108 FERC ¶ 61, 059
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Consolidated Edison Company of New York, Inc. Docket No. EL04-36-000
Consolidated Edison Solutions, Inc.
KeySpan Energy Services, Inc.
Constellation New-Energy
Strategic Energy
New York Energy Buyers Forum
Consumer Power Advocates

v.

New York Independent System Operator, Inc.

ORDER DENYING COMPLAINT CONCERNING CALCULATION OF IN-CITY INSTALLED CAPACITY REBATES

(Issued July 13, 2004)

1. In this order, we deny a complaint against the New York Independent System Operator, Inc. (NYISO) alleging that NYISO improperly computed In-City Installed Capacity (ICAP) rebates paid to complainants[1] for In-City capacity purchases they made between the months of May and October of 2003. Complainants seek refunds of approximately $21 million based on the differential between the rebates paid to them and the rebates they contend should have been paid to them. We deny the complaint because we find that the rebates were properly computed and paid in accordance with NYISO's tariff and the applicable Commission order and because Complainants were on notice that NYISO had requested that the Commission approve implementation of the change before

[1]The complainants in this proceeding are: Consolidated Edison Company of New York, Inc. (Con Edison); Consolidated Edison Solutions, Inc. (Con Edison); KeySpan Energy Services, Inc.; Constellation New-Energy; Strategic Energy; New York Energy Buyers Forum; and Consumer Power Advocates (collectively "complainants").

the summer of 2003. Thus, there was no violation of the Filed Rate Doctrine. This order benefits customers by clarifying how In-City ICAP rebates were to be calculated under NYISO's tariff and the applicable Commission order during the summer of 2003.

I. Background

2. With Commission approval, NYISO established a transitional ICAP rate design in 2000,[2] and a permanent ICAP market design in 2001.[3] This market design was set out in NYISO's Market Administration and Control Area Services Tariff (Services Tariff) with market mitigation strategies that included capacity auctions. The market design approved in 2001 required each load serving entity (LSE) to procure resources currently equal to 118% of its peak load,[4] subject to payment of a deficiency payment (if this requirement was not met).

3. NYISO's market power mitigation measures in New York City required that sales of capacity from Divested Generation Owners (DGOs) be subject to a price cap of $112.95/kW-year. DGOs are the current owners of In-City power plants previously owned by Con Edison. Dividing this number by twelve, Complainants state that, during the summer of 2003, the applicable monthly price cap was $9.41/kW.[5]

4. In May 2002, NYISO's ICAP Working Group introduced to its participants (including Complainants) the concept of revising the ICAP market design to introduce an ICAP demand curve (Demand Curve) to encourage new generation investment and lessen price volatility within the New York City energy market.[6] After a year of internal discussions and development, on March 21, 2003, NYISO filed a request with the Commission seeking approval of its ICAP Demand Curve proposal.[7] The proposed ICAP Demand Curve would establish an ICAP requirement based on a monthly demand curve.

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[2] New York Independent System Operator, Inc., 90 FERC ¶ 61,319 (2000).

[3] New York Independent System Operator, Inc., 96 FERC ¶ 61,251 (2001).

[4] This level is determined annually by the New York State Reliability Council.

[5] Complaint at 9, 11.

[6] NYISO Answer at 17 & 19.

[7] Id.

5. The Demand Curve would serve to define the amount of ICAP that each LSE would have to obtain for the following month. It was intended to improve system and resource reliability by valuing the ICAP resources available above the system's required levels, and providing more effective economic signals for new investment. The Demand Curve would be used in monthly ICAP spot market auctions, which would replace current LSE bids in deficiency procurement auctions. The proposal sought to phase-in the Demand Curve to the NYISO system over a period of three years. The minimum ICAP requirement and coinciding specific prices were established for New York City, Long Island, and the balance of New York.[8] The tariff revisions submitted to the Commission supported the implementation of the Demand Curve.

6. In an order issued on May 20, 2003, the Commission approved NYISO's proposal. New York Independent System Operator, Inc., 103 FERC ¶ 61,201 (Demand Curve Order), reh'g denied, 105 FERC ¶ 61,108 (2003).

