

98 FERC ¶ 61, 268
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

New York Independent System Operator, Inc. Docket Nos. ER01-1520-000 and
ER01-1740-000

ORDER ON REQUESTS FOR CLARIFICATION

(Issued March 13, 2002)

In this order, we grant two clarifications requested by the New York Independent System Operator, Inc. (NYISO) and by New York State Electric & Gas Corporation (NYSEG) of orders concerning demand response programs issued May 16, 2001,¹ and April 27, 2001.² Specifically, NYISO seeks clarification that entities which reduce their demand in exchange for payments pursuant to NYISO's Day-Ahead Demand Reduction Program (DADRP)³ or its Emergency Demand Response Program (EDRP), as well as "Special Case Resources"⁴ that reduce demand, or produce electricity, in response to NYISO instructions, will receive the same blanket authorizations and regulatory waivers that the Commission has granted to similarly situated entities in the United States portion of the Western Systems Coordinating Council (WSCC). NYSEG requests the Commission to clarify that sales of power deemed to be made by a load serving entity (LSE) to its customers that participate in NYISO's demand response programs are not subject to the Commission's jurisdiction. The Commission's action will benefit customers by facilitating much-needed demand response programs.

¹95 FERC ¶ 61,223 (2001).

²95 FERC ¶ 61,136 (2001).

³The DADRP is formally referred to as the Incentivized Day-Ahead Economic Load Curtailment Program.

⁴"Special Case Resources" are a category of Installed Capacity Suppliers that include distributed generators rated 100 kW or higher and load capable of being interrupted upon demand.

Background

In its March 14, 2001 Order Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States (Western Order)⁵ in Docket No. EL01-47-000, and in subsequent orders in that proceeding,⁶ the Commission adopted a number of measures intended to boost energy supplies in the WSCC. Among other things, it permitted on-site generators, used primarily for self- and back-up generation, to make wholesale sales at market-based rates without complying with the commission's normal prior notice requirements and granted them the blanket authorizations and regulatory waivers that are customarily extended to entities with market-based rate authority. The Commission afforded the same authorizations and waivers to retail customers as permitted by state laws and regulations, and to wholesale customers that reduce consumption for the purpose of reselling their load reduction at wholesale.

The Western Order also required wholesale purchasers of power from on-site generators operating under blanket authorizations and waivers to report to the Commission the name of each seller from whom power was purchased, the aggregate amount of capacity and/or energy purchased from each seller, and the aggregate compensation paid to each seller. In order to minimize reporting burdens, the Commission allowed purchasers to file one report for all such purchases and allowed any purchaser that otherwise files quarterly transaction summaries to include this information as a separate section in its transaction summary for the first quarter of 2002. Comparable reporting requirements were imposed with respect to megawatt sales transactions.

The April 27 Order in Docket No. ER01-1520 stated that the EDRP was consistent with the goals set forth in the Western Order, but did not make any reference to the blanket authorizations and waivers that the Western Order granted.⁷

⁵94 FERC ¶ 61,272 (2001).

⁶95 FERC ¶ 61,225 (2001), 96 FERC ¶ 61,088 (2001), and 96 FERC ¶ 61,155 (2001).

⁷Among other things, the Western Order and its successors:

- (1) Waived prior notice requirements and granted authorization of market-based rates for wholesale power sales from generation used primarily for back-up and self generation;
 - (2) Authorized wholesale customers and retail customers (where permitted under state
- (continued...)

NYISO's Motion

NYISO asserts that certain NYISO market participants are concerned that the Commission has not expressly granted WSCC-style authorizations and waivers to them. They are concerned that without these express authorizations and waivers, entities that have not obtained permission to engage in megawatt sales at market-based rates on an individual basis may be subject to punitive Commission action if they were later found to have participated in the EDRP or DADRP in violation of the Federal Power Act's prior notice requirements. The same is potentially true with respect to Special Case Resources that reduce demand, or generate electricity, in response to NYISO instructions without first obtaining an individual market-based rate authorization.

NYISO requests that the WSCC-style authorizations and waivers remain in effect for NYISO market participants for the duration of the EDRP and DADRP, which are currently scheduled to expire on October 31, 2002 and October 31, 2003, respectively. NYISO asserts that Special Case Resources should be afforded the relevant authorizations and waivers for so long as they are treated as a distinct kind of ICAP supplier that is subject to special rules. In addition, NYISO maintains that EDRP/DADRP participants (or NYISO filings on their behalf) should be subject to the same reporting requirements as are WSCC participants.

For the reasons described by NYISO, the Commission grants the authorizations and waivers requested by NYISO to the extent necessary to implement its demand response programs and Special Case Resources program, to remain in effect for the duration of the relevant demand response programs. The Commission believes that NYISO's proposal is a reasonable means to facilitate these much needed programs since it reduces regulatory uncertainty and the regulatory burden for participants in these programs.

⁷(...continued)

rules) who reduce consumption to resell their load reduction at wholesale at market-based rates;

- (3) Waived the prior notice requirements for wholesale contract modifications to facilitate demand-side management; and
- (4) Where there were cost-based wholesale rates in effect subject to a formula, permitted demand-side management costs to be treated consistently with other types of incremental and out-of-pocket costs.

NYSEG's Motion

As mentioned above, NYSEG requests the Commission to clarify that sales of power deemed to be made by a load serving entity (LSE) to its customers that participate in NYISO's demand response programs are not Commission-jurisdictional sales for resale, but rather are State-jurisdictional retail sales. NYSEG asserts that, given its analysis in the Western Order, the Commission may deem a load reduction arrangement to involve two separate and independent transactions: the first being a "sale for resale" of power by the LSE to a retail customer that is participating in the programs (by generating electricity or reducing its electric consumption) (the "Retail Sale"), and the second involving the participating retail customer's sale of power back to NYISO and the LSE, which was also viewed by the Commission as a sale for resale (the Program Sale). NYSEG requests the Commission to clarify that in these circumstances, the "Retail Sale" portion of the transactions is not subject to the Commission's jurisdiction.

NYSEG asserts that in the absence of its requested clarification, the LSE providing service to the customer is at risk for a potential refund obligation since the LSE may not know whether the customer it is serving is participating in a load reduction program. This is because in New York, the LSE that supplies the customer's retail energy needs may not be the same market participant that coordinates the retail customer's megawatt sales. NYSEG maintains that an LSE that has no notice of the retail customer's subsequent Commission-jurisdictional sale could (e.g., in the event of the bankruptcy of certain market participants) be subject to potential refund exposure if the LSE had failed to have on file a rate schedule with the Commission.

The Commission grants NYSEG's requested clarification as it applies to NYSEG's retail customers because this will reduce regulatory uncertainty for participants in these programs.. The Commission did not intend otherwise in the Western Order and successor orders.

The Commission orders:

The clarifications requested by NYISO and NYSEG are granted as discussed in the body of the order.

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By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.