

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent System)	Docket No. ER09-1142-000
Operator, Inc.)	
)	
)	

**MOTION TO INTERVENE AND COMMENTS OF THE
ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214, the Electric Power Supply Association (EPSA)¹ respectfully files this motion to intervene and comment in the above-captioned proceeding. On May 15, 2009, the New York Independent System Operator, Inc. (NYISO) submitted a filing to the Commission in compliance with Order No. 719.² NYISO's filing addresses the four areas for possible reforms identified by Order No. 719 – demand response and price formation, long-term contracts, market monitoring policies, and RTO responsiveness – and proposes tariff changes where necessary. Specifically, the NYISO states its filing demonstrates that its existing tariffs and market design already satisfy, or will soon satisfy, Order No. 719 requirements with respect to demand response and pricing during periods of operating reserve shortage, facilitating long-term power contracts, and RTO responsiveness, but does propose revisions to comply with market monitoring

¹ The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

² *Order No. 719: Wholesale Competition in Regions with Organized Electric Markets*, 18 CFR Part 35, 125 FERC ¶ 61,071, Docket Nos. RM07-19-000 and AD07-7-000 (October 17, 2008).

and bid disclosure directives. The filing also reflects that several additional filings will be submitted in the near term to comply with the directives and goals of Order No. 719.³ EPSA is generally supportive of the NYISO filing, but asks the Commission to provide guidance or direct NYISO to take certain actions to enhance its overall compliance, which will provide further benefits to its already well-functioning markets. Accordingly, EPSA's comments focus on three issues: 1) NYISO's utilization of an operating reserves demand curve in periods of operating shortage; 2) NYISO's tariff language regarding states' tailored information requests to the Market Monitoring Unit (MMU); and, 3) the NYISO Transmission Owners' (TOs) proposed modification to the definition of Market Violation, which NYISO says will be considered prospectively through its stakeholder process.

I. BACKGROUND

On October 17, 2008, the Commission issued Order No. 719, a final rule, which was the culmination of a lengthy and inclusive process that included three technical conferences, both an advanced notice of proposed rulemaking and notice of proposed rulemaking, and numerous comments in response to each. The Order, among other things, required that independent system operators and regional transmission organizations (RTOs) submit a compliance filing that modifies and improves the operation of wholesale electric markets specifically in the substantive areas of demand response and price formation, long-term power

³ See *generally* the NYISO Order No. 719 Compliance Filing discussing additional filings related to demand response and confidentiality protections on information sharing (NYISO Order No. 719 Compliance Filing).

contracting, market monitoring policies and RTO responsiveness to comply with the mandates and recommendations of the final rule.

In response, NYISO says it discussed development of its compliance filing at a number of stakeholder meetings, with presentations describing one or more elements of the compliance proposal discussed at various committee meetings held between December 3, 2008 and April 14, 2009. In April, the NYISO shared final drafts of its transmittal letter and proposed tariff changes with stakeholders and made modifications in response to their feedback.⁴ The NYISO believes that there is broad support for its compliance proposals, including the determination that its existing arrangements already satisfy Order No. 719's requirements with respect to demand response resources, pricing during operating reserve shortages, and RTO responsiveness.⁵

Among other things, the NYISO does propose changes to its market monitoring policies to (1) establish Potomac Economics (currently serving as the Independent Market Advisor) as its MMU reporting to non-RTO management Board members; and, (2) establish its current internal MMU as the Market Mitigation and Analysis Department reporting to Senior RTO management.⁶ Additionally, the NYISO will submit a separate filing regarding confidentiality provisions to protect market participant data in response to tailored requests for information that may be submitted to the NYISO MMU by state commissions.⁷

⁴ NYISO Order No. 719 Compliance Filing at 39.

⁵ *Id.*

⁶ *Id.* at 17-19.

⁷ *Id.* at 19-20.

II. INTERVENTION AND COMMUNICATIONS

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving global power markets. EPSA seeks to bring the benefits of competition to all power customers.

Many of EPSA's member companies are market participants and members of the NYISO. Further, EPSA and its members have been and continue to be active in many of the Commission's ongoing proceedings on NYISO issues, and were also active parties in the process leading to issuance of the final rule, Order No. 719, in this proceeding. Accordingly, EPSA has a direct and substantial interest in the outcome of this proceeding that cannot be adequately represented by any other party. Therefore, allowing EPSA to actively participate in this proceeding would be in the public interest.

