

UNITED STATES OF AMERICA 115 FERC ¶61,026
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

New York Independent System Operator, Inc.

Docket Nos. ER06-185-000
and ER06-185-001

ORDER GRANTING TARIFF WAIVER

(Issued April 7, 2006)

1. In this order, we grant a request by the New York Independent System Operator, Inc. (NYISO) for a tariff waiver to allow it to correct errors it made in its computation of bid production cost guarantees (Guarantees) when implementing the market mitigation measures in its Market Administration and Control Area Services Tariff (Services Tariff)¹ for the period from June 1, 2002 through January 31, 2005, which corrections result in billing adjustments of approximately \$4 million to generators. We also confirm that, consistent with section 4.2.2(d) of the Services Tariff, Attachment H, we will not require NYISO to recompute the locational-based marginal prices (LBMPs) for that period. As for the period from February 2005 to the present, for which NYISO has not yet determined the net settlement charges for generation, the Commission will similarly grant a tariff waiver to allow for billing adjustments for this period, subject to the condition that NYISO provide the Commission with details of the settlement corrections, consistent with the Staff data request of January 6, 2006.

I. Background

A. NYISO's Waiver Request

2. On November 8, 2005, NYISO reported to the Commission that it had discovered that it had made errors in computing Guarantees going back to June 1, 2002.² These

¹ New York Independent System Operator, Inc. FERC Electric Tariff, Original Vol. No. 2.

² We will refer to NYISO's November 8, 2005 report as the Initial Filing. On February 6, 2006, NYISO filed a response to an earlier Staff data request (Amendment).

errors occurred while NYISO was implementing the new mitigation measures provisions in its Services Tariff. In brief, certain aspects of mitigation implementation did not conform to the applicable tariff requirements as they were changed from time to time. According to NYISO, for the most part, the implementation errors affected Guarantee compensation of certain units in the New York City zone, which has been designated as a Constrained Area for market mitigation purposes. NYISO's proposed settlement corrections are intended to bring NYSIO into compliance with its tariff. NYISO also explains that, while most of the mitigation errors impacted computation of Guarantees, they also affected LBMP computation in certain limited instances. NYISO states that the precise effects of the mitigation errors on LBMPs are difficult, if not impossible, to quantify because of the uncertainties inherent in recomputing market-clearing prices retroactively, and would not warrant departure from the Commission's policy against retroactive application of market mitigation measures to change market-clearing prices.

3. Thus, NYISO states that it will correct the Guarantee compensation errors consistent with the filed rate in effect at the time of the specific error(s). NYISO explains that it will make the settlement corrections through the adjustment of outstanding bills, and that such billing adjustments are not proposed changes to its tariff; to the contrary, they are intended to conform outstanding bills to the actual rate on file. In addition, NYISO states that it is not seeking any retroactive changes to market-clearing prices.

4. Furthermore, NYISO seeks confirmation that the Services Tariff, Attachment H, section 4.2.2(d), precludes the recomputation of past LBMPs, except as authorized by the Commission.³ NYISO requests that the Commission waive any other provisions of the Services Tariff that could be interpreted to require retroactive recomputation of LBMPs.⁴

5. Specifically, NYISO requests confirmation that it need not recompute:
(1) LBMPs for units located in New York City (in-city) during the period from June 1, 2002 to January 31, 2005, that were calculated using the "Con Edison mitigation measures" for Out of Merit (OOM) units; (2) LBMPs for the period from May 1, 2004 to January 31, 2005 that were computed using the "proxy impact test"; (3) in-city LBMPs during the period from February 1, 2005 to November 8, 2005 that were calculated

³ NYISO argues that re-computation of the LBMP is precluded by Services Tariff, Attachment H, section 4.2.2(d), which states that "[t]he ISO shall not use a default bid to determine revised market-clearing prices for periods prior to the imposition of the default bid, except as may be specifically authorized by the Commission."

⁴ NYISO does not specify which, if any, provisions of its Services Tariff it believes might need to be waived.

without the use of “conduct and impact mitigation” to OOM energy bids; (4) LBMPs for in-city units that were computed without applying the “load pocket threshold conduct test” to supplemental resource evaluation (supplemental resource), OOM units, and thunder storm alert units in unconstrained hours; and (5) in-city LBMPs during the period from February 1, 2005 to November 8, 2005 (using real-time scheduling) that were computed without regard to the change in the constraint identification within New York City. NYISO states that it will, however, recompute Guarantees, as needed, for the period from June 1, 2002 to January 31, 2005, and seeks any tariff waiver necessary to allow such recomputation and billing adjustments. (We discuss the details of these mitigation errors below.)

