

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

New York Independent System Operator, Inc.)
)
) **Docket Nos. ER06-185-002, et al.**

**REQUEST FOR CLARIFICATION OR REHEARING
AND REQUEST FOR EXPEDITED ACTION OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rule 713 of the Commission’s Rules of Practice and Procedure,¹ the New York Independent System Operator, Inc. (“NYISO”) respectfully requests clarification or rehearing of certain aspects of the Commission’s November 3, 2006, order in this Docket (“November 3 Order”).² The NYISO supports most aspects of the November 3 Order, but asks the Commission to address a limited number of issues.³

The NYISO requests that the Commission clarify that following April 7, 2006, the NYISO can continue to correct Bid Production Cost guarantee (“BPCG”) payments in Customer bills so that real-time guarantee payment (“RTGP”) mitigation conforms to the requirements of the Services Tariff without additional authorization from the Commission, subject to the reporting requirement previously imposed by the Commission,⁴ and subject to seeking a waiver for any departure from the tariff’s requirements.⁵

¹ 18 C.F.R. § 385.713 (2006).

² *New York Independent System Operator, Inc.*, 117 FERC ¶ 61,164 (2006).

³ Unless otherwise specified, capitalized terms have the meanings specified in the NYISO’s Market Administration and Control Areas Services Tariff (“Services Tariff”).

⁴ *New York Independent System Operator, Inc.*, 115 FERC ¶ 61,026 (2006) (“April 7 Order”), Ordering Paragraph B.

⁵ November 3 Order at PP 9-10 and n.4.

The NYISO further requests that the Commission clarify its statement in the November 3 Order that the NYISO must “complete” by January 1, 2007, the corrections to BPCG payments for the period from February 2005 to April 7, 2006 (the “Relevant Period”).⁶ It is not clear to the NYISO what the term “complete” is intended to require. The NYISO believes the term is intended to refer to the obligation of the NYISO to post for review by each affected Market Participant and report to the Commission the initial results of its calculation of RTGP mitigation. However, read expansively, the requirement to “complete” corrections to BPCGs for the Relevant Period could be interpreted as requiring the NYISO to take any and all actions necessary to finalize the mitigation by January 1, 2007. That interpretation would require the NYISO to complete the process of consulting with potentially mitigated generators, and to complete the process for closing out final bills for all Market Participants for all of the affected months by January 1, 2007.⁷

A January 1, 2007, deadline for Close-Out Settlements for the affected months would be inconsistent with the timeline established in the NYISO’s tariffs for it to make any necessary corrections to invoices, would not permit compliance with current procedures, and would impose an extraordinary burden and expense on the NYISO and the Market Participants. Moreover, no reasons for imposing such a deadline are apparent in the November 3 Order.

The NYISO requests that the Commission provide clarification or rehearing of what the NYISO and affected generators are required to complete by the January 1, 2007, deadline as expeditiously as possible, because if the Commission intends to require the NYISO and the

⁶ November 3 Order at P 23 n.7.

⁷ Since debits or credits to a Market Participant have to be matched by credits or debits elsewhere in the billing system so that the flow of dollars between Market Participants balances out, bills for all Market Participants need to be finalized on the same schedule.

impacted Market Participants to complete the consultation process and settle with finality bills reflecting the corrected BPCGs, the NYISO and affected Market Participants will have to immediately reassign significant resources in a best-efforts attempt to complete an unexpected and vast acceleration in the mitigation consultation and final bill close-out processes. Such an expenditure of NYISO and Market Participant resources is not warranted by any findings in the November 3 Order.

I. STATEMENT OF ISSUES

In compliance with Commission Rule 713(c) and Order No. 663-A,⁸ the NYISO identifies the following errors or points requiring clarification:

1. The Commission should clarify that following April 7, 2006, the NYISO can continue to correct BPCG payments in Customer bills to reflect RTGP mitigation in the manner required by the NYISO's tariffs without requiring additional authorization from the Commission, subject to the reporting requirement previously specified by the Commission and subject to seeking any necessary tariff waivers.

2. The Commission should clarify that the NYISO is not required to finally settle by January 1, 2007, any necessary corrections to guarantee payments for the Relevant Period. Rather, the NYISO is required, by January 1, 2007, to post the initial results of its RTGP mitigation for the Relevant Period and to report the posted results to the Commission.

