97 FERC ¶ 61, 154
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. ER00-3038-001

New York State Electric & Gas Corporation
v. Docket No. EL00-70-002
New York Independent System Operator, Inc.

ORDER ON REHEARING AND REQUESTS FOR CLARIFICATION

(Issued November 8, 2001)

In this order, we deny requests for rehearing of the July 26, 2000 order[1] (July 26 Order) in which we found that several flaws in the market design of the New York Independent System Operator (NYISO) warranted a temporary bid cap of $1,000 per MWh through the Summer 2000 capability period. In particular, we uphold our prior decision to: (1) impose the $1,000 bid cap, (2) deny retroactive refunds, and (3) reject anti-gaming provisions. Here, the Commission reiterates its position that the $1,000 bid cap was necessary to prevent unjustifiable price spikes in New York during the Summer 2000 capability period. We believe that our decision in this order will promote confidence in the NYISO-administered markets, which will increase supply, improve reliability, and in the long run, lower energy prices.

I. $1,000 Bid Cap

The July 26 Order approved a temporary bid cap of $1,000 per MWh in the NYISO-administered energy markets, effective through the Summer 2000 capability period. In that order, the Commission found that:

> Given that NYISO's energy market is currently undergoing significant revisions to correct for existing market flaws, and the fact that there is a lack of demand-responsiveness to price, we

[1]New York Independent System Operator, Inc., et al., 92 FERC ¶ 61,073 (2000).

find that to ensure just and reasonable rates during the summer period, it is necessary to implement some form of bid cap.

On rehearing, PPL EnergyPlus, LLP (PPL) argues that the ongoing revisions of NYISO's market design to correct flaws and to allow for demand-responsiveness are not sufficient grounds for imposing a temporary bid cap. Citing San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service Into Markets Operated by the California Independent System Operator and the California Power Exchange[2] (SDG&E Company) and New York Independent System Operator, Inc.,[3] PPL states that Commission precedent requires that the imposition of a bid cap be based on a finding that there is market power. PPL also cites "Staff Report to the Federal Energy Regulatory Commission on the Causes of Wholesale Electric Pricing Abnormalities in the Midwest During June 1998" (Staff Report) stating that price caps "... create a situation in which prices are not allowed to perform their rationing function ...[and] can distort market signals and prevent the efficient allocation of resources resulting in shortages." PPL further argues that the bid cap will forestall demand response and may impair reliability by decreasing supply. Additionally, PPL argues that the bid cap will interfere with the expectation of owners of Transmission Congestion Contracts (TCCs).[4] It explains that when TCCs were purchased, the buyers relied on the fact that there were no bid caps in the NYISO-administered markets. PPL claims that the imposition of the bid cap will affect the value of a TCC by lowering the spread between energy prices in two locations. It further argues that with the bid cap in place, NYISO will most likely have to make more emergency purchases, the costs of which are spread across all market participants, and that owners of TCCs will in essence thus subsidize market participants that did not hedge risks by purchasing TCCs.

The Commission's decision to impose a temporary bid cap of $1,000 per MWh was based on a finding that the lack of demand-side responsiveness to price and the tight supplies would exacerbate the potential problems for NYISO. The Commission stated that "if the load cannot respond to increases in prices, then generators can submit very high bids that NYISO must accept when supply is tight during peak periods, and price spikes can be magnified." The NYISO-administered energy market suffered from market flaws. Although corrections had been initiated, the Commission was not assured that they would completely resolve the problems or not lead to unintended adverse

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[2] 92 FERC ¶ 61,172 (2000).

[3] 91 FERC ¶ 61,218 (2000).

