109 FERC ¶ 61,163
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.	Docket Nos. EL03-26-000
v.	EL03-26-001
Dynegy Power Marketing, Inc.	EL03-26-002

ORDER ON REHEARING AND ARBITRATION AWARD

(Issued November 17, 2004)

1. This order addresses erroneous mitigation by the New York Independent System Operator, Inc. (NYISO) of bids by Dynegy Power Marketing, Inc. (Dynegy) for its Roseton Generating Units 1 and 2 (Roseton Units) into NYISO's day-ahead market. We will deny NYISO's request that we vacate the arbitration award (Award)[1] that compensated Dynegy for the erroneous mitigation and affirm the Award. However, because the Award contains computational errors, we will require re-computation of the compensation due Dynegy. In addition, we will deny rehearing of the Commission's November 25, 2003 Order[2] concerning refusal to consider new exhibits. This order benefits customers by ensuring that market power mitigation measures are consistently applied to market participants and promoting arbitration as a means of dispute resolution.

[1] American Arbitration Association Case No. 13 198 00247 02, *Dynegy Power Marketing, Inc. and New York Independent System Operator, Inc.* (October 28, 2002) (Grigg, Arb.).

[2] *New York Independent System Operator, Inc. v. Dynegy Power Marketing, Inc.*, 105 FERC ¶ 61,249 (2003) (November 2003 Order).

Background[3]

NYISO Market Mitigation

2. NYISO administers the day-ahead and the real-time electric wholesale markets in the New York Control Area (NYCA). It determines the prices for sales and purchases of energy pursuant to market rules in its Market Administration and Control Area Services Tariff (Services Tariff). In the day-ahead market, buyers and sellers submit bids to NYISO for the purchase or sale of electricity for delivery the next day on an hourly basis.

3. To determine the optimal day-ahead schedules for power supplies that will be needed each hour to serve the NYCA load for the next day, NYISO uses a software program called the Security Constrained Unit Commitment (SCUC). The SCUC makes a series of iterations and ranks the submitted hourly bids. It starts with the least cost bid and accepts bids, in order of least cost, until the total number of accepted megawatts meets the forecasted load for that hour, while also taking into account various factors, including transmission congestion. The bid price of the last megawatt accepted by the SCUC sets that hour's market-clearing price, called the Location Based Marginal Price (LBMP). All sellers whose bids for that hour were accepted receive the LBMP for all the megawatts accepted. The resulting day-ahead market schedule establishes for each generator the LBMP and the number of megawatts an individual seller is financially committed to deliver in real-time.

4. NYISO's market mitigation measures[4] use a two-part test to detect economic withholding, the Conduct Threshold and the Impact Threshold. The Conduct Threshold compares the bid submitted by a seller with the seller's Reference Level, that is, a value determined by an historical average of the seller's bids accepted by NYISO or, if there is insufficient historical information available, then the Reference Level is determined by NYISO after consultation with the seller. The market mitigation measures intend Reference Levels to reflect a generating unit's marginal cost. If a bid exceeds the lesser of $100 or 300 percent of the applicable Reference Level, the bid is deemed to have crossed the Conduct Threshold. NYISO then examines the bid to see if it substantially distorts market outcomes, that is, the bid violates the Impact Threshold. The Impact

[3] The description of NYISO markets operations is taken, unless otherwise indicated, from the Joint Stipulation of Facts (Exhibit No. 1) submitted to the Arbitrator at pp. 1-11, Item No. 2 *in* NYISO's February 20, 2003 Motion to Vacate.

[4] *See* New York Independent System Operator, Inc., FERC Electric Tariff (Services Tariff), Attachment H "NYISO Market Monitoring Plan" (Attachment H) (Item No. 4 *in* NYISO and Dynegy's joint December 5, 2003 filing).

Threshold is violated if the bid would increase market prices by the lesser of $100 or 200 percent. Should the seller's bid be found to violate the Impact Threshold, the bid is mitigated prospectively to the default bid, which is the applicable Reference Level. Even if a seller's bids cross the Conduct Threshold and violate the Impact Threshold, the seller normally receives the LBMP at its generation bus for all the MW accepted by the SCUC. A generator can still be paid an amount exceeding its Reference Level based on the prices that are produced by SCUC outcomes calculated with mitigated bids.

Automation of the Mitigation Procedures

5. These market mitigation procedures necessarily entailed a one-day delay in mitigating conduct that would otherwise set non-competitive market energy prices in the day-ahead market. To remedy this delay, NYISO proposed revisions to Attachment H that automated a step in the mitigation. The Commission modified and accepted the proposed Automated Mitigation Procedure (AMP) on June 28, 2001, for use during summer 2001, expiring October 31, 2001.[5] The AMP leaves unchanged the numerical values designated for the Conduct and Impact Thresholds. When bids input to the SCUC exceed the Conduct Threshold, the AMP substitutes mitigated bids in later SCUC iterations. Resulting prices are then examined to determine if the Impact Threshold has been exceeded. If both the Conduct and Impact Thresholds are exceeded, the AMP automatically mitigates a seller's bid to its Reference Level without further investigation or consultation whether the bid represents an attempt to exercise market power. Using the AMP, and under normal conditions, all sellers, including sellers whose bids have been mitigated, receive payment at the applicable LBMP for all MW accepted for any hour in which mitigated bids are accepted.

