112 FERC ¶ 61,283
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc. Docket Nos. ER05-428-003

ORDER DENYING REHEARING

(Issued September 15, 2005)

1. In this order, the Commission denies two requests for rehearing of our order issued in this proceeding on April 21, 2005. *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,117 (2005) (April 2005 Order). [1]

Background

2. On January 7, 2005, NYISO filed proposed tariff revisions to its Market Administration and Control Area Services Tariff (Services Tariff) to define the ICAP Demand Curves for three Capability Years – 2005/2006, 2006/2007, and 2007/2008. Based on the record presented, the Commission found that it was unable to make a determination whether to accept NYISO's proposed ICAP Demand Curve parameters or to make any of the revisions to those parameters as suggested by the intervenors. The Commission accepted NYISO's proposed tariff revisions to its Services Tariff to define the ICAP Demand Curves, suspended them for a nominal period and made them effective subject to refund and further Commission order. *New York Independent System Operator, Inc.*, 110 FERC ¶ 61,201 (2005) (March 2005 Order). In addition, to fill the gaps in the record, the March 2005 Order directed staff to convene a technical conference. The technical conference was held on March 21, 2005 (March 21 Technical Conference), and the information presented at the conference was made part of the record. With this information before it, the Commission issued the April 2005 Order,

[1] In the April 2005 Order, the Commission accepted, as modified, the Installed Capacity (ICAP) Demand Curves proposed by the New York Independent System Operator, Inc. (NYISO) for Capability Years 2005/2006, 2006/2007, and 2007/2008, and removed the refund condition previously imposed in this proceeding.

accepting the ICAP Demand Curves, as modified, and removed the refund condition. As relevant here, the Commission reduced the winter/summer differential by $1/KW-year.

3. On May 10, 2005, NYISO filed a letter with the Commission explaining that data from the 2004 Gold Book that was the basis for the Commission's findings on the winter/summer differential appeared to be contradicted by preliminary 2005 data and that this was causing concern to those market participants that had argued against the winter/summer differential ultimately accepted in the April 2005 Order.

4. NYISO stated that its plan was to address these concerns through the stakeholder process and that it would establish a process to discuss with market participants the causes and significance of the new Gold Book winter/summer differential data, and whether and to what extent the new information may affect the Demand Curves recently approved by the Commission. NYISO stated that this dialogue would consider the established procedures for determining the Demand Curves prior to the publication of the 2005 Gold Book, the numerous other factors that are balanced in the Demand Curve determination and the value of certainty once Demand Curves have been established for a three-year period.

5. Further, NYISO pledged to report the results of this stakeholder process to the Commission, and make any filings with respect to the Demand Curves that may be appropriate. In the meantime, NYISO argued that the existing Demand Curves, as established on the basis of the information reviewed in the prior stakeholder process and approved by the Commission, should remain in place.

6. On May 23, 2005, two separate requests for rehearing of the April 2005 Order were filed. One, a request for rehearing filed by Keyspan-Ravenswood, LLC (Keyspan) challenged the Commission's reliance on the assumptions of NYISO and its consultant -- Levitan & Associates, Inc. (Levitan) -- with respect to Load Shape, Gas Transportation Costs, Property Taxes and Heat Rate. Keyspan argues that its consultant -- PA Consulting -- contradicted the evidence of NYISO and Levitan and that the Commission erred by ignoring this. Keyspan argues that based on its assumptions, the Commission should have established an in-City Demand Curve Reference Price of $146/kW-year based on a $176/kW-year revenue requirement and a $30/kW-year Net Energy & Ancillary Services Revenue credit, rather than $128/KW-year. Keyspan argues that these changes should be ordered on a going-forward basis and that NYISO's tariff should be revised consistent with Keyspan's recommendations to ensure that future ICAP Demand Curve reset processes are more efficient and transparent.

