UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	)	Docket No. ER00-1969-000 (not consolidated)
Niagara Mohawk Power Corporation v. New York Independent System Operator, Inc.	)	Docket No. EL00-57-000 (not consolidated)
Orion Power New York GP, Inc. v. New York Independent System Operator, Inc.	)	Docket No. EL00-60-000 (not consolidated)
New York State Electric & Gas Corporation v. New York Independent System Operator, Inc.	)	Docket No. EL00-63-000 (not consolidated)
Rochester Gas and Electric Corporation v. New York Independent System Operator, Inc.	)	Docket No. EL00-64-000 (not consolidated)
Strategic Power Management, Inc. v. New York Independent System Operator, Inc.	)	Docket No. EL00-67-000 (not consolidate)

NEW YORK INDEPENDENT SYSTEM OPERATOR'S MOTION FOR LEAVE TO FILE RESPONSE AND RESPONSE TO MOTIONS TO INTERVENE

On March 27, 2000, 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 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 because it was faced with evidence of substantial concentration in the market for 10-Minute Non-Synchronized Reserves (10-Minute NSR), a substantial decline in the quantities offered for 10-Minute NSR, a substantial increase in the resulting prices for operating reserves, and no indication of imminent market entry sufficient to render the operating reserves markets workably competitive. Consequently, the NYISO requested an effective date of March 28, 2000 so that it could suspend the use of market-based bids immediately.

Several parties have filed pleadings in response to the NYISO's March 27 filing. As discussed below, because of the complex nature of these proceedings, the NYISO hereby files a Motion for Leave to File Response and Response to the pleadings filed in the above-captioned dockets.

MOTION FOR LEAVE TO FILE RESPONSE

As can be seen from the arguments in the pleadings filed in these dockets, several intervenors have raised new arguments and asserted claims against the NYISO which the NYISO has not had the opportunity to address. Moreover, in several instances, certain parties rely on factual inaccuracies that mischaracterize the NYISO's filing. The NYISO wishes to address these new arguments raised by the intervenors and to clarify the facts and legal issues involved in this proceeding. Thus, to the extent this pleading is not a permitted response under Rule 213(a), the NYISO seeks leave to file the following response to clarify and to aid the Commission's understanding of the issues.[1]

RESPONSE

A. The Interventions have not Shown that the Operating Reserves Markets Were Workably Competitive

1. The Interventions do not Demonstrate that the 10-Minute NSR Market Is not Concentrated

The key fact underlying the NYISO's March 27 filing is the significant level of concentration in the ownership of quick start capacity capable of providing 10-Minute NSR. As shown in the table on p. 6 of the March 27 filing, during the period that prompted the NYISO's filing three entities accounted for 97% of the 10-Minute NSR capability in New York.

Several intervenors argue that the market concentration shown for 10-Minute NSR does not accurately portray competitive conditions in the 10-minute reserves markets because it does not account for an apparent surplus of 10-Minute NSR capacity or the fact that 10 minute spinning reserves can displace 10-Minute NSR if the price of the latter rises substantially.[2] These arguments, however superficially plausible, do not change the NYISO's conclusions regarding the competitiveness of the market. First, the market concentration table

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[1] *See, e.g., Central Hudson Gas & Electric Corp.*, 88 FERC ¶ 61,137, 61,381 (1999) (accepting otherwise prohibited pleadings because they helped to clarify the issues and because of the complex nature of the proceeding).

[2] *See, e.g.,* Joint Motion to Intervene and Protest of Long Island Power Authority at 29; Protest of Orion Power New York GP, Inc., at 13

shows the tested maximum capability of the units, and therefore errs on the side of overstating the amount of capacity that is typically available. In actual operations, any unit deratings would detract from this total and thus from any purported surplus. For example, from January 1 to March 31, an average of approximately 1500 MW of 10-Minute NSR capacity was actually available, rather than the maximum capability level of 2359 MW.

Second, while all spinning reserves may substitute for 10-Minute NSR in theory, in reality such substitution is limited to spinning reserve offers east of the Central-East transmission constraint, because locational reserve requirements require the NYISO to purchase most of its 10-minute reserves in that area. Moreover, a substantial portion of the units capable of providing 10-minute spinning reserves sell their output pursuant to PURPA contracts that the sellers believe limit their ability to offer the units in the ancillary services markets. Therefore, a very limited amount of 10-minute spinning reserves is typically available to displace 10-Minute NSR resources when they are withheld. Furthermore, such substitution cannot occur until the marginal offer price of 10-Minute NSR exceeds the marginal offer price of 10-minute spinning reserves. Spinning reserves prices were typically much higher than non-spinning reserves prices prior to January 29.

Accordingly, the NYISO's characterization of the market concentration level in the 10-Minute NSR market is appropriate and accurately reflects competitive conditions in that market.

2. The Interventions do not Demonstrate that Blenheim-Gilboa Was Available to Supply 10-Minute Reserves

Certain intervenors express the wish that the NYISO had been able to make operating reserves available from the Blenhiem-Gilboa Pumped Storage Project (Blenheim-Gilboa).[3] However desirable that may have been, it does not change the fact that Blenheim-Gilboa was not available to provide operating reserves during the period of dramatic increases in operating reserves prices. Moreover, the Interventions have not shown that the availability of Blenheim-Gilboa would have been sufficient to make the control of 10-Minute NSR not concentrated.

As stated in the NYISO's recent answer to the complaint filed by New York State Electric & Gas Corporation (NYSEG) with respect to the recent performance of the operating reserves markets, the NYISO acknowledges that to date its software has been significantly limited in its ability to recognize operating reserves from Blenheim-Gilboa.[4] Indeed, to the extent that the NYISO software design could be changed to recognize significant operating reserves from Blenheim-Gilboa, the NYISO does not disagree that this situation could be characterized as a Market Design Flaw. The operational limitations affecting the Blenheim-Gilboa unit are, however, the result of modeling decisions detailed in the "B-G Scheduling Agreement with NYISO Operation" document developed and signed by the Blenheim-Gilboa joint project contractors. This document requires modeling Blenheim-Gilboa as a single

[3] *See, e.g.* Joint Motion to Intervene and Protest of Long Island Power Authority at 36.

