

122 FERC ¶ 61,261  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Black Oak Energy, LLC

Docket No. EL07-95-000

v.

New York Independent System Operator, Inc.

ORDER ON COMPLAINT

(Issued March 21, 2008)

1. On September 7, 2007, Black Oak Energy, LLC (Black Oak) filed a complaint against the New York Independent System Operator, Inc. (NYISO) under sections 206 and 306 of the Federal Power Act (FPA), alleging that NYISO failed to properly administer its energy markets and violated its tariff on three occasions in 2005, which resulted in financial losses to Black Oak and an inappropriate penalty (Complaint). For the reasons discussed below, the Commission denies the Complaint.

**I. Background**

2. Black Oak states that it is a power marketing firm that engages in the trading of energy in NYISO energy markets, making purchases and sales of energy in NYISO Day-Ahead and real-time markets, including both imports and exports of physical power to and from the New York Control Area (NYCA).

3. NYISO states that it schedules and settles transactions for the NYCA, including external transactions (export and import transactions), in response to bids to purchase or offers to sell energy in the Day-Ahead or real-time market.

**II. Summary of the Complaint**

4. In its Complaint, Black Oak alleges that on April 4, 2005, and October 30, 2005, NYISO, in violation of its tariff, replaced the results of the competitive real-time energy market at two proxy buses representing the NYISO-PJM interface and the NYISO-ISO New England interface with prices of its own creation. Black Oak asserts that NYISO's tariff provides special rules for settling imbalances caused by curtailment of exports and imports that NYISO violated. In these instances, Black Oak asserts that, rather than

using the + or -\$999.70 real-time price generated by NYISO's Real Time Commitment (RTC) program that the tariff requires for settlement of Black Oak's curtailed external (import or export) transactions on those dates, NYISO replaced them with prices of its own creation and failed to follow tariff procedures for the correction of prices. Black Oak also asserts that, for the same reason, NYISO improperly priced and failed to give effect to a "contingency bid" for an export that flowed on April 4, 2005. Finally, Black Oak alleges that NYISO acted improperly with respect to a Black Oak import of power from ISO-New England on April 17, 2005. Black Oak states that NYISO improperly curtailed the transaction after failing to notify Black Oak of a typographical error on its transaction's E-Tag. Black Oak also contends that NYISO unjustly issued a market gaming penalty of \$12,000 for that typographical error.

5. Black Oak states that it does not seek tariff changes but requests that NYISO be directed to restore real-time energy market prices at the foregoing two external proxy buses on the days in question, resettle all Day-Ahead market transactions against the actual real-time market results, issue refunds with interest to Black Oak and all other affected parties, and dismiss the penalty that was imposed on Black Oak. Black Oak states that its losses due to NYISO's improper actions total \$687,470 and that NYISO should be directed to pay Black Oak this amount plus accrued interest.

### **III. Notice of Filing and Responsive Pleadings**

6. Notice of Black Oak's Complaint was published in the *Federal Register*, 72 Fed. Reg. 52,871 (2007), with interventions and protests due on or before September 27, 2007. On September 20, 2007, in response to a motion for extension of time by NYISO, the due date for responses was extended to October 11, 2007.

7. Constellation Energy Group, Incorporated and DC Energy, LLC filed timely motions to intervene. New York Transmission Owners<sup>1</sup> filed a timely motion to intervene and comments reserving the right to file a supplemental pleading. PJM Interconnection, L.L.C. filed a motion to intervene out of time. On October 11, 2007, NYISO filed an answer to the Complaint, in both public redacted form and non-public unredacted form, requesting denial of the Complaint. On October 29, 2007, Black Oak filed an answer to NYISO's answer. On November 1, 2007, and November 2, 2007, Black Oak filed additional information including affidavits. On November 13, 2007, NYISO filed a response to Black Oak's October 29, 2007 answer. On November 28, 2007, Black Oak filed an answer to NYISO's November 13, 2007 response.

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<sup>1</sup> New York Transmission Owners refers to Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation, individually and collectively.