7. The other, a request for rehearing filed by the Independent Power Producers of New York, Inc. (IPPNY), argues that the Commission erred when it approved a $4/KW-year winter revenue benefit adder (the "winter revenue benefit") to the net revenue offset applicable to the New York Control Area (NYCA) ICAP Demand Curves, because the

winter revenue benefit approved by the Commission was based on outdated and inaccurate information provided by NYISO pertaining to the differential between the summer and winter installed capacity of generators located in New York.[2] In this regard, IPPNY argues that more timely and pertinent information, withheld by NYISO, demonstrates that there is no justification for *any* winter revenue benefit adjustment. Moreover, IPPNY argues that it presented evidence refuting NYISO's proposed winter/summer differential.

8. On June 7, 2005, NYISO filed an answer arguing that IPPNY's rehearing request was really a request to reopen the record to further examine the winter/summer differential issue and thus the Commission should consider its answer to this request. NYISO states that, contrary to IPPNY's allegations, it did not deliberately withhold the 2005 Gold Book. In any event, NYISO states that the issue before the Commission is not whether the data in the 2005 Gold Book were accurate or whether the data were properly reported, but whether the 2005 Gold Book data warrant revision of the recently approved Demand Curves.

9. NYISO maintains that the 2005 Gold Book data do not dictate an automatic and self-evident revision to the Demand Curves. In NYISO's view, whether revisions should be made must consider the following factors: (1) potential anomalies in the 2005 data, and whether the data is representative of typical conditions; (2) the inclusion of a 300 MW increase in winter capacity already included in the recently approved Demand Curves; (3) consideration that the recently approved Demand Curves were intended to be in place for three years and the benefits of making after-the-fact revisions must be weighed against the effect this would have on stability and certainty; and (4) other factors and costs that might change during the three year period, and offset the revisions requested by IPPNY. NYISO states that it would be seeking comments on this issue from stakeholders and requests that the Commission defer action until NYISO can report back on its findings after review of these comments.

10. On June 9, 2005, a collection of intervenors that we collectively refer to as Indicated NY Entities,[3] filed an answer opposing IPPNY's rehearing request.

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[2] IPPNY Rehearing at 1-3.

[3] Comprised of: New York Transmission Owners (Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York (Con Ed), Long Island Power Authority (LIPA), New York Power Authority (NYPA), New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Orange and Rockland Utilities, Inc., and Niagara Mohawk Power Corporation); Multiple Intervenors (an association of

(continued…)

11. On August 1, 2005, NYISO filed a letter reporting on the stakeholder process and arguing that the Demand Curves approved in the April 2005 order should not be revised.

Discussion

A. Keyspan's Request for Rehearing

12. Keyspan's rehearing argues that, in the April 2005 Order, the Commission erred by adopting four findings advocated by NYISO and Levitan instead of adopting Keyspan's position on these issues. In each instance, Keyspan reiterates the arguments it made earlier in the proceeding and argues that the Commission erred by allegedly ignoring its position.

13. First, it argues that the 2002 load shape used in the Levitan analysis, and relied on by NYISO and the Commission, does not represent normal weather. In Keyspan's view, the problem with this load shape is that 2002 was a year with an above-average number of near-peak hours, because it was a season with unusually sustained periods of warm weather. To avoid this problem, Keypan argues that load shape should be modeled using average historical data. Keyspan argues that its view was supported by its consultant – PA Consulting – and that the Commission erred by allegedly ignoring this credible evidence.[4]

14. Second, Keyspan argues that the Commission erred [5] by finding Levitan's exclusion of Local Distribution Company (LDC) gas demand charges from fixed or variable costs to be reasonable. Keyspan argues that the Commission ignored evidence related to actual gas transportation costs and erroneously assumed it was reasonable that this cost could be negotiated to zero. While conceding that this result could be achieved by some developers, Keyspan argues that these circumstances do not exist for every developer and will likely come at the expense of some other increased cost. Thus, Keyspan argues, the Commission should base its gas cost projections on the expected average costs for each cost component.

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55 large industrial, commercial, and institutional New York energy customers); and Municipal Electric Utilities Association of New York (MEAU).