[5] *New York Independent System Operator, Inc.*, 95 FERC ¶ 61,471 at 62,690, *reh'g denied*, 97 FERC ¶ 61,176 (2001), *petition for review denied per curium sub nom*., *Dynegy Power Marketing, Inc. v. FERC*, 62 Fed. Appx. 1 (2003) (AMP Order). The Commission extended the AMP first until April 30, 2002, *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,242 (2001), and then until May 31, 2004, when it directed NYISO to determine needed changes and refinements addressing, *inter alia*, unnecessary mitigation. *New York Independent System Operator, Inc.*, 99 FERC ¶ 61,147 (2002). On May 31, 2002, the Commission accepted NYISO's compliance filing of a comprehensive market power mitigation plan, which included permanent adoption of a refined AMP. *New York Independent System Operator, Inc.*, 99 FERC ¶ 61,246 (2002), *order on reh'g*, 103 FERC ¶ 61,61,291 (2003) (requiring report by December 2, 2004 on the operation of NYISO's revised market monitoring and mitigation procedures from May, 31, 2004 to the end of the 2004 summer capability period) (Permanent AMP Order).

6. During its consideration of the proposed AMP, the Commission agreed with certain intervenors that the proposed AMP may mitigate bids in situations where market power is not the cause of high or volatile bids, and that NYISO's proposal may not provide for sufficient consultation with generators to establish reasonably that particular bids were attempts to exercise market power. Accordingly, the Commission stated that if NYISO subsequently determines that a bid was not an attempt to assert market power, the generator will be paid its full bid.[6]

7. On July 26, 2001, NYISO issued Technical Bulletin No. 67 "Automated Mitigation Procedures for the Day-Ahead Energy Market" (Technical Bulletin No. 67),[7] which explained how NYISO uses the AMP and stated how NYISO would treat inappropriate mitigation of a unit:

> In the unlikely circumstance that a unit is mitigated inappropriately, the unit will be held harmless to the level of its bid that was consistent with the information provided to the NYISO but not incorporated into the Reference Level for the day(s) at issue. For the hours at issue, the affected unit would receive a supplement to its LBMP revenues equal to the difference between the LBMP and its bid, times the number of megawatts supplied by the unit.[8]

Erroneous Mitigation

8. Prior to August 8, 2001, Dynegy and NYISO's Market Monitoring Unit negotiated new Reference Levels for the Roseton Units. On August 8, 2001, Dynegy submitted bids for all its generating units, including the Roseton Units, for the August 10, 2001 day-ahead market. NYISO did not update its day-ahead market software to reflect the recently revised Reference Levels for the Roseton Units.[9] Because the software compared Dynegy's bids to the old Reference Levels, the SCUC erroneously mitigated

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[6] AMP Order, 95 FERC ¶ 61,471 at 62,690 & n.9.

[7] Arbitration Exhibit No. 7, Item No. 10 *in* NYISO and Dynegy's joint, December 5, 2003 filing.

[8] Technical Bulletin No. 67 at 3.

[9] *See* testimony of James H. Savitt, Ph.D., NYISO's Market Monitor and Principal Economist, at the September 5, 2002 Hearing (Hearing Transcript) at 140, Appendix Tab 4 *in* NYISO's February 20, 2003 filing.

and improperly lowered certain of Dynegy's bids for upper output levels from the Roseton Units for hours 9 through 19 of the August 10, 2001 day-ahead market. This resulted in the SCUC scheduling the Roseton Units to provide a certain number of megawatts for hours 9 through 19, for which Dynegy received only the LBMP, a price lower than its bids.[10]

9. NYISO did not dispute that it had erroneously mitigated Dynegy's bids into the August 10, 2001 day-ahead market; however, it disagreed with Dynegy's assessment of the additional compensation due for the erroneous mitigation. As explained later, the dispute centers on number of megawatts that should receive supplemental compensation. NYISO states that only those megawatts that were mitigated in error should be compensated, while Dynegy states that compensation should be applied to all megawatts scheduled, as would be the case if the units actually set the market clearing price. NYISO calculated $12,687.97. Dynegy claimed $895,596.00 plus additional compensation for lost opportunity costs relating to other generating units.[11] Pursuant to section 11.3 of the Services Tariff and section 10.05 of NYISO's Independent System Operator Agreement (NYISO Agreement),[12] to which Dynegy is a signatory, the parties sought arbitration of their dispute. On September 5, 2002, the Arbitrator held an evidentiary hearing (Hearing). On October 28, 2002, he awarded Dynegy $895,596.00 as damages for the erroneous mitigations of its bids from the Roseton Units and denied Dynegy's claim for consequential damages.

Filings and the Commission's Procedural Order

10. On November 8, 2002, NYISO filed the Award with the Commission, as required by Section 11.3 (Docket No. EL03-26-000). On January 10, 2003, Dynegy filed a motion with the United States District Court for the Southern District of New York

[10] For the remainder of Dynegy's bids into the August 10, 2001 day-ahead market, including lower bid blocks in hours 9 through 19, bids from the Roseton Units were not mitigated. Dynegy received LBMPs that were equal to or higher than its bid.

[11] Dynegy's lost opportunity costs related to generation from Dynegy's Danskammer Units. At the hearing, Dynegy acknowledged that technically these units were not improperly mitigated. Hearing Transcript at 61. The Arbitrator did not award damages for these units, and Dynegy did not pursue this claim before the Commission.

