

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

**New York Independent System Operator, Inc.     )     Docket No. ER06-185-002**

**RESPONSE OF  
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.  
TO PROTESTS OF ASTORIA GENERATING COMPANY, L.P., NRG COMPANIES  
AND THE INDEPENDENT POWER PRODUCERS OF NEW YORK**

On October 2, 2006 Astoria Generating Company, L.P. (“Astoria”) and the NRG Companies (“NRG”) (filing together), and the Independent Power Producers of New York (“IPPNY”) (collectively, “Protesters”), submitted protests to the New York Independent System Operator, Inc.’s (“NYISO’s”) Initial Informational Filing and Request for Limited Tariff Waiver (“September 5 Filing”).<sup>1</sup> Since the protests request affirmative relief and thus are, in effect, motions, the NYISO submits that it has the right to respond to these protests under Rule 213 of the Federal Energy Regulatory Commission’s (“Commission’s”) Rules of Practice and Procedure. Alternatively, the NYISO respectfully requests leave to respond, and responds, to the protests.<sup>2</sup>

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<sup>1</sup> *New York Independent System Operator, Inc.*, Initial Informational Report and Request for Limited Tariff Waiver of the New York Independent System Operator, Inc., Docket No. ER06-185-002 (September 5, 2006).

<sup>2</sup> In this pleading the NYISO responds to the protests submitted by Astoria and NRG (jointly) on October 2, 2006 and the separate protest submitted by IPPNY on October 2, 2006. This response does not address NRG’s protest that was untimely submitted (with regard to the NYISO’s September 5 Filing) on October 12, 2006 in Docket No. ER06-185-003. The NYISO will submit an answer to NRG’s October 12 filing at a later date.

## I. EXPLANATION OF RIGHT TO RESPOND AND REQUEST FOR LEAVE TO SUBMIT RESPONSE

The NYISO recognizes that the Commission generally discourages responses to protests. The protests submitted on October 2, 2006, however, seek affirmative relief from the Commission by requesting the Commission to (1) “remand this back to the NYISO with a specific directive to complete a meaningful stakeholder review process,” and (2) “submit tariff filings within six months of its Order.”<sup>3</sup> The Commission’s Rules of Practice and Procedure therefore permit the NYISO to respond to the protests.<sup>4</sup>

To the extent that the NYISO’s response is not expressly permitted under Rule 213, the NYISO respectfully requests leave to submit this response. The Commission has allowed such responses when they help to clarify complex issues, provide additional information that will assist the Commission, correct inaccurate statements, or are otherwise helpful in developing the record in a proceeding.<sup>5</sup> The NYISO’s response meets this standard. The NYISO’s response is submitted for the limited purpose of clarifying certain factual matters and correcting inaccurate or misleading statements in the protests, thereby assisting the Commission in its review and consideration of the issues presented in this proceeding. The NYISO therefore respectfully requests that the Commission exercise its discretion and accept the NYISO’s response.

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<sup>3</sup> Astoria/NRG protest, at 5. *See also* Astoria/NRG protest, at 9; IPPNY protest, at 8, 9.

<sup>4</sup> Rule 213(a)(3) of the Commission’s Rules of Practice and Procedure allows an answer to filings seeking affirmative relief from the Commission. 18 C.F.R. § 385.213(a)(3).

<sup>5</sup> *See, e.g., Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 at 61,036 (2000) (accepting an answer that was “helpful in the development of the record . . . .”); *New York Independent System Operator, Inc.*, 91 FERC ¶ 61,218 at 61,797 (2000) (allowing “the NYISO’s Answer of April 27, 2000, [because it was deemed] useful in addressing the issues arising in these proceedings . . . .”); *Central Hudson Gas & Electric Corp.*, 88 FERC ¶ 61,138 at 61,381 (1999) (accepting prohibited pleadings because they helped to clarify the issues and because of the complex nature of the proceeding).

