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THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350  
Internet Address: <http://www.dps.state.ny.us>

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December 2, 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 Request for Rehearing 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 black ink that reads 'David G. Drexler'. The signature is written in a cursive style.

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.                            )

REQUEST FOR REHEARING OF THE  
NEW YORK STATE  
PUBLIC SERVICE COMMISSION

REQUEST FOR REHEARING

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure, the New York State Public Service Commission (NYPSC) hereby submits its Request for Rehearing of the Commission's November 3 Order.<sup>1</sup> The November 3 Order addressed the confidentiality of information contained in the New York Independent System Operator, Inc.'s (NYISO) proposed mitigation measures that addressed the on-going exercise of market power by three generators.

While the NYPSC sought the release of "details regarding the extent and magnitude of the anticompetitive

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<sup>1</sup> Docket No. ER09-1682-000, New York Independent System Operator, Inc., Order on Requests for Confidentiality and Accepting and Suspending Tariff Sheets, Subject to Conditions, 129 FERC ¶61,103 (issued November 3, 2009) (November 3 Order).

behavior,"<sup>2</sup> the Commission determined that the "payments and the time periods at issue here are to be held in confidential status as they could be used to calculate the underlying [locational based marginal prices (LBMPs)], bids, reference prices, and costs."<sup>3</sup> However, the Commission's November 3 Order did not explain how aggregate data regarding the extent and magnitude of the anticompetitive behavior could be used to calculate such information. Because we believe that the release of the aggregate data will not cause the inappropriate disclosure of proprietary information, the NYPSC seeks rehearing so that the requested data may be released. In the alternative, the Commission should adequately explain how the aggregate data could be used to calculate confidential information.

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<sup>2</sup> NYPSC Comments at p. 6.

<sup>3</sup> November 3 Order at ¶30.

## STATEMENT OF ISSUE

Whether the Commission's determination to provide confidential treatment for aggregate information was contrary to the standards for agency decision-making under relevant case law,<sup>4</sup> and the Administrative Procedure Act.<sup>5</sup>

## BACKGROUND

On September 4, 2009, the NYISO proposed new mitigation measures to address the abuse of market power.<sup>6</sup> The NYISO's proposal was the result of its review of market behavior and the identification of three generators that were bidding in

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<sup>4</sup> Mudge Rose Guthrie Alexander & Ferdon v. U.S. International Trade Commission, 846 F.2d 1527 (D.C. Cir. 1988) (concluding that the International Trade Commission failed to provide a reasoned explanation why disclosure of aggregate data would identify proprietary characteristics of individual businesses).

<sup>5</sup> In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right...; or, unsupported by substantial evidence." 5 U.S.C. §706. See, Bluewater Network v. Environmental Protection Agency, 370 F.3d 1, 18 (D.C. Cir. 2004).

<sup>6</sup> Docket No. ER09-1682-000, New York Independent System Operator, Inc., September 4, 2009 NYISO Filing (September 4 Filing). 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. NYISO Market Services and Control Area Administration Tariff, Attachment H, § 1(b).

an anticompetitive manner, knowing their bids would be selected by the NYISO to resolve particular reliability concerns.<sup>7</sup>

Specifically, the NYISO's September 4 Filing proposed to utilize more stringent thresholds for applying mitigation measures to the generators in question. In situations where the more stringent thresholds are exceeded, the NYISO proposed to substitute the generators' anticompetitive bids with default bids (i.e., reference level bids) designed to serve as a proxy for bids that would be expected to be submitted under competitive conditions. However, the NYISO sought confidential treatment for significant portions of its September 4 Filing, including the identities of the three generators.

On September 25, 2009, the NYPSC submitted a timely Notice of Intervention and Comments regarding the NYISO's September 4 Filing. While the NYPSC supported the NYISO's proposal for addressing the abuse of market power, we requested that the Commission "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, we sought

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<sup>7</sup> 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.

the "release [of] 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."<sup>8</sup>

The Commission's November 3 Order addressed various requests for confidential treatment, as well as requests for disclosure of such information purported to be confidential. Although the Commission determined that the generators' identities were not entitled to confidential treatment, the FERC indicated that "the guarantee payments and the time periods at issue here are to be held in confidential status as they could be used to calculate the underlying LBMPs, bids, reference prices, and costs."<sup>9</sup> Accordingly, the November 3 Order rejected the NYPSC's request for disclosure of the extent and magnitude of the anticompetitive behavior.

