 27, 2009 DEC Letter to NYISO) on which NRG had relied,¹⁰ was not sufficient evidence of the determination of completeness required by subsection (b). In that letter, among other things, the DEC Project Manager stated that DEC had received the “narrative portions” of NRG’s DEIS (Draft Environmental Impact Statement), a component of the air permitting application, and that the DEC expected the “DEIS, including all appendices, to be provided next week.” A subsequent letter from a DEC Bureau Chief to NRG representatives, dated July 6, 2009 (July 6, 2009 Letter), also relied on by NRG, verified that the DEIS materials referenced in that February 27, 2009 Letter were submitted electronically and that a paper copy of the document was received on March 9, 2009.¹¹ The Commission held that, even assuming that electronic filing was permissible, it is apparent that, by failing to include required DEIS appendices, NRG was not yet fully compliant with the DEC’s filing requirements as of February 27, 2009. Moreover, the Commission continued, even if NRG submitted the appendices the next day, or any time prior to March 1, 2009, the February 27, 2009 DEC Letter to NYISO does not itself sufficiently evidence a state regulator’s “determination” that the application was, in fact, “complete” as of February 27, 2009. The Commission further determined that the July 6, 2009 Letter only purported to report what the February 27, 2009 Letter said, which was that required appendices were missing, and, thus, the July 6, 2009 Letter cannot be read as recognition that the electronic version of the DEIS was complete, i.e., included all the required appendices, as of February 27, 2009. Moreover, the Commission held, even if the July 6, 2009 Letter

⁹ September 3, 2009 Order, 128 FERC ¶ 61,221 at P 31-32.

¹⁰ Complaint, Attachment D (letter from DEC Project Manager Stephen Tomasic to Robert Fernandez, General Counsel, NYISO, dated February 27, 2009).

¹¹ NRG July 7, 2009 answer, Exhibit A.

constituted a “determination” that the application was complete, it was dated over four months past the critical March 1 deadline.¹²

9. Having found that NRG’s complaint should be denied, the Commission added that, consistent with its the findings in the case, NYISO should revise subsection (b) in order 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. The Commission directed NYISO to meet with its stakeholders for the purpose of amending subsection (b), and to submit a new filing within 90 days of the September Order.¹³

NRG’s Request for Rehearing

10. NRG first contends that the Commission erroneously failed to address a second letter from the DEC also dated February 27, 2009 (February 27, 2009 DEC Letter to NRG),¹⁴ which NRG had appended to its complaint and which, NRG asserts, addresses the Commission’s finding that NRG failed to demonstrate that it had submitted all required appendices prior to March 1, 2009. NRG notes that the February 27, 2009 DEC Letter to NRG states that the DEC “is in receipt of the following draft sections of the [DEIS] for the proposed action”¹⁵ and then asserts that the letter proceeds to list 28 different “appendices” submitted by NRG, which it asserts are all the materials required for a completed DEC application.¹⁶ NRG further notes that the letter concludes: “These documents are currently undergoing review by DEC.”¹⁷ NRG contends that the February 27, 2009 DEC Letter to NRG provides clear evidence that the DEC had issued

¹² September 3, 2009 Order, 128 FERC ¶ 61,221 at P 33-34.

¹³ September 3, 2009 Order, 128 FERC ¶ 61,221 at P 38.

¹⁴ Complaint, Attachment E (letter from Stephan Tomasik, DEC Project Manager, to Mr. David Alexander, Managing Principal, Air Resources Group, LLC, dated February 27, 2009).

¹⁵ *Id.*

¹⁶ NRG request for rehearing at 4. In our discussion that follows below, we note that, contrary to NRG’s assertion, the February 27, 2007 DEC Letter to NRG only contains a list of the titles of 28 DEIS sections and does not, in fact, refer to the list as “appendices.”