#### **IV. Discussion**

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214(d) (2007), the Commission will grant PJM's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Black Oak's answers and NYISO's response because they have provided information that assisted us in our decision-making process.

9. As discussed below, we deny the Complaint. Black Oak failed to support its claims and has not shown that NYISO acted inappropriately to correct pricing and scheduling errors that occurred on the three days in controversy. Although the parties raised and debated an array of complex issues throughout the course of their pleadings, as summarized below,<sup>2</sup> the resolution of the issues of the case turns on two essential findings: (1) on both October 30 and April 4, 2005,<sup>3</sup> for various separate reasons, real-time prices generated by NYISO for purposes of settlement of transactions that did not flow as scheduled were in error and had to be corrected and, (2) on April 17, 2005, Black Oak failed to correct its scheduling error and, therefore, its transaction was appropriately denied and subject to a penalty. Our detailed discussion of these issues follows.

##### **A. October 30, 2005 Transactions**

##### **1. Details of the Complaint**

10. Black Oak states that it had three external transactions scheduled in the Day-Ahead market for October 30, 2005, that were adversely affected by NYISO's replacement of prices: two 150 MW imports from PJM into NYISO, and one 200 MW export from NYISO to ISO New England. Black Oak states that NYISO should have settled these transactions at real-time prices, but arbitrarily replaced the results of the

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<sup>2</sup> Many of the arguments in the pleadings raised issues that either fell by the wayside throughout the course of the pleadings or the resolution of which would not alter our disposition of the Complaint. Accordingly, our discussion only focuses on the finite set of key issues addressed below. This fact notwithstanding, we have presented a brief summary of all the arguments in each pleading to ensure a full understanding of the relevant facts and issues that we address herein.

<sup>3</sup> As discussed below, we also find that NYISO correctly settled the "contingency bid" 50 MW export on April 4, 2005, that flowed.

real-time market on that day with Day-Ahead market prices or other prices of unknown origin that resulted in financial losses to Black Oak of \$171,579.20.

11. Specifically, regarding the two 150 MW Day-Ahead imports from PJM, Black Oak states that they were curtailed on October 30, 2005, in real-time to resolve NYISO's reliability needs, and as such were forced curtailments that should have resulted in the transactions settling at the real-time price of  $-\$999.70/\text{MW}$ , for a total payment to Black Oak of  $\$320,091$ . That is, due to the imbalance caused by the curtailment of Black Oak's imports at the interface, NYISO sold the power to Black Oak, and Black Oak claims that the price for the power it purchased from NYISO should be the negative  $\$999.70$  real-time price, resulting in a payment by NYISO to Black Oak, rather than a payment to NYISO at a corrected price as claimed by NYISO.

12. Black Oak also states that it voluntarily curtailed 40 MW of its exports from NYISO to ISO New England and scheduled a 100 MW Hour-Ahead market import from ISO New England into NYISO when NYISO's price signals were showing the greatest need for additional imports from ISO New England. Black Oak contends that it should have been compensated for responding to these real-time price signals.

13. Black Oak claims that the tariff provides that if the interface is "binding" (i.e., too much power is scheduled to flow across the interface) and an export or import is curtailed, the Day-Ahead price automatically is changed to a  $\pm \$999.70$  real-time price<sup>4</sup> which, it asserts, becomes the market clearing price at which the curtailed transactions are settled. Black Oak cites a number of NYISO Technical Bulletins and provisions of the NYISO Tariff in support of its claim. For example, Black Oak states that NYISO's Technical Bulletin 123 provides that when an external transaction is curtailed by NYISO in real-time because the interface is binding, the settlement price automatically defaults to the  $\text{RTC}_{15}$  price, which in this case was  $-\$999.70$ .<sup>5</sup> Black Oak also asserts that NYISO's tariff provides that when the external proxy Bus interface is binding, NYISO is required to use the results of its RTC to calculate the real-time prices for settlement of all external transactions.<sup>6</sup> Therefore, according to Black Oak, when NYISO curtailed Black Oak's two 150 MW imports from PJM, the tariff required that those transactions settle at the -

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<sup>4</sup> Black Oak cites NYISO's Technical Bulletin 040 which provides that external transactions (exports and imports) scheduled in the Day-Ahead market will have priority over other transactions submitted in the real-time market through automatic adjustment of the Day-Ahead bid prices for these transactions to a  $-\$999.70$  real-time price for imports and  $+\$999.70/\text{MW}$  real-time price for exports. Black Oak Complaint, Appendix D.

