

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

New York Independent System Operator, Inc.)	Docket Nos. ER04-230-011,
)	ER01-3155-009,
)	ER01-1385-017,
)	EL01-45-018

**REQUEST FOR REHEARING AND MOTION FOR CLARIFICATION OF
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rules 212 and 713 of the Commission’s Rules of Practice and Procedure¹ and Section 313(a) of the Federal Power Act,² the New York Independent System Operator, Inc. (“NYISO”), by counsel, respectfully requests rehearing of Ordering Paragraph A of the June 24 Order in the above-captioned proceedings, or, in the alternative, clarification of the scope of the Commission’s order.³ Ordering Paragraph A of the June 24 Order requires the NYISO to file “revised tariff sheets removing provisions permitting the application of AMP [Automated Mitigation Procedures] in the RTM [Real-Time Market] outside New York City”

The Commission acted arbitrarily and capriciously by relying solely and erroneously on a court decision and Commission Remand Order⁴ in a different and distinguishable proceeding to reach its conclusion in this case. Both the court decision and the subsequent Commission order related to a critically different form of the AMP operating in a different market. Both prior

¹ 18 C.F.R. §§ 385.212, 385.713.

² 16 U.S.C. § 8251(a).

³ *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,468 (2005) (“June 24 Order”).

⁴ *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir.), *clarified*, No. 03-1228 (D.C. Cir. Mar. 24, 2005) (“*Edison Mission Energy*”); *see also New York Independent System Operator, Inc.*, 111 FERC ¶ 61,399 (2005) (“Remand Order”).

proceedings considered only the Day-Ahead Market (“DAM”)⁵ and the form of the AMP the Commission had approved for use in that market. The Commission’s automatic application of these holdings to the crucially different version of the AMP for the rest-of-state (“ROS”) Real-Time Market (“RTM”) approved by the Commission in its August 10 Order was arbitrary and capricious.⁶ The NYISO therefore requests that the Commission grant rehearing and accept the ROS RTM-AMP.

In the alternative, the NYISO requests that the Commission clarify that the June 24 Order does not preclude the use of the NYISO’s Real-Time Scheduling (“RTS”) software to impose conduct-and-impact mitigation after appropriate consultations with a Market Participant.

I. Background

This proceeding involves the implementation of the NYISO’s new RTS software, which included enhancements to the NYISO’s ability to implement its Commission-approved Market Mitigation Measures.⁷ As part of this new capability in the administration of its markets, the NYISO’s RTS filing proposed to extend a new form of the AMP to the rest-of-state, Real-Time Market. In recognition of the generally competitive conditions in the rest-of-state Real-Time Market, and pursuant to the consensus reached in discussions with the Market Participants,⁸ as a

⁵ Unless otherwise specified, capitalized terms using in this filing have the meanings specified in the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”).

⁶ *New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 (2004) (“August 10 Order”).

⁷ *Id.* at P 2.

⁸ *New York Independent System Operator, Inc.*, New York Independent System Operator, Inc.’s Tariff Revisions Reflecting the Implementation of Enhanced Real-Time Scheduling Software, Docket No. ER04-230-000 at 3, 59 (Nov. 26, 2003).

safeguard to ensure that the AMP is only applied when a seller is exercising market power the proposed ROS RTM-AMP required that (i) a seller be observed breaching the applicable conduct and impact tests for the detection of market power abuse, and (ii) the NYISO initiate consultations with the seller to determine that there is no legitimate cost basis for the bid breaching the applicable conduct and impact tests.⁹ Under the NYISO's Market Mitigation Measures (Attachment H to the Services Tariff) as in effect prior to the compliance filing to implement the June 24 Order, real-time mitigation could only be applied in an area that is not a Constrained Area, i.e., could only be applied in the rest-of-state area, if the conditions in § 3.2.2(d) are met. That section specifies that:

The ISO may implement automated mitigation procedures in RTC for a Generator that is not in a Constrained Area if a bid has been submitted for that Generator that (i) exceeds the applicable threshold for economic withholding specified in Section 3.1.2 and (ii) results in a market impact that exceeds the applicable threshold specified in Section 3.2.1 and (iii) the ISO, in consultation with the Market Advisor, determines that the bid is inconsistent with competitive conduct. Automated mitigation procedures may be used for a Generator that is not in a Constrained Area for a period not longer than six months from the submission of such a bid.

