

141 FERC ¶ 61,123
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

The Incorporated Village of Port Jefferson

Docket No. EL12-89-000

v.

National Grid Generation LLC

ORDER DENYING COMPLAINT

(Issued November 15, 2012)

1. On July 30, 2012, The Incorporated Village of Port Jefferson (Complainant) filed a complaint (Complaint) against National Grid Generation LLC and its affiliates (collectively, GENCO) alleging that GENCO is engaged in fraudulent practices and illegal exercise of market power and seeking an investigation and hearing. Complainant also seeks Commission orders requiring GENCO to divest itself of the ownership of its existing generating facilities in the Long Island Control Area (LICA), to cease its alleged exercise of market power, and to engage in corrective measures to relieve the conditions that make such exercise possible. For the reasons discussed below, the Commission denies the Complaint.

I. Background

2. Complainant states that Port Jefferson is located in the town of Brookhaven in Suffolk County, New York, and its residents are residential and commercial consumers of the Long Island Power Authority (LIPA), a corporate municipal instrumentality, which through its wholly-owned subsidiary, the Long Island Lighting Company, owns the retail electric transmission and distribution system on Long Island. GENCO, according to Complainant, owns and operates 52 electric generation units throughout Long Island and currently supplies LIPA with capacity, energy and ancillary services from these facilities at cost-based rates pursuant to the terms of a Power Supply Agreement (PSA) between LIPA and GENCO. The PSA was executed in 1997 and expires on May 28, 2013,

subject to LIPA's right to renew for an additional 15-year term on substantially similar terms.¹

3. GENCO states that the PSA is a tolling agreement in that LIPA provides all fuel for operation of GENCO's generation fleet and is entitled to all electric output.² The generating facilities include the natural gas-fired peaking units located at the existing Glenwood Generation Station and Port Jefferson Generation Station. GENCO states that its fleet consists of 49 oil and natural gas-fired units having a capacity of approximately 3700 MW³ and that it currently provides nearly two-thirds of the capacity and about a quarter of the energy for the LICA.⁴ GENCO also states that under the PSA, LIPA is solely responsible for the dispatch of GENCO's generating plants and for the bidding of GENCO's plants into the capacity and energy markets operated by the New York Independent System Operator, Inc. (NYISO).

II. Complaint

4. Complainant asserts that certain conduct by GENCO as set forth by Complainant: (A) is not just and reasonable and thereby, violates section 206 of the Federal Power Act (FPA) and, in particular, Attachment H to NYISO's Market Administration and Control Area Services Tariff (Services Tariff)⁵ and (B) violates section 222 of the FPA as it exhibits fraudulent behavior amounting to market manipulation.

5. First, with respect to (A) above, Complainant alleges that GENCO has violated section 206 of the FPA by exercising monopoly power in the LICA in order to benefit from continued high energy prices on Long Island, resulting in unjust and unreasonable rates within the LICA. According to Complainant, GENCO is able to insulate itself from competition by not retiring existing generation while simultaneously avoiding repowering of existing generation, and forestalling opportunities for new entry into the energy and capacity markets. Complainant states that because GENCO controls nearly two-thirds of the capacity resources on Long Island, it benefits from the high energy prices and

¹ Complaint at 8.

² GENCO August 20, 2012 Answer at 4, n.3

³ GENCO August 20, 2012 Answer at 3.

⁴ *Id.* at 3-4.

⁵ Complaint at 16 (citing NYISO, Services Tariff, § 23 (Attachment H - ISO Market Power Mitigation Measures)).

suppressed capacity prices, as well as an extension of the cost-based pricing mechanisms in the PSA.

