

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
90 FERC ¶ 61,317

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

New York Independent System Operator, Inc.	Docket No. ER97-1523-020 ER97-1523-021
Central Hudson Gas & Electric Corporation	ER97-4234-017 ER97-4234-018
Consolidated Edison Company of New York, Inc.	OA97-470-019 and OA97-470-020
New York State Electric and Gas Corporation	
Niagara Mohawk Power Corporation	
Orange and Rockland Utilities, Inc.	
Rochester Gas and Electric Corporation	
New York Power Pool	

ORDER ON REHEARING AND ON COMPLIANCE FILING

(Issued March 29, 2000)

This order addresses the revised market power mitigation plan that the New York Independent System Operator, Inc. (NYISO or ISO) filed on December 23, 1999, to comply with the order issued on November 23, 1999, in Central Hudson Gas & Electric Corp., et al.¹ In that order, the Commission found that the original plan gave the NYISO too much discretion in using specific mitigation measures, namely reducing bid flexibility, imposing financial obligations to pay for operating reserves, and imposing default bids. The Commission also found that general descriptions of behavior that could significantly affect market prices were too vague to justify the specific mitigation measures.² For the reasons set forth below, the Commission conditionally accepts the

¹89 FERC ¶ 61,196 (1999).

²Id. at 61,605.

revised plan, as modified and clarified. The Commission also denies rehearing of the November 23 order.

NYISO's Revised Market Power Mitigation Plan

The revised plan addresses the deficiencies described by the Commission. Conduct that may warrant mitigation is unchanged—physical or economic withholding, or uneconomic production³—but, where the Commission had found the original plan did not establish "specific thresholds or bright line test that would trigger the conclusions that market power has been exercised,"⁴ the revised plan now gives specific threshold values for identifying generators or transmission facilities that engage in such proscribed conduct. The ISO proposes to keep the specific thresholds confidential, while publicly stating the general threshold attribute. For example, a generation owner offering less than a certain percentage of its total generating capability or less than a certain percentage of each individual unit's capability would trigger the withholding threshold. If a transmission facility does not follow ISO instructions and, as a result, contributes to transmission congestion, this signals physical withholding. Energy scheduled at a location-based marginal prices (LBMP) point that is less than a certain percentage of the applicable reference level and that contributes to transmission congestion is one example of an uneconomic production threshold. The revised plan would give the ISO authority to impose a financial obligation—*i.e.*, penalty—on the party engaging in this behavior if it caused a material increase in price or in one or more guarantee payments⁵.

As in the original plan, financial penalties would not apply unless the party first failed to satisfactorily explain why the behavior that has triggered the threshold was not an exercise of market power. For example, the plan specifically notes that taking advantage of opportunities to sell at a higher price in another market is not withholding.

³See id. at 61,604.

⁴Id. at 61,605.

⁵A guarantee payment assures a generator that is committed that it will receive all its bid costs, including payments for start-up and no-load costs. If the revenues from selling in the ISO's markets fail to cover all these costs, a guarantee payment equal to the difference will be made through up-lift charges.

As discussed subsequently in this order, we are requiring the NYISO to revise its mitigation plan to clarify that mitigation for market power is prospective only.

The penalty for withholding equals the real-time LBMP multiplied by the capacity withheld.

To establish thresholds for economic withholding, the ISO first sets reference levels for each component of a generator's bid. The ISO's preferred measure is an average of the generator's accepted bids over the preceding 90 days during comparable periods adjusted for changes in fuel prices. Alternative ways of determining reference levels are given when data are insufficient for calculations done using the preferred method. The ISO would substitute the reference value as a default bid if the bid exceeds the reference value by a critical percentage or absolute dollar value (both confidential). However, the ISO would use this mitigation measure only if higher bids caused a material increase in the energy price or guarantee payments and the generator could not satisfactorily explain why its bid was not economic withholding. The generator would, however, receive the market-clearing price even if it exceeded the default bid. Substituting a default bid only limits a generator's ability to set the market-clearing price, not its ability to receive the market-clearing price. The revised plan no longer includes reducing bid flexibility as a mitigation option, an option the Commission rejected in the earlier mitigation plan.

Because mitigation would not be imposed unless the problematic conduct had a material effect on prices or on guarantee payments, the revised plan also gives specific, confidential threshold values for what is a material price effect.

Also, as stated in its original filing, to calculate the effect of the conduct on prices and guarantee payments, the Market Monitoring Unit, in consultation with the market advisor will use, when available, the Security Constrained Unit Commitment (SCUC) or Security Constrained Dispatch (SCD) computer models to simulate the degree to which the problematic behavior may have had an effect on prices or guarantee payments. These are the same models used by the ISO to commit and dispatch generators in its daily energy market. The revised plan acknowledges that these models are not yet capable of assessing the price effects, and it does not give a date or estimate of when the capability will be available. Until the SCUC and SCD computer models are available, the Market Monitoring Unit and the Market Advisor will use data and models that they judge to be most appropriate to estimate price effects.