6. In support of its position that the Guarantees should be recomputed, but not the LBMPs, NYISO explains that generators submit three-part bids into the real-time market for energy, for minimum generation, and for start-up. The marginal energy bid sets the LBMP for energy. All three parts of the bid are used to commit units and determine whether they should receive a Guarantee for a given operating day. A Guarantee is paid if a unit’s as-bid costs are greater than its revenues for an operating day. While NYISO determines LBMPs based on the geographical market-clearing price, it determines Guarantees on a unit-by-unit basis. Further, NYISO states, the level of a unit’s Guarantee cannot be determined until the unit’s revenues are determined at the end of the day’s operation (when the unit’s revenues are determined). Thus, NYISO continues, Guarantees ultimately are determined in the billing and settlement process for each unit and only affect that unit. By contrast, energy clearing prices, or LBMPs, are determined interval by interval through the market day, are paid to all units selected for energy, and once determined, cannot be changed without disrupting the settled expectations of all entities participating in the energy market.

7. In response to a Staff data request, NYISO later quantified the current level of settlement corrections and corresponding billing adjustments. It states that generators will receive a net payment of \$2,901,159 for the period June 1, 2002 to April 30, 2004 and a net payment of \$1,277,956 for the period May 1, 2004 to January 31, 2005. NYISO explains that the settlement corrections for February 1, 2005 to the present have not yet been determined, but that it expects the correction methodology and manual procedures to be in place by the third quarter of 2006, in time for final settlements for the period beginning February 2005.

B. Description of the Mitigation Errors

8. In this section, we describe the various errors NYISO made in implementing the mitigation measures, as its tariff was changed from time to time. We refer to these errors generically as “mitigation errors.”

1. Continuation of the “Proxy Impact Test” in the Period from May 1, 2004 to January 31, 2005

9. NYISO’s November 26, 2003 filing to implement its real-time scheduling proposed several improvements to the mitigation measures, including refinements to mitigation in the day-ahead market, as well as replacing the “proxy impact test” for in-city automated mitigation procedures.

10. NYISO’s real-time scheduling filing purported to implement the “full impact test” with certain modifications. The Commission approved the use of the replacement mitigation measures with an effective date of May 1, 2004.⁵ However, as NYISO explains, it found that the “proxy impact test” procedures could not be replaced until the real-time scheduling software went into operation, which was not until February 1, 2005. Thus, NYISO continued to use the “proxy impact test” for calculating LBMP impact from May 1, 2004 through January 31, 2005, even though the Commission had approved an effective date of May 1, 2004.

11. NYISO states that its independent Market Advisor, Dr. David Patton, and its Market Monitoring and Performance Unit agree that it would be enormously burdensome, if not impossible, to accurately re-run every real-time interval for this period using “full impact” mitigation instead of the “proxy impact” test to redetermine LBMPs.

2. Continuation of Certain Con Edison Mitigation Measures in the Period from June 1, 2002 to January 31, 2005

12. NYISO states that the March 20, 2002 Comprehensive Mitigation Measures filing superseded certain real-time mitigation measures within New York City. This was intended to include replacement of the “Con Edison measures” for real-time mitigation of energy, minimum generation, and start-up bid components of in-city supplemental resource and OOM units. Because these units are committed outside the normal economic evaluation, they may require a Guarantee in order to be made whole to their as-bid costs, with a consequent potential for mitigation of the unit’s start-up and minimum generation bids.

13. NYISO states that, due to the complexity of the bidding, software could not be developed at that time and that, pending development of the capability to use automated market models, Services Tariff, Attachment H, section 3.2.2(b) instructs the Market Monitoring Unit, in consultation with the Market Advisor, to determine the effect on

⁵ *New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 at P 9 (2004).

prices or Guarantee payments of questioned conduct using the best available data and using such models and methods as the Unit deems appropriate.

14. However, instead of applying real-time conduct and impact by the best means available (as contemplated by the tariff), NYISO instead continued to use the Con Edison mitigation measures, which resulted in over-mitigation. NYISO states that the Con Edison mitigation measures erroneously remained in place until January 31, 2005, even though this was inconsistent with NYISO's filed tariff.

15. NYISO explains that it is able to calculate the effect of this mitigation error on Guarantee payments and has determined that the net effect is a refund to affected in-city generators. NYISO also explains that, in contrast, LBMPs would only have been affected in certain limited instances, such as if an OOM unit: (a) would have been dispatched for Energy; (b) was eligible to set price; (c) would not have been subject to mitigation under the mitigation measures; and (d) its incremental Energy bid would have made it the marginal unit. Thus, NYISO concludes that the potential effects on LBMPs would be narrow and relatively minor. This consideration, combined with the very difficult, if not impossible task of retroactively recalculating market-clearing prices, leads NYISO to conclude that settled market expectations should not be disturbed by attempting to recompute LBMPs.

