

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

New York Independent System Operator, Inc.	)	Docket No. ER00-1969-002
	)	and -003
)	
Niagara Mohawk Power Corp.	)	Docket No. EL00-57-001
v.	)	and -002
New York Independent System Operator, Inc.)	
)	
Orion Power New York GP, Inc.	)	Docket No. EL00-60-001
v.	)	and -002
New York Independent System Operator, Inc.)	
)	
New York State Electric & Gas Corporation	)	Docket No. EL00-63-000
v.	)	and -002
New York Independent System Operator, Inc.)	
)	
Rochester Gas and Electric Corporation	)	Docket No. EL00-64-000
v.	)	and -002
New York Independent System Operator, Inc.)	

**REQUEST FOR EXPEDITED ACTION, MOTION FOR STAY
OR, IN THE ALTERNATIVE, FURTHER EXTENSION OF TIME,
AND ALTERNATIVE REQUEST FOR CLARIFICATION
OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rule 212 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2001), the New York Independent System Operator, Inc. (“NYISO”) hereby respectfully requests that the Commission grant a stay of the portions of its May 31, 2000 *Order on Tariff Filings and Complaints*, 91 FERC ¶ 61,218 (“May 31 Order”), and *Order on Rehearing* issued on November 8, 2001, 97 FERC ¶ 61,155 (“November 8 Order”), in the above-referenced dockets that deal with rebilling of operating reserves during the period of March 1 through March 27, 2000. Specifically, the NYISO asks that the Commission stay its decision to require the NYISO to re-bill for operating reserves for the period of March 1 through March 27, 2000

pending a judicial decision on the NYISO's appeal of the May 31 and November 8 Orders.¹ In the alternative, the NYISO respectfully requests that the Commission further extend the interim extension that it granted the NYISO to comply with the May 31 Order's rebilling requirement in its July 31, 2000 order in this proceeding. *See New York Independent System Operator, Inc., et al.*, 92 FERC ¶ 61,134 (2000) ("July 31 Order").

In addition, the NYISO respectfully requests that the Commission take expedited action in this matter as the date for the NYISO to comply with billing requirements in the November 8 Order is fast approaching. The Commission should shorten the time to answer this pleading to require that answers be filed no later than November 23, 2001.

I. BACKGROUND

In March 2000 the NYISO completed an analysis of anomalous bidding patterns in the 10-minute non-synchronized reserves markets by suppliers located east of the Central-East constraint which indicated market power was being exercised in that market. The NYISO believes that these bidding patterns resulted in \$65 million of over-charges being assessed against its customers for operating reserves in late January, February and March 2000. On March 27, 2000, the NYISO made an "exigent circumstances" filing ("March 27 Filing")² under Section 205 of the Federal Power Act seeking the imposition of various bidding restrictions to prevent future market power abuses. The NYISO also asked the Commission to initiate proceedings that would result in refunds being paid for January, February and March. In

¹ The NYISO is concurrently submitting a petition for judicial review of the May 31 and November 8 Orders in the United States Court of Appeals for the District of Columbia Circuit.

² *Request of New York Independent System Operator, Inc. for Suspension of Market-Based Pricing for Ten-Minute Reserves and to Shorten Notice Period*, Docket No. ER00-1969-000 (March 27, 2000).

addition, the March 27 Filing requested that the Commission uphold the NYISO's decision to recalculate operating reserves prices for March 2000 based upon a weighted average of prices from prior periods when the operating reserves markets behaved in a workably competitive manner. This recalculation eliminated approximately \$27 million in charges that the NYISO believed to be attributable to the exercise of market power.

The May 31 Order partially granted and partially rejected the March 27 Filing's requests and acted on several other related complaints. In particular, the May 31 Order refused to allow the NYISO to re-calculate March 2000 operating reserves prices. On June 30, 2000, the NYISO filed a request for rehearing and stay of certain aspects of the May 31 Order, including its decision regarding the March 2000 prices. In the July 31 Order, the Commission granted the NYISO an interim extension, until fifteen days after the issuance of a merits order on rehearing to comply with the May 31 Order's ruling on this issue. The Commission reasoned that the NYISO was in a position analogous to other "intermediary" utilities involved in refund disputes and concluded that "[i]n light of the potential difficulties of undoing an initial merits decision on the billing issue raised by NYISO, the Commission will grant an extension of time by which NYISO is required to comply"³ Because the July 31 Order granted the NYISO an interim extension, it dismissed the NYISO's request for a stay as moot, without addressing its merits. Subsequently, the November 8 Order denied the NYISO's request for rehearing and directed the NYISO to "recalculate operating reserves charges based on the rates that were in effect prior to the March 28, 2000 effective date of the May 31 Order."⁴

³ 92 FERC ¶ 61,134 at 61,503 (2000).

⁴ 97 FERC ¶ 61,155, slip op. at 14 (2001).

II. REQUEST FOR EXPEDITED ACTION

The NYISO requests that the Commission take expedited action in this matter as the date for the NYISO to comply with billing requirements in the November 8 Order is fast approaching. The July 31 Order requires that the NYISO comply with the May 31 Order fifteen days after the Commission's merit order on rehearing. Therefore, the NYISO asks that the period for answering this filing be shortened to no more than seven days and that the Commission act on this filing in an expedited manner.

III. MOTION FOR STAY

The NYISO moves for a stay of the portions of the May 31 and November 8 Orders that require the NYISO to restore the unmitigated prices for operating reserves over the period of March 1 through March 27, 2000, pending the resolution of the NYISO's judicial appeal. The need for a stay is every bit as urgent now as it was when the NYISO first sought one in June 2000.