## II. RESPONSE

The Protesters' filings are rife with omissions, mischaracterizations of the NYISO's filings, and failures to acknowledge the Commission's prior conclusions in this Docket. As a result, they attempt to re-litigate decided issues and amount to little more than self-serving efforts to avoid the legitimate imposition of Bid Production Cost Guarantee Payment ("BPCG") mitigation in accordance with the thresholds long established in the NYISO tariff.<sup>6</sup>

### *A. The Protests Are Collateral Attacks on the Commission's Prior Order*

The September 5 Filing was made in response to Ordering Paragraph (B) in the Commission's April 7, 2006 Order Granting Tariff Waiver in this docket, which states that:

The Commission hereby grants NYISO's request to correct errors it made in its computation of Guarantees, but not LBMPs, while implementing the mitigation measures in its Market Administration and Control Area Services Tariff, for the period from February 1, 2005 to the present, subject to the condition that NYISO provide the Commission with details of the settlement corrections, consistent with the Staff data request of January 6, 2006.<sup>7</sup>

Nowhere do the Protestors contest any of the "details of the settlement corrections." Nowhere do they seek to show that the settlement corrections were based on erroneous data or calculations. Rather, they seek to contest the underlying authority for making the corrections, by claiming that the NYISO is attempting to impose "retroactive" mitigation or otherwise not complying with its tariff.<sup>8</sup> These issues were decided in the April 7 Order, which states:

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<sup>6</sup> Capitalized terms not defined herein shall have the meaning ascribed to them in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff").

<sup>7</sup> *New York Independent System Operator, Inc.*, 115 FERC ¶ 61,026 (2006) ("April 7 Order").

<sup>8</sup> *See, e.g., Astoria/NRG protest*, at 3.

[W]e agree with NYISO's response that it is not in fact proposing any rate changes to its filed rate schedules nor is it issuing refunds. For the most part, the various mitigation errors that NYISO seeks to correct in this filing are the result of NYISO failing to compute Guarantee compensation in accordance with the filed rate schedule's rates, terms, and conditions, specifically newly modified mitigation measures, because of software implementation errors. Thus, rates are not being changed retroactively, nor is NYSIO making refunds. To the contrary, NYISO is attempting to ensure that final bills, as far as possible, conform to its filed rate schedules.<sup>9</sup>

In the April 7 Order, the Commission also stated that it concurred in the NYISO's position that

the recalculation of Guarantees does not require any retroactive recalculation of market-clearing prices, but rather, individual unit Guarantee payments. The recalculation of Guarantees does not involve refunds, and can be performed with certainty. The billing procedures for these underlying obligations are not yet finalized, and remain subject to final determination, consistent with NYISO's tariff.<sup>10</sup>

The April 7 Order also made clear that the Commission was approving both the correction of prior erroneous mitigation and the imposition of mitigation:

NYISO explains that, for those generating units that were mitigated, an upward adjustment of the Guarantee will occur if the bid passes the conduct and impact test and no previous adjustment has already taken place. A downward adjustment will occur for those generating units not mitigated if they are found to fail the conduct and impact test and no previous adjustment has been made.<sup>11</sup>

The NYISO's November 8, 2005 filing in this Docket,<sup>12</sup> which gave rise to the April 7 Order, made clear that the corrections for the period from February 1, 2005 forward would

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<sup>9</sup> April 7 Order, P 45.

<sup>10</sup> *Id.*, at P 58.

<sup>11</sup> *Id.*, at P 36.

<sup>12</sup> Report of Tariff Implementation Errors and Request for Limited Tariff Waivers of the New York Independent System Operator, Inc. (Nov. 8, 2005) ("November 8 Filing")

include downward adjustments for BPCG mitigation; this was also discussed in the NYISO's February 6, 2006 response to the Staff Data Request dated January 6, 2006.<sup>13</sup>

Thus, the Protests do not raise issues that are responsive to the September 5 filing. Rather, they seek to resurrect issues as to the NYISO's and Commission's authority to impose the BPCG corrections, and the compliance of those corrections with the NYISO's Tariff. Those issues were decided in the April 7 Order. No party, including the Protesters, sought rehearing of that Order, which has long been final. Commission precedent precludes this sort of collateral attack on issues that have already been decided.<sup>14</sup>