3. The Commission erred if it held that all bills affected by RTGP mitigation within the Relevant Period must be corrected and finalized by January 1, 2007. Such a decision would be arbitrary and capricious because it (i) would be inconsistent with prior orders and not supported by the evidence in the record, (ii) would require the NYISO to ensure that all consultations with generators are completed by January 1, 2007, a task that is not entirely within the NYISO's control, and (iii) would require the NYISO to finalize all of its bills earlier than is permitted by the NYISO's tariffs. If the Commission is unable to grant the NYISO's requested clarification of the requirements of the January 1, 2007, deadline, it should instead grant rehearing of this aspect of its November 3 Order to conform its requirements to the NYISO's interpretation.⁹

⁸ *Revision of Rules of Practice and Procedure Regarding Issue Identification*, 112 FERC ¶ 61,297, *order on reh'g*, 114 FERC ¶ 61,284 (2006); 18 C.F.R. § 385.713(c).

⁹ Authority for this issue is set forth in footnotes 19, 23 and 26, *infra*.

II. REQUEST FOR EXPEDITED ACTION

The NYISO respectfully asks that the Commission provide clarification or issue an order on rehearing in this proceeding as expeditiously as possible. In particular, a prompt clarification or rehearing is necessary with regard to the meaning of the sentence: “These corrections must be completed January 1, 2007.”¹⁰

The NYISO interprets the requirement that it “complete” corrections to BPCGs by January 1, 2007 as requiring the NYISO to (1) accurately apply the applicable bidding conduct test and the RTGP impact test (“RTGP Test”) to each day and month of the Relevant Period, (2) post the results in its Decision Support System (“DSS”) for review by affected Market Participants, and (3) provide a report of those mitigation results to the Commission. If the NYISO misapprehends the meaning of this sentence and the Commission intended that the NYISO (a) complete the process of applying RTGP mitigation to bids for the Relevant Period (that is, steps (1) through (3), above), (b) complete consultation with all affected Market Participants for all outstanding months, and (c) close out the settlements for all Market Participants for all of the impacted months so that the RTGP mitigation is truly “final,” compliance with normal mitigation consultation procedures and the tariff requirements that apply to final bill Close-Out Settlements would not be possible, and it is certain that other important projects would have to be set aside in order to make a best-efforts attempt to comply with the requirements of the November 3 Order.

Because fully settling with finality the corrected BPCG payments by January 1, 2007, is infeasible with current NYISO resources, would likely require the NYISO to promptly obtain new resources at significant expense in order to make a best-efforts attempt at compliance, and

¹⁰ November 3 Order at P 23 n.7.

would require the Market Participants and the NYISO to complete a heretofore unexpectedly accelerated consultation process, the NYISO requests that the Commission expeditiously clarify, or issue a rehearing order holding that the NYISO's interpretation of the obligation imposed in footnote no. 7 of the November 3 Order is correct.

III. REQUEST FOR CLARIFICATION OR REHEARING

A. Request for Clarification of the NYISO's Authority to Correct Guarantee Payments from April 8, 2006, until the Implementation Date of the Going-Forward Real-Time Guarantee Payment Impact Test Without Additional Authorization from the Commission.

In the November 3 Order, the Commission stated that "the instant order does not authorize any revisions to Guarantees for transactions after the date of issuance of the April [7] 2006 Order."¹¹ The NYISO seeks clarification that the NYISO is not required to obtain additional authorization from the Commission to correct BPCG payments in Customer bills following April 7, 2006 to reflect the appropriate RTGP mitigation required by the NYISO's tariffs. In both its April 7 Order and its November 3 Order, the Commission recognized that the NYISO's correction of bills to reflect appropriate RTGP mitigation is not retroactive ratemaking.¹² Rather, these corrections ensure that the NYISO's final bills conform to the NYISO's filed rates. The NYISO should not be required to seek additional Commission authorization to comply with the terms and conditions of rates that have already been accepted for filing by the Commission.

Instead, the NYISO understands that it must seek the Commission's authorization to depart from full compliance with the terms and conditions of its filed rates, as specified in

¹¹ November 3 Order at P 23 n.7 (emphasis in original).

