

directed the NYISO to file tariff revisions setting forth a reasonable timeline for completing this analysis.⁴ Pursuant to Rule 212 of the Commission’s Rules of Practice and Procedure and the Commission’s Combined Notice of Filings #1, issued on May 24, 2018, Independent Power Producers of New York, Inc. (“IPPNY”) hereby protests certain aspects of the NYISO’s May 2018 Filing.

As discussed below, the NYISO has failed to demonstrate that its proposal to issue a final physical withholding determination only 30 days before a Generator’s deactivation date (the “30-day determination proposal”) when a Market Participant seeks to deactivate its Generator more than 150 days after its Generator Deactivation Assessment Start Date is reasonable.⁵ The NYISO’s proposal to provide the physical withholding determination 30 days before the end of the deactivation process does not provide a reasonably adequate amount of time for a Market Participant to make informed decisions and effectively implement the measures necessary to deactivate its Generator. This is especially the case in light of the NYISO’s unreasonable proposal that, for the NYISO’s market power determination to be binding, the Generator must then deactivate no more than five days before, and no more than ten days after, its requested deactivation date. Nor has the NYISO adequately defined a reasonable mechanism to address situations where the Market Participant “must make irrevocable deactivation-related decisions”

⁴ April 2018 Order at P 17. Because the Commission found that the interim process applied to the Indian Point facility, the Commission specified that the physical withholding provisions would not apply to the Indian Point facility. *See id.* In the May 2018 Filing, the NYISO requested a July 23, 2018 effective date.

⁵ The NYISO’s 30-day determination proposal is reasonable with respect to a Market Participant that seeks to deactivate its Generator less than or equal to 120 days after its Generator Deactivation Assessment Start Date, *i.e.*, in the period beginning as close as possible to Day 90 following the NYISO’s completion of the 90-day reliability determination and the issuance of a finding that the Generator is not needed for reliability. IPPNY does not oppose the NYISO’s proposal to issue a physical withholding determination no earlier than 90 days after the Generator Deactivation Assessment Start Date.

that will make the Generator's deactivation essentially and practicably irreversible.⁶ Thus, additional revisions are required to these aspects of the May 2018 Filing.

In directing the NYISO to file a reasonable deadline for the physical withholding determination when a Generator seeks to deactivate from the system, the Commission referenced concerns that had also previously been raised by the NYISO about “the variability in the amount of advance notice a generator may give of its planned deactivation,” observing that “there is no limit on how far in advance a generator can provide this notice.”⁷ To reasonably address these concerns, the deadline that is implemented should turn on whether the Market Participant has provided the NYISO with the 365-day minimum notice or notice for some longer period of time. Specifically, to provide Market Participants with certainty while allowing the NYISO to effectively conduct its market power analysis, the NYISO should be required to issue a final physical withholding determination: (i) in the event the requested deactivation date is less than or equal to 150 days from the Generator Deactivation Assessment Start Date, no later than 30 days before the requested deactivation date but no earlier than 90 days after the Generator Deactivation Assessment Start Date; (ii) in the event the requested deactivation date is more than 150 days but within 365 days of the Generator Deactivation Assessment Start Date, no later than 120 days after the Generator Deactivation Assessment Start Date (the “120-Day Requirement”); (iii) in the event the requested deactivation date is more than 365 days after the Generator Deactivation Assessment Start Date but there is an irreversible decision point in the interim, no later than 30 days before the date that the Market Participant could make a decision that is irreversible; and (iv) for all other

⁶ See May 2018 Filing at 4—5.

⁷ See April 2018 Order at P 17 & n.50.

requested deactivation dates, no later than 240 days before the requested deactivation date (the “240-Day Requirement”).

