

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

**New York Independent System Operator, Inc.            )**

**ER05-428-000**

**EMERGENCY MOTION FOR EXPEDITED ACTION AND  
ALTERNATIVE REQUEST FOR EXPEDITED REHEARING OF THE  
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

In accordance with Rules 212 and 713 of the Commission’s Rules of Practice and Procedure, the New York Independent System Operator, Inc. (“NYISO”) respectfully submits this emergency request for expedited action. Immediate measures are needed to eliminate the harmful market uncertainty created by the Commission’s imposition of a refund condition on the NYISO’s proposed Installed Capacity (“ICAP”) Demand Curves<sup>1</sup> for the 2005/2006, 2006/2007, and 2007/2008 Capability Years<sup>2</sup> in its March 2 Order.<sup>3</sup>

As is explained below, the NYISO, and its Independent Market Advisor, expect the prospect of a refund condition to create uncertainty and deter participation in the ICAP Auctions scheduled for April. Auctions conducted under such a cloud are likely to produce distorted results and undermine the very benefits that the ICAP Demand Curves were designed to achieve. Problems are likely to be acute because ICAP Demand Curves play a role in determining both the price at which ICAP, is purchased and the quantity that must be purchased.

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<sup>1</sup> Any capitalized terms that are not otherwise defined herein shall have the meaning specified in Articles II and V of the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”).

<sup>2</sup> Each “Capability Year” begins on May 1.

<sup>3</sup> *New York Independent System Operator, Inc.*, 110 FERC ¶ 61,108 (2005).

Consequently, the NYISO requests that the Commission accept the NYISO's proposed ICAP Demand Curves, or modified versions, with no refund condition, as soon as possible. In order to ameliorate the uncertainty that the March 2 Order created, the Commission must approve a set of ICAP Demand Curves far enough in advance of the April ICAP auctions for potential participants to account for them when they formulate their bids.

Alternatively, the NYISO respectfully requests rehearing of the imposition of a refund condition and asks that the Commission instead adopt the proposed 2005/2006 ICAP Demand Curves not subject to refund on an interim basis. The Commission has discretion under the Federal Power Act ("FPA") to take this approach. Granting rehearing would spare the NYISO ICAP Auctions from debilitating uncertainty and would bring more benefit to customers than traditional refund protection. Implementing an interim rate would also give the Commission more time to consider, and to resolve, the issues in this proceeding without damaging the markets.

### **I. COPIES OF CORRESPONDENCE**

Copies of correspondence concerning this filing should be served on, and the NYISO respectfully requests that the Secretary include on the official service list, the following:

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## II MAKING THE PROPOSED 2005/2006 ICAP DEMAND CURVES SUBJECT TO REFUND WILL DO SIGNIFICANTLY MORE HARM THAN GOOD

The Commission has regularly imposed refund conditions in traditional rate proceedings to protect customers from excessive rate increases or, more rarely, to the possibility that proposed rate decreases would be too small. Refund conditions have also frequently been imposed on Commission-jurisdictional sellers with market-based rate authority. For example, all sellers were recently required to incorporate refund conditions into their market-based rate tariffs under the Commission's market-behavior rules.<sup>4</sup> Sellers that fail the Commission's interim screens for generation market power must sell subject to refund in regions where they are deemed to have market power.<sup>5</sup> These measures protect customers from abusive behavior, or the exercise of market power, by individual sellers.

The Commission, however, has not made the results of ISO-administered auctions or markets generally subject to refund, except in the case of the major California dysfunctions of

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<sup>4</sup> See *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 139 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004) (stating that the "principal remedy [for a violation of market behavior rules] is disgorgement of the seller's unjust profits attributable to the specific violation at issue.").

<sup>5</sup> See, e.g., *AEP Power Marketing, Inc., et al.*, 109 FERC ¶ 61,276 (2004).

several years ago.<sup>6</sup> Results produced by the NYISO's auctions and markets are not under a general "subject to refund" condition and the same is true of other ISO/RTO markets.<sup>7</sup>

The Commission has repeatedly held that it would be inappropriate to upset market participants' settled expectations by re-opening prior auction or market results.<sup>8</sup> The relevant precedent recognizes that retroactive adjustments create uncertainty that harms markets, and ultimately customers. Consistent with this policy, the Commission has previously allowed the NYISO to cancel a Transmission Congestion Contract Reconfiguration Auction rather than hold it under a cloud of uncertainty that threatened to cause abnormal outcomes.<sup>9</sup> Retroactive changes also give rise to the difficult problems of determining what their effect(s) on complex and dynamic markets might have been if they actually had happened in the past. They can create

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<sup>6</sup> See, e.g., *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 93 FERC ¶ 61,121, at 61,370 (2000), *order on reh'g*, 97 FERC ¶ 61,275 (2001) (finding that "circumscribed refund liability [of sellers for a period of several years]...is appropriate.")