¹² See November 3 Order at PP 8, 14, 23; April 7 Order at PP 45, 47.

footnote 4 of the November 3 Order. That is, if the inability to retrieve conduct test results or other impediments would preclude the NYISO from applying tariff-compliant RTGP mitigation, the NYISO understands that it must return to the Commission to request any waiver that may be necessary for BPCG payment corrections after April 7, 2006.¹³

The NYISO respectfully requests that the Commission clarify that the foregoing understanding is correct, and that settlement corrections that bring RTGP mitigation into compliance with the NYISO's filed rates do not require additional authorization from the Commission, but that guarantee payment corrections after April 7, 2006, that will not result in full compliance with the NYISO's tariffs will require additional Commission waiver authorization.¹⁴

B. Request for Clarification of the NYISO's Obligation to Complete Corrections by January 1, 2007, to Guarantee Payments for the Relevant Period.

In the November 3 Order, the Commission stated that the NYISO must "complete" by January 1, 2007, the corrections to BPCG payments for the Relevant Period.¹⁵ The NYISO respectfully requests that the Commission clarify that the Commission's intent was not to require final settlement of bills for the Relevant Period by that date, but rather to require the NYISO to post by that date the initial results of its RTPG Test for the Relevant Period in DSS for review by

¹³ November 3 Order at PP 9-10. The NYISO further understands that the Commission does not intend for any such waiver to be open-ended, and that a request must be supported by information on the progress of the NYISO's software corrections and other relevant factors.

¹⁴ The NYISO will continue to submit informational filings to the Commission showing that the RTGP related corrections it is making to generator's bills result in compliance with the NYISO's filed rate until such time as the NYISO implements its going-forward RTGP test.

¹⁵ November 3 Order at P 23 n.7.

potentially impacted generators, and to submit informational filing(s) covering the Relevant Period to the Commission by that date.

Clarification is required for several reasons. First, while the NYISO has already begun an accelerated process of determining RTGP mitigation for the relevant months,¹⁶ the January 1, 2007, date set forth in the November 3 Order does not provide adequate time for potentially impacted generators to (1) review the mitigation results for the eleven remaining affected months, and (2) complete the process of consulting with the NYISO's Market Monitoring and Performance Department ("MMP") and its Independent Market Advisor regarding the NYISO's mitigation determinations. Second, depending on the number of consultation requests it receives and the relative complexity of those requests, the NYISO may lack adequate staff to complete in less than two months consultations on the RTGP testing of up to 125 New York City generating units covering a 10+ month period, while simultaneously performing its ongoing market administration obligations and meeting its other priorities. Third, if a metering authority¹⁷ were to submit revised metering results for any of the New York City generators after the NYISO completes its implementation of the RTGP Test for a particular month, the NYISO billing and settlement system would automatically re-test generators using the updated metering data, which could result in a new determination of RTGP impact, or could undo mitigation for a generator that was previously determined to have failed the RTGP Test.¹⁸ Thus, until final bills are closed

¹⁶ The accelerated process already requires a significant effort by the NYISO to revise its official settlement data for all of the months affected by the April 7 and November 3 Orders and to screen the results of its RTGP Test to ensure accuracy.

¹⁷ The NYISO is not authorized to act as a metering authority. In New York, Transmission Owners and other Load Serving Entities are authorized by the New York Public Service Commission to perform this function.

¹⁸ By increasing or reducing LBMP or net ancillary services revenues payable to a generator over the course of a market day, revised meter data can result in additional RTGP mitigation (*e.g.*, if the
(continued...)

out for the relevant months pursuant to the NYISO's standard settlement cycle, it remains possible for RTGP mitigation results to change, and the NYISO's tariffs do not provide for final bill closeout for most of the impacted months until after January 1, 2007.

C. Alternative Request for Rehearing Regarding the NYISO's Obligation to Complete Corrections to Guarantee Payments by January 1, 2007, for the Relevant Period.

The NYISO understands and supports the Commission's goal of finalizing bills within a reasonable time. The NYISO respectfully submits, however, that if the November 3 Order was intended to require the finalizing of all bills affected by RTGP mitigation by January 1, 2007, it is inconsistent with the NYISO's approved tariff schedule for final bill close-out, is not supported by any evidence, would be unreasonably burdensome and expensive for both the NYISO and the Market Participants, and thus is arbitrary and capricious.¹⁹

revised meter reading reduces the MWh sold by the generator, thus increasing the guarantee payments it must receive in order to be kept whole to its bids) or it can reverse a previous determination that mitigation was appropriate (*e.g.*, if the revised meter reading increases the MWh sold by the generator, thus reducing the guarantee payments the generator must receive in order to be kept whole to its bids). Changed metering data is only expected to affect generators that are very close to the applicable RTGP impact threshold, or generators that would not be eligible to receive any BPCG payment at all if their conduct-failing bid components were mitigated. Consistent with existing billing practices, because revised meter data flows through all aspects of the NYISO settlement process and because generators have ready access to metering data affecting their own generating facilities, the NYISO believes it is appropriate for revised metering data to be reflected in the RTGP impact determination.