[4] A Transmission Congestion Contract is a right to collect or obligation to pay congestion rents in the day-ahead market for energy associated with a single MW of transmission between the Point of Injections and the Point of Withdrawal. TCCs are financial instruments that enable buyers and sellers of energy to hedge against fluctuations in the price of transmission.

consequences. NYISO also presented data suggesting that New York energy markets were likely to experience supply shortages during the summer period.[5]

Even though staff reports are not binding on the Commission, we will address PPL's argument that the July 26 Order is inconsistent with the conclusions in the Staff Report that the bid cap would increase the probability of supply shortages. In the July 26 Order, we noted that bid caps could make it difficult to get supplies into the market during the summer peak period. However, there were two offsetting factors that would ensure that sufficient supplies can be obtained to meet load in New York during peak periods. First, load serving entities in New York were required to acquire Installed Capacity (ICAP) sufficient to meet their peak loads plus a reserve margin. Generation capacity designated to meet the ICAP requirement was required to bid into the NYISO's energy market each day and could not be sold outside of New York to the extent that it is required to meet New York load. Second, the NYISO was permitted to pay prices above the cap for emergency energy imports needed to meet load (although the prices paid for such imports were not allowed to set the clearing price in New York).[6]

We also reject PPL's argument that the $1,000 bid will interfere with expectations of owners of TCCs. In the July 26 Order, the Commission found that the bid cap should not have a significant impact on what parties paid for ICAP and TCCs. The Commission's finding was based on the fact that in energy markets administered by PJM Interconnection, L.L.C. (PJM) that are capped at the $1,000 level, prices only on occasion reached the cap. We also noted in the July 26 Order that prices in NYISO's markets had only recently approached this level.

For these reasons, we reject PPL's request for rehearing of the Commission's decision to impose the $1,000 bid cap on the NYISO-administered energy market.

II. Retroactive Refunds

Member Systems[7] request rehearing of the July 26 Order on the grounds that the Commission erred in failing to establish a refund effective date and in declining to provide for retroactive refunds for tariff violations with respect to pro rata curtailment and fixed block pricing methodology. These issues are addressed below.

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[5] See generally 92 FERC at 61,302-03.

[6] Id. at 61,304.

[7] Member Systems consists of Central Hudson & Electric Corporation, Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

A. Establishment of a Refund Effective Date

The July 26 Order also addressed a complaint filed by New York State Gas & Electric Company (NYSEG) against NYISO in Docket No. EL00-70-000. In its complaint, NYSEG requested, among other things, that the Commission establish the earliest refund effective date possible applicable to energy and ancillary markets, and order retroactive refunds of overcharges to the extent that prices were not established in accordance with applicable tariffs or are otherwise subject to correction. On rehearing, Member Systems argue that the Commission erred in rejecting requests to establish a refund effective date. In the July 26 Order, the Commission denied NYSEG's request for retroactive refunds and for establishment of a refund effective date, stating that such refunds would create substantial uncertainty in the New York markets and would undermine confidence in them. The Commission concluded that the remedy it had chosen, the $1,000 per MWh bid cap, was both effective and fair, while the computation of refunds would be complex and would encourage needless litigation. For these reasons, we deny rehearing of this issue.

B. Alleged Tariff Violations

Citing NRG Power Marketing, Inc. v. New York Independent System Operator, Inc. (NRG v. NYISO),[8] Member Systems state that under the filed rate doctrine, the Commission is required to order retroactive refunds, especially where the Commission made a finding of tariff violations with regard to fixed block bids and pro rata curtailment of bilateral transactions. Further, they argue that the Commission lacks the discretion to refuse to order refund relief based solely on the complexity of the computation required when the filed rate doctrine has been violated.

The July 26 Order found that NYISO's curtailment practice was in violation of the Commission-approved Open Access Transmission Tariff (OATT), which required curtailment on a pro rata basis. At that time, however, NYISO's software was incapable of curtailing transactions on a pro rata basis.[9] The pro rata curtailment was implemented by NYISO only in November 2000 and subsequently accepted for filing by the Commission.[10] We believe that because the method for determining pro rata curtailment was not available, certain bilateral transactions that otherwise would have taken place, albeit on a pro rata basis, were curtailed. Certain market participants did not receive

[8] 91 FERC ¶ 61,218 (2000).

