

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE  
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350  
Internet Address: <http://www.dps.state.ny.us>

PUBLIC SERVICE COMMISSION

GARRY A. BROWN  
*Chairman*  
PATRICIA L. ACAMPORA  
MAUREEN F. HARRIS  
ROBERT E. CURRY JR.  
JAMES L. LAROCCA  
*Commissioners*



PETER MCGOWAN  
*General Counsel*

JACLYN A. BRILLING  
*Secretary*

October 22, 2010

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. ER10-3043-000 - 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 proceedings. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

A handwritten signature in black ink, appearing to read 'David G. Drexler', is written over a faint, larger version of the same signature.

David G. Drexler  
Assistant Counsel

Attachment

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System                    )   Docket No. ER10-3043-000  
Operator, Inc.                                    )

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

NOTICE OF INTERVENTION

On September 27, 2010, the New York Independent System Operator, Inc. (NYISO) filed proposed revisions to the market power mitigation measures applicable to the New York City (NYC) Installed Capacity (ICAP) market (September 27 Filing). The New York State Public Service Commission (NYPSC) hereby submits its Notice of Intervention and Comments in accordance with the Federal Energy Regulatory Commission's (FERC or Commission) Notice of Extension of Time, issued on October 1, 2010, 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  
Assistant Counsel  
New York State Department  
of Public Service  
Three Empire State Plaza  
Albany, New York 12223-1350  
david\_drexler@dps.state.ny.us

William Heinrich  
Chief, Policy Coordination  
New York State Department  
of Public Service  
Three Empire State Plaza  
Albany, New York 12223-1350  
william\_heinrich@dps.state.ny.us

## BACKGROUND

In order to address market power issues in the NYC ICAP market, the Commission approved several modifications to the applicable market mitigation measures.<sup>1</sup> While the measures addressed the on-going exercise of market power by pivotal ICAP suppliers that were engaging in economic withholding to inflate prices, they also dealt with concerns that buyers (i.e., Load-Serving Entities) may exercise market power in order to suppress prices. In particular, the Commission adopted an offer floor for new ICAP suppliers that enter the market, whereby bids that are below the floor are deemed "uneconomic" and not entitled to clear the market.<sup>2</sup> The Commission also approved the methodologies for calculating the duration which the Offer Floor applies.

The NYISO's September 27 Filing proposes several revisions to the methodologies for calculating the duration of the offer floor. Under the proposal, an ICAP supplier would be subject to an offer floor for a minimum of six Capability

---

<sup>1</sup> Docket No. EL07-39-000, NYISO, Order Conditionally Approving Proposal (issued March 7, 2008).

<sup>2</sup> The Offer Floor is set at the lower of a unit's net Cost of New Entry (CONE), or 75% of Mitigation Net CONE.

Periods, and a maximum of 30 Capability Periods.<sup>3</sup> Between these periods, the Offer Floor duration would be determined based on the shorter of either: 1) a formula that adds the new supplier's capacity to the surplus capacity in the market, and divides the total MWs by a forecast of average load growth over a three year period; or, 2) when the total cleared Unforced Capacity (UCAP) of the new supplier (measured when at least 50% of the supplier's capacity is accepted) is greater than the supplier's total nominal UCAP. These revisions are intended to avoid deterring "economic" entry in the ICAP market by inappropriately over-mitigating new ICAP suppliers.

#### DISCUSSION

The NYPSC agrees with the NYISO that the proposed tariff revisions represent an improvement over the existing NYC ICAP buyer-side mitigation measures.<sup>4</sup> The amended provisions should help to provide greater certainty and transparency to potential new entrants, and assist in avoiding several scenarios that could result in unreasonable mitigation outcomes, which could otherwise occur under the current mitigation measures.

---

<sup>3</sup> Because each Capability Period is six months long, the mitigation period would be between three years and 15 years.

<sup>4</sup> September 27 Filing, p. 5.

In particular, we support the use of a three-year average of forecasted load growth, rather than the current methodology of using historical load growth, since it will better reflect future conditions in the market. This forward-looking approach will more closely align with the decision-making process of new entrants that determine whether to make financial commitments based on those future market conditions. In addition, the use of projected load growth should avoid unreasonable mitigation outcomes that could otherwise occur from utilizing historical load growth. For example, when load growth has historically been negative, such as the recent recessionary period, the mitigation measures could be applied in perpetuity.<sup>5</sup>

However, the NYPSC objects to the retention of an offer floor for a minimum of six Capability Periods in light of the NYISO's other proposed changes that include a methodology for determining when a new resource is deemed "economic." We remain concerned that the application of buyer-side mitigation measures with a mandatory minimum Offer Floor will still act as a barrier to new entry, which may include generation or transmission resources, by creating additional financial risk that entrants

---

<sup>5</sup> This result is the product of utilizing a negative denominator in the formula for determining the duration of the Offer Floor.

will not be eligible to receive ICAP payments for some length of time. This will likely add to the cost and difficulties of financing new generation within NYC or transmission into NYC, thus deterring financial investments and creating a barrier to new entry.

