

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

New York Independent System Operator, Inc.

Docket No. EL07-18-000

v.

Astoria Energy LLC

ORDER DENYING COMPLAINT

(Issued March 15, 2007)

1. New York Independent System Operator, Inc. (NYISO) filed a complaint against Astoria Energy LLC¹ (Astoria) alleging that Astoria failed to adhere to NYISO's Market Administration and Control Area Services Tariff (Services Tariff) regarding Installed Capacity (ICAP)² Supplier qualification. NYISO requests that the Commission find that Astoria failed to submit the required data for capacity certification for the May 2006 ICAP Spot Market Auction. The Commission denies NYISO's complaint with respect to capacity certification. NYISO also requests that the Commission waive its Services Tariff to require Astoria to pay a modified deficiency charge to be paid to another entity

¹ NYISO's complaint names SCS/Astoria Energy LLC as respondent. Astoria, in its answer, asserts that it is unaware of any company named SCS/Astoria Energy LLC, but contends that one of Astoria's indirect parent companies is SCS Energy LLC, which is not itself a party to any arrangements or transactions with the NYISO. The Commission grants Astoria's request that SCS Energy LLC be dismissed from the complaint.

² "Installed Capacity" describes the amount of power measured in kW that must be provided to meet the ISO's and load serving entities' (LSE's) capacity requirements. The power can be generated by facilities located within the region or be imported from other regions.

(Supplier).³ As discussed below, the Commission denies NYISO's request for waiver of the tariff provision regarding deficiency charges.

I. Background

2. In spring 2006, Astoria completed construction of a new combined-cycle gas-fired generating unit located in Queens County, New York. In April 2006, Astoria sought to qualify the unit as an ICAP Supplier eligible to supply Unforced Capacity (UCAP)⁴ to the New York Control Area (NYCA). The NYISO administers monthly ICAP auctions where ICAP suppliers offer UCAP that LSEs purchase to meet their NYCA minimum ICAP requirements. Astoria desired to commence supplying UCAP in May 2006, which was the first month of the NYISO's summer capability period.⁵

II. Complaint

3. On December 1, 2006, NYISO filed its complaint against Astoria alleging that Astoria violated the Services Tariff provisions controlling the qualification of units to supply ICAP. NYISO asserts that, in an attempt to participate as an ICAP Supplier in New York for the month of May 2006, Astoria phoned NYISO on April 13, 2006 to inquire about the requirements for certifying capacity from a new generating unit as ICAP. A staff member in NYISO's Customer Relations Department provided Astoria with an informal, oral response erroneously interpreting the requirements of the Services Tariff, stating that Astoria could qualify as an ICAP Supplier on the basis of documenting

³ The name of the entity is being withheld as protected confidential information at the request of NYISO.

⁴ "Unforced Capacity" generally describes an amount of capacity available to the ISO based on reliability of the unit. Unforced Capacity is derived from Installed Capacity using a formula specified in the Services Tariff. The industry uses this term to better reflect the actual amount of capacity available from a generating unit.

⁵ According to section 2.17 of the Services Tariff, there are two six-month capability periods, a summer capability period (May 1 through October 31) and a winter capability period (November 1 through April 30).

its nameplate capacity,⁶ seasonally adjusted, supported by an in-period Dependable Maximum Net Capability (DMNC) test.⁷ NYISO contends that Astoria completed NYISO's automated ICAP certification form based on its nameplate capacity and its unit was erroneously certified as an ICAP Supplier.

4. NYISO states that section 5.12.1(ii) of the Services Tariff provides that to qualify as an ICAP Supplier, a generator shall, "in accordance with the ISO Procedures, perform DMNC tests and submit the results to the ISO, or provide to the ISO appropriate historical production data." NYISO states that Astoria could not provide historical production data for a preceding capability period, as permitted under the ISO Procedures, because it is a new unit and did not have such data with which to demonstrate its capability. Under the ISO Procedures, which are set out in the ICAP Manual, "Installed Capacity Suppliers, with the exception of new Resources, may use historical production data for the immediately preceding like Capability Period, no more than 12 months old, in lieu of DMNC test data."⁸ The ICAP Manual states:

New Resources may qualify as Installed Capacity Suppliers at any time during a Capability Year based on the results of an appropriate demonstration test, production data, or Special Case Resource (SCR) registration before participating as an Installed Capacity Supplier in the NYISO Installed Capacity market.⁹

⁶ "Nameplate capacity" is an industry term of art generally referring to the manufacturer's design capacity for the unit.