7. NYISO conducted three auctions in March, April, and May of 2003 to auction capacity from generators located within New York City covering the May-October capability period of 2003.[9] Complainants purchased capacity in each of these auctions (collectively "the auctions") to meet their capacity requirements during the periods covered by the auctions. The three auctions were held after NYISO had filed its Demand Curve proposal, but shortly before the Commission issued its order approving the proposal.

8. According to the Services Tariff, when the clearing price for capacity sold at an auction is higher than the price cap applicable to capacity sold within New York City by DGO's, NYISO is required to issue rebates equal to the difference to those LSEs in that area. In accordance with the Demand Curve Order, the revised demand curve applicable to the calculation of monthly capacity rebates went into effect on May 21, 2003. This effective date was requested by NYISO and granted by the Commission so that NYISO's proposal could be implemented prior to the summer of 2003.[10]

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[8] The ICAP Demand Curve was established in New York City at $127.89/kW-yr and $151.14/kW-yr for years one and two of phase-in, respectively.

[9] The March 2003 Auction (the Summer 2003 Strip Auction) cleared In-City capacity for the six month period from May-October 2003, while the April 2003 and May 2003 auctions were monthly capacity auctions that cleared In-City capacity for the months of May and June, 2003, respectively. During the months of May and June, market participants can adjust the capacity they purchased in the strip auction by making additional capacity purchases or by making sales of capacity.

[10] See Demand Curve Order at P 10 and Ordering Paragraph (A).

9. After the period covered by the two monthly auctions and the Summer 2003 Strip Auction had passed, NYISO calculated the rebates due and paid rebates in accordance with those calculations.[11]

10. On December 11, 2003, complainants filed a complaint against NYISO (Complaint) requesting that the Commission direct NYISO to: (1) revise its calculation of In-City ICAP rebates for the summer of 2003 to comply with NYISO's Services Tariff; and (2) pay complainants additional rebates totaling approximately $21 million.

Complainants' Arguments

11. Using the price cap of $9.41/kW-month (monthly expression of yearly cap), complainants claim that the New York LSEs should have been entitled to a capacity rebate of $28,849,635. Complainants state that NYISO unfairly elected to use a higher price cap, and this resulted in rebates amounting to $8,014,386, a difference of $20,835,249.

12. Complainants argue that NYISO's actions violate the Filed Rate Doctrine by failing to use the price caps in effect at the time of the auctions when calculating rebates. In this regard, Complainants cite Montana-Dakota Utilities Company v. Northwestern Public Service Commission, 341 U.S. 246, 251-52 (1995) (Montana-Dakota), arguing that, under the Filed Rate Doctrine, NYISO can claim no rate as a legal rate other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in a commodity on other terms.

13. Complainants also argue that, by using a price cap other than $9.41/kW-month, NYISO failed to follow the terms of its Services Tariff. They state that by failing to abide by the terms of its tariff, NYISO did not allow complainants fair participation in the auctions.

14. They also complain that NYISO did not inform them of its plan to retroactively implement price caps. Complainants claim that their bidding strategy for the auctions was based on the expectation of a mitigated price cap of $9.41/kW-month.

15. Complainants further argue that, had NYISO publicly announced that it would retroactively modify the price cap when and if it was approved by the Commission, then they would have modified their bidding and hedging strategies accordingly, or objected to the Commission of the unwarranted change. Finally, complainants argue that NYISO violated its code of conduct by answering a customer's question about NYISO's tariff.

[11] The rebate calculation for May 2003 was not contested.

16. Based on these arguments, complainants request that the Commission direct NYISO to provide a rebate to them based on the price cap of $9.41/kW-month, or alternately establish a hearing to decide this matter.

NYISO's Answer

17. NYISO's answer states that the complaint is without merit and that no hearing is needed to reach this conclusion. NYISO argues that the Commission should reject the requests set forth in the complaint for several reasons. First and foremost, NYISO states that in calculating the ICAP rebates, it complied with its Services Tariff. When the Commission approved the Demand Curve Filing and established the May 21, 2003 effective date, NYISO subsequently, "applied the shaped methodology to all auction awards and rebates calculated and paid for the months following May 21, 2003."[12] NYISO states that this is what was required of it by the Commission, and was explained to Consolidated Edison Solutions, Inc. and several other parties in a letter dated August 29, 2003.