<sup>7</sup> See *New York Independent System Operator, Inc.*, 99 FERC ¶ 61,125 at 61,534-35 (2002) (stating that the NYISO's markets were not subject to a general refund condition.)

<sup>8</sup> See, e.g., *Wisvest-Connecticut, LLC v. ISO New England, Inc.*, 104 FERC ¶ 61,262 at P 11 (2003) (rejecting retroactive ICAP adjustment and stating that it "will not upset market participants' reliance on the finality of the months that have already settled...."); *Morgan Stanley Capital Group Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,058, at 61,156 (2000) ("Morgan Stanley has not presented a sufficient basis for changing at the last minute the auction that was approved through the NYISO's process and upsetting the expectations of the market participants."); *NSTAR Services Co. v. New England Power Pool, et al.*, 92 FERC ¶ 61,065, at 61,200 (2000) ("We do not believe that retroactive price adjustments promote confidence in the ISO's markets."); *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,317, at 62,055 (2000) ("We do not intend for mitigation to entail any retroactive recalculation of market-clearing prices."); *New England Power Pool*, 87 FERC ¶ 61,045, at 61,198 (1999) (agreeing with NEPOOL that changes to market rules should be prospective "so that market participants will know the rules that will apply at the time they make their market decisions.")

<sup>9</sup> See *New York Independent System Operator, Inc.*, 107 FERC ¶ 61,292 at P 13 (2004).

inequities for auction participants who may be significantly impacted by a retroactive change, but cannot protect themselves by modifying their past conduct.

The problems associated with retroactive changes would be acute in the ICAP Demand Curve context. The very purpose of the ICAP Demand Curves was to reduce capacity price volatility, thereby benefiting customers by providing “better signals to investors for the construction of new generation . . . .”<sup>10</sup> Making them effective subject to refund introduces uncertainty that fundamentally defeats this purpose. In the face of uncertainty, potential ICAP Suppliers, who are under no obligation to offer capacity in New York, may decide to provide non-capacity products, or to sell their capacity to neighboring markets. To the extent that they continue to participate in New York ICAP Auction, uncertainty is likely to skew bidding in inefficient ways. In earlier pleadings, a number of NYISO market participants noted the problems that retroactive changes could pose.<sup>11</sup>

In addition, the ICAP Demand Curves are one of the two factors, along with bid-based supply curves, that the NYISO uses to establish both the price and the quantity of ICAP that load-serving entities are required to purchase.<sup>12</sup> Modifying them after-the-fact would

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<sup>10</sup> *New York Independent System Operator, Inc.*, 105 FERC ¶ 61,108 at P 1 (2003).

<sup>11</sup> *See, e.g., Motion to Intervene, Supporting Comments and Limited Protest of the Mirant Companies*, Docket No. ER05-428-000 at 5 (Jan. 28, 2005) (Imploring the Commission to act quickly, and arguing that “it is not possible to retroactively implement different Demand Curves for markets that have already cleared.”)

<sup>12</sup> *See, e.g., New York Independent System Operator, Inc.*, 105 FERC ¶ 61,108 at P 3 (“The point where the supply curve of bids crosses the ICAP demand curve establishes the aggregate ICAP requirement and the associated ICAP price.”) (2003); *Affidavit of David B. Patton, PH.D.*, Docket No. ER05-428-000 at P 11 (“By establishing the capacity demand curve, the NYISO establishes the economic value that it attributes to capacity. This does not determine the price for capacity, which can range from zero up to the cap in any particular capacity auction. It is the suppliers that determine the price for capacity. . . [V]arying the level of the demand

(continued...)

retroactively change the point at which the supply and demand curves intersected. Depending on which direction the ICAP Demand Curve is shifted, the result would be either that: (i) some Suppliers would have to be paid for retroactively making capacity available for a period when they may have actually used it for other purposes so; or (ii) some ICAP Suppliers that actually made ICAP available would retroactively be denied payment. Exposure to the latter risk will be an especially strong disincentive to participation in the ICAP Auctions.<sup>13</sup> Reduced participation would distort the auction's results and diminish their efficiency.