⁷ Based on section 4.2.2 of the NYISO's ICAP Manual, the DMNC rating for a resource is the amount of power delivered to the transmission grid. The rating should reflect a reduction in gross output of the resource for station service load. DMNCs for combined cycle stations are determined by (a) the sustained maximum net output over four consecutive hours; and (b) the average ambient and cooling system temperature experienced at the time of the transmission district's seasonal peaks for the previous four years.

⁸ Section 4.2 of NYISO's ICAP Manual.

⁹ Section 4.2.1 of NYISO's ICAP Manual.

According to NYISO, Astoria, which does not qualify as an SCR, failed to submit an appropriate demonstration test or production data. NYISO claims that, with the exception of Intermittent Power Resources, NYISO's Services Tariff and ICAP Manual do not permit the nameplate capacity of a unit to be used to qualify the unit as an ICAP Supplier.

5. NYISO contends that the informal advice cannot change or diminish the requirements of the Commission-approved Services Tariff. NYISO contends that, as the Commission has found, the filed rate "supercedes informal oral advice [from staff]".¹⁰

6. NYISO asserts that nameplate data is equivalent to neither a demonstration test nor production data, and that it is not aware of any precedent or logic supporting Astoria's position that nameplate capacity should be viewed as a form of "production data." Further, if nameplate capacity were an acceptable form of data to supply when qualifying a resource as an ICAP Supplier, the relevant sections of both the Services Tariff and the ICAP Manual would have used that term.

7. According to NYISO, adherence to the Services Tariff's requirement for production data ensures that the certification of ICAP reflects the real capability of the plant and not merely its design capability, so that the capacity rating reflects the plant's real contribution to system reliability. NYISO claims that accepting nameplate capacity for ICAP certification would expose the NYCA to the risk that capacity would not be available to meet reliability needs, if actual plant performance did not meet its designed performance.

8. NYISO states that an in-city LSE purchased Astoria's capacity in a bilateral transaction before the ICAP Spot Market auction for May. The certification process for bilateral transactions¹¹ occurs shortly before the ICAP Spot Market Auction and the quantity of capacity certified in bilateral transactions necessarily affects the auction, by

¹⁰ NYISO cites to *ARCO Oil and Gas Co.*, 22 FERC ¶ 61,293, at 61,515 (1983).

¹¹ Section 2.16 of the Services Tariff defines "bilateral transaction" as a "Transaction between two or more parties for the purchase and/or sale of Capacity, Energy, and/or Ancillary Services other than those in the ISO Administered Markets."

reducing the quantity of capacity an LSE would otherwise be required to purchase in the ICAP Spot Market Auction to meet its minimum capacity obligation.

9. NYISO claims that Astoria had a shortfall in the capacity it committed to supply. NYISO claims that such a shortfall warrants the imposition of a deficiency charge. However, NYISO contends that, in light of the mistaken information Astoria received from NYISO staff, and the availability of sufficient capacity from Supplier to prevent the occurrence of the shortfall, NYISO requests that the Commission authorize a tariff waiver to limit the deficiency charge to the market clearing price. NYISO states that market results show that if the Astoria capacity had only been certified for the amount of the plant information data, Supplier would have sold an amount of capacity equivalent to the difference in the ICAP Spot Market Auction, and at the same clearing price.

10. NYISO requests the Commission find that Astoria failed to submit the required data for capacity certification for the May 2006 ICAP Spot Market Auction and that submission of nameplate capacity is neither equivalent to, nor a reasonable substitute for, information required to be submitted under section 5.12.1 of the Services Tariff or section 4.2 of the ICAP Manual. NYISO also requests the Commission order Astoria to pay a deficiency charge, modified as discussed above, and direct the NYISO to use the deficiency charge to pay Supplier for the capacity it should have sold in the May ICAP Spot Market Auction.