[12] The provisions of the Services Tariff and the NYISO Agreement are consistent. For simplicity, as in previous orders in this proceeding, this order will cite only to section 11.3 of the Services Tariff (section 11.3).

(District Court) to confirm the Award.[13] On February 20, 2003, NYISO filed with the Commission a motion to vacate the award (NYISO's Motion to Vacate), which included nine exhibits. Dynegy responded, on March 7, 2003, by filing two motions. The first motion urged the Commission to dismiss NYISO's Motion to Vacate. The second motion asked the Commission to strike from consideration Exhibit Nos. 5, 8, and 9 of NYISO's Motion to Vacate because these items had not been in the record submitted to the Arbitrator (Motion to Strike Exhibits).

11. On March 14, 2003, the Commission established the schedule for submission of further pleadings to address the substantive issues. The schedule would be based on whether Commission granted or denied NYISO's Motion to Vacate in an order to issue after the close of the intervention period.[14]

12. In the November 2003 Order, the Commission asserted its primary jurisdiction over the Award because of the novel and technical policy issues presented: the interpretation of full bid in the context of mitigation;[15] and the design and operation of market mitigation procedures.[16] The Commission granted Dynegy's motion that Exhibit Nos. 5, 8, and 9 be stricken from Commission consideration (Stricken Exhibits). It also

[13] *Dynegy Power Marketing, Inc. v. New York Independent System Operator, Inc.*, No. 03 CIV 247 (S.D.N.Y., filed Jan. 10, 2003).

[14] *New York System Operator, Inc. v. Dynegy Power Marketing, Inc.*, 102 FERC ¶ 61,297 (2003)(Procedural Order). The intervention period required one year from the date of the Award, closing on October 28, 2003, because section 11.3 gives parties one year from the date of an arbitration decision to request the Commission or other appropriate authority to vacate, modify or take other appropriate action with respect to an arbitration decision.

[15] The Commission had not defined the term "full bid" when referring to correction of erroneous mitigation in the AMP Order, 95 FERC ¶ 61,471 at 62,690 n.9.

[16] November 2003 Order, 105 FERC ¶ 61,249 at P 14-15.

ordered the parties to file with the Commission all exhibits presented to the Arbitrator that had not previously been filed. Lastly, the Commission directed Dynegy to file a substantive answer to NYISO's Motion to Vacate, and NYISO to file a rebuttal to Dynegy's forthcoming answer.[17]

13. On December 5, 2003, NYISO and Dynegy jointly filed the exhibits presented to the Arbitrator that had not been filed previously with the Commission (Arbitration Exhibits) (Docket No. EL03-26-001).

14. On December 19, 2003, NYISO filed a request for rehearing of the Procedural Order, in which it objected to the Commission's refusal to consider Stricken Exhibit Nos. 5, 8, and 9 (Docket No. EL03-26-002).

15. On December 24, 2003, in Docket No. EL03-26-000, Dynegy filed its substantive response to NYISO's February 20, 2003 Motion to Vacate (Dynegy's Response). On January 13, 2004, NYISO filed its rebuttal to Dynegy's Response (NYISO's Rebuttal).[18]

Notice and Responsive Filings

16. Notice of NYISO's and Dynegy's joint filing of the Arbitration Exhibits was published in the *Federal Register*, 68 Fed. Reg. 74,231 (2003), with interventions, protests, and comments due on or before December 19, 2003. New York Transmission Owners (Transmission Owners)[19] filed a timely motion to intervene in Docket No. EL03-26-001. On January 5, 2004, Dynegy filed its opposition to Transmission Owners' intervention, to which Transmission Owners replied, on January 20, 2004.

[17] November 2003 Order, 105 FERC ¶ 61,249 at Ordering Paragraphs (B) – (D). Because of the Commission's assertion of primary jurisdiction, the District Court stayed its proceeding pending resolution of the Commission's proceedings. *Dynegy Power Marketing Inc. v. New York Independent System Operator, Inc.*, No. 03-CIV-247 (S.D.N.Y. Dec. 9, 2003) (mem. order granting stay).

[18] On January 9, 2004, NYISO was granted extended time to file its rebuttal.

[19] Transmission Owners consist of: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, LIPA, New York Power Authority, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Orange and Rockland Utilities, Inc., and Niagara Mohawk Power Corporation.

Discussion

Procedural Matters

Intervention

17. Notwithstanding Dynegy's opposition, we will grant Transmission Owners' motion to intervene in the Docket No. EL03-26-001 proceeding. We are satisfied that Transmission Owners have adequately demonstrated their interest in the outcome of this proceeding, that no other party represents their interests, and that their participation may be in the public interest.[20] Transmission Owners state, in their January 20, 2004 filing, that they do not protest or take any position with respect to the remaining exhibits. We infer that Transmission Owners accept the record in this proceeding, as it existed when they moved to intervene. As the Commission had decided only procedural matters as of that date, granting Transmission Owners' intervention does not delay or otherwise hinder the progress of these proceedings nor cast an undue burden on any party.[21]

Privileged Treatment

18. For four of the filings in this proceeding, NYISO or Dynegy or both request privileged treatment under section 388.112 of the Commission's regulations.[22] The four filings are: the Award; NYISO's February 20, 2003 Motion to Vacate; NYISO and Dynegy's joint December 5, 2003 filing of Arbitration Exhibits; and NYISO's January 13, 2004 Rebuttal. The parties state that these filings contain confidential trade secrets and commercial information relating to the level of the bids submitted by Dynegy to certain energy markets administered by NYISO. NYISO states that it does not otherwise disclose this information, and that disclosure could adversely affect competition by Dynegy in, and the competitiveness of, the markets that NYISO administers. No party protested the requests for confidentiality. We will grant NYISO's and Dynegy's requests. For this reason, we will not cite in this order to specific data concerning the erroneously mitigated bids.