The revised plan states that the exercise of market power may warrant mitigation even if the defined thresholds are not triggered. Therefore, the ISO proposes lower thresholds that would automatically trigger a section 205 filing to impose mitigation. Behavior that increases the hourly day-ahead or real-time price at any location or in guarantee payments to a party for a day by a certain percentage is one example of a lower

threshold that would warrant a section 205 filing to get authority for appropriate mitigation. However, the ISO may make a section 205 filing any time it believes conduct in a particular circumstance warrants it, even when the thresholds are not met.

Also in response to the November 23 order, the revised plan limits the load bid mitigation measure to the circumstance when persistent unscheduled load causes operational problems. The ISO developed this mitigation measure to address its concern that load-serving entities might not bid sufficient load in the day-ahead market to achieve price convergence with the real time market. If the ISO observes that one or more load-serving entities are relying significantly on the real time market and judges that such behavior results in prices in the day-ahead and real time markets that are not what would be "expected under conditions of workable competition" and the behavior causes operational problems, load bid mitigation may apply. The Commission said that it was not convinced that lack of price convergence called for any ISO intervention, and required the ISO to limit the mitigation to address operational problems.⁶ The revised mitigation measure would impose a penalty on a load-serving entity when it purchases in the real time market beyond an allowance level when operations and prices are significantly affected. The ISO will describe such operational problems on its web site, as the Commission previously directed.⁷

The ISO requests that all threshold levels remain confidential because of its concern that some parties could exploit this information by raising bids to just below the threshold levels. The ISO is particularly concerned about this since it has set fairly high threshold levels to limit its market mitigation only to the most serious market power problems. It also asserts that the requested confidentiality would in no way impede market participants from commenting meaningfully on what thresholds are appropriate, how they should be determined, or whether another approach entirely would be preferable. The ISO also reminds the Commission that we agreed to confidentiality of standards for specific market screens in the November 23 order,⁸ a decision consistent with the practice of ISO New England, which also allows confidentiality for specific market screens. The ISO emphasizes that market monitoring for both New York and New England relies on the calculation of a wide variety of screens that may be useful for identifying market design or market power problems. No single screen triggers mitigation, but it may signal the need for further investigation or analysis.

⁶See id. at 61,606.

⁷Id.

⁸Id.

Notice of Filing, Interventions, and Protests

Notice of the filing was published in the Federal Register, 65 Fed. Reg. 1363 (2000), with protests and motions to intervene due on or before January 12, 2000.

In its protest to the NYISO's revised plan, Sithe/Independent Power Partners, L.P. (Sithe) repeats its protest against the NYISO's original plan. It argues that the NYISO should not have any authority to mitigate without specific Commission approval. However, if the Commission accepts the revised plan with express thresholds that would trigger possible mitigation, then Sithe believes that due process requires that those thresholds be disclosed. Without disclosure, parties could be subject to mitigation without knowing, in advance, what the "rules" are. As long as the NYISO has the flexibility to make a section 205 filing, it has an appropriate response to any gaming concerns.

Sithe further protests that the NYISO's market power analyses should consider more than simply whether particular behavior had a significant effect on market clearing prices. A market power determination that warrants mitigation should also consider the time period over which prices were allegedly affected and whether the behavior was, in fact, profitable. Sithe raises concerns about the ISO's ability to estimate material price effects, especially before the SCUC or SCD computer models have this capability. It believes that all market participants should have the ability to independently evaluate any NYISO claim of significant price effects.

Sithe disagrees that the particular reference prices are appropriate default bids. An average of accepted bids during the previous 90 days may include near-zero bids to ensure that a generator can operate during peak hours when it can sell at a higher price. Furthermore, when a percentage or dollar value threshold that would trigger possible mitigation is specified, Sithe protests giving the ISO the discretion to choose which value to use as the trigger. It wants the trigger to be specified as the higher of the percentage or dollar value.

The Independent Power Producers of New York, Inc. (IPP), supported by Dynegy Power Marketing, Inc. and Enron Power Marketing, Inc., object to confidential, triggering threshold levels. IPP argues that such secret threshold levels would impair market participants' due process rights and impede competitive markets. Any party subjected to mitigation then would have valuable information about such threshold levels that was not generally available and that could give it competitive advantages in bidding. Also, without specific, public thresholds, IPP cannot comment constructively on whether they are reasonable.