[4] New York Independent System Operator, Inc.'s Answer to Complaint, Motion to Consolidate, and Conditional Request for Expedited Complaint Procedure, Docket No. EL00-63-000, at 4 *et seq.* (April 13, 2000).

dispatch unit, which inherently restricts its ability to participate in both the 10-minute spinning and non-spinning reserves markets and to be scheduled for energy at feasible operating levels.

The NYISO has been investigating various means to better utilize the Blenheim-Gilboa plant, and on March 24, 2000 entered into an operating agreement with the Blenheim-Gilboa joint project contractors that would allow the scheduling of an additional 250 MW of spinning reserves from Blenheim-Gilboa. The joint project contractors have also agreed to model the Blenheim-Gilboa plant as four individual units, which will allow the Blenheim-Gilboa plant to pursue bidding strategies that, within the constraints of a competitive market, could result in operating schedules similar to those realized under the operation of the New York Power Pool. The NYISO anticipates that this change will be in place by June 1, 2000. All such changes, however, have required and will require discussion and agreement with the Blenheim-Gilboa contracting parties. The plain consequence is that none of these changes could have been quickly or unilaterally implemented by the NYISO in response to the sudden non-competitive performance of the 10-Minute NSR market; and the fact remains that the available operating reserves from Blenheim-Gilboa were not sufficient to render the operating reserves markets workably competitive during the period addressed by the March 27 filing.

3. The Intervenors do not Demonstrate that There Were Sufficient Operating Reserves Offers to Eliminate Market Power Concerns

LIPA, along with certain other intervenors, asserts that "the NYISO did not experience a shortage of capacity bid into the 10-Minute NSR segment of the market during the period in question ….”[5] This assertion simply ignores half of the equation, since the price at which resources are offered is as important as the amount offered. The fact that a sufficient quantity of bids was received in an hour does not mean that market power was not exercised through economic withholding.

Indeed, the fact that there is more than enough 10-Minute NSR capacity available to meet New York Control Area (NYCA) needs is evident from the table on p. 6 of the March 27 filing, which shows 2,359 MW of winter rating capability. LIPA’s pointing to the amount of 10-Minute NSR capacity, however, begs the questions both of its concentration and whether it was withheld.[6] Concentration concerns turn on the control of capacity, not the amount of it; and any amount of capacity, however large, is of no value to a market if it is withheld.

In light of the concentration in control of 10-Minute NSR resources, it is noteworthy that intervenor LIPA spends several pages of its filing detailing the intimate operating relationships between itself and various KeySpan entities.[7] Whatever the facts may be about the asserted adherence of those entities to the various code of conduct and corporate separation requirements touted by LIPA, the mutual benefits of economic or physical withholding strategies would seem readily apparent to LIPA and the KeySpan entities it identifies. *See* LIPA, Affidavit of John J. Schroeder at ¶5 (“I am also aware that there is

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[5] *See* LIPA at 6.

[6] In its filing, LIPA identifies itself as having been accused of market power abuse. The March 27 filing made no such identification.

[7] LIPA at 16 *et seq*

another subsidiary of KeySpan Corporation ('KeySpan Ravenswood, Inc.') that owns the Ravenswood generating facilities located in Queens, New York.").

Intervenor LIPA claims that it always has, and will continue to, bid in enough operating reserves to meet reserve requirements on Long Island at low prices, and asserts that it is therefore not exercising market power on Long Island. LIPA again misses the point. Whether or not that assertion is and remains true, it does not address the relevant question, which is the abuse of market power in the pricing of 10-Minute NSR in the area east of the Central-East constraint. That is the market addressed by the March 27 filing. Indeed, LIPA appears to be asserting a right to engage in a strategy of exercising market power in the area east of Central-East as a whole by withholding any of its 10-Minute NSR capability not needed to meet the Long Island locational reserve requirement—that is, by withholding the vast majority of its capability. By this logic, any supplier without a locational reserve requirement should have the right to withhold all of its capability, and LIPA should have the right to exercise market power elsewhere in the State as long as it does not violate the locational requirements on Long Island.

LIPA also claims that the NYISO does not always need to purchase 1200 MW of operating reserves, and thus the NYISO exacerbated any market problems by purchasing excessive amounts of reserves.[8] LIPA acknowledges that the 1200 MW standard is based on

[8] LIPA at 31-32; *see also* KeySpan-Ravenswood at 24. KeySpan-Ravenswood's affiant Kinneary, at ¶14, also claims that the NYISO may have been purchasing more operating reserves than necessary, because "Ravenswood has noticed that in many hours its units are dispatched into the day-ahead energy market at well below full capacity and,

(continued . . .)

the potential loss of the Bowline unit and the NYCA interconnection with Hydro Quebec, but nowhere establishes that these were not the appropriate assumptions to use during the relevant period.[9] It may well be that one day the NYISO's scheduling and dispatch software can be modified to optimize further the dynamic scheduling of energy and reserves. In the meantime, however, LIPA and the other intervnors have not shown that the NYISO's scheduling of operating reserves was in any way inconsistent with existing reliability standards, including appropriate conservative assumptions to ensure those standards can be met. LIPA has likewise failed to show that its alternatives are consistent with the existing capabilities of the NYISO's software. Equally important, LIPA has not shown how any of its assertions are sufficient to negate the clear evidence that the operating reserves markets were not workably competitive.

4. The Interventions do not Demonstrate that the NYISO's Actions will Distort Price Signals

Several intervenors assert that the NYISO's actions will interfere with price signals in the operating reserves markets, causing a number of adverse consequences for the economic

notwithstanding their zero bids into the spinning reserve market, the excess capacity is not taken from spinning reserves and instead the NYISO takes higher priced 10-minute non-spinning reserves." The NYISO's price verification process is specifically designed to flag the relationship Kinneary describes, and the NYISO is not aware of any situations where it has done so. The NYISO would request KeySpan-Ravenswood to provide it with the factual support for Mr. Kinneary's claim.