*B. Protestors' Claims of "Retroactive" Mitigation Ignore the Nature of BPCG Payments and Any Related Mitigation*

As explained in the NYISO's November 8, 2005 filing in this docket:

A BPCG is paid if a unit's total as-bid costs are greater than its revenues for an operating day. While LBMP prices are established by the market clearing price for a given geographic market area, BPCGs are necessarily determined on a unit-by-unit basis. Moreover, the level of a unit's BPCG cannot be determined until the results of a full day's operations are available, since only then can the unit's revenues be determined. As a result, BPCGs are ultimately determined in the billing and settlement process for each unit, and only affect that unit.<sup>15</sup>

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<sup>13</sup> November 8 Filing, at 12; February 6, 2006 Response to Staff Data Request, at 11-12.

<sup>14</sup> *See, e.g., New York Independent System Operator, Inc.* 103 FERC ¶ 61,291, at P 17 n.11 (2003) (dismissing arguments raised in a rehearing request in a docket involving the NYISO's market mitigation measures because "[t]he Commission has approved specific NYISO market mitigation measures, including reference prices and conduct and impact criteria. KeySpan's arguments regarding reference prices and conduct and impact criteria are a collateral attack on these orders."); *Florida Power & Light Co.*, 31 FERC ¶ 61,169 (1985) (holding that intervenors could not relitigate issues that had been decided by the Commission in the absence of a change in factual circumstances); and *Richard Blumenthal, et al.*, 117 FERC ¶ 61,038 (2006) (dismissing a complaint by the Attorney General of Connecticut attacking the use of LBMP pricing in New England on, among other grounds, a finding that it constituted a collateral attack on prior Commission decisions).

<sup>15</sup> November 8 Filing, at 2-3.

The rules for calculating BPCG payments are set forth in Attachment C to the NYISO's Services Tariff, and the conduct and impact thresholds for mitigating BPCG payments are specified in the NYISO's Market Mitigation Measures ("MMM"), Attachment H to the Services Tariff. The formulae set forth in Attachment C make clear that BPCGs are calculated over a 24 hour day.<sup>16</sup> Because BPCG payments are (i) calculated and paid over 24 hours, (ii) depend on the bids submitted and LBMP and Ancillary Service revenues received over the course of a 24 hour operating day, and (iii) are only paid to compensate generators to the extent their legitimate Minimum Generation, Start-up and Energy costs (as reflected in a unit's bids) are not recovered via LBMP or Ancillary Service revenues in the operating day, BPCG impact can only be tested at the end of each operating day. The BPCG impact test measures the increase in a unit's BPCG payments resulting from bids that exceed the relevant conduct test.<sup>17</sup> The NYISO must wait until the end of the market day to apply the BPCG impact test, so that two sets of daily BPCG payments can be calculated, first using the as-submitted bids, and a second time substituting mitigated bids for the conduct test-failing bids that the generator submitted. The two sets of bids are then compared to determine if the BPCG payment based on the as-submitted bids fails the BPCG impact test.<sup>18</sup> This is true whether the assessment of the mitigation thresholds is done manually or on an automated basis; either way, the test must account for accepted bids and revenues in all 24 hours of the day in order to accurately test BPCG impact.

Thus, the fact that BPCG mitigation is not determined until after the completion of the operating day arises from the fundamental fact that the BPCG payments subject to potential

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<sup>16</sup> See Services Tariff, Attachment C, First Revised Sheet No. 422A (definition of variable "N").

<sup>17</sup> Services Tariff, Attachment H §3.2.1(2); September 5 Filing at 7-9.