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<sup>8</sup> NYPSC Filing at p. 6.

<sup>9</sup> November 3 Order at ¶30.

## DISCUSSION

### The Commission Should Grant Rehearing And Provide For The Disclosure Of Aggregate Information Concerning The Extent And Magnitude Of The Market Abuse

The NYPSC seeks rehearing of the Commission's November 3 Order, in so far as it may be interpreted to preclude the release of information concerning the extent and magnitude of the anticompetitive behavior. Regarding the extent of the anticompetitive harm, the NYPSC requests that the Commission provide for the disclosure of the dates when such harm commenced and ceased.<sup>10</sup> As we previously explained, this information will assist market participants in crafting appropriate solutions to prevent such harm from occurring in the future.

Moreover, identifying the scope of the harm may highlight the need for additional tariff language to protect consumers during any potentially lengthy periods between when anticompetitive behavior first occurs and such behavior can be remedied. Allowing market participants to collect excessive charges as a result of their exercise of market power, while an appropriate remedy is formulated, will undermine consumer confidence in the market and the Commission's ability to ensure

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<sup>10</sup> In the event specific dates cannot be disclosed, the Commission should direct the disclosure of the approximate time frames covering the anticompetitive behavior, such as the month(s) that the harm began.

rates are just and reasonable, as required under the Federal Power Act.<sup>11</sup>

Regarding the magnitude of the anticompetitive harm, we seek aggregate information concerning the overpayments to each of the three generators. We do not believe that the release of the total excess payments to each generator will allow others to discern proprietary information, such as bids, reference prices, or costs. Alternatively, if individual figures cannot be disclosed, the total amount of excess payments to all three generators should be provided.

Although the Commission is required to provide an adequate explanation of its decision-making under relevant case law and the Administrative Procedure Act, the Commission failed to explain why the disclosure of the extent and magnitude of the anticompetitive harm "could be used to calculate the underlying LBMPs, bids, reference prices, and costs."<sup>12</sup> In the case of Mudge Rose Guthrie Alexander & Ferdon v. U.S. International Trade Commission, the D.C. Circuit Court of Appeals had occasion to review an agency's claim that the release of aggregated data from three or more firms might result in disclosure of

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<sup>11</sup> See, 16 U.S.C. §824d.

<sup>12</sup> November 3 Order at ¶30.

individual businesses' proprietary information. The Court found that, at a minimum, a coherent explanation of why disclosure of the requested aggregate data would reveal proprietary information was necessary. Accordingly the Court remanded the issue for an adequate explanation, "either narratively or perhaps, more usefully, through a few hypothetical examples."<sup>13</sup>

Similar to the agency's decision in Mudge Rose Guthrie Alexander & Ferdon, the Commission has not provided a coherent explanation of why disclosure of aggregate information related to the extent and magnitude of the anticompetitive behavior could reveal trade secret information. Likewise, the Administrative Procedure Act requires an agency to "articulate[] a satisfactory explanation for its action,"<sup>14</sup> which is absent in this proceeding. Therefore, the Commission's determination to provide confidential treatment for aggregate information is contrary to the standards for agency decision-

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<sup>13</sup> Mudge Rose Guthrie Alexander & Ferdon v. U.S. International Trade Commission, 846 F.2d 1527, 1532 (D.C. Cir. 1988)

<sup>14</sup> Bluewater Network v. Environmental Protection Agency, 370 F.3d 1, 18 (D.C. Cir. 2004) (quoting Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 43 (1983)) (interpreting the "arbitrary and capricious" standard under the Administrative Procedure Act to require a reasoned explanation of an agency's decision).

making within relevant case law, and the Administrative Procedure Act.

CONCLUSION

In accordance with the discussion above, the Commission should grant the NYPSC's Request for Rehearing and determine that the aggregate information sought by the NYPSC is not confidential and should be disclosed. Alternatively, the Commission should provide an adequate explanation of why the aggregate information should be kept confidential.

Respectfully submitted,



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: December 2, 2009  
Albany, New York

CERTIFICATE OF SERVICE

I, David G. Drexler, do hereby certify that I will serve on December 2, 2009, the foregoing Request for Rehearing 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: December 2, 2009  
Albany, New York

  
David G. Drexler

