

166 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

New York Independent System Operator, Inc.

Docket No. ER16-120-007

ORDER ON COMPLIANCE

(Issued March 21, 2019)

1. On February 19, 2015, the Commission instituted a proceeding pursuant to section 206 of the Federal Power Act (FPA)¹ to direct the New York Independent System Operator, Inc. (NYISO) to submit tariff revisions governing the retention of and compensation to generating units needed for reliability, including procedures for designating such resources, the rates, terms, and conditions for reliability must run (RMR) service, provisions for the allocation of costs of RMR service, and a *pro forma* agreement for RMR service.² On April 23, 2018, the Commission granted, in part, and denied, in part, clarification and rehearing and ordered NYISO to submit a compliance filing to set a deadline for completing final market power reviews for deactivating generators. As discussed below, we accept NYISO's compliance filing to the April 2018 Order, subject to condition, effective July 23, 2018, as requested, and direct NYISO to submit a further compliance filing, within 30 days of the date of this order.

I. Background

2. In the RMR Order, the Commission instituted a proceeding pursuant to section 206 of the FPA to direct NYISO to submit tariff revisions governing the retention of and compensation to generating units needed for reliability, including a "clear timeline" for NYISO to determine whether a deactivating generator is needed for reliability and for that generator to deactivate.³ NYISO has submitted three compliance

¹ 16 U.S.C. § 824e (2012).

² *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, at P 4 (2015) (RMR Order), *order on reh'g & compliance*, 155 FERC ¶ 61,076 (2016) (First Compliance Order), *order on reh'g & compliance*, 161 FERC ¶ 61,189 (2017) (Second Compliance Order), *order on clarification & reh'g*, 163 FERC ¶ 61,047 (2018) (April 2018 Order).

³ RMR Order, 150 FERC ¶ 61,116 at PP 1, 4, 13.

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filings, the last of which the Commission accepted in full.⁴ The Commission issued the April 2018 Order at the same time that it accepted NYISO's third compliance filing. In the April 2018 Order, the Commission granted, in part, and denied, in part, clarification and rehearing of the Second Compliance Order and directed further compliance.⁵

3. Relevant here, pursuant to NYISO's RMR process, called the Generator Deactivation Process, a deactivating generator must provide NYISO with at least 365 days' notice of deactivation (there is no limit on how far in advance a generator can provide this notice).⁶ The Generator Deactivation Process starts when NYISO informs the deactivating generator that its notice of deactivation is complete.⁷ NYISO will notify a deactivating generator within 90 days of its notice being complete whether deactivating would create a reliability need.⁸ If deactivating would not create a reliability need, or any need created could be addressed in NYISO's biennial reliability planning process, the Generator Deactivation Process "will conclude."⁹ If such a generator wants to deactivate earlier than the end of the 365-day notice period, it can do so once NYISO notifies it that it has "completed all required [NYISO] administrative processes and procedures" (but no earlier than day 91).¹⁰

4. Until deactivation, the deactivating generator has a continuing obligation to submit additional information to NYISO in connection with its "assessment of market impacts under Section 23 of Attachment H of the ISO Services Tariff," which governs market power reviews of deactivating generators and generators seeking to de-rate their available

⁴ See First Compliance Order, 155 FERC ¶ 61,076 at P 1 (accepting in part, subject to condition, and rejecting in part NYISO's first compliance filing, and directing further compliance); Second Compliance Order, 161 FERC ¶ 61,189 at P 1 (accepting, subject to condition, NYISO's second compliance filing, and directing further compliance); *N.Y. Indep. Sys. Operator, Inc.*, Docket Nos. ER16-120-005, ER16-120-006 (Apr. 24, 2018) (delegated order) (accepting NYISO's third compliance filing).

⁵ April 2018 Order, 163 FERC ¶ 61,047 at P 1.

⁶ NYISO, Open Access Transmission Tariff (OATT), Attach. FF, § 38.3.1 (1.0.0).

⁷ *Id.* § 38.1.

⁸ *Id.* § 38.3.4.3.

⁹ *Id.*

¹⁰ *Id.* § 38.3.6; see also Second Compliance Order, 161 FERC ¶ 61,189 at P 33 (accepting this proposed "off ramp").

