97 FERC ¶ 61, 242
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 No. ER01-3155-000

ORDER APPROVING EXTENSION OF AUTOMATIC MITIGATION PROCEDURES SUBJECT TO CONDITIONS

(Issued November 27, 2001)

On September 28, 2001, the New York Independent System Operator, Inc. (NYISO) filed, pursuant to section 205 of the Federal Power Act (FPA),[1] a request to extend the termination date for the Automated Mitigation Procedures (AMP)[2] to October 31, 2002. The Commission's June 28, 2001 order[3] in this proceeding approving the AMP required those automated procedures to expire on October 31, 2001. In this order, we accept NYISO's proposed extension of the AMP until April 30, 2002, and we direct NYISO to file a comprehensive mitigation proposal that addresses the Commission's concerns with the AMP set forth in this order, as well as our concerns regarding how NYISO's overall mitigation measures work together. NYISO is directed to file the comprehensive mitigation proposal by March 1, 2002 to be effective May 1, 2002. The Commission's action here benefits customers by protecting them from market power, while establishing procedures to modify and improve the AMP mechanism, as well as other mitigation measures in NYISO.

[1]16 U.S.C. § 824(d) (1994).

[2]The AMP provisions appear in Attachment H to NYISO's Market Administration and Control Areas Services Tariff (Services Tariff).

[3]95 FERC ¶ 61,471 (2001).

I. Procedural Background

In a November 23, 1999 order,[4] the Commission accepted in part and rejected in part the market monitoring and mitigation plans filed by NYISO. In instances where NYISO concludes that a specific market participant is exercising market power, the Commission accepted NYISO's proposal to allow it to engage in discussions to resolve the issues informally or issue demand letters requesting the participant cease certain behavior. In addition, the Commission stated that NYISO could file on a case-by-case basis under section 205 of the FPA to impose specific mitigation measures, or to make such filings based on recurring types of conduct that warrant mitigation. However, the Commission did not allow NYISO to reduce bid flexibility, impose financial obligations to pay for operating reserves, or impose default bids, because this would give too much discretion to NYISO in price-setting and other similar regulatory functions without Commission review. The Commission determined that NYISO had not described with sufficient specificity the types of conduct that would trigger the imposition of these measures; it had not established specific thresholds or bright line tests that would trigger the conclusion that market power had been exercised.

In a March 29, 2000 order,[5] the Commission further clarified NYISO's authority under the plans. Among other things, the Commission accepted the specific thresholds proposed by NYISO to trigger possible mitigation, but rejected NYISO's proposal to keep them confidential. The Commission also allowed NYISO limited discretion as to when to mitigate (e.g., NYISO may choose not to impose mitigation if it is satisfied with the party's explanation for its behavior) and for how long, but required NYISO to clarify that mitigation for market power may be imposed only prospectively.

In a complaint filed in Docket No. EL01-55-000, the Mirant Companies (Mirant) alleged that NYISO improperly intended to implement the AMP without filing any changes to the MMM pursuant to either section 205 or 206 of the FPA. In its May 9, 2001 order on Mirant's complaint,[6] the Commission found that part of NYISO's proposal is within the bounds of its existing tariff, in that section 3.2(b) of the Market Mitigation Measures (MMM) specifically envisions use of the Security Constrained Unit

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[4]Central Hudson Gas & Electric Corp., et al., 89 FERC ¶ 61,196 (1999).

[5]Central Hudson Gas & Electric Corp., et al., 90 FERC ¶ 61,317 (2000), clarified, 91 FERC ¶ 61,154 (2000).

[6]95 FERC ¶ 61,189 (2001).

Commitment (SCUC)[7] to identify questionable conduct. However, the Commission also found that NYISO's AMP proposal needed to be examined in greater detail before it could be approved. Further, the Commission noted that section 205(c) of the FPA requires that NYISO keep on file with the Commission "practices and regulations" affecting its rates, and that NYISO's tariff did not contain language adequately specifying the timing and the process that are contained in the AMP. Accordingly, the Commission concluded, that if NYISO wishes to implement its AMP proposal, it must file revised tariff sheets pursuant to section 205 of the FPA to set forth the AMP procedures. In that filing, the Commission added, NYISO must address the concerns raised by the parties in the Mirant complaint proceeding, including: (1) whether the AMP provides sufficient opportunity for meaningful consultation; (2) whether inaccurate market-clearing prices will result even if the party whose bid was improperly mitigated is ultimately made whole; (3) whether the AMP would establish a new $150 threshold that never appears in the MMM; and, (4) whether NYISO proposes to exclude hydro units, imports, and exports from the AMP.

