

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Orion Power New York GP, Inc.	)	Docket No. EL00-60-000
	)	
v.	)	
	)	
New York Independent System	)	
Operator, Inc.	)	

**NEW YORK INDEPENDENT SYSTEM OPERATOR’S ANSWER TO  
COMPLAINT REQUESTING FAST TRACT PROCESSING AND RESPONSE  
TO EMERGENCY MOTION REQUESTING CEASE AND DESIST ORDER**

On March 27, 2000, the New York Independent System Operator, Inc. (“NYISO”) filed a Request for Suspension of Market-Based Pricing for 10-Minute Reserves and to Shorten Notice Period, Docket No. ER00-1969-000 (“March 27, 2000 filing”). In that filing, the NYISO requested immediate authority to suspend the use of market-based bids in the New York markets for 10-minute reserves until those markets could be demonstrated to be workably competitive. The NYISO made its request when it was faced with evidence of a substantial decline in the levels of bids and quantities offered for 10-minute reserves and a substantial increase in the resulting prices. This lack of competitive performance in the market for 10-minute reserves increased the cost of reserves dramatically, from a total cost for December 1999 of \$6.5 million to a total cost in February 2000 of \$75 million. As a result, the NYISO requested an effective date of March 28, 2000 so that it could suspend the use of market-based bids immediately. To prevent further harm pending the Commission’s decision on that request, the NYISO issued statements to market participants announcing it would suspend market-based markets for 10-minute reserves effective April 1, 2000.

On March 31, 2000, Orion Power New York GP, Inc. (“Orion”) filed a Complaint Requesting Fast Track Processing and Emergency Motion Requesting Cease and Desist Order, requesting that the Commission order the NYISO to cease and desist from suspending the market-based rate markets for 10-minute reserves. Pursuant to Rules 206 and 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.206 and 213, the NYISO hereby files its answer to Orion’s complaint and motion. Because of the serious potential for substantial financial harm that could be caused to market participants in the market for 10-minute reserves if cost-based bids are not imposed immediately, Orion’s complaint should be denied.

#### ANSWER

**1. The NYISO’s Action to Suspend the Use of Market-Based Bids in the Markets for 10-Minute Reserves is Consistent with Section 205 of the Federal Power Act.**

Under Section 205(d) of the Federal Power Act (FPA) and Section 35.11 of the Commission’s regulations, 18 C.F.R. § 35.11, the Commission has the discretion to waive the 60-day notice requirement. Section 35.11 states that

[u]pon application and *for good cause shown*, the Commission may, by order, provide that a rate schedule, or part thereof, shall be effective as of a date prior to the date of filing or prior to the date the rate schedule would become effective in accordance with these rules.

18 C.F.R. § 35.11 (emphasis added). The Commission’s discretion to waive notice and suspension provisions is a source of significant regulatory power, *Vermont Yankee Nuclear Power Corp.*, 40 FERC ¶ 63,006, at 65,050 (1987); *Tapoco, Inc.*, 39 FERC ¶ 61,363 (1987), and allows the Commission the “authority to fashion effective practical remedies to problems presented by rate filings under Section 205” *Id.* at 62,171 (citing *United States v. Chesapeake*

& *Ohio R.R. Co.*, 426 U.S. 500 (1976) and *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978); see also *City of Piqua, Ohio v. FERC*, 610 F.2d 950, 953 (D.C. Cir. 1979) (stating that “[s]ection 205 purports to dictate not *when* contractually authorized rate increases *can* be made operative but only that they *cannot* become operative at any time without compliance with the statutory procedure.”) (emphasis in original); *City of Kaukauna v. FERC*, 581 F.2d 993, 996 (D.C. Cir. 1978).

The Commission has granted waiver of the prior notice requirements in a variety of instances. *El Paso Electric Company*, 87 FERC ¶ 61,219 (1999) (in requests for market based rate authority, Commission generally grants waiver of the 60-day prior notice requirement for new service if good cause is shown and the filing is submitted before the commencement of service); *Indianapolis Power & Light Co.*, 90 FERC ¶ 61,180 (2000) (allowing changes to OATT to become effective on date of filing); *California Power Exchange Corp.*, 86 FERC ¶ 61,211 (1999) (granting waiver to allow changes to market monitoring protocols to be effective two days after the filing); *California Independent System Operator Corp.*, 83 FERC ¶ 61,309 (1998) (granting waiver of the prior notice requirements to allow proposed tariff amendment to correct for insufficient regulation bids to go into effect as of the date of filing).