Uncertainty will be further exacerbated by possible differences in the Commission's authority, under FPA Section 205(e), to make upward and downward demand curve adjustments effective prior to the issuance of another order. The Commission has interpreted Section 205(e) as giving it authority to suspend rate increases or decreases.<sup>14</sup> The statute, however, limits the Commission's refund authority to cases involving a proposed rate increase.<sup>15</sup> If the Commission were to apply this principle to the ICAP Demand Curves, then the March 2 Order would allow it

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curve would primarily affect the quantity of the capacity sold into the NYISO capacity market rather than the price.”) (March 21, 2005).

<sup>13</sup> Although Suppliers might reasonably expect that the Commission would grant them some relief if they found themselves in this situation, there will still be uncertainty as to how much compensation that should expect and how long it might take to obtain it in the face of possible opposition.

<sup>14</sup> *See* 18 C.F.R. § 2.4 (2004).

<sup>15</sup> Section 205(e) states that at the conclusion of a rate suspension period the proposed rate shall go into effect, “but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility . . . to keep accurate account in detail of all amount received by reason of such increase . . . and may by further order require such public utility to refund, with interest . . . such portion of such increased rates or charges as by its decision shall be found not justified.”

to make reductions, but not increases, effective back to March 9, 2005.<sup>16</sup> Increases would only take effect prospectively from the date of the Commission's order accepting ICAP Demand Curves without a refund condition. Of course, there could be legal challenges if the Commission takes this approach, which would only protract the uncertainty.<sup>17</sup>

The existing statutory framework was entirely appropriate for traditional rate cases where the filing utility could be presumed to be trying to maximize its charges. It can, however, produce unusual consequences in cases, such as this one, where some parties argue that the ICAP Demand Curves are too low, while others contend they are too high.<sup>18</sup> If the Commission leaves the refund condition in place, it may find itself using different ICAP Demand Curves for different auctions, with those held prior to the issuance of the Commission's next order subject only to decreases, and those held subsequent subject to both increases and decreases. In this scenario, there could be a period when the ICAP Demand Curves would be lower than the level that the Commission had found to be just and reasonable.

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<sup>16</sup> The NYISO is taking no position at this time on the question of whether such an interpretation and application of Section 205(e) would be appropriate.

<sup>17</sup> For example, it might be argued that demand curves are not "rates" and thus not subject to the traditional Section 205(e) distinctions. There could also be claims that the Commission's freedom to review and modify the demand curves should be as great as its freedom to review and to revise the inputs to formula rates. *See, e.g., Appalachian Power Co.*, 23 FERC ¶ 61,032 (1987) (Commission's conditional acceptance of a formula rate is subject to retroactive refunds.) The NYISO is taking no position on the merits of these arguments, or any others like them, at this time.

<sup>18</sup> The Commission has recognized this difficulty in at least one earlier NYISO case. *See New York Independent System Operator, Inc.*, 99 FERC ¶ 61,125 at 61,537 ("Of course, there is a difficulty in mechanically applying . . . FPA Section 205 and 206 precedent to this NYISO case since this case does not present the usual . . . FPA Section 205 situation where a utility proposes a rate increase and its customers object. Rather, here the regulated entity, NYISO, proposes a rate decrease under Section 205, and the market participants who object are suppliers to the NYISO market.") (2002).

The NYISO is also concerned that bidding behavior in the ICAP Monthly Auctions will be affected by uncertainty over the ICAP Demand Curves, even though the curves are only used in the ICAP Spot Market Auctions. The same entities participate in all of the auctions and follow integrated business strategies in them. Problems in the ICAP Spot Market Auction are, thus, likely to be considered, and to adversely affect, the monthly auctions.

In short, the NYISO expects that the March 2 Order's imposition of a refund condition on the ICAP Demand Curves will harm customers by giving Suppliers incentives to stay out of the ICAP auctions, or even to sell their capacity outside of New York. The NYISO believes that the harm this will cause is very likely to outweigh any possible customer protection benefits that a refund condition might bring. This is especially true given that the NYISO is not a profit-maximizing entity and has not proposed ICAP Demand Curves at the highest level that might be justified. Instead, it exercised its independent judgment and attempted to set the ICAP Demand Curves at a level that fairly balanced all relevant factors.