3. Discontinuation of In-City OOM Mitigation on February 1, 2005

16. NYISO states that when scheduling improvements to the real-time market were implemented on February 1, 2005, the Con Edison mitigation measures were discontinued as not conforming to the Services Tariff. However, the software required to perform the new Guarantee impact test had not yet been developed. As a result, in-city units that were eligible for Guarantee payments were monitored on a manual "best efforts" basis, in accordance with section 3.2.2(b) of the mitigation measures, with the expectation that Guarantee impact test software would be developed in the near future and that Guarantee payments would be computed and corrected in the billing and settlement process on a unit-by-unit basis.

17. In addition, NYISO discovered that the real-time scheduling software did not apply conduct-and-impact LBMP mitigation to the Energy bids of in-city OOM units, and that, once the older mitigation measures were discontinued, no LBMP mitigation was applied to these units' Energy bids. NYISO states it directed software fixes to be implemented as soon as possible to ensure that OOM units are appropriately included in LBMP mitigation. NYISO reports that Phase I of the software corrections was implemented on November 8, 2005. NYISO states that, in Phase I of the corrections, the real-time Energy bids of OOM units are subject to conduct-and-impact LBMP mitigation at the same thresholds that apply to other in-city units. NYISO further states that Phase II of the software fix will ensure that in-city supplemental resources or OOM generators are

always subject to load pocket thresholds, including during periods when there are no active transmission constraints. NYISO expects to have Phase II in place by May 2006. According to NYISO, its Market Advisor believes that only 1-2 percent of all intervals would be affected by the lack of load pocket thresholds prior to Phase II.

18. NYISO also reports that a small potential gap in the software has also been uncovered with respect to the load pocket threshold that applies during thunderstorm alerts. The mitigation measures specify that a load pocket threshold is to be applied to all in-city units whenever a thunderstorm alert is in effect. The relevant software, however, did not recognize this additional requirement. The correct thunderstorm alert load pocket thresholds will be applied by the Phase II software fix. Again, NYISO states that its Market Advisor believes that the adverse effects of this gap is very small, affecting only 1.5 percent of intervals, and the resulting disruption and expense of determining the impact of these errors on LBMPs is unwarranted.

4. Error in Constraint Identification Affecting In-City Load Pocket Thresholds for the Day-Ahead Market in the Period from February 1 through November 8, 2005

19. NYISO states that its Market Monitoring and Performance Unit discovered that, with the implementation of real-time scheduling on February 1, 2005, changes to the identification of constraints generated for the in-city day-ahead market had been made. However, the changes in the shadow price costs associated with the constraints were not included in the day-ahead market load pocket threshold calculations. This error was not apparent until September 2005. NYISO reports that the Market Monitoring and Performance Unit froze the load pocket thresholds at the August values, thus capping the impact of this error. The error affected only the in-city day-ahead market and not the real-time market. According to NYISO, only 6.3 percent of hours in August and September would have been affected by this error, which is not sufficient to warrant disrupting settled expectations.

C. Notice of Filing and Responsive Pleadings

20. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 71,822 (2005), with interventions and protests due on or before November 29, 2005.⁶ The New York Public Service Commission filed a notice of intervention. Timely motions to intervene were filed by: AES Easter Energy, L.P.; KeySpan-Ravenswood, LLC

⁶ This comment date was later extended to December 6, 2005.

(Ravenswood) (with comments); Mirant Parties; New York Transmission Owners⁷ (with protest); NRG Companies (NRG) (with comments); Reliant Energy Companies; and Strategic Energy, LLC. In addition, Consolidated Edison Company of New York, jointly with Orange and Rockland Utilities, Inc. (Con Edison and Rockland), filed a timely protest. The Constellation Energy Commodities Group and Constellation NewEnergy, Inc. jointly filed a motion to intervene out of time.

21. Several commenters argue that NYISO had not provided the Commission or the New York market participants with sufficient information to determine: (1) whether the errors in question actually triggered a need for payments; (2) the total amount of money to be paid to generators; (3) the methodology and accuracy of the proposed billing adjustments; and (4) the impact of such adjustments on load-serving entities. These parties argue that transparency on these matters is needed before further action is taken by NYISO. New York Transmission Owners request that the Commission hold NYISO's waiver request in abeyance until this information is provided by means of a stakeholder process and order NYISO to file a detailed report within 30 days of the conclusion of such stakeholder process.

