97 FERC ¶ 61, 155
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 Nos. ER00-1969-002 and ER00-1969-003
Niagara Mohawk Power Corporation v. New York Independent System Operator, Inc.	Docket Nos. EL00-57-001 and EL00-57-002
Orion Power New York GP, Inc. v. New York Independent System Operator, Inc.	Docket Nos. EL00-60-001 and EL00-60-002
New York State Electric & Gas Corporation v. New York Independent System Operator, Inc.	Docket Nos. EL00-63-000 and EL00-63-002
Rochester Gas and Electric Corporation. v. New York Independent System Operator, Inc.	Docket Nos. EL00-64-000 and EL00-64-002

ORDER ON REHEARING

(Issued November 8, 2001)

In this order, we deny requests for rehearing of the May 31, 2000 order (May 31 Order).[1] In that order, we accepted New York Independent System Operator, Inc.'s (NYISO) request for bidding restrictions on the 10-minute non-spinning operating reserves (NSR)

[1]New York Independent System Operator, Inc., et al., 91 FERC ¶ 61,218 (2000).

market on an interim basis. Also, we rejected NYISO's request to: (1) impose a bid cap on spinning reserves, (2) re-bill for operating reserves over the period of March 1 through March 28, and (3) establish alternative dispute resolution (ADR) procedures to facilitate re-billing of rates charged over the period of January 29, through March 28. We deny rehearing of all those matters. In this order, we also dismiss as moot KeySpan-Ravenswood, Inc.'s (KeySpan) request for rehearing and clarification of the order issued on July 31, 2000 (July 31 Order)[2] granting NYISO an extension of time to comply with the May 31 Order. 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.

Discussion

I. Issues on Rehearing of the May 31 Order

A. Self-Supply

The May 31 Order addressed complaints filed by Niagara Mohawk Power Corporation (Niagara Mohawk) and by Rochester Gas and Electric Corporation (Rochester G&E) alleging that NYISO is violating its Open Access Transmission Tariff (OATT) and the Commission's policy by not permitting transmission customers to self-supply operating reserves. The Commission found that the parties should be given the option of self-supplying without being required to bid into the NYISO-administered markets. We therefore directed NYISO to meet with its members and devise a plan that will permit its customers to self-supply outside of the NYISO market. However, the Commission stated that the NYISO may require that the right of customers to self-supply comes with the obligation to self-supply generation capacity that meets all applicable technical requirements, including locational requirements. Further, the Commission directed NYISO to consider ways of allowing generators in the west to self-supply load in the east if they acquire sufficient transmission capacity to deliver capacity and energy to the east.

On rehearing, Niagara Mohawk and Rochester G&E argue that the Commission failed to address their claims that Section 6.0 of Schedule 4 of NYISO's Administration and Control Area Services Tariff (Services Tariff) already expressly requires NYISO to permit them to self-supply operating reserves. They argue that Niagara Mohawk should be allowed to self-supply by designating its Albany Steam Station and the Blenheim-Gilboa Pumped Storage Facility as sources of operating reserves. Citing NRG Power Marketing, Inc. v. New

[2] New York Independent System Operator, Inc., et al., 92 FERC ¶ 61,134 (2000).

Independent System Operator, Inc. (NRG v. NYISO),[3] they further maintain that the NYISO's tariff violations can only be fully remedied by requiring NYISO to refund, for the period beginning January 29, 2000, all payments they made for amounts of operating reserves that they would have been able to self-supply, had NYISO complied with its tariff.

We will deny Niagara Mohawk and Rochester G&E's request for refunds because the May 31 Order did not find that NYISO was in violation of its tariff regarding the implementation of self-supply arrangements. The Commission determined that NYISO's practice of implementing self-supply by requiring parties to bid into NYISO's markets was not consistent with the intent of Order No. 888.[4] Specifically, in the May 31 Order, the Commission did not rule out the possibility that an ISO could permit self-supply through its market process. We acknowledged that an ISO might implement self-supply through the ISO's market process, provided that "...the market would place a customer in the same financial position as supplying Ancillary Services on its own behalf...." However, the Commission was concerned that the NYISO's current mechanism did not meet this standard, given the current problems experienced by the NYISO in its ancillary service markets. We recognized that there may be situations where parties, including Niagara Mohawk, could obtain operating reserves at lower prices outside the NYISO's market process. Therefore, we found that the parties should be given the option of self-supplying without being required to bid into the NYISO's markets. Accordingly, the Commission directed NYISO to meet with market participants to undertake prospective measures to permit self-supply outside of the NYISO market in the manner envisioned by Order No. 888 and to file its plan and findings with the Commission in a September 1, 2001 report.[5]

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[3] 91 FERC ¶ 61,346 (2000).

