

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

NEW YORK INDEPENDENT SYSTEM)
OPERATOR, INC.) Docket No. EL07-39-000

**REPLY COMMENTS OF THE
NEW YORK STATE CONSUMER PROTECTION BOARD**

Pursuant to the Order issued by the Federal Energy Regulatory Commission (“FERC” or “Commission”) in this proceeding on July 6, 2007,¹ the New York State Consumer Protection Board (“NYSCP”) submits this reply to comments submitted on the compliance filing made by the New York State Independent System Operator (“NYISO”) on October 4, 2007. We address three issues raised by the parties in their initial comments: (1) whether the expectations of the divested generation owners (“DGOs”) that the Commission will decline to exercise its refund authority trumps the right of consumers under the Federal Power Act (“FPA”) to be protected from unjust and unreasonable rates; (2) in what forum and on what schedule, establishment of a forward installed capacity (“ICAP”) market for the NYISO should be considered; and, (3) whether additional categories of costs should be included in the NYISO’s calculation of “going forward costs” (“GFC”).

¹ New York Independent System Operator, Inc., 120 FERC ¶ 61,024 at p. 15 (2007) (“July 6 Order”).

I. New York Consumers are Entitled to a Refund of Excess Costs Incurred for ICAP in the NYC Market After the Refund Effective Date Established in this Proceeding.

Consolidated Edison demonstrated in its Initial Comments that New York consumers have paid at least \$110 million more for ICAP since the refund effective date. The CPB and numerous other parties joined with them in calling for the Commission to order that those excess payments be refunded. In response, the DGOs contend that it was their “settled expectation” that they could continue to exercise their market power to drive rates above competitive levels, and FERC should not alter the results after the fact.²

In a confrontation between the rights of consumers and the expectations of generators, the obligation of the Commission is clear. The courts have repeatedly emphasized that the primary function of FERC under the FPA is to protect consumers from unjust and unreasonable rates.³ Because the Commission chooses to allow rates to take effect without its prior review and approval, it can meet its obligation to consumers only through an after-the-fact evaluation and a redress of charges found to be excessive through the refund authority conferred by Section 206 of the FPA.⁴

The DGOs argue that the outcome of their economic withholding was foreseeable from the inception of the NYC ICAP market and was, therefore,

² “Protest of the NRG Companies and Proposed Reforms to the In-City Capacity Market,” November 19, 2007, (“NRG Protest”), p. 37.

³ The Towns of Alexandria, Minnesota, et al. v. FPC, 555 F.2d 1020, 1028 (DC Cir. 1977); Municipal Light Board v. FPC, 450 F.2d 1341, 1348 (DC Cir. 1971).

⁴ See Public Utility District No. 1 of Snohomish County Washington v. FERC, 471 F.3d 1053, 1081 (9th Cir. 2006).

tacitly approved by FERC when it permitted the existing rules to take effect.⁵ In addition to overlooking the Commission's obligation to assure that the rates resulting from its policies remain just and reasonable, this contention also ignores the significant changes that have occurred in the NYC ICAP market since the Commission approved the original supplier mitigation measures in 1998. There is no reason to believe that FERC anticipated that continued economic withholding by DGOs would have such a detrimental impact on consumers even after the implementation of demand curves and the addition of a thousand megawatts of new capacity to the market.

The argument of the DGOs concerning their continuing expectations is simply not credible. Once the NYISO's long and arduous stakeholder process generated an initial filing aimed at substantially changing the existing supplier mitigation rules, the DGOs were no longer operating on settled expectations. This Commission's declaration of a refund effective date recognizing that continuation of the existing rules might result in rates that were unjust and unreasonable, merely underscored that fact. Subsequent decisions by DGOs to continue economic withholding of capacity in the NYC market through the summer of 2007, were no longer based on expectations of regulatory vindication; they were purely practical. If they did not withhold, they could never collect their monopoly rents. If they did, the worst that could happen is that they would have to pay back their excess profits.

⁵ NRG Protest, p. 36; "Initial Comments Of Keyspan-Ravenswood, LLC on the Proposal of the New York Independent System Operator, Inc. Regarding the New York City Installed Capacity Market Structure," November 19, 2007, p. 10.

NRG also suggests that such notice as may have been provided by the setting of a refund effective date came too late for any market participants who hedged their positions in the financial or physical markets in reliance on existing ICAP rules.⁶ Given that NRG provides no examples or other evidence that such hedges were in place prior to the Commission's May 12, 2007, order in this case, there is no factual basis in the record for the concern, and it should be accorded no weight. Even assuming, however, that some instances of detrimental reliance occurred, and that such reliance was reasonable in light of the pendency of the NYISO's 2006 filing to change the supplier mitigation rules, that would be no justification for a wholesale denial of refund relief to consumers.

