

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 12-1008 and 12-1081

**TC RAVENSWOOD, L.L.C., *ET AL.*,
Petitioners,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.**

**On Petition for Review of Orders of the
Federal Energy Regulatory Commission**

**BRIEF OF INTERVENOR-RESPONDENT
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

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DATED: October 19, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties, Intervenors, and *Amici*:

To counsel's knowledge, the parties, intervenors, and amici before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in the Petitioner's brief.

B. Rulings Under Review:

1. *New York Indep. Sys. Operator, Inc.*, "Order Accepting Tariff Revisions Subject to Modification, Suspending for Five Months, and Directing Compliance Filing," 134 FERC ¶ 61,058 (Jan. 28, 2011), amended by *New York Indep. Sys. Operator, Inc.*, "Errata Notice," (Feb. 17, 2011) ("January Order"), R.36, JA ____;
2. *New York Indep. Sys. Operator, Inc.*, "Order on Request for Expedited Clarification and Rehearing," 134 FERC ¶ 61,178 (Mar. 9, 2011) ("March Order"), R.65, JA ____;
3. *New York Indep. Sys. Operator, Inc.*, "Letter Order," 135 FERC ¶ 61,002 (Apr. 4, 2011) ("April Order"), R.81, JA ____;
4. *New York Indep. Sys. Operator, Inc.*, "Order on Rehearing," 135 FERC ¶ 61,170 (May 19, 2011) ("May Order"), R.117, JA ____;
5. *New York Indep. Sys. Operator, Inc.*, "Order on Rehearing," 137 FERC ¶ 61,218 (Dec. 15, 2011) ("December Order"), R.135, JA ____.

C. Related Cases:

This case has not previously been before this Court or any other court.

Other appeals pending in this Circuit have substantially the same parties but different issues: (1) *New York Public Service Commission v. FERC*, Nos. 08-1366, *et al.* (D.C. Cir. filed Nov. 21, 2008) (mitigation in New York City capacity

market); (2) *TC Ravenswood, LLC v. FERC*, No. 11-1258 (D.C. Cir. filed July 12, 2011) (mitigation in energy markets outside of New York City and Long Island); and (3) *TC Ravenswood, LLC v. FERC*, No. 11-1305 (D.C. Cir. filed Aug. 25, 2011 (mitigation in New York City capacity market).

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of this Court, Intervenor-Respondent New York Independent System Operator, Inc. (“NYISO”) states the following:

The NYISO is a not-for-profit corporation organized and existing under the laws of New York. Although the NYISO does not own or control any electric power generation facilities, it possesses operational control over the transmission facilities in New York State. The NYISO is the independent body responsible for providing open access transmission service, maintaining reliability, and administering competitive wholesale electricity markets in New York State.

The NYISO is not a publicly-held company. It does not have a parent company, and no publicly held company has a 10% or greater ownership in it.

Respectfully submitted,

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* Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY OF TERMS**TERM****DEFINITION**

April Order	<i>New York Indep. Sys. Operator, Inc.</i> , 135 FERC ¶ 61,002 (Apr. 4, 2011), R.81, JA _____
Capability Period	Six-month periods which are established as follows: (i) from May 1 through October 31 of each year (“Summer Capability Period”); and (ii) from November 1 of each year through April 30 of the following year (“Winter Capability Period”).
Compliance Curves	Revised Installed Capacity Demand Curve rates filed in the March 29 Filing and the NYISO’s September 22, 2011 Filing
December Order	<i>New York Indep. Sys. Operator, Inc.</i> , 137 FERC ¶ 61,218 (Dec. 15, 2011), R.135, JA _____
Demand Curve	The NYISO’s Installed Capacity Demand Curves set pursuant to the provisions of § 5.14 of the Market Administration and Control Area Services Tariff
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
HWI	The Handy-Whitman Index
ICAP	Installed Capacity
ISO/RTO	Independent System Operator/Regional Transmission Operator
JA	Joint Appendix
January Order	<i>New York Indep. Sys. Operator, Inc.</i> , 134 FERC ¶ 61,058 (Jan. 28, 2011), R.36, JA _____