¹⁹ Pursuant to Section 206 of the Federal Power Act, the Commission can change the NYISO's tariffs on its own motion if it finds that the tariffs' provisions are "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a) (2006). However, in the November 3 Order, the Commission did not indicate that it intended to make any such change, nor did the Commission make any findings regarding the justness or reasonableness of the NYISO's tariff provisions. Moreover, even if the Commission intended to change the NYISO's tariffs, it failed to "examine the relevant data and articulate a satisfactory explanation for its action . . ." *Motor Vehicles Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The Supreme Court has found that an agency's ruling may be found to be "arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency . . ." *Id.*

A January 1, 2007, Close-Out Settlement deadline would not be consistent with the Commission's April 7 Order or with the record in this docket, and it would require the NYISO to accelerate the final close-out of all bills in a manner that would radically depart from the approved close-out schedule in its tariffs. Completing the normal bill close-out procedures for the relevant months would not be possible in the time between November 3, 2006, and January 1, 2007. The NYISO would also have to depend on the timely actions of (potentially unwilling) third parties to engage in a greatly and unexpectedly accelerated consultation process. These practical realities would result in final bills that would not fully comply with the filed rate due to the necessary rapidity of the close-out process, and could also result in other market administration priorities not being met. For these reasons, the NYISO must respectfully request that, if and to the extent the Commission rejects the NYISO's request for clarification, the Commission grant rehearing of any determination that the NYISO is required to finalize all bills affected by RTGP mitigation by January 1, 2007. The Commission should instead require the completion of the DSS posting process and submission of related informational filings for the Relevant Period by January 1, 2007.

1. A Requirement that the NYISO Complete its Corrections by January 1, 2007, Would be Inconsistent with Prior Orders and is Not Supported by any Evidence in the Record

The NYISO has previously noted in its response to a Commission Staff data request that for the period from February 1, 2005, forward

[t]he NYISO expects the correction methodology and manual procedures to be in place by the third quarter of this year, in time for the final settlement for the period beginning February, 2005. The appropriate settlement corrections will then be applied month-by-month as the final settlements for the months following February, 2005 become due.²⁰

²⁰ *NYISO's Response to the Commission's Staff's Data Request*, Docket No. ER06-185-001, at 3 (February 6, 2006) ("Data Response").

The Commission stated in its April 7 Order that it would allow the NYISO to “correct errors in its computation of Guarantees, but not LBMPs, while implementing the mitigation measures in its Services Tariff, subject to the condition that the NYISO provide the Commission with details of the settlement corrections, consistent with the Staff data request of January 6, 2006.”²¹ It did not impose an accelerated bill close-out schedule. Since the issuance of the Commission’s April 7 Order, the NYISO has been submitting the details of its settlement corrections to the Commission “month-by-month as the final settlements for the months following February, 2005 become due” in accordance with the commitment it made in its response and consistent with its understanding of its obligations under the April 7 Order.²² Nowhere in its November 3 Order does the Commission explain why it would now choose to depart from the procedure for submitting RTGP-related settlement corrections that were proposed by the NYISO in its Data Response and accepted by the Commission in its April 7 Order. The Commission does not explain why it would be necessary or appropriate to change the previously accepted procedure. Moreover, the NYISO is not aware of any record evidence or finding by the Commission indicating that the final bill close-out schedule set forth in the NYISO’s tariffs is unjust, unreasonable, unduly discriminatory or preferential with regard to the NYISO’s implementation of RTGP mitigation or the correction of BPCG payments covering the Relevant Period.²³

²¹ April 7 Order at P 47 and Ordering Paragraph B (emphasis added).

²² *Data Response* at 3.

²³ Having approved the NYISO’s settlement cycle in its Services Tariff and its OATT, the FERC cannot now order the NYISO to act inconsistently with its tariffs and accelerate the timeline unless the Commission has acted pursuant to Section 206 of the Federal Power Act, which it has not. *See* footnote 19, *supra*. The U.S. Court of Appeals for the District of Columbia Circuit has recently found that the Commission “may not keep regulations in place and then disregard them in order to disapprove actions

(continued...)

