UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	)	
	)	
v.	)	Docket No. EL03-26-000
	)	
Dynegy Power Marketing, Inc.	)	

THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.'S RESPONSE TO DYNEGY POWER MARKETING, INC. MOTIONS TO (1) TO DISMISS THE MOTION OF THE NYISO TO VACATE AWARD OF ARBITRATOR AND (2) STRIKE EXHIBITS ANNEXED TO SAME

Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2001), the New York Independent System Operator, Inc. ("NYISO") files this response to the motions of Dynegy Power Marketing, Inc. ("Dynegy") to: (1) dismiss the motion of the NYISO to vacate the award of arbitrator; and (2) to strike exhibits annexed to the NYISO's motion. Both Dynegy motions are groundless and should be denied.

I. INTRODUCTION

On February 20, 2003, the NYISO requested that the Commission vacate the Award of Arbitrator ("Award") issued on October 28, 2002, to Dynegy in American Arbitration Association ("AAA") Case No. 13 198 00247 02.[1] The Award grants compensation to Dynegy for the erroneous application of the NYISO's Automated Mitigation Procedure ("AMP") to one of Dynegy's units in August, 2001. The NYISO moved to vacate the Award on the grounds that

[1] The Award is governed by Article 11 of the New York Independent System Operator Market Administration and Control Area Services Tariff ("Services Tariff"). Section 11.3 of the Services Tariff specifies that parties to an arbitration proceeding may request the Commission to "vacate, modify or take such other action as may be appropriate" with respect to arbitration decisions within one year of the decision.

it results in costs for jurisdictional energy sales that are not just and reasonable, not consistent with the applicable NYISO tariff, and that compensate Dynegy at levels substantially in excess of the marginal cost and the "full bid" standards for the megawatts ("MW") at issue established by the Commission.[2, 3] On March 7, 2003, Dynegy filed motions with the Commission to: (1) dismiss the motion to vacate the Award; and (2) strike certain exhibits annexed to the NYISO's motion.

The Commission should reject both of these motions. First, Dynegy's motion to dismiss concedes that the Commission has jurisdiction to review the Award, and Dynegy's four page discussion of an irrelevant Supreme Court case relating to venue provides no grounds for the Commission to divest itself of its jurisdiction under the Federal Power Act, 16 U.S.C. § 791a - 828c (2000) ("FPA"), to ensure that rates are just and reasonable.

Second, Dynegy's motion to strike Exhibits 5, 8, and 9 of the NYISO's motion is also without merit. Exhibits 5 summarizes, and Exhibit 8 analyzes, the facts on the record compiled at the hearing before the arbitrator. By Dynegy's own admissions, these exhibits do not add to the factual record of the arbitration proceeding. Rather, they are provided by the NYISO in order to aid the Commission in understanding the consequences of the Award and the appropriateness of the NYISO's proposed compensation methodology. They are thus entirely appropriate. Likewise, Dynegy's contention that the NYISO should not provide the Commission, in Exhibit 9, with a copy of an authority cited in the NYISO's brief, is wholly unsupportable.

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[2] *New York Independent System Operator, Inc*., 95 FERC ¶ 61,471 (June 28, 2001), at 62,690, fn. 9, requiring that, with respect to the AMP, "if NYISO subsequently determines that the bid was not an attempt to assert market power, the generator will be paid its full bid."

Because Dynegy has shown no good cause why the Commission should dismiss the NYISO's motion to vacate the Award of the arbitrator, nor why the Commission should strike Exhibits 5, 8, and 9 of the NYISO's motion, Dynegy's motions should be denied.

II. DYNEGY'S MOTION TO DISMISS THE NYISO'S MOTION TO VACATE THE AWARD OF THE ARBITRATOR SHOULD BE DENIED

A. The Award is Subject to Review by the Commission

The Commission's obligations under the FPA and the Services Tariff, and the Commission's long-standing policy with respect to the reviewability of arbitration awards, all contradict Dynegy's motion to dismiss. Indeed, Dynegy itself acknowledges that: "It is also beyond dispute that the Commission, pursuant to the Services Tariff and the NYISO Agreement, has the power to vacate or modify the arbitration award."[4] Dynegy has come forward with no authority supporting its assertion that the Commission should not exercise that power with respect to the Award.