6. Complainant asserts that the publicly available facts, to be supplemented with evidence derived from a thorough investigation and the hearing that it requests be conducted by the Commission, demonstrate that GENCO is a monopolistic supplier of energy and capacity within LICA that has knowingly perpetrated a form of physical and economic withholding in order to evade competition and forestall new entry into the energy and capacity markets within LICA and to thereby continue benefiting from high energy prices on Long Island. Moreover, according to Complainant, as a pivotal supplier, GENCO has a powerful incentive to suppress capacity prices and discourage new entry into the LICA. In a highly constrained market, GENCO, according to Complainant, benefits most from maintaining a capacity price sufficiently low so as to discourage competition in both the wholesale energy and wholesale capacity markets, without threatening large reductions in sales of either energy or capacity. Complainant concludes that GENCO's strategic forbearance is a form of physical and economic withholding, and Complainant states that the Commission has previously acknowledged that an incumbent supplier has the potential to engage in this type of withholding through its decisions regarding aging facilities.⁶ Complainant also asserts that the continuation of this scheme has caused and continues to cause long-term damage to the energy and capacity markets in the LICA and results in quantifiable harm to consumers.

7. Specifically, Complainant asserts that, as early as 2009, LIPA commenced discussions with GENCO regarding certain issues relating to the expiration of the PSA, and potential options for LIPA to meet its statutory obligations to procure capacity and to supply energy to customers on Long Island. According to Complainant, lack of success in these negotiations resulted in LIPA's resort to various requests for proposals in order to attract new economic supply, including the recent "Request for Proposals for New or Repowered Generation" (RFP), which was specifically intended to encourage GENCO to submit proposals for repowering some or all of its base load plants. Complainant states that GENCO strategically failed to participate in either the RFP or in the recent Request for Information (RFI) issued in connection with the New York State Energy Highway Initiative. Complainant states that this failure to participate perpetuates a resource condition in which high-cost, inefficient resources unduly influence the marginal cost of energy thereby maintaining high energy prices. Complainant asserts that LIPA's monopsony power is unable to offset GENCO's market manipulation because of

⁶ Complaint at 15 (citing *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, *order on reh'g and Compliance*, 124 FERC ¶ 61,301 (2008); *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178 (2010)).

unfavorable terms in the PSA and material changes in the wholesale energy and capacity markets occurring in the decade since its execution.

8. Complainant characterizes GENCO's inaction as both "strategic forbearance" and active decision-making intended to manipulate market prices and exercise market power. Complainant alleges that, by refusing to participate in the RFP or the RFI, or to allow competitive opportunities for repowering the legacy facilities, GENCO seeks to pressure LIPA to extend the terms of its current power supply agreement on an all-or-nothing basis (for an additional 15 years on substantially the same terms) or else compete only with higher-priced alternatives.

9. Complainant asserts that GENCO would obtain a substantial long-term benefit from a renewal of the PSA on substantially the same terms because the current PSA includes unreasonable terms relating to cost-based pricing for capacity, the allocation of the cost of generation improvements, and the costs associated with unit retirement. Complainant adds that, given the age and inefficiency of the generation resources at issue and the near certainty that former contingencies regarding upgrades will be near-term realities, a renewal of the PSA for 15 more years has the potential to choke off investment in new generation while saddling rate payers with continued high energy prices. Alternatively, according to Complainant, if an extension of the PSA is not achieved, GENCO will continue to benefit from high energy prices as a pivotal supplier of energy and a critical source of required capacity.

10. Complainant argues that excessive market power is monopoly power when marked by the seller's ability to raise prices or exclude competitors entirely, and the monopoly is coercive when the seller actively prohibits competition by using practices derived from its market power. Complainant states that as the owner of a majority of all the existing base-load generation that would be eligible for repowering, GENCO possesses a near monopoly on both base-load generation and generation most suited for repowering within the LICA. Further, according to Complainant, GENCO's refusal to participate in the RFP and the RFI is a coercive exercise of market power because it forecloses desirable opportunities for repowering. Complainant adds that GENCO's ability to manipulate the energy market depends upon exploiting the unique market constraints existing in the LICA and its position as a pivotal supplier. Further, according to Complainant, the abuse is compounded by GENCO's dual status as both owner and fuel supplier to nearly two-thirds of available generation capacity within the LICA.