I. BACKGROUND

In its initial order in Docket No. EL15-37, issued on February 19, 2015, the Commission directed the NYISO to establish provisions governing the deactivation process for generators in New York and the retention of, and compensation to, generators that wish to deactivate but are required to provide service to maintain reliability, commonly referred to as “reliability must run” (“RMR”) service.⁸ In response to the RMR Order, the NYISO filed, on October 19, 2015, a proposed process that would require a generator seeking to deactivate to provide the NYISO with 365-days’ prior notice.⁹ The NYISO proposed detailed information requirements and a series of deadlines by which it would process generator deactivation notices between the date that the deactivation notice is filed and 365 days from the date the NYISO determines the notice is complete. Among other deadlines, the NYISO proposed in its filing letter that it would complete market power assessments for Generators in Mitigated Capacity Zones within the first 120 days from the date of their completed deactivation notice, now known as the Generator Deactivation Assessment Start Date.¹⁰

In its answer to protests of the NYISO’s Initial Compliance Filing, which challenged the 365-day notice period, the NYISO defended the market power assessment aspect of its proposed notice period as critical for both the NYISO and the Market Participants seeking to deactivate their

⁸ *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 (2015) (“RMR Order”).

⁹ *New York Indep. Sys. Operator, Inc.*, Docket Nos. ER16-120-000 et al., Compliance Filing (Oct. 19, 2015), at 7 (“Initial Compliance Filing”).

¹⁰ *See id.* at 16.

Generators, acknowledging that “[t]his analysis must be performed *at the start of the process* to provide transparency regarding potential penalties that the Generator could be subject to if it were to deactivate” and confirming that the NYISO required 120 days from the Generator Deactivation Assessment Start Date to enable the NYISO to address any market power concerns.¹¹ Thus, the NYISO established that it would perform this analysis to determine “whether a Generator’s proposed deactivation raises market power concerns or constitutes conduct inconsistent with competitive behavior *promptly* following a Generator’s *submission of its completed Generator Deactivation Notice,*” *i.e.*, at the front end of the process which the NYISO then clarified would be completed within a period of 120 days.¹² In its Initial Compliance Order, the Commission accepted the NYISO’s proposed market power assessment review deadlines, effective October 20, 2015.¹³

Because the Commission directed the NYISO to, *inter alia*, separate its generator deactivation process from its gap solution process, the NYISO was required to file a second compliance filing with the Commission.¹⁴ The NYISO did not seek to modify, or in any other way

¹¹ *New York Indep. Sys. Operator, Inc.*, Docket Nos. ER16-120-000 et al., Request for Leave to Answer and Answer of New York Independent System Operator, Inc. (Dec. 21, 2015), at 27 & n.86 (emphasis added) (further stating that the NYISO’s willingness to revise its tariff to allow a generator to deactivate earlier if its reliability assessment identified no system needs was “one more reason the NYISO will need a Generator’s information at the start of the process”) (“December 21, 2015 Answer”).

¹² *Id.* at 27 & n.84 (emphasis added).

¹³ *New York Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,076 (2016) (“Initial Compliance Order”). While the Commission rejected the NYISO’s proposed 365-day notice period in its Initial Compliance Filing because the Commission required the generator deactivation process to be separated from the NYISO’s gap solution process in its tariff, the Commission accepted the information and other requirements placed on generators, finding that they were “consistent with NYISO’s responsibility to monitor its markets and competitive behavior,” and further established that aspects of the Initial Compliance Order that the Commission did not discuss in its order were also accepted. *Id.* at PP 15, 64.

¹⁴ *New York Indep. Sys. Operator, Inc.*, Docket Nos. ER16-120-003 et al., Compliance Filing (Sept. 20, 2016) (“Second Compliance Filing”).

address, the timeline or rules for completing the final physical withholding analysis for generators in Mitigated Capacity Zones in its Second Compliance Filing. The Commission issued the Second Compliance Order on November 16, 2017.¹⁵