18. NYISO claims that applying the annual cap using the new, shaped methodology for rebates is integral to the implementation of the ICAP Demand Curve. It states that the Demand Curve does not change the annual In-City mitigated generation price of $112.95-kW/year on file with the Commission in the Services Tariff. Rather, to complement the new ICAP Demand Curve market design, NYISO developed the theory for shaping the annual price cap so that the monthly amounts derived from the annual cap reflect seasonal market differences.

19. NYISO states that complainants have not identified any language in the Service Tariff, ISO procedures, or the Demand Curve Order, that would support their contention that the monthly portion of $9.41/kW-month was to be retained though the summer of 2003 capability period, especially as all other components of the Demand Curve filing were implemented after the Demand Curve Order. Specifically, in response to complainants' argument that $112.95-kW/year is both a bid and price cap, and that the bid cap in effect at the beginning of a capability period must equal the price cap used to calculate rebates, NYISO states that this is not the case, and that the only stipulation according to the Services Tariff is that sales or re-sales of unforced capacity from In-City units not exceed $112.95-kW/year, nothing further.

20. NYISO presents testimony from an independent market advisor, Dr. David B. Patton, stating that seasonal differentiation in price cap is necessary and would improve signals to invest in new capacity and retain existing capacity.[13] Dr. Patton states that

[12] NYISO Answer at 7.

[13] Id. at Exhibit A.

applying a uniform price cap of $9.41-kW/month effectively sets a *de facto* price cap on In-City mitigated generation that is actually lower than $112.95-kW/year, based on market clearing prices in the summer and winter.

21. NYISO also provides testimony from Mr. John Charlton, the program coordinator for NYISO's ICAP/Resource Adequacy programs.[14] Mr. Charlton explains that, if NYISO had applied the old monthly amount of $9.41/kW-month to the summer of 2003 capability period, and the shaped amount to the Winter 2003/2004 capability period (approximately $6.83-kW/month), this would result in a lower overall price cap than $112.95-kW/year, taking revenue away from generation and defying the general purpose of the Demand Curve implementation. The anticipated market improvements would be delayed until the 2004-2005 capability year. Reliant also argues that, if complainants were to prevail, the annual cap of $112.95/kW-year could not be achieved, and also argues that complainants' attempt to revise price caps "represent a collateral attack on the Demand curve itself."[15] Thus, NYISO and Reliant argue that applying the old rebate method would be inconsistent with the purposes of the ICAP Demand Curve and the mitigated annual cap on file with the Commission.

22. NYISO also claims that if complainants' request is granted, this would provide them with an advantageous position over their competitors during the 2003-2004 capability year. NYISO asserts that, implementation of complainants' position would result in "inequitable consequences for Customers, with certain LSEs receiving significantly higher amounts of rebates over the course of the year."[16] Further, generators who participated in the Summer 2003 Strip Auction would receive less for capacity, when compared with those offering capacity into later auctions.

23. NYISO explains that ICAP rebates are calculated monthly and are not tied to a particular auction. The completion of an ICAP auction does not create a fixed rebate for the entire period covered by such an auction. Rebates for monthly and strip auctions are calculated after the close of each month in a given capability period, and rebates are paid to customers in the month following the calculation. The rebates apply to all LSEs, whether or not they participated in the monthly or strip auctions. NYISO states that, because rebates are calculated on a monthly basis and adjustments are made to subsequent bills to reflect monthly load shifting among LSEs, rebates thus are tied only to an individual month's conditions, not to a particular auction.

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[14] NYISO Answer, Exhibit B.

[15] Reliant Answer at 17.

[16] NYISO Answer at 12.

Notice, Interventions, and Additional Pleadings

24. Notice of the Complaint was published in the Federal Register, with comments, interventions, or protests to be filed by January 13, 2004.[17] The comment date was subsequently extended to January 23, 2004.