[4] Promoting Wholesale Competition Through Open Access Non-discriminatory transmission services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part, remanded in part on other grounds sub nom., Transmission Access Policy Study Group, et al. v. FERC, 225 F. 3d 667, Nos. 97-1715 et al (D.C. Cir.), cert. granted in part, New York v. FERC, 121 S.Ct. 1185 (2001).

[5] At present, the self-supply feature still has not been implemented because NYISO lacks the technical capability to allow self-supply arrangements. The Commission addressed this issue in the order establishing mediated procedures to facilitate the formation of a single Regional Transmission Organization in the Northeast. In that order, the Commission

(continued...)

Niagara Mohawk, Rochester G&E, and LSE Intervenors also assert that there is no reliability rule prohibiting the provision of operating reserves from the west. They maintain that the NYISO has inexplicably interpreted Section 4.1.1 of the Reliability Rules to require the purchase of 1200 MW of 10-minute reserves east of the eastern constraint at all times, even in hours when the largest contingency in the New York Control Area is below 1200 MW. They argue that New York Power Pool (NYPP) Operating Procedure 2-23 (OP 2-23),[6] which the NYISO cites as justification for this policy, does not require 1200 MW of 10-minute reserves when the largest contingency east of Central East is less than 1200 MW, and allows operating reserves to be provided west of the Constraint through reserved transmission.

The Commission addressed this issue in the May 31 Order, where we stated that "... it is not clear why the NYISO should not be able to rely on western suppliers when there is no congestion present. Moreover, we do not understand why procedures cannot be developed to permit the ISO to procure ancillary services from western suppliers, even during constraints, if it would lead to overall lower costs of energy and ancillary services ..." [7] In that order, we directed the NYISO to develop procedures for procuring reserves from western suppliers and for permitting self-supply of operating reserves from western suppliers. These procedures were to be filed as part of the comprehensive compliance filing and report by September 1, 2000, to become effective on November 1, 2000 (September Report). NYISO's September Report showed that there was no immediate solution that would allow transmission capacity across the Central-East constraint to be used to move western operating reserves to the east.[8] The order issued on November 8, 2000 addressing NYISO's September Report established a technical conference for the parties and the Commission staff to develop priorities and deadlines for addressing various problems,

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[5](...continued)
noted that "[w]hile NYISO has a full schedule of market enhancements that it needs to work on to ensure reliable and economic service this summer, it should allocate sufficient resources to address the self-supply issue as soon as possible consistent with that schedule."

[6] Niagara Mohawk and Rochester G&E state that while OP 2-23 was promulgated by the NYPP, it is a part of the NYISO's "filed rates and agreements" by virtue of Section 6.01 of the NYISO Agreement.

[7] See supra note 1, at 61,799.

[8] New York Independent System Operator, Inc., 93 FERC ¶ 61,142, 61,432 (2000).

including the problem of self-supplying operating reserves from west.[9] The order after the technical conference approved NYISO's priority list, which assigned a lower priority to this project.[10]

Niagara Mohawk and Rochester G&E also argue that the Commission should examine the validity of the market-based rate authority of KeySpan and its affiliates despite the Commission's finding that the Herfindahl-Hirshman Index (HHI) for 10-minute NSR would be 2,848 after inclusion of the Blenheim-Gilboa facility in the operating reserve resource mix.

The May 31 Order addressed this argument; it suspended market-based pricing in the NSR market until November 1, 2000 for all suppliers, including KeySpan and its affiliates, by imposing a $2.52 bid cap, plus opportunity costs, and mandatory bidding requirements. The Commission extended these measures in the November 8, 2000 order, finding that the market was still highly concentrated. The Commission stated that the bid cap would remain in place until it is demonstrated that improvements in the non-spinning reserves market eliminated the need for it.[11] The issue of the market-based authority will be revisited if NYISO or any other interested party makes a filing challenging the NSR bidding restrictions.