On December 18, 2017, Entergy Nuclear Power Marketing, LLC (“Entergy Nuclear”) filed a request for clarification or, in the alternative, rehearing of the Commission’s Second Compliance Order conditionally accepting the NYISO’s Second Compliance Filing.¹⁶ Noting that the NYISO had omitted the associated tariff revisions to implement its proposed deadline for completion of final physical withholding analyses for Generators in the Mitigated Capacity Zones seeking to deactivate, Entergy Nuclear requested that the Commission clarify that the interim process applied to the Indian Point facility and the Second Compliance Order required the NYISO to complete a final physical withholding determination, if such determination is deemed by the NYISO to be necessary, of the Indian Point facility’s generator deactivation notice by no later than March 13, 2018—120 days from the submission of its Generator Deactivation Assessment Start Date (the “120-Day Deadline”).¹⁷ If the Commission did not grant its requested clarification, Entergy Nuclear alternatively requested that the Commission direct the NYISO on rehearing to submit tariff revisions imposing a 120-Day Deadline on the NYISO to perform final market power assessments of deactivation notices and to make such revisions effective October 20, 2015.

¹⁵ *New York Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,189 (2017) (“Second Compliance Order”).

¹⁶ *New York Indep. Sys. Operator, Inc.*, Docket Nos. EL15-37-003 et al., Request of Entergy Nuclear Power Marketing, LLC for Clarification or, in the Alternative, Rehearing (Dec. 18, 2017) (“Request”).

¹⁷ As reflected in the Request, Entergy Nuclear entities had entered into a Settlement Agreement with the State of New York and other parties to retire Indian Point Unit 2 and Indian Point Unit 3 by no later than April 30, 2020 and April 30, 2021, respectively. Request at 9.

In its answer to the Request, the NYISO stated that the 120-day timeline it had proposed in its December 21, 2015 Answer was made in the context of Generators proposing to deactivate within the minimum 365-day period.¹⁸ Per the NYISO, its timeline did not, however, consider those Generators that intended to deactivate years in the future.¹⁹ The NYISO went on to contemplate the potential for a Generator owner’s business plans or the plans of other Generator owners to change when Generator deactivation notices are submitted years in advance of the proposed deactivation date.²⁰

Although the Commission denied Entergy Nuclear’s requested clarification in its April 2018 Order based on the fact that the NYISO had not proposed tariff revisions specifying a deadline of 120 days to complete this analysis in the context of Generator deactivations, it did not conclude that the a requirement to complete this analysis within 120 days was *per se* unreasonable.²¹ Moreover, the Commission agreed that Generators need certainty to proceed with their deactivation decisions, holding that there is “a need for clarity and transparency surrounding final market power reviews” and, therefore, granted rehearing in part to require the NYISO to propose, within 30 days of the date of the April 2018 Order, revisions to its Generator Deactivation Process establishing a timeline for completing final physical withholding determinations for deactivating Generators, if needed.²² The Commission ruled that the lack of a deadline for the

¹⁸ See *New York Indep. Sys. Operator, Inc.*, Docket Nos. ER16-120-004 et al., Request for Leave To Answer and Answer of the New York Independent System Operator, Inc. (Jan. 2, 2018), at 4–7.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 9.

²¹ April 2018 Order at P 15. Rather, the Commission simply found the 120-day timeline had not been adequately supported in the record. *Id.* at P 17.

²² *Id.* at P 13.

NYISO to perform the physical withholding determination in the OATT or Services Tariff “impacts the ability of that generator to ‘be deactivated as planned.’”²³ The Commission explained:

The inability of a deactivating generator to know the point at which NYISO will complete the final market power review (if needed), and therefore assess the likelihood that it will be subject to charges under Services Tariff section 23.4.5.6, could impede the generator’s ability to make informed decisions about deactivating.²⁴

Focusing on the concern that Generators may seek deactivation dates well into the future because “there is no limit on how far in advance a generator can provide this notice,” the Commission agreed that “the final market power review may be less effective with data and assumptions too far removed from a generator’s actual deactivation date” and, based on those facts, suggested that the NYISO should consider working back from such proposed deactivation dates.²⁵

In its May 2018 Filing, the NYISO proposes two types of events that would trigger the deadline applicable for the NYISO’s issuance of a final physical withholding determination. First, the NYISO proposes that it provide the Market Participant seeking to deactivate its Generator the opportunity to obtain a final physical withholding determination at least 30 days before its requested deactivation date (*e.g.*, a generator proposing the minimum 365-day period would not receive its physical withholding determination until Day 335).²⁶ Under this proposal, if the Generator’s requested deactivation date is shorter than 120 days after its Generator Deactivation Assessment Start Date, the NYISO proposes to issue a final physical withholding determination no

²³ *Id.* at P 16.

