

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

Independent Power Producers of New York, Inc.,)	
)	
)	
Complainant,)	
)	
v.)	Docket No. EL13-62-002
)	
New York Independent System Operator, Inc.,)	
)	
)	
Respondent.)	

MOTION FOR LEAVE TO ANSWER AND ANSWER

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),¹ the Electric Power Supply Association (“EPSA”)² hereby respectfully requests leave to answer³ and answers⁴ certain responses to its motion for expedited action⁵ on the compliance filing submitted

¹ 18 C.F.R. §§ 385.212, 385.213 (2016).

² Celebrating its 20th anniversary in 2017, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. Power supplied on a competitive basis collectively accounts for 40 percent of the U.S. installed generating capacity. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

³ Although the Commission’s procedural rules do not allow for answers to answers as a matter of right, the Commission regularly accepts otherwise impermissible answers where, as here, they will assist the Commission’s understanding of the record and its decision-making. *See, e.g., PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,133 at P 12 (2017); *Big Rivers Elec. Corp. v. Midcontinent Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,132 at P 28 (2017); *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,152 at P 17 (2016); *Arizona Pub. Serv. Co.*, 153 FERC ¶ 61,157 at P 26 (2015).

⁴ EPSA has deliberately attempted to limit the scope of this answer as much as possible. EPSA’s decision not to address particular assertions or arguments should not be construed as acceptance of, or agreement with, such arguments or assertions.

⁵ Request for Expedited Action, Docket No. EL16-49-002 (filed Jan. 9, 2017) (the “Motion”).

by the New York Independent System Operator, Inc. (the “NYISO”)⁶ on June 17, 2015⁷ and amended on December 16, 2015.⁸ As discussed below, there is no merit to the procedural or substantive objections raised by certain intervenors and the Commission should expeditiously order the NYISO to modify the Services Tariff in the manner proposed in the January 19, 2016 protest of the Independent Power Producers of New York, Inc. (“IPPNY”).⁹

I. ANSWER

A. There Is No Merit To Intervenors’ Substantive Objections

In its March 19, 2015 order in this proceeding,¹⁰ the Commission found that agreements like the Dunkirk Repowering Agreement “raise potential issues of artificial price suppression,” because they “procure more capacity than is needed for short-term reliability, and for a much longer term.”¹¹ As indicated in the Motion, the NYISO and its Market Monitoring Unit (the “MMU”) have now similarly recognized that uneconomic retention presents artificial price suppression concerns, and the MMU has further acknowledged the need for mitigation measures, rather than just referrals to the

⁶ Capitalized terms not otherwise defined herein have the meaning given them in in the NYISO’s Market Administration and Control Area Services Tariff (the “Services Tariff”) or, if not defined therein, in its open access transmission tariff.

⁷ Compliance Report, Docket No. EL13-62-002 (filed June 17, 2016).

⁸ Response to Information Request, Docket No. EL13-62-002 (filed Dec. 16, 2015) (the “NYISO Response”).

⁹ Protest of the Independent Power Producers of New York, Inc., Docket No. EL13-62-002 (filed Jan. 19, 2016) (the “IPPNY Protest”).

¹⁰ *Independent Power Producers of N.Y., Inc. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214 (2015) (the “March 2015 Order”). The March 2015 addressed a complaint filed by IPPNY on May 10, 2013, see Complaint Requesting Fast Track Processing of the Independent Power Producers of New York, Inc., Docket No. EL13-62-000 (filed May 10, 2013) (the “Original Complaint”), and amended on March 25, 2014, see Motion To Amend, and Amendment to, Complaint of the Independent Power Producers of New York, Inc., Docket No. EL13-62-000 (filed Mar. 25, 2014) (the “Amendment”).

¹¹ March 2015 Order, 150 FERC ¶ 61,214 at P 69.

Commission's Office of Enforcement, as the NYISO proposed.¹² There is nothing about the uneconomic retention that will result from subsidies in the form of "zero emissions credits" awarded to nuclear power plants pursuant to the August 1, 2016 order (the "NYPSC Order")¹³ of the New York Public Service Commission (the "NYPSC") that makes this uneconomic retention any less problematic than that resulting from the Dunkirk Repowering Agreement.

Exelon Corporation ("Exelon") attempts to analogize the zero emissions credits contracts to the Reliability Support Services Agreements ("RSSAs") that were found in the March 2015 Order not to present artificial price suppression concerns on the grounds that units covered by RSSAs are needed for local reliability requirements and would clear a capacity market that accounted for such requirements.¹⁴ The fatal flaw in this argument is that it falsely assumes that reliability and environmental considerations are the same from a capacity market perspective. They are not.

Like other capacity markets, the NYISO capacity market is "designed to procure on a least-cost basis sufficient capacity to meet the reliability needs of the region as a whole"¹⁵ With that in mind, one can understand why the Commission was willing to tolerate the effects of the RSSAs as State-mandated interventions addressing a demonstrated reliability need on the theory that the result approximated what one would have seen in a better designed capacity market.¹⁶ A State-mandated out-of-market

¹² See Motion at 4-6.