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capacity.¹¹ Section 23.4.5.6 of the Services Tariff provides that any proposal to deactivate an installed capacity supplier, or to de-rate available capacity, where that generator is located in the zones subject to NYISO's capacity market power mitigation measures (i.e., the mitigated capacity zones), "may be subject to audit and review by the ISO if the ISO determines that such action could reasonably be expected to affect" market clearing prices in the mitigated capacity zone in which that generator is located.¹² In other words, NYISO has discretion in determining whether to complete a market power review. If NYISO decides to complete a market power review, such "review shall assess whether the proposal or decision has a legitimate economic justification or is based on an effort to withhold Installed Capacity physically in order to affect prices."¹³ If NYISO determines that the generator is physically withholding capacity, and that behavior would increase market clearing prices in a mitigated capacity zone capacity market by five percent or more (and is at least \$0.50/kW-month), NYISO will assess a penalty on the generator.¹⁴ The generator must continue to pay the penalty until it demonstrates that the deactivation or de-rate is justified by economic considerations other than the effect of such action on market clearing prices in a mitigated capacity zone capacity market.

5. In the April 2018 Order, the Commission found that there is a need for clarity and transparency surrounding final market power reviews and, given the lack of a deadline for NYISO to perform final market power reviews of deactivating generators, required NYISO to propose "a timeline for completing final market power reviews of deactivating generators, if needed, as part of its Generator Deactivation Process."¹⁵ The Commission stated:

In recognition of the variability in the amount of advance notice a generator may give of its planned deactivation, and the need to ensure that the data used in the

¹¹ NYISO, OATT, Attach. FF, § 38.3.1.6 (1.0.0).

¹² NYISO, Market Administration and Control Area Services Tariff (Services Tariff), Attach. H, § 23.4.5.6.1 (22.0.0).

¹³ *Id.*

¹⁴ *Id.* § 23.4.5.6.3. NYISO will assess a penalty equal to 1.5 times the difference between the market clearing price for the mitigated capacity zone with and without the inclusion of the withheld capacity multiplied by the total of the number of MW withheld in each month and all other MW of capacity in the mitigated capacity zone under common control with the withheld MW in the relevant month.

¹⁵ April 2018 Order, 163 FERC ¶ 61,047 at P 13.

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market power review reasonably reflects the market conditions at the time of deactivation, NYISO should set a deadline for completing final market power reviews (if needed) working back from the proposed deactivation date rather than starting from the submission of a complete generator deactivation notice. This is because the final market power review may be less effective with data and assumptions too far removed from a generator's actual deactivation date. If the data and assumptions do not reflect the market conditions close to the time of deactivation, NYISO will be unable to properly "assess whether the proposal or decision has a legitimate economic justification or is based on an effort to withhold Installed Capacity physically in order to affect prices."¹⁶

II. Filing

6. NYISO proposes two timelines, based on the circumstances of the deactivating generator, for NYISO to provide a final physical withholding determination (i.e., a final market power review) before a generator deactivates. First, NYISO proposes to provide a final physical withholding determination at least 30 days before a deactivating generator's deactivation date where the deactivating generator submits its request and updated deactivation date at least 60 days before the specified deactivation date.¹⁷ NYISO contends that this proposal is consistent with the Commission's instruction that NYISO set a deadline "working back from the proposed deactivation date."¹⁸ There is one exception, though; where the deactivating generator is seeking to deactivate fewer than 120 days after the start of the Generator Deactivation Process (i.e., after NYISO informs the deactivating generator that its notice of deactivation is complete), NYISO states that it requires a minimum of 90 days to issue a final physical withholding determination.¹⁹ In addition, NYISO asserts that, in order for the deactivating generator to be able to rely on NYISO's determination, NYISO proposes to require the generator to deactivate no more than five days before and no more than 10 days after the specified deactivation date. According to NYISO, this addresses the Commission's concern in the

¹⁶ *Id.* P 17 (footnotes omitted).

¹⁷ Proposed Services Tariff § 23.4.5.6.4.2.1; Transmittal Letter at 4.

¹⁸ Transmittal Letter at 4 (quoting April 2018 Order, 163 FERC ¶ 61,047 at P 17).

¹⁹ Proposed Services Tariff §§ 23.4.5.6.2.1, 23.4.5.6.4.2.2.1; Transmittal Letter at 4.