<sup>5</sup> Black Oak Complaint, Appendix D. The  $\text{RTC}_{15}$  estimates real-time prices every 15 minutes between the time of the RTC and real-time.

<sup>6</sup> Black Oak Complaint at 19 (citing Attachment B, section E and section 4.4.2.E of its Market Services Tariff).

\$999.70/MW RTC<sub>15</sub> price and no after-the-fact modification to real-time prices by NYISO could alter this result. Black Oak adds that NYISO's decision not to compensate participants when their transactions are curtailed to solve real-time reliability problems both undermines the reliability of the New York system and denies Black Oak the compensation it is entitled to receive under the tariff.

14. Black Oak contends that NYISO has refused to provide a tariff justification for its decision to change prices but, even if NYISO were to argue that it was merely attempting to correct real-time prices, it failed to follow the procedures dictated by the tariff for making such changes. The NYISO tariff in effect at the time, according to Black Oak, specified only two narrow circumstances in which NYISO can correct real-time market results and modify real-time energy prices: a market implementation error (a flaw in the design or implementation of software that results in Locational Based Marginal Prices (LBMPs) that do not accurately reflect the application of market rules) or an emergency system condition (systematic equipment malfunction that prevents the ISO from operating the ISO-administered markets in accordance with market rules, or widespread electric transmission or generation equipment outages that prevent the ISO from dispatching the system in accordance with the market rules).<sup>7</sup> Black Oak asserts that neither of these circumstances occurred here. Black Oak argues that the Commission has previously ruled that NYISO is only permitted to replace prices in a very narrow set of circumstances, which it asserts did not occur here, citing *H.Q. Energy Services v. NYISO*, *PSEG Energy Resources v. FERC*;<sup>8</sup> and *NRG Power Marketing v. NYISO*.<sup>9</sup>

15. Moreover, according to Black Oak, NYISO failed to follow the Commission's established process for changing real-time prices, which requires consultation and cooperation with market participants and jurisdictional agencies. According to Black Oak, NYISO's tariff requires it to post notice as soon as reasonably practicable that it is considering correcting prices in a given hour and, to the extent possible, do so prior to submittal of bids.<sup>10</sup> Black Oak states that on October 30, 2005, NYISO replaced real-time prices in eight consecutive hours, but never posted notice on its Open Access Same-Time Information System (OASIS) site prior to any hour that it was considering such

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<sup>7</sup> Black Oak Complaint at 23-24 and Appendix B, citing *N. Y. Indep. Sys. Operator, Inc.*, 100 FERC ¶ 61,081 (2002).

<sup>8</sup> 360 F.3d 200 (D.C. Cir. 2004) (*HQ Energy*), order on remand, 110 FERC ¶ 61,243 (2005) (*HQ Energy on Remand*).

<sup>9</sup> 91 FERC ¶ 61,346 (2000) (*NRG*).

<sup>10</sup> Citing Attachment E, section C.2, NYISO Market Services Tariff, Attachment E, § C.2, First Revised Sheet No. 444-5. Black Oak cites to the version of Attachment E in effect in 2005.

action. Further, Black Oak contends that NYISO's price correction logs show the market prices in question were verified as "correct."

16. Black Oak also asserts that NYISO's tariff, attachment E as in effect at the relevant time, requires NYISO to recalculate prices in a manner that reflects as closely as possible the prices that would have resulted but for the market issue. Black Oak contends that substitution of the Day-Ahead prices, which it claims NYISO did with respect to these transactions, does not accomplish this. Black Oak further asserts that NYISO has reconstructed real-time prices on other occasions without substituting Day-Ahead prices, pointing to an instance on November 1, 2007.