25. Timely motions to intervene were filed by the New York Power Authority (NYPA), Reliant Resources, Inc. (Reliant), NRG Companies (NRG), and Keyspan-Ravenswood, LLC. In addition, Reliant filed comments and NRG filed a protest, both supporting the NYISO's actions.

26. Complainants filed an answer to NYISO's answer, Reliants' comments, and NRG's protest. Reliant and NYISO each filed answers to complainants' answer.

27. The Commission's Alternate Dispute Resolution Staff was enlisted in an attempt to resolve the matter informally. This proved unsuccessful and the matter is now before the Commission for decision.

II. Discussion

28. As a preliminary matter, the timely uncontested motions to intervene in this proceeding serve to make the entities that filed them parties to this proceeding. Further, in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), we will deny complainants' motion for leave to file an answer to NYISO's answer and to NRG's protest. This being the case, we will also deny the answers to complainants' answer, as moot.

29. Complainants argue that NYISO's refund calculation improperly applied the new higher price cap instead of the old price cap to ICAP auctions during the spring and summer of 2003. As a result, complainants argue that rebates of about $21 million were not made to them on their capability payments.

30. Complainants argue that NYISO's actions were improper because: (1) NYISO's rebate calculation violated the Filed Rate Doctrine; (2) NYISO violated the appropriate terms of its filed tariff by applying the new tariff provisions to auctions conducted before the effective date of the Services Tariff changes; (3) NYISO's actions harmed complainants who reasonably relied on the old Services Tariff in formulating their auction strategies and bids; (4) under NYISO's tariff, the auctions created an obligation for NYISO to pay the auction prices, not a recalculated price and NYISO violated its own

[17] 68 Fed. Reg. 74,571 (2003).

rules by having inconsistent bid and price caps; and (5) NYISO unfairly gave preferential notice to some market participants. We will now address these arguments point by point.

A. Filed Rate Doctrine

31. Complainants argue that NYISO's rebate calculation violated the Filed Rate Doctrine and constituted retroactive ratemaking. They argue that the bid cap essentially sets the market-clearing price for mitigated capacity. Thus, they argue that NYISO effectively modified the market-clearing price when it revised the bid cap.

32. NYISO responds that, because it fully complied with its tariffs, its actions did not violate the Filed Rate Doctrine. NYISO argues that in characterizing the calculated rebates as a retroactive adjustment of the ICAP price cap and therefore a violation of the rule against retroactive ratemaking, complainants fail to realize that the price cap, in fact, did not change and that NYISO thereby fully complied with its tariffs and the Filed Rate Doctrine. NYISO states that no retroactive rate changes were performed and that the ICAP rebates were calculated both predictably and equitably. NYISO further argues that the "rate" in question for ICAP is the market-clearing price paid by buyers and established through competitive bidding in the auctions. NYISO concludes, "[n]othing that the NYISO did to implement the Commission's May 20, 2003 order altered the Market-Clearing Prices previously established in the summer of 2003 capability period auctions."[18]

33. Further, the other relevant rate in question here is the annual price cap of $112.95-kW/year, and NYISO states that this has not changed. The shaped methodology was applied prospectively to rebates calculated after the Demand Curve Order was made effective, and NYISO claims that prospective implementation of a Commission order fully complies with the requirements of the Filed Rate Doctrine. NYISO states that if it had, in fact, followed complainants' suggestion and applied the old methodology to its rebate calculation, such an action itself could be interpreted as a violation of the Filed Rate Doctrine, because in conjunction with the winter 2004-2005 capability period, the annual $112.95/kW-year would then no longer be the rate that was implemented.

34. Reliant and NRG both agree that NYISO did not violate the Filed Rate Doctrine or engage in retroactive ratemaking in applying the shaped monthly cap, because the annual cap of $112.95/kW-year, which was the rate on file, did not change. Reliant states,

[18] NYISO Answer at 20.