On March 17, 2001, in Docket No. ER01-2076-000, NYISO filed a new Attachment H to its Services Tariff which incorporated the proposed AMP procedures (March 17 Filing). By order issued June 28, 2001,[8] the Commission accepted NYISO's March 17 Filing allowed NYISO to implement the AMP mechanism for 2001 summer capability period when supplies may still be tight and when the effectiveness of new demand response mechanisms are uncertain. The Commission viewed the proposed mechanism as only a temporary solution, and agreed with certain of the intervenors that the proposed AMP may mitigate bids in situations where market power is not the cause for high or volatile bids, and may not provide for sufficient consultation with generators to reasonably establish that particular bids were attempts to exercise market power. The Commission further explained that automatic market power mitigation may be most appropriate where it is tied to structural market power problems, such as must-run situations where generators would otherwise be in a position to name their price, and noted that both PJM and ISO-NE use this more limited approach to automatic mitigation.

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[7]The SCUC is NYISO's Day-Ahead Software computer algorithm. It performs a series of passes, or computer runs, that sequentially evaluate the generation resources bid into the Day-Ahead Market against demand bids, NYISO load forecasts, ancillary services needs and reliability requirements. Through this analysis, the SCUC selects the optimal least-cost, security-constrained dispatch of generation and load.

[8]New York Independent System Operator, Inc., 95 FERC ¶ 61,471 (2001).

II. NYISO's Market Mitigation Procedures, Including AMP

Under Commission orders allowing NYISO to implement its MMM,[9] NYISO's Market Monitoring Unit (MMU), in consultation with NYISO's Market Advisor, is responsible for monitoring the markets administered or controlled by NYISO and for mitigating a market party's conduct when NYISO determines that market power has been exercised. The MMM has specific threshold values for identifying generators or transmission facilities that exercise market power. NYISO imposes mitigation when a market party's conduct has a material effect on prices or on guarantee payments. Conduct and impact criteria must be satisfied before NYISO may mitigate a generator's bid. NYISO may not mitigate market prices retroactively.

Under its manual procedures, prior to implementation of the AMP, NYISO is able to identify conduct and pricing impacts that exceed the MMM standards only after the SCUC runs for a given day-ahead market have been completed, which means that mitigation cannot be implemented until the next day's day-ahead market. The primary purpose of the AMP is to eliminate the one-day lag inherent in the manual application of the market mitigation thresholds that currently exist in NYISO's market mitigation. That delay can be important when market conditions arise that permit an exercise of market power. The AMP procedures are activated when the SCUC that calculates day-ahead market prices makes a preliminary determination that prices in a given area of New York will exceed $150 absent mitigation.[10] Once the AMP is activated, it only mitigates bids if specific thresholds for both bidding conduct and market impact are crossed. The conduct and impact thresholds used by the AMP are the same thresholds approved by the Commission under NYISO's Market Mitigation Measures. Under the automated procedures of the AMP, non-competitive bidding behavior is still mitigated prospectively, as authorized in the MMM, but the mitigation will occur within the SCUC runs in which the conduct and price effect thresholds of the MMM are crossed, without the one-day delay that occurs under the manual procedures.

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[9] 86 FERC ¶ 61,062 (1999), 89 FERC ¶ 61,196 (1999), and 90 FERC ¶ 61,317 (2000).

[10] NYISO explains that this threshold was selected because it is unlikely that the thresholds for mitigation of bids will be exceeded if prices are below $150.

III. This Filing

On September 28, 2001, NYISO filed to extend the AMP, which would otherwise expire on October 31, 2001, until October 31, 2002.[11] NYISO requests waiver of the 60-day prior notice requirement to permit a November 1, 2001 effective date. NYISO states that good cause exists for the waiver in order to prevent a gap in the availability of the AMP.

NYISO believes the performance of the AMP was consistent with its design, which is to eliminate the delay of one Day-Ahead Market cycle inherent in manual application of the market mitigation thresholds. NYISO explains that during Summer 2001, prices hit the $150 level 12 times, but the AMP imposed bid caps only four times. Of those four times, the largest average number of megawatts mitigated was 481, while customers were protected from more that $11 million in unwarranted energy costs. NYISO further states that only twice did AMP mitigation apply to more than one entity in one zone. NYISO concludes that while the AMP is an automated procedure, it does not automatically apply bid caps whenever prices are high.