11. Complainant further states that, since 1997, GENCO was able to obtain favorable cost-based pricing for its capacity resources and if LIPA chose to compel generation retirement, GENCO would receive full payment for the retired capacity. Complainant adds that GENCO, therefore, did not upgrade its existing plants and it blocked competitive entry into the LICA by manipulating the capacity market. Now, according to Complainant, LIPA is forced to either renew the PSA on its existing unreasonable terms

or to continue to pay unreasonably high prices until more economic entry into the market can occur. Complainant contends that GENCO has co-opted and subverted the ICAP demand curve by nullifying underlying assumptions related to generation retirement and this, in turn perpetuates the existence of excess capacity in the LICA market and maintains capacity prices well below net cost of new entry (CONE). Complainant states that this capacity is primarily inefficient for energy production. Complainant alleges that GENCO's further efforts to "stamp down" on real estate taxes in host communities, and its separate ability to benefit as the fuel supplier to such inefficient generation units are part and parcel of its deliberate scheme to increase its profits at the expense of Long Island rate payers. Further, according to Complainant, GENCO's refusal to participate in the targeted RFP and the RFI can have no other explanation and would be economic suicide if GENCO were not a pivotal supplier.

12. Second, Complainant claims that GENCO's conduct constitutes market manipulation that violates section 222 of the FPA and section 1c.2 of the Commission's Regulations. Complainant alleges that GENCO's maintenance of inefficient capacity resources and refusal to participate in efforts to repower existing infrastructure, is market manipulation and satisfies the scienter requirements of FPA section 222 and that Congress intended to proscribe "exactly the type of anti-competitive scheme that GENCO has engaged in."⁷ Complainant adds that there are no "per se" violations, however, and the Commission must examine all of the facts surrounding the alleged manipulation and Complainant believes that GENCO's deliberate plan of "strategic forbearance" qualifies as manipulation.⁸

13. Complainant asserts that, while it is impossible to accurately quantify the net financial impacts of GENCO's actions, it is well documented that LIPA has paid significantly higher prices than customers in other parts of the New York Control Area (NYCA), a portion of which is attributable to "uplift costs" that are incurred because of the need for local load serving entities, such as LIPA, to commit generators for reliability purpose that would not otherwise be economic to operate at market prices.⁹ Complainant states that uplift in Long Island rose from \$3 million in 2010 to \$22 million in 2011 and Long Island accounted for 66 percent of real-time local reliability uplift during 2011.¹⁰

⁷ Complaint at 18 (citing 16 U.S.C. § 824v (2006)).

⁸ *Id.* at 19 (citing 18 C.F.R. § 1.c.2(a) (2012)).

⁹ *Id.* at 21 (citing Potomac Economics, *2011 State of the Market Report*, at A-104-105 (April 2012)).

¹⁰ *Id.* (citing Potomac Economics, *2011 State of the Market Report*, at A-112 (April 2012)).

Complainant alleges that this \$19 million dollar increase (or some portion of it), and similar amounts in other years, is the direct consequence of GENCO's strategic forbearance, although the full amount of financial harm and the amount in excess of just and reasonable rates will be determined only after a Commission investigation. Complainant states that, after such investigation, the Commission should order disgorgement of excess amounts and require GENCO to make customers whole for the distortion of energy prices. In addition, Complainant argues that GENCO's conduct has had a non-financial impact in that it has undercut the functioning of the Long Island energy and capacity markets and reduced confidence in the New York energy and capacity markets. In addition, Complainant states that GENCO's actions will continue to erect barriers to entry to Long Island's energy and capacity market.

14. Complainant requests: (a) a full and complete public hearing to investigate and disclose the extent of GENCO's market manipulation and how these practices were permitted to persist; (b) an order requiring GENCO to divest itself of all generating capacity in the LICA; (c) an order requiring GENCO to make customers whole for the injuries caused by its "strategic forbearance" and other market manipulation; (d) penalties to be levied against GENCO for market manipulation, and (e) an order directing LIPA and GENCO not to execute any extension of the PSA pending the outcome of the Commission's investigation.

III. Notice of Filing and Responsive Pleadings

15. Notice of the Complaint was published in the *Federal Register*, 77 Fed. Reg. 47,051 (2012), with interventions and protests due on or before August 20, 2012.