B. The $2.52 Bid Cap

The Long Island Power Authority and its subsidiary LIPA (collectively, LIPA) argue that the NYISO's $2.52 bid cap in the 10-minute NSR market is not supported because it rests on the NYISO's HHI market concentration analysis for 10-minute NSR, which LIPA claims is flawed. LIPA maintains that a more meaningful measure of market power is the percentage of hours during which a single market participant is essential to serve the market, i.e., is a "pivotal bidder." LIPA argues that a bidder is pivotal and thus has market power if at least some of the bidder's supply must be used to meet demand -- that is, if supplies from all other suppliers are not large enough to meet total market demand.

LIPA also asserts that the choice of $2.52 as the bid cap is not justified because that figure is neither the product of a competitive market nor a cost-based figure. Rather, the $2.52 figure, which was the highest price during the initial 69-day period of operations (except for one hour), reflects only the efforts of bidders to learn how to bid. Further, LIPA

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[9] Id. at 61,433.

[10] See New York Independent System Operator, Inc., 94 FERC ¶ 61,371 (2001).

[11] See supra note 8, at 61,437 (2000).

maintains that there is no basis for concluding that the structure of the 10-minute reserves market was different in the November 18, 1999 - January 29, 2000 period than in the January 29, 2000 - March 10, 2000 period. In addition, LIPA states that the Commission's decision to require the NYISO to pay lost opportunity costs to generators selected to provide 10-minute NSR makes the $2.52 bid cap unnecessary. In LIPA's view, this requirement will moderate prices for NSR because generators will be more certain of covering their costs and will more readily compete for the right to earn lost opportunity costs by bidding aggressively low to supply NSR. Finally, LIPA asserts that the $2.52 bid cap does not compensate generators for the risks and penalties to which bidders are exposed, such as the problem of over-commitment of gas turbine units.

We will deny LIPA's request to reject the $2.52 bid cap. Our conclusion that a cap is needed was not based exclusively on an HHI analysis. We also took note that the conditions based upon which market-based rate authority for ancillary services was granted do not match the current operational realities and that the amount of NSR capacity offered into the market was reduced while prices dramatically increased. As we stated in the May 31 Order:

> In addition, while we make no finding here that any supplier engaged in the withholding of capacity, the NY ISO has shown that capacity that was previously offered to the market is no longer being offered and that the decline in supply offers correlates with a dramatic increase in bid prices. The NY ISO has shown that, as a result, the rates paid by transmission customers for non-spinning reserves rose by approximately $65 million from January 29 through March 10, 2000. Taken together, we believe that the evidence present by the NY ISO is sufficient to call into question our continued reliance on market-based rates for non-spinning reserves.[12]

LIPA does not dispute that NSR rates increased by $65 million beginning on January 29, when the bidding behavior of suppliers changed.

Moreover, while LIPA suggests that a pivotal bidder analysis of competition would be more accurate, LIPA does not provide any quantitative results of such an analysis to aid in our decision here. In any event, LIPA's suggestion to use a pivotal bidder analysis comes at a late stage of this proceeding -- in its request for rehearing after the May 31 Order was issued. LIPA could have made these arguments in a timely fashion so that the Commission could consider them in addressing the issues presented by this case. These arguments are not properly made on rehearing.

We also are not persuaded by LIPA's arguments about the specific level of the cap. We continue to believe that compensation under the May 31 Order will be adequate. During

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[12] See supra note 7.

the first 69 days of NYISO operations, sufficient suppliers were willing to provide NSR at $2.52 or less to enable the NYISO to procure adequate NSR capacity in every hour except one. LIPA has offered no reason why the greater payment allowed by the May 31 Order -- of $2.52 plus lost opportunity costs -- should be inadequate compensation for providing NSR. In any event, the May 31 Order permitted any generator that believes that it is unable to recover its costs under the cap to file a proposed cost-based bid limit under section 205 of the Federal Power Act (FPA).[13] No one has made such filing at this time.

