

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

Astoria Generating Company, L.P., NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, Oswego Harbor Power LLC and TC Ravenswood, LLC)	
)	
Complainants,)	Docket EL11-42-000
)	
v.)	
)	
New York Independent System Operator, Inc.,)	
)	
Respondent.)	

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

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission’s (“FERC” or the “Commission”) Rules of Practice and Procedure, 18 C.F.R. § § 385.212 and 385.214 (2011), the Electric Power Supply Association (“EPSA”)¹ respectfully requests leave to intervene and comment in support of the *Complaint Requesting Fast Track Processing* (“Complaint”) submitted pursuant to Sections 206 and 306 of the Federal Power Act (“FPA”) in the above-captioned proceeding on June 3, 2011,² and as amended on June 15,

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

² *Astoria Generating Company, L.P., NRG Power Marketing LLC, Arthur Kill Power, LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, Oswego Harbor Power LLC and TC Ravenswood, LLC (collectively, “Complainants”) v. New York Independent System Operator, Inc. (“NYISO”), Complaint Requesting Fast Track Processing, Docket No. EL11-42-000 (filed June 3, 2011).*

2011 (“Amendment”).³ Specifically, the Astoria Generating Company, L.P., the NRG Companies and TC Ravenswood, LLC (collectively, the “New York City Suppliers”) filed the Complaint due to concerns the NYISO is implementing its buyer-side market power mitigation provisions (“Buyer-Side Market Power Rules”) in violation of the NYISO Market Administration and Control Area Services Tariff (“Services Tariff”) and in a manner inconsistent with Commission orders, policy and precedent.

Accordingly, the New York City Suppliers request fast track processing of the Complaint to prevent artificial price suppression in the New York City (“NYC”) capacity market that will result from this flawed implementation, and in order to prevent unjust, unreasonable and unduly discriminatory rates that could result from a massive amount of uneconomic entry and undermine the long-term sustainability of the NYC capacity market. The New York City Suppliers explain and support in detail the actions that are necessary by the Commission.

As discussed herein, transparency, consistency and fairness, and the vigorous pursuit of the exercise of market power – comparably applied to all market participants – are vital components of a well-functioning competitive market, and are key elements the Commission must require from the NYISO in implementing its Buyer-Side Market Power Rules. As the Commission has previously recognized, buyer-side market power is as relevant a concern as seller market power, and the Commission has a duty to protect the integrity of the wholesale power markets. The Complaint therefore addresses matters of the

³ Amendment To Complaint And Request For Shortened Comment Period, Docket No. EL11-42-000 (filed June 15, 2011).

utmost importance and the Commission's actions here are critical to protect both the viability of the NYC capacity market and the NYISO competitive electricity market more generally. EPSA supports the NYC Suppliers in their complaint and therefore urges the Commission to act decisively and expeditiously, as it did in the recent PJM MOPR proceeding,⁴ to provide greater certainty to existing and potential market participants and to prevent an influx of uneconomic entry from occurring in the first instance that would have to be unwound for years to come (if possible).⁵

I. MOTION TO INTERVENE AND COMMUNICATIONS

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

Many of EPSA's member companies have made significant investments in generation assets in New York and/or are market participants in the competitive wholesale electric markets administered by the NYISO, including the installed capacity ("ICAP") market. EPSA member companies are also active participants in NYISO stakeholder processes, including in the ISO's stakeholder processes to

⁴ *PJM Interconnection, LLC*, 135 FERC ¶ 61,022 (April 12, 2011) ("PJM MOPR Order").

⁵ See *ISO New England Inc.*, 135 FERC ¶ 61,029 at P 214 (2011). ("[T]he amount of historical [out-of-market] resources in the market has significantly contributed to a large capacity surplus in New England that is likely to last for many years.")

ensure that the ICAP Demand Curves are set at levels that adequately value capacity and that rules are in place to prevent capacity prices from being artificially inflated or suppressed by the exercise of market power. Further, EPSA and its members have been and continue to be active in many of the Commission's ongoing proceedings on NYISO issues. 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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II. BACKGROUND

The New York City Suppliers state that over 2,500 MW of potential New York City generation will undergo the mitigation exemption (via the Mitigation Exemption Test), and Offer Floor determination process in the next few weeks.⁶ Given the potentially devastating impacts on the NYC capacity market should such determinations be made in error, the New York City Suppliers request that the process be held in abeyance for a limited period of time to ensure that uneconomic entry is prevented.

⁶ Complaint at 6 and 19.