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[20] *See* Rule 214(c)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(c)(2) (2004).

[21] *See*, *e.g.*, *California Independent System Operator Corporation*, 91 FERC ¶ 61,205 at 61,722 (2000).

[22] 18 C.F.R. § 388.112(a) (2004) (person submitting document may request privileged treatment because some or all of the information is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. §552 (2000), and should be withheld from public disclosure).

Rehearing re Stricken Exhibits

19. In the November 2003 Order, the Commission declined to consider NYISO's three Stricken Exhibits because the exhibits had not been in the record submitted to the Arbitrator who, therefore, could not have considered them before rendering his decision.[23] Stricken Exhibit No. 5 summarizes the testimony offered at the arbitration hearing by James Savitt, Ph.D., NYISO's Principal Economist and Market Monitor, and explains in detail a spreadsheet that he presented at the hearing.[24] Stricken Exhibit No. 8 is an affidavit by David Patton, Ph.D., NYISO's Independent Market Advisor, in which he gives his economic analysis of the Award as to its consistency with the design of the day-ahead market and with the economic principles underlying operation of the day-ahead market and the AMP. Dr. Patton describes bidding in the New York electricity markets, and assesses both Dynegy's claim for compensation, as adopted by the Award, and NYISO's proposed compensation to Dynegy. He concludes that NYISO's proposal would fully compensate Dynegy.[25] Stricken Exhibit No. 9 contains two legal encyclopedia articles on compensation for damages, one from *American Jurisprudence, 2nd edition*, and the other from *New York Jurisprudence*.[26]

20. In seeking Commission consideration of the Stricken Exhibits on rehearing, NYISO emphasizes that these exhibits do not add new facts to the record, but serve to explain the facts before the Arbitrator, and to elucidate how the Award is inconsistent with the economic principles behind the Commission-approved design of its market. NYISO cites statutory and case law in support of the Commission's plenary authority to review the Award *de novo*.[27] NYISO cites the Commission's recognition of the importance to this case of correct interpretation of the term full bid, and argues that the Stricken Exhibits aid in understanding the Arbitrator's error in applying the term.

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[23] November 2002 Order, 105 FERC ¶ 61,249 at P 18.

[24] Stricken Exhibit No. 5 contains confidential information and is excluded from the public version of NYISO's Motion to Vacate.

[25] Stricken Exhibit No. 8 contains confidential information. A redacted version is available in the public version of NYISO's Motion to Vacate.

[26] 22 Am. Jur. 2d *Damages* § 25 (2002); 36 NY Jur. *Damages* § 9 (2002).

[27] NYISO cites, *inter alia*: the Administrative Procedure Act, 5 U.S.C. § 551-706 (2000); *Duke Power Co. v. FERC*, 864 F.2d 823 (D.C. Cir. 1989); *North Carolina Eastern Municipal Power Agency v. Carolina Power & Light Co.*, 46 FERC ¶ 61,181 at 61,600 (1989).

NYISO says that the Commission should not exclude material from consideration because NYISO placed the material in an exhibit to its filing rather than in the filing itself. Finally, NYISO contends that the Commission acted arbitrarily and capriciously in excluding the Stricken Exhibits, and that reasoned decision making would require their consideration.

21. Dynegy, in its March 7, 2003 Motion to Strike Exhibits, argues that Commission review should be limited to evidence presented by the parties to the Arbitrator in the pre-hearing briefs, at the hearing, and in post-hearing briefs. It says that the information contained in the Stricken Exhibits was available and discoverable during the arbitration proceedings, but that NYISO chose not to present it. Dynegy objects to Stricken Exhibit No. 5 as a rehash of Dr. Savitt's testimony, and says that NYISO could have prepared a summary of its methodology for consideration by the Arbitrator. Dynegy objects to Stricken Exhibit No. 8, Dr. Patton's affidavit, because Dr. Patton could have but did not testify at the arbitration hearing, and was never identified as a potential witness. Dynegy states that, in response to interrogatories, NYISO said that Dr. Patton had been consulted in regards to compensation methodology, and concludes that NYISO therefore knew his opinions. Had NYISO included Dr. Patton as a witness, Dynegy would have an opportunity to depose him, request the information on which he relied, and cross-examine him at hearing to show his misunderstandings to the Arbitrator.

22. We will deny rehearing as to Stricken Exhibits 5, 9, and 8, and will not admit them for consideration. While NYISO is correct, that the Commission has plenary authority to review the Award *de novo*,[28] the Commission's plenary authority is only one of the legal principles governing this situation. In deciding whether to consider material not submitted to arbitration, we also examine whether its consideration is appropriate, under our statutory responsibilities, given our desire to effectuate the Alternative Dispute Resolution Act of 1990 (ADRA),[29] which encourages parties to resolve their disputes by arbitration. We want a disputing party to an arbitration hearing to present all existing relevant material at that hearing and not to withhold material for use in case the Arbitrator rules against the party. We also want all material or testimony to be available at the arbitration stage for cross-examination by the opposing parties.