¹⁷ *See* Complaint, Attachment E.

the necessary written “determination” prior to March 1, 2009, that DEC had: (i) received a completed application, including all necessary appendices, and (ii) commenced substantive review of NRG’s application.¹⁸ NRG states that the letter does not suggest that additional documents are required, and that, indeed, NRG provided no additional documents after February 27, 2009, other than hard copy versions of certain appendices that NRG had previously submitted electronically.¹⁹

11. Next, NRG contests the Commission’s analysis of the other letter dated February 27, 2009 (February 27, 2009 DEC Letter to NYISO). NRG contends that the Commission gave excessive weight to statements in that letter implying that NRG had not submitted all the necessary appendices prior to March 1, 2009, i.e., that NRG had provided only the “narrative” portions of the DEIS and that “[the DEC] expect[s] the DEIS, including all appendices to be provided next week.” NRG argues that, as its witness Mr. Alexander explained in his affidavit, NRG provided the DEC with an electronic copy of the application and appendices and that the DEC’s statements simply reflected an arrangement with the DEC that hardbound courtesy copies of the appendices would be submitted within the next week. NRG refers to statements in that letter that the DEC received “Permit Modification Applications for Title IV and Title V Air Permits, and Emission Reduction Credits associated with the retirement of one existing generation unit [and] an Industrial SPDES Permit Modification Application These applications are currently under review by the [DEC].” According to NRG, these statements constitute conclusive evidence that the DEC had made a determination that NRG had submitted a completed permitting application and that the DEC had begun substantive consideration of the application prior to March 1, 2009.²⁰ NRG asserts that, taken together, the two February 27, 2009 Letters show that the DEC had issued a determination, by March 1, 2009, that NRG’s air permitting application was administratively complete. NRG asserts that the only reason NYISO refused to accept these statements and admit the Astoria Repowering Project into Class Year 2009 was not out of concern that NRG had not submitted a complete permitting application, but because NYISO’s interpretation of subsection (b) required the DEC to issue a Notice of Completion prior to including a project in the Class Year study process – an interpretation the Commission soundly rejected in the September 3, 2009 Order.

12. Further, NRG argues that the Commission should have deferred to the DEC as to when the DEC made a determination that NRG’s air permitting application was

¹⁸ NRG request for rehearing at 5.

¹⁹ *Id.* at 6.

²⁰ NRG request for rehearing at 6.

complete. Specifically, NRG asserts that the Commission misconstrued which of the two February 27, 2009 letters that the July 6, 2009 Letter was referring to and claims the July 6, 2009 Letter demonstrates that the DEC made that determination as of February 27, 2009. NRG claims: “The July 6, 2009 Letter from the DEC states that the DEC issued a “completeness determination” in the second February 27, 2009 Letter.”²¹ NRG relies on the following statement in the July 6, 2009 letter: “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, 2009 letter from Mr. Stephen Tomasik to Mr. David Alexander.” NRG contends that the Commission misconstrued the July 6, 2009 Letter insofar as the Commission addressed that letter as if it were referring to the February 27, 2009 DEC Letter to NYISO, whereas an examination of the July 6, 2009 Letter shows that it was actually referring to the February 27, 2009 DEC Letter to NRG. NRG then asserts that the February 27, 2009 DEC Letter to NRG “states that the DEC “is in receipt of [all] draft sections of the . . . (DEIS) for the proposed action.”²² NRG also notes that the letter concludes with the statement that “[t]hese documents are currently undergoing review by DEC.” Further, NRG contends that the Commission should have afforded more consideration to an affidavit submitted by an NRG consultant, Mr. David Alexander, detailing the process that NRG went through to ensure that the DEC issued a completeness determination prior to March 1, 2009. NRG asserts that the affidavit details Mr. Alexander’s efforts in working with the DEC to complete the air permitting application and supports a finding that the DEC intended its February 27, 2009 letters to constitute the requisite determination of completeness.

13. NRG also asserts that, in the September 3, 2009 Order, the Commission found the existing tariff provision (subsection (b)) to be confusing and inaccurate and ultimately rejected the provision as unjust and unreasonable and therefore ordered NYISO to file to clarify the meaning of the provision. NRG asserts that the Commission cannot reasonably find a tariff provision unclear and then penalize NRG for the DEC’s failure to issue a determination that meets the strict definition of what those same unclear tariff provisions require. NRG argues that, if the tariff provision was unclear, the Commission should have considered “extrinsic evidence” to discern its meaning.²³ To that end, NRG

²¹ We note that the July 6, 2009 Letter, in fact, does not contain any such statement referring to a “completeness determination” as NRG alleges.

²² We note that, contrary to NRG’s assertion, the February 27, 2009 DEC Letter to NRG does not contain the word “[all]” or any other words to that effect. Rather, the letter states simply that “[DEC] is in receipt of the *following* draft sections of the . . . [DEIS].” (emphasis added.)