Specifically, the New York City Suppliers request that the Commission issue an initial order holding the interconnection Class Year 2009 and 2010 cost allocation process in abeyance to prevent the NYISO's exemption and mitigation determinations from potentially becoming final, pending action on the Complaint and the NYISO's implementation of the final Demand Curves in compliance with Commission orders on the Third Demand Curve Re-set Proceeding.⁷

The Complaint describes efforts in several Commission proceedings since 2007 to correct NYISO market mitigation rules that have failed to sufficiently address buyer-side market power, and highlights the critical inter-relationship of these rules with the ICAP Demand Curves.⁸ Further, the Complaint addresses the diligent attempts by and inability of the New York City Suppliers to obtain important information and clarification from the NYISO with respect to the ISO's implementation of the Buyer-Side Market Power Rules in a timely or meaningful manner.⁹

The Amendment provides additional information, which became available after the Complaint was filed. Specifically, on June 8, 2011, the NYISO released the In-City ICAP Buyer-side Mitigation Test Data (the "Actual MET Assumptions"), information which the New York City Suppliers indicate reveals a previously-unknown serious flaw in the NYISO's methodology; confirms that the NYISO is making several errors identified in the Complaint; and, demonstrates

⁷ Id. at 7.

⁸ Id. at 11-17.

⁹ Id. at 17-18.

that the NYISO will conduct its mitigation determinations using cherry-picked elements of pending – and even not-yet-filed – compliance filings.¹⁰ The New York City Suppliers provide supporting expert affidavits in both the Complaint and Amendment to identify deficiencies and specific concerns with the NYISO's application of its Buyer-Side Market Power Rules.¹¹

III. COMMENTS IN SUPPORT

As the New York City Suppliers' articulate compellingly with respect to the Buyer-Side Market Power Rules and EPSA supports herein, it is not enough for the NYISO to simply have sufficient tariff rules in place – these rules must then be implemented by the NYISO in a manner which is transparent to all market participants, and then applied in a consistent, fair and objective manner to all market participants to achieve the critical intended purpose, which is to protect market participants and consumers from the exercise of buyer market power.

The Commission should accept the Complaint proposals without delay in order to remedy the implementation flaws exposed by the New York City Suppliers, which have created ambiguity and undermine the effectiveness of the Buyer-Side Market Power Rules. The proposed actions and tariff revisions are

¹⁰ Amendment at 2.

¹¹ See the following Complaint and Amendment attachments: (1) Affidavit of Craig Hart, Senior Vice President, Strategy and Corporate Development, US Power Generating Company, discussing application of the NYISO's Mitigation Exemption Test Process from US Power Generating's perspective as a developer of a project in the Class Year 2010 ("Hart Affidavit"); (2) Affidavit of Mark D. Younger, Vice President of Slater Consulting, addressing the Mitigation Exemption Test and the manner in which the NYISO appears to be proposing to calculate the Offer Floors ("Younger Affidavit"); and, (3) Affidavit of William H. Hieronymus, Vice President and Ph.D, Economist, Charles River Associates, Inc., describing the reasons why effectively implemented minimum bid (or buyer-side) mitigation is needed to protect the long-term sustainability of the NYC capacity market and, the competitive electricity market more generally ("Hieronymus Affidavit"). The Amendment includes the Supplemental Affidavit of Mark D. Younger ("Younger Supplemental Affidavit").

necessary to preserve the integrity of the NYISO competitive wholesale market. Such action is critical to avoid a circumstance such as the one facing ISO New England, where flawed buyer-side mitigation rules have allowed uneconomic OOM resources to enter the market despite a substantial capacity surplus and prices that have been forced down to an administrative floor, currently set at less than half of reasonable estimates of new capacity costs.¹²

A. The NYISO Must Be Required To Implement Its Buyer-Side Market Power Mitigation Rules In A Transparent Manner

As the crucial first step, the Commission must require the NYISO to implement its Buyer-Side Market Power Rules in a manner that is transparent to all market participants. While the NYISO's current approach has been exposed in the Complaint and Amendment as flawed, the intent of the Buyer-Side Market Power Rules is clear and indisputable. The Buyer-Side Market Power Rules are intended to address concerns about uneconomic entry designed to suppress prices,¹³ consistent with similar mechanisms in other markets.¹⁴ In requiring and approving these rules, the Commission has recognized that buyers may have

¹² Hieronymus Affidavit at 13, fn 9 (*ISO New England Inc.*, 135 FERC ¶ 61,029 at PP 156, 218 (2011)).

¹³ *New York Independent System Operator, Inc.*, 122 FERC ¶ 61, 211 at P 100 (accepting a buyer market power mitigation mechanism "to prevent uneconomic entry that would reduce prices in the NYC capacity market below just and reasonable levels"), *on reh'g & compliance*, 124 FERC ¶ 61, 301 (2008).