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[28] *See* Alternate Dispute Resolution, Order No. 578, 60 Fed. Reg. 19,494 (April 19, 1995), FERC Stats. & Regs. ¶ 31,018, *reh'g denied*, 71 FERC ¶ 61,330 (1995) (Order No. 578) (ultimate outcome of an ADR proceeding, like any other settlement is subject to Commission review in a manner that conforms with the Commission's statutory duties).

[29] 5 U.S.C. §§571-83 (2000).

23. NYISO could have included the articles from the two legal encyclopedias in its presentation to the Arbitrator. More importantly, we do not see how two general discussions of damages benefit our understanding of the meaning of the technical term full bid. Second, if NYISO felt that the Arbitrator needed further explanation of Dr. Savitt's testimony to fully understand the situation, NYISO could have submitted its summary or elucidation of Dr. Savitt's calculations to the Arbitrator, either during the hearing or in a post-hearing brief. Finally, we find compelling Dynegy's argument that if NYISO wanted to use Dr. Patton's analyses, Dynegy should have had the opportunity to depose and cross-examine him as to his assumptions and conclusions. For these reasons, we deny NYISO request for rehearing.

Arbitration Hearing and Award

Parties' Positions at Arbitration

24. At the Hearing, Dynegy based its claim for compensation on its interpretation of the term full bid in the AMP Order and on Technical Bulletin 67.[30] Dynegy urged that compensation for its improperly mitigated Roseton Units should be calculated by supplementing the difference between the LBMP and the unit's bid, applied to the full number of megawatts supplied by the unit for those hours when the unit was erroneously mitigated and paid an LBMP below its bid price. For each hour on August 10 that each Roseton Unit was paid an LBMP below its bid, Dynegy calculated the monetary difference between the LBMP and the bid that coincided with the number of megawatts that NYISO actually scheduled. It then multiplied this monetary difference by the total megawatts scheduled for each unit to arrive at claims of $448,951 and $446,645, respectively.[31]

25. NYISO, on the other hand, determined the point at which each unit would have been scheduled but for the mitigation, that is, the megawatt output that coincides with the unit bid matching the LBMP for each hour. NYISO proposed to compensate Dynegy only for those megawatts that were erroneously scheduled above the Roseton Units' LBMPs. Like Dynegy, NYISO determined, for each hour, the unit output at the Dynegy bid that would have matched the LBMP, and compared this result to the megawatts actually scheduled to determine how many megawatts each hour had been scheduled in excess. Then, using the actual day-ahead market LBMP for each hour, NYISO calculated the dollar value of Dynegy's bid for the erroneously scheduled megawatts from each unit

[30] Testimony of John Borin, Dynegy's Asset Manager, Hearing Transcript at 50-51.

[31] Award at 9.

for each hour by comparing the actual LBMP with Dynegy's bid. Multiplying this difference by the quantity of megawatts scheduled in error, NYISO arrived at its calculation of the damages due for the erroneously mitigated hours.[32]

26. NYISO stated that the Roseton Units would not have been scheduled in the day-ahead market for the amounts actually scheduled absent the error because the megawatts that Dynegy bid above LBMP would not have been economic. After reviewing the SCUC output, NYISO determined that, for the hours in question, the units were not marginal, that is, they would not have set the LBMP at the output levels that were mitigated.[33] NYISO emphasized that for the output that was economically scheduled, Dynegy was paid the LBMP for those megawatts, a price in fact higher than its bid curve.

27. NYISO stated that the intent of Technical Bulletin No. 67 was that if NYISO erroneously mitigated a unit, NYISO did not want a unit to be forced to run at a loss. NYISO would provide a supplement to that unit for any megawatt dispatched above the point where the unit's bid was in excess of the LBMP.[34] The revenue supplement would have the objective of holding the erroneously mitigated unit harmless, and the supplement would compensate the erroneously mitigated unit by the difference between the LBMP and the megawatts that were inappropriately committed.[35] NYISO said that its proposed supplement would give Dynegy adequate revenue to cover its costs for the two Roseton Units, thus making Dynegy whole. NYISO arrived at this conclusion by comparing the revenues that Dynegy received after mitigation with Dynegy's costs to operate the units. NYISO established a proxy for Dynegy's costs of operating the units by use of Dynegy's bids and its Reference Levels.

28. Dynegy objected that NYISO's compensation methodology would keep Dynegy whole only for the segment of the bid curve that was mitigated. Dynegy wanted compensation for its full output, consistent with the rules for the day-ahead market where all megawatts are paid one price.[36]

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[32] *See* Testimony of Dr. Savitt, Hearing Transcript at 149-50.

[33] Testimony of Dr. Savitt, Hearing Transcript at 153-154.

[34] *Id.* at 182.

[35] *Id.* at 228.

[36] Testimony of Mr. Borin, Hearing Transcript at 55-58.