> [n]either the Commission nor the NYISO's tariff requires that the rate be $9.41/kW-month," and that, "charging a monthly rate above $9.41/kW-month does not violate any filed rate because the monthly charge was *never on file*.[19]

NRG adds that the revised caps represent, "a discretionary change the NYISO made to its procedures, not a change to any of its Tariffs." NRG summarizes its argument by stating,

> Complainants' requested relief would force the NYISO to violate its Services Tariff, effectively reduce the Commission approved annual mitigated price cap, provide New York City LSEs an unjust windfall, and discriminate against similarly situated In-City capacity providers without reasonable justification.[[20]]

35. NYISO argues that the cases related to the Filed Rate Doctrine cited in the complaint are not pertinent because the annual mitigated price cap was on file with the Commission and did not change. Finally, NYISO argues that, even if the implementation of the Demand Curve Order was deemed retroactive ratemaking, the Filed Rate Doctrine would not apply because complainants had adequate notice. "Courts have consistently held that the filed rate doctrine does not apply where customers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of the service."[21]

Commission Conclusion

36. Under the Filed Rate Doctrine, a customer "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." [22] Moreover, the Court stated that "the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or more reasonable one."[23]

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[19] Reliant Answer at 8.

[20] NRG Answer at 14, 16.

[21] NYISO Answer at 23.

[22] Montana-Dakota, 341 U.S. at 251-252.

[23] Id.

37. Thus, the issue is not whether calculating the rate using complainants' suggested methodology would result in a reasonable rate. Rather, for complainants to prevail, on their argument that NYISO's rebates violated the Filed Rate Doctrine, they must show that at the time the rebates were calculated, the effective tariff rate included a monthly price cap of $9.41/kW. It did not. Thus, we find complainants' argument on this issue without merit. We will now further explain this conclusion.

38. First, NYISO's Services Tariff expresses its price cap as an annual figure ($112.95 per kW-year) and prior to this revision, did not expressly stipulate how the monthly price cap would be computed.[24] Thus, complainants' argument that NYISO violated its tariff when it failed to calculate the monthly rebates using a $9.41/kW monthly price cap is simply untenable.

39. Second, although not originally specified in the tariff, unquestionably, prior to issuance of the Demand Curve Order, NYISO calculated its monthly rebates by simply dividing the annual figure ($112.95 per kW) by twelve (which yields a monthly price cap of $ 9.41 per kW-monthly). Under the methodology approved in the Demand Curve Order, the total annual price cap and the applicable tariff language would remain unchanged but, to encourage investment in new generation and to avoid price volatility, the monthly amount would vary consistent with the shaping methodology approved by the Demand Curve Order.[25] Given that the Demand Curve Order became effective prior to the calculation of the rebates, NYISO's rebate calculation did not violate the Filed Rate Doctrine because it was performed as dictated by the then effective methodology prescribed in the Demand Curve Order.

40. Third, even if we accepted, arguendo, complainants' contention that NYISO's actions constituted retroactive ratemaking, the Filed Rate Doctrine would not apply because customers were on notice that the Demand Curve proceeding (which complainants actively participated in and that was on file prior to the three auctions being held) would resolve the issue (of how rebates for the summer of 2003 would be calculated) and might cause a later adjustment to that rebate calculation. See, e.g., Consolidated Edison Company v. FERC, 347 F.3d 964, 969 (D.C. Cir. 2003), which explained that notice converts what would be purely retroactive ratemaking into a functionally prospective process by giving the proper audience notice that the rates are provisional and subject to later change. Further, as discussed below, an analysis by Dr. David Patton of complainants' bidding behavior shows that complainants' bidding

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[24] Section 5.14.1(a) of the revised tariff accepted by the Demand Curve Order clearly states that the cap will be shaped (for computing rebates) to account for seasonal differences.

[25] NYISO calculates that during the months of May-October 2003 the monthly price cap averaged $11.31 per kW-month.

strategy recognized that the Demand Curve proposal would be in place prior to the summer of 2003.

41. Thus, we find complainants' argument that NYISO's actions violated the Filed Rate Doctrine without merit. In fact, NYISO did exactly what the Filed Rate Doctrine requires, it calculated the rebates in accordance with the methodology approved by the Commission after the order adopting that methodology (i.e., the Demand Curve Order) had become effective. When NYISO filed the Demand Curve proposal with the Commission (prior to the first auction) it requested an effective date that would allow the proposal to be in place prior to the summer of 2003. When the Commission issued the Demand Curve Order, it granted this request and the rebate calculations were performed using the methodology approved by the Commission after the effective date of those changes. By contrast, had NYISO done otherwise, and calculated rebates using the outmoded no longer effective methodology, that would have violated the Filed Rate Doctrine.