16. TC Ravenswood, LLC; PSEG Energy Resources & Trade LLC, Public Service Electric and Gas Company, and PSEG Power New York LLC; the New York Department of State Division of Consumer Protection; Ingerman Smith, L.L.P.; NextEra Energy Generators; NYISO; and LIPA filed timely motions to intervene. On October 17, 2012, North Shore Central School District filed a motion to intervene out of time. On October 18, 2012, Town of Huntington, New York and The Northport-East Northport Union Free School District each filed motions to intervene out of time.

17. On August 16, 2012, the New York State Public Service Commission filed a notice of intervention.

18. Town of Brookhaven, New York (Brookhaven); New York State Assemblyman Steve Englebright; County of Suffolk, State of New York; and Port Jefferson Free Library filed comments in support of the Complaint. On September 20, 2012, Todd L. Pittinsky filed a comment out of time.

19. On August 20, 2012, GENCO filed an answer to the Complaint. On August 23, 2012, Complainant filed an answer to GENCO's answer.

20. On November 1, 2012, LIPA filed an answer in opposition to the motions for late interventions and an untimely answer to the Complaint, asking that it be dismissed. On the same day, GENCO filed an answer in support of LIPA's filing. On November 2, 2012, the Town of Huntington filed an answer to LIPA's answer in opposition to the Town of Huntington's late intervention. On November 5, 2012, Complainant filed an answer to LIPA's answer.

A. GENCO's Answer to the Complaint

21. GENCO answers that the Complaint should be denied as frivolous and not logically or legally supported. According to GENCO, Complainant's assertion that GENCO has engaged in market manipulation is self-contradictory and not truly related to market manipulation, but rather to Complainant's desire to protect its property tax revenues. GENCO also asserts that Complainant has not shown that GENCO exercised market power because Complainant's concept of strategic forbearance does not fit the definition of either economic or physical withholding.

22. GENCO asserts that there is no Commission precedent or other legal basis that would force a generator to build new units or repower existing ones. GENCO argues that the Complaint adopts an incoherent theory of manipulation in that it accuses GENCO of simultaneously refusing to both add *and* subtract supply.

23. GENCO contends that the failure to build or repower generation units does not constitute withholding or manipulation. GENCO states that this is not a category of withholding publicly recognized by the Commission "in its most recent exposition of the subject."¹¹ According to GENCO, the Commission has recognized two classic categories of withholding: physical, i.e., failing to offer energy or capacity into the market for no or specious reasons and economic, i.e., offering power but only at unjustified prices and thus preventing dispatch. GENCO states that neither of these categories applies here. GENCO further states that it cannot physically withhold its capacity because GENCO's generation is completely under the control of LIPA and can be dispatched at will by LIPA, and likewise, economic withholding cannot be the case because the price at which it provides energy and capacity to LIPA is set purely by cost-based components accepted by the Commission in the PSA. GENCO asserts that beyond these two categories, the concept of "strategic forbearance" does not fall within any of the other broad types of manipulation recognized by the Commission.¹² Further, according to GENCO such a

¹¹ GENCO August 20, 2012 Answer at 6 (citing FERC Office of Enforcement, Division of Energy Market Oversight, *Energy Primer: A Handbook of Energy Market Basics*, at 125–128 (July 2012) (*Energy Primer*)).

¹² GENCO August 20, 2012 Answer at 9 (citing *Energy Primer* at 125-126).

concept is conceptually flawed because there are no limits to a company's decisions not to build or not to repower generation and thus, virtually every potential seller of power would be guilty of manipulation. GENCO also maintains that the failure to retire generator units does not constitute manipulation in that there is no legal requirement or accepted market theory requiring market participants to retire even manifestly inefficient units. Moreover, GENCO asserts there is no precedent for the Commission to force a generator to retire its units, regardless of their economic efficiency.

