

UNITED STATES OF AMERICA 93 FERC ¶ 61,034
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. ER00-3462-000

ORDER ACCEPTING TARIFF FILING

(Issued October 11, 2000)

On August 22, 2000, the New York Independent System Operator (NYISO), pursuant to section 205 of the Federal Power Act, filed a request to allow it to implement a rebate for installed capacity (ICAP) payments for certain load serving entities (LSEs) which serve customers in New York City and to amend its tariff accordingly. NYISO requests that the Commission make the proposed revisions effective October 23, 2000. For the reasons set forth below, the Commission accepts NYISO's proposal, effective October 23, 2000, as requested.

Background

The NYISO Services Tariff requires LSEs to procure ICAP in amounts equal to their ICAP requirements through either bilateral transactions or the NYISO-administered ICAP auctions. ICAP requirements are established by the NYISO at the beginning of each Capability Year taking into account the ICAP requirements applicable to the New York Control Area, the peak load of each LSE's customers, and some adjustments for regional load growth. ICAP requirements may be modified by the NYISO to account for load-shifting resulting, for example, from a customer switching LSEs. Prior to the beginning of each month each LSE must demonstrate that it has secured a sufficient amount of ICAP by submitting ICAP certification forms to the NYISO. When load-shifting occurs, the NYISO Services Tariff provides for the compensation by the load-gaining LSE to the load-losing LSE for a pro-rated portion of the market-clearing price of ICAP.

Pursuant to the NYISO Services Tariff, different requirements apply to locational based marginal price zones within which a minimum level of ICAP must be maintained in order to ensure the availability of sufficient energy and capacity. This is the case in New York City where the NYISO adopted locational ICAP requirements. Under these requirements, In-City LSEs must procure sufficient ICAP electrically located within the New York City locality. In addition, NYISO has adopted market mitigation measures applicable to generating assets formerly owned by Consolidated Edison. These mitigation measures provide a cap of \$52.50/kW per Obligation Procurement Period

(which are the same as the capability periods, e.g., May 1 to October 31, and November 1 to April 30, and results in a charge of \$8.75 per month) on payments to certain In-City generators. In its September 22, 1998 order, the Commission approved the use of ICAP bid caps as a market power mitigation measure in New York City.

When an LSE fails to procure sufficient ICAP to meet its ICAP or locational ICAP requirement during an Obligation Procurement Period, or during any month of the Obligation Procurement Period when there is load-shifting, the NYISO Services Tariff requires the NYISO to procure such ICAP on behalf of the deficient LSE. In order to procure this ICAP, the NYISO conducts Deficiency Procurement Auctions where it submits deficiency bids on behalf of the deficient LSEs at a specific price as provided in the NYISO Services Tariff. Each Deficiency Procurement Auction consists of two phases: In the first phase, the NYISO submits bids for In-City LSEs; in the second phase, the NYISO submits bids for all the remaining deficient LSEs. Any LSEs that are still deficient after the completion of a Deficiency Procurement Auction must pay a deficiency charge as determined in the NYISO Services Tariff.

The NYISO Services Tariff states that the NYISO shall use the deficiency charges to attempt to procure ICAP from generators that are capable of selling ICAP but failed to qualify to sell it prior to the Deficiency Procurement Auction. The current NYISO Services Tariff provides that any funds remaining from the deficiency charges collected, and not used to procure ICAP from previously unqualified ICAP suppliers, are to be applied to reduce the NYISO Services Tariff Schedule 1 charge.

Applicant's Filing

NYISO has filed a request to allow it to implement a rebate for installed capacity (ICAP) payments for certain load serving entities (LSEs) which serve customers in New York City and to amend its tariff accordingly. NYISO has requested this authority because at certain times there is insufficient ICAP in the New York City locality to meet the needs of the In-City LSEs.

The NYISO seeks to revise its Services Tariff to allow for a targeted rebate of monies paid in excess of \$8.75/kW by In-City LSEs to procure ICAP during any month in which there is an insufficient supply of ICAP in the New York City locality to meet local requirements during the 2000 Summer Capability Period. The 2000 Summer Capability Period began on May 1, 2000 and ends on October 31, 2000.

At certain times during the 2000 Summer Capability Period there has been insufficient ICAP associated with qualified ICAP suppliers which are located within the New York City locality to meet the In-City ICAP requirement. As a consequence, during the ICAP Deficiency Procurement Auctions administered by the NYISO, various In-City LSEs paid up to the tariff-mandated deficiency charge of \$12.50 per kW/month to fulfill In-City and statewide ICAP requirements. This charge, however, is \$3.75 per kW/month above the de-facto price cap (\$8.75/kW) on In-City capacity.

