118 FERC ¶ 61,182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

New York Independent System Operator, Inc. Docket Nos. ER07-360-000
EL07-39-000

ORDER REJECTING PROPOSED TARIFF REVISION AND INSTITUTING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 6, 2007)

1. On December 22, 2006, the New York Independent System Operator, Inc. (New York ISO) filed proposed revisions to its Market Administration and Control Area Services Tariff, specifically to Attachment H, section 4.5(b). These proposed revisions, filed under section 205 of the Federal Power Act (FPA),[1] would modify the installed capacity (ICAP) market mitigation measures applicable to certain generating units serving New York City (in-city generation) by, among other things, lowering the price cap for capacity offered into the in-city ICAP market. As discussed below, the Commission will reject the proposed revisions but will institute a proceeding under section 206 of the FPA[2] to investigate the justness and reasonableness of the New York ISO's in-city ICAP market.

Background

2. The instant filing involves price/market power mitigation for the New York City ICAP market (the in-city ICAP market).[3] The ICAP market reflects the obligation placed

[1] 16 U.S.C. § 824d (2000).

[2] 16 U.S.C. § 824e (2000).

[3] The market for this capacity, which is "[t]he capability to generate or transmit electrical power, measured in megawatts ("MW")," is distinct from the market for "energy," which is "[a] quantity of electricity that is bid, produced, purchased, consumed,
(continued)

on load serving entities to procure sufficient ICAP to meet certain minimum requirements. These requirements for each load serving entity (such as Consolidated Edison Company of New York, Inc. (ConEd) or the Long Island Power Authority (LIPA)) are determined by forecasting its contribution to peak load, plus an additional amount to cover the additional Installed Capacity required by the New York State Reliability Council in order for the New York Control Area to meet Northeast Power Coordinating Council reliability criteria.[4]

3. In 1998 ConEd divested most of its generation. The current owners of that generation are referred to as the divested generation owners or DGOs. The DGOs are participants in the in-city ICAP market that is the subject of this case. Prior to divestiture, ConEd proposed, and the Commission approved, an offer and revenue cap of $105/kW-year for capacity offered by the DGOs into the in-city ICAP market.[5] Suppliers other than DGOs are not subject to the mitigation, and therefore may offer and receive prices higher than the $105 cap.

4. The New York ISO proposes to add mitigation that would apply conduct and impact measures to offers from DGOs, based on a reference price of $82/kW-year. The $82 reference price, originally proposed by ConEd and the New York State Department of Public Service (DPS), was determined by using ConEd's and the DPS' $176 estimation of the cost for a new generating unit to enter the New York City market, expressed in 2005 dollars, multiplied by 75 percent and then reduced by $50, an estimate of the net energy and ancillary service revenues available to a new unit.[6]

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sold, or transmitted over a period of time, and measured or calculated in megawatt hours." *Compare* New York ISO FERC Electric Tariff, Original Vol. No. 2, Art. 2, Third Revised Sheet No. 29, § 2.18 (defining Capacity) *with* New York ISO FERC Electric Tariff, Original Vol. No. 2, Art. 2, Fourth Revised Sheet No. 36A, § 2.49 (defining Energy).

[4] *See* New York ISO FERC Electric Tariff, Original Vol. No. 2, Art. 2, Fourth Revised Sheet No. 53A, § 2.120a (defining Installed Reserve Margin).

[5] *See Consolidated Edison Co.*, 84 FERC ¶ 61,287, at 62,357-58 (1998).

[6] *See* New York ISO transmittal letter at 9. The Commission has previously determined that $50/kW-year does not reflect the expected energy and ancillary service revenues for New York City and that the appropriate figure is $48/kW-year. *See New York Indep. Sys. Operator, Inc.*, 111 FERC ¶ 61,117 at P 41 (2005) (concluding that net revenue offset for New York City of $48 per kW-year is reasonable).

