

89 FERC ¶ 61,196  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;  
Vicky A. Bailey, William L. Massey,  
Linda Breathitt, and Curt Hébert, Jr.

New York Independent System  
Operator, Inc.

Central Hudson Gas & Electric  
Corporation  
Consolidated Edison Company  
of New York, Inc.  
Long Island Lighting Company  
New York State Electric and  
Gas Corporation  
Niagara Mohawk Power Corporation  
Orange and Rockland Utilities, Inc.  
Rochester Gas and Electric Corporation  
and  
New York Power Pool

Docket Nos. ER97-1523-010  
OA97-470-009  
and ER97-4234-007

ORDER ACCEPTING FOR FILING IN PART AND REJECTING IN PART MARKET  
MONITORING AND MITIGATION PLAN, SUBJECT TO MODIFICATIONS

(Issued November 23, 1999)

On July 26, 1999, the New York ISO submitted its Market Monitoring Plan, followed on August 23, 1999, by its Mitigation Plan and List of Data the New York ISO may request from market parties. These filings were made to comply with ordering paragraph "N" of the Commission's January 27, 1999 Order Conditionally Accepting Tariff and Market Rules, Approving Market Based Rates and Establishing Hearing and Settlement Judge Procedures.<sup>1</sup> In this order, for the reasons stated below, we accept in part and reject in part the proposed market monitoring and mitigation plans subject to modification.

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<sup>1</sup>Central Hudson Gas & Electric Corp., *et al.*, 86 FERC ¶ 61,062 at 61,240 (1999).

## The New York ISO Proposal

### Market Monitoring Plan

The New York ISO proposes to create, staff, and support a Market Monitoring Unit (MMU) within its organization to identify, analyze, and develop remedies for problems in the developing competitive wholesale electricity market in New York. The MMU will focus its attention on a wide range of factors that could shed light on the efficient operation of the market and flag potential market power problems. For example, the MMU will keep tabs on concentration in the ownership and control of generation, examine evidence of collusive behavior, analyze causes and costs of transmission congestion and Location-Based Marginal Prices (LBMPs), and compare bids with marginal or other costs. The New York ISO will also retain a Market Advisor (MA) with relevant experience and expertise in designing a competitive electric wholesale market. The MA will support the MMU and play a key role in identifying data and information to be monitored, in determining specific performance indices and screens, and in preparing reports.

In consultation with the MA, the MMU will also develop and adopt appropriate performance indices and screens for reviewing the data. All parties may contribute proposals for how the market data should be reviewed and interpreted and comment on the development of appropriate screens. The ISO's CEO and Board must review and approve any screen before it is adopted. Any screen or index adopted will be subject to an on-going review and evaluation.

The monitoring plan requires that the MA and MMU produce reports in a variety of circumstances. All reports are submitted to the Board which has the discretion to take any steps necessary to protect confidentiality before general release. First, any party may request an investigation or lodge a complaint which the MMU will pursue—if it judges it appropriate—and report its findings to the Board. Second, the MA and MMU will also prepare annual reports on the competitive structure and performance of the New York wholesale electric market. The Board will forward them (with comments or other remarks as appropriate) to the New York Public Service Commission (NYPSC) and the Commission. The Board will make annual reports public, subject to redaction or other measures to maintain confidentiality. Third, the MA and the MMU may also prepare other periodic reports on their own initiative or at the request of the Board or a government agency. The Board will make these reports public subject to any conditions judged necessary to protect confidentiality.

Finally, the monitoring plan identifies compliance and corrective actions the MMU may take. The MMU may: conduct informal discussions with relevant parties to resolve issues; issue a demand letter asking relevant parties to stop any actions judged incompatible with efficient market operations; implement any mitigation or remedial measures the FERC has authorized; and recommend modifications to tariffs, agreements, rules, standards, or procedures administered by the ISO.

### Market Mitigation Measures

The New York ISO's proposed mitigation plan specifies that physical or economic withholding of an electric facility and uneconomic production from an electric facility are the types of conduct that may warrant mitigation. Various indices and screens will be developed and used to detect such market power behavior. If the MMU believes that a party has engaged in anti-competitive behavior, it will contact the party, identify the behavior, and request an explanation. No further action will be taken if the MMU, in consultation as appropriate with the MA, is satisfied with the party's explanation that the behavior was not an exercise of market power.