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April 2018 Order regarding NYISO using “data and assumptions too far removed from a generator’s actual deactivation date.”²⁰

7. NYISO states that the second and more complex scenario arises where generators must make irrevocable deactivation-related decisions well in advance of the date on which the generator actually deactivates.²¹ Under this scenario, NYISO proposes to provide a final physical withholding determination at least 30 days before the irrevocable decision must be made.²² To qualify for this process, NYISO states that the generator must identify one or more specific events (which may include a failure to act) that it believes will have a consequence that will make the generator’s deactivation essentially and practicably irreversible.²³ NYISO notes that a purely economic consequence will not satisfy this standard. Then NYISO, in consultation with its Market Monitoring Unit (Market Monitor), will verify that the event will have an irreversible consequence. The generator may submit a request for a final physical withholding determination at least 60 days before that event will come to pass (the “trigger date”), which NYISO will provide at least 30 days prior to the trigger date if NYISO agrees that the trigger date is reasonable.²⁴ Similar to the first scenario, NYISO’s final physical withholding determination will only be valid if the event occurs no more than five days before, and no more than 10 days after the trigger date and the generator timely deactivates.²⁵ NYISO explains that these “irrevocable action or inaction” rules are meant for those situations in which the generator submits notice of deactivation significantly in advance of the deactivation date, generally 180 days or more after the start of the Generator Deactivation Process.²⁶

8. NYISO explains that it has learned from its experience in administering the Generator Deactivation Process thus far that its ability to complete physical withholding determinations is heavily dependent on the deactivating generator’s ability and

²⁰ Transmittal Letter at 4 (quoting April 2018 Order, 163 FERC ¶ 61,047 at P 17).

²¹ NYISO provides the example of a decision not to timely procure the fuel that would be necessary to refuel a nuclear powered generator. *Id.* at 4-5.

²² *Id.* at 5; Proposed Services Tariff § 23.4.5.6.4.2.2.1.

²³ Proposed Services Tariff § 23.4.5.6.4.2.2.2; Transmittal Letter at 5.

²⁴ Proposed Services Tariff § 23.4.5.6.4.2.2.1; Transmittal Letter at 5.

²⁵ Proposed Services Tariff § 23.4.5.6.4.2.2.3; Transmittal Letter at 5-6.

²⁶ Transmittal Letter at 5 n.11.

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willingness to timely provide the necessary information. Therefore, in addition to the two timelines discussed above, NYISO also proposes to require that it receive sufficient information from deactivating generators as a precondition to NYISO's obligation to provide a final physical withholding determination.²⁷

III. Notice of Filing and Responsive Pleadings

9. Notice of NYISO's May 23, 2018 compliance filing was published in the *Federal Register*, 83 Fed. Reg. 24,783 (2018), with interventions and protests due on or before June 13, 2018. The Market Monitor filed comments and Independent Power Producers of New York, Inc. (IPPNY) filed a protest. On June 27, 2018, NYISO filed an answer.

A. Comments and Protest

10. The Market Monitor supports NYISO's filing, asserting that NYISO's proposal to develop the timelines working back from the deactivation date is appropriate because NYISO will be better positioned to perform its evaluation based on market conditions that are close to the time of deactivation. The Market Monitor also states that NYISO's proposed "irrevocable action or inaction" rules properly allow NYISO to apply reasonable judgment to consider and classify decisions as practicably irreversible even when they are not strictly irreversible.²⁸

11. IPPNY argues that NYISO has failed to demonstrate the reasonableness of its proposal to issue a final physical withholding determination 30 days before a generator's deactivation date when a generator seeks to deactivate more than 150 days after the start of the Generator Deactivation Process and there is not an irreversible decision point. According to IPPNY, this proposal does not provide an adequate amount of time for deactivating generators to make informed decisions and effectively implement the measures necessary to deactivate and demonstrates a serious misunderstanding of the process of deactivating a generator.²⁹ IPPNY argues that the deactivating generator would not be able to delay its planned deactivation after receiving the final physical withholding determination to comply with various long lead time notice requirements because NYISO proposes that the generator must deactivate no more than five days before, and no more than 10 days after, its requested deactivation date. IPPNY argues that this puts the deactivating generator in an untenable position because it must take on

²⁷ *Id.* at 2-3, 6-8; *see* Proposed OATT, Attach. FF, §§ 38.3.1.4, 38.3.3, 38.7.3, 38.7.4.

²⁸ Market Monitor Comments at 3-4.

²⁹ IPPNY Protest at 2, 10-11.