22. Ravenswood supports a prompt resolution of the errors. Ravenswood adds that, thus far, NYISO has identified over \$2.5 million of payments due to in-city generators because of the mitigation errors. NRG supports the prompt payment of amounts owed to in-city generators. Several parties request an extension of time to file comments to permit the parties' consideration of the discussions held during NYISO's November 29, 2005 working group meeting.

23. Con Edison and Rockland state that, although NYISO justifies its action in this proceeding by reliance on section 3.2.2(b) of Attachment H of the NYISO Services Tariff, this section does not require NYISO to make billing adjustments. Rather, they explain, section 3.2.2(b) of Attachment H states that, pending the development of automated market models, NYISO's Market Monitoring Unit, in consultation with its Market Advisor, shall determine Guarantee payments in circumstances of questioned conduct using the best available data and models and methods that the Unit deems appropriate. Con Edison and Rockland state that this section does not require NYISO to recalculate Guarantees or LBMPs.

⁷ The New York Transmission Owners are: Central Hudson Gas & Electric Corporation; Con Edison; LIPA; New York Power Authority; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk); Rochester Gas and Electric Corporation; and Rockland.

24. Con Edison and Rockland allege that, since NYISO seeks to make billing adjustments only to the Guarantees, but not to the LBMPs, it has corrected only half of the problem, thereby providing a benefit to generators at the expense of loads in New York City. Con Edison and Rockland complain that this is discriminatory to customers who will be charged additional Guarantee costs without getting the potential benefit of lower LBMPs. Thus, Con Edison and Rockland ask the Commission to deny NYISO's request for a waiver and direct NYISO either to recalculate the LBMPs or refrain from recalculating both the Guarantees and the LBMPs.

NYISO Response

25. NYISO filed a response to New York Transmission Owners' argument that section 4.2.2(d) of the Services Tariff, which precludes the retroactive redetermination of market-clearing prices, likewise precludes the correct determination of Guarantee payments in market participants' final bills. NYISO states that this argument is off base and that it is simply proposing to follow its tariff procedures for correcting the billing of certain Guarantee payments as part of its final bill settlements. NYISO states that these corrections do not require further authorization from the Commission, since they are provided for in NYISO's on-file tariff and do not violate the filed rate doctrine.⁸

26. NYISO asserts that it does not request authority to impose retroactive mitigation; on the contrary, it requests that the Commission affirm its policy against retroactive mitigation.⁹ NYISO states that the settlement corrections and billing adjustments do not involve "refunds," since the bills for the underlying Guarantee payments remain open and subject to final determination in accordance with NYISO's tariff. NYISO clarifies that the methodologies for correcting the initial Guarantee calculations are not at issue in this proceeding.

27. NYISO argues that section 4.2.2(d) relates to changes in market outcomes (market-clearing prices), rather than individual unit payments. NYISO states that section 7.4 of the tariff, which governs bill corrections, applies here and plainly contradicts the argument raised by Con Edison and Rockland.

⁸ In this regard, NYISO cites *NRG Power Marketing, Inc. v. New York Independent System Operator, Inc.*, 91 FERC ¶ 61,346 (2000).

⁹ In this regard, NYISO cites *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,217 at 62,055 (2000).

28. NYISO states that it has provided market participants with the total estimated amounts involved in the Guarantee corrections.¹⁰ NYISO explains that, in an effort to protect confidential information, it does not ordinarily provide a market participant with billing information about other customers. In addition, NYISO asserts that providing each market participant with information pertaining to its final bill is necessary to preserve the confidential nature of these data.

29. NYISO reiterates its request for waiver of any tariff provisions¹¹ that could be interpreted to require retroactive mitigation of LBMPs, consistent with the Commission's policy on price certainty.¹² NYISO also requests that the Commission deny the transmission owners' requested relief, consistent with the Commission's precedent in *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 113 FERC ¶ 61,226 at P 11-12 (2005).¹³

Commission Data Request

30. After a review of NYISO's Initial Filing and the comments thereto, Commission Staff issued a data request directing NYISO to file additional information to assist in the analysis of the Initial Filing. Specifically, NYISO was directed to: (1) state the total amount of money being paid to generators and the impact of such payments on load-serving entities in New York; (2) describe the discussions NYISO had with affected market participants to date and the status of those discussions; (3) describe how payments

¹⁰http://www.nyiso.com/public/webdocs/services/financial_services/customer_settlements/billing_issues_report/bawg_report.pdf

¹¹ NYISO cites several cases to justify its request, in which, it claims, the Commission waived tariff language: *Wisvest-Connecticut*, 101 FERC ¶ 61,372 at 62,551 (2002), *Great Lakes Gas Transmission Limited Partnership*, 102 FERC ¶ 61,331 (2003), *TransColorado Gas Transmission Company*, 02 FERC ¶ 61,330 (2003), *Northern Border Pipeline Company*, 76 FERC ¶ 61,141 (1996).