However, if the conduct is judged to have had or likely to have material price effects in the market, one of three types of mitigation measures may be imposed. They are: bid restrictions; an obligation to pay for operating reserves; or a default bid. Bid restrictions are designed to limit the ability to bid non-competitively. They include limiting the frequency or size of bid changes over a specified period, or requiring a facility to submit a single bid for blocks of output or for a specified period. An obligation to pay for operating reserves is a mechanism designed to deter physical withholding. The default bid is an estimate of the bid expected under workably competitive conditions. It may be substituted for bids received from a facility that does not face "workable" competition or has been engaging in anti-competitive withholding.

The proposal also includes mitigation if the current market design does not result in convergence between day-ahead and real-time LBMPs. The ISO's concern is that current rules give loads greater latitude whether to purchase in the day-ahead market than generators have to sell in that market. As a result, loads may not purchase sufficient electricity in the day-ahead market to achieve price convergence between the two markets. The proposed mitigation, should this problem emerge, is to require a load serving entity to purchase or schedule all of its expected power requirements in the day-ahead market.

Finally, the proposal recognizes the potential need for mitigation for the capacity market but does not propose specific measures. Instead, consistent with comments from market parties and other interested parties, it commits to amending the proposal should such measures become necessary.

### Notice and Interventions

Notice of the New York ISO's July 26, 1999 market monitoring plan filing was published in the Federal Register, 64 Fed. Reg. 42,931 (1999), with comments, protests and motions to intervene due on or before August 13, 1999. Notice of the New York ISO's August 23, 1999 market mitigation measure and list of data filing was published in the Federal Register, 64 Fed. Reg. 48,815 (1999), with comments, protests, and motions to intervene due on or before September 10, 1999. Except for Southern Energy Bowline, L.L.C., et al., all of the parties filing interventions or comments have previously been allowed to intervene in these proceedings.

### Discussion

### Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1999), the timely, unopposed motion to intervene of Southern Energy Bowline, L.L.C., et al. serves to make it a party to this proceeding.

### Market Monitoring Plan

The Commission will accept the New York ISO's plan to monitor and report on the development of the New York market. It will permit the New York ISO to monitor for market power and market design flaws, and it is similar to the monitoring plan accepted in New England Power Pool (NEPOOL).<sup>2</sup> The MMP is intended to provide for the impartial and effective monitoring of and reporting on, among other things, the competitive structure, performance and economic efficiency of New York electric markets and the conduct of market parties. The MA and MMU will produce reports in a variety of circumstances including annual reports on the competitive structure and performance of the New York wholesale electric market, which will be submitted to the Commission.

PG&E states that the MMP is premised on a strategy of early, frequent, and active intervention, which will hinder the development of efficient competitive markets. PG&E asserts that the New York ISO intends to monitor and regulate single events as contrasted to a pattern of behavior. Moreover, PG&E maintains that the New York ISO will engage in a proactive function in search for threats to the market. PG&E contends that price changes are a fundamental element of a competitive market and the New York ISO should not intervene to prevent them.

In NEPOOL, PJM, and California ISO proceedings, the Commission determined that ISO markets may develop in ways that may not be totally anticipated and that the operation of a competitive and efficient market required that market power problems be quickly identified and resolved. Consequently, the Commission concluded that the markets in these ISOs must be monitored for market power and market design flaws. The New York ISO, like the other ISOs, will monitor behavior that raises market power concerns, specifically economic and physical withholding and uneconomic generation. Contrary to PG&E's position, there is nothing inherently superior in monitoring patterns rather than events which ultimately may form a pattern. Monitoring both can be important to detecting and mitigating the exercise of market power. The Commission accepts the MMP subject to the following modification, as imposed on NEPOOL:<sup>3</sup>

The New York ISO will not be required to publish every instance of market power. However, the New York ISO should include, in any confidential reports filed under section 388.112 of the

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<sup>2</sup>85 FERC ¶ 61,379 (1998).

<sup>3</sup>NEPOOL, 85 FERC at 62,480.

Commission's regulations, 18 C.F.R. § 388.112 (1999), the names of any companies exercising market power, with a description of these behaviors and any sanctions applied.

#### List of Data

The Commission will also accept the New York ISO's List of Data which specifies the information that the MMU may request from market participants. The List of Data is limited to data relevant to the objectives of the MMP to facilitate the ability of the New York ISO to carry out monitoring responsibilities. Moreover, as in NEPOOL, the data are subject to confidentiality limitations.