## 2. NYISO's October 11, 2007 Answer

17. In its answer, NYISO responds that Black Oak's Complaint is completely without merit, and its claims were previously addressed by NYISO, which found no tariff or other basis to support them. Prior to addressing the specifics of the Complaint, NYISO provides an overview of the scheduling and settlement of transactions in its energy markets. NYISO states that its software evaluates the bids and offers, determines which transactions to schedule, and calculates the Day-Ahead market clearing price based on the least-costly mix of resources. NYISO adds that participants with scheduled transactions then enter into a financial settlement with NYISO, and those participants who do not actually produce or consume the contracted amount of megawatts in the relevant hour will automatically purchase or sell back "balancing" energy in NYISO's real-time market at the real-time market clearing price.

18. Turning to the specific transactions at issue, NYISO responds that the initial real-time prices calculated by its RTC for the relevant hours on October 30, 2005, were not valid as they resulted from erroneous inputs from software that malfunctioned as a result of the switchover from daylight saving time. NYISO states that because the load forecasting software did not provide accurate data inputs regarding demand to be met for the affected hours on October 30, 2005, the RTC was unable to produce market clearing prices that were based on an accurate evaluation of the least-costly mix of suppliers necessary to meet the actual demand for energy for these hours as required by the tariff. Thus, NYISO concludes, the posted prices were inconsistent with NYISO's tariff and did not reflect NYISO's filed rate. NYISO states that it has a duty under its tariff and the filed rate doctrine to correct the erroneous real-time market prices, and that it used the best available data to do so.<sup>11</sup> NYISO distinguishes this duty from the special authority previously granted NYISO under its former Temporary Extraordinary Procedures (TEP), to take "emergency corrective actions" relied on by Black Oak.<sup>12</sup> NYISO asserts that it

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<sup>11</sup> NYISO cites *NRG*, 91 FERC ¶ 61,346.

<sup>12</sup> NYISO notes that the TEP have been removed from its tariff, effective July 15, 2006. See *N.Y. Indep. Sys. Operator, Inc.*, 116 FERC ¶ 61,037 (2006).

does not require any special tariff authority to correct prices that result from miscalculation errors and which are inconsistent with its market rules, citing *NRG*.

19. NYISO defends its decision to use the Day-Ahead market-clearing prices to replace the incorrect real-time prices its software produced, stating that these Day-Ahead prices were the best available data for the affected hours, and the corrections were made statewide for all affected hours. In addition, NYISO notes that using the Day-Ahead prices eliminates out-of-pocket costs associated with balancing the Day-Ahead transactions that did not flow in the real-time market because the Day-Ahead prices and the corrected real-time market prices for the relevant hours were the same.

20. NYISO asserts that Black Oak's claim is based upon a misunderstanding of NYISO procedures. NYISO agrees with Black Oak that external transactions scheduled in the Day-Ahead market are given a priority status in the real-time market and will be one of the last transactions curtailed if curtailment is necessary. NYISO states that for this reason, it modifies the bids for these external transactions in the real-time market to +/- \$999.70 to ensure that these transactions are given priority when NYISO determines the real-time market schedule. However, NYISO states that this modified bid does not represent the real-time market price which must be determined by an economic evaluation of the least costly mix of resources necessary to meet demand for energy in the real-time market.

21. Additionally, NYISO states that Black Oak's alleged losses for October 30, 2005, with limited exceptions, resulted from Black Oak's failure to schedule matching transactions in the relevant, adjoining control areas. Accordingly, NYISO states that, even absent the load forecasting software problem, these transactions would have failed NYISO's checkout process and would not have flowed.