Arbitrator's Award

29. The Arbitrator stated that the crux of the dispute was the meaning of the full bid to which Dynegy was entitled, and illustrated the parties' differing positions: "If a bid by Dynegy for 541 megawatts in hour 12 of the DAM were accepted and erroneously mitigated would Dynegy be entitled, as it contends, to . . . its bid price at that level of output times the entire 541 MW -- regardless of the LBMP for that hour; or, as NYISO contends, should Dynegy's bid be viewed on a block by block basis such that Dynegy would be entitled to supplemental payment only with respect to those bid blocks in which the bid price exceeded the LBMP? In other words, did Dynegy receive its 'full bid' for output accepted and scheduled from the Roseton Units for those blocks in its bid curve where the bid price fell below the applicable LBMP, thus limiting its additional compensation to those bid blocks in which the bid exceeded the LBMP?"[37]

30. The Arbitrator observed that in certain of the bid blocks for the Roseton Units, the LBMP exceeded Dynegy's bids for the units and in others, the LBMP was lower. He acknowledged that Dynegy's position includes an element of windfall because it is unlikely that the market clearing price (the LBMP) would have been set by Dynegy's bid or that the Roseton Units would have been scheduled at the upper levels of their output. Nevertheless, to resolve the dispute, the Arbitrator relied on the AMP Order and Technical Bulletin No. 67. He stated that Dynegy was entitled to rely on the clear language contained in the bulletin. He construed the applicable provisions of these documents[38] in light of market expectations and stated that:

> A supplier who submits a bid in the DAM in compliance with all market rules and applicable tariffs has the right to expect that if the bid is accepted the supplier will be paid at least the incremental bid price for all the megawatts scheduled. The supplier has the right to assume that its full bid was properly evaluated and that it did not exceed the market clearing price. Otherwise it would not have been accepted. Likewise, if a supplier were to submit a bid based on an erroneous calculation it could not later be heard to complain if, after the bid were accepted, it were determined that because of its error the supplier did not recover its costs or its anticipated return.

[37] Award at 4.

[38] *See* P 6 and 7, *supra.*

> The risk lies with the party making the error. To hold otherwise introduces uncertainty into the integrity of the bidding process and intrudes upon the stability of the markets.[39]

31. The Arbitrator sustained Dynegy's position on calculation of damages. Relying on Dynegy's calculations in Hearing Exhibit No. 8,[40] the Arbitrator awarded Dynegy $448,951 and $446,645 respectively for Roseton Unit Nos. 1 and 2, for a total of $895,596. Because there was no evidence that FERC or NYISO directives authorize the award of consequential damages, he denied that claim.[41]

Parties' Positions At the Commission

32. NYISO and Dynegy agree that the term full bid means, on a per megawatt basis, the difference between the posted LBMP and the bid from the Roseton Units.[42] Their dispute, and NYISO's dispute with the Award, is over how many megawatts should receive this full bid.

33. NYISO contends that the Award errs in applying the full bid to the totality of Dynegy's bids for each hour because only a small part of Dynegy's bids, those at the upper output levels, were erroneously mitigated, while Dynegy was fully compensated for all its risks for the remainder of its bids because those bids were paid their bid amounts or higher. NYISO further states that the Award amount is not just and reasonable under section 205 of the FPA, 16 U.S.C. § 824d (2000), and is inconsistent with the design of NYISO markets and general principles of compensation for errors. It compensates Dynegy for megawatts that were not erroneously mitigated and assumes that Dynegy submitted its bids based on average costs rather than marginal costs. Because the Award compensates Dynegy considerably in excess of its costs and well above the market clearing price that would have resulted absent the erroneous mitigation, NYISO contends that the Award cannot be upheld as either a cost-based or market-based result.

34. NYISO says that the arbitrator incorrectly treated NYISO and Dynegy as standing in a bilateral, buyer-seller relationship, whereas NYISO is really an intermediary—a market administrator rather than a market participant, and that the true buyers in the day-

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[39] Award at 5.

[40] Hearing Exhibit No. 8 is not publicly available.

[41] Award at 6-7.

[42] *See* NYISO's Motion to Vacate at 9; Dynegy's Response at 18.

ahead market are the load-serving entities. NYISO contends that the arbitrator erroneously focused on Dynegy's risk that its units might have outages resulting in the need to purchase power in real-time in order to meet its obligations in the day-ahead market as a reason to award the full bid to all the megawatts in Dynegy's bids while, in actuality, Dynegy's bids covered outage risks and every other category of costs.

35. NYISO contends that the arbitrator misconstrued Technical Bulletin No. 67.[43] The calculation it describes is intended to determine compensation only for the bids that were improperly mitigated, not associated megawatts that were not improperly mitigated. Dr. Savitt, its drafter, intended it to meet the situation where NYISO made a mistake. NYISO did not want the unit to be forced to run at a loss and so would provide a supplement to that unit for any megawatt that got dispatched above the point where the unit's bid was in excess of the LBMP.[44]

36. Dynegy disagrees that the Award violates the FPA, pointing out that under current market rules, all committed units are paid the market clearing price regardless of their marginal operating costs, and that markets are designed to pay suppliers a scarcity premium during periods of high demand. Dynegy states that the design of the New York energy markets is premised on paying a supplier the LBMP for all megawatts offered and accepted. Even under mitigation measures, the generator gets the relevant LBMP for all scheduled megawatts. NYISO's compensation offer of approximately $13,000 was determined as if each segment of the bid curve has been bid separately and is inappropriate for megawatts near the upper operating limits of Dynegy's units on one of the hottest days of the year.