The Commission has long held that it "has a statutory responsibility to vacate an arbitration award if it contravenes the public interest or is in any other way inconsistent with statutory requirements," and that "given the Commission's statutory responsibilities, decisions on vacatur will necessarily have to be made on a case by case basis."[5] In a recent case involving an arbitration clause, the Commission noted that "it is proper for the Commission to retain jurisdiction over the subject matter of th[e] dispute. Under the FPA, the Commission is charged

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[3] The NYISO's Motion to Vacate also demonstrates that the compensation offered by the NYISO pays Dynegy its full bid for the MW that were erroneously mitigated, and compensates Dynegy at rates that are just and reasonable rates and consistent with the NYISO's tariff.

[4] Dynegy Motion to Dismiss, at p. 4.

[5] *Alternative Dispute Resolution*, Order No. 578, FERC Stats. & Regs. 1991-1996 ¶ 31,018, at 31,328 (Apr. 12, 1995).

with the public responsibility to ensure that the rates are just and reasonable and not unduly discriminatory . . . ."[6]

The Commission has indicated that it will receive and consider evidence that the results of arbitration are inconsistent with the FPA or the goals and policies of the Commission.[7] In fulfillment of this responsibility, the Commission has stated it will undertake *de novo* review of arbitration awards where appropriate. The Commission has held that "upon conclusion of the arbitration process we will make an independent examination of any resulting rate filings and we will not be constrained by any findings, conclusions or recommendation of the arbitrator should we determine they are not in accordance with the statutory standards of the Federal Power Act."[8]

In particular, the Commission has stated that it "will afford appropriate deference to the outcomes of approved ADR procedures, *consistent with our obligation to ensure that the resolution is not unjust, unreasonable, or unduly discriminatory or preferential and that it is not the result of the exercise of market power*."[9] In approving the PJM ISO, the Commission assured intervenors that the Commission will "have the ability to exercise its authority over an arbitrator's decision."[10] In approving ISO New England, the Commission stated that it "will

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[6] *PacifiCorp v. Reliant Energy Servs., Inc.*, 99 FERC ¶ 61,381, at P 24 (2002).

[7] See, e.g., *California Independent System Operator*, 94 FERC ¶ 61,141 at 61,538 (Commission notes that complainant "has proffered no evidence to persuade us that the use of arbitration as an initial process in resolving disagreements . . . has produced results that are inconsistent with the FPA or the goals and policies of the Commission.")

[8] *North Carolina E. Mun. Power Agency v. Carolina Power & Light Co.*, 46 FERC ¶ 61,181 at 61,600 (1989).

[9] *PacifiCorp*, 69 FERC ¶ 61,099 at 61,383 (1994) (emphasis added).

[10] *Atlantic City Electric Co.*, 81 FERC ¶ 61,257 at 62,269 (1997).

retain ultimate review authority over any" "ADR with respect to the imposition of monetary penalties."[11]

Here, the NYISO's request for review of the Award under the FPA and the Commission's precedent is based on the express terms of the Services Tariff, which provides that:

> Within one (1) year of the arbitration decision, a party may request that the Commission or any other federal, state, regulatory or judicial authority (in the State of New York) *having jurisdiction* over such matter vacate, modify or take such other action as may be appropriate with respect to any arbitration decision that is:
>
> 1. based upon an error of law;
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> 2. contrary to the statutes, rules or regulations administered by such authority;
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> 3. violative of the Federal Arbitration Act or the Administrative Dispute Resolution Act;
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> 4. based on conduct by an arbitrator that is violative of the Federal Arbitration Act or Administrative Dispute Resolution Act; or
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> 5. involves a dispute in excess of $500,000.[12]

Dynegy is subject to the NYISO Services Tariff, and was aware that that review by the Commission was available to either party. Dynegy has articulated no reason why the Commission may not exercise its clear authority to make an independent evaluation of the Award.

[11] *New England Power Pool*, 85 FERC ¶ 61,379, at 62,471 (1998).

[12] NYISO Services Tariff, § 11.3 (emphasis added).