¹² NYISO cites proceedings in which, it argues, the Commission outlined its preference for price certainty and policy against retroactive mitigation, e.g., *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,217 at 62,055 (2000).

¹³ In this case, the Commission has deemed all issues that did not comply with the Commission's Final Rule in *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, FERC Stats. & Regs. ¶ 31,193 (2005), to be waived.

to generators will be calculated; and (4) describe NYISO's plans for preventing the recurrence of errors and to improve pricing and billing accuracy.

31. On February 6, 2006, NYISO filed a response to the Commission's request for information (Amendment). Notice of the Amendment was published in the *Federal Register*, 71 Fed. Reg. 8,850 (2006), with interventions and protests due on or before February 21, 2006.

32. In the Amendment, NYISO reports that, for the period June 1, 2002 to April 30, 2004 (Period 1), generators will receive a net payment of \$2,901,159 in corrected settlements relative to the original Guarantee determinations. NYISO plans to charge this amount to load-serving entities. NYISO also reports that, for the period May 1, 2004 to January 31, 2005 (Period 2), generators will receive a net payment of \$1,227,956 in corrected settlements, which also will be charged to load-serving entities. Finally, for the period from February 1, 2005 to the present (Period 3), NYISO reports that the net settlement charges have not been determined. NYISO expects to have in place the correction methodology and manual procedures for Period 3 in time for the final settlement for that period.

33. In addition, NYISO provided detailed company-specific information, requesting that this information be afforded privileged and confidential treatment. NYISO states that the disclosure of the data could adversely affect competition by the affected generators and the competitiveness of the NYISO markets.

34. NYISO reports that it made separate presentations on these issues to its Management Committee and to the Scheduling and Pricing Working Group and Dr. David Patton, its independent market advisor. It also states that it sent e-mails to affected generators and presented a report on these matters to the Billing and Accounting Working Group. In addition, NYISO asserts that, as of February 6, 2006, affected participants have been notified of the settlement corrections for Period 2.

35. NYISO claims that the process used to determine the adjustments to the Guarantee calculations will ensure that the final payments in the billing and settlement process are correct. NYISO asserts that the adjustments are in accordance with its tariffs and that none of these adjustments involves refunds; rather, the adjustments are part of the final settlement process for months that are (or were) still open and not yet subject to a final determination of invoice amounts. Thus, NYISO argues, the adjustments do not involve refunds or changes to market-clearing prices.

36. NYISO explains that, for those generating units that were mitigated, an upward adjustment of the Guarantee will occur if the bid passes the conduct and impact test and no previous adjustment has already taken place. A downward adjustment will occur for

those generating units not mitigated if they are found to fail the conduct and impact test and no previous adjustment has been made.

37. NYISO's submittal describes the administrative and procedural changes it would implement to prevent further occurrences of these types of errors; it states that it has commissioned an independent market advisor to review its compliance with its market monitoring plan and the mitigation measures. NYISO also reports that it has instituted additional training programs to improve its compliance with its tariffs on file at the Commission. NYISO states that it expects to extend training to all NYISO employees. NYISO states that compliance training is already part of its mandatory on-line training and that it will expand this training.

38. NYISO also describes an internal reorganization, with significant focus placed on compliance with NYISO's tariffs, including the creation of six product managers responsible for the major products lines of NYISO and complying with all tariff requirements associated with the product line.

39. NYISO states that it will continue to work with stakeholders to shorten the time periods for price reservation and correction with a stated goal of eliminating the need for Temporary Extraordinary Procedures.¹⁴ To that end, NYISO's Billing and Price Correction Task Force reviewed current practices, developed a plan and schedule for eliminating Temporary Extraordinary Procedures, and developed a framework for price correction without resort to such procedures.

40. NYISO reports that it has formed an interdepartmental team, the Price Error Elimination Team, and charged that team with responsibility for studying and proposing actions to reduce initial pricing errors. The team will report weekly to the CEO and the Billing and Price Correction Task Force. NYISO provides details of its successes in improving the accuracy of bills and shortening the settlement cycle; it reports that 34 final bills have been issued, and that at the current rate, NYISO expects to be current by July 2006.