Absent mitigation, NYISO states that significant unwarranted wealth transfers from buyers to sellers could take place especially during high-load summer months when supply may be tight. NYISO asserts however, that transmission constraints can create tight market conditions in small areas even during shoulder months.

NYISO states that the conditions necessitating the need for the AMP are almost certain to be present this coming summer as they were this past summer, and with the potential for market power problems to arise in shoulder periods as well, it is preferable to keep the AMP in place while improvements are implemented and additional analysis under taken, rather than to summarily terminate the AMP.

NYISO states that the AMP, while working as intended, is subject to improvements. Specifically, NYISO states that it intends to make two improvements in the AMP prior to Summer 2002. The proposed modifications will have the effect of narrowing the scope of the AMP to mitigate prices only when market power exists. First, NYISO proposes to exclude from mitigation by the AMP a Market Participants' bids that trigger the conduct test for mitigation if the total quantity of those bids is 50 MW or less, unless analysis shows the relevant units are in a position to exercise market power at

[11]No tariff sheets were submitted as part of the filing.

those quantity levels. At present, the AMP excludes bids by bidding entities with 50 MW or less of capacity. NYISO stated the reason for exempting such bids was because the withholding of such small amounts will rarely have a material effect on prices.

Second, NYISO proposes to limit mitigation to zones in which the price impact test for mitigation is met by implementing at least one additional AMP pass in SCUC. This proposed change would fine-tune the application of the AMP to limit mitigation to the specified zones and hours where the price impact test is met. At present, under the AMP, all bids subject to the AMP, that exceed the conduct thresholds in the areas where zonal prices exceed $150, are tested for their impact on prices in a single SCUC pass. If the price impact threshold is exceeded in any hour or any zone, the results of the mitigated pass are used to determine the Day-Ahead prices. The proposed modification will appropriately exclude mitigation from occurring in those areas or hours where the price impact test is not met.

NYISO states that it will be working on correcting other minor flaws[12] in the AMP and that it is committed to working with Market Participants to determine if other refinements or changes in the AMP design should be considered.

IV. Notice of Filing and Pleadings

Notice of NYISO's filing was published in the Federal Register, 66 Fed. Reg. 51,650 (2001), with comments, protests, and interventions due on or before October 19, 2001. Motions to intervene were filed by Constellation Power Source, Inc., et al.; HQ Energy Services (U.S.) (late); the Member Systems;[13] NRG Companies; and the PSEG Companies. Motions to intervene and comments in support of NYISO's filing were filed by the City of New York; Consolidated Edison Company of New York, Inc., and Orange and Rockland Utilities, Inc. (ConEd); the New York Consumer Protection Board (Consumer Board); the New York State Public Service Commission (New York Commission); and the Multiple Intervenors. Protests and motions to intervene were filed

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[12]NYISO describes minor changes that it will fix regarding the way it computes reference levels that may have understated appropriate levels for units whose final output blocks should have much higher reference levels.

[13]The Member Systems include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, Orange and Rockland Utilities, Inc., the Power Authority of the State of New York, and Niagara Mohawk Power Corporation.

by Aquila Energy Marketing Corporation, et al. (Aquila); Dynegy Power Marketing, Inc. (Dynegy); The Electric Power Supply Association (EPSA); Enron Power Marketing, Inc. (Enron); The Independent Power Producers of New York, Inc. (Independent Producers) ; KeySpan-Ravenswood, Inc. (Keyspan) (late); the Mirant Companies, et al. (Mirant); and Williams Energy Marketing & Trading Company (Williams).

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2001), all the timely motions to intervene are granted and all late motions to intervene filed before the issue date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

On October 31, 2001, the New York Commission filed a motion for leave to answer the protests and comments. Although Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2001), generally prohibit answers to protests, we will accept the New York Commission's answer because it helps clarify issues under consideration in this proceeding.

Intervenor Protests and Comments

Five parties, as identified above, support NYISO's proposal. New York City believes that the extension of the AMP is a necessary (but not sufficient) measure for mitigating excessive prices. It maintains that the AMP does not adequately protect New York City consumers from excessive wholesale prices because it sets too high a trigger for implementing the mitigation, noting that the AMP was not triggered on August 9, 2001, when day-ahead energy prices reached a record $1024/MWH in New York City. Similarly, ConEd believes that the AMP remains necessary to prevent or identify and mitigate the exercise of market power in New York's day-ahead market. It asserts that extending the AMP will permit NYISO to assess further the coordinated operation of the various mitigation measures that it administers.