In its March 27, 2000 filing, the NYISO requested waiver of the Commission’s 60-day notice requirements so that the tariff changes it was filing to implement the cost-based market for 10-minute reserves could go into effect as early as March 28, 2000. In order to provide notification to Market Participants and to implement the necessary software changes, however, the NYISO decided to implement the tariff changes on April 1, 2000. In its filing, the NYISO presented good cause for the waiver of the notice provisions.

As stated in the filing, there is substantial evidence of a lack of competitive conditions in the market for 10-minute reserves. March 27, 2000 filing at 6-9. Beginning on January 29, 2000, the NYISO observed a pattern of physical and economic withholding of reserve capability. Prior to January 29, on average more than 1400 MW of 10-Minute Non-Synchronized Reserves (“10-Minute NSR”) was being offered in the market. On January 29, however, the quantity of 10-Minute NSR offered dropped to less than 900 MW. Also, during this time the prices at which 10-Minute NSR were being offered increased dramatically. The quantity of 10-Minute NSR offered at less than \$30 prior to January 29 went from a high of 1200 MW to a low of just over 300 MW after January 29, 2000, a decline of approximately 75%.

Faced with this substantial evidence of both physical and economic withholding, and with the support of the Market Advisor, the NYISO made its filing to suspend the market-based rate markets for 10-Minute reserves and require that cost-based bids be offered in those markets until they could be demonstrated to be workably competitive. Because of the substantial financial harm being caused by lack of a workably competitive market, the NYISO requested an effective date of March 28, 2000 so that it could implement tariff changes to require cost-based bids immediately.

Although the NYISO did not act under the provisions of its market mitigation measures, the NYISO’s filing of a Section 205 tariff change and subsequent imposition of the changes is, nevertheless, consistent with the intention of the Commission’s November 23, 1999 Order, *New York Independent System Operator, Inc.*, 89 FERC ¶ 61,195, 61,604 (1999) (stating that a revised mitigation plan could commit the ISO to file on a case-by-case basis

under Section 205 of the FPA to impose specific mitigation measures when the ISO concludes that they are warranted and that “the operation of a competitive and efficient market required that market power problems be quickly identified and resolved”<sup>1</sup> and with the Commission’s approval of similar actions taken by the California ISO in the face of large price increases for ancillary services. *AES Redondo Beach*, 84 FERC ¶ 61,046, 61,198 (1998) (suspending market-based pricing for ancillary services pending Commission action on the California ISO’s motion); *see also California Independent System Operator Corp.*, 88 FERC ¶ 61,146 (1999) (granting an effective date 2 days after the filing date to allow the CAISO to remove bidding hierarchies that restricted the ISO’s ability to manage Intra-Zonal congestion in a least cost manner).

The FPA was enacted to “curb abusive practices of public utility companies.” *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1983) (stating that the Commission has broad authority to consider anticompetitive and other conduct touching the “public interest.”). Its primary goal is the to prevent the imposition of excessive rates and charges. *Municipal Light Bds. of Mass. v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). As discussed above, the Commission has the discretion to waive the 60-day notice requirements of Section 205 to allow the NYISO’s tariff changes to become effective on March 28, 2000 to protect consumers of ancillary services in New York. Because the NYISO

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<sup>1</sup> *See also New York Independent System Operator, Inc.*, 90 FERC ¶ 61,317, slip op. at 4 (1990).

made its filing before implementing the tariff changes, the NYISO actions are not contrary to Section 205.