42. This same reasoning also leads us to find unpersuasive complainants' contention that NYISO's rebate calculation constituted retroactive ratemaking because the revised methodology for calculating rebates became effective prior to NYISO calculating refunds using that methodology. Thus, NYISO applied the dictates of the Demand Curve Order prospectively, not retroactively. By contrast, had NYISO calculated the rebates using the outmoded methodology replaced in the Demand Curve Order, that would have constituted retroactive ratemaking.

B. NYISO's Tariff

43. Complainants argue that, by using a price cap other than $9.41/kW-month, NYISO failed to follow the terms of its Services Tariff. They state that by failing to abide by the terms of its tariff, NYISO did not allow complainants fair participation in the auctions.

44. NYISO responds that the method for calculating the monthly rebates was prescribed by the Demand Curve Order, and not by the Services Tariff. NYISO further argues that the Demand Curve Order was effective before it calculated the rebates and that nothing in its calculation of the rebates was inconsistent with the requirements of the Services Tariff then on file and effective.

45. As we stated in our discussion of the Filed Rate Doctrine, the Demand Curve Order established an effective date of May 21, 2003. The Demand Curve Order expressly stated that it was establishing this effective date so that the Demand Curve proposal approved in the order would be in place prior to the summer of 2003. Thus, although the auctions were conducted prior to the effective date of the Demand Curve Order, the Demand Curve Order and the procedures approved therein were in place and effective prior to the time when NYISO was called upon to calculate the rebates.

Moreover, as this matter was governed by the Demand Curve proposal approved in the Demand Curve Order and not by the Services Tariff, calculating the rebates in conformance with the Demand Curve proposal did not violate NYISO's then effective Services Tariff.

46. As to complainants' contention that the earlier tariff should have been used because that was the tariff in place at the time when it made its bids in the three auctions, this argument overlooks that this matter is not covered in the tariff. The argument also fails because, in accordance with section 5.15 of NYISO's Services Tariff, allocation of the rebates (a different matter than calculation of the rebates) did not depend on participation in the three auctions.

47. Section 5.15 of NYISO's Services Tariff provides as follows:

> The ISO shall rebate to all LSEs, except NYPA, with Locational Minimum Installed Capacity Requirements in the New York City Locality any Excess Amount that remains after the completion of an auction. Such rebates shall be allocated among all New York City LSEs, except NYPA, in proportion to their share of the Locational New York City Installed Capacity Requirement, regardless of whether they actually took part in the first phase of the strip or monthly auctions. The ISO shall allocate such rebates among In-City LSEs except NYPA on a monthly basis. NYPA will not share in any rebates under this section. Rebates shall include interest accrued between the time they were collected and the time they are paid.

48. This provision illustrates that the rebates paid to complainants were made in compliance with the Services Tariff and did not turn on complainants' participation in the three auctions. Rather, it turned on their share of the Locational New York City Installed Capacity Requirement. Moreover, this allocation formula was in place prior to the three auctions and its existence contradicts any equitable argument by complainants that they were harmed or mistreated by NYISO's use of the Demand Curve proposal in making its rebate calculations.

C. Arguments on Reliance

49. Complainants argue that, even though the Commission ultimately approved NYISO's Demand Curve proposal, this was not foreseeable, and they were harmed by their reasonable reliance on the older monthly rebate methodology when formulating and implementing their bidding strategy for the three auctions. They also argue that there was no guarantee that the Commission would approve the Demand Curve filing as submitted and during the time period desired by NYISO. Complainants argue that the Demand Curve filing was a controversial matter and, thus, it was not unreasonable for them to expect that the Commission could modify it. Thus, complainants state that the decision

to revise the monthly price cap could not have been anticipated by market participants based on publicly available information.