The purpose of the instant filing is to change the tariff provisions to allow the NYISO to use a portion of the funds remaining from the deficiency charges collected, and not used to procure ICAP from previously unqualified ICAP suppliers, to issue a rebate of monies paid in excess of \$8.75/kW by In-City LSEs. Under the proposed change, the NYISO would rebate up to \$3.75/kW to those LSEs that have paid greater than \$8.75/kW, either in a regular Obligation Procurement Period Auction or through a deficiency charge. These rebates would be made from the difference between the amount collected by the NYISO in deficiency charges and the amount paid by the NYISO to procure previously unqualified ICAP. By the end of the 2000 Summer Capability Period, the NYISO proposes to settle the accounts of the In-City LSEs by issuing the targeted rebate for all transactions undertaken during any month since May 1, 2000 in which an ICAP deficiency existed in the New York City locality. NYISO states that the implementation of the targeted ICAP rebate does not result in a charge to Rate Schedule 1 of the NYISO Services Tariff, *i.e.*, it does not impose a new cost on the system; rather, it merely lessens the amount that will be applied to reduce Schedule 1 rates.

NYISO argues that it is fair and reasonable to implement this targeted ICAP rebate. Deficiency charges were included in the NYISO Services Tariff to provide a price signal that would encourage the development of new capacity, and as an incentive for LSEs to procure ICAP in amounts sufficient to meet their requirements. In practice, however, the amount of qualified ICAP available in the New York City locality has been insufficient in the 2000 Summer Capability Period to meet the locational ICAP requirement. NYISO argues that the deficiency charges have become purely punitive for those LSEs that were unable to procure sufficient ICAP because of the ICAP shortage. NYISO states that LSEs have indicated that these penalties, if ultimately imposed by the NYISO as prescribed by the current NYISO Services Tariff, will create a severe financial hardship and may drive them out of the New York market.

NYISO contends that, in addition to being fair and reasonable, the implementation of the targeted rebate is consistent with New York State and FERC policies. NYISO states that the New York Public Service Commission has already expressed concern that a mechanical application of the deficiency charges will unnecessarily impair the development of retail electric competition in New York State because it may force LSEs out of the market. NYISO also submits that during a true shortage of ICAP the application of these deficiency charges as they are presently prescribed by the NYISO Services Tariff is inconsistent with the Commission's goal of promoting robust wholesale electric competition.

NYISO suggests that granting its request for the implementation of a targeted rebate for the 2000 Summer Capability Period will not upset interested parties' expectations or undermine their business plans. NYISO states that the implementation of the targeted ICAP rebate for In-City LSEs has been approved in accordance with the NYISO's governance process, was discussed at length with NYISO market participants, and was approved by a 70 percent vote of the NYISO Management Committee and by the NYISO Board. NYISO's approval of the instant proposal was predicated on

the assumption that the targeted ICAP rebate would apply to the 2000 Summer Capability Period in its entirety.

Notice of Filing, Interventions, Comments, and Protests

Notice of the filing was published in the Federal Register, 65 Fed. Reg. 53,288 (2000), with protests and motions to intervene due on or before September 12, 2000. Timely motions to intervene were filed by Southern Energy Bowline, L.L.C., Southern Energy Lovett, L.L.C., and Southern Energy NY-Gen, L.L.C.; Dynegy Power Marketing, Inc.; New York Electric & Gas Corporation (NYSEG); 1st Rochdale Cooperative Group, Ltd and Coordinated Housing Services Inc.; and Keyspan Energy Services. In addition, the New York Public Service Commission (the New York Commission) filed a notice of intervention, and the Member Systems filed a motion to intervene out of time..

Keyspan Energy Services, Inc., (Keyspan) filed comments in support of NYISO's proposed revisions. Keyspan states that, because of a shortage of In-City ICAP, it has at times been unable to procure sufficient ICAP to meet its requirements.

New York State Electric & Gas Corporation (NYSEG) protests the proposed revision because it would eliminate the credit of penalty revenues to Schedule 1 charges that are billed to all participants. NYSEG argues that the deficiency charge accomplishes its task by imposing a charge on LSEs that fail to satisfy their installed capacity requirements and that it should not be reduced, through a rebate, that directly benefits the same non-compliant LSEs. As an alternative, NYSEG suggests that the NYISO should consider reducing the In-City LSE's locational ICAP requirement instead of providing a rebate. NYSEG maintains that it is better policy to implement a requirement that can be satisfied than to reduce the deficiency charge for a select group of market participants and inadvertently promote non-compliance.

Discussion

Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2000), the timely, unopposed motions to intervene listed above serve to make the filing entities parties to this proceeding. Due to the absence of any undue prejudice or delay, the Commission will grant the late, unopposed motion to intervene of the Member Systems.