B. The Commission Has Both Exclusive Jurisdiction and Primary Jurisdiction Over the Issues Raised by the NYISO's Motion to Vacate

Dynegy bases its Motion to Dismiss on the fact that Dynegy has filed a motion to confirm the Award in the Southern District of New York. Such a district court filing does not divest the Commission of its jurisdiction over the Award.[13] The NYISO's Motion to Vacate asserts that the Award is based on a fundamental misunderstanding of the role of the NYISO, of the design of the NYISO markets, and of the requirements of the FPA and the Services Tariff. None of those issues are, or could be, raised before the District Court. In approving the establishment of the NYISO, consistent with ISO Principle 11, the Commission required "that any arbitration decision subject to the *jurisdiction* of the Commission must be filed with the Commission."[14] That was done here, because the Commission has exclusive, as well as primary, jurisdiction over the Award and is required to exercise its jurisdiction under the FPA to ensure that "consumers pay no more than a reasonable rate."[15]

The Commission's exclusive jurisdiction over the Award is confirmed by long-standing authority. As the Supreme Court has held: "FERC has exclusive authority to determine the reasonableness of wholesale rates. . . . This principle binds both state and federal courts. . . ."[16] The Supreme Court has also held that: "[T]he Federal Power Act . . . delegated to the . . . Federal Energy Regulatory Commission, exclusive authority to regulate the transmission and

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[13] Because the Commission has exclusive jurisdiction over the matters at issue in the Award, the NYISO has filed for dismissal and stay of the entry of the arbitration Award in the Federal District Court for the Southern District of New York.

[14] *Central Hudson Gas & Electric Corp.*, 83 FERC ¶ 61,352 at 62,416 (1998) (emphasis added). Consistent with this requirement, the parties submitted the Award to the Commission on November 8, 2002.

[15] *Indiana Mun. Power Agency v. FERC*, 56 F.3d 247, 252 (D.C. Cir. 1995).

[16] *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 371 (1988).

sale at wholesale of electric energy in interstate commerce."[17] The FPA makes the Commission's jurisdiction over the regulation of interstate wholesale rates "exclusive" and "plenary."[18] In short, the "[c]ases are legion affirming the exclusive character of FERC jurisdiction where it applies . . . the Federal Power Act."[19] Dynegy's race to the courthouse cannot confer on the court jurisdiction that it does not have, nor strip the Commission of jurisdiction that Congress gave only to it.

The Supreme Court has on several occasions considered the proper relationship between the courts and the federal regulatory commissions empowered by Congress with jurisdiction over rates. The Supreme Court has noted that "the question of tariff construction, as well as the reasonableness of the tariff as applied [is] within the exclusive primary jurisdiction of the . . . Commission."[20] Thus, "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . the judicial process is suspended pending referral of such issues to the administrative body for its views."[21] The Supreme Court has also stated that "where words in a tariff are used in a particular or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that 'the inquiry is essentially one of fact and

[17] *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982).

[18] *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986), and citing *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-6 (1964).

[19] *Pub. Utils. Comm'n of California v. FERC*, 900 F.2d 269, 274 (D.C. Cir. 1990).

[20] *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956).

[21] *Id. at 64.*

discretion in technical matters,' then the issue of tariff application must first go to the Commission."[22]

These jurisdictional principles are especially cogent here, since a critical legal issue is the meaning of the "full bid" standard for compensation for erroneous mitigation as used by the Commission in its order approving the NYISO's AMP. The Commission is plainly the best authority to elaborate its intention in using this term, and the proper application of the term to the situation at issue in this proceeding. In a similar situation, the U.S. Court of Appeals for the First Circuit held that

> the meaning of the disputed language . . . cannot be determined solely from the text itself. . . The ultimate issue is not what those words mean in some abstract sense, but rather what FERC intended them to mean. . . . That question is obviously one as to which the agency has special insight, which would shed light on this nominally 'legal' question.[23]

The Commission has primary jurisdiction in addition to exclusive jurisdiction. Even if review of the Award under the FPA, Services Tariff and Commission orders were found to be otherwise subject to the jurisdiction of another forum, which is plainly not the case, the Commission should assert its primary jurisdiction:

> Whether the Commission should assert jurisdiction. . . depends . . . on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission.[24]

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[22] *Id*. at 66, citing *Great Northern R. Co. v. Merchants Elevator Co*., 259 U.S. 285, 291 (1922).