37. Dynegy says that the Commission's requirement, stated in the AMP Order, to pay an erroneously mitigated generator its full bid, means that the harmed generator should be made whole and held harmless for the AMP's errors. Payment of an arbitrary fraction of the generator's bid curve is not payment for the full bid and would not comport with the Commission's concerns over lack of consultation prior to the mitigation. Dynegy says that Technical Bulletin No. 67 clearly does not distinguish between mitigated and unmitigated megawatts when describing compensation for improper mitigation, and that this was Dynegy's understanding when it placed bids for the Roseton Units.

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[43] *See* P 7, *supra*.

[44] NYISO Rebuttal at 10-11.

Commission Response

38. The Commission has long indicated that it would accord appropriate deference to ADR outcomes.[45] We will apply that rationale here by affirming the Award, but with a calculation revision.

39. The AMP Order did not define the "full bid" to which erroneously mitigated sellers would be entitled. Related Commission orders[46] were similarly unspecific, speaking only of making improperly-mitigated bidders whole. NYISO issued the Technical Bulletin No. 67 on July 21, 2001, two months after the AMP Order issued, at least in part to respond to the numerous sellers who had criticized the AMP as likely to result in improper and impermissible mitigation of economically justifiable bids.[47] Technical Bulletin No. 67 provided sellers with NYISO's remedy in case of inappropriate mitigation. Thus, sellers would be encouraged to bid into the day-ahead market despite its feature of automatic mitigation without prior consultation of bids that exceeded the economic withholding thresholds established in NYISO's market mitigation measures. The day-ahead market would be able to function.

40. NYISO and Dynegy agree that the term full bid means, in this situation and on a per megawatt basis, the difference between the posted LBMP and the bid from the Roseton Units at the megawatt level scheduled by NYISO.[48] Their dispute, and NYISO's dispute with the Award is over how many megawatts from the Roseton Units should receive this difference. NYISO's calculation of compensation to Dynegy essentially applies the difference between the Dynegy bid and the LBMP to the megawatts that were

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[45] Policy Statement Regarding Regional Transmission Groups, FERC Stats. & Regs. ¶ 30,976 at 30,877-78 (1993). *Cf. California Independent System Operator Corporation*, 107 FERC ¶ 61,152 at P 26 (2004), *reh'g pending* (California Independent System Operator Corporation tariff, when providing for arbitration, states that parties intend the Commission to afford substantial deference to arbitrator's factual findings, and limits appeal of arbitration award to grounds that award is contrary to or beyond scope of, among other things, relevant independent system operator documents, the FPA, or Commission regulations and decisions).

[46] *See Mirant Americas Energy Marketing, L.P., et al*., 95 FERC ¶ 61,189 (2001) (requiring NYISO to file its proposed automation of day-ahead bidding and procedures and mitigation measures); Permanent AMP Order, 103 FERC ¶ 61,291 at P 29.

[47] *See, e.g.,* May 31, 2001 protest of the Independent Power Producers of New York, Inc., in Docket No. ER01-2076-000, the AMP Order proceeding.

[48] *See* NYISO's Motion to Vacate at 9; Dynegy's Response at 18.

erroneously scheduled; whereas Dynegy's claim applies the difference between the Dynegy bid and the LBMP to the entire megawatt output of the units for each hour as if the Roseton Units would have set the LBMP for the hours in question.

41. NYISO contends that the Award cannot be upheld as either a cost-based or market-based result because it compensates Dynegy considerably in excess of Dynegy's costs and is well above the market clearing price that would have resulted absent the erroneous mitigation. It essentially compensates Dynegy for megawatts that were not erroneously mitigated. In addition, NYISO attempted to show that Dynegy already recovered its costs of operation, even after being mitigated, by using Dynegy's Reference Prices as a proxy for costs, since in theory, reference prices which are based on a generators bidding history should reflect a unit's marginal costs; and also discussed whether Dynegy's bidding strategy was rational for the NYISO market design. NYISO also states that the Arbitrator erred by emphasizing Dynegy's risk that it might have to purchase power in real-time in order to meet its obligations in the day-ahead market, should its units have outages, as a reason to award the full bid to all the megawatts in Dynegy's bids; in actuality, Dynegy's bids covered outage risks and every other category of costs.

42. Dynegy responds that Technical Bulletin No. 67 clearly does not distinguish between mitigated and unmitigated megawatts when describing compensation for improper mitigation, and that this was Dynegy's understanding when it placed its Roseton Units bids. It disputes that the Award violates the FPA, pointing out that, under current market rules, a supplier is permitted to receive compensation greater than its marginal costs, that all committed units are paid the market clearing price regardless of their marginal operating costs, and that markets are designed to pay suppliers a scarcity premium during periods of high demand. Dynegy states that the design of the New York energy markets is premised on paying a supplier the LBMP for all megawatts offered and accepted. Dynegy says that payment of an arbitrary fraction of the generator's bid curve is not payment for the full bid and would not comport with the Commission's concerns over lack of consultation prior to the mitigation. Approximately $13,000 compensation is inappropriate for megawatts near the upper operating limits of Dynegy's units on one of the hottest days of the year.

43. The Commission does not believe it is relevant or practical in competitive markets that attempts should be made here to dissect Dynegy's costs and bids in order to determine whether the supplier in fact made money by operating on August 10, 2001 and whether this fact should be determinative of how much compensation Dynegy should receive. Nor do we believe that Dynegy's bidding strategy is relevant to the determination of full bid. Additionally, how suppliers account for operating (*i.e.* outages risks) and market risks in their bids is also not relevant in determining the full bid compensation.