[9] Instead of curtailing bilateral transactions with equal decremental bids on a pro rata basis, as required by its tariff, NYISO randomly added pennies to certain transactions to get around its software problem, which resulted in certain transactions being cut completely. See Preliminary Compliance Report Concerning Pro Rata Curtailment Procedures and Fixed Block Generation Pricing, Docket No. ER00-3038, et al. (August 4, 2001).

[10] See New York Independent System Operator, Inc., et al., 95 FERC ¶ 61,121 (2001).

the service they were otherwise entitled to under the tariff, while other customers received more service than they were entitled to. However, no customer paid unjust and unreasonable rates as a result of NYISO's failure to follow its tariff in regard to pro rata curtailment. For this reason, we find that no refunds are due and thus deny Member Systems' request for refunds.

With respect to the fixed block generation pricing, the July 26 Order found that NYISO's practice for setting prices for fixed block generation units was, in certain situations, inconsistent with its locational based marginal pricing (LBMP)[11] methodology. In the July 26 Order, the Commission concluded that when less expensive generation resources are dispatched down for the purpose of accommodating more expensive fixed block resources, the marginal cost of supplying the next increment of load should be equal to the bid price of the least expensive unit that has been backed down, not the bid price of the fixed block resource as was NYISO's practice. The Commission thus directed NYISO to revise its procedures for setting prices accordingly.[12]

However, we modified our decision in the April 26, 2001 (April 26 Order)[13] order acting on rehearings and on a motion and compliance filing by NYISO to implement a "hybrid" fixed block pricing rule in lieu of the Commission's pricing methodology proposed in the July 26 Order. In the April 26 Order, we found NYISO's "hybrid" fixed block pricing proposal to be just and reasonable and accepted it for prospective application, finding that it will promote efficiency in the NYISO-administered energy markets.[14] While we recognized that the hybrid approach differed from the

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[11] LBMP is a pricing methodology under which the price of energy at each location in the New York transmission system is equivalent to the cost to supply the next increment of load at that location.

[12] On August 4, 2001, NYISO filed a "Preliminary Compliance Report concerning Pro Rata Curtailment Procedures and Fixed Block Generation Pricing." With regard to fixed block pricing, NYISO indicated in the report that it could not implement the pricing revisions required by the July 26 Order immediately because it would need to reprogram its software. NYISO indicated it would need several weeks to implement the software modifications and to test those modifications.

[13] See New York Independent System Operator, Inc., et al., 95 FERC ¶ 61,121 (2001).

[14] NYISO describes the "hybrid" rule as combining the best features of the Commission-proposed pricing method and NYISO's current fixed block pricing approach. In particular, NYISO proposed to use the Commission's pricing rule (i.e., to set the LBMP at the bid of the backed-down unit) to calculate all day-ahead LBMPs, and also to determine real-time LBMPs when fixed block units are not actually required to meet load, but are operating due to minimum run-time constraints or under similar inflexible conditions. However, NYISO proposed to use its current pricing rule when the operation of fixed block units is required to meet load, avoid the operation of higher-cost units or satisfy

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approach required by our earlier order, we found that the changes proposed by NYISO would lead to a more accurate calculation of the LBMP as set forth in its Services Tariff. We also noted that the issue of the fixed block pricing arose because NYISO's tariff did not clearly specify how the LBMP would be calculated when lower-priced units were backed down to accommodate fixed block units. To avoid such disputes in the future, we required that NYISO to file compliance tariff sheets to specify how it will treat fixed block units in setting the LBMP under its proposed hybrid fixed block pricing rule.

We deny Member Systems' request for refunds because NYISO was not in violation of its tariff with respect to the fixed block pricing methodology. The Commission's orders on this issue clearly indicate that NYISO's tariff was subject to interpretation regarding how fixed block units would set prices under the LBMP methodology. In the April 26 Order, the Commission overturned its original determination regarding the issue and required prospective implementation of NYISO's proposed hybrid rule. Accordingly, we find that no refunds are due.

