

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
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September 25, 2009

SENT VIA ELECTRONIC FILING
Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. ER09-1682-000 - New York Independent
System Operator, Inc.

Dear Secretary Bose:

For filing, please find the Notice of Intervention and Comments of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'David G. Drexler', is written over a horizontal line.

David G. Drexler
Assistant Counsel

Attachment

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System) Docket No. ER09-1682-000
Operator, Inc.)

NOTICE OF INTERVENTION AND COMMENTS OF
THE NEW YORK STATE PUBLIC SERVICE COMMISSION

NOTICE OF INTERVENTION

On September 4, 2009, the New York Independent System Operator, Inc. (NYISO) proposed additional mitigation measures to address the on-going exercise of market power by three generators. The New York State Public Service Commission (NYPSC) hereby submits its Notice of Intervention and Comments in the above-captioned proceeding pursuant to the Federal Energy Regulatory Commission's (FERC or Commission) Notice of Filings, issued on September 9, 2009, and Rule 214 of the Commission's Rules of Practice and Procedure.

Copies of all correspondence and pleadings should be addressed to:

| | |
|-------------------------------|----------------------------------|
| David G. Drexler | William Heinrich |
| Assistant Counsel | Chief, Policy Coordination |
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BACKGROUND

Pursuant to its Market Mitigation Measures (MMM), the NYISO is responsible for identifying market behavior that does not trigger the thresholds specified for imposing mitigation measures, but nonetheless constitutes an abuse of market power.¹ In situations where such market behavior has a significant affect on guarantee payments (i.e., an increase of 100%), the NYISO is obligated to seek authorization, pursuant to section 205 of the Federal Power Act, to apply appropriate mitigation measures.²

Based upon a review of market behavior, the NYISO identified three generators that were being committed for reliability purposes, but bidding in an anticompetitive manner.³ These generators were able to exert market power knowing their bids would be selected. Although this bidding did not trigger

¹ NYISO Market Services and Control Area Administration Tariff, Attachment H, § 1(b).

² Attachment H, § 3.2.3.

³ Generators that are selected to operate for reliability purposes are entitled to a guarantee payment that allows for recovery of startup and minimum generation costs that are not recovered in the dispatch day. However, these payments do not include an opportunity to recover "fixed" costs. As Dr. David Patton testified, submitting bids that incorporate a fixed cost component is not consistent with conduct that would be expected under competitive market conditions. September 4 Filing, Attachment B, Affidavit of Dr. David Patton.

the conduct and impact thresholds specified in the MMM, it resulted in bid production cost guarantee payments increasing more than 100%.

The NYISO determined that the bidding practices of the three generators departed from conduct that would be expected under competitive market conditions, and was not attributable to legitimate competitive market forces or incentives. In order to address the identified vulnerabilities in the MMM, the NYISO proposes significantly tighter thresholds targeted to the three generators engaging in anticompetitive behavior.⁴ These thresholds would only apply to these three generators under circumstances when they are needed for reliability.⁵ If the thresholds are exceeded, the NYISO will substitute a default bid at the generators' reference levels, which serve as a proxy for bids that would be expected to be submitted under competitive conditions.

⁴ Docket No. ER09-1682-000, New York Independent System Operator, Inc., September 4, 2009 Filing (September 4 Filing).

⁵ The generators may also submit a bid that exceeds the tighter thresholds, and will be afforded an opportunity to explain to the NYISO's market monitor why the generators believe the bids are consistent with competitive market conditions.

DISCUSSION

The NYPSC supports the NYISO's September 4 Filing and commends the NYISO for identifying and addressing market behavior that constitutes an abuse of market power. The measures proposed by the NYISO should bring bidding behavior closer in line with competitive conduct (i.e., bids closer to marginal operating costs), and significantly reduce the ability of the three generators to exercise market power when committed for reliability purposes. Such measures are necessary and a reasonable short-term solution while the NYISO works with interested stakeholders to develop a permanent solution.

The September 4 Filing, however, reveals that the New York rest-of-state market is in fact susceptible to market power problems in certain reliability situations, and the NYPSC believes a thorough review of the NYISO's rest-of-state mitigation rules is therefore required. For instance, the current conduct threshold for energy bids in the rest-of-state market is the lower of 300% or \$100/MWh above reference levels. Thus, suppliers could triple their energy bids without even crossing the NYISO's conduct thresholds. Such excessive thresholds leave consumers at risk of significant harm from

market power abuse, and must be addressed in a subsequent filing, which the NYISO has committed to undertaking.⁶

Given the NYISO's conclusion that the behavior of the three generators constituted an abuse of market power, the Commission should conduct an investigation to determine whether any violations occurred, tariff or otherwise,⁷ that would provide a basis for refunds to consumers that were overcharged. We believe that the amount of overcharges could be fairly significant. As the NYISO's August 2009 Monthly Report indicates, guarantee payments in the Real-Time (Balancing) Market totaled approximately \$15 million for July and August 2009, combined.⁸ The Commission should not permit generators to profit from market power abuse by keeping their ill-gotten gains.

Alternatively, the Commission should apply the proposed mitigation measures to the generators' anticompetitive

⁶ The NYISO indicates that it will undertake a stakeholder process to "develop a comprehensive set of mitigation measures that will be designed to address the ability of Generators that are committed or dispatched for system reliability to exercise market power at levels below the current applicable conduct and impact thresholds," and will subsequently file them with the Commission. September 4 Filing, p. 19.

⁷ For example, the Commission's regulations prohibit any entity from engaging in manipulation of energy markets. 18 CFR §1c.2.

⁸ NYISO August 2009 Monthly Report, Chart 4C.

conduct so that refunds can be issued and consumers won't be harmed by this anticompetitive behavior.⁹ In this situation, providing refunds to consumers should be relatively easy to accomplish since the overcharges in question concerned individual generator guarantee payments, and do not require the NYISO to recalculate market prices.

The Commission should also make the non-commercially sensitive information contained in Attachments C, D, and E publicly available, such as the identities of the three generators, to ensure sufficient market transparency. Similarly, the Commission should release details regarding the extent and magnitude of the anticompetitive behavior so that market participants can fully understand the magnitude of the harm to consumers and work with the NYISO to craft solutions to prevent such harm from occurring in the future.

CONCLUSION

As discussed above, the NYISO's proposed mitigation measures are reasonable and should be approved by the Commission. In addition, the Commission should issue refunds to

⁹ While the NYISO proposes to implement the revised mitigation thresholds on a prospective basis, the NYISO indicates that "the MMM does not require that the NYISO's proposed mitigation measure apply prospectively." September 4 Filing, fn 16.

consumers that were harmed by the exercise of market power, and should release relevant information that is not protected under the law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter McGowan". The signature is written in a cursive, somewhat stylized script.

Peter McGowan
General Counsel
Public Service Commission
of the State of New York

By: David G. Drexler
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

Dated: September 25, 2009
Albany, New York

CERTIFICATE OF SERVICE

I, David G. Drexler, do hereby certify that I will serve on September 25, 2009, the foregoing Notice of Intervention and Comments of the New York State Public Service Commission upon each of the parties of record indicated on the official service list compiled by the Secretary in this proceeding.

Dated: September 25, 2009
Albany, New York


David G. Drexler