2. The NYISO Lacks Authority to Ensure that All Consultation with Generators Will Be Completed by January 1, 2007.

The consultation process necessarily relies on the active involvement of affected Market Participants. The NYISO's Market Mitigation Measures ("MMM") do not set forth any specific limitation on the time available for potentially mitigated generators to initiate consultation.²⁴ Thus, generators may arguably request consultation regarding the results of the NYISO's RTGP mitigation up to the point when the relevant bills are closed out.²⁵ The MMM do not grant the NYISO clear authority to impose deadlines by which requests for consultation must be submitted. For these reasons, it is not presently possible for the NYISO to require potentially affected generators to complete all consultation with the NYISO by January 1, 2007, and requiring the NYISO to take actions that are beyond its ability to effectuate would be arbitrary and capricious.²⁶

3. The NYISO's Tariffs Preclude the NYISO from Finalizing Bills for Affected Generators by January 1, 2007.

Section 7.4.1 of the Services Tariff and section 7.2A.1 of the NYISO's Open Access Transmission Tariff ("OATT") establish an approximately 19 month timeline for closing out

taken by regulated entities to conform with those regulations. Doing so is perhaps the essence of 'arbitrary and capricious.'" *S. Cal. Edison Co. v. FERC*, 415 F.3d 17, 23 (D.C. Cir. 2005).

²⁴ The MMM are set forth in Attachment H to the Services Tariff.

²⁵ *NYISO's Response to Protest and Request for Relief of the NRG Companies*, Docket Nos. ER06-185-002 and 003, at 12-14 (October 27, 2006)(describing an instance in which the NYISO delayed its processing of final bill close-outs due to its receipt of a late consultation request).

²⁶ Attachment H of the Services Tariff requires the NYISO to allow generators the ability to consult with the NYISO regarding RTGP mitigation up until the point that the NYISO must in accordance with its tariffs finalize the generator's bill. As established in footnotes 19 and 23 above, the NYISO cannot be required to act inconsistently with its FERC-approved tariffs unless the FERC changes those tariffs pursuant to § 206 of the Federal Power Act, which it has not done in the November 3 Order.

settlements for Customer invoices issued prior to January 1, 2007, which includes all of the months that are subject to the November 3 Order. Following the issuance of the invoices, the tariffs grant the NYISO twelve months to review the accuracy of the settlement information and correct the Customer invoices. Customers have an additional four-month period to review and challenge the invoices, and the NYISO is given a final two to four-month period to implement any further changes to the invoices with an opportunity for Customer review.²⁷ The NYISO is not authorized to finalize monthly invoices before the completion of this review, challenge and correction period. As a majority of the monthly invoices issued for the Relevant Period, will still be within the review/correction period on January 1, 2007, absent a determination by the Commission, supported by evidence in the record, that the existing provisions of the NYISO's tariffs that address Close-Out Settlements would be unjust, unreasonable, unduly discriminatory or preferential if applied to the NYISO's implementation of RTGP mitigation or to the correction of BPCG payments covering the Relevant Period, it would be arbitrary and capricious to require the NYISO to finalize the invoices by this deadline.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc., respectfully requests clarification of the November 3 Order specifying that:

- (1) following April 7, 2006, the NYISO can continue to correct BPCG payments in Customer bills to reflect RTGP mitigation without additional authorization from the Commission, subject to (a) fulfilling applicable reporting requirements, and (b) seeking any necessary

²⁷ See Services Tariff §§ 7.4.1.A - 7.4.1.C; OATT §§ 7.2A.1a - 7.2A.1c.

tariff waivers addressing RTGP mitigation that the NYISO is not able to perform in compliance with the requirements of its tariffs; and

(2) footnote 7 of the November 3 Order requires the NYISO to (a) accurately apply the applicable conduct test and the RTGP Test to Bids for each day and month of the Relevant Period, (b) post the mitigation results in its DSS for review by affected Market Participants, and (c) provide a report of those mitigation results to the Commission by January 1, 2007.

In the alternative, the NYISO respectfully requests rehearing on the second identified issue, and confirmation of the foregoing requirements on rehearing.

Respectfully submitted,

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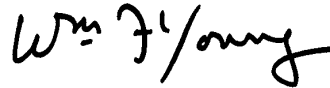
November 29, 2006

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day electronically served the foregoing document on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 29th day of November, 2006.

A handwritten signature in black ink, appearing to read "Wm F Young". The signature is written in a cursive style with a horizontal line underneath it.

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