All pleadings, correspondence and other communications concerning this proceeding should be directed to:

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III. COMMENTS

A. SCARCITY PRICING IN PERIODS OF OPERATING SHORTAGE

Order No. 719 directed each RTO to “reform or demonstrate the adequacy of its existing market rules to ensure that the market price for energy reflects the value of energy during an operating reserve shortage.”⁸ As the Commission found that inaccurate price formation is a barrier to functional demand response, Order No. 719 required each RTO to produce a factual record that its shortage pricing proposal or existing mechanism meets six specific criteria.⁹ Further, the Commission did not mandate any specific approach to this area of reform in recognition that changes to market rules should reflect each region’s market design. However, Order No. 719 offers four suggested approaches that may be proposed to meet the required criteria,¹⁰ or indicates that an RTO may develop

⁸ Order No. 719, P 194.

⁹ Those criteria include: 1) improve reliability by reducing demand and increasing generation during periods of operating reserve shortage; 2) make it more worthwhile for customers to invest in demand response technologies; 3) encourage existing generation and demand resources to continue to be relied upon during an operating reserve shortage; 4) encourage entry of new generation and demand resources; 5) ensure that the principle of comparability in treatment of and compensation to all resources is not discarded during periods of operating reserve shortage; and, 6) ensure market power is mitigated and gaming behavior is deterred during periods of operating reserve shortages including, but not limited to, showing how demand resources discipline bidding behavior to competitive levels. Order No. 719, P 247.

¹⁰ The four suggested approaches are: 1) RTOs would increase the energy supply and demand bid-caps above the current levels only during an emergency; 2) RTOs would increase bid caps above the current level during an emergency only for demand bids while keeping generation bid caps in place; 3) RTOs would establish a demand curve for operating reserves, which has the effect of raising prices in a previously agreed-upon way as operating reserves grow short; and, 4) RTOs would set the market-clearing price during an emergency for all supply and demand response resources dispatched equal to the payment made to participants in an emergency demand response program. Order No. 719, P 208.

another approach in coordination with its stakeholders that achieves the same objectives.¹¹

The NYISO believes its market design meets the scarcity pricing requirements of Order No. 719 as it has already implemented one of the suggested approaches. Specifically, since February 2005, NYISO says it has successfully utilized demand curves for both operating reserves and regulation to set real-time clearing prices during operating reserve shortages.¹² NYISO suggests that its experience “appears to have been a principal reason why the Commission first proposed making the use of a demand curve one of its four representative scarcity pricing options in the rulemaking that culminated in Order No. 719.”¹³

EPSC commends the NYISO for its leadership as the first RTO to develop and implement operating reserve demand curves. As noted in the report on demand response filed by the NYISO’s independent market advisor, NYISO “currently [has] the most complete set of market rules governing shortage pricing. In addition to the reserve demand curves, the NYISO is the only RTO we are aware of that allows emergency demand response resources that are called to avoid a shortage to set prices at levels intended to reflect the marginal value of the foregone consumption.”¹⁴

¹¹ Order No. 719, P 234.

¹² NYISO Order No. 719 Compliance Filing at 11-13.

¹³ *Id.* at 11.

¹⁴ *Report on Demand Response of Potomac Economics, Ltd.*, Independent Market Advisor for the New York ISO, Docket No. ER09-1142 (May 15, 2009), pg. 16.

While EPSA is supportive of the NYISO's current approach and does not propose any modifications in this proceeding, it is important to note that the NYISO has a parallel process underway with stakeholders to assess the set operating points (set points) that were initially established when the reserve demand curves were implemented in 2005.¹⁵ EPSA supports this type of periodic assessment of underlying market assumptions to ensure that mechanisms such as this are sending accurate price signals and providing the intended benefits to the market. Although use of operating reserve demand curves is one of the Commission's preferred approaches, it is critical in establishing – or maintaining – such a mechanism that market design features do not suppress prices during shortage conditions to levels below the value of lost load (VOLL). It is possible that at the conclusion of this parallel process the NYISO may need to propose changes to ensure the accuracy of the set points establishing the reserve demand curves.