41. Last, NYISO states that, with its stakeholders, it has developed tariff revisions for improved and expedited billing settlement, which it expects to file with the Commission no later than April, 2006.

¹⁴ The Temporary Extraordinary Procedures are contained in Attachment E of the Services Tariff. Attachment E outlines the circumstances under which NYISO would correct prices resulting from market implementation errors and emergency system conditions.

Additional Comments

42. Niagara Mohawk submitted comments supporting NYISO's Amendment. Niagara Mohawk states that, while it previously intervened in this proceeding as one of the New York Transmission Owners, it now supports NYISO's request for waivers to allow NYISO to correct its tariff implementation errors and requests that the Commission approve NYISO's filing.

II. Discussion

A. Procedural Matters

43. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the notice of intervention and timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, we will grant the late-filed motions to intervene, given the parties' interest in this proceeding and the absence of any undue prejudice and delay.

44. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NYISO's answer because it has provided information that assisted us in our decision-making process.

B. NYISO May Correct Billing Errors

45. As to New York Transmission Owners' argument that section 4.2.2(d) of the Services Tariff precludes making corrections to the computation of Guarantee payments, we agree with NYISO's response that it is not in fact proposing any rate changes to its filed rate schedules nor is it issuing refunds. For the most part, the various mitigation errors that NYISO seeks to correct in this filing are the result of NYISO failing to compute Guarantee compensation in accordance with the filed rate schedule's rates, terms, and conditions, specifically newly modified mitigation measures, because of software implementation errors. Thus, rates are not being changed retroactively, nor is NYISO making refunds. To the contrary, NYISO is attempting to ensure that final bills, as far as possible, conform to its filed rate schedules.

46. With the filing of the Amendment, any initial concerns the Commission had over the computation of the billing adjustments to Guarantee compensation (for Periods 1 and 2, that is, all affected pre-February 1, 2005 bills) have been resolved. The Commission has reviewed the data that NYISO provided to market participants at its November meeting, and finds that there was sufficient transparency to permit stakeholders to voice any concerns.

47. Thus, to the extent necessary, we grant NYISO a tariff waiver to make the stated settlement corrections and billing adjustments to Guarantee calculation and compensation for the period from June 1, 2002 through January 31, 2005.¹⁵ As for the period from February 2005 to the present, for which NYISO has not yet determined the net settlement charges for generation, the Commission will grant NYISO's request to correct errors in its computation of Guarantees, but not LBMPs, while implementing the mitigation measures in its Services Tariff, subject to the condition that NYISO provide the Commission with details of the settlement corrections, consistent with the Staff data request of January 6, 2006.

C. NYISO Need Not Recompute LBMPs

48. We next discuss whether NYISO is required by the terms of its tariff to recompute LBMPs when it recomputes Guarantee compensation. It is NYISO's position that it need only, and can only, recompute Guarantee compensation. NYISO points to the provision in section 4.2.2(d) of its Services Tariff, and asks the Commission to confirm that this provision precludes it from recomputing LBMPs. Section 4.2.2(d) states that "[t]he ISO shall not use a default bid to determine revised market-clearing prices for periods prior to the imposition of the default bid, except as may be specifically authorized by the Commission." We find that this provision prohibits NYISO from recomputing market-clearing prices on its own initiative, but expressly provides that the Commission can authorize NYISO to recompute market-clearing prices.

49. Thus, the issue remains whether the Commission should require NYISO to recompute the LBMPs whenever it recomputes Guarantees for open bills. Con Edison and Rockland argue in favor of such a requirement. Con Ed and Rockland maintain that, since NYISO has asked for permission to make adjustments to the Guarantees, but not the LBMPs, it has corrected only half of the alleged problem, thereby providing a benefit to generators at the expense of load in New York City. Con Ed and Rockland state that this is discriminatory to customers who will be charged additional Guarantee costs without getting the potential benefit of lower LBMP prices.

50. To decide whether we should direct NYISO to recompute LBMPs, we need to analyze the possibility and effect of such recomputation. In the Background section of

¹⁵ In this order, we allow NYISO to recompute the Guarantees because they were not properly computed in accordance with the terms and conditions of NYISO's Services Tariff. By contrast, in the order in Docket No. ER06-617-000, we reject NYISO's proposed compensation methodology for GP2-mitigated generators because the proposal is not authorized by, and is inconsistent with, the terms and conditions of NYISO's Services Tariff.

this order, we explained in detail the several mitigation errors that NYISO discusses in the Initial Filing. In general, the mitigation errors resulted from instances when the mitigation measures actually applied were not consistent with the tariff language, typically because the necessary software was not yet available to implement the new mitigation measures.

