UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	Docket Nos.	ER01-3001-019 ER03-647-011

REQUEST TO ACCEPT RESPONSE AND RESPONSE OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC. TO NEW YORK TRANSMISSION OWNERS COMMENTS ON THE ICAP DEMAND CURVE COMPLIANCE FILING

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, the New York Independent System Operator, Inc. ("NYISO") hereby responds to comments submitted in this proceeding by the New York Transmission Owners ("New York TOs").[1] The comments ("TO Comments") were submitted in response to the NYISO's January 15, 2008 compliance filing report on the implementation of the ICAP Demand Curves ("Demand Curves Report").[2] The TO Comments are limited to an assertion that the Demand Curves Report fails to comply with the Commission's directive to provide an analysis of whether there has been any significant withholding of installed capacity in the Rest of State area ("ROS").[3] The New York TOs' assertions that the Demand Curves Report does not comply with the Commission's instructions is simply wrong. Moreover, the Demand Curves Report shows that there is no basis to conclude that there has been significant withholding in the ROS markets for Installed Capacity

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[1] The New York Transmission Owners submitting the comments to which the NYISO is responding are: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

[2] The NYISO's filing also reported on its progress in implementing Demand Side Management programs, and on the development of new generation projects in the New York Control Area ("NYCA"). Those portions of the January 15 filing are not relevant here.

[3] TO Comments at 1. The ROS is the area in New York outside of New York City and Long Island.

("ICAP").[4] Accordingly, the TO Comments should not be considered in the Commission's evaluation of the Demand Curves Report.

The Commission's rules allow parties to answer comments as a matter of right. See 18 C.F.R. § 385.213(a)(3). If the Commission decides to view the TO Comments as a protest, the NYISO respectfully requests permission to respond to them. The Commission has allowed answers when they correct inaccurate statements and provide additional information that will assist the Commission, or are otherwise helpful in the development of the record in a proceeding, and this filing meets those standards.[5]

I. The Demand Curves Report Complies with the Commission's Directives

A. The Required Analysis of ROS Withholding

As the TO Comments note, the Commission issued an order on October 26, 2007 accepting the NYISO's previous report on the implementation of its ICAP Demand Curves.[6] The Oct. 26, 2007 Order states that

> in the [Demand Curves] report due in January 2008 and in future reports, NYISO must provide a complete analysis of withholding (including an analysis of bidding behavior) in the Rest of State region, (as well as in the other regions of New York State). To the extent that NYISO is able to estimate the amount of unsold capacity that reflects withholding, it should present that estimate and its likely effects on capacity prices. To the extent that NYISO is unable to determine the amount of unsold capacity that reflects withholding, it should include an analysis similar to that provided in NYTOs' comments to estimate the upper bound of the effect of withholding on capacity prices.[7]

In a footnote to the first sentence quoted above, the Commission stated:

[4] Unless otherwise specified, capitalized terms used in the filing have the meanings specified in the NYISO's Market Administration and Control Areas Services Tariff ("Services Tariff").
[5] *See, e.g.*, *New York Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,188 at P 7 (2004) (accepting NYISO answer to protests because it provided information that aided the Commission in better understanding the matters at issue in the proceeding).
[6] *New York Indep. Sys. Operator, Inc.*, 121 FERC ¶ 61,090 (2007) ("Oct. 26, 2007 Order").
[7] *Id*. at P 37.

> We agree with NYISO that withholding is less likely to occur when: (1) the amount of unsold capacity in the Rest of State does not exceed a few percent of available supplies; (2) capacity purchased has consistently exceeded the minimum requirements; and (3) prices have been below the costs of entry. Nevertheless, in the report due in January 2008 and in future reports, NYISO's analysis of bidding behavior in the Rest of State should include, for capacity offers that were not accepted, an examination of how many (if any) of the offers significantly exceeded a reasonable estimate of their going forward costs.[8]

B. The Demand Curves Report Provides the Required ROS Analysis

The New York TOs commented exclusively about ROS capacity that was offered into a NYISO-administered auction but remained unsold (referred to as "unsold" capacity), as distinct from capacity that was not offered at all (referred to as "unoffered" capacity). In essence, the New York TOs claim that the Demand Curves Report is deficient because it does not compare the going-forward costs of each resource with unsold capacity with the offers to sell capacity from each such resource.[9] The New York TOs' claim ignores the fact that the NYISO does not have data on the going-forward costs of each capacity resource located in the ROS, and thus is not in a position to apply a going-forward-costs test to make an economic withholding determination. Accordingly, the NYISO instead complied with the second prong of the Commission's directive in the Oct. 26, 2007 Order, by doing an analysis of the upper bound of any possible effects on prices from possible economic withholding of ROS capacity. In effect, this analysis is equivalent to making the assumption that such capacity resources have going-forward costs of zero and, accordingly, was offered as a price taker in the spot auction. In its orders approving other market power mitigation measures in New York, the Commission has

[8] *Id.*, n.19.
[9] TO Comments at 5-6.

reinforced the principle that withholding (conduct) by itself is not evidence of strategic behavior in the absence of significant price effects (impact).[10]

The analysis in the Demand Curves Report shows that the quantities offered but not sold are small, and that any price effects would at worst be minimal, if not non-existent. The Demand Curves Report shows that the average monthly quantity of unsold ROS capacity has been quite small—at most approximately 1% of available capacity during the 2006-2007 Capability Year—and indeed "there was virtually no unsold capacity during the Summer 2007 and the Winter 2007-2008 Capability Periods."[11] As a result: "Given the slopes of the NYCA ICAP Demand Curves for these two Capability Periods, if all offered capacity was sold, then the spot auction prices would have been to lower by, approximately, $0.40/kW-month in Summer 2006 and ostensibly unchanged in Summer 2007."[12] Moreover, the "capacity offered and purchased throughout the state has consistently exceeded the minimum capacity requirements, and prices have been below the costs of entry reflected on the ICAP Demand Curves."[13] Thus, the Demand Curves Report concludes that: "There is no significant physical or economic withholding of Rest-of-State capacity in the overall New York Control Area ("NYCA") market or on Long Island."[14]

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[10] *See, e.g., New York Indep. Sys. Operator, Inc.*, 99 FERC ¶ 61,246 (2002) (approving the conduct and impact approach to market mitigation measures).