24. GENCO asserts that it did not and could not manipulate the Long Island markets and offers three arguments in support. First, GENCO argues that the current PSA is subject to cost-of-service regulation and is a tolling agreement in which LIPA provides all fuel, is entitled to all electric output, directs the operation of GENCO's units, and is solely responsible for the dispatch and for bidding those GENCO units into the NYISO capacity and energy markets. GENCO asserts that cost-of-service regulation is presumed to prevent the exercise of market power by only allowing equity returns that approximate those that would prevail in a competitive market, and all bidding of GENCO's units into the NYISO capacity and energy markets is performed by LIPA with no involvement by GENCO. Thus, GENCO states, it is indifferent to whether capacity and energy prices in the LICA are high or low as its profits remain substantially the same in either case under the PSA.¹³

25. Second, GENCO argues that the fact that more than a third of all existing capacity in the LICA is not affiliated with GENCO demonstrates that it cannot erect barriers to entry. Likewise, according to GENCO, the fact that unaffiliated entities submitted 29 new on-island and 16 off-island proposals for generation units in LIPA's RFP¹⁴ illustrates that GENCO is unable to impose barriers to new entry through control of generation sites, and Complainant itself concedes that there are other sites which are cost-competitive with repowering GENCO's facilities.¹⁵

¹³ GENCO also notes that as a condition of approving the National Grid acquisition of Keyspan Corporation in 2007, the New York Public Service Commission required that GENCO demonstrate its inability to exercise vertical market power in the event that the PSA is not renewed on a cost-of-service basis. GENCO August 20, 2012 Answer at 9 (citing Case 06-M-0878 (N.Y.P.S.C. August 23, 2007)).

¹⁴ GENCO August 20, 2012 Answer at 11.

¹⁵ *Id.* (citing Complaint at 3 n.6) (stating that "repowering some of [Genco's generation] was feasible and could be accomplished at costs similar to building new generation at other sites").

26. Third, GENCO argues that its plants, which have been substantially depreciated, are low cost resources overall and have provided better capacity rates for consumers than the alternatives. GENCO adds that a new or repowered generating plant would have to produce extraordinary gains in efficiency in order to overcome the inherent economic advantage of GENCO's low cost capacity.¹⁶

27. GENCO also asserts that the Complaint is insufficiently pleaded with respect to the current PSA and unripe with respect to a potential future PSA. GENCO argues that the Complaint fails to make a showing with respect to the three elements necessary for a market manipulation claim: (1) scheme or artifice to defraud, (2) made with scienter, and (3) in connection with a transaction subject to the jurisdiction of the Commission.¹⁷ GENCO asserts that while the PSA and any future PSA are and will be subject to Commission jurisdiction, Complainant has made no showing of fraud or scienter, and as GENCO has demonstrated, GENCO does not even participate in the market and thus, it is difficult to see how it could have perpetrated a fraud or artifice. GENCO adds that Complainant's sole statement with respect to scienter asserts that GENCO has satisfied the scienter requirements by maintaining inefficient capacity resources and refusing to participate in efforts to repower existing infrastructure. GENCO responds that it had and has no obligation to repower its generating units and Complainant fails to show any intent by GENCO to manipulate markets.

28. In addition, GENCO states that it is difficult to determine whether the Complaint constitutes a section 206 challenge to the PSA because it states on the one hand that it does not challenge the current tariff and PSA, or their amendments, but then also states that it does challenge whether GENCO's conduct was unjust and unreasonable in violation of section 206 of the FPA. GENCO states that this contradiction is irreconcilable.

¹⁶ GENCO cites its 2011 FERC Form 1, which shows an embedded book cost of generation facilities of \$529.9 million or approximately \$143/kW (\$529.9 million/3700 MW). In comparison, GENCO cites a recent study by NERA Economic Consulting that projects the cost of a new gas-fired peaking plant on Long Island to be \$1690/kW. GENCO August 20, 2012 Answer at 12 (citing NERA Economic Consulting, *Independent Study to Establish Parameters of the ICAP Demand Curve for the New York Independent System Operator*, at 28).

¹⁷ GENCO August 20, 2012 Answer at 13 (citing *DC Energy, LLC v. H.Q. Energy Servs. (U.S.), Inc.* 124 FERC ¶ 61,295, at P 2 (2008); *see also Prohibition on Energy Mkt. Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at PP 49, 52-53, *reh'g denied*, 114 FERC ¶ 61,300 (2006) (codified at 18 C.F.R. pt. 1c)).