²⁴ *Id.*

²⁵ *Id.* at P 17 & n.50.

²⁶ May 2018 Filing at 4.

earlier than 90 days from the Generator Deactivation Assessment Start Date.²⁷ The NYISO would require the Market Participant to request the final market power determination at least 60 days before the specified deactivation date.²⁸ The NYISO further proposes that a Market Participant should not be permitted to rely on the NYISO’s final physical withholding determination unless it deactivates its Generator no more than five days before, and no more than ten days after, its requested deactivation date.²⁹ While the Commission was clearly focused on notices that could far exceed the 365-day time frame in its April 2018 Order—the issue the NYISO had framed—the NYISO unjustifiably has lumped all requests together in its filing and argues that its proposal is consistent with the Commission’s statement in its April 2018 Order that “NYISO should set a deadline for completing final market power reviews (if needed) working back from the proposed deactivation date rather than starting from the submission of a complete generator deactivation notice.”³⁰

Second, the NYISO proposes that it provide the Market Participant seeking to deactivate its Generator a final physical withholding determination at least 30 days before the date that the Market Participant “must make irrevocable deactivation-related decisions . . . that will make the Generator’s deactivation essentially and practicably irreversible” (the “irrevocable event”).³¹ IPPNY wishes to note that this premise is an important component of the physical withholding analysis structure because it recognizes that Generators may provide longer deactivation notice

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (citing April 2018 Order at P 17).

³¹ *Id.* at 4–5.

periods but take certain actions that show deactivation will be completed. To that end, the NYISO states that “[a] decision not to timely procure the fuel that would be necessary to refuel a nuclear powered generator is one example of a potentially irrevocable decision that must be made well in advance of deactivation.”³² The NYISO proposes that if it, in consultation with the external Market Monitoring Unit, agrees that there is a point in the deactivation process that is identified by the Market Participant that would make such process “essentially and practicably irreversible,” the NYISO will “inform the Market Participant, in writing, of the first (in time) act, decision not to act, or event that the NYISO agrees will have an irreversible consequence.”³³ At least 60 days before the occurrence of the irreversible action, inaction or event specified by the NYISO in its notice (the “trigger date”), the Market Participant may request that the NYISO issue a final physical withholding determination.³⁴ If the NYISO determines that the trigger date is reasonable, the NYISO will issue a final physical withholding determination at least 30 days before the trigger date.³⁵

II. THE COMMISSION SHOULD REJECT THE NYISO’S 30-DAY DETERMINATION PROPOSAL FOR A GENERATOR SEEKING TO DEACTIVATE MORE THAN 150 DAYS AFTER ITS GENERATOR DEACTIVATION ASSESSMENT START DATE IN INSTANCES WHEN THERE IS NOT AN IRREVERSIBLE ACTION.

The Commission should reject the NYISO’s 30-day determination proposal because it will “impede [Generators’] ability to make informed decisions about deactivation,” and thus, it fails the

³² *Id.* at 5.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Commission’s directive to set a reasonable timeline.³⁶ Indeed, the NYISO’s proposal effectively holds the generator hostage until a month before its intended deactivation date. The NYISO then compounds this unreasonable situation for the Generator by requiring that the Generator deactivate very close to the intended date without providing any basis for these newly proposed, extremely tight time frames. While the Commission stated in its April 2018 Order that the 120-Day Deadline “is not supported in the record,” and that “NYISO should set a deadline for completing final market power reviews (if needed) working back from the proposed deactivation date,” the context of the order was focused on requests from Generators providing more than 365 days’ notice of deactivation.³⁷ For Market Participants providing between 150 and 365 days’ notice, a 120-Day Requirement is just and reasonable because it appropriately balances the Market Participant’s need for certainty of when it can deactivate its Generator with sufficient time to align the termination of its business arrangements with the deactivation and the NYISO’s need to assess whether the planned deactivation would constitute physical withholding.