March 28 Filing	NYISO Tariff Filing: Compliance to State Currently Effective Demand Curves (filed Mar. 28, 2011), R.70, JA _____
March 29 Filing	NYISO Tariff Filing: Compliance Filing and Request for Flexible Effective and Implementation Dates (filed Mar. 29, 2011), R.____, JA _____
March Order	<i>New York Indep. Sys. Operator, Inc.</i> , 134 FERC ¶ 61,170 (Mar. 9, 2011), R.65, JA _____
May Order	<i>New York Indep. Sys. Operator, Inc.</i> , 135 FERC ¶ 61,170 (May 19, 2011), R. 117, JA _____
November Filing	NYISO Tariff Revisions to Implement Revised Demand Curves (filed Nov. 30, 2010), R.1, JA _____
NYISO	New York Independent System Operator, Inc.
Pre-Existing Curves	Installed Capacity Demand Curve rates for capability year 2010/2011
Proposed Curves	Installed Capacity Demand Curve rates filed in the November Filing and suspended in the January Order
R.	Record Citation
Tariff	The NYISO's Market Administration and Control Area Services Tariff
Suppliers	Petitioners TC Ravenswood, LLC; NRG Power Marketing, LLC; Arthur Kill Power LLC; Astoria Gas Turbine Power LLC; Dunkirk Power LLC; Huntley Power LLC; and Oswego Harbor Power LLC

STATUTES AND REGULATIONS

The applicable statutes are contained in the brief of the Respondent, FERC.

STATEMENT OF THE ISSUES

Intervenor adopts the Statement of the Issues as described in the brief of the Respondent, FERC.

STATEMENT OF THE CASE

Intervenor adopts the Statement of the Case as described in the brief of the Respondent, FERC.

STATEMENT OF THE FACTS

Intervenor adopts the Statement of the Facts as described in the brief of the Respondent, FERC.

SUMMARY OF ARGUMENT

Suppliers allege that FERC violated its Federal Power Act (“FPA”) Section 205 suspension authority by allowing the NYISO to implement the Compliance Curves after the end of the suspension period. FERC’s actions were entirely consistent with the FPA. FERC did not set a 7-month suspension period. It was the NYISO’s submissions, and FERC’s acceptance of those NYISO filings, that resulted in the Pre-Existing Curves remaining in effect until September 15, 2011. The March 28 Filing was voluntarily submitted by the NYISO to avoid any gap between the Pre-Existing Curves and the Compliance Curves. FERC’s

acceptance of the NYISO's requested implementation date was consistent with its precedent providing ISOs/RTOs flexibility to select reasonable implementation dates for complex tariff revisions.

Additionally, FERC's acceptance of the NYISO's proposal to use a general inflation rate, rather than the Handy-Whitman Index ("HWI"), in its Demand Curves was reasonable and based on clear record evidence.

The Court should therefore affirm FERC's orders in their entirety. If, however, the Court rules against FERC on any issue it should leave FERC free on remand to fashion whatever remedy it concludes is necessary and practicable. Granting maximum flexibility to FERC would be appropriate because modifying its determinations would have complex ramifications for the NYISO's markets that would be impossible to calculate with certainty and difficult to even reasonably approximate.

ARGUMENT

I. Suppliers' Theories Regarding Alleged Violations of FERC's Statutory Authority Are Irrelevant Because the NYISO Voluntarily Requested a Deferred Implementation Date

Contrary to assertions of Petitioners, each a New York capacity supplier ("Suppliers"), the April Order accepted the NYISO's voluntary March 28 Filing that proposed a deferred implementation date for the Compliance Curves until FERC acceptance (ultimately, September 15, 2011).

The April Order recognized the NYISO's right to request a flexible implementation date and that the Pre-Existing Curves should remain in effect until FERC acceptance of the Compliance Curves. Suppliers' claim that FERC's rationale in the December Order invalidates the November Filing is without merit because none of their observations render unlawful the NYISO's ability to propose, or reasons for proposing, a deferred implementation date.

A. The NYISO Voluntarily Proposed an Implementation Date for the Compliance Curves

FERC correctly observes that Suppliers ignore that filings by public utilities, such as the NYISO are not subject to the FPA Section 205 suspension authority limits. *See* FERC Br. 22 (citing 16 U.S.C. § 824d and 18 C.F.R. § 35.3(a)(1)). This fact moots Suppliers' arguments because it was the NYISO, as the filing party, that proposed the implementation date. The date was not imposed by FERC. The January Order recognized the potential difficulties of implementing Compliance Curves in the middle of a Capability Period, and identified that the NYISO could propose a reasonable deferred implementation date. The NYISO's proposed implementation date happened to fall after the end of the suspension period. This is fully compatible with the FPA.