[4] Adoption of Keyspan's average historical data approach would result in lower net energy revenues and higher reference values.

[5] Citing April 2005 Order at P 35.

15. Third, Keyspan argues that the Commission ignored evidence related to actual property tax rates and erroneously assumed developers have leverage to negotiate property taxes significantly below actual rates.

16. Finally, Keypsan argues that the Commission erroneously adopted the 9,740 Btu/kWh heat rate proposed by Levitan. It argues that the heat rate assumed by Levitan is too low and reflects an efficiency that cannot be achieved by LM6000 units actually operating in New York City. KeySpan argues that its own heat rate of 10,400 Btu/kWh is more realistic because it is based on actual performance data from the units.[6] Thus, Keyspan argues, Levitan's proposed heat rate is too optimistic and not achievable in actual operations.

Commission Conclusion

17. For each of these issues, Keyspan's argument on rehearing merely reiterates an argument that the Commission previously considered and properly rejected in the April 2005 Order. For each of these issues, Keyspan advocated a different position than that proposed by other parties and accepted by the Commission. Keyspan wrongly concludes from this that the Commission ignored its position. The fact that the Commission in each of these instances adopted a different position than that advocated by Keyspan does not equate to the Commission ignoring Keyspan's arguments. Moreover, Keyspan's argument here overlooks that the record contains evidence that supports the Commission's conclusions. The Commission's decision must be based on substantial evidence. The fact that the record may also contain additional information that arguably would support a contrary conclusion does not invalidate a Commission finding supported by substantial evidence. *Consolo v. FMC*, 383 U.S. 607, 620 (1966); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1485 (D.C. Cir. 1986). In the instant case, the Commission reached its decision based on substantial evidence. For each of the findings disputed by Keyspan, the Commission relied on evidence that in the Commission's view was more compelling.

18. As to Keyspan's arguments on Load Shape, we dispute Keyspan's assertion that the April 2005 Order ignored the arguments made by Keyspan and PA Consulting. In fact, the order expressly acknowledged that Keyspan advocated the use of a weather-normalized load shape based on the 1993-1997 period. However, the Commission found

[6] *See* KeySpan Initial Filing, Exhibit 4 – Letter Report, Table 1, at 7.

that other factors were more important in reaching a decision on this issue and provided a number of reasons why use of the 2002 weather data was appropriate in fashioning load shape.[7]

19. For example, as noted by Con Ed,[8] contrary to Keyspan's assertions, the weather in 2002, as reflected in the combination of heat, humidity and total cooling-degree days, is average. In addition, as noted by the New York Public Service Commission, while the 2002 load shape may have had more peak hours than the historical average, it is likely to be representative of load shapes in the future, because increased real-time pricing at the retail level will flatten the load shape.[9] Levitan also provided support for use of 2002 data and explained that the 2002 load shape was also adopted by the Installed Capacity Subcommittee (in preference to the previously used 1995 load shape), because the "average curve" derived from 1993-2002 relies on antiquated data and does not reflect current structural changes.[10] Based on all these factors, the Commission reasonably concluded in the April 2005 Order that using the 2002 load shape was reasonable.

20. As we noted in the April 2005 Order, while the 2002 load shape may differ from the historical average, the relevant issue is whether the 2002 load shape is representative of the future, and the record supports a finding that it is. The 2002 load shape is likely to better reflect changes in the market than historical averages from the 1990s. For example, a load shape based on historical averages would fail to reflect that the increased use of real-time pricing at the retail level may flatten the load shape in the future. Indeed, as Levitan notes, the NYISO Installed Capacity Subcommittee has adopted the 2002 load shape in preference to averages from the 1990s for this reason. Thus, we deny rehearing.

21. As to Keyspan's arguments on gas transportation costs, in the April 2005 Order, we recognized that protestors were arguing that flexibility and negotiated rates should not form the basis for assumptions, and that full cost levels should be used for all cost assumptions. However, we found that Levitan appropriately analyzed past experience and costs to develop a reasonable and realistic estimate of property tax costs and local gas transportation costs. We find the argument that Levitan should ignore the real-life opportunities available to actual developers and should instead substitute costs based on a

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[7] April 2005 Order at P 42-43.