51. For example, NYISO states that, on March 12, 2004, in Docket No. ER04-230-003 (referred to herein, as the real-time scheduling filing), it filed for approval of tariff language that would implement new mitigation measures, one of which was the new software for real-time scheduling, which would replace the older proxy impact test. (This mitigation error is discussed in more detail in section I.B.1. above). NYISO requested an effective date for *most* of the mitigation measures, not including real-time scheduling, of May 1, 2004 and indicated that it would not be able to implement all of the outlined market mitigation, particularly any of the measures related to this newer real-time scheduling software, until the real-time scheduling was completed. The Commission approved the modifications with an effective date of May 1, 2004, which included the use of automated conduct-and-impact mitigation for the in-city day-ahead market in place of the proxy impact test.

52. However, NYISO found that the proxy impact test procedures could not be replaced until the real-time scheduling went into operation. As it turned out, the full real-time scheduling was not ready for implementation until February 1, 2005. NYISO thus continued to use the proxy impact test for LBMP impact in the real-time market from May 1, 2004 through January 31, 2005.

53. NYISO predicts that the results of the proxy impact test should closely match the results of the full impact test, and as a result, NYISO does not believe that the real-time prices during the period were sufficiently affected to warrant re-determining market-clearing prices. Additionally, NYISO states that its Market Monitoring and Performance Unit and its independent Market Advisor both informed it that it would be impossible, or at least nearly impossible, and at a minimum enormously burdensome, to re-run every real-time interval between May 1, 2004 and January 31, 2005 accurately using the full impact test in lieu of the proxy impact test.

54. NYISO also cites four additional Commission orders¹⁶ that, it argues, support its request of a one-time waiver of tariff provisions. NYISO states that, consistent with these orders, a one-time request for waiver can be characterized as addressing an error that was made in good faith, requiring a waiver of limited scope, having a definitive problem and solution and not having undesirable consequences (such as harming third parties).

55. We will not require NYISO to recompute LBMPs. We find that doing so would have a ripple effect with far-ranging, and unintended, consequences¹⁷ that outweigh any putative benefits. Moreover, given the logistics of NYISO's market, the recomputation would likely not produce accurate real-world results, as it would depend (at several points) on predictions of how other market participants would respond at the time they made their actual market decisions if this or that variable had been changed. Furthermore, we find that it would be virtually impossible in this case to predict with any certainty what market participants' responses might have been based on real-time progression of market-clearing prices for every minute during this time frame, using the newer real-time scheduling. In essence, any attempt to recalculate the market-clearing prices in this case would be mere conjecture as to what market participants' bidding behavior might have been under different circumstances, with little evidence to support such conjecture.

56. For this reason, the Commission found in an earlier NYISO proceeding that market mitigation measures are intended to be applied prospectively and are not intended to trigger a recomputation of market-clearing prices. Specifically, in a case cited by NYISO,¹⁸ the Commission accepted a NYISO market mitigation plan. At that time,

¹⁶ *Wisvest-Connecticut*, 101FERC ¶ 61,372 at 62,551 (2002), *GreatLakes Gas Transmission Limited Partnership*, 102 FERC ¶ 61,331 (2003); *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330 (2003); and *Northern Border Pipeline Co.*, 76 FERC ¶ 61,141 (1996).

¹⁷ *See, e.g., New York Independent System Operator*, 99 FERC ¶ 61,125 (2002), where the Commission found that, after the imposition of a bid cap on non-spinning reserves (NSRs) within NYISO, suppliers of NSRs should receive their lost opportunity costs for periods when their energy bids are below the applicable energy price and their units could have been selected for the energy market, but NYISO instead holds their units in reserve to supply NSRs, and such lost opportunity cost payments should be tied to the projected LBMP that each supplier would have received if it had supplied energy.

¹⁸ *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,317 (2000).

mitigation was determined manually and often after the fact. The Commission determined that NYISO could exercise limited discretion in the application of the mitigation measures, subject to certain limitations. The Commission required NYISO to “file a further revised mitigation plan to clarify that mitigation for market power is prospective only. We do not intend for mitigation to entail any retroactive recalculation of market-clearing prices.”¹⁹ There, as here, the Commission did not want the use of market mitigation measures to create uncertainties in settled markets. Prolonged disputes regarding the appropriate application of mitigation measures could result in delaying or changing final market outcomes to the detriment of the market participants.

