

98 FERC ¶ 61, 077
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

New York Independent System Operator, Inc.

Docket No. ER01-3009-001,
ER01-3009-002, ER01-3153-001,
and ER01-3153-002

Morgan Stanley Capital Group, Inc.

v.

Docket No. EL00-90-001 and
EL00-90-002

New York Independent System Operator, Inc.

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued January 31, 2002)

In this order, we deny certain requests for rehearing of the October 25, 2001 order (October 25 Order)¹ and dismiss another request for rehearing of that order. In the October 25 Order, we accepted for filing revisions to New York Independent System Operator, Inc.'s (NYISO) tariff to implement virtual bidding and conditionally approved NYISO's proposed credit policy requirements. We also accept in part and reject in part NYISO's compliance filing, directed by the October 25 Order, to become effective on the date of issuance of this 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 prices on energy.

I. Background

The October 25 Order accepted for filing NYISO's virtual bidding procedures that allow non-physical customers to submit bids for purely financial purchases or sales of

¹ New York Independent System Operator, Inc., 97 FERC ¶ 61,091 (2001).

energy, which do not entail physical generation or consumption of energy. The introduction of virtual bidding has enabled a customer to buy energy ("virtual load") in the day-ahead market (DAM) at day-ahead prices and sell it in the real-time market (RTM) at real-time prices or to sell energy ("virtual supply") in the DAM at day-ahead prices and buy energy to cover that sale in the RTM at real-time prices.

Also, the October 25 Order conditionally approved NYISO's proposed credit requirements. The credit policies require that virtual transactions be fully collateralized; that is, virtual bidding participants must maintain a cash deposit or an irrevocable letter of credit to support virtual market transactions.² The credit policy requirements provide that NYISO may suspend services to a customer for failure to maintain creditworthiness. The October 25 Order directed NYISO to change the formula for determination of the amount of the collateral to reflect a seven-day collateralization period and to include the credit policy requirements into its tariff.

II. Procedural Matters

Edison Mission Energy, Inc. and Edison Mission Marketing & Trading (Edison Mission) filed a late motion to intervene in Docket No. ER01-3009-000, et al., the original virtual bidding proceeding. Orion Power New York GP, Inc. (Orion) also filed a late motion to intervene in that proceeding and comments in support of Sithe Power Marketing, LP (Sithe) and Exelon Generation Company, LLC's (Exelon) request for rehearing. We will deny, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2001), Edison Mission's and Orion's untimely motions to intervene in this proceeding for failure to demonstrate good cause warranting late intervention. To permit Edison Mission's motion to intervene after the issuance of the October 25 Order, in order to challenge that order, would result in unjustified delay and disruption of the proceeding, and in an undue burden on other parties.³ Furthermore, the October 25 Order constitutes final Commission action and it has been the Commission's

² Physical market participants are required to meet a minimum long-term debt credit rating to participate in the physical market. Virtual bidders are required to post cash or a letter of credit equal to a maximum day-ahead/real-time price differential per MWh times the MWhs they wish to trade times 7 days in order to participate in the virtual market.

³ See Allegheny Energy Supply Company, LLC, 96 FERC ¶ 61,272, 62,033 (2001) and Southern Company Services, Inc., 96 FERC ¶ 61,168, 61,758 (2001).

policy to disallow late interventions after a final order has been issued.⁴ Consequently, we will also dismiss Edison Mission's request for rehearing. Because Edison Mission is not a party to this proceeding, it lacks standing to seek rehearing of the October 25 Order under the Federal Power Act (FPA) and the Commission's regulations.⁵ We will also reject, pursuant to 18 C.F.R. § 385.713(d) (2001), Orion's comments in support of Sithe and Exelon's request for rehearing.

Given the lack of undue prejudice and the parties' interests, we will, however, grant the New York State Public Service Commission's and Aquila Energy Marketing Corp. (Aquila) and Edison Mission's motions to intervene in Docket No. ER02-3009-002, et al., i.e., the compliance filing proceeding. In addition, pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure,⁶ which prohibits an answer to a protest, we will reject NYISO's answer to Aquila and Edison Mission's protest to the compliance filing.

III. Rehearing Requests

On rehearing, Aquila states that the Commission violated the Federal Power Act⁷ (FPA) and the filed rate doctrine⁸ by approving the virtual bidding credit policy without having the full and complete tariff before it. Citing Electrical District No. 1 v. FERC, 774 F.2d 490 (D.C.Cir. 1985) (Electrical District No. 1), it argues that the Commission could not lawfully authorize an immediately effective rate change and direct a compliance filing in which the details of the new rate would be later described and accepted by the Commission. In connection with this, Aquila requests that the Commission reverse its decision in the October 25 Order and direct application of NYISO's current credit policy for physical transactions to virtual transactions, thereby providing NYISO with an opportunity to make a separate filing to implement the virtual bidding credit policy.

⁴ See Western Resources, Inc., 83 FERC ¶ 61,077, 61,379 (1998).

