

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

Cricket Valley Energy Center LLC and)
Empire Generating Center, LLC,)
)
v.)
)
New York Independent System)
Operator, Inc.)

Docket No. EL21-7-000

**MOTION FOR LEAVE TO RESPOND AND
LIMITED RESPONSE OF THE INSTITUTE FOR POLICY
INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW**

Pursuant to Rules 212 and 213 of the Commission’s Rules of Practice and Procedure,¹ the Institute for Policy Integrity at NYU School of Law (Policy Integrity) moves for leave to respond, and responds briefly to the Answer filed by Cricket Valley Energy Center LLC and Empire Generating Company, LLC (Complainants) on November 24, 2020.² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.³

There is good cause to permit Policy Integrity to file this limited response to the Answer. Our limited response corrects the Complainants’ erroneous suggestion that the arguments and evidence presented in our initial comments had already been presented to and rejected by the

¹ 18 C.F.R. §§ 385.212, 385.213.

² Motion for Leave to Answer and Answer, Docket No. EL21-7-000 (*filed* Nov. 24, 2020).

³ Policy Integrity’s timely motion to intervene in this proceeding, filed by doc-less intervention, was accepted on October 20, 2020. These comments do not reflect the views of NYU School of Law.

Commission in a past proceeding. The Commission should be aware both that those arguments and evidence presented in our Initial Comments in this proceeding are novel and that neither the Complainants nor the Commission have responded to them, much less refuted them.

Background

Complainants commenced the above-captioned proceeding by filing their complaint pursuant to sections 206 and 306 of the Federal Power Act (FPA) on October 14, 2020. The New York Independent System Operator (NYISO) and various intervenors, including Policy Integrity,⁴ then filed protests and comments on or before November 18, 2020. Cricket Valley sought leave to file an answer and filed an answer on November 24, 2020.

I. Motion for Leave to Respond

The Commission has discretion to permit responses to answers,⁵ and has permitted responses that would clarify a disputed issue and assist the Commission in its decisionmaking process without placing additional burdens on existing parties.⁶ Here, Policy Integrity seeks to assist the Commission by clarifying a narrow but important point that might otherwise go overlooked. Complainants rely heavily on the arguments and evidence that persuaded the Commission to issue its June 29, 2018 Order,⁷ and assert that Policy Integrity is among those

⁴ See Comments of Policy Integrity (*filed* Nov. 18, 2020) [hereafter Initial Comments of Policy Integrity].

⁵ ISO New England Inc., 132 FERC ¶ 61,187, at P 23 n.12 (2010) (“the Commission’s rules and procedures generally prohibit answers to protests . . . and it is within Commission discretion to decide whether to accept answers to protests or answers to answers”); 18 C.F.R. § 385.213(a)(2) (providing no channel for such responses without Commission’s assent).

⁶ See, e.g., PJM Interconnection, L.L.C., 171 FERC ¶ 61,273 at P 53 (2020) (granting leave to file responses “because they have provided information that assisted us in our decision-making process”); N.Y. Indep. Sys. Operator, Inc., 99 FERC ¶ 61,246, at 62,040 (2002) (granting leave because responses “help clarify issues under consideration” and “will not disrupt the proceeding or place additional burdens on existing parties.”), *rev’d on other grounds*, Edison Mission Energy, Inc. v. Fed. Energy Reg’y Comm’n, 394 F.3d 964 (D.C. Cir. 2005).

⁷ PJM Interconnection, L.L.C., 163 FERC ¶ 61,236 (2018).

which, in this proceeding, “simply rehash” arguments and re-present evidence put before the Commission in that earlier proceeding.⁸ This is incorrect; Exhibit 1 to Policy Integrity’s Initial Comments is new economic research that the Commission has not seen previously, and which sharply undermines the core of the Complainants’ argument that NYISO’s capacity market rules are unjust and unreasonable. As such, the Commission should grant Policy Integrity leave to respond to clarify that the arguments and evidence presented in this proceeding are indeed novel and unanswered.

II. Policy Integrity’s Limited Response

Complainants’ answer incorrectly asserts that “the Commission considered and squarely rejected” arguments made by Policy Integrity,⁹ citing as support the Commission’s rejection of the argument that payments made through renewable portfolio standard or clean energy standard programs are not distinguishable from other out-of-market revenues, such as coal ash sales.¹⁰ But the Commission could not have already rejected the arguments and evidence Policy Integrity presented in this proceeding because Policy Integrity has not previously presented them to the Commission.¹¹ Nor have other parties done so.