²³ NRG request for rehearing at 12.

argues that the Commission should have, but failed to, “consider the extrinsic evidence that the DEC determined that it was in receipt of a completed Astoria [Repowering Project] permitting application.”²⁴

14. NRG further argues that it should not be penalized for its efforts in trying to comply with an allegedly outdated and unclear tariff provision, particularly since this was the first time the tariff provision was applied to a generator subject to what NRG refers to as “the alternate DEC environmental permitting process.”²⁵ To that extent, NRG argues that the Commission should not apply ambiguous tariff provisions in a manner that frustrates their purpose (in this case, to facilitate interconnection of new generation) and should avoid decisions that would otherwise inhibit business and financing decisions. In any case, NRG opines that fundamental principles of fairness dictate that the Commission should direct NYISO to allow the Astoria Repowering Project into Class Year 2009.

15. Finally, NRG asserts that, in the alternative, the Commission should “waive any technical deficiencies” and direct NYISO to include the Astoria Repowering Project in the Class Year 2009 interconnection study process. NRG claims that the project was, in fact, ready to enter the 2009 Class Year interconnection study on March 1, 2009, because it had successfully completed a System Results Interconnection Study and submitted a completed environmental permitting application. NRG asserts that the principles underlying the interconnection process require that the Astoria Repowering Project enter the 2009 Class Year. NRG asserts that Attachment S is designed to (i) ensure that generators demonstrate a serious commitment to the permitting process prior to March 1 of the relevant year, and (ii) encourage the interconnection of new generation resources. Arguing that the NYISO transmission system is deeply in need of new, clean, efficient generation resources, NRG states that the Astoria Repowering Project would retire 31 less efficient generators in the New York City area to make way for new, clean-burning, efficient units. NRG argues that interpreting Attachment S in a manner that creates barriers to new entry frustrates the purpose of both the provision and Order No. 2003.²⁶ Further, NRG asserts that fundamental principles of fairness dictate that NRG should not

²⁴ *Id.*

²⁵ *Id.*

²⁶ Citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 1 (2003), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’ns v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

be penalized because NYISO's tariff was out of date and NYISO provided conflicting interpretations of those requirements to NRG and the DEC. NRG claims that, as a courtesy to NRG, and because the DEC knew NRG needed a determination letter, the DEC drafted something it viewed as an appropriate acknowledgement that it was currently reviewing NRG's completed application. NRG asserts that the Astoria Repowering Project should not be delayed due to the apparent lack of clarity in a series of "non-standard letters" generated by the DEC.²⁷

16. Reasserting that it did, in fact, submit a completed permitting application to the DEC prior to March 1, 2009, NRG contends that a window still exists in which a timely determination on rehearing would allow the Astoria Repowering Project to be included in Class Year 2009 without significantly impacting the study process schedule.

Procedural Matters

17. On October 20, 2009, Bayonne and Astoria Energy II each filed an answer to NRG's request for rehearing.²⁸ NYISO filed its answer on October 21, 2009.

18. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2009) prohibits answers to requests for rehearing. Accordingly, we reject the answers to NRG's request for rehearing.

Discussion

19. We will deny rehearing. NRG, as the complainant, bears the burden of proof in this case,²⁹ but failed to demonstrate with clear and convincing evidence that it met that burden. Its evidence consists of its own interpretation of unclear, noncommittal excerpts of various letters from the DEC. As we emphasized in the September 3, 2009 Order, the relevant question for purposes of interpreting and applying subsection (b) is whether the DEC issued a written determination, by March 1, 2009, that the air permitting application for the Astoria Repowering Project was complete. The issue is not resolved alone by whether NRG had in fact submitted a complete application by that date; the DEC must have completed its initial review of the application and have made a "determination" on or before March 1, 2009, that the application met its filing requirements such that substantive review of the application could commence. While the Commission held that

²⁷ NRG request for rehearing at 15.

²⁸ Although Bayonne and Astoria Energy II each characterize their pleading as an answer to a "motion," the filings are, in fact, prohibited answers to a rehearing request.

²⁹ 16 U.S.C. § 824e(b) (2006); accord, 5 U.S.C. § 556(d) (2006).

the “determination” need not be in the form of a formal notice or indicate that substantive DEC review of the application is complete, the tariff requires the issuance of some form of written statement by the state regulators that the application is “complete” as so defined. Accordingly, the state regulator’s written “determination” that must issue by March 1 should, for purposes of complying with NYISO’s tariff, reflect language sufficiently showing that, following its initial review of the application, the DEC has found that its filing requirements had been met, the application is therefore “complete,” and substantive review of the application will commence.