[23] *Distrigas of Mass. Corp. v. Boston Gas Co*., 693 F. 2d 1113, 1118 (1st Cir. 1982).

[24] *PPL Montana, LLC*, 96 FERC ¶ 61,313, at 62,207 (2001); *see also PPL Elec. Utils. Corp.*, 92 FERC ¶ 61,057, at 61,147 (2000) (citing to the same factors); *Clarksdale Public Utis. Comm'n*, 93 FERC ¶ 61,002, at 61,0005 (2000) (referring to the same factors).

This case involves FERC's special expertise in elaboration and interpretation of its own "full bid" language. There is a need for uniformity of interpretation to ensure that mitigated rates are uniformly applied, as another similar arbitration matter is currently pending that also requires application of that term, and future mitigation may also involve "full bid" compensation, both in New York and elsewhere.[25] The issue is also important in relation to the regulatory responsibilities of the Commission in ensuring that market power is properly mitigated and that resulting rates are just and reasonable.

The only authority Dynegy cites for its desired contravention of these well-established jurisdictional principles is a case dealing with venue, not jurisdiction. Venue is not the same as jurisdiction. Even a cursory review of the federal venue statutes shows that venue issues presume jurisdiction.[26] The issue here is not the choice between two locations within a given jurisdictional judicial system for a for review of the Award. The issue here is the jurisdictional reach of two different agencies. *Cortez Byrd*,[27] the authority cited by Dynegy, is simply not relevant to whether the Commission should consider the NYISO's motion to vacate the Award. *Cortez Byrd* involved a venue provision of the Federal Arbitration Act, and concerned which of two federal district courts should hear a case over which both had jurisdiction. In marked contrast, the issue in this proceeding is whether the Commission, as opposed to a federal court,

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[25] *See Midwest Independent Transmission System Operator, Inc.*, Order Accepting Market Mitigation Measures Subject to Modifications and Ordering Technical Conference, Docket No. ER03-323-000, Slip Op. at 38 (March 13, 2003) (finding "it reasonable to permit the generator that was improperly mitigated (e.g., below that generator's marginal cost) to be compensated. We therefore, require the Midwest ISO to revise its tariff to provide for the generator to receive its full bid if the Midwest ISO subsequently determines that the bid was not an attempt to assert market power.")

[26] *See* 28 U.S.C. § 1391.

[27] *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000).

has jurisdiction to decide upon the meaning of the term "full bid" and the application of tariff provisions, and not which of two co-equal federal courts is the proper location to hear a dispute.

Here, the federal district court is required as a matter of the respective jurisdictions of the courts and the Commission to allow the Commission to address the issues raised by the Motion to Vacate. As the Supreme Court has stated, the "reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order."[28] There is just no venue choice to be made. The issue is jurisdiction, and only the Commission has jurisdiction to hear the NYISO's Motion to Vacate. The only role for the federal district court would be to enter an award consistent with the determination reached as a result of the proceedings now before the Commission. The Commission must be able to make the required policy judgments and interpret its own technical terms where FPA and policy issues are in dispute.

III. DYNEGY'S MOTION TO STRIKE EXHIBITS ANNEXED TO THE MOTION OF THE NYISO SHOULD BE DENIED

A. The NYISO's Exhibits Properly Support Its Motion to Vacate and Should be Included in the Commission's Review of the Merits of the NYISO Motion to Vacate

The NYISO's exhibits properly support its Motion to Vacate and should be included in the Commission's review of the merits of the Motion to Vacate. Commission Rule 212 of Procedures requires that a "motion must contain a clear and concise statement of: (1) The facts and law which support the motion. . . ."[29] The attachments to the NYISO's motion support the clear and concise statement of the facts and legal authorities that form the basis of its motion to

[28] *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 375 (1988).

[29] 18 C.F.R. § 385.212 (c)

vacate the Award. The exhibits summarize and interpret the factual record before the arbitrator to facilitate the Commission's understanding of the issues, or simply provide the Commission with a copy of certain legal authority cited by the NYISO.

In light of their substance, the inclusion of Exhibits 5, 8, and 9 in the NYISO's Motion does not demonstrate a desire by the NYISO to re-open the factual record of the arbitration—although the Commission would by no means be precluded from revisiting factual issues in the appropriate case. Rather, the exhibits challenged by Dynegy go to the legal standards governing arbitrator's decision, and plainly should be considered by the Commission.