Accordingly, in generally approving NYISO's use of the operating reserve demand curves approach, the Commission should not endorse the specific set points for the current reserve demand curves. Further, the Commission should direct NYISO to undertake its review of the operating reserve demand curve set points consistent with the Commission's Order No. 719 findings to ensure that

¹⁵ NYISO's 2009 Product Enhancements project list dated April 28, 2009, includes a project entitled "Shortage Pricing Evolution," that reflects that NYISO and its stakeholders "...will assess the operation of the reserve demand curves to confirm the continued applicability of the set points and consider needs for additional demand curve capabilities to quantify shortage conditions." See page 3 of the project list available from NYISO's website at: http://www.nyiso.com/public/webdocs/committees/mc_bpwg/meeting_materials/2009-05-04/2009KeyProjectDescriptions_BPWG_50409.pdf

the market price for energy reflects the value of energy (or stated another way, the VOLL) during an operating reserve shortage.¹⁶

B. STATES' TAILORED REQUESTS FOR INFORMATION FROM THE INDEPENDENT MARKET MONITOR

Order No. 719 concluded that states within an RTO's footprint may make tailored requests for information from the MMU.¹⁷ In that Order, the Commission laid out a number of guidelines and restrictions to the types of requests states may make. First, the Commission noted that requests from states should not be unduly burdensome to the MMU, stating that "if this limitation were not imposed, the MMU could rapidly become an unpaid consultant for the states, and would be unable to perform its core functions."¹⁸ Next, the Commission found that states may only request information from the IMM if the information is not requested to aid state enforcement actions and if appropriate non-disclosure agreements are executed.¹⁹ According to Order No. 719, that data also must be "appropriately redacted to meet confidentiality concerns."²⁰ Finally, Order No. 719 allows affected market participants the opportunity to contest a request or to provide context to the data that the states have requested.²¹

¹⁶ Order No. 719, P 192-199.

¹⁷ *Id.*, P 446-459.

¹⁸ *Id.*, P 446.

¹⁹ *Id.*, P 448-449.

²⁰ *Id.*, P 450.

²¹ *Id.*, P 455.

To that end, NYISO proposes general language in Section 6.5.4 of its Market Monitoring Plan (including new sub-sections 6.5.4.1 through 6.5.4.4) to provide information regarding general market trends and the performance of the New York wholesale markets to certain parties, including state commissions, if the information is not confidential or protected, is not unduly burdensome for the MMU to provide, and the requesting party will provide reimbursement for the costs of disclosing the information. In Sub-section 6.5.4.1, the NYISO indicates it will not disclose protected information until appropriate confidentiality protections are developed by NYISO and its stakeholders and approved by the Commission. NYISO indicates it will develop such provisions with its stakeholders and file proposed tariff revisions in a timeframe to permit the changes to become effective in the first quarter of 2010. Further, Sub-section 6.5.4.4 states the NYISO and its MMU will not provide information to the New York Public Service Commission (NYPSC) or other state commission that is designed to aid a state enforcement action.

The proposed language speaks directly to two of the five requirements set forth in Order No. 719 – that the request is not unduly burdensome for the MMU and that it is not designed to aid state enforcement actions. However, NYISO's proposed language does not speak to: the confidentiality rules that a transmission provider or the MMU should use in disclosing information about market participants, requirements for non-disclosure agreements and procedures for market participants to contest a request, as well as reviewing an information request after it has been processed to have the opportunity to provide further

contextual information, as Order No. 719 directed. Further, the proposed tariff language does not discuss redaction of potentially sensitive information.

Presumably, all of these required provisions will be incorporated into the NYISO's future filing on confidentiality protections that will be developed with its stakeholders. In developing these tariff provisions, EPSA suggests the NYISO look to ISO New England tariff language as a model, as it allows market participants full review of an MMU's answer to tailored information requests in order to either contest or contextualize the information to be sent to the requesting state. Section 3.3(b)(iii) of ISO New England's Information Policy provides an excellent template for other RTOs seeking to comply with Order No. 719's directives. ISO New England explains the importance of "providing a level of negotiation that goes beyond merely permitting a market participant to contest the information."²² As such, Section 3.3(b)(iii) allows "the Market Participant whose data is the subject of the request to provide input on the terms and conditions under which that data may be released and afford the Market Participant a forum before the Commission should it feel that those protections are not adequate."²³ NYISO should develop provisions similar to those found in ISO New England's, to allow for and ensure an appropriate level of participation from affected market participants, as well as adequate protection of commercially sensitive information.