[9] The NYISO's scheduling and dispatch software, along with all of the NYISO's initial procedures, were developed by LIPA and its fellow transmission owners prior to the commencement of operation by the NYISO.

efficiency of those markets.[10] This assertion is perfectly circular. Prices provide signals for efficient market outcomes only if the prices result from competitive markets. High prices resulting from an abuse of market power, on the other hand, are by definition artificially high and thus provide an artificially high incentive to market entry. At the same time, potential market entrants are likely to be aware that market power exists, and will be deterred from entry by the power of incumbents to use their control over prices to discipline new entry. In short, the intervenors' assertions about price signals presume the answer to the very question at issue: whether the operating reserves markets are and have been workably competitive. The NYISO has imposed bid caps on the 10-minute operating reserve markets precisely because they have not been workably competitive, and is working with the market participants to determine what additional steps may be appropriate to achieve workably competitive markets.

5. The Interventions do not Demonstrate that Operational Constraints or Other Concerns Justify the Bidding Behavior in the Operating Reserves Markets

Intervenor LIPA makes a number of assertions about operational constraints on its units capable of providing 10-Minute NSR, and claims to have engaged in communications with the NYISO about its bidding intentions for those units. These assertions are made in an apparent attempt to justify not having offered those units to the market. These assertions do not withstand scrutiny. First, LIPA makes no attempt to quantify the effect of the asserted operational limitations, or to correlate that effect with its actual bidding practices.

[10] *See, e.g.*, Protest of PG&E National Energy Group, *et al.* at 4.

Second, the affidavits submitted with LIPA's filing are notably vague in citing any specific statements to LIPA from the NYISO approving a bidding strategy that would result in the monthly cost of operating reserves elsewhere in the State increasing some tenfold. The NYISO denies that it suggested or approved any such strategy. The NYISO has reviewed its files, including emails exchanged with LIPA, and can find no support for LIPA's innuendo that LIPA only withheld 10-Minute NSR capacity with the express or tacit approval of the NYISO.

Third, the essence of LIPA's assertions is its purported concern with the excessive operation, including the number of starts and stops, of its combustion turbine units (CTs).[11] While there were discussions between the NYISO, LIPA and others about the use of CTs beginning prior to the operation of the New York markets, the issues in those discussions were substantially resolved by the end of this past January. Moreover, LIPA's concern would lead to the exact opposite of LIPA's bidding patterns for 10-Minute NSR observed by the NYISO. Specifically, LIPA would minimize operating wear and tear on its CTs by bidding them high in the energy market, and low in the 10-Minute NSR market, so that they would tend not to get picked to operate for energy but would tend to get picked and, therefore, paid to provide 10-Minute NSR. After all, a unit providing 10-Minute NSR gets paid just to sit there, *not* operating. Furthermore, the NYISO's records show that for the period from December 1, 1999 to March 28, 2000, LIPA's quick start units were called upon to provide

[11] LIPA at 24. The NYISO does not dispute that LIPA's CTs are an important factor in maintaining system reliability on Long Island. Offering the CTs into the 10-Minute NSR, however, would not be detrimental to such reliability.

energy less than one-half of one percent of the time that they were selected to provide 10-Minute NSR.[12]

Fourth, LIPA's assertions belie the profitability motive for its withholding of capacity from the operating reserves markets. By exercising market power in the operating reserve markets, LIPA would be able to increase its profits at the expense of the customers of load serving entities elsewhere in the State, since (a) the costs for operating reserves are borne by the State as a whole, and (b) LIPA is a net seller of reserves. *See* LIPA, Schroeder Affidavit at ¶12 ("the bidding of LIPA's resoures should be done in a manner that avoided exerting local, i.e., Long Island, market power") (emphasis in original). The NYISO estimates that the net returns to LIPA from the increased prices for operating reserves in February alone were on the order of $15 million.

In sum, LIPA's list of purported reasons for not making units available is, of course, totally irrelevant unless the units were in fact not made available (*i.e.*, were withheld). Thus, LIPA's arguments about the operating constraints on its CTs are a purported justification of withholding. LIPA does not come forward, however, with appropriate evidence that a sufficient number of its units were subject to *bona fide* outages to account for the precipitous decline in capacity offered to the 10-Minute NSR market, nor does it offer any quantifiable

[12] LIPA's quick start units were called on to provide energy in only 187 instances during the entire period. During this same period, LIPA's CTs were accepted for 38,274 hours of 10-Minute NSR payments. Thus, even assuming that each of the 187 reserve pick-ups was for a full hour, being selected for 10-Minute NSR actually resulted in LIPA's units being called on to run less than one-half of one percent of the time during which they were serving as 10-Minute NSR.

justification for the extremely high market clearing prices for those units that were offered. Since LIPA's arguments do not stand up, the fact of withholding remains and the only apparent justifications for it are economic.

Intervenor KeySpan-Ravenswood asserts, at 13, that: "The NYISO's filing in this proceeding never identifies any generator as having committed any physical or economic withholding."[13] That argument is a red herring. The charts included with the March 27 filing clearly demonstrate that substantial quantities of capacity were withheld from the 10-Minute NSR market, and that prices correspondingly skyrocketed. Which units specifically contributed to the withholding is not particularly relevant to the overall non-competitive performance of the market. Moreover, in such a highly concentrated market, remedies limited to particular units would almost certainly be undercut by the other sellers. KeySpan-Ravenswood is of course free to raise this issue in the proposed dispute resolution process, but any settlement of this issue will not change the overall market performance that was the basis for the March 27 filing.

KeySpan-Ravenswood claims that the NYISO "presents no evidence, at all, of any basis for its belief that suppliers are engaging in economic withholding, *i.e.*, bidding unreasonably high prices."[14] KeySpan-Ravenswood again appears not to have examined the charts accompanying the March 27 filing. As noted in the March 27 filing, Attachment A to that filing shows that "the quantity of 10-Minute NSR being offered at less than $30 dropped

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[13] *See also* KeySpan-Ravenswood at 21.