PG&E Generating and PG&E Energy Trading-Power, L.P. (PG&E) object to (1) confidential threshold levels that would trigger possible mitigation, (2) any ISO authority to sanction or penalize market participants; (3) the specific reference levels used to judge bidding behavior; and (4) the plan's failure to include a means to resolve disputes. With respect to specific reference levels, PG&E argues that 90 days is too long and wants New York to follow ISO New England and use a 30-day period. PG&E also believes that the multi-step process—compare bids to reference values, determine whether behavior has resulted in a significant increase in price or guarantee payments, and confer with targeted party for further explanation—is too complicated to be completed within a normal bidding cycle and will encourage hasty judgements. Finally, PG&E notes that the revised plan does not provide for any party against whom mitigation measures have been imposed to appeal the ISO's decision to the Commission.

On January 27, 2000, the NYISO filed a response to the requests to modify or amend the revised market mitigation measures.

Discussion

Procedural Matters

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.213(a)(2) (1999), prohibits the filing of an answer to a protest unless otherwise permitted by the decisional authority. We are not persuaded to allow the NYISO's response.

The Revised Plan

The Commission conditionally accepts the proposed revised plan, with the modifications and clarification discussed below. The revised plan complies with the Commission's November 23 order because it sets specific thresholds for identifying economic and physical withholding and uneconomic production that would trigger possible mitigation. It also gives specific measures for what constitutes a significant price effect and how any default bid or financial obligation will be calculated. Under the revised plan, load bid mitigation would apply only when there is a persistent operational problem, and such information will be posted on the NYISO's web site. We disagree with Sithe's and PG&E's position that the NYISO should not have authority to mitigate without specific Commission approval on a case-by-case basis. They raise no new arguments not considered or addressed in the November 23 order. The NYISO's ability to mitigate when specific thresholds are triggered will help to remedy market power quickly and deter

participants from exercising market power, and it was a factor in approving market-based rates in the NYISO's markets.⁹

The NYISO does retain some limited discretion as to when to use mitigation and for how long, but we think that this level of discretion is desirable and consistent with the Commission's directives in the November 23 order. For example, if a threshold that would trigger possible mitigation is reached, the ISO may choose not to impose mitigation, depending on whether it is satisfied with the party's explanation for its behavior. The ISO would retain discretion to decide how long a specific mitigation measure would be in place, limited to a six-month period after the conduct at issue. However, the revised plan does not specify when a particular mitigation measure would initially take effect. We require that the ISO file a further revised mitigation plan to clarify that mitigation for market power is prospective only. We do not intend for mitigation to entail any retroactive recalculation of market-clearing prices.

The ISO also would have discretion to decide what constitutes price convergence between day-ahead and real-time markets, what constitutes an operational problem, and the period of time when load bid restrictions would apply. The ISO will post a description of any such operational problems on its web site, giving all parties an opportunity to bring any problems promptly to the Commission's attention. We think this level of remaining discretion is reasonable, because it gives the NYISO some flexibility to respond to unexpected circumstances or persistent unanticipated problems, while placing limits on the amount of flexibility.

The Commission accepts the proposed specific thresholds that would trigger possible mitigation,¹⁰ but we will reject the ISO's proposal to keep them confidential. Although we agree with the ISO that the disclosure of threshold levels that would trigger possible mitigation may influence some generators' decisions on how high to bid or how much capacity to make available, we do not believe that confidentiality, in practice, could

⁹In Central Hudson Gas & Electric Corporation, et al., 86 FERC ¶ 61,062, order on reh'g, 88 FERC ¶ 61,137 (1999), we noted that Niagara Mohawk Power Corporation's energy market shares exceeded 20 percent in some energy markets and that market shares for suppliers of ancillary services were as high as 51 percent. Nevertheless, we approved market-based rates because a variety of factors, including the ISO's monitoring and mitigation plan, were present and they mitigated market power. Id. at 61,233-37.

¹⁰We believe that the particular thresholds that would trigger possible mitigation are sufficiently high so that triggering them would likely raise market power concerns warranting further investigation and possibly mitigation.

be maintained over the long term in any event. We agree with IPP that actual mitigation will undercut confidentiality among all participants, since each instance of mitigation would inform participants of what behavior triggers mitigation. We also agree with Sithe that due process requires that generators subject to ISO mitigation have complete information on exactly what actions may trigger default bids or financial obligations. Accordingly, we will reject the NYISO's proposal to keep threshold levels that would trigger possible mitigation confidential.

If the NYISO still wishes to use the particular threshold levels that it proposed here as triggers for possible mitigation, the NYISO may do so but must first publicly disclose them. Alternatively, if the NYISO decides that, in light of our rejection of confidentiality and our direction that thresholds that trigger possible mitigation should be made public, different thresholds would be appropriate, the NYISO may file a new Federal Power Act section 205, 16 U.S.C. § 824d (1994), filing with new, public thresholds.