Suppliers present the March 28 and March 29 Filings in isolation from each other when they should be read in tandem. The March 29 Filing explained that the NYISO would need time to "review the Commission's order and identify the

accepted numerical values for the ICAP Demand Curves, enter the revised values into its software, establish and post ICAP Demand Curve reference prices, compute Mitigation Net CONE, perform IT system verification and validation, and identify Pivotal Suppliers prior to the opening of the ICAP Spot Market Auction.” See March 29 Filing at 13 n.61, JA ____.

Thus, the March 29 Filing informed FERC that Compliance Curves could be effective “for the ICAP Spot Market Auction that next follows a Commission order accepting specific numeric values for the new ICAP Demand Curves ... provided there are at least twelve business days between the date of such Commission order and the date of the deadline for certification for LSEs and ICAP Suppliers.” *Id.* at 13, JA ____ . In addition, questions that would substantially influence the final composition of the Compliance Curves were still pending on rehearing at that time.

In order to prevent a gap between the expiration of the Pre-Existing Curves and the implementation of the Compliance Curves, the NYISO chose to submit the March 28 Filing to extend the Pre-Existing Curves. See March 28 Filing at 1, JA ____ .

When FERC accepted the March 28 Filing in its April Order it effectively accepted the implementation timetable that the NYISO proposed. FERC did not act *sua sponte* to extend the suspension period of the Proposed Curves. See FERC Br. 22 (citing December Order at P 10, JA ____) (“The interim rates that [the

NYISO] filed on March 28, 2011, were not suspended, but were accepted . . . as proposed by NYISO”) and April Order at P 10, JA ____ (“We grant waiver and accept NYISO’s March 28, 2011 proposed revisions to its Services Tariff, to be effective April 21, 2011, as requested, subject to further action by [FERC]”).

Suppliers are wrong to claim that the March 28 Filing was submitted involuntarily. The March 28 and March 29 Filings were styled as “compliance” filings to clearly establish their relationship to the January Order. Their designation does not mean that they were “involuntary” or that the implementation timetable that the NYISO proposed in those filings was somehow imposed by FERC.

FERC has previously accepted compliance filings that the NYISO initiated because it thought that they were necessary to “fill gaps” even when FERC did not require the NYISO to make such a filing. *See New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,206 at P 45 (2008) (accepting certain NYISO-proposed tariff revisions not expressly directed by FERC, finding them necessary to “accommodate the changes required by the [relevant] Order [and that a] further stakeholder process is not necessary for NYISO to include them in its compliance filing.”). Additionally, compliance filings are not limited to adopting tariff language specifically prescribed by FERC. Many FERC orders provide guidance concerning policy objectives and allow filing utilities to voluntarily develop the

details for their “compliance filing” submittals. *See, e.g., Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh’g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012) (providing general guidance but not prescribing particular tariff language to be implemented); *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Stats. & Regs. ¶ 31,226, *reh’g denied*, Order No. 681-A, 117 FERC ¶ 61,201 (2006) (same).

Suppliers’ claim that it is a “legal fiction” to say that the NYISO made the March 28 Filing “of its own volition” must therefore be rejected. FERC effectively refuted those arguments in detail, too, observing that the March 28 Filing was voluntarily submitted to prevent a gap in rates. *See* FERC Br. 21-22.

B. The NYISO’s Ability to Request Deferred Implementation Dates Is Critically Important

Tariff filers have the right to request whatever implementation dates may reasonably be necessary. Suppliers would require the Court to interpret the FPA’s suspension requirement to prevent a filer from requesting a delayed implementation date beyond five months. Revisions to NYISO’s tariff, market, and software rules are sometimes extremely complex to implement which makes the right to request deferral beyond five months crucial. As FERC has observed, “implementation in these types of markets can be difficult” due to complexities

and costs. FERC Br. 23. *See e.g., Devon Power, LLC*, 107 FERC ¶ 61,240, P 1 (2004) (deferring tariff implementation for 18 months); *Devon Power, LLC*, 112 FERC ¶ 61,179, P 5 (2005) (delaying tariff implementation for an additional 6 months). The Court must reject Suppliers' argument because restricting the right to request deferred implementation dates would create significant difficulties for ISO/RTO markets and is not required by the FPA.