50. In response, NYISO presents an analysis by Dr. David Patton of complainants' bidding behavior that shows that their actions were consistent with an expectation that the Demand Curve would be approved and effective (i.e., he concluded that had they assumed the Demand Curve proposal would be approved, they would have acted exactly as they did).[26] NYISO also emphasizes that complainants were active participants in the process wherein the Demand Curve proposal was formulated and presented to the Commission for approval (opposing its adoption every step of the way). In addition, the Demand Curve proposal was filed with the Commission prior to the three auctions, and complainants and other market participants were familiar with this proposal prior to formulating and implementing their bidding strategy for the three auctions. They were also aware that the proposal contained a requested effective date chosen so that the revised methodology would be in place prior to the summer of 2003. Reliant supports this argument, stating that complainants were on notice that the shaped monthly cap would apply to the summer capability period auction, and that Con Edison even admitted knowledge of this in a filing made in April of 2003.

51. The factors cited by NYISO and Reliant are all persuasive in rebutting the argument that complainants' were blindsided by approval of the Demand Curve Order and its use in calculating In-City ICAP rebates for the period from June-October 2003. Moreover, the May 21, 2003 effective date was approved by the Commission just so that the change in methodology would be in place prior to the summer of 2003. However, we also rely on another factor in rejecting complainants' argument. This additional factor is that the rebates at issue here were not calculated based on some future Commission action that had not yet been implemented, but by the currently effective Demand Curve Order. Given that the Demand Curve changes were in place prior to the time when NYISO was called upon to calculate the rebates, complainants' entire argument is beside the point. Thus, we reject the argument that Complainants were harmed by their reliance on the old methodology. To the contrary, if we ordered the requested refunds it would

[26] NYISO theorizes that, if complainants had developed their bidding strategies based on the old methodology, then, given that there is no surplus capacity in New York, it would be reasonable for generators to assume that the clearing price for ICAP would be very close to the monthly amount of the annual cap. If complainants or other generators had believed the old methodology would apply to the Strip auction, and the shaping methodology would apply to the monthly auctions, it would have been irrational for them to sell any capacity in the Strip Auction. Thus, from the willingness of In-city mitigated generators to sell capacity in the Summer 2003 Strip Auction, NYISO concludes that this confirms that all the market participants, including complainants, understood that the shaping methodology (i.e., the Demand Curve methodology) would be used to calculate rebates.

give complainants an undeserved windfall at the expense of other market participants and would undermine the objectives of the Demand Curve Order.

D. NYISO's Tariff Obligations in Calculating Rebates

52. Complainants argue that the auctions created an obligation for NYISO to pay the auction prices, not a recalculated price. In this regard, complainants state that NYISO failed to apply the appropriate terms of its filed tariff in calculating the In-City rebates. Complainants state that nowhere in NYISO's March 21st filing was it mentioned that the new price caps would be applicable to auctions conducted prior to acceptance, approval, or effective date (May 21, 2003) of the Demand Curve. In addition, complainants point out that all of NYISO's summer of 2003 auctions were conducted prior to the issuance and effective date of the Demand Curve Order. Complainants state, "prior to May 21, 2003, the tariff terms and conditions that controlled the conduct of the NYISO auctions were the provisions of the NYISO Services Tariff that were in place and on file prior to May 21, 2003."[27] Complainants argue that, prior to May 21, 2003, the tariff required that the annual price cap be set at $112.95/kW-year ($9.41/kW-month).

53. Complainants also refer to the following language presented on the NYISO's website after the March 31 Strip Auction : "This notice serves as a reminder to all Market Participants that have purchased mitigated unforced Capacity in the Summer 2003 Strip Auction conducted on March 31, 2003 or will purchase unforced Capacity in the monthly UCAP auctions to be conducted during the remainder of the 2003/2004 Capability Year that mitigated In-City capacity cannot be resold at a price higher than the mitigated price cap of $9.41/kW-month."[28]

54. Complainants also argue that the actions taken by NYISO were not supported by its own rules. They state that even though the DGOs were not allowed to bid higher than $9.41/kW-month in the auctions, NYISO paid them at the new price caps which were higher than $9.41. This, complainants contend, was inconsistent with both the old and new tariff in that the bid cap was different than the price cap. Complainants claim that NYISO's actions failed to line up capacity purchase decisions with their associated price. Secondly, complainants argue that the NYISO capacity manual prohibits the monthly billing process from being used to reset clearing prices and capacity rebates, and by issuing bills net of any rebates, NYISO is in violation of this rule.