5. Under the proposal, if a DGO's offer is more than three percent above the proposed $82/kW-year reference level, and has the effect of raising the total market cost of capacity by three percent or more above the cost that would have resulted from an offer set at the $82/kW-year reference price, then the New York ISO will substitute the reference price. The proposal does not remove the current revenue cap of $105/kW-year that applies to DGOs. If the market clearing price were set by a non-DGO at a level above $105, DGOs would have to rebate their revenues above $105.

6. The New York ISO states in its transmittal letter that the instant filing is the result of a joint proposal for in-city mitigation by ConEd and the DPS that was presented to, and after much debate approved by, the New York ISO Management Committee.[7]

Notice of Filing, Interventions, Protests and Answers

7. Notice of the New York ISO's filing was published in the *Federal Register*, 72 Fed. Reg. 774 (2007), with protests and interventions due on or before January 12, 2007, subsequently extended to January 24, 2007.

8. Timely motions to intervene were filed by: Consolidated Edison Solutions, Inc.; ConEd, Orange & Rockland Utilities, Inc., the New York Power Authority, and Consumer Power Advocates (collectively the New York Market Participants); Central Hudson Gas & Electric Corporation, Long Island Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, and Rochester Gas and Electric Corporation (collectively the New York Transmission Owners); Entergy Nuclear Power marketing, LLC; AES Eastern Energy, L.P.; FPL Energy, LLC; and Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (collectively the CEG Companies).

9. Timely motions to intervene and comments were filed by: the New York Association of Public Power; the New York State Public Service Commission; the New York State Consumer Protection Board; Niagara Mohawk Power Corporation d/b/a National Grid (National Grid); ConEd and Orange & Rockland Utilities, Inc.; Astoria Generating Company, L.P.; Multiple Intervenors; the New York Power Authority; Mirant Energy Trading, LLC, Mirant New York, Inc. Mirant Bowline, LLC, Mirant Lovett, LLC, and Mirant NY-Gen, LLC (collectively, Mirant Parties); Strategic Energy, L.L.C.; and the City of New York, the New York City Economic Development Corporation, and Consumer Power Advocates (collectively the City Parties).

[7] *See* New York ISO transmittal letter at 8.

10. Timely motions to intervene and protests were filed by Energy Curtailment Specialist, Inc.; Independent Power Producers of New York, Inc.; NRG Power Marketing, Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC (collectively NRG); Webenergy.net, Inc. d/b/a ConsumerPowerline; and Keyspan-Ravenswood, LLC (Ravenswood).

11. Answers were filed by NRG, the New York ISO, and, collectively, ConEd, Orange & Rockland Utilities, Inc., Multiple Intervenors, and the City of New York. Ravenswood subsequently filed a motion to strike the answers, to which ConEd, Orange & Rockland Utilities, Inc., Multiple Intervenors, and the City of New York filed an answer.

Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to Docket No. ER07-360-000. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed herein because they have provided information that assisted us in our decision-making process.

B. Commission Determination

13. The New York ISO's filing offers no cost support for the proposed reference price. Nor does the filing provide sufficient economic justification for determining the reference price using the methodology that had been proposed by ConEd and the DPS.

14. The Administrative Procedure Act explains that in situations such as the case at bar the proponent has the burden of proof, and that the agency may consider a failure to

meet this burden sufficient grounds for a decision adverse to the moving party.[8] The Commission finds that the New York ISO filing patently fails to satisfy its burden.[9]

15. The affidavit that the New York ISO filed in support of its proposal states:

> In general, when one utilizes reference levels in a conduct and impact mitigation framework, the reference levels should reflect the marginal costs of supplying a given service. . . . The reference level in the [instant proposal] does not conform to this economic standard. Instead, it appears to be based on an effort to reach a negotiated compromise.[10]

16. The New York ISO also included with its filing the "NYISO Board of Directors' Decision on Appeals of the Management Committee's Decision Approving New Installed Capacity Market Mitigation Measures" (Board of Directors' Decision). The Board of Directors' Decision states:

> [T]he Proposal's reference price is not based on actual operating costs. Rather, the Proposal's $82/kW-year offer cap and the 3% thresholds represent the outcome of deliberations . . . . In short, it is a result-oriented compromise . . . . We note that the Proposal's proponents offer no empirical, theoretical or technical justification for employing 2005 [Cost of New Entry (CONE)] figures when more recent and presumably accurate information is available. Similarly, they offer no valid justification for using only 75% of the 2005 CONE figure or for the proposed 3% thresholds.[11]

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[8] *See* 5 U.S.C. § 556(d) (2000); *accord Midwest Indep. Transmission Sys. Operator, Inc.*, 103 FERC ¶ 61,217, at P 6 (2003).

[9] *See Municipal Light Boards v. Federal Power Comm'n*, 450 F.2d 1341, 1345-48 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *Midwest Indep. Transmission Sys. Operator, Inc.*, 103 FERC ¶ 61,217, at P 6 (2003); *see also Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1441 (D.C. Cir. 1996) (recognizing the Commission's authority to reject filings not in compliance with substantive Commission regulations).

[10] New York ISO Proposal, Affidavit of David Patton at 6.

[11] New York ISO Proposal, Board of Directors' Decision at 6; *see also* New York ISO transmittal letter at 11 (making same assertions).

The New York ISO Board of Directors' Decision concludes that "the improved market outcomes that the Proposal would produce outweigh its analytical shortcomings" notwithstanding the fact that the Decision also noted that "the Proposal is hardly supported by rigorous analysis."[12]

17. As a consequence, we must reject the New York ISO's filing. Nevertheless, upon consideration of the pleadings filed in this case and the problems they identify with the current in-city ICAP market rules, we will institute an investigation under section 206 of the FPA in Docket No. EL07-39-000.[13] The proceeding should consider the justness and reasonableness of the New York ISO's in-city ICAP market, and whether and how market rules need to be revised to provide a level of compensation that will attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators.

18. In cases where, as here, the Commission institutes an investigation on its own motion under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the Commission's initiation of the investigation, but no later than five months subsequent. Consistent with our general policy of providing maximum protection to customers,[14] we will set the refund effective date at the earliest date allowed, 60 days from the date of publication of notice of the initiation of the investigation in Docket No. EL07-39-000.

19. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Based on our review of the filings, if this case does not settle, and if we were instead to institute a paper hearing immediately, we expect that we

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[12] New York ISO Proposal, Board of Directors' Decision at 6.

[13] The purpose of the in-city ICAP market is to compensate generators for providing capacity, and to provide an incentive to build new in-city generation and new transmission to bring in outside generation. *See Consolidated Edison Co.*, 84 FERC ¶ 61,287, at 62,357 (1998) (discussing consequences of price cap in in-city ICAP market).

[14] *See, e.g., Seminole Elec. Coop., Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

would be able to render a decision within 12 months, or if the case were to go to paper hearing immediately by March 28, 2008.

20. To allow the parties an opportunity to develop new in-city ICAP market rules consensually, we will hold further proceedings in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[15] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.[16] The settlement judge shall report to the Chief Judge and the Commission within thirty days of the date of designation concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or notify the Commission that the settlement discussions have failed. Should settlement discussions fail, the Commission will issue a further order establishing procedures to investigate in-city ICAP market rules.

The Commission orders:

(A) The New York ISO's December 22, 2006 filing in Docket No. ER07-360-000 is hereby rejected.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL07-39-000 to address new in-city ICAP market rules. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this

[15] 18 C.F.R. § 385.603 (2006).

[16] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov - click on Office of Administrative Law Judges).

order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the date of designation, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or notify the Commission that the settlement discussions have failed, is appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) The refund effective date established in Docket No. EL07-39-000 pursuant to section 206(b) of the FPA is 60 days from the date of publication of notice of the initiation of the investigation in Docket No. EL07-39-000.

(F) The Secretary is hereby directed to publish notice of the initiation of Docket No. EL07-39-000 in the *Federal Register*.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.