<sup>18</sup> Services Tariff, Attachment H §3.2.1(2); September 5 Filing at 8-9.

mitigation cannot themselves be determined until after completion of the operating day. As stated in the April 7 Order with specific reference to the period after February, 2005, the Commission granted the “NYISO’s request to correct errors in its computation of Guarantees, but not LBMPs, *while implementing the mitigation measures in its Services Tariff.*”<sup>19</sup> The Protesters make vague assertions that BPCG mitigation should somehow be done differently than is being done by the NYISO, but nowhere explain how this “prospective” mitigation could be accomplished, or how a different method would comply with the tariff provisions governing the determination of BPCG payments.<sup>20</sup> The absence of such an explanation is telling, and confirms that what the Protesters are essentially seeking is the right to be free for at least a day from the application of the conduct and impact thresholds for market power mitigation of BPCG payments that have long been a part of the tariff. The Protesters have made clear that they are looking to receive a “free bite at the [BPCG] apple.” There is no justification in either policy or the tariff for such an exemption from the application of the market power mitigation measures for BPCG payments that are specified in the Services Tariff.

*C. The Protestors Fail to Acknowledge Their Own Roles and Knowledge in the Application of Mitigation to BPCG Payments*

The Protests try to give the impression that they are or will be the surprise victims of BPCG mitigation, particularly with regard to the going-forward process once the BPCG mitigation software has been developed.<sup>21</sup> Nothing could be farther from reality. As the NYISO first explained in the November 8 Filing, BPCG payments are unit-specific payments based on

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<sup>19</sup> April 7 Order, at P 47 (emphasis supplied).

<sup>20</sup> *See, e.g.* IPPNY protest, at 6.

<sup>21</sup> *See, e.g., Id.*, at 5-6; Astoria/NRG protest, at 2-3.

the individual bids of the given unit. At the end of each operating day, a generator will know (1) how long it operated and at what prices in the energy markets, (2) what its Minimum Generation and Start-up bids are, and (3) whether the reference levels for those bids can be justified under the standards specified in the Services Tariff. Thus, each generator can readily determine if its bids make it a candidate for BPCG mitigation on any given operating day. A moment's reflection on how BPCG payments and any resulting mitigation are determined reveals that the Protesters' assertions that they will be forced to participate in the NYISO's markets with little idea whether they might be subject to BPCG mitigation ring hollow.

Moreover, the Protests ignore the reality of the consultation process. In both the correction of past BPCG mitigation and in the going-forward process, the NYISO will afford any generator that is determined to be a candidate for BPCG mitigation an opportunity for consultation with the NYISO if the generator believes that the reference levels that the NYISO used to perform the mitigation were inappropriate. A generator's ability to justify its bids, or a revision of its reference levels, turns on the unit's actual bids and operating costs.<sup>22</sup> Those facts are uniquely in the possession of the generator, and indeed would be known to the generator at the time it formulated its bids before participating in the dispatch for an operating day. Given the tariff standards that prescribe how reference levels are to be determined, and with the protections of the consultation process, a generator that is a candidate for BPCG mitigation at the end of an operating day will ultimately only be mitigated if it cannot show that its bids had a legitimate basis and hence were not submitted in order to exercise market power. The tariff also makes clear that a generator can request a consultation about its reference levels before submitting a bid if the generator determines that its reference levels do not reflect the current competitive market

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<sup>22</sup> Market Mitigation Measures, Services Tariff, Attachment H §3.1.4(d).

circumstances.<sup>23</sup> The upshot is that any generator that timely provides adequate substantiation in the consultation process for a reference level that would avoid having its bids trigger the conduct or impact thresholds for mitigation will not have its bids mitigated.

Furthermore, as the IPPNY protest acknowledges,<sup>24</sup> under the proposed going-forward mitigation methodology, which the NYISO briefly described but did not request approval of in its September 5 Filing, a generator will have access to preliminary BPCG mitigation information two days after the operating day, and thereafter the impetus logically and fairly lies with the generator to consult with the NYISO if the generator believes consultation is warranted. Thus, the substance and the timing of the BPCG mitigation process is largely within the control of the affected generators.

*D. The NYISO's Market Mitigation Measures Authorize the NYISO to Mitigate Real-Time Bid Production Cost Guarantee Payments*

The Astoria/NRG protest argues that the NYISO's tariff does not authorize the mitigation of BPCG payments once the underlying bids have been initially accepted in the market day, even if the NYISO determines that the bids failed both the applicable conduct and impact tests.<sup>25</sup> IPPNY's protest makes a similar claim, but IPPNY appears to limit its argument to questioning the NYISO's proposed going-forward BPCG test.<sup>26</sup> These arguments are incorrect, and of

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<sup>23</sup> *Id.*

<sup>24</sup> IPPNY protest, at 4.