[14] KeySpan-Ravenswood at 22.

from a high of over 1200 MW prior to January 29 to a subsequent low of only just over 300 MW, for a decline of approximately 75%." March 27 filing at 6. The $30 price selected for purposes of illustration "was more than 10 times higher than the previous maximum market clearing price." *Id.*

In contrast to the specific market behavior documented in the March 27 filing, KeySpan-Ravenswood offers only speculation that "opportunity costs may have increased."[15] KeySpan-Ravenswood asserts that the "NYISO wholly ignores suppliers' real opportunity costs from bidding into the 10-minute non-synchronous reserve market, associated with foregone opportunities in the energy markets."[16] This is another broad generalization, devoid of specifics. The NYISO does not disagree that from time to time a quick start unit may incur an opportunity cost as a result of being selected to provide 10-Minute NSR rather than energy. KeySpan-Ravenswood glides over the fact, however, that the quick start units at issue generally have high operating costs, and therefore will have opportunity costs (*i.e.*, the difference between a unit's energy bid and the applicable locational clearing price for energy) only if they are selected for 10-Minute NSR during the relatively few hours when energy prices are quite high. An initial review of the bids from the relevant quick start units shows that the opportunity cost for 10-Minute NSR units is seldom greater than zero and on average is close to $1.00. Thus, even if opportunity costs can be anticipated to be relatively high in a given hour, that would only warrant a relatively high bid for 10-Minute NSR for that hour.

[15] KeySpan-Ravenswood at 22.

[16] *Id.*

See KeySpan-Ravenswood, Kinneary Affidavit at ¶16 (“Ravenswood appropriately takes into account the volatility (day-to-day and hour-to-hour) of energy markets in framing its bids to provide 10-minute non-spinning reserves”). KeySpan-Ravenswood’s opportunity cost argument does not justify the sustained high prices for operating reserves described in the March 27 filing.

KeySpan-Ravenswood and LIPA also claim that that the NYISO “wholly ignores the fact that suppliers must bid prices relative to their risk of substantial nonperformance penalties in the event that for any reason they are not able to supply reserved energy when requested.”[17] The suggestion that the possibility of nonperformance penalties warrants a risk premium that would push operating reserves prices to the levels reported in the March 27 filing does not withstand scrutiny. First, a unit would have to be selected to provide 10-Minute NSR; second, the unit would have to be called on to provide energy because of its 10-Minute NSR status; and third, the unit would have to fail to operate when called upon. As discussed above, LIPA’s quick start units, when selected to provide operating reserves, were called on to provide energy less than one-half of one percent of the time. Thus, a LIPA unit would be at risk for a nonperformance penalty only some small fraction of one-half of one percent of the time. Tellingly, neither LIPA nor KeySpan-Ravenswood provides any facts demonstrating a significant risk of nonperformance by its quick start units, or showing that they have been subjected to significant nonperformance penalties, or showing that sellers of 10-Minute NSR all experienced a sudden and simultaneous jump in their perception of nonperformance risk in

[17] *Id.; see also* LIPA at 34.

late January. In fact, during the entire period January through March of this year, KeySpan-Ravenswood was assessed total 10-Minute NSR nonperformance penalties of $3,082, LIPA incurred total 10-Minute NSR nonperformance penalties of $14,806, and the total for all suppliers was $25,706.

6. The Interventions do not Demonstrate that the NYISO is Discriminating Against Suppliers East of Central-East

LIPA strangely asserts that the NYISO's proposed bid caps are discriminatory, since they do not apply to units to the west of the Central-East constraint (*i.e.*, outside the area of market concentration).[18] The NYISO's bid caps only apply to units east of the Central-East constraint because that is the area in which there is a market concentration problem (attributable in significant part to the limited ability to import spinning reserves over the Central-East constraint). LIPA has neither shown nor attempted to show that there is a market power problem in the area west of Central-East, such that would warrant the imposition of any remedies is warranted.

7. The Interventions do not Demonstrate that the NYISO Should Discriminate in Prices for Spinning and Non-Spinning Reserves

LIPA characterizes the NYISO policy of paying the same market clearing price for both spinning and non-spinning reserves as a "paradigm of fallacious logic."[19] The logic of LIPA's proposal that the NYISO price discriminate between spinning and non-spinning

[18] *See* LIPA at 8.

[19] LIPA at 33. This "fallacious logic" was developed by LIPA and its fellow transmission owners and bequeathed to the NYISO prior to its commencement of operations.

reserves, however, is that the NYISO should adopt a pricing policy that would facilitate inefficient gaming of 10-minute reserve bids. Under the present pricing policy, all suppliers of 10 minute reserves (spinning and non-spinnning) east of Central-East can offer their reserves into the market at low bids and be assured of being selected and paid the market price. This provides the maximum incentive for such suppliers to undercut any effort at withholding 10-Minute NSR capacity. If the NYISO were to attempt to price discriminate between spinning and non-spinning reserves as suggested by LIPA, suppliers of spinning reserves would respond by attempting to obtain the 10-Minute NSR market clearing price by bidding at just under the expected 10-Minute NSR market clearing level. This would be difficult to achieve, and the uncertainty involved and resulting miscalculations would likely reduce the competitive supply of 10-minute reserves clearing in the market and enable the sale of additional 10-Minute NSR at artificially high prices. In short, since spinning reserves can serve the same function as 10-minute non-spinning reserves, and if anything are higher quality reserves, there is no apparent logic in paying spinning reserves less than the market clearing price for 10-minute reserves.

8. The Interventions do not Demonstrate that the Proposed Bid Caps are Inappropriate

The March 27 filing requested that offers for 10-Minute NSR from units east of Central-East be subject to a cost-based limit equal to the incremental cost of providing non-synchronized reserves, but not to exceed \$2.52 per MW per hour. \$2.52 is the highest market clearing price (with the exception of one hour when the price was set by a 30 minute reserve unit) for 10-Minute NSR in the period from the start of the 10-Minute NSR market to the time when the bidding and pricing at issue started to occur. As shown in the March 27 filing, during that period, the lowest market clearing price for 10-Minute NSR was zero. Since the incremental costs of providing 10-Minute NSR should be quite low, and since $2.52 was the highest market clearing price observed during the period when the market appeared to be functioning normally, using $2.52 as an upward limit on incremental cost bids should ensure that sellers are adequately compensated.

A number of intervenors criticize the NYISO's proposed cost-based bid caps, and in particular the proposed upper limits on those caps.[20] The NYISO would be the first to agree that any system of administered bid caps is inferior to prices determined by competitive market forces, but that begs the question whether a market is competitive in the first instance. The NYISO would also be the first to agree that any bid caps should cover the bidder's legitimate costs, and the NYISO's proposal accordingly includes procedures for individual sellers to demonstrate to the NYISO what their cost recovery requirements are. By contrast, the intervenors merely make a number of generalized assertions about the need for bid caps to cover a seller's costs. Nowhere does any intervenor provide any cost-based justification for setting caps at any specific levels, such as the $750/MW advocated by NRG.[21] Much less do any of the intervenors provide any specific cost-based justifications for operating reserves prices at the levels experienced during the period that triggered the NYISO's filing.