29. Further, according to GENCO, if Complainant is challenging the existing PSA, it has not made the requisite public interest showing necessary under *Mobile-Sierra* to challenge the current PSA. GENCO states that once the Commission has approved a contract as it has done with the PSA and subsequent amendments, the presumption of justness and reasonableness can only be overcome by a showing that forced modification would meet a higher “public interest” standard.¹⁸ GENCO asserts that Complainant has not shown that the current PSA should be modified and, in fact, does not even attempt to meet any of the requirements of that “public interest” standard. Further, according to GENCO, to the extent Complainant is challenging any future PSA, its Complaint is fatally unripe. GENCO adds that if and when a new PSA is entered into, Complainant will have a full opportunity to intervene and become a party to the review proceedings, but only after the new PSA is filed with the Commission. It would be unprecedented and speculative, according to GENCO, for the Commission to consider a new PSA between GENCO and LIPA at this point.

30. Finally, GENCO contends that the Complaint appears to be an attempt to maintain Complainant’s property tax revenues at current levels rather than an actual concern with market manipulation. GENCO states that property taxes are a pass-through under the PSA with no mark-up by GENCO, but they amount to \$194 million per year and constitute 43 percent of GENCO’s charges to LIPA under the PSA. In addition, according to GENCO, LIPA pays another \$216 million per year in payments in lieu of taxes or other property-related taxes. GENCO notes that LIPA has begun a formal legal challenge to the property taxes it pays with respect to GENCO’s plant in Port Jefferson. GENCO argues that the Commission should not allow Complainant to resolve its fiscal problems in the context of a contrived market manipulation claim before the Commission.

B. Comments

31. With the exception of LIPA, commenters, express their support for the Complaint and reiterate Complainant’s request for an investigation.

32. LIPA included in its motion for intervention a “statement of position in lieu of a response.” In its statement, LIPA disagrees with all of Complainant’s assertions, beyond confirming the existence of the PSA. LIPA states that it entered into a PSA with GENCO dated June 26, 1997, as amended, whereby LIPA buys all of the capacity,

¹⁸ *Id.* at 14 (citing *e.g. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (Mobile); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956) (Sierra); *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 130 S. Ct. 693 (2010)).

energy and ancillary services provided by GENCO on Long Island, including that of the Port Jefferson generating facility. LIPA states that the PSA expires on May 28, 2013, and that LIPA and GENCO are currently negotiating a successor agreement to take effect in 2013. LIPA asserts that the requested relief, including the divestiture of GENCO facilities covered by the PSA and the prevention of a LIPA and GENCO successor PSA would interfere with the contractual provisions of the PSA and would affect LIPA's ability to serve its customers on Long Island. LIPA notes, however, that it is not named as a respondent in the Complaint, and therefore, LIPA's view is that it has no obligation under Rule 206 of the Commission's Rules of Practice and Procedure to submit a formal response. LIPA avers that because Complainant did not identify what it considers LIPA's role to be in this proceeding, LIPA would be required to speculate in order to respond to each allegation under the Complaint. Regardless, LIPA asserts that the Commission has no factual or legal basis to accept the Complaint for filing or conduct any type of meaningful proceeding under the FPA.

C. Complainant's Answer to GENCO's Answer

33. In its August 23, 2012 answer, Complainant responds that GENCO's answer misstates or omits facts and this obfuscation, together with its admission that it supplies "nearly two-thirds of the capacity and about a quarter of the energy for the LICA" undermine GENCO's basic premise that it cannot manipulate the LICA energy and capacity markets because it does not participate in them. Further, according to Complainant, combining GENCO's admitted "indifference to market results" with its confession that the continued viability of its LICA based generation is due to the fact that new market entrants must overcome the inherent economic advantage of GENCO's low cost capacity begs the question of whether this barrier to entry is being erected or artificially preserved by GENCO through the illegal exercise of market power and whether that illegal exercise of market power was occurring in the past. Complainant reiterates that this is the question it is asking the Commission to investigate.