**2. The NYISO is Not Circumventing the Commission’s Policy Against Retroactive Mitigation.**

Citing the Commission’s recent order on the NYISO revised mitigation plan, *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,317 (1990), slip op. at 7, Orion claims that the NYISO is attempting to circumvent the Commission’s policy against retroactive mitigation by implementing a new rate prior to Commission review. Orion Complaint at 5. Orion, however, misses the point. NYISO is **not** acting pursuant to its market mitigation plan. The March 27, 2000 filing requests authority to suspend the market-based markets for 10-minute reserves, not impose mitigation measures on certain participants. Moreover, the suspension of the market is prospective only – the NYISO did not request that the suspension of the market be retroactive. Rather, in the March 27, 2000 filing, the NYISO requested that redress for any harm caused by the economic and physical withholding prior to the effective date of the market suspension be determined through a settlement process utilizing the Commission’s ADR process. If the settlement process is not successful, the NYISO reserved the right to seek relief from the Commission.<sup>2</sup> If this request for relief is construed as a

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<sup>2</sup>As stated in the March 27, 2000 filing, the NYISO proposed to render bills for the period March 1, 2000 through March 31, 2000 based on a pro forma approximation of the prices that would be expected to result from a workably competitive market. NYISO March 27, 2000 filing at 11. The billing for this period will not be completed until mid April. The NYISO intends to proceed with the pro forma calculation, as a temporary and expedient remedy, based on the weighted average of 10-minute reserve prices prevailing in the period prior to the dramatic increases in prices. Because of the substantial basis for concern about the competitiveness of the 10-minute reserves markets described above, and because the billing and collection for a substantial portion of the price run-up period has already been

(continued . . .)

request for a retroactive effective date for the March 27, 2000 filing, the NYISO believes that it has presented extraordinary circumstances to obtain such relief. *See e.g., Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, at 61,339 (1992) (in extraordinary circumstances, Commission will grant waiver of notice where filing is made on or after the date service has commenced).<sup>3</sup>

### **3. Orion is Not Unjustly Harmed by the NYISO's Actions.**

Orion states that a suspension of the market-based bids in the market for 10-minute reserves “could cost Market Participants thousands of dollars in lost revenues to which they are otherwise entitled.” Orion Complaint at 6. Orion, however, is not “entitled” to revenues that are inflated by markets that are not workably competitive. The potential revenues Orion claims it would lose as a result of the NYISO's actions are the same revenues that would be lost to load serving entities in New York who would be financially harmed by the lack of a competitive marketplace for 10-minute reserves. Based on the substantial evidence gathered by the NYISO, those potential revenues are attributable to prices directly resulting from clear instances of physical and economic withholding. Neither Orion, nor any other Market Participant is entitled to such revenues.

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conducted on the basis of the high prices experienced in the 10-minute reserves markets, the NYISO believes that the equities strongly favor the proposed *pro forma* billing and collection. *See, e.g., Complaint of Niagara Mohawk Power Corp*, Docket No. ER00-57-000 at 2.

<sup>3</sup> In addition, the Commission has authority to grant relief without construing the request as a request for a retroactive effective date. *See, e.g., Washington Water Power Co.*, 83 FERC ¶ 61,282 (1998) (requiring a refund of profits in connection with transactions undertaken in violation of utility's market-based rate order and affiliate conduct requirements).

Other than the potential loss of revenues from a noncompetitive market, Orion has alleged no harm from the suspension of market-based bids in the market for 10-minute reserves.

**4. Orion's Complaint Should Be Referred to the Commission's ADR Process.**

Orion's request for fast-track complaint procedures and cease and desist order should be denied. As the NYISO requested in the March 27, 2000 filing, the Commission should refer the question of redress for the harm caused by the physical and economic withholding in the 10-minute reserves market to the Commission's Dispute Resolution Service for resolution in 90 days. Orion's complaint could be consolidated in that ADR process for prompt resolution.

**COMMUNICATIONS**

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**COMPLIANCE WITH RULE 213**

**a. Disputed Factual Allegations**

- The NYISO disputes that there are substantive flaws in its request to suspend the market based pricing in the market for 10-minute reserves. Orion Complaint at 2, n. 1.



**b. Law Upon Which Answer Relies**

- Section 205(d) of the Federal Power Act, 16 U.S.C. § 824d (1998), which states, in part:

“The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days’ notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.”