57. As to three of the mitigation errors outlined in the Background (in sections I. B. 2-4), NYISO explains that the units at issue are all located in the New York City zone, which has been designated as a constrained area under the mitigation measures. As a constrained area, mitigation thresholds are generally in the range of \$3 to \$10 and any impact on LBMPs above these relatively low thresholds would have been appropriately mitigated. Thus, the potential effects on LBMPs would be confined to a narrow band of market outcomes bounded at the top by the constrained area thresholds. NYISO states that, given the limited circumstances under which LBMPs could have been affected, the relatively minor potential price impacts, and the very difficult if not virtually impossible task of retroactively recalculating market-clearing prices, the settled market expectations should not be disturbed by attempting to retroactively re-clear energy market-clearing prices in the relevant real-time markets. Thus, NYISO argues, the LBMPs have not reached a level substantially unrelated to the market price and thus, recalculation is not possible with reasonable certainty in this circumstance.

58. In contrast, NYISO states, the recalculation of Guarantees does not require any retroactive recalculation of market-clearing prices, but rather, individual unit Guarantee payments. The recalculation of Guarantees does not involve refunds, and can be performed with certainty. The billing procedures for these underlying obligations are not yet finalized, and remain subject to final determination, consistent with NYISO’s tariff.

59. We are persuaded by NYISO’s arguments, and we find that, on balance, it would not be reasonable to direct NYISO to recompute LBMPs for Periods 1 and 2, even though it is correcting its Guarantees payments for these periods consistent with its tariff

¹⁹ *Id.* at 62,055.

obligations and the final determination procedures for Guarantees.²⁰ We agree that the extreme difficulty of recomputing LBMPs, combined with the minimal impact and lack of certainty of the recomputed prices' accuracy, would make such recomputation an exercise in futility. Furthermore, we agree that disrupting the settled expectations of market participants is unwarranted in these circumstances. While we are sympathetic to the view of Con Edison and Rockland that NYISO is correcting only one side of the equation, we are convinced that it is reasonable for NYISO to make only those settlement corrections that can be determined with a degree of accuracy and do not have unintended, and adverse, market consequences, including unsettling expectations.²¹ Thus, we reject Con Edison and Rockland's alternative suggestion that no adjustments be made, if both the Guarantees *and* the LBMPs cannot be corrected together. We see no advantage to preventing the corrections of errors that can be readily and accurately corrected, with no disruption to settled expectations, even if all errors cannot be corrected.

D. Improved NYISO Training and Reporting

60. Finally, we address NYISO's recitation of the improvements it intends to implement to ensure better accuracy in computing prices under its tariff that comply with the filed rate schedule. We are pleased that NYISO is acknowledging that its current methods of assuring that it properly computes prices under its tariff needs improvement and that, among other matters, it needs to better train its employees to perform these important tasks competently. We expect NYISO to closely monitor its progress in perfecting its software, in properly training its employees, and in devising any other steps needed to stem the continuing epidemic of billing and computation errors that have plagued NYISO since the inception of its real-time system. If these steps prove insufficient, NYISO must act proactively to identify any remaining or new problems, to devise effective solutions, and to report to the Commission realistically about the scope of its problems and its efforts to resolve them.

²⁰ NYISO requests that we waive any provisions of the Services Tariff that could be interpreted as requiring retroactive recomputation of LBMPs. While NYISO does not specify what those provisions are, we will grant a general waiver in order to clarify that NYISO is not required by the Services Tariff to recompute LBMPs.

²¹ In addition, NYISO reports one additional mitigation issue that it is considering: the appropriate conduct thresholds under the tariff for the start-up bids of in-city units. NYISO is not proposing any waivers with respect to this issue, but only reports that it intends to explore this issue with its stakeholders in the future, and will report to us when there is a consensus on how to resolve this issue. We expect NYISO to file an appropriate request with the Commission at that time.

61. Unfortunately, in the past, this has not always been the case. For example, at the time when NYISO proposed an effective date for its mitigation measures, it knew that its software was not yet ready to handle these tasks but, nevertheless, asked for Commission approval to make these mitigation measures effective. NYISO could have done a better job in being candid with the Commission about the status of its software development and implementation and should not have asked for unrealistic effective dates.

The Commission orders:

(A) The Commission hereby grants NYISO's request to correct errors it made in its computation of Guarantees, but not LBMPs, while implementing the mitigation measures in its Market Administration and Control Area Services Tariff, for the period from June 1, 2002 through January 31, 2005.

(B) The Commission hereby grants NYISO's request to correct errors it made in its computation of Guarantees, but not LBMPs, while implementing the mitigation measures in its Market Administration and Control Area Services Tariff, for the period from February 1, 2005 to the present, subject to the condition that NYISO provide the Commission with details of the settlement corrections, consistent with the Staff data request of January 6, 2006.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.