⁵ 16 U.S.C. §§ 8251(a) (1994); 18 C.F.R. §§ 385.713(b) (2001).

⁶ 18 C.F.R. § 385.213(a)(2) (2001).

⁷ 16 U.S.C. § 796, et seq. (1994).

⁸ Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981) (explaining that the filed rate doctrine forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate regulatory authority).

We believe that Electrical District No. 1 does not apply to the instant proceeding. In Electrical District No. 1, the compliance filing was made to establish specific rates, previously "unforeseeable" to tariff customers, that were developed de novo to comply with the Commission directive. In the instant case, market participants were familiar with the proposed creditworthiness provisions. Aquila argues only that it previously lacked detail of the creditworthiness provisions, not that it could not "foresee" their applicability. Even though the virtual bidding credit policies were not fully codified in a tariff on file with the Commission, they were available for review in NYISO's various manuals.⁹ Thus, the circumstances in this case differ from those before the court in Electrical District No. 1, and Aquila's argument must be rejected. In any event, even if Electrical District No. 1 were applicable, the Commission would only be required to establish a different effective date for NYISO's credit policy, rather than reject it altogether.

Further, Aquila argues that the Commission's finding of the virtual bidding credit policy to be just and reasonable was not based on substantial evidence. It reasons that there could be no finding that the credit policies are not discriminatory because the complete details of the proposed tariff were unknown to the Commission. Aquila also argues that the difference between credit policies for physical transaction and those for the virtual market is not justified because there is no evidence in the record that virtual transactions create a greater risk of default than physical transactions. It points out that the historical experience of the PJM credit policy demonstrates that the credit risk is not greater for virtual transactions. In connection with this, Aquila requests that the Commission direct NYISO to develop a universal credit policy for both virtual and physical trades. Further it argues that alternatively, the Commission should have directed NYISO to apply its current credit policy for physical transactions to virtual transactions.

We continue to believe that the record here was adequate to suggest that the virtual bidding credit policy is just and reasonable. NYISO's virtual bidding is a completely new market mechanism and thus no information is available about potential drawbacks and risks of the NYISO virtual market. For this reason, the October 25 Order accepted NYISO's credit policy as an interim measure until operation of the virtual market produces sufficient information to judge the appropriateness of these policies. NYISO was directed to file, within 30 days of the end of each of the first four capability periods in which virtual bidding is permitted, a report detailing its experience with the virtual market, including its "experience with bad debts and adequacy of and/or need for the differing credit requirements." The Commission may revisit the issue of adequacy of the virtual bidding credit policy at the time it acts on these reports. Furthermore, the virtual bidding credit policies were approved by the Commission upon two conditions, one of

⁹ NYISO's manuals are readily available on its website, www.nyiso.com.

which is that NYISO file with the Commission revised tariff sheets to include all credit requirements. The Commission has reviewed this compliance filing and concluded that the credit policies are just and reasonable and not unduly discriminatory, as discussed below.

On rehearing, Sithe and Exelon argue that the virtual bidding credit policies create an impossibly high hurdle to market entry for all but the largest market participants, and propose the following modifications to the creditworthiness requirements. First, in their opinion, the collateral requirement should be based on zones in which a market participant chooses to participate, not the maximum deviation for any zone.¹⁰ Second, they propose to lower the current deviation level from 97 percent to 95 percent. In their opinion, this deviation level is unreasonably high and should be changed to a 95 percent level. Aquila supports, on an interim basis, the proposed changes to the collateralization requirement.

Because the revisions proposed by Sithe and Exelon are similar to those suggested by intervenors in the compliance filing proceeding, they will be addressed below.

IV. Compliance Filing

On November 27, 2001, NYISO made a compliance filing, as directed by the October 25 Order. As stated above, NYISO was directed to: (1) file revised tariff sheets incorporating all the credit policy requirements, subject to the modifications and (2) modify the formula determining the amount of the collateral to reflect a seven-day collateralization period. The revised tariff sheets submitted by NYISO specify: (1) the form and amount of the collateral required to participate in the virtual market, (2) the manner in which NYISO will monitor virtual transactions, and (3) the conditions under which NYISO may suspend authorization of a customer's authorization to engage in virtual transactions.

¹⁰ To assess a market participant's potential exposure or risk, NYISO reviewed historic data from the Summer 2001 daytime hours. In virtual bidding, losses result from deviation in price between the day-ahead market and the real-time market. NYISO set the credit requirement (price deviation times MWh times 7 days) based upon a loss level that was exceeded in only three percent of the peak load hours of Summer 2001 in any zone, or at a 97 percent deviation level. See Request for Rehearing of Sithe Power Marketing, LP and Exelon Generation Company, LLC, Docket No. ER01-3009-001, et al., at 5 (November 12, 2001).