C. Relation of Spinning Reserves (SR) to Non-Spinning Reserves (NSR)

LIPA also maintains that the Commission erred in interpreting Section 4.21 of the NYISO's Services Tariff as requiring the NYISO to set the market clearing price of 10-minute SR no lower than that for 10-minute NSR. LIPA claims that Section 4.21 of the Services Tariff and Section 4.0 of Rate Schedule 4 explicitly require the NYISO to determine day-ahead availability prices for 10-minute SR and 10-minute NSR separately. LIPA further alleges that the May 31 Order's approval of this divergence from the NYISO tariff is inconsistent with the Order's requirement that the NYISO pay lost opportunity costs to providers of 10-minute NSR. LIPA argues that the Commission's directive to pay lost opportunity costs to providers of NSR should remove one of the distorting factors that caused generators in the past to submit higher bids for NSR than for SR.

We disagree. As we stated in the May 31 Order, while the NYISO's tariff lacks detail with regard to pricing of 10-minute SR, the NYISO's method of establishing SR prices is consistent with its tariff and is reasonable. Section 4.21 of the NYISO's Services Tariff states that suppliers of each category of operating reserves shall be paid the applicable market clearing price. NYISO's bidding provision ensures that the SR price will clear the market. If the SR price were lower than the NSR price, generators would not want to be in the SR market; they would bid into the NSR in order to receive the higher price, resulting in less SR supply. Further, the implication of LIPA's argument is merely that this feature of the NYISO's practices may never be invoked in the future, because NSR providers may always bid below SR bids. That is, LIPA argues that paying lost opportunity costs to NSR removes an incentive for generators to submit higher bids for NSR than for SR. LIPA does not explain why the NYISO's practice is harmful, and we continue to be convinced that it is desirable.

[13] 16 U.S.C. § 824d (1994).

The LSE Intervenors[14] argue that the Commission's concern that suppliers of SR will bid into the market for NSR ignores the provisions of the Services Tariff and related agreements. They believe that because generators providing SR are by definition already synchronized to the New York State Power System, these resources cannot be started, synchronized and loaded within ten minutes, as required to qualify as a provider of 10-minute NSR. They also assert that the types of generation used to provide these two services are very different. 10-minute NSR are generally provided by peaking hydro, pumped storage, and combustion gas turbines designed for quick start-up and brief operations in periods of peak demand only, whereas SR are provided by relatively large fossil-fueled plants that are generally not capable of starting up quickly enough to meet the 10-minute NSR requirements. Thus, they conclude, it is unlikely that facilities providing SR will also be able to supply NSR. With the use of a hypothetical, the LSE Intervenors also dispute the Commission's conclusion that applying the Services Tariff according to its express provisions would tend to discourage generators from supplying SR. They claim that their interpretation of NYISO's tariff would provide all suppliers of SR with economically efficient incentives for supplying such reserves without forcing consumers to pay the supra-competitive prices that result from the NYISO's misapplication of the Services Tariff whenever distortions in the NYISO's market for 10-minute NSR cause the price of lower quality NSR to rise above the price of higher quality SR.

We disagree with LSE Intervenors. SR are reserves of higher quality than NSR because SR can be dispatched more quickly than NSR. Thus, the price of SR should not be less than the price of NSR. Moreover, generation capacity that meets the requirements to provide SR (i.e., it is currently synchronized to the grid and is capable of providing the specified amount of energy within ten minutes) necessarily meets the requirements to provide NSR (i.e., it can be started, synchronized to the grid, and provide the specified amount of energy within ten minutes). Indeed, it is because SR capacity can meet the requirements to provide NSR that the Commission allowed the ISO to substitute SR capacity for NSR capacity offered at a higher bid. Therefore, it is important that the price of SR at least matches the price of NSR, so that SR is not diverted to the NSR market.

The Municipal Electric Utilities Association of New York State (MEUA) alleges that the May 31 Order is inconsistent with the intent of the Commission's January 27, 1999 order[15] approving the original NYISO proposal, since the latter order intended that the NYISO's independent operating reserve markets act as hedges on each other. MEUA explains that if the price of SR is lower than the price of NSR, the NYISO would be required

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[14] Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation, and Rochester Gas and Electric Corporation.