55. NYISO responds that it was reasonable to expect that the new methodology for monthly rebates would apply to the summer of 2003 capability period. Complainants noted that NYISO announced on its website that the monthly amount of $9.41 was in

[27] Complaint at 13.

[28] Exhibit K of NYISO website at www.nyiso.com/markets/icapinfo.html

effect for the 2003-2004 capability year. However, NYISO argues that this announcement was made on April 4, 2003, more than 6 weeks prior to the Commission's ruling on the Demand Curve, and in compliance with the Services Tariff then in effect. They claim that complainants have not justified why they considered that amount would remain in effect after the Commission's approval of the Demand Curve filing. Reliant and NRG both agree that complainants had ample opportunity to clarify their understanding of the relevant rebate calculation method.

56. As mentioned above, NYISO also cites the actual behavior of In-City generators as being consistent with an understanding by all market participants that the shaping (Demand Curve) methodology would be used in the summer of 2003.

57. While it might have been better had NYISO's website been updated to note that it had proposed changes to the methodology for calculating monthly rebates (beyond the notice it did post), it is also true that complainants could have sought clarification from NYISO, if they were uncertain about this matter. Overall, we find complainants' arguments on these points unpersuasive. NYISO's obligation was to calculate the rebates in accordance with its currently effective tariff on file and in accordance with the terms of the Demand Curve Order that became effective on May 21, 2003. It did just that. Moreover, complainants' contention that NYISO should have calculated refunds based on the methodology superceded by the Demand Curve Order constitutes an improper collateral attack on the Demand Curve Order.

58. As to complainants' contention that there is an inconsistency between NYISO's bid cap and the new price cap, we find, as noted by NYISO, that there is no requirement in the Services Tariff that the bid cap in effect at the beginning of a capability period must equal the price cap used to calculate rebates. The Services Tariff's only stipulation is that sales or re-sales of unforced capacity from In-City units may not exceed $112.95-kW/year.

E. NYISO's Responses to Customer Inquiries

59. Complainants argue that NYISO violated its code of conduct when a NYISO employee responded to a question from a representative of a DGO who asked about a provision of the Services Tariff related to the implementation of the ICAP Demand Curve. The inquiry concerned how the demand curve would be implemented. Complainants argue that answering this question about how NYISO interpreted its tariff improperly gave preferential treatment to that customer. NYISO responds that answering customer inquiries during the ordinary course of business does not violate NYISO's code of conduct. It states that complainants mischaracterize the facts and ignore the meaning and intent of the code of conduct. NYISO contends that the code of conduct is not intended to apply to customer questions concerning the application of NYISO's Tariffs.

60. NYISO argues that rather than inappropriately sharing confidential or proprietary information as forbidden by Commission Order No. 889, NYISO aided a market participant in understanding and interpreting a tariff, for which there is no bar. NYISO asserts that the code of conduct does not prohibit NYISO from engaging in communications with Market Participants. NRG agrees and adds that, "if the NYISO cannot answer questions from market participants for fear of allegations of code of conduct violations, less information will be available and the markets will be less efficient to the detriment of all interested parties."[29]

61. We agree with NYISO and NRG that communications by company representatives answering customer questions about the meaning of tariff provisions and applicable Commission orders affecting tariff provisions do not violate the code of conduct or the provisions of Order No. 889. These rules were designed to prevent a public utility from conveying information to its merchant function employees and affiliates that is not available to the public and other customers. They were not intended to prevent company representatives from answering customer questions about the meaning of tariff provisions and its understanding of applicable Commission orders. Additionally, complainants' argument ignores that the information conveyed to the customer could reasonably have been inferred from NYISO's request in the Demand Curve proceeding for an effective date that would allow the proposal to be implemented before the summer of 2003.

The Commission Orders:

Complainants' complaint against NYISO is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[29] NRG Answer at 24.