20. As the Commission found in the September 3, 2009 Order, the March 9, 2009 Letter, not the earlier-dated letters, reasonably can be read as embodying a DEC “determination” of completeness for purposes of subsection (b). The March 9, 2009 Letter contains statements conspicuously absent from the earlier-dated documentary evidence (including the two February 27, 2009 Letters), which demonstrate a DEC determination that NRG’s air permitting application was administratively complete for DEC filing purposes (i.e., all necessary information and components of the application were on file to allow substantive review to commence). More specifically, in the March 9, 2009 Letter, the DEC states that DEC had received the “*full [DEIS], including all elements identified in the Final Scoping Document issued by DEC on December 24, 2008;*” that DEC was reviewing the document “*for purposes of rendering a decision regarding acceptability for public review*” (as opposed to reviewing the documents for purposes of discerning whether all required information has been filed to comply with the DEC’s filing requirements); and that its staff “*has determined that the application contains the required information to commence the process of building a draft permit.*”³⁰ The absence of similar statements from the February 27, 2009 letters from the DEC fail to reflect that the “state regulators have determined that the Article X, Article VII or comparable permitting application for the project is complete” by March 1, 2009, as required by subsection (b). NRG does not dispute that the March 9, 2009 Letter could constitute the requisite DEC determination of completeness but, instead, rests its rehearing request on the assertion that the determination of completeness occurred earlier via a combination of the two February 27, 2009 letters -- only the first of which, we note -- was sent to NYISO.

21. NRG’s arguments related to the February 27, 2009 DEC Letter to NYISO are unpersuasive and, as noted earlier herein, are based on an inaccurate description of that letter. As the Commission found in the September 3, 2009 Order, the February 27, 2009 DEC Letter to NYISO constitutes mere recognition that NRG submitted the enumerated DEIS draft sections and applications, and provides only the statement that the

³⁰ Complaint, Attachment F (emphasis added).

“applications are currently under review by the [DEC]” without an indication that the “review” underway was anything more than the DEC’s initial review to determine if the NRG air permit applications met the DEC’s filing requirements so that substantive review of those applications could commence. Nowhere within the four corners of that document does the DEC use any of the more specific language it chose to use in the March 9, 2009 Letter (emphasized above), which not only reflects acknowledgement that the NRG air permitting application had been received, but also that the DEC had finished its initial review of the application and determined it satisfied the filing requirements so that substantive review of the application could proceed.

22. For the same reasons, the February 27, 2009 DEC Letter to NRG is no more indicative of a DEC determination of completeness than the February 27, 2009 DEC Letter to NYISO. The February 27, 2009 DEC Letter to NRG merely states that the DEC “is in receipt of the following draft sections” of the DEIS, not “[all]” such sections as NRG contends.³¹ The letter then proceeds to list the titles of draft sections of the DEIS, not “28 different appendices,” contrary to NRG’s claim.³² Nowhere does the letter even use the term “appendices.” The letter concludes with the unenlightening statement that “[t]hese documents are currently undergoing review by DEC.” That review could have been for filing purposes. In addition, the letter refers to only the DEIS, which is just one component of the requisite air permitting applications. We thus cannot find that the letter clearly sets forth a “determination” that all submitted components of NRG’s air permit applications were administratively complete or even that the DEIS component of the applications was complete, i.e., that all sections or appendices of a complete DEIS application were received and that each such “section” or appendix contained all the information required such that substantive review of the applications could commence.³³ Indeed, the letter does not even reference the status of the pending air permitting applications. Finally, if that letter were the second part of a two-part “determination” by the DEC that the NRG application was complete by that date, as NRG apparently argues, NRG does not explain why it wasn’t sent to NYISO like the other letter. Given the fact

³¹ See *supra* note 22.

³² NRG request for rehearing at 4. NRG is reminded that all pleadings filed before the Commission are under oath.

³³ NRG avers that, subsequent to February 27, 2009, it, in fact, submitted no additional documents that it had not already submitted electronically on that date. While, if true, that might support the assertion that its air permitting applications actually were complete as of that date, it does not show that the DEC had made a “determination” on February 27, 2009, i.e., by March 1, 2009, that the applications were complete as of that date.

that the two letters bear the same date, but one was sent to NRG and the other to NYISO, it is reasonable to conclude that the February 27, 2009 DEC Letter to NRG lists merely the “narrative portions” of the DEIS (which the DEC also acknowledges in the February 27, 2009 DEC Letter to NYISO), and not the missing “appendices” referenced in the February 27, 2009 DEC Letter to NYISO. We find it unreasonable to conclude that, on the same day, the DEC would acknowledge receipt of the appendices in a letter to NRG, while indicating to NYISO that it expects the appendices to arrive at a future date.