[20] *See* KeySpan-Ravenswood at 26 *et seq.*; Motion to Intervene and Protest of NRG Power Marketing, Inc., at 2.

[21] NRG at 2.

9. The Interventions have not Shown that the Use of Bid Caps Is Inappropriate

Although LIPA is correct that the Commission directed the California ISO to employ a purchase price cap to remedy market design flaws in its ancillary services markets, LIPA is incorrect to imply that bid caps are disfavored by the Commission.[22] In its California ISO orders, the Commission simply found that purchase price caps were appropriate to remedy the particular market design flaws in California's ancillary services markets.[23] The Commission did not disavow the use of bid caps in appropriate circumstances. Indeed, the Commission had previously held that it would consider allowing the California ISO and California PX to propose the use of bid caps on a case-by-case basis to check the exercise of market power.[24]

Moreover, the Commission approved the use of bid caps to mitigate generation market power in New York City more than two months *after* it authorized the California ISO to implement purchase price caps.[25] The Commission has upheld these bid caps on multiple occasions.[26] In addition, as the NYISO noted in its March 27th filing, the Commission has

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[22] LIPA at 40.

[23] *See AES Redondo Beach, L.L.C.*, 85 FERC ¶ 61,123 (1998).

[24] *See Pacific Gas and Elec. Co., et al.*, 81 FERC ¶ 61,122 at 61,546 (1997) ("We find that, if there is evidence that the Companies have been exercising market power, bid caps may be an appropriate response.").

[25] The Commission approved the use of bid caps as a market power mitigation measure in New York City on September 22, 1998 in *Consolidated Edison Co. of New York, Inc.*, 84 FERC ¶ 61,287 (1998). The Commission first accepted the use of a purchase price cap in California on July 17, 1998, in *AES Redondo Beach, L.L.C.*, 84 FERC ¶ 61,046 at 61,197 (1998).

[26] *See, e.g., New York Independent System Operator, Inc.*, 89 FERC ¶ 61,109 at 61,300-01 (1999) (clarifying how the New York City rate caps would be expressed in monthly

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also approved a rule requiring New York City suppliers with spinning reserve capability to participate in the spinning reserves market and to bid zero during all hours. Similarly, the Commission has accepted the use of bid caps in New England and PJM.[27] Taken together, these rulings demonstrate that the Commission has accepted the use of bid caps in appropriate circumstances.

LIPA also fails to recognize that a key consideration in the Commission's approval of purchase price caps in California was the fact that the California ISO's and PX's respective market monitors strongly endorsed that approach.[28] By contrast, as the NYISO's March 27 filing emphasized, the NYISO's independent Market Advisor has determined that the implementation of temporary bid caps is reasonable in this proceeding.[29] The Commission should give as much weight to the NYISO's Market Advisor in this proceeding as it gave to the California market monitors, and should endorse the use of bid caps for the 10-minute reserves markets in the particular circumstances facing the NYISO.

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terms); *Consolidated Edison Co. of New York, Inc., et. al.*, 87 FERC ¶ 62,297 at 62,504 n. 7 ("The mitigation measures cap the price the units may receive in the In-City market and impose bid caps in the energy market during periods when market power might be conferred due to local reliability rules and transmission constraints.")

[27] *See New England Power Pool*, 87 FERC ¶ 61,045 at 61,197 (1999) (accepting NEPOOL Market Rule 17 which allows for the imposition of bid caps); *PJM Interconnection, L.L.C.*, 88 FERC ¶ 61,039 (1999) (accepting PJM's bid cap procedures).

[28] *See AES Redondo Beach*, 85 FERC at 61,460-62.

[29] March 27th filing at 8.

B. The NYISO Was Authorized to Make the March 27, 2000 Filing to Suspend the Market for Market-Based 10-Minute Reserves.

Certain intervenors argue that the NYISO did not have the authority under Section 205 of the Federal Power Act (FPA) or the filed rate doctrine to make the March 27 filing or subsequently to suspend the markets for market-based 10-minute reserves.[30] Certain parties also argue that the NYISO did not comply with the terms of the Independent System Operator, Inc. Agreement (ISO Agreement).[31] As discussed below, the NYISO's filing is consistent with Section 205 and the filed rate doctrine. Moreover, the NYISO's actions were undertaken in accordance with the terms of the ISO Agreement. The intervenors' arguments should therefore be rejected.[32]

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 and the Filed Rate Doctrine.

The Commission has the discretion under Section 205(d) of the FPA to waive the 60-day notice requirement. Section 205(d) 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

[30] *See, e.g.*, Joint Motion to Intervene of Southern Parties at 7; Protest of Orion Power New York GP, Inc., at 4; Protest of PG&E National Energy Group, at 2.

[31] *See e.g.*, Southern Parties at 7; Motion to Intervene of Indeck Energy Services, Inc., at 4-5; Motion of Keyspan-Ravnswood, at 11..

[32] Several parties support the NYISO's actions to suspend the market based market for 10-minute reserves as authorized under either Section 205, the NYISO's Mitigation Measures or the TEPs. Motion to Intervene in Support of LSE Intervenors at 8; Motion to Intervene by Strategic Power Management, Inc., at 5; Motion to Intervene and Comments of Multiple Intervenors, at 6; Motion to Intervene of the Municipal Electric Utilities Association of New York, at 7.

> 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.

18 U.S.C. § 824d(d). 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."[33]

The Commission has granted waiver of the prior notice requirements in a variety of instances. *See e.g., 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).

[33] *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); s*ee 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).

In its March 27 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. To prevent further harm pending the Commission's decision on that request, the NYISO advised Market Participants that it would suspend market-based rate markets for reserves effective April 1, 2000. In its filing, the NYISO presented extraordinary circumstances in support of its request for waiver of the notice provisions.