44. We conclude that the Arbitrator did not err by finding NYISO's arguments to be inconsistent with the plain meaning of Technical Bulletin No. 67, which NYISO drafted and which both parties to this dispute agree governed the August 10, 2001 day-ahead market. That text states that the supplement to the LBMP revenues to be paid to remedy inappropriate mitigation of a bid from a generating unit would be the difference between the LBMP and the bid, *times the number of megawatts supplied by the unit*. While NYISO states that its intent when developing this language was otherwise,[49] the text reads to the contrary and means all the megawatts supplied by the unit. This was the market rule that was in place at the time, and that Dynegy, and other sellers, relied upon when bidding into NYISO's August 10, 2001 day-ahead market. We disagree with NYISO that the windfall quality of the Award causes violation of the FPA. While NYISO is an intermediary for market participants, it is responsible for administering the NYISO markets and acting on market participants' behalf.

45. Moreover, in this proceeding (both before the Arbitrator and in filings with the Commission) neither NYISO nor Dynegy argued that Technical Bulletin No. 67 was inapplicable to the dispute because it had not been filed with and approved by the Commission. Rather, the parties disputed over the meaning of the bulletin's text. For this reason, we will treat the parties as having agreed that, despite the lack of Commission approval, Technical Bulletin No. 67 applies to their dispute. We therefore will not question its applicability in this proceeding. However, we emphasize that while we will honor the parties' agreement to apply Technical Bulletin No. 67 to the dispute here, we do not approve it, and it is without authority as precedent in other administrative or judicial proceedings.

46. The fact remains that the cause of the erroneous mitigation is that the new Reference prices which NYISO just finished negotiating with Dynegy were not input into the SCUC by NYISO in time for the August 10 day ahead market. However, while we generally affirm the basis for the Award, we find that the Arbitrator did not take into account an error in the calculation made by Dynegy that mis-states the additional compensation that forms the basis of the Award. The Arbitrator awarded Dynegy its full claim of $895,596 for the erroneous mitigation of the Roseton Units. Review of hearing testimony reveals that, during hours 12 through 17 for Roseton Unit No. 2, NYISO's calculation shows that no damages were due to that unit because Dynegy's bid from Roseton Unit No. 2 for those hours was less than the Roseton Unit No. 2 LBMP for the

[49] NYISO's Rebuttal at 10-11, *citing* Hearing Transcript at 182. *See also* P 27 and 35, *supra.*

megawatts scheduled into the day-ahead market.[50] In other words, Roseton Unit No. 2 was paid at least its bid for all megawatts supplied during those six hours. Therefore, according to Arbitration Exhibit 8 that presents Dynegy's calculations, during hours 12 through 17, Dynegy used the wrong bid in Column D for the quantity of megawatts scheduled by NYISO. Correcting for this error, Dynegy's claim for compensation is overstated and should be reduced to reflect only those hours that its bid exceeded the LBMP.

47. Subsequent to the events that lead to this proceeding, we note that NYISO revised Technical Bulletin No. 67 concerning, in cases of erroneous mitigation, how it will compute the difference on a per megawatt basis and the megawatts to which this difference will be applied. NYISO should file the current edition of Technical Bulletin No. 67 and any future such revisions with the Commission. NYISO's remedy for inappropriate mitigation sufficiently affects the rates and charges for transmission to fall within the Commission's "rule of reason" regarding filings under section 205(c) of the FPA, 16 U.S.C. § 824d(c) (2000).[51] Since the Commission does not typically require that NYISO file its technical bulletins, NYISO, in the alternative, may file the substance of Technical Bulletin No. 67, as revised, as a revision to its Services Tariff that include the provision relating to erroneous mitigation. NYISO's filing will give market participants an opportunity to comment on the appropriateness of NYISO's remedy for erroneous mitigation.

The Commission orders:

(A) NYISO's February 20, 2003 Motion to Vacate the Arbitration Award is hereby denied, as discussed in the body of this order.

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[50] Hearing Transcript at 161-165. In Arbitration Exhibit 8, Dynegy input to column D for Roseton Unit No. 2 the bid that does not correspond to the output scheduled by NYISO in the DAM and represents instead the bid for the next higher block of MW that was not scheduled.

[51] *See Tenaska Power Services Company v. Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,095 at P 32 & n.13, *citing* Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61-986-89, *order on reh'g*, 65 FERC ¶ 61,081 (1993); *Pacific Gas and Electric Company, et al*., 80 FERC ¶ 61,128 at 61,423 (1997).

(B) NYISO is hereby directed to recalculate the amount due Dynegy correcting the computational error as discussed in the body of this Order and to pay to Dynegy this amount to compensate Dynegy for improper mitigation of Dynegy's bid into the August 10, 2001 day-ahead market. NYISO is directed to file this calculation and a refund report within 15 days from the date of this Order.

(C) NYISO is hereby directed to file, for Commission acceptance, revised Technical Bulletin No. 67 or a revision to its Services Tariff as discussed in the body of this Order within 30 days from the date of this Order.

(D) NYISO's request for rehearing of the Commission's November 23, 2003 order is hereby denied.

(E) Transmission Owners' December 19, 2003 motion to intervene in Docket No. EL03-26-001 is hereby granted.

(F) NYISO and Dynegy's requests for privileged treatment of certain filings are hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.