23. In short, either read together or separately, the two February 27, 2009 letters fail to satisfy the requirements of subsection (b).

24. Moreover, NRG cannot meet its burden of proof in this case by relying on extrinsic evidence of intent, in the form of testimony of NRG witness Alexander, to show that the February 27, 2009 DEC Letter to NYISO constitutes a determination of completeness. The Commission found in the September 3, 2009 Order that the “determination” intended by subsection (b) of the tariff must be reflected in language of the written document that constitutes the determination. The Commission found, and NRG has postulated no contrary view, that this provision of the tariff was intended to establish a ministerial act to be employed by NYISO, requiring only that NYISO check that the applicant can produce a written state regulator determination issued by March 1. This provision of NYISO’s tariff was not intended to require NYISO to have to engage in a subjective, fact-finding inquiry into the nuances of state regulator review processes and the intent of ambiguous documents, as NRG has presented here. The state regulators’ “determination” should be reasonably plain from the face of the document claimed to constitute the determination. In addition, even if we were to consider such extrinsic evidence, we disagree with NRG’s assertion that NRG witness Alexander’s affidavit evidences the DEC’s intent that the February 27, 2009 Letters constitute a completeness determination. The affidavit is that of an NRG consultant, not of a DEC employee, expressing his opinion as to what he thought letters from the DEC project manager intended in acknowledging receipt of various submissions and, therefore, is unconvincing as to the DEC’s intent.³⁴ Similarly, while NRG claims that the DEC drafted the

³⁴ Claiming support from certain statements from the affidavit of its witness Alexander, at P 14 of Appendix B of NRG’s answer, NRG asserts that the missing DEIS appendices referred to in the February 27, 2009 DEC Letter to NYISO had, in fact been submitted electronically to the DEC by February 27, 2009, and that hard-bound paper duplicates were submitted to the DEC after the March 1, 2009 deadline. NRG rehearing request at 6. However, Mr. Alexander only provided a chart listing titles of what he described as electronically-submitted DEIS sections and applications which, of course, were given a “receipt date” of the same date as sent. Nothing in the chart evidences a determination by the DEC project manager that the listed items reflected a complete

(continued...)

February 27, 2009 letters at NRG's request, with the intent of evidencing a completeness determination, NRG has submitted no appropriate extrinsic evidence from the DEC of such intent, and, as discussed above, such intent is not apparent in the February 27, 2009 Letters.

25. We also reject NRG's claim that "[t]he July 6, 2009 Letter from the DEC states that the DEC issued a completeness determination in the second February 27, 2009 letter [February 27, 2009 DEC Letter to NRG]."³⁵ The claim is a complete misstatement of the facts. The July 6, 2009 Letter uses no such language and simply clarifies that DEC "was in receipt of an electronic version of the [DEIS] for the [Astoria Project] on February 27, 2009 as noted in the February 27, 2009 letter from Mr. Stephen Tomasik to Mr. David Alexander." The July 6, 2009 letter then clarifies that the paper copy of "the document" was received by the DEC on March 6, 2009. Thus, the July 6, 2009 letter cannot be read as recognition that the February 27, 2009 DEC Letter to NRG constituted a DEC determination that the DEIS was complete as of that date. In any event, as we discussed earlier, references to only the DEIS component of the air permitting applications does not provide the claimed confirmation that, on February 27, 2009, the DEC made a determination that the air permitting applications themselves were complete.