[8] *See* Tr. 108 (Statement of Norman Mah at March 21 Technical Conference).

[9] Affidavit of Mark A. Reeder at 13.

[10] Affidavit of Seth Parker at P 31-32.

hypothetical developer who might not avail itself of these opportunities to be unrealistic. We, therefore, affirm our findings in the April 2005 Order on this issue.[11]

22. As to Keyspan's arguments on property taxes, as with gas transportation costs, Keyspan is advocating that we substitute the hypothetical costs developers might encounter if they failed to avail themselves of realistic opportunities to reduce costs rather than pay posted rates. We find this argument without merit and affirm our findings in the April 2005 Order on this issue.[12]

23. As to Keyspan's arguments on heat rate, as we stated in the April 2005 Order, Keypan's arguments ignore the fact that that NYPA units are operated at less than full load, and that start up costs may differ from the 3 percent assumed by PA Consulting. In the April 2005 Order, we found that these factors cast sufficient doubt on the validity of Keyspan's assumptions that the Commission could not rely on its estimates. We continue to find the manufacturer's estimate of the capacity of the units more realistic than a proposed heat rate drawn from operating conditions that will not match the actual expected operation of the units. Moreover, while Keyspan's rehearing request reiterates arguments that the Commission considered and properly rejected in the April 2005 Order, it failed to come forward with answers to the questions in the April 2005 Order about flaws in its arguments. Thus, we affirm our findings in the April 2005 Order on this issue.[13]

B. IPPNY's Request for Rehearing

24. IPPNY argues that more timely and pertinent information regarding the actual winter/summer differential demonstrates that there is no justification for *any* winter revenue benefit adjustment. IPPNY argues that evidence refuting NYISO's proposed winter/summer differential was readily available to NYISO well in advance of its participation in the March 21 Technical Conference.[14] In fact, IPPNY states that the updated information was prepared by NYISO staff under the supervision of the very

[11] April 2005 Order at P 35.

[12] *Id.*

[13] *Id.* at P 23, 75.

[14] This updated information concerned the expected future winter/summer differential that will pertain during the affected period. IPPNY states that it was posted on NYISO's website on March 4, 2005, and was included in the 2005 Load and Capacity Data Report (2005 Gold Book) issued on April 15, 2005.

same affiants that were supporting the need for NYISO's proposed $5/KW-year winter revenue benefit.[15]

25. IPPNY further states that, despite the fact that updated and more accurate information existed that could resolve one of the most controversial issues in the demand curve reset process, NYISO neglected to make the information available for Commission staff's consideration at the March 21 Technical Conference or at any other time prior to the issuance of the April 2005 Order, due to an apparent oversight by NYISO.[16] IPPNY adds that, while NYISO's staff had the actual updated information available to it at the time it submitted its affidavit, NYISO staff did not incorporate this updated information into the affidavit it filed with the Commission's Staff.[17]

26. IPPNY argues that this updated information shows that the projections presented by NYISO at the March 21 Technical Conference were erroneous, and supports IPPNY's position that, based on expected future conditions, no winter/summer differential is appropriate.

27. IPPNY further argues that the Commission's policy is to make adjustments to test-year estimates if a utility fails to demonstrate that its estimate was reasonable when made, or upon a showing that the estimate would yield unreasonable results because of subsequent events which were not reasonably foreseeable at the time the estimate was developed.[18] In this instance, IPPNY argues that the Commission should find that

[15] *See* Joint Affidavit of Belinda F. Thornton and John W. Charlton (Joint Affidavit) at 19.

[16] IPPNY states that NYISO did not disclose to market participants that the updated information was located on its website until after the Commission's April 2005 Order was issued. IPPNY states that the information was not posted with the other documents related to the demand curve reset process. Instead, IPPNY states, it was posted on a section of NYISO's website that market participants would only have found if they had stumbled upon it or were given notice of it.