III. Notice of Filings and Responsive Pleadings

11. Notice of NYISO's December 1, 2006 complaint was published in the *Federal Register*, 71 Fed. Reg. 74,507 (2006), with comments, interventions, and protests due on or before January 2, 2007. A motion for extension of time to file comments was filed by KeySpan-Ravenswood, LLC (KeySpan) on December 20, 2006 and an answer to KeySpan's motion requesting a similar extension of time to file an answer was filed by Astoria on December 21, 2006. The Commission granted these requests for extension of time.

12. Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc. (ConEd), Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation; NRG Power Marketing Inc.; Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC, Astoria Generating Company, LP; New York Municipal Power Agency; and KeySpan filed timely motions to intervene.

13. Astoria filed an answer and KeySpan filed comments to the complaint on February 1, 2007. NYISO and KeySpan filed answers to Astoria's answer on February 16, 2007. ConEd and Astoria filed answers to KeySpan's comments on February 16, 2007. KeySpan filed an answer to Astoria's February 16, 2007 answer on February 28, 2007. NYISO filed an answer to ConEd's answer on March 5, 2007, to which ConEd filed a reply on March 12, 2007.

IV. Astoria's Answer

14. Astoria presents a more detailed and somewhat conflicting version of the events at issue. Astoria contends that a conference call subsequent to the one on April 13, 2006 that was described by NYISO in its complaint, was held that same day with the same parties confirming the earlier direction that operating capacity¹² should be used to certify Astoria's ICAP. According to Astoria, these oral communications were followed up with e-mails by Astoria to NYISO confirming the direction provided by the phone calls. In a telephone communication Astoria had with NYISO following the e-mails, Astoria received confirmation that the steps listed in the e-mails were correct and that it was proceeding properly. Astoria also states that it was told by the NYISO representative that a DMNC test was not required as it would serve no purpose, but that an in period test would need to be performed during the summer capability period as proof of the amount certified.

15. Astoria states that when it had difficulty in trying to enter its capacity in the automated ICAP system due to user interface issues, NYISO staff assisted Astoria and ConEd to qualify Astoria's UCAP for sale and to register the bilateral UCAP transaction between Astoria and ConEd. Astoria further states that NYISO staff then entered Astoria's ICAP and subsequently assisted Astoria in completing its UCAP bilateral transaction with ConEd.

16. Astoria states that following Astoria's commencement of commercial operations and delivery of UCAP and energy pursuant to its Power Purchase Agreement (PPA) with ConEd, it received a call from NYISO on Monday, May 15, 2006 informing it of a change of course regarding the certification of Astoria's ICAP for the pending June

¹² Astoria contends that NYISO is incorrect when it refers to the data required of and provided by Astoria as the "nameplate capacity" of the facility. Astoria claims it was directed by NYISO to provide the Engineering, Procurement, and Construction (EPC) design guarantee its EPC contractor was required to meet as well as the nameplate capacity of the facility (operating capacity).

Monthly Auction. Astoria was instructed that it needed to submit by 5:00 pm that day the best operational data to date to qualify Astoria's ICAP for the June Monthly Auction and by 5:00 pm on Wednesday, May 17, 2006, submit any updated operational data to qualify Astoria's ICAP for the June Spot Market Auction.

17. Astoria contends that NYISO's interpretation of its tariff requirements for certifying ICAP was not provided to Astoria in an "informal, oral response." To the contrary, Astoria asserts that NYISO told it to rely on NYISO's officially designated representatives for such tariff interpretations and guidance on a number of occasions in conference calls and in e-mails. Astoria argues that these employees were not, as NYISO's complaint implies, clerical employees who happened to answer the phone at NYISO's Customer Relations Department.