²² *Filing of ISO New England Inc. and New England Power Pool in Response to Order No. 719*, Docket No. ER09-1051-000 (April 28, 2009), p. 95.

²³ *Id.*

Additionally, because the NYISO is a single-state RTO, the proposed tariff language in Section 6.5.4 should be revised to limit and apply only to the NYPSC as the entity who may submit a tailored request for information to the MMU. This narrow scope is contemplated by the California Independent System Operator (CAISO), another single-state RTO, in its Order No. 719 compliance filing where it specifically references the California Public Utility Commission (CPUC) in its proposed tariff language as the sole requesting entity for information requests to the MMU.²⁴ State commissions outside of the NYISO footprint should work instead with the MMU in the RTO in which they are located to obtain information regarding general market trends or the performance of the wholesale market.

Accordingly, the Commission should not accept NYISO's proposed tariff Section 6.5.4 (including Sub-sections 6.5.4.1 through 6.5.4.4), but direct NYISO to further revise its tariff language to narrow the scope of applicability to the NYPSC as the sole requesting entity for tailored information requests. Further, the Commission should direct the NYISO, in developing its separate filing with its stakeholders on confidentiality protections, to ensure adequate protections and opportunity for market participant involvement for such requests, similar to the ISO-NE provisions and consistent with the requirements of Order No. 719.

²⁴ *California Independent System Operator Corporation*, Order No. 719 Compliance Filing, Docket No. ER90-1048-000 (April 28, 2009), First Revised Sheet No. 1466, Section 8.1 through 8.4.

C. TRANSMISSION OWNERS' PROPOSED MODIFICATION TO THE NYISO DEFINITION OF MARKET VIOLATION

In proposing changes to the Market Monitoring Plan as required by Order No. 719, among other things, the NYISO proposed a definition of the term Market Violation, consistent with Order No. 719. However, in accompanying Footnote 58, the NYISO filing states:

In discussions leading up to the NYISO's Order No. 719 compliance filing, the New York Transmission Owners, Long Island Power Authority and New York Power Authority (collectively, the TOs), offered a proposed modification to the definition of a "Market Violation" to the NYISO that would incorporate an "act, practice or course of business by a Market Participant that (a) is intended to avoid and shift to another entity charges or costs resulting from a transaction undertaken by the Market Participant and (b) has a detrimental effect on the efficiency of one or more of the NYISO's markets." The objective of the TOs in proposing this amendment is to clarify that the described conduct is a violation of the NYISO's Tariffs, and to provide greater support for subsequent requests to the Commission for relief to Market Participants that are harmed by such conduct. The NYISO has agreed to Market Participant requests to consider possible revisions to its Tariffs that would provide greater protection for Market Participants that are harmed as a result of market errors or market manipulation. The NYISO intends to consider the TOs' proposed definition, along with other proposals, in its stakeholder process.

EPSA is concerned that the proposed modification to the Market Violation definition offered by the TOs is beyond the scope of the NYISO's authority for consideration. The appropriate venue for the TOs or other parties to propose modifications to the Market Violation definition was the thorough and inclusive rulemaking proceeding resulting in Order No. 719. EPSA asserts the proposed language veers beyond the requirements of and constitutes a collateral attack on Order No. 719. Having foreclosed their previous opportunity to propose changes in the rulemaking process, this is not an appropriate matter for consideration in a prospective stakeholder process. Accordingly, the Commission should direct the

NYISO to refrain from consideration of proposed changes from the TOs or other parties to the definition of Market Violation.

IV. CONCLUSION

WHEREFORE, EPSA respectfully requests that the Commission grant its timely motion for leave to intervene, as set forth above. Further, EPSA requests that in rendering its decision on NYISO's compliance with Order No. 719, the Commission consider EPSA's comments and, among other things, (1) direct NYISO to ensure the outcome of the 2009 review of set points for its operating reserves demand curves is consistent with FERC's Order No. 719 findings on scarcity pricing; (2) direct NYISO to further revise tariff proposals related to states' access to confidential information to ensure adequate protections for market participants; and, (3) prohibit prospective consideration by NYISO and its stakeholders of the NYISO TOs' proposed modification to the definition of Market Violation.

Respectfully Submitted,



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June 12, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., June 12, 2009.

A handwritten signature in cursive script that reads "Nancy Bagot".

Nancy Bagot, VP of Reg. Policy