[17] We note that NYISO staff submitted an affidavit into the record at the March 21 Technical Conference asserting the need to modify the winter revenue benefit adjustment based on the impact of new generation additions within NYCA on the winter/summer differential. Joint Affidavit at P 40.

[18] In this regard, IPPNY cites *Villages of Chatham and Riverton, Illinois v. FERC*, 662 F.2d 23, 29, 33 (D.C. Cir. 1981), and *Public Service Company of Indiana*, Opinion No. 783-A, 57 FPC 1173 (1977), *aff'd*, 575 F.2d 1204 (7th Cir. 1978).

NYISO failed to demonstrate that its estimate of a 1,700 MW winter/summer differential was reasonable because NYISO had superior evidence, in the form of data produced by actual tests, available to it that directly refuted its estimate.

28. Indicated NY Entities respond that IPPNY's request should be denied for four reasons. First, they argue that neither IPPNY nor any other market participant had any reasonable expectation that the data contained in the 2005 Gold Book would be used in setting the Demand Curves. IPPNY never asserted the need for these data until after the Commission approved NYISO's demand curve proposal, and only at that time did IPPNY decide that inclusion of these data was vital. The fact that some of these data were published on NYISO's website before the technical conference that the Commission convened in this docket is of no relevance, since there was never any expectation that these data would be used in establishing the Demand Curves.

29. Second, Indicated NY Entities argue that the process contained in NYISO's Services Tariff for the development of ICAP Demand Curves does not envision continual revision of these curves whenever new information that might be favorable to one party or another may come to light. Instead, it sets forth a procedure for assessing these curves on a triennial basis, on a timetable set forth in that Tariff.

30. Third, Indicated NY Entities argue that continued revision of the Demand Curves would add uncertainty to the market, which would deter investment and be harmful to loads.

31. Finally, Indicated NY Entities argue that using the new data to determine the ICAP Demand Curves would have had virtually no impact on the Demand Curves. In this regard, they state that the most recent ICAP market data for the 2004/2005 Capability Year continues to support the winter/summer differential and the winter revenue benefit that were used to establish the Demand Curves approved by the Commission.

32. NYISO disputes IPPNY's contention that it hid the publication of the 2005 Gold Book from the Commission and the parties in this proceeding. In this regard, it notes that it posted the report on its website and notified both the Commission and its stakeholders of the existence of this data. It also points out that its witnesses at the March 21 Technical Conference were not responsible for preparation of the 2005 Gold Book.

33. NYISO states that, after conducting the stakeholder process outlined in its May 10^{th} and June 7^{th} letters, which included the submittal of written comments and reply comments to NYISO and its Board, oral presentations before its Board, and advice from its independent market advisor, Dr. David Patton, it has concluded that the recently approved ICAP Demand Curves should not be revised.

34. In support of this conclusion, NYISO argues that the three year ICAP reset process envisions that, to foster stability and predictability, once the Demand Curves for a three year period are established, they should not be changed, absent "exigent circumstances."[19] Moreover, NYISO argues that the circumstances cited by IPPNY do not constitute exigent circumstances because: (1) the data in the 2005 Gold Book would not lead to materially different ICAP Demand Curves; and (2) the Demand Curves were developed in a fair and open stakeholder process that ended long before the 2005 Gold Book became available, and were based on a range of data that may change over the three year life of the Demand Curves.

Commission Conclusion

35. As a preliminary matter, Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2005), prohibits an answer to a request for rehearing. However, IPPNY's argument is really more in the nature of a motion to reopen the record.[20] Thus, we will accept the answers filed by NY Indicated Entities and NYISO (its August 1, 2005 letter constitutes an answer) as answers to motions, which have provided information that assisted us in our decision-making process.