This process would include consultation with the relevant Market Participant about the basis for its bid, as specified in § 3.3 of Attachment H.¹⁰ The Commission's August 10 Order recognized that, with this consultation safeguard, the proposed ROS RTM-AMP would only be applied "when the structure of a relevant market gives rise to significant market power leading to substantial increases in rates, and only after a generator's breach of the conduct and impact tests

⁹ See Services Tariff, Attachment H § 3.2.2(d).

¹⁰ See August 10 Order at P 14 (stating that "an initial breach of the conduct and impact tests would result in consultations with the seller, without mitigation being imposed").

for market power establishes that an abuse of market power has in fact occurred.”¹¹ The Commission specifically approved the ROS RTM-AMP on the basis of the NYISO’s “additional description of the operation of the proposed AMP procedures outside of New York City”¹²

The use of these threshold conditions for the application of the ROS RTM AMP were not before the D.C. Circuit or the Commission in their consideration of the rest-of-state, Day-Ahead Market AMP (“ROS DAM-AMP”) in *Edison Mission Energy* and the resulting Commission Remand Order. In addition, the DAM includes virtual trading, which allows entities to participate in the market without physical generation or load.¹³ Thus, the DAM potentially includes a significant number of competitors and a significant number of competitively bid MW that are not eligible to participate in the RTM. Nonetheless, on June 24, 2005, the Commission issued its order on rehearing in the above-captioned dockets, relying on the D.C. Circuit’s *Edison Mission Energy* decision to reverse the Commission’s August 10 Order and to direct the NYISO to remove its tariff provisions permitting application of the ROS RTM-AMP.¹⁴

II. Request for Rehearing

A. The Commission Must Meaningfully Respond to the Evidence Presented

Both the Supreme Court and the D.C. Circuit have held that the Commission must give reasoned consideration to the record before it, including specifying the facts on which it relies

¹¹ *Id.* at P 12; *see also New York Independent System Operator, Inc.*, Request for Rehearing and Clarification of the New York Independent System Operator, Inc., Docket No. ER04-230-001, at 2-3 (Mar. 12, 2004) (“NYISO March 12 Filing”).

¹² August 10 Order at P 16.

¹³ Services Tariff, Attachment H § 4.6.

¹⁴ June 24 Order at P 11.

and explaining how that evidence supports the Commission's conclusion.¹⁵ This also means that, in order to avoid being arbitrary and capricious, the Commission must consider important aspects of the problem, "'respond meaningfully to the evidence,' [and] 'answer[] objections that on their face appear legitimate'"¹⁶ Consequently, the Commission does not engage in reasoned decision-making through dismissive treatment of a party's arguments, or by not recognizing critical features of the facts and circumstances before it.¹⁷

The Commission's June 24 Order does not pass muster under the "arbitrary and capricious" standard because it relied exclusively and erroneously on the outcome in a different proceeding, without recognizing the critical distinctions between the tariff provisions and markets at issue in those proceedings and those at issue here. The June 24 Order simply relied on the outcome from the *Edison Mission Energy* proceeding as the sole basis for its ROS RTM-AMP decision in this proceeding: "Consistent with the court's Remand Order and the Commission's recent order in response to the Remand Order, the Commission grants Edison Mission's request for rehearing of the August 10 Order as it applies to the application of the RTM-AMP outside of New York City."¹⁸ The *Edison Mission Energy* proceedings dealt only

¹⁵ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency "must examine the relevant data and articulate a satisfactory explanation for its action Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it]"); *Tarpon Transmission Co. v. FERC*, 860 F.2d 439, 445 (D.C. Cir. 1988).

¹⁶ *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1056 (D.C. Cir. 2003) (quoting *Tesoro Ala. Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000)).

¹⁷ *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998); see also *Edison Mission Energy* at 969 (finding that the Commission responded to a party's argument with "vague generalities.").

¹⁸ June 24 Order at P 11.

with the DAM and the ROS DAM-AMP tariff provisions, which as discussed further below are critically different from the provisions at issue here.¹⁹ Nowhere does the Commission recognize the differences between the DAM and RTM-AMP, or the differences in the Day-Ahead and Real-Time Markets. Neither the court nor the Commission considered the ROS RTM-AMP in those prior proceedings, and the Commission acted arbitrarily and capriciously in not recognizing the distinctions between the ROS DAM-AMP and the ROS RTM-AMP.

