UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

KeySpan-Ravenswood, LLC, Complainant,	)	**Docket Nos. EL05-17-___**
v.	)	
New York Independent System Operator, Inc. Respondent.	)	

ANSWER OF
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.
TO MOTION OF DYNEGY POWER MARKETING, INC.
AND DYNEGY NORTHEAST GENERATION, INC.
FOR ORDER ON REMAND AND REQUEST FOR REFUNDS

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, the New York Independent System Operator, Inc. ("NYISO") hereby respectfully submits this Answer to the Motion of Dynegy Power Marketing, Inc. and Dynegy Northeast Generation, Inc. (collectively, "Dynegy") for Order on Remand and Request for Refunds ("Dynegy Motion") in the above dockets. In light of its failure to follow the NYISO governance procedures, its failure to show supportable and equitable reasons for granting a refund, its failure to justify restating ICAP market results, the burden a refund would place on other Market Participants, and Dynegy's unexcused delay in presenting its alleged, specific harm, the NYISO respectfully requests that the Commission exercise its discretion to deny the Dynegy Motion.

I. Introduction and Background

On January 12, 2007, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") issued its opinion[1] on a petition for review of the Commission's orders

[1] *KeySpan-Ravenswood, LLC v. FERC*, 474 F.3d 804 (2007) ("January 12 Opinion").

in the above dockets.[2] Those orders arose from a complaint filed by KeySpan-Ravenswood, LLC ("Ravenswood"), which related to the ICAP markets in New York City. The orders approved the NYISO's application of methodologies for translating installed capacity ("ICAP") into the newly-approved unforced capacity ("UCAP") standard for quantifying Installed Capacity. UCAP was used for the first time for the 2001-2002 Winter Capability Period (November 2001 through April 2002). The Commission's orders had approved the translation method, and rejected Ravenswood's request for a refund.[3] The January 12 Opinion by the D.C. Circuit vacated the orders and remanded the matter for further proceedings consistent with the Court's decision, and in particular for further consideration of whether any refund to Ravenswood would be appropriate. The D.C. Circuit's mandate issued on March 9, 2007. Ravenswood reached a settlement with certain Market Participants that were purchasers of UCAP in New York City, which was filed with the Commission on October 30, 2007. Dynegy was not a party to that settlement because its generation is located outside New York City, and it had not come forward at any point in these lengthy proceedings with a showing of harm to it as an upstate supplier of capacity.

[2] *KeySpan-Ravenswood, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,116 (2005) ("Initial Order"); *KeySpan-Ravenswood, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 111 FERC ¶ 61,336 (2005) ("Rehearing Order").

[3] Unless otherwise specified, capitalized terms used herein have the meanings specified in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff").

II. Answer

A. A Refund to Dynegy would not Further the Purpose of the Filed Rate Doctrine

Granting a refund would not further the essential purpose of the filed rate doctrine. That purpose is to provide Market Participants with notice of a proposed rate.[4] As shown further below, the record in this proceeding shows that Dynegy, along with all other NYISO Market Participants, had some eight months advance notice of the methodologies to be used to translate ICAP to UCAP for the 2002 Summer Capability Period, through the NYISO's Commission-approved stakeholder process. Moreover, the Market Participants were not just on notice of the translation methodologies, but were active participants in their adoption. The stakeholder process also afforded an opportunity for Dynegy (and any other Market Participant) to object to the chosen methodologies. Dynegy's decision not to exhaust the remedies available to it under the ISO Agreement shows that Dynegy accepted not only the notice provided by those deliberations, but also the UCAP translation methodologies ultimately adopted. Granting Dynegy a refund based on methodologies that were not in effect at the time would undermine the Commission-approved stakeholder process, which was a key part of the filed rate, and would not serve the purpose of the filed rate doctrine.

[4] *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 165 n.10 (D.C. Cir. 1993) (stating that "'actual notice'" is the "'essential requirement of the filed rate doctrine'") (citation omitted); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 817 (D.C. Cir. 1998) (finding that the Commission abused its discretion in granting refunds when Koch's actions, "even if technically violative of [the filed rate], did not truly implicate the [filed rate] doctrine's concerns"); *W. Res., Inc. v. FERC*, 72 F.3d 147, 150 (D.C. Cir. 1995) (stating that the filed rate doctrine "requires that customers receive adequate notice of a rate in advance of the service to which it relates . . .") (citations omitted).