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potentially significant risk that it will not be able to deactivate in the face of a NYISO determination that deactivation would be an exercise of physical withholding subject to penalties.³⁰

12. IPPNY asserts that the April 2018 Order was focused on generators providing more than 365 days' notice of deactivation and therefore, the deadline that NYISO implements should turn on whether the deactivating generator has provided NYISO with the 365-day minimum notice or a longer period of time.³¹ IPPNY proposes the following alternative timelines: (1) if the requested deactivation date is less than or equal to 150 days from the start of the Generator Deactivation Process (i.e., after NYISO informs the deactivating generator that its notice of deactivation is complete), NYISO will provide a final physical withholding determination no later than 30 days before the requested deactivation date but no earlier than 90 days after the start of the Generator Deactivation Process; (2) if the requested deactivation date is more than 150 days but within 365 days of the start of the Generator Deactivation Process, NYISO will provide a final physical withholding determination no later than 120 days after the start of the Generator Deactivation Process; (3) if the requested deactivation date is more than 365 days after the start of the Generator Deactivation Process but there is an irreversible decision point in the interim, NYISO will provide a final physical withholding determination no later than 30 days before the trigger date for the event; and (4) for all other requested deactivation dates, NYISO will provide a final physical withholding determination no later than 240 days before the requested deactivation date.³²

13. IPPNY contends that for deactivating generators providing between 150 and 365 days' notice, its proposed 120-day timeline appropriately balances a deactivating generator's need for certainty of when it can deactivate with sufficient time to align the termination of its business arrangements with the deactivation and NYISO's need to assess whether the planned deactivation would constitute physical withholding.³³ In addition, IPPNY asserts that its proposed 120-day timeline allows the deactivating generator to receive its final physical withholding determination at the same time as the 120-day period identified by NYISO itself in its prior submissions to the Commission.³⁴

³⁰ *Id.* at 11-13 (citing April 2018 Order, 163 FERC ¶ 61,047 at P 16).

³¹ *Id.* at 3, 9, 11.

³² *Id.* at 3-4.

³³ *Id.* at 11.

³⁴ *Id.* at 13 (citing NYISO, Request for Rehearing and Clarification, Docket No. ER16-120-001, et al., at 15 (May 23, 2016)).

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IPPNY also argues that its proposed 240-day timeline effectively addresses NYISO's concerns about the potential for generators to propose deactivation dates well beyond the 365-day notice period by requiring that their physical withholding analyses be issued closer in time to such extended dates. According to IPPNY, its proposed 240-day timeline also reduces the possibility that a deactivating generator that provides greater than 365 days' notice will be required to make long lead time decisions before NYISO completes its final physical withholding analysis.³⁵

14. IPPNY supports, in concept, NYISO's "irrevocable action or inaction" rules, stating that they could be an effective mechanism for deactivating generators that request longer deactivation end dates to be able to pursue their deactivation planning with the required certainty. However, IPPNY argues that NYISO's proposed framework falls short because NYISO states that a purely economic consequence would not satisfy the standard; IPPNY interprets this as potentially precluding long lead time decisions that could be changed, but only at potentially significant expense, such as terminating a labor agreement. IPPNY contends that its proposed 240-day timeline greatly reduces the risk exposure for deactivating generators required to make long lead time decisions.³⁶ IPPNY asks that the Commission clarify that certain events, such as having to install emissions control technologies to comply with an environmental law, constitute irreversible decisions for purposes of NYISO's proposed rules.³⁷

15. Lastly, IPPNY asks that the Commission reject NYISO's proposal to require deactivating generators to deactivate no more than five days before, and no more than 10 days after, their specified deactivation date. IPPNY asserts that this proposal is unduly burdensome and impedes deactivating generators' ability to make informed decisions. IPPNY contends that NYISO did not offer any justification for this narrow window, and that a deactivating generator should be able to deactivate as soon as the same day it receives the final physical withholding determination and up to 30 days after the specified deactivation date.³⁸

³⁵ *Id.* at 13-14.

³⁶ *Id.* at 14-15.

³⁷ *Id.* at 14 n.42.

³⁸ *Id.* at 11, 15.

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B. Answer

16. NYISO agrees with the Market Monitor that a significant financial consequence may satisfy the “irrevocable action or inaction” requirement.³⁹ In response to IPPNY’s protest, NYISO argues that its proposal takes into account the significant degree of flexibility generators have to choose their deactivation date, including the ability to deactivate more than a year after the date specified in the initial notice of deactivation.⁴⁰ According to NYISO, IPPNY’s request that NYISO provide final physical withholding determinations based on the deactivation date specified in the initial notice of deactivation is inconsistent with the Commission’s directives because it would not ensure that the data and assumptions are not too far removed from the actual deactivation date.⁴¹ NYISO also expresses concern that IPPNY’s proposed alternatives would require NYISO to provide final physical withholding determinations even if NYISO lacks the necessary information it requires to perform the analysis.⁴² Nevertheless, NYISO states that, in light of IPPNY’s concerns, NYISO would not be opposed to providing final physical withholding determinations at least 60 days (rather than 30 days) before the deactivation date specified in the deactivating generator’s updated notice to NYISO. NYISO explains that this compromise proposal would require deactivating generators to request a final physical withholding determination at least 90 days (rather than 60 days) before the specified deactivation date.⁴³

IV. Discussion**A. Procedural Matters**

17. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure prohibits an answer to a protest unless otherwise ordered by the decisional authority.⁴⁴ We will accept NYISO’s answer because it has provided information that assisted us in our decision-making process.