Aquila and Edison Mission argue that NYISO's compliance filing does not comply with the Commission's directives in the October 25 Order because it does not describe all the credit policies and incorporates provisions that were never approved by the Management Committee. In particular, according to Aquila and Edison Mission, NYISO failed to include in its tariff the anti-netting policy, as explained in NYISO's Technical Bulletin # 81, which precludes offsetting of virtual load and supply bids. Aquila and Edison Mission argue that the application of the anti-netting policy results in an irrationally high collateral requirement. They request that the Commission direct NYISO to discontinue the use of this anti-netting policy because it violates the filed rate doctrine, as the provision is not contained in NYISO's tariff nor was it approved pursuant to NYISO's governance process.

Furthermore, Aquila and Edison Mission challenge the minimum collateral requirement of \$1,113 per MWh, which was neither approved by the Management Committee nor mentioned in the original filings, or even in any of the Technical Bulletins. They argue that it does not reflect the effects of price convergence during shoulder and off-peak periods. They further state that the minimum collateral requirement also has been neither discussed in NYISO committees nor approved or disapproved by stakeholders.

Aquila and Edison Mission further argue that the use of 97 percent of the maximum price deviation in any zone to determine the collateral requirement is unjustified. In particular, according to the interveners, the filing fails to explain why such a high collateral requirement is needed for virtual transactions in the zones whose deviation between the real-time and day-ahead prices is considerably less than the 97 percent maximum. Aquila and Edison Mission also challenge the application of the price deviation between the RTM and DAM during the summer months¹¹ to virtual bids made in the winter and shoulder months.

Aquila and Edison Mission further state that NYISO's credit requirements violate the FPA's standard that rates be just and reasonable and not unduly discriminatory because the collateral requirement is too high and is inhibiting market participants from entering into virtual transactions. To support this point, Aquila and Edison Mission state that according to NYISO, only 10-12 market participants have registered as virtual bidders.¹² Additionally, the protesters state that there has been a notable increase in price

¹¹ Id.

¹² See Protest One Day Out-Of-Time of Aquila Energy Marketing Corp., and, to
(continued...)

responsive load bidding¹³ since the introduction of virtual bidding on November 7, 2001, as bidders are seeking to avoid the draconian credit policy for virtual bidding. Aquila and Edison Mission have also submitted an affidavit by Mr. Klein, who is Edison Mission's Director of Strategic Analysis, and who asserts that NYISO's credit policy makes virtual transaction cost prohibitive. Aquila and Edison Mission request that the Commission reject the filing and direct NYISO to: (1) apply the physical transactions credit policy to virtual transactions and (2) file with the Commission, within 120 days, a detailed description of a comprehensive credit policy for all transactions. In the alternative, they propose to modify the credit policy to: (1) calculate the collateral requirement for each zone, (2) require market participants to post collateral based on the price deviation in which they wish to place virtual bids, (3) reduce the price deviation percent from 97 percent to 95 percent, and (4) eliminate double counting of virtual bids, thereby permitting trading position to be offset when calculating the credit used.

Commission Decision

We accept in part and reject in part NYISO's compliance filing, effective on the date of issuance of this order, as discussed above. We direct NYISO to remove from its tariff sheets the minimum collateral requirement. As we stated in the October 25 Order, the virtual market is expected to bring about convergence of the day-ahead and real-time prices, and as a result the amount of collateral required will also decrease. NYISO's minimum collateral requirement, in essence, sets a limit to such convergence and thus must be rejected. We also note that this provision appeared neither in NYISO's original virtual bidding filing nor in any comments or protest submitted in that proceeding.

We, however, will not address Aquila and Edison Mission's other arguments at this time. We believe that the proposed credit policy should be given an opportunity to operate for a while, to gain experience before potentially burdensome modifications are required. As mentioned above, NYISO's virtual bidding is a completely new market mechanism and thus no information is available about potential drawbacks and risks of the NYISO virtual market. For these reasons, in the October 25 Order, we approved NYISO's credit policy as an interim measure and directed NYISO to file, within 30 days

¹²(...continued)

the Extent Necessary, Motion to Intervene Out-Of-Time and Protest of Edison Mission Energy, Inc. and Edison Mission Marketing & Trading, Inc., Docket No., ER01-3009-002, et al., at 5, n.14 & at 14 (November 28, 2001).

¹³ Price responsive bidding is a financial-based bid, which has similar effects of virtual bidding.

of the end of each of the first four capability periods in which virtual bidding is permitted, a report detailing its experience with the virtual market. We expect that NYISO will address in its report the concerns raised by Aquila and Edison Mission. We will then consider modifications to NYISO's virtual bidding procedures as appropriate at that time.

The Commission orders:

(A) Aquila Energy Marketing Corp.'s request for rehearing is hereby denied, as discussed in the body of this order.

(B) Edison Mission Energy, Inc. and Edison Mission Marketing & Trading's request for rehearing is hereby dismissed, as discussed in the body of this order.

(C) Sithe Power Marketing, LP and Exelon Generation Company, LLC's request for rehearing is hereby denied, as discussed in the body of this order.

(D) NYISO's compliance filing is hereby accepted for filing, subject to modification, to become effective on the date of issuance of this order.

(E) NYISO is hereby directed to file, within 20 days of the date of issuance of this order, revised tariff sheets to remove the minimum collateral requirement.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