B. The Sequence of Events Leading to the 2002 Summer Capability Period Shows that Dynegy Had Notice of the Translation Formulas Applicable to Generators and LSEs

In the spring of 2000, the Market Participants and NYISO embarked on a stakeholder process that would span 16 months and include 18 ICAP Working Group meetings.[5] All sectors of the industry were represented and worked collaboratively to develop and approve the use of UCAP as the standard for quantifying capacity.[6] On July 6, 2001, the NYISO submitted tariff provisions to implement a market design based on the UCAP methodology to the Commission.[7]

The stakeholders adopted the formulas needed to effectuate this methodology about two weeks later, at the NYISO's July 19, 2001 BIC meeting.[8] These formulas were adopted in accordance with the stakeholder process described in NYISO's July Filing and prescribed by the ISO Agreement, which is on file with the Commission.[9] All sectors of the NYISO membership participated and provided input on the content of these formulas.

At the time of the vote, NYISO was in the process of accumulating data to calculate LSE and generator UCAP values on the basis of outage experience that would be current as of the

[5] *KeySpan-Ravenswood, LLC v. N.Y. Indep. Sys. Operator, Inc*., Docket No. EL05-17-000, Answer of New York Independent System Operator, Inc. to Complaint of Key-Span-Ravenswood, LLC, Attachment 1, Affidavit of John W. Charlton ¶ 6 ("Charlton Aff.") (Nov. 22, 2004).

[6] *See* Charlton Aff. ¶ 6.

[7] *See N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER01-2536-000, Request to Implement a Stage II ICAP Market with an Unforced Capacity Methodology and One-Month Obligation Procurement Period (July 6, 2001) ("NYISO July Filing").

[8] Charlton Aff. ¶ 6.

[9] ISO Agreement was accepted by the Commission in *Cent. Hudson Gas & Elec. Corp.*, 88 FERC ¶ 61,229 (1999).

auctions for the Summer Capability Period starting on May 1, 2002.[10] The outage rates and corresponding UCAP translations were made publicly available in April 2002, in connection with the auctions for the Summer Capability Period.[11] The auctions for the 2002 Summer Capability Period were necessarily based on this data, since it was the only data available, and at the time of the auctions, the NYISO was obligated to follow the procedures developed through the stakeholder process.[12]

Dynegy does not and cannot claim that it was deprived of notice that these methodologies would be used during the 2002 Summer Capability Period, or that anyone was then aware of any discrepancies in required ICAP purchases resulting from the formulas, or that Dynegy or anyone else urged the use of different formulas at the time. Further, Dynegy does not and cannot claim that Market Participants acted unreasonably in relying on the translation methodologies adopted through the stakeholder process in order to make economic decisions in the auctions. Dynegy's request for a refund is directly analogous to an attack on a formula rate not on the basis of the formula, but on the basis of an after-the-fact analysis of the results of the formula.[13] Dynegy has not shown that it lacked notice or objected to the translation methodologies in the stakeholder process.

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[10] *See KeySpan-Ravenswood, LLC v. N.Y. Indep. Sys. Operator, Inc.*, Docket No. EL05-17-000, Answer of the New York Independent System Operator, Inc. to Complaint of KeySpan-Ravenswood, LLC, ("NYISO Answer"), at 17 (Nov. 22, 2004).

[11] *See* Charlton Aff. ¶ 10.

[12] *See* NYISO Answer, Ex. 1, ISO Agreement § 9.01 ("Procedures adopted by the Business Issues Committee will be implemented by the staff of the ISO unless suspended or overruled by the Management Committee or ISO Board.").

[13] *Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 n.3 and 257 (D.C. Cir. 2001).

