MOTION OF CON EDISON, O&R, THE CITY OF NEW YORK, MULTIPLE INTERVENORS, CONSUMER POWER ADVOCATES AND NYPA IN OPPOSITION TO AN APPEAL

Consolidated Edison Company of New York, Inc. ("Con Edison"), Orange and Rockland Utilities, Inc. ("O&R"), The City of New York, Multiple Intervenors, Consumer Power Advocates and the New York Power Authority (collectively the "Indicated Parties") hereby file this motion with the Management Committee ("MC") in opposition to the appeal filed by KeySpan-Ravenswood, LLC ("KeySpan") with respect to the Business Issues Committee's ("BIC") August 9, 2006 decision to not table the motion that ultimately approved a market monitoring and mitigation proposal for the In-City capacity market ("Capacity Mitigation Measures").

SUMMARY

On August 9th, the BIC approved the Capacity Mitigation Measures, which establish a conduct and impact test that compares the capacity bid of an In-City generator, in the demand curve spot auction, with that of its reference bid to determine if the bid of such generator is inconsistent with the workings of competitive markets. As such, the Capacity Mitigation Measures require an amendment to the NYISO Services Tariff. KeySpan and others made a motion to table the vote on the Capacity Mitigation Measures. That motion was voted on and failed.

KeySpan's appeal should be rejected on two grounds. First, it is an improper appeal. The MC's By-Laws expressly preclude an appeal of a BIC decision to seek tariff amendments. Although KeySpan's "Notice of Appeal" claims to seek a reversal of the BIC's decision not to table the vote on the Capacity Mitigation Measures, KeySpan's pleading amounts to an attack on the substance of the proposed tariff amendment rather than on the procedural motion.

Second, the Capacity Mitigation Measures approved by the BIC represent a reasonable proposal to improve the competitive workings of the In-City capacity market. Accordingly, the MC should reject KeySpan's appeal.

ARGUMENT

I. KeySpan's Appeal Should Be Rejected on Procedural Grounds

Section 15.01 of the MC's by-laws states, in relevant part:

> "The Management Committee shall review and determine appeals from the Lower Committees of actions of the Lower Committees that do not require a change to an ISO tariff in order to be implemented … Actions of a Lower Committee that require a change to an ISO Tariff to be implemented are not subject to this appeals process…"

The Capacity Mitigation Measures approved by the BIC require a tariff change to the NYISO Services Tariff in order to be implemented. Thus, the BIC vote approving the proposal to amend the tariff is not subject to an appeal according to the MC by-laws because the MC can simply reject the proposal, rather than reverse the BIC's decision to approve the proposal. Although KeySpan claims to be seeking a reversal of the BIC's decision to not table the vote on the Capacity Mitigation Measures, its pleading makes it clear that it is seeking to have the MC reject the substance of the proposed tariff amendment by granting KeySpan's appeal. KeySpan's attempt to circumvent the appeals process spelled out in the by-laws is unjustified and unnecessary to achieve the result that KeySpan seeks. Accordingly, it should be rejected.

II. The Capacity Mitigation Measures Approved By BIC Represent A Reasonable Solution to the Potential Exercise Of Market Power By Suppliers In the In-City Capacity Market

A. The Price of Capacity Should Decrease With Additional Supply

It is fundamental economic theory that the price of a commodity should decrease as the supply of that commodity increases. This theory is one of the principle premises behind the demand curve market design that was implemented by the NYISO and approved by FERC in 2003.[1] Specifically, the demand curve is designed with the expectation that as capacity is added to the NYISO's market, the price for capacity would decrease (i.e., slide down along the demand curve to a lower level) and correspondingly, when there is a shortage of capacity or an increase in load, the price for capacity should increase (or slide up the demand curve to a higher level).[2] KeySpan asserts that it "does not agree that additional capacity should automatically cause market prices to drop."[3] Such an expectation is inconsistent with the demand curve concept that was approved by the FERC, which indicated that the "demand price would gradually fall for amounts of capacity beyond 118 percent of peak load."[4] Nor is KeySpan's general statement sufficient to change the fact that the demand curve, which was designed to address generator concerns about capacity payments, has shown to be in need of reform to address the issue of economic withholding.

KeySpan also argues that the Capacity Mitigation Measures are premised on an incorrect assumption, i.e., that 1000 MW of additional capacity was added to the NYISO

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[1] *New York Independent System Operator, Inc.*, Order Conditionally Accepting for Filing Tariff Revisions, 103 FERC ¶61,201 (2003) (the "*Demand Curve Order*").
[2] Although the In-City price caps for capacity where in place at the time the demand curve came into being, the workings of the demand curve (including the obligation of load to purchase all capacity offered for sale) sufficiently changed the market so as to bring about the need for additional mitigation.
[3] KeySpan Appeal, p. 2.
[4] *Demand Curve Order* at P 5.

market. KeySpan incorrectly asserts that 500 MW of capacity from SCS Astoria was not available in New York City in May and June of this year,[5] citing to a May 11, 2006 filing by Con Edison. What KeySpan neglects to mention is that subsequent to that filing, SCS Astoria received the go ahead from the NYISO to be considered a capacity provider. As such, it has provided, and was paid for providing, 500 MW of UCAP since May 1, 2006.