The Commission appears to have recognized this when it suspended the proposed ICAP Demand Curves for a nominal period, rather than for five months. It is standard practice for the Commission to use a five-month refund period if it believes that proposed rates may be substantially excessive.<sup>19</sup> Under the circumstances, there is less need for traditional refund protection, and insufficient justification to accept the market uncertainty and other negative effects that it would create.

The NYISO has discussed its misgivings about the use of a refund condition with its Independent Market Advisor, Dr. David B. Patton. As his attached affidavit demonstrates, Dr

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<sup>19</sup> See, e.g., *Utah Power & Light Co.*, 30 FERC ¶ 61,015 at 61,023 (1985); *West Texas Utilities Co.*, 18 FERC ¶ 61,189 (1982).



Patton shares the NYISO's concerns and agrees that the Commission should take some action to allow the ICAP Demand Curve auctions to proceed without a refund condition.

### **III. MOTION FOR EXPEDITED ACTION**

Given the problems identified above, the Commission should issue an order accepting ICAP Demand Curves without a refund condition far enough in advance of the April ICAP Auctions to provide stability. The NYISO appreciates that the Commission has already moved swiftly to schedule the conference, and that it intends to act quickly to resolve the issues in this proceeding. Nevertheless, the NYISO must urge the Commission to continue to act expeditiously in order to avoid the risk of serious market disruptions. There is clearly enough evidence in the record, as supplemented by the March 21 technical conference and the various filings submitted in connection with it, for the Commission to reach a decision now.

Obviously, the NYISO believes that the best outcome would be for the Commission to accept its proposed ICAP Demand Curves without modification. For purposes of ameliorating uncertainty, however, the most important thing is that the Commission accept ICAP Demand Curves, at whatever level, not subject to refund, before the auctions take place.

The Monthly ICAP Auction for May 2005, the first month of the 2005/2006 Capability Year, is scheduled for April 14, 2005. Although ICAP Demand Curves will not be used in this auction, the NYISO is concerned that it will be adversely affected by uncertainty. For the April 14 auction to proceed without disruption, the Commission should issue an order no later than April 11 so that potential bidders will have time to consider the new curves. If the Commission cannot act by that date, it must at a minimum, issue an order by April 21, to avoid undermining the April 26, 2005 Spot Market ICAP Auction for May, 2005. Ideally, if the Commission opts to

accept the NYISO's motion, it would give notice of its intent to act by a particular date so that auction participants can know what to expect.

#### IV. ALTERNATIVE REQUEST FOR REHEARING

In the alternative, if the Commission determines that it cannot resolve the issues in this case by mid-April, it should grant rehearing and replace the refund condition with interim ICAP Demand Curves not subject to refund. The refund condition is likely to cause substantial harm without any offsetting customer protection benefits.

Specifically, the NYISO believes that it would be appropriate to make the ICAP Demand Curves temporarily effective, without a refund condition, for sixty days, starting on March 9, 2005. The NYISO could then conduct the next several ICAP auctions free from uncertainty. A sixty day interim period would also give the Commission more time, if it needs it, to carefully evaluate the issues and record in this proceeding.

FPA Section 205(e) gives the Commission discretion to make rates effective after a suspension period without subjecting them to refund.<sup>20</sup> Although the Commission's general policy has been to set a refund effective date, the Commission nevertheless has the option not to do so when circumstances warrant.<sup>21</sup>

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<sup>20</sup> Section 205(e) of the Federal Power Act states that in the case of a "proposed increased rate or charge" the Commission "may" establish a refund condition but does not require it to do so. *See also, San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 93 FERC ¶ 61,121 at 61,379 (2000) (citing the legislative history of the Regulatory Fairness Act of 1988 which made the Commission's refund authority under FPA Section 206 discretionary to conform with its authority under FPA Section 205.)

<sup>21</sup> *See, e.g., Id.* at 61,379-80; *See also Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 72-73, 76 n.8 (D.C. Cir. 1992) (describing the Commission's discretion to refuse to require refunds in response to filed rate violations.)