C. The Stakeholder Process Also Provided Dynegy with the Right and Opportunity to Object to the Reasonableness of the Translation Methodologies

The UCAP methodologies approved for the 2002 Summer Capability Period became final and binding on the NYISO as a result of an uncontested BIC vote.[14] An integral part of the stakeholder process is the opportunity to appeal decisions made by NYISO's BIC to the Management Committee, and to appeal Management Committee decisions to the Board. Under section 7.13 of the ISO Agreement, Dynegy had the right to appeal the BIC vote adopting the translation methodologies: "Any party may appeal an action of such a committee or subcommittee to the Management Committee . . . ."[15] If Dynegy had appealed to the Management Committee, but was again dissatisfied with the result, it would have had the right to appeal the Management Committee's decision under §5.07: "The Board shall review and determine appeals from actions of the Management Committee."[16] Dynegy did neither.[17] Evidently, Dynegy had no objections to letting the auctions proceed on the basis of the UCAP translation methodologies approved by a consensus of the NYISO stakeholders. Dynegy's failure to exhaust the remedies available to it for opposing decisions made in the stakeholder process should not be rewarded by a refund.[18]

[14] NYISO Answer, Ex. 1, ISO Agreement § 9.01 ("Procedures adopted by the [BIC] will be implemented by the staff of the ISO unless suspended or overruled by the Management Committee or ISO Board.").

[15] NYISO Answer at 13.

[16] NYISO Answer at 13, Exhibit 1, ISO Agreement § 5.07.

[17] *See Niagara Mohawk Power Corp. v. NYSRC*, 114 FERC ¶ 61,098 (2006) (dismissing complaint when petitioner did not exhaust its remedies in the NYISO's stakeholder process).

[18] *See* NYISO Answer at 20 n.49 (citing *Towns of Concord v. FERC*, 955 F.2d 67, 72, 75 (D.C. Cir. 1992) "(upholding FERC's decision to decline to order a refund, finding that, with regard to refunds, the Federal Power Act confers remedial discretion to FERC, and noting that

D. The NYISO and Market Participants' Decision to Adopt the Translation Methodologies Applicable to the 2002 Summer Capability Period was Reasonable

The tariff requires that the ICAP requirement for LSEs be derived from the IRM (the margin of ICAP above forecast peak load) set by the NYSRC.[19] A consensus of NYISO stakeholders adopted the ten-year outage assessment period for the LSE translation because the IRM was predicated on an outage rate determined over a ten-year period,[20] and because a shorter-time period was thought to be less reliable given the on-going transition from regulated to divested generation.[21] The assessment period applicable to LSEs was therefore determined by backing out of the NYSRC's IRM the outage rate that had been used to develop the IRM by the NYSRC in the first place.[22]

Contemporaneously, the Commission's acceptance of NYISO's July Filing approved the stakeholders' previous decision, in endorsing that filing, to adopt the rolling twelve-month outage period for generators. The stakeholders and the Commission agreed that the twelve-

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FERC's remedy must be based on the facts of the case and premised on 'the precise purpose of the filed rate doctrine')" and citing *City of Lebanon v. Cincinnati Gas & Elec. Co.*, 64 FERC ¶ 61,341 at 63,445 (1993) "(stating, as dictum, that a 'customer must be reasonably diligent in protecting its rights')").

[19] *See* NYISO July Filing, Att. I, Services Tariff § 5.10, Original Sheet No. 120A - Second Revised Sheet No. 121 (effective Sept. 4, 2001).

[20] NYISO Answer at 9.

[21] Charlton Aff. ¶ 13.

[22] NYISO Answer at 6.

month period would encourage generators to improve reliability by recognizing improvements in outage performance more quickly.[23]

In adopting these methodologies, the stakeholders also considered the precedents in neighboring PJM, which used different time periods for generators and LSEs without adverse consequences.[24] In fact, NYISO and the Commission staff discussed the PJM model and concluded that it would be effective in the NYISO market.[25] The ICAP Working Group (now the Installed Capacity Subcommittee) of the NYSRC also reviewed and approved the NYISO's proposed methodology.[26] The consensus adoption of the formulas shows that the decision was reasonable, and that it would be unreasonable to grant Dynegy an after-the-fact refund on the facts of this case.[27]

E. The Costs of a Refund Would be Borne by Other Market Participants

The NYISO is only the administrator of the ICAP markets; any refund would have to be passed on to the Market Participants, presumably in particular the LSEs that assertedly should have purchased additional capacity from Dynegy. Dynegy fails to justify requiring LSEs to make a payment to Dynegy for capacity they may not have received and cannot now use. Capacity purchased today cannot be used for 2002, since 2002 is of course long over.