Under the Administrative Procedure Act, 5 U.S.C. § 705 (1994), an administrative agency may stay its orders when justice so requires. In applying this standard, the Commission generally requires the movant to show (1) that it will suffer irreparable injury if a stay is not granted; (2) that a stay will not cause substantial harm to other interested parties; and (3) that a stay is in the public interest. *See, e.g., CMS Midland, Inc.*, 56 FERC 61,177 at 61,631 (1991); *Iroquois Gas Transmission System, L.P.*, 54 FERC ¶ 61,103 (1991), *Michigan Mun. Coop. Group v. FERC*, 990 F.2d 1377 (D.C. Cir.), *cert. denied*, 510 U.S. 990 (1993); *NE Hub Partners, L.P.*, 85 FERC ¶ 61,105 (1998); *Boston Edison Co.*, 81 FERC ¶ 61,102 (1997). As discussed more fully below, all the requirements for a stay are satisfied in this case. The May 31 and November 8 Orders could have serious, irreparable impacts if they are allowed to stand, even if

they are reversed later on appeal. Equity, the public interest and the interests of the parties will all be best served by a stay.

A. A Stay is Necessary to Prevent Irreparable Injury to NYISO Customers

Although the Commission has previously held that economic or monetary losses alone do not ordinarily constitute irreparable injury and, thus, are not generally sufficient to justify a stay,⁵ there are exceptions to this rule. The Commission explained in *Iroquois Gas Transmission System, L.P.* at 61,342 that economic or monetary loss may constitute irreparable harm when the loss threatens the very existence of a movant's business. In this case, while all LSEs will be harmed if the NYISO is forced to collect the disputed \$ 27 million from them, the very existence of smaller LSEs that are not in a financial position to absorb their share of this amount would be threatened. The concerns raised by Strategic Power Management, Inc. last April concerning the survival of smaller, financially vulnerable LSEs remain valid today. *See, e.g., Motion to Intervene by Strategic Power Management, Inc.* in Docket No. ER00-1969-000 at 5 (April 10, 2000). ("SPM fully supports the NY ISO's March 27, 2000 filing and asks this Commission to grant the relief requested in full, particularly the request to withhold billing and collecting the March 10-minute reserves above 'normal' levels. Without this relief, SPM for one and possibly others will be driven out of the market because of an inability to meet such extraordinary cash demands SPM has been adversely affected by the failure of the 10-minute reserve markets to the point where it will face extreme financial distress should this Commission deny the relief requested by the NY ISO.") The possibility of future refunds in the aftermath of a successful judicial appeal by the NYISO does not mitigate the potential for irreparable harm since such

⁵ *City of Tacoma, Washington*, 87 FERC ¶ 61,197 at 61,735 (1999).

refunds would come too late to help entities that are in financial jeopardy today. While the impact on these entities will not directly harm the NYISO, given the NYISO's unique role in the administration of New York's wholesale electricity markets, the Commission should allow it to stand in the shoes of the small LSEs for purposes of this stay request.

B. A Stay Would Not Harm Other Parties

Granting the requested stay will not harm any other party. The suppliers have already reaped the benefits of very high prices for operating reserves for the period prior to March 2000. The interim payments for March are based on weighted average market prices prior to January 2000, when the market behaved in a workably competitive manner, which adequately compensates the suppliers. At most, the suppliers will experience only a delay in their recovery of a windfall payment for March 2000 in the event that the NYISO's judicial appeal fails. At that point they would receive the full amount with interest. Suppliers will therefore not suffer any legitimately cognizable harm in the event that a stay is granted.

C. The Public Interest Strongly Supports a Stay

The question that must be asked when considering the criterion of public interest is whether a further interest beyond those represented by the parties to a proceeding precludes maintaining the *status quo* during the rehearing or appeal process. *The Crude Co.*, 22 FERC ¶ 62,081, 63,138 (1983) citing *Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, at 843 (1977). Maintaining the status quo in this case is clearly consistent with the public interest. It is clearly in the public interest to avoid the imposition of charges that were not the product of a workably competitive market on consumers while awaiting the resolution of the NYISO's appeal. That appeal will demonstrate that the Commission is not barred from allowing

refunds in this case, as the November 8 Order erroneously concluded, and that the Federal Power Act in fact requires the payment of refunds in the public interest.

IV. ALTERNATIVE MOTION FOR FURTHER EXTENSION OF TIME

If the Commission denies the NYISO's request for a stay, it should instead further extend the interim extension initially established by the July 31 Order. The Commission's rationale for granting the interim extension, *i.e.*, "the potential difficulties of undoing an initial merits decision on the billing issue raised by NYISO" is just as valid now as it was when the July 31 Order was issued. Given that suppliers will not be harmed by the maintenance of the status quo, the Commission should allow the interim extension to remain in effect until the NYISO's judicial appeal is resolved.

V. CONCLUSION

WHEREFORE, for the reasons set forth above, the NYISO respectfully requests the Commission to stay portions of its May 31 and November 8 Orders in this proceeding pending the completion of judicial review or, in the alternative, further extend the interim extension of time that it initially established on July 31, 2000.

Respectfully submitted,

NEW YORK INDEPENDENT
SYSTEM OPERATOR, INC.

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November 16, 2001

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each party designated on the official service lists compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.2010 (2001).

Dated at Washington, D.C. this 16th day of November.

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