The NYISO’s proposal to hold back the final physical withholding determination until such a late point in the process shows a serious misunderstanding of the process of retiring a Generator. Once a Market Participant has been told that its Generator is not needed for reliability, the economically rational response is to limit spending additional money on that Generator to only those sums that can be recovered in the time remaining before the Generator retires. For example, prior to deactivating a Generator, a Market Participant must take a variety of steps to ensure that the termination of its business operations coincides with the deactivation of the Generator. These

³⁶ See April 2018 Order at P 16.

³⁷ *Id.* at P 17.

include, but are not limited to, outreach to the local communities, the termination of labor agreements and contracts for operation and maintenance, decisions to forego further capital expenditures, and decisions to enter into contractual arrangements to sell salvageable equipment and real property.

For example, a pre-existing labor contract may require the Market Participant to provide 90 days' prior notice to terminate employment. However, if a Market Participant were to give 90 days' notice of termination (before receiving the NYISO's physical withholding determination) and the NYISO subsequently determines that its deactivation would be an exercise of market power subject to penalties, the Market Participant would be caught between a rock and a hard place. Either it would be required to pay a significant premium to obtain the labor that is necessary to continue operating the Generator (following the termination of the labor contract) or it would be subject to penalties imposed by the NYISO for failure to continue operations. Either way, it would likely suffer significant financial harm.

In addition, the Market Participant would not be able to delay its planned deactivation after receiving the results of the NYISO's physical withholding assessment to comply with the 90-days' notice requirement and other long-lead notice requirements because the NYISO proposes that the Generator must deactivate no more than five days before, and no more than ten days after, its requested deactivation date.³⁸ If the Market Participant changed its deactivation date to coincide with the termination of its business operations, it would trigger the need for a new physical withholding assessment. This puts the Market Participant in an untenable position because it must take on potentially significant risk that it will not be able to deactivate in the face of a NYISO

³⁸ May 2018 Filing at 4.

determination that deactivation would be an exercise of physical withholding subject to penalties. Thus, the NYISO's completion of the physical withholding assessment so close in time to the planned deactivation date is likely to impede a Generator's deactivation plans, which is entirely contrary to the Commission's goal that Generator owners know with certainty when they can deactivate their resources so that they may plan for the cessation of operations accordingly.³⁹ The NYISO's 30-day determination proposal fails to reasonably balance these two needs.

In its prior submissions to the Commission, the NYISO itself established that the physical withholding determination should be provided to the Market Participant within the first 120 days from the deactivation notice to ensure that Generators can reasonably assess their exposure to potential penalties and the NYISO can address any market power concerns. The NYISO assured the Commission that it had the capability to complete the assessment in the first four months after receiving a completed Generator deactivation notice, "which is why it proposed [this time frame] in the first place."⁴⁰ The NYISO should be held to its assurance. For Generators proposing the minimum 365-day notice, IPPNY's proposed 120-Day Requirement allows the Generator to receive its physical withholding analysis at the same time as the 120-day period identified by the NYISO itself for such applications.

Likewise, IPPNY's proposed 240-Day Requirement effectively addresses the NYISO's concerns about the potential for Generators to propose deactivation dates well beyond the 365-day period by requiring that their physical withholding analyses are issued closer in time to such extended dates. In fact, the 240-Day Requirement for Generators providing more than 365-days'

³⁹ See, e.g., April 2018 Order at P 16.