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[23] NYISO July Filing at 5 and Att. I, Services Tariff § 5.12.6(a), First Revised Sheet No. 135B - Original Sheet No. 135B.01 (effective Sept. 4, 2001); *see also N.Y. Indep. Sys. Operator, Inc.*, 98 FERC ¶ 61,180 (2002).

[24] NYISO Answer at 8-9.

[25] *See* Charlton Aff. ¶ 14.

[26] *See id.*

[27] *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,212 (2007) (denying refunds where the parties acted reasonably despite a tariff violation).

Alternatively, neither Dynegy nor Dr. Lesser show that Dynegy in fact provided capacity for which it was not paid. Under the Services Tariff, ICAP suppliers are required to offer energy from the ICAP supplier into the Day-Ahead Market ("DAM"), as well as meet a variety of other requirements.[28] Neither Dynegy nor Dr. Lesser make any showing that Dynegy in fact offered into the DAM any of the 463 MW for which it now claims additional compensation, and thus acted as an ICAP supplier for the additional 463 MW. The result of Dynegy's refund claim would in effect be to force LSEs to buy a product now that they cannot use (ICAP for a summer six years ago), and that Dynegy has not shown they received at the time.

As the Commission found in its prior order in this matter, in a finding that was not overturned by the Court, there were no reliability problems in the 2002 Summer Capability Period.[29] Dynegy makes no showing that it contributed to this outcome in a manner that was not adequately compensated by the capacity, energy and ancillary services markets as they operated in the summer of 2002.

F. Dynegy's Claims Rest on Unsupported Assumptions

Dynegy's refund claim is premised on Dr. Lesser's hypothetical calculation of what the outcome of the 2002 Summer Capability Period strip auction would have been if the auction had been conducted under different market conditions. Dynegy itself, however, has recently opposed refunds for alleged market overcharges by In-City ICAP suppliers on the basis of the inherent

[28] NYISO Answer, Ex. 4, Services Tariff § 5.12.1, Second Revised Sheet No. 128 - Second Revised Sheet No. 131 (effective Sept. 4, 2001); and see now Services Tariff § 5.12.1, Sixth Revised Sheet No. 128 - Original Sheet No. 131A (effective July 1, 2006, Feb. 1, 2005, July 1, 2006, Feb. 1, 2005, Sept. 4, 2001, Feb. 1, 2009, and March 27, 2008, respectively).

[29] Rehearing Order at P 27; *see also* January 12 Opinion at 812-13.

difficulty of trying to determine what the outcome of a prior capacity auction would have been under different facts and circumstances:

> [I]t will be impossible to determine the appropriate refund [for asserted overcharges by In-City ICAP suppliers] since such an effort would entail determining what the in-City ICAP market should have cleared at absent the alleged improper bidding behavior. Even if such an exercise could be undertaken, there will be cases where market participants will not be able to resettle transactions with counter-parties. As a result, awarding refunds will unfairly harm market participants that did not engage in the bidding behavior complained of.[30]

In addition, Dynegy, through its expert, Dr. Jonathan A. Lesser, makes a series of assumptions about Dynegy's ability to sell 81 MW of capacity at a higher price and to sell an additional 463 MW of capacity during the 2002 Summer Capability Period at that price. Neither Dr. Lesser nor Dynegy make any effort to assess whether, and to what extent, the relevant LSEs would have been able to procure the additional ICAP needed to meet the New York State Reliability Council's ("NYSRC") reliability requirement from existing self-supply or bilateral contracts. Dr. Lesser offers no support for his assertion that the LSEs had no option other than to acquire additional UCAP in the Strip Auction.