The List of Data sets forth information that may be requested by the MMU, most of which will be collected in the course of conducting business through the ISO-administered markets, e.g., data generated in connection with scheduling, commitment and dispatch of generation, and the calculation of LBMPs. If the MMU asks for data not previously agreed to that the party receiving the request deems as unduly burdensome, irrelevant to the purpose of the plan, or commercially sensitive, it need not comply. In this event, the parties are expected to negotiate appropriate compromises and confidentiality protections. If these efforts fail, the MMU may invoke the ISO's dispute resolution provisions which are binding on all parties. If these provisions do not apply to the entity from which the data have been requested, the ISO may initiate judicial or regulatory proceedings to compel compliance with the data request.

The MMP is responsive to requests for data confidentiality. There is no provision for disclosing data designated as protected to any entity in any time frame. The MMU, in consultation with the MA, will make publicly available a description of the categories of information it collects and maintains. The MMU will provide data it judges useful for assessing the efficient functioning of the market if the data comes from publicly available sources or are subject to disclosure under tariff agreements. The MMU and the MA will also develop data retention policies to determine when data can be destroyed.

Sithe claims that the market participants' specific rights available under the MMP (e.g., market participants may dispute a data request if they believe the request is burdensome, not relevant, or requires production of commercially sensitive data) are negated because there is no restriction on additional information that the ISO may add to the list. Sithe requests that the Commission order the New York ISO to modify the MMP to provide that the ISO may only collect information routinely gathered in the normal course of ISO business or otherwise publicly available, unless the request is subject to the due process rights in Section 6, Data Collection and Disclosure, of the MMP. PG&E also expresses a concern regarding the collection of commercially sensitive data.

The Commission denies Sithe's and PGE's request. The New York ISO has developed extensive measures to protect commercially sensitive data. Moreover, the New York ISO's proposal

is consistent with NEPOOL, which required market participants to supply NEPOOL with any information deemed necessary to perform its obligations, subject to confidentiality conditions. This information was not limited to that collected during the normal course of business.

#### Standard for MMP Liability

The Commission will approve the proposed MMP liability provision, which limits the New York ISO's liability under the MMP, subject to a "willful misconduct" standard rather than a "negligence" standard. The proposed liability provision is consistent with the provision approved in PJM Interconnection, L.L.C., (PJM).<sup>4</sup> The New York ISO proposed a "willful misconduct" standard in order to ensure the MMP is implemented without the threat of litigation. The New York ISO asserts that the risk of improper implementation is small and it does not wish to incur the expense of acquiring insurance to protect itself against any general liability.

Sithe and Enron are concerned that the MMP liability provision unnecessarily limits the New York ISO's liability. Sithe states that the Commission should order the New York ISO to change the MMP liability provision to a "negligence" standard which would be consistent with the liability provision of the New York ISO's open access tariff. Sithe contends that a "negligence" standard would send the proper signal to the New York ISO to act responsibly with respect to these matters. Enron also protests the provision that the New York ISO is not liable for monetary damages for misapplying mitigation measures.

The Commission rejects these arguments. The New York ISO will not be able to properly monitor and implement measures to correct market power if the threat of lawsuits becomes a variable in its decision making. The proposed MMP liability provision is also consistent with the Commission-approved liability provision for PJM's market monitoring plan.

#### Market Mitigation Measures

PG&E states that the proposed mitigation measures will place the New York ISO in the regulatory role of interpreting market actions of the participants, adjudicating the legitimacy of such actions and enforcing its own interpretation of the tariff, market rules and mitigation measures. Moreover, PG&E asserts, the New York ISO will do this without market participants having recourse to the Commission or courts, without reference to publicly announced standards, and without due process rights. Further, PG&E and Enron state that the New York ISO should focus on the detection and prevention of persistent or sustained deviations from competitive pricing rather than temporary price fluctuations and transitory events.

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<sup>4</sup>86 FERC ¶ 61,247 (1999).

PG&E also contends that the proposed rules go beyond adjusting prices based on software design flaws or malfunctions. The ISO, states PG&E, will unilaterally change the effect of the rules for setting prices based on unspecified and unpredictable flaws in the rules. It asserts that the granting of this authority is inconsistent with the filed rate doctrine, which forbids the charging of prices other than those filed with the Commission.

In addition, Enron states that bid limitations should not be approved until the New York ISO demonstrates that they will achieve the desired effect. For example, Enron contends that when a generator is required to submit a bid for an extended period of time, this does not eliminate the possibility of market power, but simply requires it to submit rigid bids.