The Complainants are correct that Policy Integrity had raised questions in the PJM context about the premise that externality payments to nuclear and renewable resources artificially cause capacity market prices to fall, but those earlier arguments merely highlighted

⁸ Answer at 3.

⁹ Answer at 4 nn.13 & 14.

¹⁰ *Id.*; see also 169 FERC ¶ 61,239 PP 66, 69 (2019).

¹¹ Compare Comments of Policy Integrity, *PJM Interconnection L.L.C.*, Docket No. ER18-1314-000, at 3, 28–35 (filed May 7, 2018), with Initial Comments of Policy Integrity at 10–19.

the absence of evidence for this premise.¹² The argument in our Initial Comments in this proceeding goes a step further. In brief, we use economic theory to show that state-directed externality payments that supplement nuclear and renewable resources' energy market revenues are unlikely to cause a reduction in capacity market prices.¹³ And, the circumstances in which it is possible for such payments to have this result are not present in NYISO.¹⁴ Having misstated Policy Integrity's argument and evidence, Complainants then fail to address our actual argument and evidence, asserting, incorrectly, that "nothing in the NYISO Answer or the other November 18 Filings casts doubt on Complainants' showing that below-cost offers from state-subsidized resources threaten the integrity and effectiveness of the capacity market in NYISO, just as they did in PJM."¹⁵

As we noted in our initial comments, Complainants must carry a double evidentiary burden here because they filed their Complaint under FPA section 206, the first prong of which requires showing that the rate underlying NYISO's capacity market is unjust, unreasonable, or

¹² See Comments of Policy Integrity, *PJM Interconnection L.L.C.*, Docket No. ER18-1314-000, at 3, 28–35 (May 7, 2018); see also *id.* Exhibit A; SYLWIA BIALEK & BURCIN UNEL, INST. FOR POL'Y INTEGRITY, CAPACITY MARKETS AND EXTERNALITIES: AVOIDING UNNECESSARY AND PROBLEMATIC REFORMS 14 (2018) ("Concerns that externality payments would inefficiently suppress capacity market prices, and that the resulting price changes would undermine the viability of markets, have been at the heart of the arguments in favor of capacity market redesign. But, currently there is no empirical support for this argument.").

¹³ Initial Comments of Policy Integrity at 10–19.

¹⁴ Initial Comments of Policy Integrity at 18:

[E]xternality payments can cause long-term capacity prices to fall only when given to peaking units, and thereby reducing the peak energy price. This does not tend to occur in New York State, where such payments flow to low-merit resources, like wind, solar, and nuclear generators. In other words, economic reasoning that takes the interaction between energy and capacity markets into account does not support the premise that changes to generation prices from per-MWh payments cause price declines (let alone "suppression") in the *capacity* markets.

¹⁵ Answer at 2 (internal quotation marks omitted).

unduly discriminatory or preferential.¹⁶ However, the argument and evidence presented in our initial comments reveal the Complainants’ story of capacity market “price suppression” in NYISO to be inaccurate. Consequently, the refutation of our argument is necessary for Complainants to carry their evidentiary burden. But because the Complainants’ Answer ignores and so fails to refute our argument, the Commission cannot join the Complainants in disregarding what we have entered into the record, and must conclude that it is both unanswered and fatal to Complainants’ assertions about rates in NYISO. To do otherwise would mean impermissibly grounding a decision on arguments unsubstantiated by relevant evidence.¹⁷

Respectfully submitted,

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¹⁶ Initial Comments of Policy Integrity at 2–3; *see also* Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc., 121 FERC ¶ 61,205, at P 32 (2007) (spelling out evidentiary standard for section 206’s two-part test).

¹⁷ 16 U.S.C. § 825l(b); *see also* S.C. Pub. Serv. Auth., 762 F.3d at 65 (quoting 5 U.S.C. § 706(2)(E)), *and* Pac. Gas & Elec. Co. v. F.E.R.C., 306 F.3d 1112, 1116 (D.C. Cir. 2002) (remanding decision to FERC for fuller articulation of reasoning and noting that (FERC’s findings of facts are conclusive if supported by substantial evidence.”).

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at New York, New York this 1st day of December 2020.

Respectfully Submitted,

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