Instead, Dr. Lesser assumes that, in the face of increased UCAP requirements, LSEs would have used the NYISO's strip auctions to buy capacity because they would not have had time to respond to these increased requirements by "suddenly entering into new bilateral agreements . . . ."[31] This assumption completely disregards the fact that, if the error in the translation methodology had been apparent earlier, any different translation methodology would

[30] *N.Y. Indep. Sys. Operator, Inc.*, Docket No. EL07-39-000, Reply Comments of Dynegy Northeast Generation, Inc. and Coral Power, L.L.C., at 4 (Dec. 12, 2007).

[31] Dynegy Motion, Att. A, Affidavit of Jonathan A. Lesser, Ph. D., at 19 ("Lesser Aff.").

have been adopted in the stakeholder process in the fall of 2001, months before the spring auctions for the 2002 Summer Capability Period, and LSEs would have had ample time to self-supply or enter into bilateral contracts. Likewise, Dr. Lesser fails to account for any rest-of-state LSEs which were bidding to sell capacity rather than offering to buy it. Dr. Lesser further claims that 80% of Dynegy's additional UCAP would have cleared the NYISO's strip auction, but he makes no effort to determine whether or not that percentage mirrors percentages used in subsequent Capability Periods, when the assertedly correct translation method was in place.

Finally, Dr. Lesser's calculation only shows the gross results that assertedly would have resulted if Dynegy had sold the 81 MW it did sell plus an additional 463 MW at a new, higher market clearing price.[32] Dr. Lesser does not address whether Dynegy would have incurred any incremental costs in selling additional ICAP. Thus, Dr. Lesser's analysis is deficient as a showing of the refund that would be necessary to put Dynegy in the position it would have been in if a different translation method had been used, assuming a refund were otherwise appropriate.

G. Dynegy's Motion Should be Denied Because It Is Barred by the Doctrine of Laches

Commission precedent dictates that a claim is barred "if the person bringing the claim has delayed for such a time that permitting it to prosecute the claim would be inequitable."[33] Dynegy admits that it has been waiting to participate actively in this case.[34] Dynegy decided not

[32] *See, e.g.*, Lesser Aff. at 17, 18.

[33] *Grynberg v. Rocky Mtn. Natural Gas Co.*, 90 FERC ¶ 61,247 at 61,826 (2000); *see also ARCO Prods. Co. v. SFPP, L.P.*, 93 FERC ¶ 63,020 at 65,076 (2000).

[34] Dynegy Motion at 6-7.

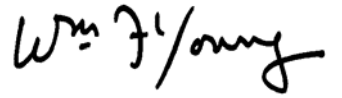
to present evidence of its alleged "specific harm" earlier, choosing instead to wait and see if the Commission would grant Ravenswood's complaint four years ago, and whether the Commission would grant Dynegy a forum on remand. Dynegy took no action after the D.C. Circuit's remand, and continued to wait approximately six more months after the settlement was filed with the Commission to present its alleged "specific harm." The doctrine of laches should therefore be applied to bar Dynegy's Motion.[35]

III. Conclusion

WHEREFORE, for the above stated reasons, the NYISO respectfully requests that the Commission exercise its discretion not to grant any refund to Dynegy resulting from the UCAP methodologies applied during the 2002 Summer Capability Period.

[35] *See* NYISO Answer at 20 n.49 (citing *City of Lebanon v. Cincinnati Gas & Elec. Co.*, 64 FERC ¶ 61,341 at 63,445 (1993) (stating, as dictum, that "a customer must be reasonably diligent in protecting its rights")).

Respectfully submitted,
NEW YORK INDEPENDENT SYSTEM
OPERATOR, INC.

By: 

Counsel

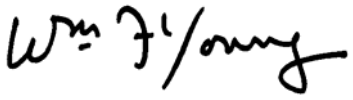
William F. Young
Susan E. Dove
Hunton & Williams LLP
1900 K St., N.W.
Washington, D.C. 20006-1109
202-955-1500
wyoung@hunton.com
sdove@hunton.com

April 29, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2007).

Dated at Washington, DC this 29th day of April, 2008.

By: 

Hunton & Williams LLP
1900 K St., N.W.
Washington, D.C. 20006-1109