For example, in *Devon Power*,<sup>22</sup> the Commission rejected proposed “Reliability Must Run” (“RMR”) contracts and instead directed ISO New England Inc. (“ISO-NE”) to establish special bidding safe harbors in its market power mitigation procedures for high cost peaking units needed for reliability, which were known as “PUSH bids.” The Commission held that the cost-of-service components that were included in the RMR contracts would serve as the basis for establishing the PUSH bids. It also stated that the safe harbor levels would not be subject to refund due to its “inability to order refunds because of the interaction between Peaking Unit Safe Harbor and the market price of electricity.”<sup>23</sup> On rehearing, the Commission clarified that its decision not to impose refunds was “not a question of agency authority” but had been reached “because the parties filings only set the level at which the PUSH bids would be made, it would be inappropriate to accept these filings subject to refund.”<sup>24</sup> In this sense, the PUSH bid precedent is analogous to ICAP Demand Curves, in that both are factors in the calculation of clearing prices, rather than traditional rates or charges. The PUSH bid mechanism was also envisioned as an interim market feature, albeit one that would remain in effect long enough for ISO-NE to implement enhanced market rules.

The Commission also declined to impose a refund condition on the California Power Exchange “wind up” charge that was designed to give that entity a means of funding its activities while it wrapped up its affairs. The Commission reasoned that a refund condition would “add yet another level of complexity to an already complex situation and, thus, increase the regulatory

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<sup>22</sup> *Devon Power LLC, et al.*, 103 FERC ¶ 61,082 (2003).

<sup>23</sup> *See* 103 FERC ¶ 61,082 at P 54.

<sup>24</sup> 104 FERC ¶ 61,123 at P. 65.

uncertainty of all participants in the California markets.”<sup>25</sup> The Commission believed that this would have been unwarranted given that the California Power Exchange’s wind-up activities were expected to last, at that point, for only a brief period of time.<sup>26</sup>

In short, the Commission has authority to make the proposed 2005/2006 ICAP Demand Curves effective, without a refund condition, on an interim basis. In fact, doing so would be more consistent with the customer protection objective that underlies the refund condition policy than setting a traditional refund condition would be. Although the March 2 Order reached the “preliminary” conclusion that the NYISO’s proposed Demand Curves had not been shown to be just and reasonable,<sup>27</sup> an element in the Commission’s reasoning was that the proposed Demand Curves would be in effect for the next three years.<sup>28</sup> The Commission was concerned that it needed to set the Demand Curves at the right level over this period in order to send proper price signals for the construction of new infrastructure.<sup>29</sup> This concern should not be a consideration, however, in the Commission’s determination of what constitutes a suitable interim Demand Curve because it would only remain in effect for a short time. Market participants are unlikely to use it as the basis for making long-term investments, even though it will provide enough near-term comfort for them to sell existing capacity in New York. It would therefore not be

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<sup>25</sup> See *California Power Exchange Corp.*, 101 FERC ¶ 61,330 at P 18 (2002).

<sup>26</sup> *Id.*

<sup>27</sup> March 2 Order at P 30.

<sup>28</sup> March 2 Order at P 5.

<sup>29</sup> *Id.* (“This order benefits consumers by providing the Commission with the information needed for the Commission to decide issues on a properly informed basis. It is important that we establish Demand Curves for the next three years that will give proper price signals to existing and potential new market entrants for participation in the New York wholesale electric power market.”)

inconsistent with the March 2 Order for the Commission to use the proposed 2005/2006 ICAP Demand Curves on an interim basis.

Finally, the NYISO's proposed 2005/2006 ICAP Demand Curves are the best choice for use as interim curves because they reflect the NYISO's independent assessment of what would be a reasonable demand curve during the relevant period. They were also calculated using the most recent available data.

## V. SERVICE

The NYISO is serving this document on the official service list compiled by the Secretary in this proceeding. The NYISO also respectfully requests a waiver of the requirements of 18 C.F.R. § 385.2010 to the extent necessary for electronic service for those on the service list willing to accept electronic filings in accordance with the Commission's recent issuance concerning electronic service.<sup>30</sup> In addition, the complete filing will be posted on the NYISO's website at [www.nyiso.com](http://www.nyiso.com). Use of electronic service will get copies to all stakeholders faster than any other method. Furthermore, the NYISO has used electronic service methods several times, and there have been no complaints from stakeholders about electronic service.