### **3. Black Oak's October 29, 2007 Answer**

22. In its October 29, 2007 answer to NYISO's answer, regarding the October 30, 2005 transactions, Black Oak asserts that it properly scheduled each of its transactions, and appends a letter from PJM personnel attesting to that fact, and transcripts of telephone conversations between PJM and NYISO dispatch personnel confirming that the transactions were properly scheduled and that NYISO dispatchers decided to curtail all import and export transactions between NYISO and PJM on the morning of October 30, 2005, due to operational concerns unrelated to Black Oak.<sup>13</sup> Black Oak states that ISO New England also confirms that the October 30, 2005 Black Oak transactions in question were properly scheduled in the ISO-New England energy markets. Black Oak contends that its October 30, 2005 transactions did not flow in real-time solely because of

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<sup>13</sup> Black Oak October 29, 2007 Answer at Attachment A.

NYISO's decision to curtail them and, thus, NYISO is required by its tariff to compensate Black Oak.

23. Black Oak also asserts that NYISO's argument that it is not bound by the real-time prices generated on October 30, 2005, is not valid and reiterates its argument that NYISO's tariff requires that if NYISO curtails a Day-Ahead scheduled transaction in real-time, the market participant is required to "buy back" the power in real-time at real-time prices and the real-time prices in this instance were -\$999.70 at the PJM – NYISO interface and +\$999.70 at the NYISO – ISO interface.

24. In response to NYISO's argument that its failure to properly forecast load on October 30, 2005, constitutes a miscalculation or computational error that justifies ignoring real-time market results, Black Oak asserts that load forecasting errors and resultant dispatch decisions are fundamentally no different from any other unexpected change in supply or demand that results in increased real-time energy prices.<sup>14</sup> Black Oak distinguishes the facts of this case from those of *NRG* where NYISO identified the reason why the software failed to compute prices properly and the specific provision of the tariff where the error occurred and then recomputed prices as directed by the tariff provisions. Black Oak asserts that, moreover, in *NRG*, unlike here, NYISO identified why faulty software failed to compute prices properly and its computer error was completely limited to the calculation of prices, and had no impact on physical system conditions, i.e., the generators that set the erroneously high price were never dispatched to a level corresponding to that price. In contrast, according to Black Oak, on October 30, 2005, the real-time price computations made by NYISO resulted in the dispatch of generators, curtailment of physical flows of power, and financially binding bids and offers, and NYISO is not free to disregard these events. Black Oak also asserts that the resettlement of prices at external interfaces does not affect in any way internal market prices and, thus, NYISO is able to re-settle these prices without impacting real-time prices throughout the whole of New York State.

25. Finally, Black Oak states that, contrary to NYISO's claims, external proxy buses do settle at the +/--\$999.70 "priority" price when the proxy bus is constrained and an import or export transaction becomes the marginal transaction. Black Oak offers price data from the NYISO website in support of its assertion that prices have cleared at the +/--\$999.70 price eight times in the past six months alone. Further, Black Oak reiterates its claims that NYISO's Technical Bulletins support Black Oak's position.

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<sup>14</sup> *Citing Allete, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 119 FERC ¶ 61,142 (2007) (*Allete*) (finding that abnormally high prices resulting from a variety of modeling assumptions were valid, even though there were flaws in the underlying model).

#### **4. NYISO's November 13, 2007 Answer**

26. In its November 13, 2007 answer, NYISO disagrees with Black Oak's claim that the load-forecasting software was functioning properly and reasserts its claim that the October 30, 2005 event was a substantial failure of its load forecasting software resulting in load forecasts that were drastically different than the actual energy demand and, as a consequence, the resulting initial price calculations were grossly erroneous. NYISO states that, for one of the hours at issue, the load forecasting software estimated load at an amount approximately 8,000 MW more than the highest peak demand for energy ever recorded in New York State and approximately 30,000 MW more than the actual load ultimately consumed in that hour. NYISO adds that this failure had significant consequences for the proper functioning of the New York energy markets statewide. NYISO also asserts that it used the best information available to recalculate real-time prices and reiterates its argument that Black Oak has misstated how the tariff procedures apply.

