

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

New York Independent System) Docket No. ER10-2220-000
Operator, Inc.)

**MOTION TO INTERVENE AND PROTEST 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 (2010), the Electric Power Supply Association ("EPSA")¹ respectfully files this motion to intervene and protest in the above-captioned proceeding. On August 13, 2010, the New York Independent System Operator, Inc. ("NYISO") submitted, pursuant to Section 205 of the Federal Power Act ("FPA") and the Commission's May 20, 2010 *Order on Proposed Application of Mitigation Measures and Compliance Filings* in Docket Nos. ER09-1682-000, et al.,² a filing proposing revisions to its Market Power Mitigation Measures ("MMM") and corresponding changes to the Market Monitoring Plan to permit implementation of a mitigation measure that will generally apply to all Rest-of-State ("ROS") Generators³ at times when they are the sole unit that can

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 *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,169 (2010) ("May 20 Order").

³ Rest-of-State Generators refers to generators located outside of the New York City Constrained Area ("NYCA").

meet an identified reliability need and when other specified prerequisite conditions are satisfied.⁴

The ROS Mitigation Proposal is similar to, but includes additional reduced mitigation thresholds beyond, the mitigation measure approved in the May 20 Order applicable to three identified generators committed for reliability. EPSCA protests the ROS Mitigation Proposal because it fails to combine the reduced mitigation thresholds with a new mechanism that would provide generators committed for reliability the opportunity to earn adequate revenues to recover their fixed costs. Unless and until such a mechanism is included as part of a comprehensive proposal, the NYISO ROS Mitigation Proposal is not just and reasonable. Accordingly, EPSCA requests that the Commission: (1) order the NYISO to submit a compliance filing by December 31, 2010, containing an appropriate fixed cost recovery mechanism as discussed in more detail herein; and, (2) suspend consideration of the ROS Mitigation Proposal until it is combined with the new fixed cost recovery mechanism as a comprehensive proposal for Commission review.

I. BACKGROUND

The May 20 Order approved with modifications a filing submitted by the NYISO on September 4, 2009, pursuant to Section 205 of the FPA and Sections 1(b) and 3.2.3 of the NYISO's Market Power Mitigation Measures ("MMM"), requesting authorization to apply prospectively proposed new market power mitigation rules in the form of a separate Rate Schedule M-1 to three identified

⁴ *New York Independent System Operator, Inc.*, "Request for Authority to Apply A Market Power Mitigation Measure to Rest-of-State Generators Committed or Dispatched for Reliability," Docket No. ER10-2220-000 (filed August 13, 2010)("ROS Mitigation Proposal").

generators⁵ bidding into the NYISO's Day-Ahead Market ("DAM").⁶ (Before the NYISO may invoke Section 1(b) and 3.2.3 of the MMM to propose new, generator-specific mitigation measures, the NYISO must find that conduct has occurred that departs significantly from the conduct that would be expected under competitive market conditions, but does not trigger the thresholds in Sections 3.1.1 to 3.1.3 of the MMM, and that such conduct has a significant impact on market prices or guarantee payments as measured by predefined thresholds set forth in Sections 3.2.3(1) and 3.2.3(2) of the MMM.) In tandem with the September 4 Filing proposing the generator-specific mitigation measure, the NYISO commenced stakeholder discussions to develop a generally applicable mitigation measure targeted at ROS generators that are committed for reliability, and that will apply at times when a single supplier is pivotal to solving an identified reliability need.

In support of its request to impose mitigation measures on the Specified Generators, the NYISO explained in its September 4 Filing that the Specified Generators were submitting bids into the DAM that did not clear the market, but were committed by the NYISO to operate for reliability, out-of-merit. By virtue of the fact that the Specified Generators' bids exceeded their marginal costs (*i.e.*, had exceeded the impact threshold), the NYISO claimed that the Specified Generators' bidding behavior departed significantly from conduct that would be expected under competitive market conditions. The NYISO also alleged the

⁵ The three specifically identified generators to whom the new market mitigation measures apply are collectively referred to herein as the "Specified Generators."

⁶ *New York Independent System Operator, Inc.*, Docket No. ER09-1682-000 (filed Sept. 4, 2009)("September 4 Filing").

Specified Generators' bids caused their guarantee payments to exceed the applicable impact threshold specified in Section 3.2.3 of the MMM.