³⁹ NYISO Answer at 9-10.

⁴⁰ *Id.* at 2, 5-6 (citing NYISO, OATT, Attach. FF, § 38.14.1 (0.0.0)).

⁴¹ *Id.* at 6 (citing April 2018 Order, 163 FERC ¶ 61,047 at P 17).

⁴² *Id.* at 7.

⁴³ *Id.* at 7-9.

⁴⁴ 18 C.F.R. § 385.213(a)(2) (2018).

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B. Commission Determination

18. As discussed below, we accept NYISO's compliance filing to the April 2018 Order, subject to condition, effective July 23, 2018, as requested, and direct NYISO to submit a further compliance filing, within 30 days of the date of this order.

19. In the April 2018 Order, the Commission directed NYISO to set a deadline for providing final physical withholding determinations "working back from the proposed deactivation date rather than starting from the submission of a complete generator deactivation notice" to ensure the effectiveness of the data and assumptions underlying those determinations.⁴⁵ NYISO's two proposed timelines appropriately work back from a generator's proposed deactivation date, recognizing the flexibility generators have in proposing deactivation dates. NYISO's proposal also focuses on ensuring the accuracy of final physical withholding determinations at deactivation. However, in so doing, NYISO's proposal fails to strike the appropriate balance between the needs of the deactivating generator for "transparency and certainty" and NYISO's need to ensure that the data and assumptions underlying the final physical withholding determinations are not "too far removed from a generator's actual deactivation date."⁴⁶

20. Instead, we find NYISO's proposed alternative in its answer better strikes this balance, allowing deactivating generators to timely plan their deactivations while giving NYISO adequate time to perform its physical withholding determinations and base them on "market conditions close to the time of deactivation."⁴⁷ We therefore direct NYISO to submit a further compliance filing that requires NYISO to provide final physical withholding determinations at least 60 days before the deactivation date specified in the deactivating generator's updated notice to NYISO where the deactivating generator submits its request and updated deactivation date at least 90 days before the specified deactivation date.⁴⁸ We accept NYISO's proposed information submission requirements as reasonable preconditions to NYISO's ability to provide timely final physical withholding determinations.

21. As for IPPNY's proposed alternative timelines, IPPNY overlooks the Commission's clear guidance in the April 2018 Order that NYISO establish a timeline

⁴⁵ April 2018 Order, 163 FERC ¶ 61,047 at P 17.

⁴⁶ *Id.* PP 16-17.

⁴⁷ *Id.* P 17.

⁴⁸ NYISO Answer at 7-9.

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“working back from the proposed deactivation date.”⁴⁹ Moreover, we find NYISO’s proposed timelines, as conditioned above, to be clearer and more transparent and to more effectively result in final physical withholding determinations that are based on valid data and assumptions on which generators can reasonably rely.

22. We decline to provide IPPNY’s requested clarifications surrounding the “irrevocable action or inaction rules.” Rather, we believe that NYISO should have discretion to, in consultation with the Market Monitor, consider the facts and circumstances on a case-by-case basis to determine what events will have an irreversible consequence.

23. We similarly disagree with IPPNY’s assertion that NYISO’s proposal to require deactivating generators to deactivate no more than five days before, and no more than 10 days after, their specified deactivation date is unreasonable. NYISO’s proposal addresses the Commission’s concern that the final market power review “may be less effective with data and assumptions too far removed from a generator’s *actual* deactivation date.”⁵⁰ In addition, IPPNY fails to recognize that deactivating generators have the flexibility to choose their actual deactivation date when they request a final physical withholding determination.

The Commission orders:

(A) NYISO’s compliance filing is accepted, subject to condition, effective July 23, 2018, as discussed in the body of this order.

(B) NYISO is hereby directed to submit a further compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁹ April 2018 Order, 163 FERC ¶ 61,047 at P 17.

⁵⁰ *Id.* (emphasis added).