36. IPPNY has expressed concern that NYISO was not forthcoming regarding the 2005 Gold Book data. NYISO has responded that it did not deliberately withhold the 2005 Gold Book from the Demand Curve process and notes that the Gold Book is not prepared by NYISO employees, that IPPNY now acknowledges this fact, and that the 2005 Gold Book data were posted in the appropriate web location and not hidden. In light of these circumstances, we find IPPNY's contention that NYISO was not being candid with the Commission unwarranted. We also note that NYISO's May 10, 2005 letter to the Commission advised us of the new data, and its subsequent letter submitted on August 1, 2005 advised us on the outcome of the stakeholder process.

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[19] Citing Services Tariff § 5.14.1(b).

[20] If we treated IPPNY's pleading solely as a request for rehearing, and thus rejected the answers, we would also deny rehearing because parties are not permitted to raise new evidence on rehearing. To allow such evidence would allow impermissible moving targets. *See, e.g., Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC v. Consolidated Edison Company of New York, Inc.,* 112 FERC ¶ 61,117 at P 39 (2005).

37. We will affirm the finding we made in the April 2005 Order[21] on whether the ICAP Demand Curves should reflect a winter/summer differential, for the following reasons. First, as was the case with other findings made in the April 2005 Order, the Commission based its findings on the data reported in the 2004 Gold Book, the most recently published source of official data on Load and Capacity. This data was relied on by Levitan in its report, by all the stakeholders in the NYISO stakeholder process and by NYISO itself. All parties had a chance to assess this data and made arguments based on it. By contrast, the new information referenced by IPPNY did not become available early enough to be evaluated either by NYISO's consultants or by NYISO stakeholders.

38. Second, as in a cost-of-service rate case involving test year data, at a certain point, a decision must be made based on the information on hand, and adjustments based on selected post test year data can throw off the balance between offsetting factors.[22] NYISO should fully evaluate this new information in preparing its next three-year update, but we decline to reopen our review of the winter/summer differential to alter our conclusions based on these new data, which have not been subject to review by NYISO and its stakeholders.

39. Third, the entire ICAP Demand Curve process is based on the premise that it is important to the market to have price stability and certainty. Thus, even if we were otherwise inclined to make IPPNY's proposed adjustment, we would hesitate to do so, based on the confusion this would create in the market. Stability and certainty would be sacrificed if we retroactively changed the parameters for generation auctions, if we reopened the possibility of refunds, or even if we acted prospectively but outside the envisioned three year process for developing ICAP Demand Curves. Furthermore, acceptance of IPPNY's proposed adjustment would create a precedent for further – month-by-month, perhaps -- adjustments as data and circumstances change in New York over the three year period, which would promote uncertainty rather than stability.

40. Fourth, if we were to substitute the 2005 Gold Book data for the 2004 Gold Book data in determining the Demand Curves, this would necessitate that we conduct a rigorous assessment of all the fundamental assumptions underlying the Gold Book data, not limited to the narrow issues raised by IPPNY in its request for rehearing. Fairness dictates that such a review would include a full examination of each of the fundamental assumptions used in determining the Reference Price, including the Annual Reference Value ratio derived from the Gold Book data, actual import levels from neighboring

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[21] *See* April 2005 Order at P 63-71.

[22] *See, e.g., Public Service Company of New Mexico*, Opinion No. 73, 10 FERC ¶ 61,053, 61,123 (1980); *Commonwealth Edison Company*, Opinion No. 63, 8 FERC ¶ 61,277 (1979).

control areas, and a full review of the reasonableness of the Gold Book data itself.[23] The complexity of this task underscores the inadvisability of attempting to make such adjustments at this late stage in the proceeding. We expect NYISO to fully consider such factors when it develops its next triennial update.

The Commission orders:

The requests for rehearing filed by Keyspan and IPPNY are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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[23] For example, the Independent Market Advisor for NYISO, David B. Patton, notes that the 2005 Gold Book Data contains potentially erroneous information on the St. Lawrence hydroelectric plant. *See* Affidavit of David B. Patton, *New York Independent System Operator, Inc.'s 2005 Gold Book Issues Informational Filing*, at P 13-14 (August 1, 2005).