The NYISO's Rate Schedule M-1 imposes new thresholds on each of the Specified Generators' bids that are significantly tighter than the previous thresholds in Section 3.1.2 of the MMM. When these tighter thresholds are exceeded, the NYISO will determine the generator's guarantee payment based on the generator's reference level, not its submitted offer. In its May 20 Order, the Commission found Rate Schedule M-1, as modified, just and reasonable as applied to the Specified Generators. The Commission also encouraged the NYISO to continue efforts to develop a market mitigation measure for general applicability to ROS must-run units and directed the NYISO to submit a progress report within 90 days of the May 20 Order, if such a measure was not filed with the Commission by that date.

The generally applicable ROS Mitigation Proposal in the instant filing basically conforms to the mitigation measure approved for the Specified Generators; however, this proposal includes further tightening of the conduct thresholds for assessing generators' bids. Specifically, the proposal includes an additional threshold to address "the potential for the maximum number of stops per day in a Generator's Bid parameters to be manipulated to artificially increase its guarantee payment (by extending the required commitment period) if the generator is in a position to exercise market power."⁷ For the same reason, another threshold is expanded to apply to start-up time and minimum down time

⁷ ROS Mitigation Proposal at 6.

in addition to minimum run time.⁸ The ROS Mitigation Proposal also includes several clarifications requested by generators in the stakeholder process to address transparency concerns, including requiring a Transmission Owner that requests a local reliability commitment to identify the suppliers that are capable of meeting the reliability need, or to inform the NYISO that the requested supplier is the only one that can meet the reliability need, and also to clarify that an ROS generator committed for reliability will have access to information supporting any mitigation applied pursuant to the ROS Mitigation Proposal.⁹

Additionally, at the request of generators, the NYISO developed a proposal for temporarily providing additional compensation to generators that are not able to recover their fixed costs in the NYISO's markets. However, no stakeholder supported the NYISO's proposed measure, although most stakeholders indicated they were willing to participate in further discussions to consider such a measure. The NYISO determined "it would not be appropriate to delay the submission of this filing until an acceptable compensation mechanism (if needed)" is developed,"¹⁰ so such a measure is not included in the instant filing.

Importantly, given the lack of a fixed cost recovery mechanism, the Independent Power Producers of New York ("IPPNY") and TC Ravenswood each

⁸ Id. at 6-7.

⁹ Id. at 4.

¹⁰ Id. at 4-5. The ROS Mitigation Proposal was approved for filing by the Business Issues Committee on May 5, 2010, and by the Management Committee on May 28, 2010. Both votes were contested, with all of the Generation Owners and many members of the Other Suppliers sector voting against the proposal.

appealed the decision approving submittal of the instant filing to the NYISO Board of Directors (“NYISO Board”). The NYISO Board denied the appeals and directed submittal of the ROS Mitigation Proposal, but also directed the NYISO to continue work with stakeholders to address concerns that existing cost recovery mechanisms are inadequate and review the process for determining and planning for permanent solutions to specific reliability needs.¹¹

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. EPISA seeks to bring the benefits of competition to all power customers.

Many of EPISA’s member companies provide energy in the NYISO’s energy, capacity and ancillary services markets and consequently, may become subject to the proposed mitigation measure that is the subject of this proceeding. EPISA member companies are also active participants in NYISO stakeholder processes, including the stakeholder process leading to the instant filing. Further, EPISA and its members have been and continue to be active in many of the Commission’s ongoing proceedings on NYISO issues. Accordingly, EPISA has a direct and substantial interest in the outcome of this proceeding that cannot

¹¹ Id at 5 and 8-9. Also, see the NYISO Board’s July 29, 2010 Decision on Appeal of the Management Committee’s May 28, 2010 Decision Adopting Mitigation Measures that will Apply to Rest-Of-State Generators that are Committed for Reliability (“NYISO Board Decision”), along with the Dissenting Opinion of Thomas F. Ryan, both submitted with the NYISO’s filing.

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. Underlying Issues With Market Rules And Software Are Not Resolved In The NYISO ROS Mitigation Proposal

The earlier September 4 Filing proposing new mitigation for the Specified Generators included an affidavit from the NYISO's Market Monitor Dr. David Patton, who opined that generators committed for reliability purposes should not be allowed to incorporate a fixed cost component into their bids.¹² Dr. Patton asserted that such conduct is inconsistent with the conduct that would be expected under competitive market conditions. The NYISO's September 4 Filing stated that its tariff did not include provisions for generators that are committed for reliability the opportunity to recover fixed costs as part of their guarantee payment. Significantly, Dr. Patton also acknowledged that it may be possible that generators needed for reliability will not be able to receive adequate revenues to stay in operation if they cannot recover their fixed costs (operations/maintenance, capital costs, debt repayment, and a return on