Under the Administrative Procedures Act[30] and the Commission's Rules and Procedures, the Commission is free to consider any facts or legal arguments necessary for reasoned decision-making. Moreover, the Commission has an enforcement obligation with respect to the FPA, and an obligation to make policy decisions delegated to it by Congress; Dynegy's suggestion that the Commission merely sits as an "appellate court" in reviewing an arbitration award mischaracterizes the Commission's role in this type of dispute. As the Commission has stated, its "intent is that the ultimate outcome of an ADR proceeding, like any other settlement, be subject to Commission review in a manner that conforms with the Commission's statutory duties. . . ."[31] The Commission has accordingly determined that it "obviously must reserve authority to ensure that decisions reached through ADR procedures are not contrary to the public interest or inconsistent with statutory requirements,"[32] and that "the Commission has a statutory

[30] 5 U.S.C. §§ 551-706 (2000).

[31] *Alternative Dispute Resolution,* Order No. 578, FERC Stats. & Regs. 1991-1996 ¶ 31,018, at 31,321.

[32] *Id*. at 31,326.

responsibility to vacate an arbitration award if it contravenes the public interest or is in any other way inconsistent with statutory requirements."[33]

The NYISO's motion and exhibits provide the Commission with an explanation of the policy issues at stake in this proceeding. The NYISO and Dynegy are in general agreement as to the facts; the dispute revolves instead on the application of the "full bid" language used by the Commission in its June 28, 2001, Order, and the proper interpretation of the NYISO Services Tariff. These are determinations for which the Commission requires the full and fair elucidation provided by the NYISO Motion and exhibits.

B. Exhibit 8 is an Analysis of the Arbitration Record by Dr. David Patton, the NYISO's Independent Market Advisor.

Exhibit 8 to the NYISO's Motion to Vacate is an affidavit from Dr. David B. Patton, the NYISO's independent Market Advisor. Dr. Patton's affidavit will assist the Commission's review of the Award by providing the benefit of an independent economic analysis of the Award and its underlying factual basis by a person thoroughly familiar with the NYISO's markets and mitigation measures. In Exhibit 8, Dr. Patton explains why the NYISO's proposed compensation methodology for the Dynegy situation is economically sound and appropriate. Dr. Patton confirms that the NYISO's proposal pays Dynegy at or above both the marginal cost and the full bid for each MW that was scheduled as a result of erroneous mitigation by the AMP. Dr. Patton further explains that the Award is fundamentally inconsistent with the economic principles underlying the NYISO market.

The importance of information provided by an independent market monitor about the operation of electric markets was just recently recognized by the Commission:

[33] *Id.* at 31,328.

> [Market monitors] serve an important practical and unique function as the Commission's 'eyes and ears' in the marketplace, and are charged with reporting back to the Commission any problems and anomalies which they encounter so that the Commission may take appropriate action under the Federal Power Act. Market monitors stand apart from the interests of any market participant and even the RTO or ISO, as the market operator, and must objectively monitor those participants . . . [and] are practically an extension of, or a surrogate for, the Commission's own market monitoring and investigative staff.[34]

Ignoring Dr. Patton's status as the NYISO's independent Market Advisor, Dynegy protests the Commission's right to review Exhibit 8 of the NYISO's Motion to Vacate while at the same time arguing that Exhibit 8 contains no new evidence and relies entirely on evidence already presented to the arbitrator. Dynegy is trying to have it both ways, protesting that it would be "unfair" for the Commission to hear this additional material,[35] all the while claiming that Dr. Patton's affidavit is "nearly identical in substance to the testimony of Dr. Savitt that was given before the arbitrator," "cumulative," and "add[s] nothing."[36] The reality is that Exhibit 8 does not introduce new facts, but provides the Commission with the benefit of Dr. Patton's economic analysis of the facts on which the Award was based, in support of the NYISO's contention that the arbitrator fundamentally misunderstood the economics of the NYISO markets. Dynegy would have the Commission arbitrarily turn a blind eye to this highly relevant analysis.