B. The Commission Failed to Consider the Consultation Safeguard Included in § 3.2.2(d) of the NYISO's Attachment H to its Services Tariff

The *Edison Mission Energy* decision remanded the ROS DAM-AMP because of the Court's conclusion that the ROS DAM-AMP could fail "to distinguish between price increments due to scarcity . . . and ones due to exercises of market power"²⁰ In contrast to the ROS DAM-AMP provisions, however, the much more recent RTS filing added a new Section 3.2.2(d) of Attachment H to the NYISO's Services Tariff, which provides that the ROS RTM-AMP may be applied only when the conduct and impact thresholds are crossed and after "the ISO, in consultation with the Market Advisor, determines that the bid is inconsistent with competitive conduct."

This process for consultation and a determination that an abuse of market power has occurred, which safeguards sellers against unwarranted mitigation, was an important factor in the Commission's August 10 Order's acceptance of the ROS RTM-AMP, and appropriately so. In that order, the Commission recognized that: "As with the current rest-of-state manual

¹⁹ Compare Services Tariff, Attachment H §§ 3.2.2(c), 4.2.2(e)(3) (addressing the ROS DAM AMP), with Services Tariff, Attachment H §§ 3.2.2(c)-(d) (which address the ROS RTM-AMP); see *Edison Mission Energy* at 968.

²⁰ *Edison Mission Energy* at 967.

procedures, under the requested extension of the AMP, an initial breach of the conduct and impact tests would result in consultations with the seller, without mitigation being imposed.”²¹ The consultation procedures would provide a Market Participant with an opportunity to demonstrate to the NYISO that a bid was based on legitimate costs, as specified in the tariff provisions for determining a unit’s reference levels, rather than an ability to exercise market power.²² Under conduct-and-impact mitigation, the applicable reference level provides the benchmark for assessing whether a bid meets the conduct test, which is set in the tariff at a specified dollar or percentage increase in a bid over the reference level.²³ Correspondingly, if no such showing can be made, then the logic of the Commission-approved conduct and impact tests leads to the conclusion that the bids at issue are based on market power,²⁴ since the ROS tests are based on relatively high thresholds to ensure that they are applied only in instances of a significant abuse of market power.²⁵ Thus, the ROS RTM-AMP would use a consultation process and the NYISO’s Commission-approved reference level and conduct and impact

²¹ August 10 Order at P 14.

²² Services Tariff, Attachment H § 3.1.4.

²³ *Id.* § 3.1.2.

²⁴ *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,317 (2000) (order approving conduct and impact thresholds); *California Independent System Operator Corp.*, 100 FERC ¶ 61,060 at P 64-67 (2002) (approving conduct and impact market screens and recognizing that an MMM-like conduct-impact framework “can be effectively implemented as a market power mitigation tool without interfering with the efficient and reliable operation of the grid.”); *see also* *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,053 at P 101 (2005) (applying conduct and impact thresholds at the control area level “to the entire Midwest ISO energy market, . . . not conditioned on being in BCAs [Broad Constrained Areas] or NCAs [Narrow Constrained Areas]”).

²⁵ 90 FERC ¶ 61,317 at 62,054-55 and 62,055 n.10.

standards and to determine whether or not suspect bids are attributable to scarcity conditions, or instead to market power problems, before mitigation is imposed.

The ROS RTM-AMP therefore directly addresses the D.C. Circuit's concern that the AMP might not distinguish between price increments due to scarcity and ones due to exercises of market power. It was arbitrary and capricious for the Commission not to recognize the critical differences between the facts and circumstances of the ROS DAM-AMP and the ROS RTM-AMP. The Commission should therefore grant rehearing, and in light of its conclusions in the August 10 Order, direct the NYISO to reinstate the ROS RTM-AMP in its tariff.

III. Specification of Error

Pursuant to Rule 713(c), the NYISO respectfully states that:

- The Commission was arbitrary and capricious in relying exclusively and erroneously on the results of a different proceeding to reach its conclusion regarding the ROS RTM-AMP. The Commission failed to connect the facts with the choice it made in the June 24 Order.
- The Commission was arbitrary and capricious by entirely failing to consider the evidence presented by the NYISO in support of the ROS RTM-AMP and by failing to reconcile the conclusions reached regarding the ROS RTM-AMP in the August 10 Order with those made in the June 24 Order.