C. The NYISO Has No Incentive to Use Deferred Implementation Dates to Harm Suppliers

The NYISO's ability to defer implementation dates does not impermissibly disadvantage Suppliers. Because the NYISO is independent of all Market Participants it has no incentive to exclude, or discriminate against, any group or individual stakeholder. *See, e.g., Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 827 n.5 (D.C. Cir. 2006) ("NYISO is an independent entity and is governed by a board of directors, none of whom is affiliated with market participants"); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 5 (D.C. Cir. 2002) (ISOs "have no financial stake in any power market participant . . ."); *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,072, PP 26-27 (2010) (finding that the NYISO operates "independent of any market participant or class of market participants").

Further, the January Order set an outer limit of November 1, 2011, beyond which FERC indicated its expectation that it likely would disallow additional time.

See January Order at P 168 (allowing the NYISO to propose an implementation date as late as November 1, 2011). By establishing this limit, FERC recognized, and guarded against, any possible harm from unjustified delays. The NYISO worked diligently to implement the Compliance Curves forty-five days before FERC's limit, belying any notion that the NYISO acted with an intent to harm Suppliers.

II. The Commission Reasonably Permitted the NYISO to Use General Inflation Indices to Set the Compliance Curves

As FERC's brief establishes, the NYISO provided more than sufficient factual support for its proposed use of general inflation indices. *See* FERC Br. 33-34. Suppliers' claim that FERC's decision accepting the proposal is unfounded must be rejected.

The Tariff requires that a comprehensive study of Demand Curve parameters be conducted every three years. *See* NYISO Market Administration and Control Area Services Tariff § 5.14.1.2 (providing that every three years the Demand Curves "will be defined by the results of the independent review conducted pursuant to this section" which includes an analysis for all inputs into the Demand Curves). It provides the NYISO with the authority to propose changes to individual Demand Curve components based on its judgment of what is reasonable for the relevant period. Equally, if the NYISO believes that a different component

accepted in previous Demand Curves is appropriate for new Demand Curves, it can, and is expected to, propose it. Suppliers cannot contradict that fact.

Suppliers' attempt to depict the use of the HWI as "precedent" that cannot be changed without extensive support has no merit. As FERC explains, the orders cited by Suppliers do not dictate the use of the HWI. FERC Br. 31-32. Further, FERC's established policy is to allow ISO/RTO markets to have different rules. *See, e.g., Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 59 (2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009) (confirming that different ISOs/RTOs may have market designs tailored to regional circumstances).

III. If the Court Rules Against FERC on Any Issue, the Case Should Be Remanded to FERC to Fashion Any Remedy that it Deems Appropriate

Suppliers seek to vacate the disputed FERC orders and "remand the matter to FERC." *See* Suppliers Br. 79. Suppliers have not asked this Court to order refunds or the re-running of past NYISO auctions. FERC has persuasively shown that there is no basis for overturning any of its rulings in the challenged orders.

To the extent, however, that this Court concludes that FERC erred on any issue it should not prescribe a specific remedy. As explained by FERC, re-running past auctions is practically impossible and the attempt could have profoundly

harmful market impacts. *See* FERC Br. 26, 28-29. Additionally, as this Court has held, refunds are discretionary, left to FERC's "expert judgment," and FERC's authority is at its "zenith" in fashioning refunds. *See Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67, 76 (D.C. Cir 1992), (citing *Niagara Mohawk Serv. Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (internal quotation marks omitted)). Thus, the Court should leave any remedy questions on remand to FERC's discretion.

IV. CONCLUSION

For the foregoing reasons, FERC's Orders should be upheld in all respects and Suppliers' petition should be denied.

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CERTIFICATE OF COMPLIANCECertificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) and Cir. R. 32(a), as modified by order of this Court, because this brief contains 2,101 words (briefs of Intervenor do not exceed 2,187 words and the briefs of all Intervenors on behalf of the Respondent do not exceed a combined total of 8,750 words), as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and excludes the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii) and Cir. R. 32(a)(1).

This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

/s/ Shawn Patrick Regan
SHAWN PATRICK REGAN

Dated: October 19, 2012

CERTIFICATE OF SERVICE

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Circuit Rule 15(b) of this Court, I hereby certify that I have this 19th day of October, 2012 served a copy of the foregoing Brief of Intervenor-Respondent New York Independent System Operator, Inc. electronically through the Court's CM/ECF system on all ECF-registered counsel in this case and have served a copy by First Class U.S. mail, postage prepaid, on counsel listed below:

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