As the NYISO demonstrated in the March 27 filing, there is substantial evidence of a lack of competitive conditions in the market for 10-minute reserves.[34] 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 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, with the support of the Market Advisor, the endorsement of the Market Performance Committee of the NYISO Board of Directors and the approval of the Board, the NYISO made its filing to suspend the market-based rate markets for 10-minute reserves and require that cost-based bids

[34] March 27 filing at 6-9.

be offered in those markets until they could be demonstrated to be workably competitive. Because of the substantial financial harm being caused by the lack of a workably competitive market, including an increase in monthly operating reserves costs of some $60 million, 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 Monitoring Plan, 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 approving that plan, *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"),[35] 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). Moreover, only a few days after the March 27 filing, the Commission approved the NYISO's proposed Market Mitigation Measures.[36] The conduct observed by the NYISO in the operating reserves markets would have been more than sufficient to trigger the Market Mitigation Measures.

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 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 made its filing before implementing the tariff changes, the NYISO actions are not contrary to Section 205.[37]

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[35] *See also New York Independent System Operator, Inc.*, 90 FERC ¶ 61,317, slip op. at 4 (2000).

[36] *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,317 (1990).

[37] Certain intervenors contend that the NYISO is in violation of Section 205 for imposing cost-based bids beginning on April 1, 2000. In the March 27, 2000 filing, the NYISO stated that it 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. On April 1, 2000, the NYISO began that *pro forma* billing. 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 conducted on the basis of the high prices experienced in the 10-minute reserves markets, the NYISO believes that the equities strongly

(continued . . .)

2. The ISO Acted in Accordance With the ISO Agreement

Certain intervenors argue that the NYISO violated the Independent System Operator Agreement by filing the March 27, 2000 Section 205 tariff change without first obtaining the approval of the NYISO's Management Committee.[38] According to these intervenors, the ISO did not comply with the procedural requirements of the ISO Agreement for making a Section 205 filing without Management Committee approval. They also argue that the "exigent circumstances" provision of the ISO Agreement only allows such a filing under circumstances related to reliability. These arguments have no merit.

The NYISO complied with the procedures of Section 19.01 of the ISO Agreement for making a Section 205 filing without Management Committee concurrence.[39] Section 19.01 of the ISO Agreement states:

> the ISO Board may submit to the Commission a proposed amendment ot the ISO OATT, the ISO Services Tariff or the ISO Agreement under Section 205 of the FPA, without the concurrence of the Management Committee, under the following circumstances: the ISO Board certifies that (1) the proposed amendment is necessary to address exigent circumstances related to the reliability of the NYS Power System or to address exigent circumstances related to an ISO Administered Market; and (2) the urgency of the situation justifies a deviation from the normal ISO governance procedures.

ISO Agreement, Section 19.01. Following an extensive review by the Board's Market Performance Committee of presentations by the NYISO and the NYISO's Market Advisor, the

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favor the proposed *pro forma* billing and collection. *See, e.g.*, Complaint of Niagara Mohawk Power Corp, Docket No. ER00-57-000 at 2.

[38] *See e.g.*, Southern Parties at 8. ; Indeck Energy Services, at 4-5; Keyspan-Ravnswood to Intervene and Protest, at 11; PG&E National Energy Group, at 3.

[39] *See* March 27, 2000 filing at n. 2.

NYISO Board provided certification on March 21, 2000 in a regularly scheduled session of the Board . The NYISO Board found that there were "exigent" circumstances in the context of the 10-minute reserves markets justifying the March 27 tariff filing. The NYISO Board also found that the urgency of the situation justified a deviation from the normal governance procedures for filing tariff amendments.

Southern Parties claims that the "exigent circumstances" clause in Section 19.01—relied on by the NYISO for the authority to make the filing—is limited to circumstances involving system reliability. The Commission recently rejected this same argument. In the January 12, 2000 Order Accepting Proposed Tariff Revisions for Filing, the Commission accepted the NYISO's proposal to permit the NYISO to unilaterally file to revise any ISO Tariff or agreement without concurrence of the Management Committee when necessary to address exigent circumstances related to the NYISO's markets or the transmission grid. *New York Independent System Operator, Inc*., 90 FERC ¶ 61,015, at 61,034 (2000).[40] The Commission found that it was reasonable for an ISO to have the ability to file unilateral amendments "when the ISO believes that immediate action is necessary to protect the integrity of an energy market or the transmission grid." *Id.* On rehearing, the Commission specifically rejected an intervenor's argument that the exigent circumstances should be limited to circumstances related to reliability. *New York Independent System Operator, Inc*., 91 FERC ¶ 61,012, slip op. at 7, 9 (April 4, 2000).

[40] A similar provision was accepted for the PJM ISO. *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997), *on reh'g*, 82 FERC ¶ 61,047 (1998).

Certain parties have argued that the March 27 filing was not valid because the proposed changes to the ISO Services Tariff do not contain an expiration date. This argument should also be rejected. The NYISO stated in its filing that it was proposing to suspend the market until it determined that the market was workably competitive. While the NYISO does not now know how long that will take, it has already begun an evaluation process with its Business Issues Committee and its Operating Committee with the goal of achieving consensus on appropriate action within 60 days. Pursuant to the ISO Agreement, however, the requested relief cannot be longer than 120 days, unless approved by the Management Committee or approved by FERC under Section 206 of the FPA. Thus, whether or not the tariff sheets state a particular time limit, the proposed changes are ultimately limited by the terms of the ISO Agreement, unless a longer time frame is approved by the Commission.

The NYISO thus acted in accordance with the terms of the ISO Agreement in making the March 27 filing.