27. NYISO further responds that PJM and ISO-New England, not NYISO, curtailed and/or reduced Black Oak's October 30, 2007 transactions and that this is what NYISO meant when it said in its initial filing that the transactions were not properly scheduled. NYISO states that, for one reason or another, PJM and ISO New England reported to NYISO that Black Oak's Day-Ahead transactions did not flow in real-time, and for that reason they were settled against real-time prices.

#### **5. Black Oak's November 28, 2007 Answer**

28. Black Oak contests NYISO's claim that Black Oak's transactions on October 30, 2005, were not curtailed at NYISO's request and argues that Black Oak is entitled to receive the real-time price for any properly scheduled transaction that is later curtailed, regardless of the reason for curtailment.<sup>15</sup>

29. Black Oak further states that NYISO's claim that it can correct prices resulting from a software flaw is in direct contradiction to the provisions of the tariff; that price changes resulting from software flaws are treated differently under NYISO's tariff than price changes resulting from other causes. Black Oak asserts that NYISO's authority to change prices resulting from a software flaw lies exclusively in Attachment E of NYISO's tariff, and that NYISO failed to follow any of the procedural or substantive requirements, i.e., NYISO failed to: (1) notify market participants of a price change in a timely manner; (2) post the proposed correction on its website prior to changing prices; (3) notify FERC or Stakeholders of the nature of the Market Implementation Error; and (4) consult with Market Participants in the reconstruction of prices. Black Oak further states that NYISO did not choose to invoke the provisions of Attachment E to correct

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<sup>15</sup> Citing NYISO Services Tariff § 4.

prices resulting from a software error, and as such, NYISO has no further legal basis by which it can change real-time price results.

30. Finally, Black Oak states that it did in fact properly schedule all transactions on October 30, 2005, contrary to NYISO's assertion.

## 6. Commission Determination

31. In a proceeding under FPA section 206, the burden of proof to show that any charge or practice is unjust or unreasonable is on the complainant.<sup>16</sup> Thus, the preliminary question before the Commission is whether Black Oak has demonstrated that NYISO failed to properly administer its energy markets on the dates in question by subsequently correcting the real-time prices used for settlement of Black Oak's transactions. For the reasons discussed below, with regard to the October 30, 2005 transactions, the Commission finds that Black Oak has not demonstrated that NYISO violated its tariff or acted unreasonably.

32. The first issue is whether, and if so under what authority, NYISO was authorized to act to correct prices. NYISO, as an administrator of the energy markets, facilitates the sale of energy by calculating market clearing energy prices, and it is obligated to calculate those prices in accordance with the market rules. NYISO's tariff requires it to calculate schedules and prices based on the least-costly mix of available resources necessary to meet the demand for energy.<sup>17</sup> The Commission has held that, consistent with the filed rate doctrine, when the energy market clearing price is erroneous, the ISO has the authority, and is required, to correct all prices that do not reflect operation of the ISO market rules (which are the filed rate).<sup>18</sup>

33. Black Oak relies on the fact that, at the time in question, NYISO's tariff contained Attachment E providing for temporary emergency procedures (TEP) that authorized the correction of prices attributable to market implementation errors or emergency system conditions.<sup>19</sup> Attachment E defined market implementation error as "a flaw in the design or implementation of software that results in LBMPs that do not accurately reflect the

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<sup>16</sup> 16 USC § 824e (2000).

<sup>17</sup> See NYISO Market Services Tariff, § 4.4.2A., Fourth Revised Sheet No. 97.00.

<sup>18</sup> *ISO New England, Inc.*, 90 FERC ¶ 61,141, at 61,425 (2000); *NRG*, 91 FERC ¶ 61,346 at 62,166.

<sup>19</sup> The Commission accepted tariff revisions eliminating the NYISO's TEP and replacing them with revised price correction procedures, effective July 15, 2006. *N.Y. Indep. Sys. Operator, Inc.*, 116 FERC ¶ 61,037 (2006).

application of market rules.”<sup>20</sup> Black Oak argues that NYISO was, therefore, limited to only those two circumstances to correct prices, and neither circumstance occurred on the day in question.