- Section 35.11 of the Commission’s Regulations, 18 C.F.R. § 35.11 (1999), regarding waiver of the notice requirement;
- *Vermont Yankee Nuclear Power Corp.*, 40 FERC ¶ 63,006, at 65,050 (1987);
- *Tapoco, Inc.*, 39 FERC ¶ 61,363, 62,171 (1987) (allowing the Commission the authority to “fashion effective practical remedies to problems presented by rate filings under Section 205” );
- *City of Piqua, Ohio v. FERC*, 610 F.2d 950, 953 (D.C. Cir. 1979) (stating that “[s]ection 205 purports to dictate not *when* contractually authorized rate increases *can* be made operative but only that they *cannot* become operative at any time without compliance with the statutory procedure.”) (emphasis in original);
- *City of Kaukauna v. FERC*, 581 F.2d 993, 996 (D.C. Cir. 1978).
- *El Paso Electric Company*, 87 FERC ¶ 61,219 (1999) (in requests for market based rate authority, Commission generally grants waiver of the 60-day prior notice requirement for new service if good cause is shown and the filing is submitted before the commencement of service);
- *Indianapolis Power & Light Co.*, 90 FERC ¶ 61,180 (2000) (allowing changes to OATT to become effective on date of filing);

- *California Power Exchange Corp.*, 86 FERC ¶ 61,211 (1999) (granting waiver to allow changes to market monitoring protocols two days after the filing);
- *California Independent System Operator Corp.*, 83 FERC ¶ 61,309 (1998) (granting waiver of the prior notice requirements to allow proposed tariff amendment to correct for insufficient regulation bids to go into effect as of the date of filing);
- *New York Independent System Operator, Inc.*, 89 FERC ¶ 61,195, 61,604 (1999) (stating that a revised mitigation plan could commit the ISO to file on a case-by-case basis under Section 205 of the FPA to impose specific mitigation measures when the ISO concludes that they are warranted and that “the operation of a competitive and efficient market required that market power problems be quickly identified and resolved.”);
- *AES Redondo Beach*, 84 FERC ¶ 61,046, 61,198 (1998) (suspending market-based pricing for ancillary services pending Commission action on the California ISO’s motion);
- *California Independent System Operator Corp.*, 88 FERC ¶ 61,146 (1999) (granting an effective date 2 days after the filing date to allow the CAISO to remove bidding hierarchies that restricted the ISO’s ability to manage Intra-Zonal congestion in a least cost manner);
- *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1983) (stating that the Commission has broad authority to consider anticompetitive and other conduct touching the “public interest.”);
- *Municipal Light Bds. of Mass. v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) (stating that the primary goal of Section 205 is to prevent the imposition of excessive rates and charges);

- *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, at 61,339 (1992) (in extraordinary circumstances, Commission will grant waiver of notice where filing is made on or after the date service has commenced);
- *Washington Water Power Co.*, 83 FERC ¶ 61,282 (1998) (requiring a refund of profits in connection with transactions undertaken in violation of utility's market-based rate order and affiliate conduct requirements).

**c. Admission's and Denials of Material Allegations**

- As discussed above, the NYISO denies that its March 29, 2000 letter notifying market participants that the NYISO was suspending the market based bids in the markets for 10-minute operating reserves is contrary to Section 205 of the FPA and the filed rate doctrine. Orion Complaint at 5 and 6.
- The NYISO denies Orion's claims that NYISO is attempting to circumvent the Commission's policy against retroactive mitigation by implementing the market changes as proposed in the March 27, 2000 filing. Orion Complaint at 5.
- The NYISO denies Orion's claims that it is entitled to revenues obtained in a market that has not been shown to be workably competitive. Orion Complaint at 6.
- The NYISO disagrees with Orion's claims that this dispute could not be successfully resolved through alternate dispute resolution procedures. Orion Complaint at 6.

**d. Defenses**

- The NYISO has fully complied with Section 205 of the FPA.

**CONCLUSION**

Docket No. EL00-60-000

For the foregoing reasons, the NYISO respectfully requests that the Commission dismiss the March 31, 2000 Complaint of Orion and deny the unjust and unreasonable relief it seeks.

Respectfully submitted,

NEW YORK INDEPENDENT  
SYSTEM OPERATOR, INC.

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Of Counsel

Dated: April 10, 2000

**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 Washington, D.C. this 10<sup>th</sup> day of April 2000.

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