⁴⁰ *New York Indep. Sys. Operator, Inc.*, Docket Nos. ER16-120-001 et al., Request for Rehearing and Clarification of the NYISO (May 23, 2016), at 15.

notice directly aligns with a 120-Day Requirement for Generators providing 365-days' notice that was part of the NYISO's original proposal. In such instances involving requested deactivation dates with longer lead times, the Commission should also require the NYISO to issue a preliminary withholding analysis 120 days after the Generator Deactivation Assessment Start Date. While this analysis would not be binding, it would provide useful information to a Market Participant that provides more than 365 days' notice of deactivation about its likely final physical withholding determination.

Moreover, the NYISO's proposal to include an "irreversible decision" exception could be an important component of the rule set applied to Generators seeking to retire beyond the 365-day period. If designed properly, the NYISO's proposal to provide the physical withholding determination 30 days before the occurrence of an irrevocable event that "will make the Generator's deactivation essentially and practicably irreversible" would be an effective mechanism for Market Participants that request longer deactivation end dates to be able to pursue their deactivation planning with the certainty required. However, the NYISO's proposed framework for this mechanism falls short. Indeed, based on the NYISO's statement in its filing that "[a] purely economic consequence will not satisfy this standard,"⁴¹ it is entirely possible that the NYISO would disagree that the example of the termination of a labor agreement discussed above or any other long-lead time decision that could be changed, but only at potentially significant expense, would satisfy the standard.⁴² IPPNY's proposed 240-Day Requirement greatly reduces the

⁴¹ May 2018 Filing at 5 n.12.

⁴² The Commission should clarify in its order that a Market Participant's execution of a consent decree or other settlement with a government entity to deactivate a Generator for environmental or other public policy reasons is an irreversible decision for purposes of this decision. Similarly, if a Generator is required to install emissions control technology to comply with an environmental law, the irreversible decision should be the date on which it must begin the process to install the required equipment. IPPNY would note that a retirement resulting from an environmental

possibility that a Market Participant that provides greater than 365 days' notice of its Generator's deactivation will be required to make long-lead time decisions that would expose the Market Participant to significant expense if reversed before the NYISO issues its physical withholding determination.⁴³

The Commission should also reject the NYISO's proposal that the Market Participant can only rely on the NYISO's physical withholding determination if it deactivates its Generator no more than five days before, and no more than ten days after, the Market Participant's requested deactivation date. Like the 30-day determination proposal, this proposal is unduly burdensome and impedes the Market Participant's ability to make informed decisions about deactivating. The NYISO has not offered any justification supporting its proposal to constrain the time period in which a Market Participant may rely on the NYISO's physical withholding determination to this inordinately narrow window. A Market Participant should be able to rely on the NYISO's physical withholding determination if it deactivates its Generator as soon as the same day it receives the determination, assuming it has met all other requirements for deactivation, and up to 30 days after its requested deactivation date.

IPPNY's proposal for the timing of a final market power determination is consistent with the balance of interests that was part of the NYISO's original proposal while recognizing that, in cases where a Generator gives more than a year's notice of its retirement, it may be reasonable to issue the determination later than 120 days after the Generator Deactivation Assessment Start

law requiring a Generator to retire is not an exercise of physical withholding and cannot require a physical withholding assessment. *See New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 131 (2008).

⁴³ If a Market Participant notifies the NYISO of a long-lead time event that could be reversed at significant expense, the NYISO should be required to reflect those expenses in the calculation of the Generator's Going-Forward Costs when performing its physical withholding assessment.

Date. Importantly, IPPNY's proposal requires the NYISO to issue the physical withholding determination early enough to allow for an orderly retirement of the units and avoids holding the departing unit hostage. At the same time, it provides the NYISO with adequate time to complete the physical withholding determination and addresses the concerns raised by the NYISO with requested deactivation dates going beyond the 365-day minimum period.

III. CONCLUSION

For the foregoing reasons, the Commission should reject the NYISO's proposed timeline for issuing physical withholding determinations and order the NYISO to modify its proposal as discussed above.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated at Albany, NY, June 13, 2018.

By: David B. Johnson
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