The New York Commission asserts that the AMP is needed throughout the year, focuses only on high prices caused by market power, and has not unreasonably disadvantaged generators. It also believes that the AMP complements but does not duplicate the in-city mitigation measures, remains necessary despite price-capped load bidding and virtual bidding, and conforms to the Commission's preference for ex ante mitigation. The Consumer Board maintains that the fundamental rationale for the AMP has not changed, the AMP is working as intended and has not unduly interfered with the performance of competitive markets, NYISO has committed to make improvements in the

AMP before next summer. The Multiple Intervenors also agree that the AMP is necessary to prevent the exercise of market power and believe that the Commission should encourage NYISO to continue to improve the AMP.

Eight parties, as identified above, filed protests concerning NYISO's proposal. Mirant asserts that NYISO has not shown the AMP is needed or addressed the flaws in the AMP identified by the Commission. It also states that the AMP resulted in the improper mitigation of economically justifiable bids during the 2001 Summer Capability Period and is likely to harm consumers by discouraging efficient supply-side and demand-side decisions. EPSA and Williams make similar arguments. EPSA further asserts that mitigation measures should not be a part of the discussions to form a Northeastern RTO. The Independent Producers maintain that the AMP is flawed because it improperly mitigates bids that do not cross the impact threshold required for mitigation, and because it mitigates a generator's bids for quantities that are not large enough to represent an exercise of market power. They further state that some units were improperly mitigated as a result of flawed calculations of reference level curves, that the AMP has not been tied to structural market power problems, and that the AMP improperly inhibits ICAP generators from managing their risk by choosing whether to sell in the day-ahead or in the real-time market. Enron supports the protests of EPSA and the Independent Producers.

Aquila makes many of the arguments described above and also asserts that NYISO's AMP extension request ignores the improvements in market conditions that have occurred over the summer of 2001. Aquila maintains that at a minimum, the Commission should deny NYISO's request to continue the AMP, without prejudice to a subsequent filing by NYISO that address the flaws with the current version of the AMP. Keyspan suggests as an alternative that the AMP should only be extended until April 30, 2002, and only if the 50 MW exemption is extended, the consultation process is revised, a structural power screen is added, and a firm timetable for completion of the items discussed in NYISO's filing is provided.

In addition to arguments made by other protesters, Dynegy asserts that the AMP has not worked as designed, and that on August 9, 2001, 22 of its day-ahead market bids for August 10 for its Roseton Units 1 and 2 had been mitigated. Dynegy maintains that these should not have been mitigated since they did not cross the "conduct threshold" in NYISO's MMP, and that Dynegy still has not received a direct explanation from NYISO as to why its bids were mitigated, although recent NYISO reports and statements indicate that a mistake was made with respect to Dynegy's bids. Dynegy states that an explanation of the performance of the AMP was provided in a memorandum (now available on NYISO's website) made available to those that attended a joint meeting of the Scheduling

& Pricing Working Group and the Market Structures Working Group held on October 9, 2001. According to Dynegy, at that meeting, NYISO claimed that the AMP worked as designed since the coding for the computer programs worked as intended, although certain upstream data inputs caused Dynegy's bids to be improperly mitigated. Further, Dynegy asserts that NYISO has dropped the $100 million day price spike (June 26, 2000) as justification for the AMP and now concedes that the price spike was due to seams problems.

Answers

In its answer, the New York Commission reaffirms its support for the proposed extension of the AMP until October 31, 2002. The New York Commission states that the AMP is necessary to ensure that wholesale prices are just and reasonable in light of the tight supply situation and transmission constraints that continue to exist in New York. In response to the arguments presented by the generators opposing the extension of the AMP, the New York Commission submits that: the AMP adequately distinguishes between high prices associated with market power and high prices associated with scarcity; the AMP properly evaluates the combined impact of generators; and the AMP is needed through the year, not just during the summer capability period during high load periods, given transmission constraints and scheduled and unscheduled outages during shoulder months. Finally, in response to generators' concerns that the AMP may mitigate in certain situations where mitigation should not have taken place, the New York Commission says that it is just as important to protect against the occurrence of market power that goes unmitigated should the AMP not be extended. Absent the AMP, the New York Commission states the harm of permitting unmitigated market power would be far greater than any harm caused by improper mitigation. The New York Commission compares the $11 million withheld from generators as a result of the AMP being in effect during Summer 2001 with the $100 million resulting from a single day of unmitigated market power in 2000.