¹⁴ See, e.g., *ISO New England Inc. & New England Power Pool Participants Comm*, 131 FERC ¶ 61,065 (2010) (explaining that the purpose of the analogous mechanism in the New England market is "to discourage buyers that have the incentive and ability to suppress market clearing prices below a competitive level from doing so" in order "to ensure that the prices in capacity markets reflect the market cost of new entry when new entry is needed"); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at PP 103-04; *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 at P 191 (2006), *on reh'g & clarification*, 119 FERC ¶ 61,318 (2007);, *on clarification*, 127 FERC ¶ 61,104, *on reh'g & clarification*, 128 FERC ¶ 61,157 (2009).

both the incentive and ability to artificially suppress market clearing prices; however, if the Commission does not impose transparency requirements on the NYISO, such provisions are, in effect, meaningless.

Specifically, the Commission must require parity from the NYISO with respect to the transparent application of the buyer-side mitigation rules that is in line with the transparency the ISO has applied to its supply-side mitigation rules. As highlighted in the Complaint, the New York City Suppliers and other market participants have attempted for months to obtain specific information regarding the criteria, assumptions and methodologies the NYISO intends to utilize in implementing the Buyer-Side Market Power Rules. The NYISO's responses have been very opaque,¹⁵ inexcusably so, as developers, investors and market participants cannot be expected to make long-term business decisions involving significant financial commitments in a vacuum and without a basic understanding of how the rules will be applied. For example, US Power Generating, who is developing the South Pier Improvement Project ("SPIP"), provides insights on its experience with the mitigation determination process under the Buyer-Side Market Power Rules, and states that:

To instill the confidence and certainty required for merchant developers to make the substantial investment necessary to continue to construct and operate generating facilities in New York City, the current lack of transparency as well as the lack of clearly defined, consistently applied, objective standards, must be corrected.¹⁶

¹⁵ See *generally* Hart Affidavit and Younger Affidavit.

¹⁶ Hart Affidavit at P 3.

To be clear, EPSA is not suggesting – nor are the New York City Suppliers requesting – that confidential competitor cost data be disclosed. Rather, what is being recommended is that the Commission require that specific parameters and assumptions be made available in a timely manner to allow existing generators to forecast future market conditions and/or a project developer planning to enter the market to assess whether its own project is structured properly. This is reasonable. As US Power Generating notes, “the NYISO specifically stated that it will not even elaborate on the basis for its determination concerning our project, including what assumptions were accepted or rejected, what specific study parameters were used, and what price forecast was utilized to evaluate project economics.”¹⁷ This, on the other hand, is untenable. By requiring the NYISO to provide a more transparent framework, the Commission would be facilitating improved market signals, and ultimately, a more efficient competitive market.

The NYISO’s lack of responsiveness is simply at odds with the Commission’s long held principles that competitive markets benefit from greater transparency wherever possible and that market participants have a right to understand how an ISO/RTO will apply its tariffs, including mitigation measures. As noted by Dr. Hieronymus, detailing the importance of transparency and objectivity to competitive markets:

Objective mitigation standards also allow for increased transparency. Objective standards and a known, consistent methodology that does not simply rely on case-by-case judgment by the NYISO can be documented and published. Participants can reasonably verify the reasonableness of methodologies and anticipate what the outcome of [Mitigation Exemption Test] determinations and [Unit Net CONE] calculations will be. Such

¹⁷ Hart Affidavit at P 14.

transparency is desirable not only for fairness, but also for efficiency and market confidence, as reasonably predictable mitigation outcomes will reduce the uncertainty and perceived risk in the market.¹⁸

Such a requirement would also be consistent with the Commission's recent action in the PJM MOPR Order, where the Commission recognized the importance transparency provides as follows:

To provide certainty to market participants, we will further require these proposed tariff provisions to include an explanation of the information resources that will need to be submitted to the IMM for this determination and the objective standards by which such submittals will be evaluated.¹⁹

B. The NYISO Must Be Required To Apply Its Buyer-Side Market Power Rules In A Fair And Consistent Manner

The other important outcome from this proceeding is the need for the NYISO to apply its Buyer-Side Market Power Rules in a fair and consistent manner, both with respect to its application of a well-known and transparent set of assumptions and metrics as discussed above, and also, consistent with Commission orders and precedent. Particularly in light of the Amendment, which reflects the NYISO's intention to rely on outdated NYC Demand Curve data in the Actual MET Assumptions, among other things, corrective action by the Commission is critical to ensure the future proper functioning of the NYISO markets. According to the New York City Suppliers' expert Mark Younger in the June 15 Amendment,

[T]he combined effect of the NYISO's approach produces the most ineffective possible result for purposes of preventing uneconomic entry.

¹⁸ Hieronymus Affidavit at 17-18.

¹⁹ PJM MOPR Order at P 121.