¹³ A copy of the NYPSC Order was provided as Attachment A to the Motion.

¹⁴ See Answer of Exelon Corporation to Request for Expedited Action at 21-22, Docket No. EL13-62-002 (filed Jan. 24, 2017) ("Exelon Answer").

¹⁵ *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066 at P 34 (2015) ("*PJM II*").

¹⁶ See March 2015 Order, 150 FERC ¶ 61,214 at P 66.

intervention to address an environmental goal is an entirely different matter, however, because, again, like other capacity markets, the NYISO capacity market “has no feature to explicitly recognize . . . environmental or technological goals”¹⁷ Indeed, while leaving the door open for a regional transmission organization and its stakeholders to devise market rules to “account for resource attributes that reflect broader objectives than . . . reliability,” the Commission has expressly rejected the idea that it can or should ignore the effects of State-mandated out-of-market interventions that “undermine the objective of [the market] to procure the least-cost, competitively-priced combination of resources necessary to meet the region’s reliability objectives.”¹⁸

It is also noteworthy that, even where the RSSAs were concerned, the Commission’s tolerance was limited. Around the same time it issued the March 2015 Order, the Commission initiated a separate proceeding under Section 206 of the Federal Power Act (the “FPA”) that put a stop to further State intervention of this kind by requiring that, going forward, all reliability must-run (“RMR”) service, like that provided under the RSSAs, be provided “pursuant to the provisions of [the NYISO’s] Commission-jurisdictional Tariff”¹⁹ The Commission reasoned that the NYISO should be responsible for administering RMR service in light of its being “uniquely positioned to assess the need for RMR service and the appropriate entity to assess the potential impacts RMR agreements may have on its markets in New York.”²⁰

¹⁷ *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 90 (2011), *on reh’g*, 138 FERC ¶ 61,194 (2012), *aff’d sub nom. New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3rd Cir. 2014).

¹⁸ *Id.*

¹⁹ *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 at P 3 (2015).

²⁰ *Id.*

Several intervenors would have the Commission refrain from acting on the theory that protecting the wholesale market would frustrate State policies.²¹ As explained in the Motion, the Commission need not and should not decide, in this proceeding, whether federal law (the FPA) preempts State action (the NYPSC Order) in this instance.²² At the same time, however, the Commission cannot allow State action to preempt the exercise of its duties under federal law, and it must, therefore, resist calls to abdicate its duty to ensure that wholesale rates are just and reasonable in the name of accommodating State policies. As the Commission has previously made clear: “While the Commission acknowledges the rights of states to pursue legitimate policy interests . . . , it is our duty under the FPA to assure just and reasonable rates in wholesale markets.”²³ The Commission’s duty in this regard does not vary based on the legitimacy or illegitimacy of the State’s policy interests or the extent to which the State is or is not acting within its jurisdiction. In other words, the Commission’s duty to protect the wholesale markets is no different when New York is subsidizing nuclear power plants than when it is subsidizing a repowered natural gas-fired power plant.

Concerns that granting the Complaint, as amended, will threaten renewable energy credits (“RECs”) and other State-sponsored renewables programs²⁴ are baseless. While it is easy to understand why intervenors would want to wrap subsidies

²¹ See, e.g., Exelon Answer at 16-29; Answer of Natural Resources Defense Council and the Sustainable FERC Project to Request for Expedited Action at 18-20, Docket No. EL13-62-002 (filed Jan. 24, 2017) (“NRDC Answer”).

²² Motion at 11 n.46.

²³ *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 143 (2011) (subsequent history omitted). See also, e.g., *PJM II*, 153 FERC ¶ 61,066 at P 34 (finding that “subjecting state-sponsored resources to the MOPR does not prevent the states from pursuing their own public policy requirements” and is, instead, “intended to ensure that whatever subsidy is received does not discriminatorily affect the outcome of the PJM auction.”) (citations omitted).

²⁴ See Exelon Answer at 16-29; NRDC Answer at 18-20.

for nuclear power plants in the renewables mantle, this proceeding is not about RECs. The Commission should remain focused on the issue at hand, uneconomic retention, and reject efforts to confuse and politicize matters by falsely claiming that this case is about RECs.

Similarly misplaced are claims that exemptions from buyer-side mitigation for new renewable resources somehow justify leaving uneconomic existing resources subsidized through zero emissions credits unmitigated.²⁵ The principal reason for such exemptions is that new renewable resources, “with low capacity factors and high development costs, . . . provide their developer with limited or no incentive and ability to exercise buyer-side market power to artificially suppress [capacity] market prices.”²⁶ Even putting aside, for the moment, the fact that “low capacity factors” are hardly characteristics of nuclear power plants, the cost considerations are entirely different where retention of uneconomic resources is involved, because, as Exelon notes with respect to nuclear resources, “[t]heir cost of construction has already been sunk”²⁷ As a result, the principal rationale for the categorical exemption from buyer-side market power mitigation for certain **new** renewable resources is irrelevant when one is talking about buyer-side market power mitigation for **existing** resources.