## VI. CONCLUSION

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc., respectfully requests that the Commission: (i) accept its emergency motion for expedited action and issue an order in this proceeding as soon as possible and no later than April 21, 2005; or (ii) in the alternative, grant rehearing for the purpose of eliminating the refund condition and making an interim demand curve effective for sixty days starting on March 9, 2005.

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<sup>30</sup> See "FERC Online v1.0: Reference Guide," available at <http://www.ferc.gov/docs-filing/fol-ref-guide.pdf>.



**Affidavit of Dr. David B. Patton  
Page 1 of 4**

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

**New York Independent System Operator, Inc.**

**Docket No. ER05-428-000**

**AFFIDAVIT OF DAVID B. PATTON, PH.D**

1. My name is David B. Patton. I am an economist and President of Potomac Economics. Our offices are located at 4029 Ridge Top Road, Fairfax, Virginia 22030. Potomac Economics is a firm specializing in expert economic analysis and monitoring of wholesale electricity markets.
2. I currently serve as the Independent Market Advisor for the New York Independent System Operator, Inc. ("NYISO") and ISO New England Inc. ("ISO-NE"). I have served in this capacity for the NYISO since May 1999 and for ISO-NE since June 2001. As the Independent Market Advisor, I am responsible for assessing the competitive performance of the markets, including assisting in the implementation of a monitoring plan to identify and remedy market design flaws and abuses of market power. This has included preparing a number of reports that assess the performance of these markets and providing advice on numerous issues related to market design and economic efficiency.
3. I have worked as an energy economist for fourteen years, focusing primarily on the electric utility and natural gas industries. I have provided strategic advice, analysis, and expert testimony in the areas of electric power industry restructuring, pricing, mergers, and market power. I have also advised other existing and prospective RTOs on transmission pricing, market design, and congestion management issues. With regard to competitive analysis, I have provided expert testimony and analysis regarding market power issues in a number of mergers and market-based pricing cases before the Federal Energy Regulatory Commission ("Commission"), state regulatory commissions, and the U.S. Department of Justice.
4. Prior to my experience as a consultant, I served as a Senior Economist in the Office of Economic Policy at the Commission, advising on a variety of policy issues including transmission pricing and open-access policies, market design issues, and electric utility mergers. As a member of the Commission's advisory staff, I worked on policies reflected in Order No. 888, particularly on issues related to power pool restructuring, independent system operators, and functional unbundling. I also

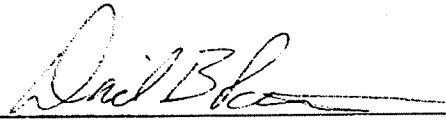


analyzed the competitive characteristics of alternative transmission pricing and electricity auctions proposed by ISOs.

5. Before joining the Commission, I worked as an economist for the U.S. Department of Energy. During this time, I helped to develop and analyze policies related to investment in oil and gas exploration, electric utility demand side management, residential and commercial energy efficiency, and the deployment of new energy technologies. This work included the development of policies in former President Bush's National Energy Strategy and the Energy Policy Act of 1992.
6. I have a Ph.D. in Economics and a M.A. in Economics from George Mason University, and a B.A. in Economics with a minor in Mathematics from New Mexico State University.
7. I have reviewed the NYISO's *Emergency Motion for Expedited Action and Alternative Request for Emergency Rehearing* in this proceeding. I agree with the concerns that it expresses in Section II, namely that the imposition of a "subject to refund" condition will impose harmful uncertainty on the Installed Capacity Auctions scheduled for April. I therefore share the NYISO's view that the Commission should take some action to alleviate the uncertainty. Any such action should be taken far enough in advance of the upcoming auctions to allow potential participants to formulate their bidding strategies.
8. This concludes my affidavit.

ATTESTATION

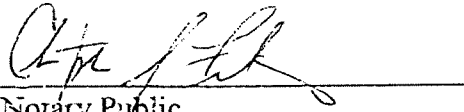
I am the witness identified in the foregoing affidavit. I have read the affidavit and am familiar with its contents. The facts set forth therein are true to the best of my knowledge, information, and belief.



David B. Patton

March 24, 2005

Subscribed and sworn to before me  
this 24th day of March, 2003



Notary Public

My commission expires: 4-30-06

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document on the official service list compiled by the Secretary in the proceeding.

Dated at Washington, DC, this 24<sup>th</sup> day of March, 2005.

*/s/*

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Submission Contents

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