34. We find that NYISO was not restricted to correct prices under the limited authority of the TEP of its tariff and had general authority under the filed rate doctrine, as applied in *NRG*, to correct the erroneous prices that its load forecasting software produced on October 30, 2005. In an order granting extension of the TEP issued October 25, 2001,<sup>21</sup> the Commission explained:

Originally, the TEP were implemented to address market design flaws and transitional abnormalities encountered during the first 90 days of NYISO’s operations. Under the TEP, a market design flaw is defined as a market structure, design, or implementation flaw that would result in market outcomes that would not be produced in a competitive market.

35. Although calculation errors due to incorrect input or software errors could produce the same flawed prices as could be produced by a market design flaw, the Commission went on to explain that NYISO did not need to rely on the TEP to correct such calculation errors:

In a majority of instances, the TEP were invoked by NYISO to identify and adjust posted prices that were incorrect due to data input or software errors. In the June 30, 2000 order acting on the complaint by NRG Power Marketing, Inc., the Commission held that recalculation of incorrectly posted prices does not require special authority under the TEP because NYISO is permitted to correct prices that violate the filed rate. [footnote omitted] Therefore, we believe it is not necessary to extend NYISO’s TEP authority in order to facilitate correction of prices calculated on the basis of computational errors. Under the filed rate doctrine, NYISO already has the authority, and is required, to take corrective actions in a timely manner in order to ensure prices consistent with its Commission-approved tariff.<sup>22</sup>

36. In the instant case, for reasons discussed below, we find that the prices generated on October 30, 2005, were the result of such “data input or software errors.” Accordingly, we find that NYISO did not have to comply with the TEP and was

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<sup>20</sup> *Id.*

<sup>21</sup> *N.Y. Indep. Sys. Operator, Inc.*, 97 FERC ¶ 61,095, at 61,497 (2001).

<sup>22</sup> *Id.*

authorized to correct prices on October 30, 2005, pursuant to the filed rate doctrine, consistent with *NRG*.

37. NYISO and Black Oak's next disagreement is with respect to whether the October 30, 2005 real-time prices were erroneous. NYISO states that its initial October 30, 2005 prices calculated by the RTC resulted from a software malfunction associated with the switchover from daylight saving time, and they were not based on an accurate evaluation of the least-costly mix of suppliers necessary to meet the actual demand for energy, as required by its tariff. Thus, NYISO argues, the filed rate doctrine and its tariff required it to correct the erroneous prices. Black Oak argues that this error regarding daylight saving time did not qualify as a market implementation error or an emergency system condition, that, in fact, market forces determined prices, and, thus, NYISO had no authority to revise the initial prices.

38. The Commission agrees with NYISO. On October 30, 2005, NYISO's load forecasting software produced real-time calculations that did not in any way reflect the actual demand for energy. As NYISO points out, the load forecasting software estimated that load for 6:00 a.m. on this day would be 42,000 MW – an amount 8000 MW above the highest peak demand for energy ever recorded in the state and approximately 30,000 MW greater than the actual load ultimately consumed in that hour.<sup>23</sup> This deviation demonstrates the grossly inaccurate nature of the load forecasting software and consequently the prices produced would also be inaccurate.

39. Black Oak characterizes the NYISO errors as “fundamentally no different from any other unexpected change in supply or demand, including demand suddenly increasing on a hot day...”<sup>24</sup> However, if prices unexpectedly increased in response to heightened demand on a hot day, they would still represent the least-cost dispatch solution and, therefore, would not need to be corrected. In this case, the prices did not reflect the least-cost dispatch solution.

40. Black Oak cites *Allete* in support of its Complaint but *Allete* is not dispositive in this case. In *Allete*, the Commission agreed with the Midwest ISO that the pricing model in question functioned properly, and that the rationing of scarce capacity in the Day-Ahead market caused the unusually high prices at the relevant node, i.e., that the large price difference between two days resulted from underlying supply and demand in the market rather than a flaw in the model or a market implementation error, thus there was

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<sup>23</sup> NYISO November 13, 2007 Answer at 5.