<sup>25</sup> Astoria/NRG protest, at 5.

<sup>26</sup> IPPNY protest, at 1.

course do not acknowledge that market power can be exercised to increase BPCG payments by submitting high Minimum Generation or Start-up Bids.<sup>27</sup>

As explained above, the BPCG mitigation of which the Protesters complain will only occur if an affected generator has in fact violated the applicable conduct and impact tests. Contrary to the implications of the Protests, the NYISO's MMM<sup>28</sup> *require* the NYISO to mitigate generators that fail an appropriate conduct test under §3.1.2 of the MMM, and that are determined to have BPCG impact pursuant to §3.2.1(2) of the MMM.<sup>29</sup>

Contrary to the Protesters' claims, the provisions of the MMM that address prospective mitigation do not preclude the NYISO from mitigating BPCG payments after a generator's bid has been accepted for a particular hour.<sup>30</sup> Section 4.1 of the NYISO's MMM states that "[t]he conduct specified in Sections 3.1.1 to 3.1.3 shall be remedied by the prospective application of a default bid measure as described in Section 4.2." Section 4.2.2(d) of the MMM, in turn, states

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<sup>27</sup> Submitting high Start-up and Minimum Generation Bids in an effort to exercise market power can be a particularly effective strategy for generators that have temporary "must-run" status as a result of being scheduled on for reliability, even though they are not economic for energy. Generators that are committed for reliability via a Supplemental Resource Evaluation or that are committed or set Out-of-Merit may well fit this profile.

<sup>28</sup> The NYISO's Market Mitigation Measures are set forth in Attachment H to the Services Tariff.

<sup>29</sup> The contention on pages 4 and 5 of the Astoria/NRG protest that the NYISO is somehow interpreting its tariff to apply different BPCG mitigation depending on whether a unit sets the market clearing price is not accurate and is not consistent with information the NYISO has provided to its Market Participants. BPCG mitigation tests all conduct-failing bids for all hours of the day. The fact that a specific conduct-failing hourly bid was not mitigated by the NYISO's LBMP Automated Mitigation Procedures ("AMP") because it did not have the requisite impact on LBMPs does not mean that the conduct-failing bid is somehow protected from subsequent mitigation based on a determination that the generator had BPCG impact over the course of the market day. There is nothing in the September 5 Filing that supports Astoria/NRG's in-merit vs. out-of-merit distinction.

<sup>30</sup> See Astoria/NRG protest, at 7.

“the ISO shall not use a default bid to determine revised *market clearing prices* for periods prior to the imposition of the default bid, except as may be specifically authorized by the Commission.” (Emphasis supplied.) As explained above and in the NYISO’s November 8 Filing, and as found by the Commission in the April 7 Order, “the recalculation of Guarantees does not require any retroactive recalculation of market-clearing prices.”<sup>31</sup> While LBMP mitigation under the NYISO’s AMP tests for impact on market clearing prices and, when applied, re-determines market-clearing prices, the purpose of BPCG mitigation, by contrast, is *not* to correct market clearing prices. Rather, the purpose of BPCG mitigation is to identify and mitigate the exercise of market power by a generator that is seeking to inappropriately inflate the unit-specific BPCG compensation that it receives after the end of the market day by bidding in a manner that overstates its running costs for the day. BPCG mitigation does not, and was never intended to, affect LBMPs. As the Commission found, it only affects payments to individual units, not market clearing prices. For this reason, performing BPCG mitigation at the end of the operating day is entirely consistent with the provisions of the NYISO’s tariff that preclude the retroactive use of a default bid to “determine revised market clearing prices.”