[15] Central Hudson Gas & Electric Corporation, et al., 86 FERC ¶ 61,062 (1999).

to purchase SR instead of NSR. MEUA states that the result of the May 31 Order is backwards, since it rewards providers in the SR market with the above-market prices paid in the NSR market.

MEUA's request for rehearing was filed late on July 3, 2000. Under Section 313(a) of the Federal Power Act (FPA), a request for rehearing must be filed within 30 days after issuance of a final order in a proceeding.[16] The Commission and the courts have firmly established that the 30-day time period cannot be waived.[17] Thus, we dismiss MEUA's request for rehearing on this basis.

D. Retroactive Rate Recalculation

In its March 27, 2000 filing in Docket No. ER00-1969-000, the NYISO, among other things, requested authority to re-bill for the costs of operating reserves during the period from March 1 through March 28, 2000, when the highest prices in reserves were experienced, based upon a weighted average of operating reserves prices from previous periods. In addition, the NYISO requested the implementation of a settlement process, in accordance with the Commission's alternative dispute resolution (ADR) procedures, in order to resolve whether the pricing of 10-minute reserves has been at proper levels since January 29, 2000.

In the May 31 Order, the Commission denied these requests and stated that such changes should be prospective because customers cannot effectively revisit their economic decisions in these circumstances. The Commission declined to use its ADR procedures because they are voluntary, and several parties, including Central Hudson Gas & Electric Corporation and Orion Power New York GP, Inc., had already refused to participate, as they did not believe that an ADR settlement process would resolve the issue. The Commission recognized that the NYISO is responsible for correcting prices that are calculated incorrectly and is permitted to make retroactive changes in order to correct mistakes in the computation or calculation of prices, within reason. Here, the Commission continued, the NYISO is not proposing to correct prices that were calculated incorrectly, but to adjust prices to correct market-based rates through negotiations among the interested parties. The Commission concluded that given its finding of market concentration, as well as other market flaws in the operation of the NYISO markets, it would be very difficult for the NYISO, or any party, to recalculate the correct market-based rates.

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[16] 16 U.S.C. §§825 l(a) (1994).

[17] See New England Power Pool, 89 FERC ¶ 61,022 , at p. 61,076 & nn.3-4 (1999) (citing numerous cases).

The LSE Intervenors and the NYISO argue that market-based pricing is permissible only when competitive market forces or adequate regulatory back-stops are in place. They assert that, given the Commission's findings that called into question continued reliance on market-based pricing for NSR, section 205 of the FPA requires the Commission to allow the recalculation of rates for the prior periods at issue in this case.
The New York State Consumer Protection Board (NY Consumer Board) makes similar arguments.

The Commission rejects these arguments. The existing rate may have become unjust and unreasonable, but changes in rates under section 206 of the FPA[18] are made effective only prospectively or during the refund effective period. Even if the Commission found that the rates charged were unjust and unreasonable, rate recalculation would be impermissible because the Commission's authority to order refunds is limited to the period after the refund effective date of the proceeding (for the 15 month period) or prospectively from the date of the Commission order resolving the dispute.[19] Accordingly, the May 31 Order correctly denied NYISO's request to initiate an ADR settlement process to facilitate retroactive re-billing of the charges for the period before the refund effective date.

The LSE Intervenors also claim that the Commission erroneously concluded that the NYISO did not propose to revise its charges for operating reserves retroactively to comply with the requirements of its tariff and related agreements. They assert that the NYISO only proposed to start with an ADR procedure but, if that failed, to make a final determination of prices on such basis as may be ordered by the Commission. They further argue that, in any event, the Commission may not rely on any actions or inactions of the NYISO as a justification for a decision not to enforce the NYISO's filed rates. In addition, the LSE Intervenors argue that the Commission overstates the difficulty of correcting NYISO's tariff violations and that the Commission may not decline to enforce NYISO's filed rates simply because it is difficult to do so.

The Commission also rejects these arguments. The Commission did not reject the proposal to revise charges retroactively because the NYISO happened to propose to start with an ADR procedure. Rather, as described above and in more detail in the May 31 Order, it was because it is not legally permitted. With respect to the argument that the Commission should order re-billing in order to enforce NYISO's filed rate, section 206 of the FPA does not permit the Commission to require refunds of unjust and unreasonable rates

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[18] 16 U.S.C. § 824e (1994).