18. Further, Astoria asserts that the tariff interpretation NYISO provided to it is not inconsistent with the language of the Services Tariff. Section 4.2.1 of the ICAP Manual provides for qualification of a "new resource" as an ICAP Supplier based on, among other things, "production data." Astoria claims that the term "production data," as it relates to new resources, is not defined in NYISO tariffs, manuals or other written guidance. The only interpretation of "production data," of which Astoria is aware, it states, is the interpretation NYISO itself provided to Astoria when it asked NYISO what information was required under the Services Tariff to qualify as an ICAP supplier. Astoria argues that it is reasonable and logical to interpret the term "production data" with respect to a new resource as projected capability based on operating capacity, given that NYISO fails to cite any instance in which the term "production data" was found to exclude the operating capacity data that Astoria submitted at NYISO's direction.

19. Astoria claims that NYISO cannot seek to apply and enforce a changed interpretation retroactively.¹³ Astoria asserts that, under the circumstances in this case, it was entitled to rely on NYISO's interpretation of its tariff requirements. Astoria states that in *PPL EnergyPlus, LLC v. NYISO*,¹⁴ the Commission was faced with a similar situation, in which NYISO argued that advice it provided to market participants through a newsletter was inconsistent with its tariff and could not vary the terms of a tariff. In *PPL EnergyPlus*, the interpretation that NYISO sought to distance itself from was in a publication. Likewise, Astoria claims that NYISO's interpretation provided to Astoria

¹³ Astoria cites *Southwest Gas Corp.*, 111 FERC ¶ 61,511 (2005).

¹⁴ 115 FERC ¶ 61,383 (2006) (*PPL EnergyPlus*).

was also in writing in the form of e-mail confirmations. Astoria claims that its entitlement to rely on NYISO's interpretation is even more compelling than in *PPL EnergyPlus*, because, in the present case, NYISO's interpretation was provided directly to Astoria in response to Astoria's request to NYISO, while in *PPL EnergyPlus*, NYISO's interpretation was provided in a generic document available to all market participants.

20. Astoria asserts that a refund, or deficiency charge, is inequitable given that Astoria's actions were specifically based on the direction and tariff interpretations that authorized NYISO representatives provided it. Astoria contends that the facts are strikingly similar to *Midwest ISO*¹⁵ and that the Commission should similarly deny the relief NYISO requests. In *Midwest ISO*, the Commission held that, because the market participants had relied on statements by the Midwest ISO in a Business Practices Manual, it would be unfair and inequitable to require a refund. Astoria contends that it similarly relied on a reasonable tariff interpretation NYISO provided to it and that, even if the Commission were to determine that a tariff violation had occurred, it would be inequitable to require a refund.

21. Astoria requests the Commission find that the Services Tariff does not preclude use of the data Astoria submitted for ICAP qualification and that Astoria's actions in qualifying its UCAP, as NYISO directed, were proper and in accordance with the NYISO Services Tariff. Further, Astoria contends that the complaint is without merit and requests that it be dismissed with prejudice. In the alternative, Astoria argues that, should the Commission not deny the complaint based on the foregoing substantive arguments, it should dismiss the complaint on procedural grounds. Astoria contends that NYISO admits that it has not commenced any form of alternative dispute resolution (ADR). Astoria therefore requests that the Commission dismiss the complaint until NYISO has fully complied with the requirements of 18 C.F.R. § 385.206 (2006), including all ADR and related requirements thereunder.

V. Comments of KeySpan

22. KeySpan contends that despite having made a section 206 filing, NYISO does not have the burden of proof in establishing a tariff violation in this case because the complaint asks the Commission to allow it to enforce the tariff, something it is already

¹⁵ Astoria cites *Midwest Independent Transmission System Operator, Inc.*, 117 FERC 61,113 (2006) (*Midwest ISO*).

allowed and required to enforce. Rather, the complaint is an informational filing and KeySpan recommends that the Commission treat the filing in this way and provide guidance to NYISO.

23. KeySpan asserts that Astoria is not entitled to rely on the informal and erroneous statements from a NYISO Customer Relations Department staff member in lieu of the Services Tariff requirements and that such statements cannot change the Services Tariff.¹⁶ KeySpan also asserts, among other things, that the retrospective certification by NYISO is inappropriate, given the scant data available and that NYISO received the information long after the required Services Tariff deadlines. Further, KeySpan asserts that it is troubled that ConEd failed to carefully scrutinize Astoria's qualification as an ICAP Supplier prior to self-supplying such capacity for its own use.