We also disagree with the ISO that our November 23 order approved the ISO's ability to keep confidential the thresholds that would trigger possible mitigation. The Commission's acceptance of confidentiality in the November 23 order, as the ISO noted in its transmittal letter, instead applied to the standards and criteria, *i.e.*, the screens, used to determine the need for further analysis or investigation, and not to mitigation. We do not believe it is necessary for the ISO to disclose how it may organize these screen data or what particular values or combination of values in particular circumstances leads to more in-depth investigation into market results generally or the conduct of a particular generator.

Currently, the SCUD and SCD models cannot be used to estimate how behavior affects market prices, an application the ISO eventually intends to implement. We disagree with Sithe that this current modeling limitation makes the ISO's methodology too ad hoc and requires further clarification on the part of the ISO. However, we do agree with Sithe that it should have access to the same models as the ISO to independently verify the ISO's market findings.

The NYISO notes that its market mitigation measures are subject to the NYISO Agreement which includes dispute resolution procedures. It did not amend its plan to allow for direct appeal to the Commission, as PG&E would like. We agree with the ISO that its revised plan has eliminated the level of discretion and ambiguity that was of concern in the November 23 order and that this makes the addition of a direct appeal outside the usual complaint process unnecessary.

The Commission accepts the revised plan's reference prices. Although there are different ways to construct a reference price, we believe the NYISO's approach is reasonable, and we do not share the concerns expressed by either Sithe or PG&E.

Issues Raised on Rehearing

Sithe and the New York Public Service Commission (New York Commission) request rehearing of the Commission's November 23 order. Sithe believes that the original proposal does not adequately protect commercially sensitive data and wants the Commission to require the ISO to incorporate revised confidentiality procedures formally into the Market Monitoring Plan. Sithe claims that the original order is mistaken when it says that the treatment of confidentiality by the NYISO is consistent with NEPOOL. It gives several specific comparisons to show the NYISO's alleged inferiority in this regard. For example, the NEPOOL Information Policy defines user groups with varying degrees of access to data, while the NYISO Confidentiality Policy contains no such detail.

The Commission denies rehearing on this issue. While several of the NYISO's provisions concerning the protection of commercially sensitive data allow more data to be disclosed than the provisions of the NEPOOL plan, Sithe has provided no reason for the Commission to conclude that any competitive harm to Sithe or any other party will occur as a result.

The New York Commission believes that the Commission should accept the ISO's original proposal with two modifications because it believes that the ISO "must have the discretion to respond to abuses of market power swiftly and effectively to protect consumers." To address the Commission's concerns about giving the ISO undue discretion, the New York Commission proposes two modifications to the ISO's original proposal. First, the plan should be approved only for an interim, 24-month period; and second, participants should be permitted to appeal to the Commission the ISO's decision to impose mitigation and such an appeal should receive fast-track treatment under the Commission's new complaint procedures. The New York Commission further comments that if the Commission does not grant rehearing, we should accept the ISO's request to keep specific threshold levels confidential.

For the reasons stated in the November 23 order, we reject the New York Commission's proposal to approve the NYISO's original mitigation plan for a 24-month period. The New York Commission has provided no reason for the Commission to change its original findings in this regard. We also reject as unnecessary the New York Commission's proposal that appeal of any NYISO mitigation automatically be given fast-track treatment. The Commission's complaint procedures allow for fast-track treatment

when the complainant shows why expedition is necessary and why standard processes would not be adequate. There is no reason to prejudge that this would automatically be the case should the Commission receive a complaint about ISO mitigation.

The Commission orders:

(A) The NYISO's revised market power mitigation plan filed December 23, 1999, is hereby conditionally accepted for filing, to become effective on December 23, 1999, with the modifications discussed in the body of this order.

(B) Within 20 days of the date of issuance of this order, the NYISO shall file further revisions to its market power mitigation plan to reflect the modifications discussed in the body of this order.

(C) The requests for rehearing are denied as discussed in the body of 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 March 29, 2000)

MASSEY, Commissioner, dissenting in part:

I dissent from the decision in today's order to deny the New York Commission's request for rehearing. The New York Commission proposes that we approve the NYISO's original market power mitigation plan for a 24-month period. Today's order rejects this rehearing request for the same reasons the majority rejected the NYISO's original mitigation plan. I continue to believe that we should have accepted the original plan for the reasons discussed in my dissent to the prior order.¹¹ Nevertheless, the revised market power mitigation plan that we approve today, as modified, is acceptable.

William L. Massey
Commissioner

¹¹89 FERC ¶ 61,196 (1999) at 61,607-608.