26. We further disagree with NRG's claim that the Commission found subsection (b) to be "confusing and inaccurate" and, therefore, rejected it as unjust and unreasonable and that, accordingly, fundamental principles of fairness dictate that NRG should not be penalized where NYISO interpreted an out-of-date tariff provision. The Commission did not reject that provision and made no such finding that the existing subsection (b) was unjust and unreasonable; nor is that order effectively based on such a finding. The Commission interpreted the tariff language as written giving the language the most reasonable and common meaning – an unremarkable task, we note, which the

application meeting the DEC's filing requirements. Likewise, Mr. Alexander's testimony simply recites his claim that "letters received from Steve Tomasik [the DEC project manager] on February 27, 2009 acknowledging receipt of each and every section of the DEIS as identified in the final scoping document." Acknowledgement of such receipt by the DEC project manager does not constitute a determination that the materials so received reflect a complete application meeting the DEC's filing requirements. Further, Mr. Alexander later appears to concede that certain appendices were, in fact, missing from the pre-March 1 electronic submissions and were submitted in the March 6, 2009 paper submission, but passes that significant fact off with the unsupported claim that they "were not dispositive to the analysis in the DEIS."

³⁵ NRG request for rehearing at 8.

Commission routinely undertakes.³⁶ Accordingly, the Commission merely directed NYISO to revise the tariff language to more explicitly reflect that interpretation, consistent with the September 3, 2009 Order.

27. In the end, moreover, the Commission did not deny NRG's complaint due to how the Commission interpreted the existing tariff; it denied the complaint because the evidence NRG submitted did not show that NRG met the provision's requirements. In this regard, the Commission has fully considered all the evidence NRG provided bearing upon the issue of whether the DEC made a determination of completeness by March 1, 2009, even including extrinsic evidence of intent. For the reasons in the September 3, 2009 Order and above, we find that NRG did not meet its burden.

28. Additionally, NRG's asserted policy reasons for waiving non-compliance and allowing the Astoria Repowering Project into Class Year 2009 also fail, and, therefore, we deny NRG's request to waive the requirements of subsection (b). The result of the Commission's ruling is simply that the Astoria Repowering Project cannot be included in Class Year 2009, because NRG failed to meet the subsection (b) requirement for consideration in that Class Year; that ruling does not reflect a bar to its inclusion in Class Year 2010 or any subsequent Class Year if NRG meets the tariff's requirements by

³⁶ In fact, the Commission interpreted the provision largely in NRG's favor. For example, the Commission held that the NRG air permitting application is "comparable" to an Article X permit; a "determination" need not be in the form of a formal "Notice of Completion" publically issued by the DEC; and an application need only be administratively "complete" for filing purposes, not substantively "complete," by March 1 for inclusion in that year's Class Year. September 3, 2009 Order, 128 FERC ¶ 61,221 at P 29. In this regard, the Commission did not adopt NYISO's view that, in accordance with DEC regulations, an application cannot be "complete" until after the DEC has determined that the DEIS is "ready for public review" which according to NRG entails a much longer review process than merely determining that the applicant has met a minimal threshold filing obligation. *See* NYISO July 22, 2009 answer at 8; Complaint, Attachment A (Affidavit of Thomas Coates) at P 14.

If NRG were correct that the need for Commission interpretation, by definition, suggests that the tariff language is unjust and unreasonable, NRG's own analysis would suggest we could not apply the tariff language as we have interpreted it – in favor of NRG and against NYISO – in this case. Hence, the Astoria Repowering Project would still not be included in Class Year 2009.

March 1 of each such year.³⁷ As discussed above, we do not find that subsection (b) was so ambiguous as to be unenforceable, and we cannot alone rely on a policy reason, such as encouraging new generation, to direct NYISO to include the Astoria Repowering Project in Class Year 2009. Nor do we find that it is inconsistent with fundamental principles of fairness, as NRG argues, to require NRG to meet the same tariff deadline that applies to all other applicants for entry into a given Class Year. On the contrary, it would be unfair to other applicants for all of the reasons cited above to allow the Astoria Repowering Project late entry into Class Year 2009.³⁸ Moreover, NRG has not shown that any circumstances beyond its control prevented it from meeting the subsection (b) requirements. Finally, we note that the matter of whether a specific project meets the NYISO tariff requirements for inclusion in a given class year does not delay or otherwise interfere with the state regulator's review of the project; nor will it speed it up. The state is on its own timetable and the project will not be built without its full review and approval.

The Commission orders:

NRG's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁷ NRG's Astoria Repowering Project, in fact, appears to meet the subsection (b) requirement for Class Year 2010 since the DEC determination of completeness pre-dates the March 1, 2010 deadline for inclusion in that Class Year.

³⁸ We note that NRG's complaint was contested by Bayonne Energy Center and Astoria Energy II LLC, both of which opposed inclusion of the Astoria Repowering Project in the 2009 Class Year. *See* September 3, 2009 Order, 128 FERC ¶ 61,221 at P 20.