24. KeySpan requests, among other things, that the Commission order NYISO to recalculate the May 2006 ICAP auctions using existing bid and offer data but excluding the Astoria facility in its entirety. KeySpan also requests that the Commission order the Supplier (which was harmed) be paid with interest. KeySpan recommends that the Commission require Astoria and ConEd to implement better controls and monitoring of their market activities to prevent future tariff violations and require NYISO to provide specific details with respect to the actions it is taking to prevent recurrence of this type of error. Finally, KeySpan requests that the Commission order the NYISO to take other actions against tariff violators as deemed necessary based on the facts and circumstances, and grant other relief and remedies the Commission deems appropriate based on the facts and circumstances.

VI. ConEd's Answer

25. ConEd states that contrary to KeySpan's suggestion, a generator may be certified prior to DMNC testing based on the submission of alternative data. ConEd further states that when NYISO certified Astoria based on the production data it should have been aware that Astoria had not conducted its DMNC test.

26. ConEd avers that it is NYISO's responsibility to certify the capacity of generators in a bilateral transaction. Section 4.5 of the ICAP Manual provides that "NYISO will calculate the amount of Unforced Capacity that Resources are qualified to supply to the

¹⁶ KeySpan cites to *Arco Oil and Gas Co.*, 22 FERC ¶ 61,293 at 61,514 (1983); *Pan Eastern Exploration Co.*, 41 FERC ¶ 61,332 at 61,905 (1987).

NYCA for each Capability Period.” Thus, in order for a generator to be able to offer capacity into NYISO’s Automated ICAP Market System, either as a bilateral transaction or as a bid to sell into the demand curve spot auction, ConEd states that NYISO must have pre-approved that amount of capacity. ConEd asserts that this is precisely what happened on April 21, 2006, the date by which each LSE and generator had to have its bilateral capacity certified (i.e., approved) by the NYISO.

27. ConEd notes that not even NYISO, the independent administrator of the Services Tariff, has alleged that ConEd’s actions in bidding the Astoria UCAP in the May 2006 Auction were improper. Rather, ConEd notes that it is the role of NYISO (1) to assure that a new generating facility is certified as a new resource eligible to supply UCAP in the NYISO’s Spot Market Auctions and (2) to certify the results of those auctions.

VII. Discussion

A. Procedural Issues

28. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure (18 C.F.R. § 385.214 (2006)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

29. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We are not persuaded to accept NYISO’s and KeySpan’s February 16, 2007 answers to Astoria’s answer, Astoria’s February 16, 2007 answer to KeySpan’s comments, KeySpan’s February 28, 2007 answer to Astoria’s February 16, 2007 answer, NYISO’s March 5, 2007 answer to ConEd’s answer, or ConEd’s March 12, 2007 answer to NYISO’s March 5, 2007 answer as they do not assist us in our decisionmaking here. However, because ConEd’s answer addressed allegations that were raised for the first time in KeySpan’s comments and therefore provides additional information that will assist us in the consideration of this case, the Commission will accept ConEd’s answer.

B. Commission Determination

i. Capacity Certification

30. The Commission denies NYISO’s complaint with respect to the capacity certification and finds that NYISO has not met its burden of showing that Astoria has

violated the Services Tariff. As discussed below, we find that the relevant provisions of NYISO's Services Tariff are ambiguous and that Astoria's interpretation of the ICAP Supplier requirements is reasonable and not inconsistent with the Services Tariff. We further find that Astoria's interpretation is consistent with the interpretation that NYISO Staff provided Astoria to clarify the ambiguity present in its Services Tariff and ICAP Manual.

31. First, we find that the Services Tariff is ambiguous as to the procedures new resources, such as Astoria, must follow in order to become an ICAP Supplier. The Services Tariff states that, in order to qualify as an ICAP Supplier, generators must, "in accordance with the ISO Procedures, perform DMNC tests and submit the results to the ISO, or provide to the ISO appropriate historical production data." The Services Tariff contains no separate provision concerning the requirements for new as opposed to existing resources. Moreover, new generators such as the Astoria facility cannot provide historical production data (as NYISO recognizes in its complaint) or DMNC test results because they have not been operational long enough to produce such data. Thus, the Services Tariff is essentially silent on the issue of what type of information new resources must provide in order to qualify as ICAP Suppliers.