The Commission has correctly found uneconomic entry cannot be permitted, regardless of the means by which it occurs.²⁰

Once again, the recent PJM MOPR Order is instructive and supports the argument for consistency with respect to the NYISO Buyer-Side Market Power Rules. Specifically, in that order, the Commission required that mitigated offer prices under the PJM MOPR be calculated on a consistent basis with the PJM Variable Resources Requirement (“VRR”) demand curve.²¹ The Commission also denied certain proposed changes to the PJM MOPR because they were not consistent with the VRR curve calculations. Further, inconsistency with the demand curve methodology, unless warranted, is likely to produce undesirable outcomes, as highlighted by Dr. Hieronymus. He notes that, “in a relatively small market with a steep demand curve, as is the case for New York City, adding a relatively small amount of capacity can have a very large impact on price.”²²

In sum, requiring a consistent approach in implementation as the Buyer-Side Market Power Rules apply to both market participants and interact with the Demand Curves and Demand Curve reset process will foster further market efficiency and guard against uneconomic entry that may harm the NYISO market for years to come.

²⁰ Younger Supplemental Affidavit at P 6.

²¹ PJM MOPR Order at P 41; also see Hieronymus Affidavit at 20-21.

²² Hieronymus Affidavit at 22.

C. The NYISO Must Aggressively Pursue The Exercise Of Market Power By Any Market Participant – Whether Buyer-Side Or Supply-Side

The NYISO – as well as all ISOs/RTOs and the Commission – must aggressively pursue the exercise of market power. While there has been a vigorous level of effort by the NYISO in pursuing allegations of market power exercised by suppliers, the NYISO has not heretofore been as vigorous in pursuing load-side interests, i.e., those that would benefit from the artificial depression of market clearing prices. For example, despite the fact that a contract providing out-of-market revenues is a well-established means of promoting uneconomic entry in order to artificially depress market clearing prices and its tariff obligation to calculate a “reasonable” Unit Net CONE,²³ the NYISO is apparently not even requesting that a new entrant provide copies of its contracts in connection with the NYISO’s exemption and mitigation determinations. It is hard to imagine the NYISO adopting a similar posture of willful ignorance with respect to critical data relevant to supplier-side mitigation. The artificial depression of market clearing prices may bring short term benefits to load at the expense of suppliers, but if not properly addressed it will ultimately undermine reliability and destroy competitive electric markets. Such outcomes are at odds with the long term interests of consumers and policymakers.

Adding urgency to this proceeding, newly implemented mandatory reliability standards and the challenging investment demands of various energy and environmental policies increase the importance of capacity revenues and the signals they send for investment today to ensure reliability tomorrow. Therefore,

²³ Services Tariff, Attach. H, § 23.4.5.7.3.4.

the changes proposed to ensure that the Buyer-Side Market Power Rules are a viable protection against the exercise of buyer side market power to artificially influence prices are equally critical for the long-term market stability that encourages necessary investment. Dr. Hieronymus sums up the urgency and need to guard against market power in these circumstances best:

Resolution of the issues...is extremely time sensitive. At least thus far, the Commission has declined to retroactively apply “buyer-side” mitigation to units that already are commercially operable. Currently, there are approximately 2,500 MW of proposed generation projects in the in-City portion of the NYISO that are identified as awaiting [Mitigation Exemption Test] determinations and Offer Floor calculations. This is equal to more than 25 percent of the in-City minimum capacity requirement and approximately double a decade’s worth of load growth. *Clearly, incorrectly exempting units or setting offer floors that are too low will eviscerate the mitigation mechanisms, severely damage the competitive market, cripple the economic viability of existing generation and those entrants wholly relying on market revenues, and undermine the regulatory construct for competitive markets established by the Commission.*²⁴ [Emphasis added.]

Considering the potential for buyer side market power protection is nothing short of fundamental to the operation of a functional wholesale electricity market, no less important than the extensive supply side market power protections utilized in these markets. Therefore, the lack of precision by the NYISO in implementing and applying the Buyer-Side Market Power Rules presents an immediate concern for all market participants and, ultimately, for consumers. As the New York City Suppliers have noted, the Complaint’s proposed actions and revisions are necessary to ensure that the Buyer-Side Market Power Rules function as *intended*.

²⁴ Hieronymus Affidavit at 8-9.

IV. CONCLUSION

WHEREFORE, EPSA respectfully requests that the Commission (1) accept this timely motion to intervene; (2) consider the supporting comments herein in rendering its decision; and, (3) grant such other relief as may be necessary to protect EPSA's interests. EPSA urges the Commission to act decisively and expeditiously to issue an order granting the relief requested by the New York City Suppliers, which will provide certainty to all NYISO market participants.

Specifically, the Commission should direct the NYISO to file tariff revisions to correct the specific errors identified in the Complaint and Amendment to address the lack of transparency by the NYISO in the application of the Mitigation Exemption Tests, as well as adoption of the additional proposed safeguards and necessary actions to ensure the Buyer-Side Market Power Rules are properly implemented.

Respectfully Submitted,



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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., July 6, 2011.



Nancy Bagot, VP of Regulatory Affairs