¹² See NYISO's September 4 Filing, Attachment B, Affidavit of Dr. David B. Patton, Ph.D. at 33-34 ("Patton Affidavit").

investment) in their guarantee payments.¹³ He stated that this occurs when a reliability need is not fully reflected into the market.¹⁴

In comments on the earlier September 4 Filing, IPPNY stated it “believes the best approach to resolving this matter, which should be pursued in the stakeholder process, is to resolve the underlying failure of the NYISO’s software to model these constraints appropriately so that they may be reflected through the clearing prices.”¹⁵ EPSA supported IPPNY’s comments on the September 4 Filing¹⁶ and asserts this underlying flaw was never fully resolved in the earlier proceeding, so it remains a concern in the instant proceeding, particularly given the general applicability of the proposed mitigation. In the NYISO’s response to comments (which included a supplemental affidavit from Dr. Patton) on the earlier September 4 Filing the NYISO stated:

As Dr. Patton explains in his Supplemental Affidavit, in order to send appropriate price signals to the market, the modeling of a new reliability constraint that can only be addressed via the commitment of a pivotal Suppliers generator(s) would need to be accompanied by appropriate mitigation measures.[] The NYISO would support IPPNY’s proposal if there are mechanisms in place to require a pivotal Supplier to submit competitive bids that reflected its Generators’ marginal costs. The NYISO expects to discuss this proposal further in its stakeholder governance process.¹⁷

¹³ Id. at PP 38 and 42.

¹⁴ Id at P 38. (“However, even with these sources of revenues, it is possible that a unit needed for reliability will not receive adequate revenues to remain in operation. In general, this occurs when there is a reliability need that is not reflected in the market requirements. When this happens, the reliability service provided by the generator is not fully priced....”)

¹⁵ *Motion to Intervene and Comments of Independent Power Producers of New York, Inc.*, at 5-6, Docket No. ER09-1682-000 (filed September 25, 2009).

¹⁶ *Motion to Intervene and Comments of the Electric Power Supply Association at 4*, Docket No. ER09-1682-000 (filed September 25, 2009).

¹⁷ *Motion for Leave to Respond, and Response, and Request for Confidential Treatment and Exemption from Freedom of Information Act Disclosure of the New York Independent System*

While the ROS Mitigation Proposal does incorporate certain provisions to provide further transparency with respect to the local reliability notification requirements of Transmission Owners (“TOs”) and availability of information to generators (in response to generator concerns raised in stakeholder discussions),¹⁸ questions remain regarding the sufficiency of detail that is required to be provided by the TOs.¹⁹ Furthermore, these provisions still do not address the remaining and root concern that there appear to be reliability constraints on the system that are not reflected in the NYISO pricing. EPSC submits that to meet the requirements of FPA Section 205, the Commission must require a remedy and direct the NYISO to develop comprehensive market rules that ensure generators are appropriately compensated when called upon to meet reliability needs.

B. Generators That Are Mitigated Must Have An Opportunity To Recover Fixed Costs

As previously noted, the ROS Mitigation Proposal is similar to the mitigation measure approved for the Specified Generators in the May 20 Order;

Operator, Inc. at 13-14 and Attachment A, Supplemental Affidavit of David B. Patton, Ph.D. at 7-8, Docket No. ER09-1682-000 (filed October 13, 2009)(“NYISO Response to Comments”).

¹⁸ ROS Mitigation Proposal at 4. (...the NYISO agreed to require a Transmission Owner that requests a local reliability commitment to identify the Suppliers that are capable of meeting the reliability need, or to inform the NYISO that the requested Supplier is the only one that can meet the reliability need. At the request of the Generation Owners sector, the NYISO also deleted language from its initial mitigation proposal specifying that a Generator would be subject to mitigation if it “was the only resource designated by a Transmission Owner to solve a local reliability need.” These changes clarify that a Supplier whose Generator is committed or dispatched for reliability will have access to information supporting the application of the mitigation measure proposed in the filing.)

¹⁹ See the “IPPNY Comments on Revised ROS Mitigation” dated March 11, 2010, and posted with the NYISO’s March 25, 2010 Market Issues Working Group meeting materials. These materials can be found on the NYISO’s website at: www.nyiso.com.

however, this proposal includes further tightening of the conduct and impact thresholds for assessing generators' bids. EPSA submits that established economic theory, the Commission's own rulings in prior proceedings, and ample precedent under the FPA require that utilities – which includes generators needed for reliability – have an opportunity to recover all of their costs, including a return of and on their fixed costs.²⁰ By mitigating generators potentially subject to these new rules back to their short-run operating costs, there are no price signals to the marketplace to provide proper incentives for the development of future resource adequacy whether from new generation, demand response or transmission, or to ensure the viability of existing economic generation.²¹ This

²⁰ See *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 692 (1923) (“*Bluefield*”) (“A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time...in other business undertakings which are attended by corresponding risks, and uncertainties.”); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (“*Hope*”) (“The return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.”)