V. Discussion

NYISO has proposed to extend the same AMP the Commission approved in the June 28 Order, without modification. NYISO states that it is committed to making further refinements to narrow the impact of the mitigation performed under the AMP and states it is committed to making what it refers to as two major improvements prior to Summer 2002: limiting the mitigation to specific zones and hours that fail the impact test and exempting bids of less than 50 MW unless there is a demonstrated market power concern.

Our review of the AMP indicates that it appropriately attempts to distinguish between market power and scarcity. The AMP closes the one day lag inherent in the manual application of mitigation measures in the current MMM and thus advances the ability of NYISO to mitigate market power. Implementation of the AMP is not without concerns, however. The AMP, as noted by NYISO and other market participants, requires some refinements and additional review, e.g., determination of Reference Prices, unnecessary mitigation, application to energy limited resources.

Also, AMP may be one of the many barriers to entry for new generating facilities. We direct NYISO to work with market participants, especially the New York Commission, to examine barriers to entry for new generation. As part of this process, the NYISO may consider exempting new generators from AMP in its March filing. We note that generators in PJM have an exemption from must-run mitigation. If NYISO chooses to exempt new units, NYISO should address whether the exemption would encourage more rapid entry of new generators and the effect of such exemption would have on NYISO's comprehensive mitigation proposal.

NYISO proposes to exempt hydro units from the AMP. NYISO believes that hydro units should not be subject to such mitigation because their volatile bids often reflect their opportunity costs, not market power. The Commission believes this logic applies to all energy limited resources, including those constrained by environmental rules. Therefore, we direct NYISO to work with market participants to determine whether there are other energy limited resources and to develop an appropriate accommodation within the AMP procedures. This coordination should develop both standing protocols as well as an accounting for possible day-to-day considerations affecting bids.

Accordingly, we will extend the AMP until April 30, 2002, subject to the following conditions. We note that NYISO has already indicated that it is committed to working with market participants to determine if other refinements or changes in the AMP design should be considered. We direct NYISO meet with market participants and to file a comprehensive mitigation proposal which addresses the Commission's concerns expressed in this order concerning the AMP, as well as explain how AMP will work in conjunction with other mitigation measures already in effect or proposed for NYISO.[14]

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[14]See Consolidated Edison Company of New York, Inc., 96 FERC ¶ 61,095 (2001), reh'g denied, 97 FERC ¶ 61,050 (2001) (orders directing NYISO to address
(continued...)

In this regard, we note that NYISO has several mitigation measures in place or proposed, including its existing MMM and its proposed AMP, as well as In-City mitigation. We are concerned that these measures may not fully fit together in a way that adequately addresses market power problems while avoiding unnecessary mitigation. On the one hand, these measure may not mitigate all significant exercises of market power. For example, the existing MMM allows suppliers to exercise market power for one day before mitigation goes into effect. On the other hand, other measures may create the potential for unnecessary mitigation.

We also direct NYISO to consider must-run mitigation measures consistent with ISO-NE and PJM. The In-City mitigation measures address market power problems created by transmission constraints into New York City, but not those created by transmission constraints within New York City or elsewhere. PJM and ISO-NE both have mitigation measures which provide for automatic mitigation in defined must-run situations.

Accordingly, we direct NYISO to file a comprehensive mitigation proposal by March 1, 2002 to be effective May 1, 2002. When developing a comprehensive mitigation plan, NYISO should bear in mind that the Commission expects one mitigation plan for the Northeast as part of the RTO process. Therefore, we strongly urge NYISO to collaborate with PJM and ISO-NE in formulating its comprehensive mitigation plan.

<u>The Commission orders</u>:

(A) NYISO's request to extend the AMP is granted until April 31, 2002, subject to the conditions set forth in the body of this order.

(B) Waiver is granted to permit the proposal to take effect November 1, 2001.

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[14](...continued)
concerns regarding the coordination of NYISO's mitigation measures when NYISO files to extend any of its various temporary mitigation measures beyond October 31, 2001).

(C) NYISO is directed to file a comprehensive proposal for mitigation as discussed herein on or before March 1, 2002 to be effective May 1, 2002.

By the Commission.

(S E A L)

David P. Boergers,
Secretary.