32. In these circumstances, we next turn to the ICAP Manual.¹⁷ The ICAP Manual states that, "Installed Capacity Suppliers, *with the exception of new Resources*, may use historical production data for the immediately preceding like Capability Period, no more than 12 months old, in lieu of DMNC test data."¹⁸ Section 4.2.1 of the ICAP Manual then addresses the data a new resource must submit, stating:

New Resources may qualify as Installed Capacity Suppliers at any time during a Capability Year based on the results of an appropriate demonstration test, production data, or Special Case Resource (SCR) registration before participating as an Installed Capacity Supplier in the NYISO Installed Capacity market.

¹⁷ Unlike the Services Tariff, the ICAP Manual is not a filed rate schedule. Accordingly, the ICAP Manual cannot override the terms of the tariff, and we have no statutory obligation to enforce its terms. However, in this case, where the Services Tariff fails to address how a new resource may qualify as an ICAP supplier, we look to the ICAP Manual to resolve this issue.

¹⁸ ICAP Manual at § 4.2 (emphasis added).

Of central importance to this proceeding, is the interpretation of the phrase “production data” in section 4.2.1 of the ICAP Manual. Both Astoria and NYISO focus their contentions on this phrase. As Astoria points out and NYISO concedes, neither the ICAP Manual nor the Services Tariff defines the term “production data.” Although NYISO states that it is not aware of any instance in which “nameplate capacity” has been determined to be the equivalent of “production data,” neither the NYISO Services Tariff nor the ICAP Manual precludes the use of the data submitted by Astoria for ICAP qualification.

33. Section 4.2 of the ICAP Manual appears to recognize the inability of new resources to submit actual production data from a past period, since it expressly excepts new resources from the authorization to submit “historical production data.” However, section 4.2.1 nevertheless permits new resources to submit “production data.” Since new resources cannot submit actual production data, it appears reasonable to interpret the phrase “production data” as used in section 4.2.1 to include projected production capability based on nameplate capacity and EPC design guarantee data, such as the type of data Astoria submitted to certify its ICAP.

34. Because the Services Tariff is “reasonably susceptible [to] different constructions or interpretations,”¹⁹ we find that extrinsic evidence of interpretation or intent may also be relied upon to assist in interpreting the Services Tariff and ICAP Manual. In *Nicole Gas Production Ltd.*,²⁰ the Commission determined that:

[w]hen presented with a dispute concerning the interpretation of a tariff or contract, the Commission looks first to the tariff or contract itself, and only if it cannot discern the meaning of the contract or tariff from the language of the contract or tariff, will it look to extrinsic evidence. Extrinsic evidence (which may include the parties’ course of performance) is admissible to ascertain the intent of the parties when the intent has been imperfectly expressed in ambiguous contract language, but is not admissible either to contradict or alter express terms.

¹⁹ 96 FERC ¶ 61,185 (quoting, *Lee v. Flintkote Co.*, 593 F.2d 1275, 1282 (D.C. Cir. 1979)).

²⁰ 105 FERC ¶ 61,371 (2003).

35. Both Astoria and NYISO agree that the NYISO representative involved in the April 13th phone call with Astoria interpreted NYISO's Services Tariff as allowing ICAP to be based on unit design capacity or nameplate capacity, seasonally adjusted. According to the affidavit of an Astoria representative, the same NYISO representative informed Astoria that it should not perform a DMNC test since, if one were performed, it would serve no purpose. Moreover, in e-mail communications from Astoria to NYISO confirming Astoria's use of nameplate capacity, NYISO did not provide a response objecting to the use of nameplate capacity as production data. Additionally, the affiant states that NYISO "specifically entered Astoria's Operating Capacity into its automated ICAP system and certified Astoria's ICAP,"²¹ a statement that NYISO does not dispute. We find that these facts buttress our interpretation of the phrase "production data" in section 4.2.1 as permitting the use of nameplate capacity.