The NYISO suggests that a "minimum mitigation period is important to maintaining the deterrent value of the Offer Floor provisions."<sup>6</sup> The NYISO also points to prior FERC precedent indicating that three years is a suitable "default" mitigation period. In addition, the NYISO indicates that a minimum Offer Floor period will guard against projects escaping mitigation prematurely "under circumstances that are not currently foreseen."<sup>7</sup>

The Commission should reject the rationales provided in the September 27 Filing for retaining a minimum Offer Floor period. The NYISO's proposal to specifically measure when a new resource is deemed economic, by ensuring a sufficient amount of the resource's capacity has cleared the market, renders a minimum mitigation period unnecessary. By definition, when a resource is deemed economic, an Offer Floor to prevent uneconomic entry

---

<sup>6</sup> September 27 Filing, p. 9.

<sup>7</sup> Id.

should no longer be needed. Because the NYISO has proposed a tailor made methodology for determining when a project shall be treated as economic (i.e., require at least 50% of a supplier's capacity to clear in any given market auction before that capacity will be counted towards evaluating it against a supplier's total nominal UCAP), a "default" mitigation provision is not necessary or appropriate.

Furthermore, the NYISO's suggestion that a minimum mitigation period will act as a check against unforeseen circumstances is too speculative to warrant the broad application of a mandatory minimum mitigation period. The Commission's rule against market manipulation should provide sufficient authority to remedy any unforeseen circumstances.<sup>8</sup>

In addition, while we agree that there needs to be a maximum duration for the application of the offer floor, we maintain that a 15 year period is unreasonably long, and could similarly deter new investments if an entrant would potentially be ineligible for ICAP revenues for such an excessive length of time. It is highly unlikely that a new entrant would enter the market to suppress prices knowing they may not get paid for 15 years. Therefore, the Commission should reject the proposed 15

---

<sup>8</sup> 18 C.F.R. 1c.2.

year maximum, and direct the implementation of a shorter time-frame that would still accomplish the objective of deterring "uneconomic" new entry, but is a just and reasonable period.<sup>9</sup>

The likely deterrent that the minimum and maximum mitigation provisions would have against new entry is of particular concern in the NYC market, which faces a number of reliability, economic and environmental challenges. Crucially, NYC is under federal and state mandates to improve air quality, and reductions in emissions from NYC generation are important to meeting those mandates.<sup>10</sup> Because NYC is a load pocket that requires a minimum amount of generation capacity to be physically located within NYC (i.e., 80% of peak load), those emissions reductions cannot be achieved without the introduction of new, cleaner resources in NYC. Moreover, NYC continues to have some of the highest electric prices in the country, which were anticipated to fall as a result of increased competition. New

---

<sup>9</sup> A maximum period of no more than six years appears to be a reasonable time-frame, as suggested in the Comments and limited Protest filed by Consolidated Edison Company of New York, Inc. et al. (filed October 22, 2010).

<sup>10</sup> The U.S. Environmental Protection Agency has mandated that the New York Department of Environmental Conservation develop a State Implementation Plan to reduce particular air pollutants in order to bring the State into compliance with the Clean Air Act, and the implementing regulations. See, <http://www.dec.ny.gov/chemical/8403.html>.

entry in NYC, along with increased competition and access to newer, more efficient, and cleaner resources, presents an opportunity to address many of these challenges at the same time, and should therefore not be unreasonably discouraged.

While the proposed revisions before the Commission in the September 27 Filing represent an improvement over the current mitigation measures, the measures require further refinements than those identified above. Further, we maintain that additional revisions to the buyer-side mitigation measures should be developed to assist in avoiding the inappropriate deterrence of new entry in the NYC market. For instance, an exemption for new entry by merchant developers should be pursued, given that such developers are merely interested in competing for revenues rather than suppressing prices. The NYPSC looks forward to working with stakeholders and the Commission in addressing these further revisions that are needed to avoid the inappropriate deterrence of new entry in NYC.

CONCLUSION

As discussed above, the Commission should accept, with modifications, the revised mitigation measures proposed in the September 27 Filing.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Peter McGowan".

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: October 22, 2010  
Albany, New York

CERTIFICATE OF SERVICE

I, David G. Drexler, do hereby certify that I will serve on October 22, 2010, 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: October 22, 2010  
Albany, New York

  
David G. Drexler