Sithe, Enron and PG&E state that the Commission should not delegate regulatory authority to the New York ISO to determine what constitutes market power or permit the New York ISO to unilaterally impose mitigation measures. Sithe contends that the New York ISO's active role in monitoring and mitigating market power will likely lead to a conflict with its primary role of ensuring safety and reliable operations and will threaten its independence from outside political pressures seeking to dictate favorable market outcomes. Sithe and Enron state that the New York ISO does not have enforcement experience and therefore should leave this role to the Commission which has the authority and expertise to monitor and enforce competition. Enron argues that while the New York ISO's proposal is similar to NEPOOL's, the Commission need not rely on NEPOOL as a precedent for the New York ISO proceeding.

We will accept in part and reject in part the proposed mitigation plan. In instances where the ISO concludes that a specific market participant is exercising market power, we will accept the proposals that would allow the ISO to (1) engage in discussion to resolve the issues informally, or (2) issue demand letters requesting the participant to cease certain behavior. These measures involve voluntary actions on the part of the participants, or at least do not require a participant to take an action involuntarily. In addition, we will accept the proposal to allow the ISO to recommend changes to tariffs, agreements, and procedures, since adopting such changes would require our approval.

However, we will not accept the current proposals that would allow the ISO to (1) reduce bid flexibility, (2) impose financial obligations to pay for operating reserves, or (3) impose default bids. We reject these proposals because we conclude that they give too much discretion to the ISO in price-setting and other similar regulatory functions without Commission review. In particular, the ISO has not described with enough specificity the types of conduct that would trigger the imposition of these measures. Under the proposal, the ISO may impose these measures if it observes behavior that it concludes may be an exercise of market power, the generator can't satisfactorily explain the behavior to the satisfaction of the ISO, and the behavior has had a material effect on the market-clearing price. The ISO has not established specific thresholds or bright line tests that would trigger the conclusions that market power has been exercised. The plan states that the ISO will choose one or more of the mitigation measures to the minimum extent necessary to mitigate price effects, but what constitutes this

minimum is left to the discretion of the ISO. Moreover, the proposal includes no provision for an affected participant to appeal the ISO's decision to the Commission.

Our prior approval of market-based rates in the ISO markets was premised, in part, on having an effective market monitoring and mitigation plan in place. However, portions of the proposed mitigation plan have unacceptable features (e.g., too much discretion, lack of specificity). We thus will require that the ISO file a revised mitigation plan that it would employ when the ISO detects a significant exercise of market power that it concludes requires mitigation. In this regard, the plan could, for example, commit the ISO to file on a case-by-case basis under section 205 of the Federal Power Act, 16 U.S.C. § 824d (1999), to impose specific mitigation measures when the ISO concludes that they are warranted. Such a section 205 filing would identify the particular conduct and justify the specific mitigation measures as a remedy for the conduct. The plan could, for example, also allow the ISO to identify, in a section 205 filing, recurring types of conduct that warrant mitigation and to propose mitigation for such recurring conduct. If the Commission approves the proposed mitigation for such recurring conduct, the ISO would be authorized to impose the same mitigation measures on a prospective basis without making a subsequent filing in response to similar conduct in the future. Alternatively, as another permissible approach, the plan might describe specific types of conduct that would trigger mitigation measures and the specific mitigation measures that would apply for each identified conduct.

Enron requests that any mitigation measure imposed be stayed if challenged under the New York ISO's alternative dispute resolution procedures. We believe our actions above adequately address Enron's concern.

In rejecting the measures proposed here, we are aware that we have previously approved similar measures for other ISOs, such as those in New England and California. We approved these earlier proposals in order to give these ISOs discretion to respond quickly to unforeseen market power and market design flaws, given the lack of prior experience with ISO operations. This initial period is now passed and the authorities and discretion we previously accorded ISOs are, we believe, no longer appropriate. We intend to revisit the authorities and discretion of these other ISOs.

The Proposal to Mitigate Effects of Withholding Load from the Day-ahead Market (The Load Bid Mitigation Measure)

Under the market rules, loads may purchase all of their requirements in either the day ahead or real time markets, while sellers must submit all bids in the day ahead market. The MMU is concerned that the difference in buyer and seller bidding flexibility may result in a lack of price convergence between the day ahead and the hour ahead markets, *i.e.*, that the prices in the two markets may be persistently different. The New York ISO proposes a load bid mitigation measure if this problem is detected. The load bid mitigation measure would require a load serving entity to bid all of its load in the day ahead market, subject to a certain tolerance level. To the extent a party exceeds its tolerance level,



it would be subject to a penalty based on a specified premium over the market price. Any revenues collected from this penalty would be distributed to market participants that scheduled energy for delivery to load within New York in the day ahead market for the day the penalty was collected. The New York ISO states that this is an interim measure until the New York ISO develops rules for bidding flexibility for all participants.