IV. Request for Clarification

In the alternative, the NYISO requests that the Commission clarify that its June 24 Order does not preclude the use of the RTS software to apply the conduct and impact tests, once appropriate consultations have occurred. With the current capabilities of RTS, the distinction between "manual" and "automated" mitigation is largely outmoded. Under the prior use of the term "manual" mitigation, when a seller triggered the conduct and impact thresholds, the NYISO would consult with the seller.²⁶ If that consultation did not satisfy the NYISO that the seller was

²⁶ Services Tariff, Attachment H § 3.3.

acting in a competitive manner, going forward the NYISO could mitigate the seller by placing it on a “watch list” for future mitigation for a period not to exceed six months.²⁷ Because SCD, the predecessor to RTS, did not operate quickly enough to apply both the conduct and impact tests to a given Real-Time Market interval, a seller on the watch list would be mitigated whenever its bids crossed the conduct threshold, with impact from such bids being presumed to occur on the strength of the observed breach of the impact tests from the similar conduct (and associated impact) that led to the consultation procedures.²⁸

RTS, however, is capable of applying both the conduct and impact tests within the computer runs for each Real-Time Market interval. Thus, under “manual” mitigation with RTS, if after consultation it is determined that a bid improperly breached conduct and impact, the NYISO would thereafter, for as long as the conditions giving rise to market power continue but not longer than six months, replace the seller’s bid with a default bid if RTS determined on an interval by interval basis that the bid breached both the conduct and impact tests. In its August 10 Order, the Commission recognized the superiority of this capability provided by the new RTS software:

The [RTS] AMP software . . . will have the capability to re-evaluate the impact test in the same interval to which the bids crossing the conduct test apply, as part of the price determination process for each interval. Mitigation under the AMP is applied only if conduct and impact tests are breached in the same interval, rather than impact being determined manually on the basis of a prior interval. The NYISO contends that the impact test will be more accurate and timely under the AMP than under the more limited capabilities of the manual procedures now in place. . . . The use of Real-Time AMP would apply such mitigation more timely

²⁷ 90 FERC ¶ 61,317 at 62,055 (“The ISO would retain discretion to decide how long a specific mitigation measure would be in place, limited to a six-month period after the conduct at issue.”).

²⁸ Services Tariff, Attachment H § 3.2.2.

and accurately and in a non-discretionary manner that protects customers and allows generators to receive a competitive price for supplying energy.²⁹

In sum, as the Commission recognized in its August 10 Order, under RTS the “the only significant difference between the existing manual procedures applied outside New York City and the requested extension of AMP is that the AMP will provide a more timely and accurate application of the impact test.”³⁰ That is, as a result of the greater capabilities of the RTS software, these same benefits of “more accurate and timely” application of the impact test are also available for “manual” mitigation. Thus, the NYISO respectfully requests that the Commission clarify that its order to remove “automated” Real Time mitigation procedures from the NYISO tariff was not meant to preclude the use of RTS to apply the conduct and impact tests once appropriate consultation has occurred under “manual” mitigation.

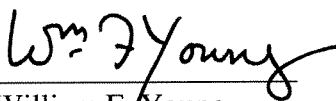
V. Request for Relief

For the reasons set forth above, the New York Independent System Operator, Inc., respectfully requests that the Commission grant rehearing of Ordering Paragraph A of its June 24 Order and accept the NYISO’s proposed ROS RTM-AMP. In the alternative, the NYISO requests that the Commission clarify that the June 24 Order does not preclude the use of the RTS software to apply conduct and impact mitigation on an interval by interval basis after appropriate consultation with the relevant Market Participant has occurred.

²⁹ August 10 Order at P 14, 16.

³⁰ *Id.* at P 14; *see also* NYISO March 12 Filing at 5-6.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wm F Young", written over a horizontal line.

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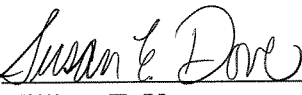
July 25, 2005

cc: Daniel L. Larcamp
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated at Washington, DC this 25th day of July, 2005.

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