NYISO's Proposal

The Commission will accept NYISO's proposal in the limited circumstances of this case. NYISO is only proposing a one-time waiver of the penalty portion of the ICAP charge during the 2000

Summer Capability Period, which will end on October 31, 2000. The LSEs still must pay the normal ICAP charge. NYISO's proposal also reflects the broad support or acquiescence of affected parties. The purpose of the ICAP deficiency charge is to provide an incentive for LSEs to satisfy their locational ICAP obligations. However, NYISO's proposal will have a limited effect on this incentive since it is a one-time waiver for a period about to expire. In any event, NYISO's proposal does not lessen the need for the parties to address the installed capacity shortage in the New York City area.¹

As to NYSEG's alternative proposal, we note that it would have the same impact on Schedule 1 credits as the instant proposal. Also, unlike NYSEG's alternative, the instant proposal enjoys the broad support of market participants. Accordingly, we reject NYSEG's alternative proposal.

The Commission orders:

(A) NYISO's August 22 tariff filing in this proceeding is hereby accepted for filing, to become effective on October 23, 2000.

(B) The designations of the proposed tariff pages are accepted effective on October 23, 2000.

By the Commission. Commissioner Hébert dissented with a separate statement attached.

(S E A L)

David P. Boergers,
Secretary.

¹Of the 11 power plant siting proceedings pending before the New York Commission, six are planned for New York City. Four of these, totaling more than 2,000 MW, have planned in-service dates within 2 years. In addition, New York Power Authority has announced plans to purchase 11 gas turbines, totaling 517 MW, for installation in New York City by next summer.

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HÉBERT, Commissioner, *dissenting*:

In an, unfortunately, increasing number of recent orders, I have objected to Commission decisions to implement or retain price caps on wholesale electricity products. As I have explained, price caps do not work. Rather, they inhibit market entry and reduce energy supply, to the detriment of energy consumers – the intended beneficiaries. (Indeed, empirical studies suggest that price caps do not even achieve the short-term goal of reducing prices.)

In the instant circumstances, price caps have operated precisely as I have feared. Specifically, a two-year old ceiling on the price of installed capacity (ICAP) in the New York City area has coincided with a two-year old shortage of installed capacity in the same area. To me, the timing of the price cap and ICAP shortage is not merely coincidental.

In today's order, the Commission acts to enforce the ICAP price cap. I would take a different approach. Instead of offering rebates to load-serving entities that are unable to procure sufficient installed capacity in the New York City area, I would act now to help ensure additional supply of installed capacity. I would do this by lifting the price cap and promoting the entry of generation. Until the Commission acts affirmatively to wean the New York ISO and New York markets of their reliance on price controls,¹ supply will strain to meet increasing demand.

The majority justifies its decision (at 5) by labeling the waiver it authorizes as a "one-time waiver." It also characterizes the circumstances presented as "limited circumstances." If there is one thing I have learned in my three years of service as a FERC Commissioner, it is that price caps, once approved, are never "limited" or "one-time" only. Rather, they will continue to remain in operation, from summer to summer,

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supported by repeated extensions, unless the Commission takes the initiative to state that enough is enough. Commission inaction or acquiescence merely emboldens other market participants to seek additional restraints on the operation of market forces. Slowly but surely, the Commission's commitment to competition becomes loosened, and the promised benefits to consumers become ever more elusive.

(The majority attempts to disprove my concerns by adding a footnote that cites, without documentation, "plans" and "announce[ments]" to add generating capacity in the New York City area. While I generally encourage such plans, they are not found in the record of this proceeding and have not been the focus of any of the arguments of any of the parties. Thus, I am not satisfied that these plans will have a significant impact on the capacity shortage that the parties have been arguing about and which the instant filing attempts to address. The ICAP shortage is real and immediate; plans to reduce this shortage are uncertain and long-term at best.)

Two years ago, the Commission approved a basket of market mitigation measures applicable to wholesale power sales from generating units located inside New York City. See Consolidated Edison Company of New York, Inc., 84 FERC ¶ 61,287 (1998). One of the mitigation measures was a price cap on the sale of installed capacity. While the Commission approved the cap, it did so only "preliminarily" and "subject to reconsideration." 84 FERC at 62,357-58. It noted that its hesitancy was based on concern for the future effect of the price cap on generation supply. Now that we know that the price cap has, in practice, acted to hinder supply, we should take this opportunity to reconsider and remove it.

¹See New York Independent System Operator, Inc. et al., 92 FERC ¶ 61,073 at 61,315-18 (2000) (dissenting statement); New York Independent System Operator, Inc. et al., 91 FERC ¶ 61,218 at 61,810-11 (2000) (concurring statement).

Because the Commission today decides to enforce the price cap and thus perpetuate the current regulatory state of affairs, I respectfully dissent.

Curt L. Hébert, Jr.
Commissioner