

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

New York Independent System Operator, Inc.)	Docket No. ER01-1740-000
)	
New York Independent System Operator, Inc.)	Docket No. ER01-1520-000

**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 clarify its May 16, 2001 Order in Docket No. ER01-1740-000¹ and its April 27, 2001 Order in Docket No. ER01-1520-000.² Specifically, the NYISO seeks clarification that entities which reduce their demand in exchange for payments pursuant to the 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 currently affords to similarly

¹ *New York Independent System Operator, Inc.*, 95 FERC ¶ 61,233 (2001) (accepting the NYISO’s Day-Ahead Demand Response Program).

² *New York Independent System Operator, Inc.*, 95 FERC ¶ 61,136 (2001) (accepting the NYISO’s Emergency Demand Response Program).

³ The DADRP is a colloquial name that is used much more frequently than the program’s formal name, 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.

situated entities in the United States portion of the Western Systems Coordinating Council (“WSCC”).

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II. 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, 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.⁶ 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

⁵ 94 FERC ¶ 61,272 (2001).

⁶ *Id.* at 61,971-72. The Commission has generally waived for such sellers the following parts of its regulations in 18 C.F.R.: most of Subparts B and C of Part 35 (documentation), Part 41 (accounting verification), Part 101 (prescribed Uniform System of Accounts), and Part 141 (annual reports). *See, e.g., InPower*, 90 FERC ¶ 61,329 at 62,105 (2000); *Reliant Energy, Inc.*, 91 FERC ¶ 61,073 at Appendix B (2000).

reduction at wholesale.”⁷ The Commission reasoned that such “negawatt” transactions, involving purchases of demand reduction, should be considered to be wholesale in character when they involve the “sale for resale of energy that would ordinarily be consumed by the reseller,”⁸ particularly where such transactions are tied to Commission-jurisdictional markets.⁹ These special authorizations and waivers are to remain in place until April 30, 2002.¹⁰

The Western Order also prescribed that wholesale purchasers of power from on-site generators operating under blanket authorizations and waivers would be required to report to the Commission the “the name of each such 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.”¹¹ 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 2002.¹² Other purchasers were required to file by April 30, 2002. Comparable reporting requirements were imposed with respect to negawatt sales transactions.¹³

The April 27 Order stated that the EDRP was “consistent with the goals set forth” in the Western Order yet neither it, nor the May 16 Order made any reference to the blanket

⁷ 94 FERC ¶ 61,272 at 61,972.

⁸ *Id.*

⁹ *See* 96 FERC ¶ 61,155 at 61,679 (2001)

¹⁰ *See* 95 FERC ¶ 61,225 (2001) (extending duration of blanket authorizations and waivers).

¹¹ *Id.* at 61,769, n. 31.

¹² *Id.*

¹³ 94 FERC ¶ 61,272 at 61,972.

authorizations and waivers that the Western Order established.¹⁴ Although it is arguable that those Orders implicitly granted the same authorizations and waivers to entities that reduce their demand in exchange for payments pursuant to the EDRP or DADRP participants, certain NYISO market participants are concerned that the Commission has not expressly addressed this issue. Without the authorizations and waivers, entities that have not obtained permission to engage in negawatt sales at market-based rates on an individual basis would 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.¹⁵ 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.

III. REQUEST FOR CLARIFICATION

The NYISO is concerned that the regulatory uncertainty associated with the absence of blanket authorizations and regulatory waivers for EDRP and DADRP participants, as well as for Special Case Resources, will impede the further development of the NYISO's demand response programs. These programs have had a very positive effect on the NYISO-administered markets and, as the Commission recognizes, their further development is essential to the improvement of those markets. Accordingly, the NYISO respectfully asks that the Commission clarify that EDRP and DADRP participants, which are similarly situated to Western negawatt sellers, and Special Case Resources, which are similarly situated, depending on how they

¹⁴ See 95 FERC ¶ 61,136 at 61,428.

¹⁵ See, e.g., *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106; *reh'g denied* 61 FERC ¶ 61,089 (1992) (reaffirming that entities which make wholesale sales of electricity without first filing appropriate tariffs or agreements and waiting for the expiration of the 60-day prior notice period must refund revenues in excess of their operation and maintenance costs absent "good cause" or "extraordinary circumstances").

operate, to negawatt sellers or to on-site-generators, enjoy the same authorizations and waivers granted by the Western Order.

Although the Commission has suggested that it did not mean to extend the blanket authorizations and waivers established by the Western Order beyond the WSCC¹⁶ the Commission's broad interpretation of the scope of its negawatt jurisdiction under the Federal Power Act necessarily has nation-wide ramifications. Because the Commission did not address the jurisdictional issue in the EDRP and DADRP orders, and because it is important to facilitate participation in these programs by small entities with little previous exposure to the Commission, the Commission should clarify its jurisdiction over negawatt sales in the NYISO-administered markets and adopt the streamlined regulatory procedures introduced in the Western Order. Similarly, Special Case Resources that participate in these programs, either by curtailing load or by generating electricity, or that reduce their demand in response to NYISO instructions outside of the two programs, should likewise be eligible for these authorizations and waivers.

Consistent with the Western Order's requirements, the requested authorizations and waivers should remain in effect for the duration of the EDRP and DADRP, which are currently scheduled to expire on October 31, 2002 and October 31, 2003 respectively, but which may be extended in the future. 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. Consistent with the Western Order's requirements, it would also be appropriate to

¹⁶ See, e.g., 95 FERC ¶ 61,225, slip op. at 6 (2001) (“[S]ome commenters favor the extension of Commission incentives nationwide to address capacity problems and avert energy problems in other areas. While we are aware of the potential for capacity deficiencies in other areas of the nation, we believe the most urgent need is in the West, which is where we will focus this measures for now. Entities in other parts of the country may request application of these measures on a case-by-case basis.”).

subject EDRP/DADRP participants and Special Case Resources to the same reporting requirements that are applicable in the WSCC. The NYISO expects that market participants would initially be responsible for filing these reports but will discuss the possibility of filing them on market participants' behalf with its stakeholder committees. The Western Order expressly permits this approach.¹⁷

Respectfully submitted,

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January 16, 2002

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¹⁷ See 94 FERC ¶ 61,272 at 61,971, n. 18 (“[T]o the extent these waivers and authorizations include sales by on-site generators into energy markets administered by an independent system operator (ISO) or power exchange, the ISO or power exchange in that case may file the required reports with the Commission.”).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each party designated on the official service list compiled by the Secretary in Docket Nos. ER01-1740-000 and ER01-1520-000, 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, DC this 16th day of January, 2002.

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