34. Complainant also reiterates its claim of market manipulation through withholding discussed above and states that GENCO's continued operation of aging units creates the appearance of an excess amount of viable generation capacity within the LICA and thus disrupts price signals that would encourage new generation in the LICA. Complainant contends that, contrary to GENCO's suggestion, it does not assert that GENCO is required to add generation but that GENCO's refusal to participate in LIPA's RFP process for new and repowered generation further demonstrates GENCO's failure to participate as a competitive supplier without the barriers erected by the PSA, and moreover is evidence of GENCO's scienter.

35. Complainant further asserts that it is not asking the Commission to interfere in an unconstrained negotiation between independent commercial parties, but rather to investigate whether GENCO is leveraging its market power to corrupt its negotiations

with LIPA over the new PSA. Complainant contends that GENCO's conduct could perpetuate the market flaws that were created by the PSA, including disruption of market price signals and raised barriers to truly viable alternative generation. Complainant states that its fears are the direct result of statements made by GENCO's representatives in response to Complainant's urging GENCO to provide a proposal for the repowering of its generation facility in Port Jefferson. According to Complainant, GENCO's representative explained that GENCO was not inclined to provide such proposals in the competitive RFP process, but would rather limit its engagement with LIPA to the renegotiation of the sole source PSA. Complainant also notes that the Commission should ignore GENCO's assertion that Complainant is motivated by tax concerns as this is an attempt to obscure the facts.

IV. Commission Determination

A. Procedural Matters

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

37. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2012), the Commission will grant the late-filed motions to intervene given the parties' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

38. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept Complainant's answer to GENCO's answer filed in this proceeding because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

39. Section 222 of the FPA makes clear that there is no private right of action to pursue a manipulation claim under the FPA. Even if there were, however, it is difficult to see such a claim here. As pled by Complainant, the fact that GENCO does not retire or repower its inefficient units or that Long Island energy prices may be higher than surrounding areas does not sufficiently allege manipulation. It is also difficult to see scienter based on the facts alleged in the Complaint. Nevertheless, Complainant is free to contact the Office of Enforcement's Hotline if it believes that market manipulation has occurred and if it has additional facts to bring to Commission staff's attention. Staff would then determine whether or not to pursue such allegations and how to pursue them. Any such actions undertaken by staff are pursued under appropriate Commission regulations governing investigations.

40. Second, we turn to Complainant's allegations that GENCO's conduct violates FPA section 206. Complainant alleges that GENCO's conduct is unjust and unreasonable, has caused unjust and unreasonable prices, and is the type of conduct subject to mitigation under Attachment H of NYISO's Services Tariff. Complainant's section 206 claims rest on GENCO's alleged position as a pivotal supplier and a "near monopolist," its failure to participate in the RFP and RFI processes, its refusal to retire inefficient units, and the effects of the sale of GENCO capacity in the capacity markets at prices allegedly below net CONE, which Complainant alleges stems from GENCO maintaining an artificially high amount of capacity. The Commission finds that Complainant has not shown that GENCO's actions in this regard are unjust, unreasonable or unduly discriminatory in violation of section 206 of the FPA for the reasons discussed below.¹⁹

41. No party disputes that GENCO is a pivotal supplier in LICA, however the facts do not show that it has a "near monopoly" or "monopoly power." It owns approximately 3700 MW on Long Island, which represents roughly two-thirds of the capacity and 25 percent of the energy supplied to LICA²⁰ but there are substantial opportunities for imports, e.g., from the Cross Sound and Neptune controllable lines.²¹ In addition, it is not unreasonable for GENCO to continue to operate substantially depreciated assets. Further, Complainant has not established that there is an "artificially high amount of Committed Capacity" maintained by GENCO,²² since LIPA is responsible for ensuring that it contracts for sufficient capacity to ensure resource adequacy.