C. The Commission has the Authority to Order Recalculation of Market-Based Clearing Prices Realized During a Time When the Market was not Workably Competitive

Certain intervenors argue that recalculating prices back to January 29, 2000 constitutes impermissible retroactive ratemaking, in violation of the filed rate doctrine.[41] Certain intervenors also argue that the NYISO's Temporary Emergency Procedures (TEPs) provide no support for recalculating market prices because the TEPs are not designed to correct market

[41] *See e.g.*, Protest of Orion Power New York GP, Inc., at 4; Southern Parties, at 7; Indeck Energy Services, at 22.

power concerns and the NYISO did not provide notice of a possible change in a market price as required in the TEPs.[42] Finally, certain intervenors argue that the NYISO cannot rely on its Market Mitigation Measures for authority to recalculate prices because the Commission specifically rejected retroactive calculation of prices in the recent order on the NYISO's Market Mitigation Measures.[43]

As discussed below, the Commission has the authority to order retroactive relief should that become necessary, whether under the Section 205 authority invoked in the March 27 filing, under the TEPs, under the filed rate doctrine or the NYISO's tariffs. At present, however, it is not necessary to resolve this issue. Instead, the Commission should allow the question of the appropriate redress to be mediated under the procedures of its Dispute Resolution Service. [44]

1. Recalculation of Market-Based Clearing Prices is Not Contrary to the Commission's Policy Against Retroactive Ratemaking or Mitigation

The NYISO's request to recalculate market prices beginning on January 29, 2000 can be approved under the Commission's authority to grant a retroactive effective date for the March 27 filing. Section 205 of the FPA and Section 35.11 of the Commission's Regulations,

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[42] *See e.g.*, Joint Motion for Leave to File Supplemental Protest of Southern Parties at 3; Southern Parties, at 9; Indeck Energy Services Inc., at 10; Motion to Intervene and Protest of Independent Power Producers of New York, Inc., at 7; PG&E National Energy Group, at 9.

[43] Southern Parties, at 9, 12; Indeck Energy Services, at 7; Independent Power Producers of New York, at 6; LIPA, at 43; Motion to Intervene and Protest of AES NY, L.L.C., at 9; Keyspan-Ravenswood 9, 15; NRG Power Marketing, at 15.

[44] *See NYISO's March 27, 2000 Request for Suspension of Market-Based Pricing for 10-Minute Reserves*, at 12-13.

gives the Commission the discretion to order a retroactive effective date. 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 has stated that it would grant waiver of the notice requirement and order a retroactive effective date in instances where the party has presented extraordinary circumstances in support of 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). Given the potentially substantial harm that may have been caused to market participants because of the lack of a workably competitive market for 10-minute reserves, the NYISO believes that it has presented extraordinary circumstances to obtain such relief.

Certain parties interpret the filed rate doctrine as precluding retroactive calculation of market prices in this proceeding. The filed rate doctrine, however, could be interpreted as *requiring* retroactive recalculation in this proceeding to the extent that the New York market for 10-minute reserves did not reflect a proper operation of the market rules, *i.e*., the market-based rate market rules were improper in a market that was not workably competitive. *ISO New England, Inc.*, 90 FERC ¶ 61,141, at 61,425 (2000) (stating that "consistent with the filed rate doctrine, the ISO already has the authority, and is required, to correct all prices that do not reflect operation of the NEPOOL market rules (which are the filed rate)").

Citing the Commission's recent order on the NYISO's revised mitigation measures,[45] certain intervenors claim that the NYISO is attempting to improperly impose mitigation measures on market participants retroactively. In addition, certain parties argue that the ISO's TEPs also do not give support for retroactive calculation of market prices because the NYISO did not comply with the TEP's notice provisions.[46]

In contrast, other parties contend that the TEPs and the Market Mitigation Measures require that the NYISO recalculate market prices.[47] For example, NYSEG contends that the NYISO has the authority under the TEPs to take Extraordinary Corrective Action to issue rebills to reverse erroneously high charges retroactive to the start-up date of the NYISO.[48]

While each has certain limitations, the NYISO believes that the Commission has authority to order recalculation of market prices under both the TEPs and the Market Mitigation Measures.[49] The Commission, however, does not have to resolve this issue now. The NYISO believes that the most efficient and expedient way to resolve the question of billing adjustments is through the Commission's dispute resolution process.

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[45] *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,317 (2000), slip op. at 7.

[46] Motione to Intervene and Protest of Independent Power Producers of New York, Inc., at 8-9; KeySpan-Ravenswood at 7.

[47] Motion to Intervene in Support of LSE Intervenors at 8; Motion to Intervene by Strategic Power Management, Inc., at 5; Motion to Intervene and Comments of Multiple Intervenors, at 6; Motion to Intervene of the Municipal Electric Utilities Association of New York, at 7..

[48] NYSEG Complaint, Docket No. EL00-63-000, at 10-11.

[49] S*ee also* Section 7.2.A of the Open Access Transmission Tariff and Section 7.4 of the Market Administration and Control Area Services Tariff; NYSEG Complaint at 3, n. 3.

2. The Commission Has Broad Authority Under Section 205 to Ensure a Just and Reasonable Resolution for All Market Participants

The Commission has authority to grant relief in this proceeding without approving the NYISO's filing with a retroactive effective date.[50] For example, the Commission has the authority to require refunds in connection with transactions that violate the Commission's regulations. *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); *Iowa Southern Utilities Co.*, 58 FERC ¶ 61,317, at 62,013 (1992) (ordering a refund of an unduly discriminatory difference in rates offered to unaffiliated customer over rate offered to affiliated customer); *Transcontinental Gas Pipe Line Corp*., 52 FERC ¶ 61,248, at 61,855-56 (1990) (upholding ALJ decision requiring pipeline to refund profits realized on transportation of gas that was sold under conditions that were unduly discriminatory and denying recovery of $75 million in related deferred gas costs), *modified* 58 FERC ¶ 61,023 (1992) (instead requiring refund of only amounts related to off-system sales, in addition to denying recovery of $75 million in deferred gas costs).[51]

[50] "The Commission has broad authority to fashion remedies so as to do equity consistent with the public interest." *Columbia Gas Transmission Corp*., 750 F.2d 105, 109 (D.C. Cir. 1984).

[51] In *Transcontinental Gas Pipe Line Corp*., while the Commission later withdrew its requirement that certain profits be refunded, the Commission nevertheless required that Transcontinental refund amounts related to off-system sales. In any event, the point of the case citation is to show that the Commission has the authority to order such refunds. *Order on reh'g, Transcontinental Gas Pipe Line Corp*., (59 FERC ¶ 61,289, at 61,927 (stating that it has "exercised its broad authority to fashion an equitable remedy according to the circumstances of the case."), *aff'd*, 998 F.2d 1313 (5th Cir. 1993).