[19] See San Diego Gas & Electric Company v. Sellers of Energy Ancillary Service Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange, et al., 96 FERC 61,120, 61,505 (2001).

charged prior to a date 60 days after the filing of a complaint. To order such refund would contravene explicit refund limitations that the Congress put in section 206 of the FPA.[20]

In its request for rehearing, the NYISO for the first time proposes that any supplier of 10-minute NSR that was selected during the prior period but whose bidding behavior during that period "deviated significantly" from its bidding behavior before that period be paid $2.52. Other suppliers would be paid at the level of their actual bids, even if higher than $2.52. In addition, SR payments that were skewed upward by the artificially high 10-minute NSR prices would be reset to the highest offer from units providing SR, but no further adjustment for lost opportunity costs would be made. The NYISO attaches to its rehearing request an affidavit by its Market Advisor indicating that he has reviewed this methodology and considers it to be a reasonable approach to determining just and reasonable rates for operating reserves during the prior period.

We will not entertain NYISO's proposal that NSR suppliers that "deviated significantly" from their prior bidding behavior be paid $2.52. NYISO failed to include this proposal in its prior filing. Absent compelling reasons demonstrated by the petitioner, the Commission, as a general matter, will not entertain issues raised for the first time on rehearing.[21] Thus, we are dismissing NYISO's request for rehearing on the ground that it raises issues that NYISO could have, but did not, raise prior to the May 31 Order.

The LSE Intervenors argue that the NYISO's practices were contrary to the Services Tariff and related agreements in two fundamental ways. First, the NYISO improperly excluded the Blenheim-Gilboa pumped storage facility from competing to supply 10-minute reserves. Second, the NYISO purchased more ten-minute reserves that it was authorized to purchase under the terms of the Services Tariff and related agreements (e.g.,

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[20] Id. at 61,506 .

[21] See generally Sierra Pacific Power Company, 96 FERC ¶ 61,050 (2001); Niagara Mohawk Power Corporation, 96 FERC ¶ 61,011 (2001); New England Power Pool, 95 FERC ¶ 61,346, 62,305 (2001); Baltimore Gas and Electric Company, et al., 92 FERC ¶ 61,043, 61,114 (2000); Baltimore Gas & Electric Company, et al., 91 FERC ¶ 61,270, at 61,922 (2000); Northern States Power Company (Minnesota), et al., 64 FERC ¶ 61,172, at 62,522 (1993); and Cities and Villages of Albany and Hanover, Illinois, et al., 61 FERC ¶ 61,362, at 62,451 (1992).

Section 4.1.1 of the Reliability Rules)[22], thereby needlessly increasing demand for 10-minute reserves.

In the May 31 Order, we addressed the first of LSE Intervenors' concerns. The May 31 Order stated that the Blenheim-Gilboa pumped storage facility was not available to supply operating reserves due to NYISO's software flaws. The remedy chosen by the Commission was of a prospective nature. NYISO was directed to add the Blenheim-Gilboa pumped storage facility to its software for spinning and non-spinning reserves as quickly as possible and to address this issue in a September 1 Report.[23] . the question here is what is the fairest and most efficient way to ensure that the participants in the New York market receive the benefits of a well functioning competitive market. The Commission believes that the procedures it has chosen and the determinations it has made are best suited to accomplish these ends within the bounds of the Federal Power Act.

Additionally, Section 4.1.1 of Reliability Rules provides in pertinent part that:

> The Minimum Operating Reserve Requirement of the ISO shall be the sum of:
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> A. Sufficient Ten (10) Minute Reserve to replace the operating capability loss caused by the most severe contingency observed under Normal Transfer Criteria. ...

We find that Section 4.1.1 of Reliability Rules provides a minimum operating reserve requirement, but does not prohibit NYISO from procuring additional reserves to meet the state-wide operating reserve requirement and to maintain the system's reliability. Therefore, NYISO did not violate its tariff and we are unable to order retroactive rate calculations.