We continue to urge the Commission to reject the NYISO's recommendation concerning refunds and to establish a proceeding for the purpose of determining any amounts that should be returned to consumers because of overcharges resulting from the economic withholding of capacity in the NYC ICAP market after May 12, 2007.

II. Any Proposal for the Establishment of a Forward Capacity Structure for the NYC Market Should be Developed Through the NYISO's Existing Stakeholder Process.

A number of parties call for the continued development of a forward capacity market structure by the NYISO, but they differ considerably in their recommendations concerning the process. The NYSCPB agrees with the comments of the Long Island Power Authority that the resolution of this issue "should be left to the NYISO's shared governance stakeholder process" and that

⁶ NRG Protest, p. 38.

there has been no evidence presented that would justify the Commission's bypassing that process by addressing the matter in this case.⁷

As the NYISO pointed out, "the subject of another forward auction is currently being considered in the NYISO stakeholder process."⁸ That process has resulted in the approval of proposals to resolve very complex and contentious issues in the past, including the adoption of demand curves and the in-city capacity price mitigation filing that initiated this case. There is absolutely no evidence to suggest that the stakeholder process inherently will fail to achieve a resolution of the forward capacity auction issue for New York.

Nor has there been any good reason presented for artificially accelerating the process. The NYISO has confirmed that a forward capacity market structure is under consideration. As an entity, it has no inherent bias in favor of moving too slowly, or too quickly, on this issue. At least until the NYISO itself reports that the process is at an impasse, it should be permitted to pursue a resolution of competing concerns through its normal stakeholder procedures. Artificial acceleration of the process is only likely to reduce the scope and depth of that analysis and to produce a suboptimal result, that is, a problem that will have to be solved later.

⁷ "Comments of the Long Island Power Authority and LIPA Supporting and Opposing Portions Of NYISO's Compliance Filing Regarding the New York City ICAP Market Structure," November 19, 2007, p. 7.

⁸ "Compliance Filing of the New York Independent System Operator, Inc. Regarding the New York City ICAP Market Structure," October 4, 2007, ("NYISO Filing"), p. 16.

III. Proposals to Expand the Definition of Going Forward Costs (“GFCs”) Should be Rejected.

The Independent Power Producers of New York propose that the definition of GFCs from which reference prices are derived under the NYISO’s supplier mitigation proposal should be expanded to include a plant’s anticipated future capital expenditures and its “lost opportunity costs” from being required to bid capacity into the NYC market.⁹ Coral and Dynegy would add property taxes to GFCs.¹⁰ These proposals should be rejected.

As the NYISO’s independent advisor, Dr. Patton, explained in his affidavit accompanying the October 4, 2007 filing, “GFCs are the costs that could be avoided if a unit is ‘mothballed’ rather than being kept in service and used to provide capacity.”¹¹ In other words, they represent a price level above which it makes economic sense for a generator to maintain availability because capacity sale revenues contribute to an overall reduction in the plant’s costs. It is not a level that guarantees the plant operator a profit, much less the maximum profit available from alternative “opportunities.”

This definition clearly excludes property taxes which will be paid whether a plant is available or not, and lost opportunity costs which are just as lost when the plant is mothballed as they are when it is operating. Furthermore, because “mothballing” is defined as a reversible, temporary state as distinguished from

⁹ “Comments of Independent Power Producers of New York, Inc.,” November 19, 2007, p. 17.

¹⁰ “Comments of Dynegy Northeast Generation, Inc. and Coral Power, L.L.C.,” November 19, 2007, p. 10.

¹¹ NYISO Filing, Attachment 1, “Affidavit of Dr. David B. Patton,” p. 14.

“retirement,” anticipated capital expenditures are also not includable in GFCs.¹²

Taking a plant temporarily out of the market may postpone them, but will not avoid them. Only permanent retirement can do that.

¹² For the definition of GFCs, see NYISO Filing, Attachment 3, “Affidavit of Mr. Christopher D. Ungate,” pp. 2-3.

CONCLUSION

The NYSCPБ requests that the NYISO's Compliance Filing be approved with the modifications we recommend in our Initial Comments filed herein.

Respectfully submitted,

/s/

Mindy A. Bockstein
Chairperson and Executive Director

Douglas W. Elfner
Director of Utility Intervention

David Prestemon
Utility Intervenor Attorney

Tariq N. Niazi
Chief Economist

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