²¹ Recent NYISO reports indicate current market prices are unable to attract investments. For example, in discussing long-term economic signals, the 2009 State of the Market Report states that: “The report shows that prices in 2009 would not support investment in new peaking generation in most locations...Currently, market conditions appear more favorable for investment in combined cycle generation (which have constituted most of the recent entry) than in gas-fired peaking generation. However, net revenues in 2009 would not likely support investment in a combined cycle unit at a new site in any areas of New York.” David B. Patton, Ph.D., Potomac Economics, NYISO Market Monitoring Unit, *2009 State of the Market Report, New York ISO Electricity Markets*, April 2010, page 6. Additionally, in discussing long-term economic signals, the 2008 State of the Market Report states that: “This comparison for 2008 shows that the Vernon/Greenwood load pocket within New York City is likely the only area of New York where an investment in a new combustion turbine might have been profitable.... Prospective investors must consider that net revenues are likely to change in subsequent years for several reasons. First, the retirement of nearly 1 GW of New York City capacity before the Summer 2010 capability period will substantially increase net revenues from the capacity market and, to a lesser degree, the energy and reserves markets. Second, net revenues tend to rise with natural gas prices, so if natural gas prices decline from 2008 levels, it is likely to reduce net revenues. Third, clockwise loop flows around Lake Erie tend to increase energy and reserves prices in Eastern New York, so the decline in those loop flows will contribute to lower net revenues for generators in Eastern New York.” David B. Patton, Ph.D., Potomac Economics, *2008 State of the Market Report: New York ISO*, September 2009, page vi.

has been recognized in other Commission proceedings addressing bid mitigation.

In a decision involving the Midwest Independent System Operator, Inc., for instance, the Commission stated “[w]e believe that competitive prices over the long run should recover both the fixed and variable costs of efficient generating units and we fear investors may decline to invest in needed generation, transmission and demand-side projects if they do not see a reasonable expectation of recovering their costs.”²² Likewise, in PJM Interconnection, L.L.C. (“PJM”) the Commission required the application of a frequently mitigated unit adder recognizing that units frequently called for reliability purposes are entitled to cost recovery.²³ Under the PJM tariff, sellers that are cost-capped more than 60%, 70% or 80% of their run hours can add, at a minimum, \$20, \$30 or \$40, respectively to their cost-based bids.²⁴ Generators in PJM may elect not to include the adder, or may only include part of it.

Furthermore, in the earlier proceeding establishing mitigation for the Specified Generators, Dr. Patton noted that in instances where generators are placed in the position of being required to run for reliability purposes but are unable to recover their fixed costs, “the Commission has generally relied on contractual solutions that are customized and appropriate for the specific

²² See *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,196 at P 49 (2003).

²³ See *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at P 39 (2004) (requiring PJM’s rules to “clearly spell out the rights generators have to higher bid caps when they are subject to frequent mitigation”).

²⁴ PJM Operating Agreement, Section 6.4.2 (a)(ii).

resource in question.”²⁵ In its May 20 Order, the Commission stated that where generators needed for reliability are unable to recover their fixed costs from the market, it has relied on reliability-must-run (“RMR”) agreements to provide the opportunity for such fixed cost recovery, although it does not prefer this solution.²⁶ The Commission further stated that “if the NYISO’s current market measures that allow for fixed cost recovery are inadequate, those issues may be addressed in other appropriate proceedings but they are not within the scope of the instant proceeding....”²⁷ It is reasonable to interpret that “other appropriate proceedings” for addressing fixed cost recovery would apply to this generic mitigation proceeding.

However, while the Commission has recognized that RMR-type agreements or other fixed cost recovery mechanisms may be necessary, the NYISO’s ROS Mitigation Proposal does not include such a cost recovery mechanism.²⁸ EPSA asserts that bifurcating this issue and deferring resolution until a later time is not reasonable because cost concerns will arise due to the ROS Mitigation Proposal and, therefore, the revenue inadequacy that will result from these new rules must be addressed at the same time.

²⁵ Patton Affidavit at P 42.

²⁶ May 20 Order at P 82.

²⁷ Id.