Enron states that the proposed load bid mitigation measures are too complex, and that the allocation of revenues from load bidding penalties needs to be clarified (i.e., the load bid mitigation measures provide for revenues to be allocated on a pro rata basis to Market Parties, but does not define Market Parties). Enron argues that the load bid mitigation measures should be discarded and the New York ISO should work on changes to market rules to allow greater bidding flexibility for all market participants.

We are not persuaded that lack of price convergence always justifies ISO intervention. Differences between the day-ahead and real-time energy prices may reflect legitimate economic phenomena, such as uncertainties in forecasting demand in advance. However, the ISO's proposed mitigation measure would be justified to remedy any persistent unscheduled load that creates operational problems (such as an inability to meet unscheduled load with available resources). Therefore, we will allow the ISO to impose the load bid mitigation measures only in instances where it has determined that it is necessary to address an operational problem. When the ISO imposes this mitigation measure, we will require that the ISO post on its web site an explanation of the operational problem to be addressed. Since application of the load bid mitigation measures will be limited to circumstances where they are necessary to address an operational problem, the provision is consistent with the discussion above concerning what support is necessary for various market mitigation measures.

#### Specificity of Standards for Investigation

In consultation with the MA, the MMU will develop and adopt appropriate performance indices and screens for reviewing the data. All parties may contribute proposals for how the market data should be reviewed and interpreted and comment on the development of appropriate screens. The ISO's CEO and Board must review and approve any screen before it is adopted. Any screen or index adopted will be subject to an on-going review and evaluation.

Enron and PG&E state the New York ISO's market power investigations should be based on clear standards which are publicly available. Specifically they note that the New York ISO will develop standards, criteria, and thresholds to identify conduct that warrants further investigation, but does not identify any of the standards which the New York ISO considers significant. Moreover, Enron contends that the mitigation proposal does not identify with specificity the sanctions or penalties that may be imposed and the circumstances in which the New York ISO would impose them.

The New York ISO states that it has deliberately not identified the standards, criteria and thresholds it will use to identify conduct that warrants further investigation. The New York ISO contends that disclosure of these standards would permit market participants to game the system, i.e., engage in behavior that comes close but just avoids the thresholds levels. The New York ISO notes that the standards, criteria and thresholds will not be used to impose mitigation measures, but are merely a tool to determine whether a conduct warrants further investigation

The Commission accepts the New York ISO's proposal as consistent with NEPOOL. Although NEPOOL identified its monitoring indices and methods, NEPOOL had the authority to adjust its screens and thresholds with experience.

#### Miscellaneous

PG&E and Enron note that the proposal permits the New York ISO to impose mitigation measures without consulting with the market participants. They contend that this provision needs to be limited to those that are truly severe. Although the proposed plan does call for notification whenever the MMU thinks it has identified anti-competitive behavior, and the participant is then allowed to justify its actions, the Commission agrees that the New York ISO must specifically notify market participants as soon as possible if it intends to impose a mitigation measure. However, the Commission believes that, subject to the discussion above which limits the New York ISO's discretion, the New York ISO should have discretion to decide what level of harm merits mitigation. In this respect, the Commission rejects the protests of PG&E and Enron.

The Commission will also require the New York ISO to file with the Commission, for prior approval, any mitigation measure which would permanently amend its existing rules. This is consistent with the Commission's approval of the New York ISO's Temporary Extraordinary Procedures.

Finally, consistent with NEPOOL, the Commission will grant Enron's request to limit New York ISO's authority to impose mitigation measures to a period of six months after the alleged conduct.

#### The Commission orders:

(A) The proposed New York ISO market monitoring plan, list of data, and market mitigation measures are hereby accepted in part with the modifications discussed in the body of this order, and rejected in part.

(B) Within 30 days of the date of issuance of this order, the New York ISO shall file a revised market monitoring plan and revised market mitigation measures to reflect the modifications required by this order.

By the Commission. Commissioner Massey dissented in part with a  
separate statement attached.

( S E A L )

David P. Boergers,  
Secretary.