In addition, the Commission has required recalculation of energy prices charged by QFs that have been found to be in noncompliance with the Commission's QF regulations. In *LG&E-Westmoreland Southampton*, 76 FERC ¶ 61,116 (1996), *modified*, 83 FERC ¶ 61,182 (1998), the Commission found that the Southampton project failed to meet the Commission's QF requirements during a certain time period in which it sold power to Virginia Power at QF rates. During the period of noncompliance, the Commission found that Southampton was not entitled to receive its QF rates. *Id.* at 61,605. Instead, the Commission ordered that the rate paid to Southamption be recalculated to equal the amount which Virginia Power would have paid in the energy market at the time of the noncompliance had it not purchased the power from Southamption. *Id.* The just and reasonable rate, according to the Commission, for that time period "should be no higher than the price the buyer would have paid for the energy had it not been required to purchase from the QF …." *Id.* at 61,604.[52]

In the QF cases, the Commission ordered that rates for purchases from QFs be changed for the time period in which the precondition for charging QF rates—compliance with the QF requirements—was not present. Here, the NYISO is in a somewhat analogous position in seeking to put in place cost based rates for a time period when the market was not workably competitive. Because the precondition for a market-based rate market for operating reserves—a workably competitive market—did not exist, the prices for operating reserves should likewise be changed to reflect the prices market participants would have paid had cost-based rates been in effect.

[52] *See also Medina Power Company*, 71 FERC ¶ 61,264, *reh'g denied*, 72 FERC

(continued . . .)

Thus, as discussed above, the Commission has authority under the Federal Power Act to order relief to market participants in these proceedings in several ways. The Commission, however, does not need to resolve this issue at this time. Instead, the NYISO believes that the most efficient and expedient way to resolve these issues is through the Commission's dispute resolution process.

D. LIPA Mischaracterizes the Commission's Recent *MAPP* Decision

LIPA incorrectly cites the Commission's recent *Mid-Continent Area Power Pool* (*MAPP)*[53] decision for the proposition that LIPA may not be ordered to pay refunds, despite the fact that it is a party to the NYISO's organizational agreements and has signed service agreements under the NYISO's tariffs, because it is a non-jurisdictional entity.[54] In *MAPP*, the Commission ordered MAPP, a non-jurisdictional entity,[55] to pay full refunds to its customers, despite the fact that the Nebraska Public Power District (NPPD), a non-jurisdictional MAPP member, had refused to pay its share of the amounts to be refunded. The Commission explained that it had authority to order MAPP to pay refunds because some of its members were jurisdictional and because its tariffs and agreements were on file and subject to

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¶ 61,224, at 62,038-39 (1995).

[53] *Mid-Continent Area Power Pool*, 90 FERC ¶ 61,280 (2000), *reh'g pending*.

[54] LIPA, at 48-49.

[55] LIPA erroneously asserts that "MAPP is a public utility under Part II of the FPA . . . ." LIPA at 48. In reality, MAPP is a "voluntary association of jurisdictional and non-jurisdictional entities," that neither owns nor operates interstate transmission facilities and thus is not directly subject to the Commission's jurisdiction.

FERC's jurisdiction.[56] Moreover, contrary to LIPA's assertions, the Commission did not decide whether NPPD could be required to pay refunds under the terms of MAPP's jurisdictional agreements, either for violating their express terms or for acting in a manner inconsistent with Commission policy.[57]

In any event, LIPA's argument is premature because the NYISO has not asked that the Commission direct it to pay refunds. Instead, the NYISO has simply asked the Commission to convene a multilateral settlement process, in which LIPA has indicated it is willing to participate.[58] It is the NYISO's hope that this process will lead to a consensual resolution of the various issues that have arisen in the NYISO's 10-minute reserve markets.

E. The Commission Should Encourage Parties to Resolve the Issues in this Proceeding Through the ADR Process

The NYISO believes that a proceeding under the auspices of the Commission's Dispute Resolution Service is the most efficient and expedient way to resolve the issues raised in the NYISO's March 27 filing. The Commission should encourage all interested parties to participate in that process. Most of the intervenors in these proceedings support this approach

[56] 90 FERC ¶ 61,280, *slip op.* at 5.

[57] *See, Mid-Continent Area Power Pool*, 89 FERC ¶ 61,135 at 61,386-87 (1999) ("[W]e need not and do not address whether nonpublic utility members of MAPP are nevertheless bound to take or refrain from taking any actions, including providing refunds, under the terms of any agreement."); 90 FERC ¶ 61,280, *slip op.* at 2 (reaffirming that the Commission had chosen not to address the question of whether NPPD could be forced to pay refunds under its Commission-jurisdictional contracts.)

[58] LIPA, at 51.

(in the event their requested relief is not granted).[59] Moreover, only two parties have indicated that they believe that ADR would not be useful.[60] The market design flaw issues raised by parties such as NYSEG, Rochester Gas and Electric Corporation and LIPA should be resolved through the NYISO's governance procedures.

LIPA objects to participation in a settlement process under the Commission's ADR procedures, supervised by this Commission and the New York Public Service Commission, on the grounds that LIPA is not jurisdictional to the Commission. This objection should not prevent the establishment of the ADR process. LIPA is a public authority of the State of New York, with an obligation to act in the public interest. If LIPA has received money that it should not have received, and if that the money came wrongfully from ratepayers elsewhere in the State of New York as a result of charges made by public utility companies located throughout the State in order to pay the money to LIPA, it is unthinkable that LIPA would insist on keeping the money rather than joining a process to make all parties whole. LIPA was formed to deal with certain problems on Long Island, with the understanding that it would not do so at the expense of the rest of the State. The public interest requires the convening of the ADR process, and the same public interest should persuade LIPA to participate.

[59] *See, e.g.*, LIPA, at 51;

[60] Motion to Intervene and Protest of Central Hudson Gas & Electric Corp., at 14. PG&E National Energy Group, at 11.

CONCLUSION

For the foregoing reasons, the NYISO respectfully requests that the Commission order the relief requested in the NYISO's March 27, 2000 filing and refer the question of the appropriate billing adjustments to the Commission's Dispute Resolution Service.

Respectfully submitted,

Dated: April 27, 2000

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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 Docket Nos. ER00-1969-000, EL00-57-000, EL00-60-000, EL00-63-000, EL00-64-000 and EL00-67-000.

Dated at Washington, D.C. this 27th day of April 2000.

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