²⁸ EPSA notes that the Commission has previously approved tariff mechanisms for both PJM and ISO New England (“ISO-NE”) that allow generators to secure cost-of-service rate treatment by entering into RMR agreements to ensure needed resources stay on-line. See *generally*, PJM Open Access Transmission Tariff, Attachment K, Section 6; and, ISO New England, Inc. Section III.6 Market Rule 1, Standard Market Design.

Tightening mitigation rules to the point where generators cannot recover their variable and fixed costs is clearly not just and reasonable. To meet the just and reasonable ratemaking requirements under the FPA, the Commission must require a comprehensive proposal from the NYISO that allows a generator subject to the mitigation that is needed for reliability the opportunity to recover its full costs, which includes a reasonable return of and on its investment.

C. Implementation Of The Proposed ROS Mitigation Proposal Should Not Be Allowed Until A Companion Mechanism For Fixed Cost Recovery Is Developed

EPSA requests that the Commission suspend its consideration of the ROS Mitigation Proposal that precludes a generator's ability to recover fixed costs in its energy bids through the proposed threshold reductions until it is combined with a proposal that establishes a new mechanism to provide the opportunity for fixed cost recovery. Without such a complementary mechanism, generators needed for reliability may not be able to recoup sufficient revenues to support their continued operation. The Commission should direct the NYISO to submit a compliance filing by December 31, 2010, with tariff provisions that will allow a generator to make a Section 205 filing requesting the establishment of a RMR arrangement, and requiring the generator to demonstrate that revenues received in the NYISO's market are insufficient to cover costs.

From a timing standpoint, EPSA asserts suspending review of the proposal for this short period is appropriate as the Commission's May 20 Order did not require the NYISO to file a generally applicable mitigation measure by a date certain. Rather, the NYISO was ordered to file a progress report on the

NYISO's efforts to develop a generally applicable mitigation measure if such a mitigation proposal had not been filed within 90 days of the May 20 Order.²⁹

In the earlier proceeding for the Specified Generators and in the NYISO's Board Decision, there has been reliance on the NYISO's Attachment Y "Gap Solution" process and New York Public Service Commission ("NYPSC") procedures as an available mechanism for negotiating additional compensation for providing reliability service.³⁰ EPSA submits the Attachment Y procedures pose a number of timing and other concerns, but the primary concern is that a generator would have to file a retirement notice with the NYPSC prior to becoming eligible for a form of reliability payment. A retirement notice is an extreme action that may trigger a number of financial and other material adverse consequences. Moreover, while the NYPSC is authorized in Attachment Y to select the best "Gap Solution" from among available options, the rates to be paid to an existing generator, should it be selected by the NYPSC, are wholesale rates that can only be established by the Commission. EPSA asserts a less severe mechanism should be available to generators and requests the Commission to direct the NYISO to develop tariff provisions, similar to those the Commission has previously approved (and thus determined to be just and reasonable) for PJM and ISO-NE, that provide for a generator to make a Section 205 filing requesting the establishment of an RMR agreement.

²⁹ May 20 Order at 40, Ordering Paragraph (C).

³⁰ NYISO Board Decision at 3-4. Also see NYISO Response to Comments in Specified Generators mitigation proceeding at 11-13.

EPSA does not believe a further stakeholder process is required for development of such provisions, as the Commission has previously approved RMR tariff provisions for NYISO's neighboring RTOs, which provide a sufficient basis for NYISO to develop its own proposed RMR tariff language. Further, this is an issue that has been debated at length within the NYISO stakeholder process without resolution. Both the Commission and the NYISO Market Monitor have recognized the problems faced by generators dispatched for reliability, yet unable to recover their fixed costs through the market.

Accordingly, EPSA submits the NYISO's ROS Mitigation Proposal is not just and reasonable as it fails to combine the reduced mitigation thresholds with a new mechanism that would provide generators committed for reliability the opportunity to earn adequate revenues to recover their fixed costs. To meet the statutory requirements of FPA Section 205, the Commission should not allow implementation of the ROS Mitigation Proposal until such a mechanism is available to generators committed for reliability.

IV. CONCLUSION

WHEREFORE, EPSA respectfully requests that the Commission grant its timely motion to intervene. Further, EPSA requests that the Commission: (1) order the NYISO to submit a compliance filing by December 31, 2010, containing an appropriate fixed cost recovery mechanism as discussed in more detail herein; and, (2) suspend consideration of the ROS Mitigation Proposal until it is combined with the new fixed cost recovery mechanism as a comprehensive proposal for Commission review.

Respectfully Submitted,



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September 3, 2010

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., September 3, 2010.



Nancy Bagot, VP of Reg. Policy