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[34] *See generally Communications with Commission-Approved Market Monitors*, 102 FERC ¶ 61,041, P 10 (2003) (lifting certain restrictions on Commission communication with *ex parte* independent market monitors).

[35] Dynegy states as one reason in support of its Motion to Strike an argument that the Patton affidavit may contain minor mistakes of fact. Because the Patton affidavit was submitted on the record, Dynegy is free to challenge its accuracy or present a different point of view.

[36] Dynegy Motion to Strike, at p. 10.

C. Exhibit 5 Only Summarizes Key Portions of the Arbitration Record

Exhibit 5 is entitled "Understanding Hearing Exhibit 10," and is merely a summation of the critical arbitration testimony of Dr. James Savitt, the Principal Economist and Market Monitor of the NYISO. It provides a detailed explanation, based on Dr. Savitt's testimony, of a spreadsheet presented by him in the hearing before the arbitrator. Both the testimony of Dr. Savitt and the spreadsheet were entered into evidence at the arbitration hearing. Exhibit 5 is thus submitted to explain the factual record before the arbitrator. The exhibit fleshes out points made in the body of the NYISO's motion. The details in the exhibit were only moved to a separate exhibit to make the motion more concise. The content of Exhibit 5 clearly would not be subject to objection if contained in the body of the NYISO's motion. The fact that it was moved to an attachment to the motion for the convenience of the Commission does not change this result.

Dynegy again as much as admits that Exhibit 5 does not introduce new evidence into the record by dismissing Exhibit 5 as a "re-hash" of "evidence already presented."[37] Dynegy again tries to have it both ways, on the one hand complaining that the exhibit must be stricken because it seeks to add to the record, and on the other hand criticizing it for being repetitive of the record. In reality, Dynegy is wrong on both counts: Exhibit 5 merely provides further details on points made in the body of the NYISO's Motion to Vacate.

D. Exhibit 9 is a Legal Treatise Cited by the NYISO in Support of Its Motion

Exhibit 9 is the entirety of portions of authority cited in the text of the NYISO Motion to Vacate. Specifically, it contains six pages from two cited American Jurisprudence and New York Jurisprudence articles, 22 AM. JUR. 2D *Damages* § 26 (1988) and 36 NEW YORK JUR. 2D *Damages* § 9 (1984). It was provided solely for the Commission's convenience.

Dynegy objects[38] to the inclusion of Exhibit 9 because it is "not a new pronouncement on the law of damages."[39] Dynegy's suggestion that the Commission may not hear legal arguments not presented to the arbitrator is wholly without merit. Nowhere does Dynegy state the basis for the view that a party is limited to citing, and the Commission can only rely, on legal authority that was written *after* the date an arbitration award is granted.

The NYISO provided a full copy of certain cited legal authority in Exhibit 9 merely to assist the Commission, since it is an authority to which the Commission may not have ready access. Dynegy seems to think that the Commission is somehow required to find the cited books in hardcover somewhere, rather than avail itself of the convenience of copies of the relevant sections.

IV. CONCLUSION

Because the arbitration award made in this case determines jurisdictional rates, the Commission has the authority and the responsibility to review the Award and address the NYISO's Motion to Vacate on the merits. To allow the Award to stand would impose energy costs that cannot be justified as either cost-based or market-based, and would provide an unwarranted windfall to Dynegy that exceeds the both its marginal cost and its "full bid." Dynegy has shown no good cause as to why the Commission should dismiss the NYISO's Motion, or why the Commission should strike Exhibits 5, 8, and 9. For these reasons, Dynegy's motions should be denied.

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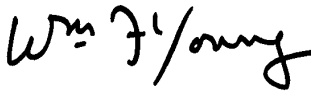
[37] Dynegy Motion to Strike, at p. 9.

[38] Curiously, Dynegy does not object to or move to strike the paragraph quote from this authority contained in the text of the NYISO Motion to Vacate, but only to the full sections contained in Exhibit 9.

[39] Dynegy Motion to Strike, at p. 11.

Respectfully submitted,

THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.



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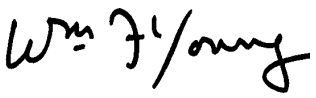
Dated: March 24, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Opposition to Motion of the New York Independent System Operator, Inc. to Vacate Award of Arbitrator upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 24th day of March 2003.



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