III. Anti-Gaming Provisions

The July 26 Order also addressed the requests by the New York State Public Service Commission (New York Commission), Multiple Intervenors, and Municipal Electric Utilities Association that we direct NYISO to revise its tariff to include "anti-gaming" provisions. These anti-gaming provisions consist of two limitations. The first is a provision that would place a $24,000 per MWh limit on payments to suppliers over a 24-hour period to prevent a supplier from bidding huge start-up costs, high minimum generation levels, or long minimum runtimes as a way of evading the bid cap. The second is a provision that would suspend bid production cost guarantee payments[15] for suppliers that bid minimum runtimes, minimum generation levels or start-up costs whenever the Locational Based Marginal Price[16] averages over $200 for the entire 24 hours of a day. The July 26 Order rejected the proposed anti-gaming provisions as unnecessary.

On rehearing, the New York Commission argues that the Commission's ruling on the anti-gaming provisions is inconsistent with its goal of achieving uniformity of market rules in PJM and

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[14](...continued)
reliability requirements.

[15] Bid production cost guarantee payments are designed to ensure that generators recover their minimum generation and start-up costs.

[16] Locational Based Marginal Price is determined in accordance with the pricing methodology under which the price of energy at each location in the New York transmission system is equivalent to the cost to supply the next increment of load at that location.

NYISO. It states that similar anti-gaming provisions are employed in the PJM market and that PJM's experience has shown that bid caps can be easily circumvented without anti-gaming safeguards. Further, the New York Commission argues that even though at the time of the July 26 Order there were no specific instances of gaming, the probability that the bid cap would be circumvented was very high. The New York Commission explains that because most suppliers are active both in PJM and the NYISO market, the recurrence of PJM's experience is likely, and the incentive to circumvent the bid cap in New York is even greater than in PJM due to NYISO's more restrictive ICAP rules. County of Westchester also requests rehearing of the Commission's decision to reject the anti-gaming provisions.

We will deny rehearing on this issue, without prejudice to considering a proposal for an anti-gaming provision in a separate filing. We are sympathetic to the New York Commission's arguments on rehearing that anti-gaming provisions in New York could prevent the bid cap from being circumvented, and would bring greater uniformity of market rules in PJM and NYISO. However, the anti-gaming provisions have been proposed by the New York Commission in its comments as an intervenor in this docket, and not by NYISO in its filing. Thus, not all parties have had an opportunity to comment on the New York Commission's proposal in this docket, and we are reluctant to impose the anti-gaming provisions on NYISO without the benefit of comments from NYISO and other interested parties.

IV. Requests for Clarifications

In its initial filing, NYISO proposed to impose a bid cap of $1,300 per MWh and requested a July 6 effective date. The July 26 Order approved a bid cap of $1,000 MWh with an effective date of July 26, 2000. Orion Power New York GP, Inc. (Orion) and Independent Power Producers of New York, Inc. (IPPNY) request that the Commission clarify that NYISO cannot impose bid or price caps until after the date on which the Commission issues an order approving the filing. They state that NYISO imposed the $1,300 cap on July 6, 2000. Orion and IPPNY argue that when a proposed cap is rejected, it is impossible to provide for realistic refunds due to the complexity of replicating market prices.

We agree with Orion and IPPNY that implementation of a bid cap before a Commission action might require refunds, which would be difficult to determine. Section 205(d) of the FPA[17] and Rule 35.11 of Commission's Rules of Practice and Procedure,[18] however, permit the Commission to waive, for good cause shown, the 60-day prior notice requirement. Moreover, the Commission may

[17] 16 U.S.C. § 824d(d) (1994).

[18] 18 C.F.R. § 35.11 (2001)

also waive this requirement in other circumstances.[19] Having said this, we do not expect NYISO to implement rate changes until Commission authorization, and will look with disfavor on requests for waiver in such circumstances.

The Commission orders:

The requests for rehearing of the July 26 Order are hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Linwood A. Watson, Jr.,
Acting Secretary.

[19] See, e.g., Central Hudson Gas & Electric Corp., 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).