B. The Capacity Mitigation Measures Are Needed

KeySpan's appeal is nothing more than an attack on the need for the proposed Capacity Mitigation Measures. KeySpan argues that the NYISO tariff adequately protects against market power and that "capacity cannot be physically withheld."[6] But, the argument for additional mitigation is not based on whether capacity is or can be physically withheld; rather it is based on whether it is or can be economically withheld. Based on the slope of the demand curve, it appears that certain parties can receive an increase in revenue by bidding their full amount of capacity at a price they know beforehand will set the demand curve clearing price. At that same clearing price, they know beforehand that not all of their capacity will clear the auction, but the amount that does clear will result in greater revenues when compared to revenues they would have received at a lower demand curve clearing price where all of their capacity would clear the auction. Thus, the demand curve provides an incentive for the exercise of market power through economic withholding.

It appears that certain of the divested generator owners are pivotal suppliers and as such can bid into the demand curve market in a way that forces the market to clear at their price cap, thereby forcing an amount of excess capacity above the minimum

[5] KeySpan Appeal, p. 2.
[6] KeySpan Appeal, p. 2.

requirement to be purchased, and further impacting the amount of capacity in the NYCA demand curve spot auction.

In response to the call by many market participants to combat the exercise of market power under the demand curve market structure and the failure of the price of capacity to respond to the normal workings of supply and demand, KeySpan calls instead for a delay.[7] Market participants should not have to wait until the demand curve is reset in May 2008 or until a new capacity market may be developed in order to realize spot market capacity prices that are the result of the normal workings of supply and demand and not the result of the exercise of market power in the current month-to-month market. The proposed Capacity Mitigation Measures improve protections to ensure that parties with market power (i.e., those with the ability to set the clearing price for capacity and to profit from that action) do not unduly profit from their ability to control the clearing price under the demand curve market design. This will enable the price of capacity to be set by the normal workings of supply and demand and the demand curve market design adopted by the FERC in 2003.

C. KeySpan's Call For Demand-Side Mitigation Measures is a Red Herring

KeySpan complains that "the market power of purchasers is not similarly mitigated."[8] Its pleading incorrectly hints that Con Edison may have entered into a contract to drive market prices down and therefore there is a need for purchaser mitigation measures. KeySpan's assertions and hints are nothing else but a red herring designed to deflect attention from the real issue in this case.

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[7] KeySpan Appeal, pp. 4-5.
[8] KeySpan Appeal, p. 3.

As KeySpan is well aware, the NYISO capacity market allows load-serving entities ("LSEs") to enter into bilateral contracts for the purchase of capacity. This was recognized by FERC in its order approving the demand curve. "The Commission does not regard the ICAP Demand Curve proposal as a measure that would preclude parties from entering into bilateral contracts or increasing demand responsiveness."[9] Further, in its tariff filing, the NYISO expressly stated that "LSEs will continue to be able to enter into Bilateral Transactions to protect themselves against these costs."[10] Thus, bilateral contracts by LSEs are not only allowed under the design of the NYISO capacity market, they were expected to continue and they serve a legitimate purpose. Moreover, the Con Edison/SCS Astoria contract was entered into prior to the effective date of the demand curve and, as such, any call for retroactive mitigation is a violation of the filed rate doctrine. Con Edison, unlike KeySpan, bids its capacity in as a price taker so that the demand curve itself sets the clearing price. As a price taker, Con Edison does not set the clearing price.

As anticipated when the Demand Curve was designed and implemented, the month-to-month market-clearing price should fluctuate when more supply enters the market, or as demand grows to reduce the amount of excess supply. To the extent that generators can bid in such a way as to impeded the intended operation of the Demand Curve and, thereby, artificially set the market clearing price and raise capacity prices statewide, reform is needed. The Capacity Mitigation Measures would do nothing more than provide for DGO capacity to be bid into the demand curve auction in a way that would allow the demand curve itself to set the market-clearing price.

[9] *Demand Curve Order*, P 75.
[10] See March 21, 2003 NYISO Filing, Docket ER03-647-000 p.5.

CONCLUSION

Accordingly, for the reasons set forth above, the Indicated Parties respectfully request that the MC reject KeySpan's appeal and affirm the BIC's decision to reject the motion to table. In addition, if the MC decides to hear presentations on this appeal, the Indicated Parties respectfully request an opportunity to present their arguments at the MC.

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Respectfully submitted,

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