36. While we recognize that, under our precedent, informal communications between the parties, such as phone calls and e-mails, do not take precedence over the language of the filed tariffs,²² we find that, given the ambiguous tariff language, Astoria, a new generator, reasonably relied on the interpretations and assistance the administrator of the tariff offered it. We note that, had the Services Tariff been clear and unambiguous about the ICAP requirements at issue in this proceeding, informal communications (whether written or oral) by NYISO's representatives would be immaterial to resolving the issues. Indeed, it was not until approximately one month after Astoria qualified for entrance into the May Monthly Auction, that NYISO informed Astoria that different operational data would need to be submitted to qualify Astoria's ICAP for the June Monthly Auction, thus making such reasonable reliance detrimental.

37. Moreover, we note that NYISO's and KeySpan's interpretations of the Services Tariff would delay the installation of new generators in a capacity-constrained area, inhibit business and financing decisions (as parties could not count on the administrator of the Services Tariff for guidance), and possibly require re-settlement of the markets based on the ambiguity of the tariff. These results contravene the Commission's intent to encourage a robust market in New York which operates within the parameters of the NYISO Services Tariff.

²¹ McCall Aff. at P 17.

²² See *Arco Oil and Gas Co.*, 22 FERC ¶ 61,293, at 61,515.

38. Further, no generator can be guaranteed to meet its design performance at all times. However, good utility practice requires that new plants meet minimum standards while existing plants need to be maintained to keep their standards. If the generators do not meet their standards, there are remedial actions – both legal and financial – which the LSE and/or the ISO can take against the manufacturer or the operator of the facility.

39. For all the reasons discussed above, the Commission finds that Astoria complied with NYISO's Services Tariff and that it was properly certified as an ICAP Supplier for the May 2006 Auction.

ii. Modified Deficiency Charge

40. NYISO also claims that based on plant information records for April, Astoria had a shortfall in the capacity it committed to supply in May. NYISO therefore requests the Commission order Astoria to pay a deficiency charge to Supplier for the capacity it should have provided in the May 2006 ICAP Spot Market Auction. However, because of the mistaken information NYISO provided Astoria, NYISO recommends waiver of the Services Tariff to permit modification of the deficiency charge. Specifically, NYISO recommends that the deficiency charge equal the market clearing price rather than one and one-half times the market clearing price, as specified in section 5.14.2 of the Services Tariff.

41. KeySpan objects to NYISO's request for waiver of the Services Tariff to permit modification of the deficiency charge. KeySpan's objection to the waiver request stems from its belief that "NYISO should not have attempted to negotiate a compromise . . . us[ing] another market participant's money as the currency for the compromise position."²³ Accordingly, KeySpan requests that NYISO's waiver request not be granted and that Astoria be required to pay the capacity supplier that was harmed, with interest.²⁴

42. Astoria does not dispute NYISO's claim²⁵ that there was a shortfall in the capacity it committed to supply in May. Any shortfall in necessary capacity, even if it was

²³ KeySpan Comments at n.6.

²⁴ *Id.* at 26.

²⁵ NYISO Complaint at 9.

discovered after the fact, warrants the imposition of a deficiency charge as specified in section 5.14.2 of the Services Tariff, which states:

If an Installed Capacity Supplier is found, at any point during a Capability Period, to have had a shortfall for that Capability Period, e.g., when the amount of Unforced Capacity that it supplies is found to be less than the amount it was committed to supply, the Installed Capacity Supplier shall be retrospectively liable to pay the ISO the market deficiency charge equal to one and one-half times the applicable Market-Clearing Price of Unforced Capacity determined in the ICAP Spot Market Auction for each month the Installed Capacity Supplier is deemed to have a shortfall.