[11] Demand Curves Report at 14 (Chart 8), 16-17. The report stated that "[t]he average levels of both unoffered and unsold (if there is any) capacity has remained approximately 1% of the available capacity" and that "… the reasons why the overwhelming share of capacity that was not offered was due to benign reasons unrelated to strategic motives to raise prices." *Id*. at 19.

[12] *Id*. at 21.

[13] *Id*. at 2.

[14] *Id*. at 1.

Accordingly, the Demand Curves Report both complies with the Oct. 26, 2007 Order and, as discussed further below, shows that the New York TOs' concerns with possible economic withholding of ROS capacity are unfounded.

II. There Is No Evidence of Strategic Withholding of ROS Capacity

In addition to ignoring the absence of data for the sort of unit-by-unit assessment of going-forward costs that the New York TOs apparently espouse, the New York TOs do not show, either from their own efforts or from anything in the Demand Curves Report, any evidence of market power that may call for undertaking the burden and expense of gathering and analyzing such data. To the contrary, the analysis and conclusions in the Demand Curves Report show that such an effort is not warranted. Indeed, the New York TOs reached the same conclusion: "The New York Transmission Owners would not have objected if the NYISO had requested that the Commission waive its requirement for the NYISO to compare the offers for this ICAP to the NYISO's estimates of the going-forward costs for these months [i.e., the 2007 Capability Year] on the grounds that the potential impact of any economic withholding was de minimis …."[15]

Without repeating the analysis in the Demand Curves Report, the NYISO would make the following brief points:

> The TOs have not shown that there is any significant level of market concentration among the ROS capacity suppliers, or that any supplier is pivotal.[16] In comparison to the situation in New York City, there are a far greater number of ROS capacity

[15] TO Comments at 8, n.25.

[16] The New York TOs have access through data published by the NYISO to information on the capacity capability of ROS generators, and are certainly aware of the capacity requirements of the LSEs in the ROS.

suppliers, and such suppliers compete with the capability for a substantial volume of imports.[17] Presumably the New York TOs are interested in mitigation measures if strategic withholding behavior were occurring, but the Commission has denied approval for such measures absent a showing of "well-defined structural problems in the market," and has done so with specific reference to the ROS area.[18]

The analysis in the Demand Curves Report was limited to capacity from sources within New York, and as noted above found that the average levels of unsold capacity was approximately 1% of the available capacity on average in the 2006-2007 Capability Year and almost non-existent in the period of May 2007 to December 2007.[19] As shown in the Demand Curves Report, up to 2,755 MW of ICAP (or approximately 2,700 MW of UCAP), or more than 10 times the average levels of unoffered and unsold capacity from within New York, can be imported from other Control Areas.[20] The New York TOs have advanced no reasons why external suppliers would not use this substantial import capability to take advantage of, and thus ameliorate, any undue price increase from the minimal levels of unoffered and unsold capacity from in-state sources if it were in fact being strategically withheld.

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[17] Demand Curves Report at 18 (Table 1) and 12 n.4.
[18] *New York Indep. Sys. Operator, Inc.*, 111 FERC ¶ 61,468 (2005) (directing the removal of tariff provisions permitting the application of automated mitigation procedures for energy markets outside of New York City).
[19] Demand Curves Report at 19.
[20] *Id*. at 12 n.4.

At the same time, fluctuations in imports into New York and exports from New York in response to changing prices in regional markets does not constitute withholding.[21] The TO Comments "agree that there are valid reasons why ICAP may go unsold, which makes it unwise to assume that the existence of unsold ICAP proves that market power has been exercised."[22] The TO Comments, however, ignore the specific reasons for capacity not being sold that are discussed in the Demand Curves Report,[23] and the New York TOs do not acknowledge, much less explain, the fact that the "group of four ROS generation-owning utilities have consistently had unoffered capacity and account for the majority share."[24] Those entities are undoubtedly not engaging in strategic behavior against themselves.

To the extent assertedly "withheld" capacity is spread across several suppliers none of which by itself is pivotal, to be effective strategic withholding would require collusion among the withholding suppliers. The NYISO is not aware of any evidence, nor have the New York TOs cited any, suggesting that any entities are colluding to engage in strategic behavior. Such conduct is particularly unlikely if a significant portion of any unoffered capacity is attributable to LSEs themselves, and if, as has been the case, the group of generation owners has sold almost all of its capacity for the last two Capability Periods.[25]

III. Conclusion

[21] *Id*. at 21 ("The combination of decreasing imports and rising exports meant growing quantities of ROS capacity that would not be sold into the NYCA market, but do not constitute 'withholding.'").
[22] TO Comments at 5.
[23] Demand Curves Report at 19-20.
[24] *Id.* at 19.
[25] *Id*.

For the foregoing reasons, the NYISO respectfully requests that the Commission reject the TO Comments on the Demand Curves Report.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document on the official service lists compiled by the Secretary in this proceeding in accordance with 18 C.F.R. § 285.2010 (2006).

Dated at Washington, DC this 27th day of February, 2008.

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