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(Issued November 23, 1999)

MASSEY, Commissioner, dissenting in part:

I dissent in part from today's order - - specifically from the order's refusal to accept the New York ISO's proposal regarding market mitigation measures (the ability of the ISO to reduce bid flexibility, to impose financial obligations to pay for operating reserves, and to impose default bids). By so doing, the majority refuses to allow the New York ISO a reasonable amount of discretion to protect consumers from market power exercises in this embryonic complex market. I find that the amount of specificity in the ISO's mitigation proposal is appropriate; that the order envisions a degree of precision in mitigation tools that may not be achievable; that the order arbitrarily denies to the New York ISO comparable discretion we gave to other ISOs; that the Commission should be willing to afford the deference requested here to an approved ISO with independent governance; and that the order places the ISO in an impossible procedural posture as the institution attempts to mitigate market power.

The order rejects the ISO's market mitigation proposal, finding that it has not described with enough specificity the types of conduct that would trigger mitigation measures and not established specific thresholds or bright line tests that would trigger mitigation. I disagree with this decision for a number of reasons.

First, the notions of appropriate specificity and discretion are inherently matters of judgment. I find the level of specificity in the proposal to be appropriate, especially for this early stage of the ISO's development. Under the proposal, mitigation is triggered only by behavior that causes a material change in prices. The price effects of behavior are

determined through the application of the ISO's Security Constrained Unit Commitment computer model or the Security Constrained Dispatch model. According to the application, these are the same computer models used to commit and dispatch generating units and produce day-ahead and real-time prices. Thus, this tool is well-specified. Whether a price effect is deemed material is determined by its magnitude and duration. I think it is wise at this point in the ISO's development to avoid over specifying thresholds in this regard until more experience is gained regarding the interaction of the specific generation and transmission resources, consumer demand and the protocols of the new markets.

The proposal identifies three types of conduct that will trigger mitigation: physical withholding, economic withholding by submitting unjustifiably high bids, and uneconomic production from a facility to cause or benefit from a transmission constraint. While no specific thresholds are provided, I believe these behaviors can be clearly identified in most circumstances.

The proposal sets out three types of mitigation measures that may be imposed. One of them is bid restrictions that would compel bids to be similar to bids in hours when the target facility faced competition. Another measure is default bids to combat withholding. Default bids would be based on two well specified formulas tied to past prices, negotiations with the target party, or the costs of the target facility and the competitive bids of similar facilities. The third mitigation measure is a requirement to pay for operating reserves, with the share of operating reserves proportional to the amount of capacity withheld. I find these measures to be appropriate.

My second concern with today's decision is that it envisions a degree of precision in fashioning mitigation tools that may not be achievable, especially not without additional experience. The draft order suggests that the revised ISO proposal might identify specific types of conduct that would trigger mitigation measures and that the ISO identify the specific mitigation measures that would apply for each identified conduct. I am not convinced that such precision is achievable.

A third concern is that the Commission has approved similar mitigation measures for other ISOs, but refuse the same type of measures for the New York ISO. The order acknowledges that we gave such approval in order "to give these ISOs discretion to respond quickly to unforeseen market power and market design flaws, given the lack of prior experience with ISO operations," but the order finds that this initial period is now passed and that level of discretion is no longer appropriate. It is not clear why the New York ISO is treated differently from the other ISOs. Our experience with the other ISOs

clearly shows that those institutions are still climbing the learning curve on market operations. We cannot expect New York to leap to the top of that curve from the start.

Fourth, the mitigation plan is proposed by a Commission-approved ISO, with appropriate governance and procedures, and the mitigation decisions of the ISO are subject to the ISO's dispute resolution procedures. One of the principal benefits of independent governance should be our

willingness to afford some deference to the regional body to deal with regional problems. There are limits to the amount of deference we can allow under the Federal Power Act; the New York ISO's proposal does not exceed those limits.

Finally, the order places the New York ISO in a tough spot for ensuring it can adequately protect consumers against market power. The Commission invites the ISO to file a revised, more specific, market power mitigation plan. The ISO has emergency powers to deal with unforeseen start-up problems for ninety days. Given that the ISO started operations last week, that emergency authority will expire in mid-February. Thus, in order to ensure that it can protect consumers from the high prices that result from market power, the ISO would have to file a revised mitigation plan with us by mid-December -- after only a month of experience -- if it is to take effect in February. I sincerely doubt that the ISO will be in any better position three weeks from now to add specificity to its proposal.

I would at least allow the ISO an appropriate amount of time, that would include the potentially troublesome summer season, to gain experience with the types of problems encountered and the factors that cause those problems. With that information, the ISO would be in a far better position to propose more specific mitigation measures and the factors that trigger them.

For these reasons, I dissent in part from today's order.

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William L. Massey  
Commissioner