The LSE Intervenors argue that the Commission erred by not finding that the NYISO had the authority and the obligation to correct past prices under the Temporary Extraordinary Procedures (TEP) of its OATT. They argue that the Commission should have required the NYISO to exercise its TEP authority to make the same corrections retroactively that the Commission ordered prospectively. The NY Consumer Board argues that the Commission erroneously relied on the NYISO's failure to exercise its TEP authority, since the

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[22] Section 2.158 of the Services Tariff incorporates by reference Reliability Rules into NYISO's tariff. See Application for Rehearing of LSE Intervenors, Docket No. ER00-1969-002, et al., at 18 (June 30, 2000).

[23] The Blenheim-Gilboa pumped storage facility became available to supply operating reserves on November 1, 2000. See New York Independent System Operator, Inc.'s Status Report, Docket No. ER00-3591-002, at 3 (October 26, 2000)

Commission stated that the TEP are not designed to address market power concerns. The LSE Intervenors also believe that the Commission's approval of a price recalculation in NRG v. NYISO requires retroactive recalculation of the prices here.

The Commission will not require NYISO to exercise its TEP authority retroactively in this case. The NYISO's TEP authority was not designed to be used in circumstances such as these. NRG v. NYISO is clearly distinguishable, since it involved limited, simple, and precise corrections to ensure that prices conformed to the filed rate.

The NYISO further argues that consumers did not make economic choices to pay the high rates for operating reserves during the retroactive period in question. It asserts that LSEs, who are the NYISO's direct customers, are required to pay for the NSR purchased by the NYISO except to the extent they can self-supply. Moreover, NYISO argues that the ultimate end-use customers did not see, let alone have a chance to make economic decisions on the basis of, the high real time NSR prices. The NY Consumer Board makes a similar argument. The NYISO also argues that the Commission should not encourage market power abuse by arbitrarily precluding retroactive action under section 205 of the FPA.

The Commission agrees that when a market is not functioning properly, the choices that customers have may be unnecessarily restricted. However, as a general matter, the best check on market power, and the best way to ensure a full array of economic choices, is to have adequate infrastructure, sound market rules, proper incentives, and continuous and effective monitoring of market structure and behavior and prompt prospective correction of detected flaws. Moreover, in the absence of a tariff violation, we cannot order the retroactive calculation of prices under the FPA. As we have found no tariff violations in this instance, we cannot order the relief requested by the NYISO.

II. KeySpan's Request for Rehearing of the July 31 Order

The July 31 Order denied as moot NYISO's motion for a stay of the Commission's refusal to allow an interim re-determination of operating reserves charges for NYISO's March bill pending the Commission review of requests for rehearing of the May 31 Order. In the July 31 Order, the Commission found that there were grounds for granting NYISO's request for stay. The Commission, however, reasoned that "[i]n light of the potential difficulties of undoing an initial decision on the billing issue," instead NYISO should be granted an extension of time to comply with the May 31 Order's directives until 15 days after the Commission issues a merits order on pending rehearings. Accordingly, the Commission allowed NYISO to recalculate operating reserves prices on an interim basis for its billing for the month of March.

On rehearing, KeySpan argues that the Commission erred in allowing NYISO to retroactively adjust its March bills pending rehearing requests on the retroactive relief issues. KeySpan contends that the July 31 Order is inconsistent with the May 31 Order that denied any retroactive re-billing adjustments for the period of January 29, 2000 through March 28, 2000. Alternatively, KeySpan requests clarifications of the July 31 Order, should the Commission decide on rehearing to permit the re-determination of charges.

The July 31 Order granted NYISO an extension of time to comply with the May 31 Order pending Commission review of the retroactive billing issue on rehearing. In this merits order, we reaffirm our initial decision to disallow retroactive refunds for the period of January 29 through March 28, 2000. For this reason, we dismiss KeySpan's request for rehearing and clarification of the July 31 Order as moot. To the extent that NYISO has not already done so, it is directed 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. KeySpan's request for clarification is dismissed as moot.

The Commission orders:

(A) The requests for rehearing of the May 31, 2000 order are hereby denied, as discussed in the body of this order.

(B) KeySpan-Ravenswood, Inc.'s request for rehearing and clarification of the July 31 Order is hereby dismissed as moot.

(C) NYISO is hereby directed to recalculate operating reserves charges based on the rates that were in effect prior to March 28, 2000, as discussed in the body of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.