It is true enough that the Commission acknowledged State environmental programs in requiring the NYISO to adopt an exemption from buyer-side market power

²⁵ See Exelon Answer at 19-20.

²⁶ *New York Pub. Serv. Comm'n v. New York Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 at P 47 (2015) (citations omitted) (“*NYPSC*”), *on reh'g*, 154 FERC ¶ 61,088 at PP 13, 27 (2016).

²⁷ Exelon Answer at 15.

mitigation for certain new resources²⁸ and in accepting a similar exemption in the New England market.²⁹ But these orders provide no basis for a blanket exclusion of low or zero emissions resources generally. First, the Commission emphasized that an “exemption for renewable resources must be narrowly tailored,”³⁰ and available only to “renewable resources that are both purely intermittent and that have relatively low capacity factors and high development costs”³¹ None of these descriptors applies to an existing nuclear plant. Second, these exemptions were subject to megawatt caps intended “to further limit any risk that the[] exempted resources will impact [capacity] market prices.”³² These megawatt caps, 200 MW in New England³³ and proposed to be 1,000 MW in New York,³⁴ would be inadequate to accommodate the plants eligible for zero emissions credits under the NYPSC Order.

B. There Is No Merit To Intervenors’ Procedural Objections

Several intervenors claim that the Motion raises issues beyond the scope of this compliance proceeding.³⁵ These assertions are without merit. The Motion simply provides further evidence that the problem described in the Complaint and the

²⁸ See *NYPSC*, 153 FERC ¶ 61,022 at PP 36, 47-51.

²⁹ *ISO New England Inc.*, 147 FERC ¶ 61,173 at PP 81-88 (2014) (“*ISO-NE*”), *on reh’g*, 150 FERC ¶ 61,065 (2015). Interestingly, the Commission approved the New England exemption over objections from Exelon, which now takes a very different position. See *ISO-NE*, 147 FERC ¶ 61,173 at P 71.

³⁰ *NYPSC*, 153 FERC ¶ 61,022 at P 49.

³¹ *Id.* at P 51.

³² *Id.* See also *ISO-NE*, 147 FERC ¶ 61,173 at P 63 (stating that the purpose of the cap is to act as “a backstop to prevent systematic downward pressure on prices”).

³³ See *ISO-NE*, 147 FERC ¶ 61,173 at P 83.

³⁴ Compliance Filing and Request for Commission Action within Sixty Days, Transmittal Letter at 10, Docket No. ER16-1404-000 (filed Apr. 13, 2016).

³⁵ See NRDC Answer at 8-13; Exelon Answer at 10-14; Motion for Leave to Answer of the New York Public Service Commission at 6-7, Docket No. EL13-62-002 (filed Jan. 30, 2017).

Amendment and recognized as a concern in the March 2015 order, has continued to worsen while this case has languished before the Commission. While the Original Complaint focused on uneconomic retention as a result of RSSAs, the Amendment expanded the scope of this proceeding to encompass the broader issue of “artificial price suppression resulting from below-cost offers of capacity from resources that are only in the market as a result of out-of-market payments.”³⁶ To the extent that the plain language of the Amendment left any room for doubt in that regard, such doubt is eliminated by even a cursory review of the revisions to the Services Tariff proposed in Attachment C to the Amendment, revisions that would plainly cover uneconomic retention through zero emissions credits.³⁷

EPSA has not requested any new relief; rather, it has asked only that the Commission grant the same relief IPPNY requested over a year ago.³⁸ Tellingly, none of the intervenors who now allege that EPSA is seeking relief beyond the scope of compliance with the March 2015 Order raised similar concerns when the IPPNY Protest was filed.³⁹ Indeed, no party made any such allegations at the time. The Commission should not entertain these woefully untimely objections to the IPPNY Protest.

³⁶ See Amendment at 2. See also *id.* at 9 (describing the repowering agreement for Units 2, 3 and 4 at the Dunkirk Generating Station as an “even more extreme example of uneconomic resources being retained (and indeed, revived) through out-of-market payments”).

³⁷ See *id.*, Attachment C.

³⁸ See Motion at 2, 15-16.

³⁹ The NYPSC filed an answer opposing the IPPNY Protest, but did not claim that the relief requested was beyond the scope. See Motion to File Answer and Answer of the New York State Public Service Commission, Docket No. EL13-62-000 (filed Mar. 25, 2013). Exelon, the Natural Resources Defense Council and the Sustainable FERC Project were parties to the proceeding when the IPPNY Protest was filed, see March 2015 Order, 150 FERC ¶ 61,214 at PP 23, 62, but did not file answers to the IPPNY protest.

II. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA requests that the Commission grant its request for leave to answer and promptly direct the NYISO to file tariff revisions to address artificial price suppression by uneconomic retention as set forth in the IPPNY Protest.

Respectfully submitted,

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On behalf of the **Electric Power Supply Association**

Dated: February 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington DC, this 14th day of February, 2017.

/s/ Stephanie S. Lim
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