42. Also, as it relates to Complainant's section 206 claim that new or repowered generation would result in lower rates, we find that Complainant has not provided any factual support. Moreover, a mere showing of an effect on market rates would not, by itself, necessarily demonstrate that GENCO's actions are unjust and unreasonable or preferential in violation of section 206. Moreover, as explained in the answers, bidding

¹⁹ We also cannot find that GENCO's conduct violates the mitigation rules of Attachment H to NYISO's Services Tariff. These rules require a showing of bidding conduct or a withholding of one's own capacity from the NYISO-administered markets, neither of which is alleged by Complainant.

²⁰ See GENCO August 20, 2012 Answer at 3. See also Complainant August 23, 2012 Answer at 2.

²¹ "The Cross Sound Cable, the 1385 line, and the Neptune Cable satisfied approximately 34 percent of the load in Long Island in 2011." Potomac Economics, *2011 State of the Market Report* at 29.

²² Complaint at 3.

decisions in the NYISO markets with respect to the units in question are made by LIPA, not GENCO.

43. We also reject the argument that GENCO's failure to participate in the RFP and the RFI constitutes a coercive exercise of market power. Because GENCO has no obligation under the Federal Power Act, our regulations, or our precedent to do either, and Complainant cites to no such obligation, the mere failure to participate in the RFP and RFI is not evidence of an exercise of market power.

44. Complainant criticizes GENCO's decision not to retire its older, more inefficient generating units and instead to continue to offer this capacity into the capacity market at what it views as very low prices. In Complainant's view, GENCO's behavior constitutes an exercise of market power by suppressing capacity prices and thereby erecting barriers to entry and excluding competitors. But offering GENCO's capacity into the capacity market cannot be an exercise of market power by GENCO, because GENCO does not offer the capacity into the capacity market. Rather, the decisions to offer the capacity into the market, as well as the price offered in the market, are made by LIPA, pursuant to the terms of the PSA. Moreover, the Commission has previously determined that the PSA is just and reasonable,²³ and Complainant has not demonstrated to the contrary. Accordingly, we find that Complainant has not adequately pled facts in support of its assertion of a coercive exercise of market power and we decline to set for investigation or hearing the alleged illegal exercise of market power.

45. Complainant further argues that the Commission should investigate the ramifications of allowing the PSA to be renewed on substantially similar terms to the existing PSA. Complainant contends that a renewal of the PSA may potentially prevent investment in new generation while "saddling" Long Island ratepayers with high energy prices into the future.²⁴ We find Complainant's arguments as to the need for an investigation into the potential impacts of any future PSA between GENCO and LIPA premature and speculative, and therefore we reject this portion of the Complaint. The Commission will review any new PSA when it is filed, and the Commission's review of any such PSA will include a public comment period during which the reasonableness of any provision of that newly-filed PSA may be challenged.

²³ See *Long Island Electric Co.*, 87 FERC ¶ 63,002, at 65,002 ("The rates and terms contained in the PSA, as modified by the June 30, 1998 Stipulation and Agreement and discussed above, are just and reasonable."), *notice of finality of initial decision*, 87 FERC ¶ 61,322 (1999).

²⁴ Complaint at 5–6.

46. Complainant also alleges that GENCO is leveraging its market power in order to corrupt the negotiations with LIPA and force LIPA to extend the PSA on substantially similar terms. Complainant asks the Commission to investigate whether such negotiations are actually unconstrained and independent.²⁵ As found above, Complainant has not alleged facts sufficient for the Commission to determine that GENCO is exercising market power in the Long Island electricity markets and thus, Complainant cannot further argue that GENCO is improperly interfering with the open and independent negotiation of a PSA between itself and LIPA through the exercise of that market power. We thus find that Complainant's arguments regarding the nature of the current negotiation of the PSA renewal, as presented to us, are unfounded; unsubstantiated allegations do not warrant further investigation. Commission review of any new PSA between GENCO and LIPA will occur when that agreement is filed with the Commission. Accordingly we decline to investigate the negotiations regarding the PSA.

47. Accordingly, we deny the Complaint and the requested relief.

The Commission orders:

The Complaint by The Incorporated Village of Port Jefferson is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁵ Complainant August 23, 2012 Answer at 5-6.