43. The Commission finds that to the extent that Astoria did not provide the necessary amount of UCAP for the month of May 2006, Astoria is required to pay to NYISO the deficiency charge. NYISO uses the monies collected from the deficiency charge to pay for the capacity it procured due to the shortfall. Thus, the generator providing the capacity due to the shortfall is fully reimbursed. Then, pursuant to the terms of section 5.14.3 of the Services Tariff, the remaining monies collected from the deficiency charge will be rebated, with interest, among all LSEs in proportion to their share of minimum ICAP requirements.

44. Finally, the Commission denies KeySpan's request that we direct NYISO to recalculate the May 2006 ICAP auction given our findings that there is no violation of NYISO's Services Tariff regarding Astoria's ICAP certification and since Astoria will be required to pay a deficiency charge to the extent it had a shortfall in May 2006. We also reject KeySpan's requests to impose additional administrative burdens on Astoria, ConEd, and NYISO and its other requests for relief.

The Commission orders:

(A) NYISO's complaint with respect to ICAP certification is hereby denied, as discussed in the body of this order.

(B) NYISO's request for a tariff waiver to limit the deficiency charge to the market clearing price is denied, as discussed in the body of this order.

(C) Astoria's request for dismissal of SCS Energy LLC as a party to the complaint is granted.

By the Commission. Commissioner Moeller concurring with a separate statement attached.

(S E A L)

Philis J. Posey.
Acting Secretary,

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket No. EL07-18-000

v.

Astoria Energy LLC

(Issued March 15, 2007)

MOELLER, Commissioner concurring:

Upon reviewing the record, I concur with the order's determination even though it does not reflect my opinion that NYISO and ConEd also bear some responsibility for failing to recognize that Astoria would be unable to satisfy its self-certified ICAP requirement for May 2006.

Setting aside today's determination that NYISO's tariff does not clearly specify how a new generator can become an ICAP supplier, or the evidence that NYISO's staff provided Astoria with less-than-accurate technical advice, the key fact is that Astoria fell short in honoring its contractual commitment to supply a specified amount of unforced capacity to its load-serving entity (ConEd). While I commend Astoria for constructing a new generating facility in New York's capacity constrained and transmission congested in-city market, if Astoria is to operate effectively, it must be knowledgeable of NYISO's Tariff, manual, and regulations. Unfamiliarity or ignorance of the rules is not a viable defense in this complex marketplace. Moreover, Astoria should have exercised better judgment than to base its commitment on the generating unit's full design capacity. Accordingly, for these reasons, I concur with the order's determination that Astoria be subject to a deficiency charge (as described in Section 5.14.2 of NYISO's Tariff) for failing to supply the required amount of unforced capacity.

However, while Astoria will bear the financial cost for its capacity shortfall, the actions (or lack thereof) by NYISO and ConEd should not go unnoticed, as both entities were in a position to have prevented this result. Being sophisticated parties, both NYISO and ConEd knew or should have known that Astoria was a new supplier and participant in the NYISO market, and that Astoria was seeking qualification for its capacity (as well as selling its capacity) for the first time. Simply put, Astoria's inexperience with the process should have warranted additional care and attention.

As to NYISO, there is no dispute that NYISO was notified on numerous occasions by Astoria that it was planning to enter its ICAP amount based on unit design, yet NYISO staff did not attempt to dissuade Astoria from taking such a risky and unconventional step. Instead, NYISO provided unreliable information and when Astoria experienced trouble with completing its ICAP certification, NYISO apparently assisted Astoria by entering the unit's nameplate capacity into the grid's automated ICAP system.

With regard to ConEd, in its capacity as Astoria's contracting load-serving entity (in addition to being the transmission owner, operator, and provider), it should have paid closer attention to Astoria's ability to provide the contracted capacity. Astoria's power purchase agreement with ConEd is not for an insignificant amount, and to assume that ConEd was not aware that Astoria's new facility could not produce the contracted capacity is hard to fathom. ConEd should have been generally aware of the status of Astoria's limited operational capability, and should have made these concerns known.

Ultimately, it is my opinion that Astoria, NYISO, and ConEd all share varying degrees of culpability in the events leading up to Astoria's inability to meet its ICAP requirement. My expectation is that the parties will institute the necessary controls and make the appropriate changes to avoid encountering a similar problem in the future.

Philip D. Moeller
Commissioner