The Astoria/NRG protest claims that § 3.3 of the NYISO’s MMM requires that the NYISO consult with generators that have submitted bids that fail the BPCG conduct and impact tests prior to the relevant operating hour. This claim is also incorrect. As explained previously, the proposed consultation is not possible because it is not possible for the NYISO to determine if a particular generator will fail the BPCG impact test until the end of the operating day. Moreover, the language of §3.3 of the MMM is entirely consistent with the NYISO’s

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<sup>31</sup> April 7 Order, at P 58.

implementation of the BPCG tests. Sections 3.3.1 and 3.3.2 of the MMM provide, in pertinent part, as follows:

3.3.1 If through the application of an appropriate index or screen or other monitoring of market conditions, conduct is identified that (i) exceeds an applicable threshold, and (ii) has a material effect, as specified above, on one or more prices or guarantee payments in an ISO Administered Market, the Market Monitoring Unit shall, as and to the extent specified in the Plan or in § 3.3.2 of these Mitigation Measures, contact the Market Party engaging in the identified conduct to request an explanation of the conduct. . . .

3.3.2 The ISO shall make a reasonable attempt to contact and consult with the relevant Market Party about the Market Party’s reference level(s) before imposing conduct and impact mitigation, other than conduct and impact mitigation imposed through the [AMP]. . . .

Section 3.3.1 of the MMM requires the NYISO to consult with a Market Participant only after its Bids have been determined to both (i) fail an appropriate conduct test, and (ii) have a “material effect . . . on prices or guarantee payments.” This means the Bid must also be determined to have impact before the NYISO is expected to initiate consultation with a Market Participant. As explained above, BPCG impact can only be determined at the conclusion of the market day. Therefore, it is impossible to consult on an hourly basis in Real-Time in the manner the Astoria/NRG protest seems to suggest. In addition, §3.3.2 of the MMM makes clear that the obligation to consult applies “before *imposing* conduct and impact mitigation.” (Emphasis supplied.) The NYISO is fully complying with this provision of the MMM by notifying generators if they are a candidate for BPCG mitigation, and consulting with any generator that requests it, before imposing BPCG mitigation in the settlement process. All of this fully complies with the tariff, as the Commission recognized in the April 7 Order.

*E. The Protests Do Not Show Any Basis for a Tariff Filing*

As noted in Section IIA of this filing, the Protests claim that the NYISO must make a tariff filing to carry out the mitigation described in the September 5 Filing.<sup>32</sup> This is just another attempt to delay compliance with the tariff standards for BPCG mitigation. As noted above, the April 7 Order found that the NYISO “is not in fact proposing any rate changes to its filed rate schedules nor is it issuing refunds . . . .”<sup>33</sup> Any BPCG mitigation described in the September 5 Filing would be in accordance with the applicable BPCG conduct and impact thresholds for mitigation described in the MMM. The Protests do not show that BPCG mitigation, whether for the period from February 2005 to the implementation of software capable of calculating BPCG mitigation on a day-to-day basis, or in the period thereafter (the “going-forward” period), would be imposed pursuant to the application of anything other than the thresholds for BPCG mitigation specified in the MMM. Thus, the protests do not show a need for a tariff filing. Indeed, the whole point of the NYISO’s filings, with respect to both the current and going-forward periods, is to ensure that BPCG mitigation *conforms* to the mitigation thresholds of the Services Tariff, and does so as accurately and as expeditiously as possible. There is no showing to the contrary in the protests, and thus no showing of a need to change the Services Tariff.

**III. CONCLUSION**

Accordingly, for the reasons set forth above and in the NYISO’s prior filings in this Docket, the NYISO respectfully requests that the Commission deny the Protestors’ requests for

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<sup>32</sup> Astoria/NRG protest, at 5. *See also* Astoria/NRG protest, at 9; IPPNY protest, at 8, 9.

<sup>33</sup> April 7 Order, at P 45.

affirmative relief, reject their Protests, accept the NYISO's September 5 Filing without modification and grant the NYISO the limited Tariff waiver requested in its September 5 Filing.

Respectfully submitted,

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Dated: October 17, 2006

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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 lists compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated at Washington, DC this 17th day of October, 2006.

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