<sup>24</sup> Black Oak October 29, 2007 Answer at 12.

no violation of the filed rate doctrine.<sup>25</sup> In contrast, in the instant case, NYISO has provided a reasonable explanation of an error that resulted in prices other than those that would have been generated by market forces.

41. Black Oak also cites *HQ Energy* and *NRG*, arguing that NYISO is only permitted to replace prices in a very narrow set of circumstances and that here the original prices were calculated in accordance with the tariff and, thus, were the filed rate. The Commission does not find either of the cited cases to be supportive of Black Oak's position. We have already explained how *NRG* supports NYISO's correction of prices here. In *HQ Energy*, the Commission concluded that the market price reflected the tight supply of energy and the generators' opportunity costs and therefore did not find a market flaw as defined by NYISO's TEP.<sup>26</sup> Here, as noted, NYISO was not restricted by the TEP. Moreover, we find that it is reasonable to conclude that the prices on October 30, 2005, significantly differed from those that would be produced in a competitive market. Further, the fact that, as Black Oak argues, prices in other instances have settled at the +/- \$999.70/MW price is not dispositive here where we have concluded that the prices on October 30, 2005, did not reflect the operation of NYISO's market rules in a competitive market.

42. The Commission's conclusion that NYISO properly chose to correct the original October 30, 2005 prices next raises the question of how the replacement prices should be calculated. NYISO determined to use the Day-Ahead prices to settle transactions that did not flow as scheduled on October 30, 2005. Black Oak argues that NYISO should reconstruct the real-time prices based on conditions at the time, rather than relying on the Day-Ahead prices. NYISO argues that the Day-Ahead prices were the best available data for the affected hours, and it could not look to the surrounding intervals because the error affected all intervals. The Commission finds that NYISO has supported its use of Day-Ahead market prices to correct the erroneous prices. It has shown that it could not practicably recalculate the erroneous prices to achieve real-time prices that actually would have occurred but for the curtailment. We note that its action is consistent with NYISO's currently effective tariff which expressly requires NYISO to consider Day-Ahead prices among other factors in after-the-fact calculation of what real-time prices would have been in the absence of curtailment.<sup>27</sup> Further, the Commission finds that it would be not be practical to recalculate prices using the surrounding intervals. In

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<sup>25</sup> *Allete*, 119 FERC ¶ 61,142 at P 37–43. The Commission also found that the Midwest ISO's subsequent revision of settings in the model did not evidence a market implementation error or misapplication of the market rules largely because the effect of the adjustments was unclear, in that the adjustments moved in opposite directions.

<sup>26</sup> *HQ Energy*, 110 FERC ¶ 61,243 at 61,996.

<sup>27</sup> NYISO Market Services Tariff, Attachment E, Second Revised Sheet No. 441.

addition, the Commission agrees with NYISO that an advantage to using the Day-Ahead prices here to settle these transactions is that doing so effectively eliminates out-of-pocket costs associated with balancing the Day-Ahead transactions that did not flow in the real-time market. Accordingly, the Commission finds that NYISO's reliance on Day-Ahead prices is reasonable under the circumstances of this case.

43. Because the Commission has concluded that the real-time prices were erroneous, that NYISO properly chose to correct them, and that the use of Day-Ahead prices for that correction was consistent with NYISO's tariff, the question of which party curtailed is irrelevant. When real-time prices are the same as Day-Ahead prices, curtailment becomes a financially neutral action for the curtailed party that had scheduled in the Day-Ahead market.

44. Further, the Commission agrees with NYISO that Black Oak has misinterpreted market procedures as detailed in NYISO Technical Bulletins. As explained in its answers,<sup>28</sup> NYISO modifies the bids of Day-Ahead external transactions in the real-time market to +/- \$999.70/MW in order to ensure that these transactions receive a higher priority than other transactions submitted in the real-time market when NYISO determines the real-time market schedule. While the real-time clearing price could potentially end up being +/- \$999.70/MW, and may have on some other date, the real-time market only settles at this price when this price reflects the least-costly mix of resources necessary to meet demand. NYISO explained that it still must make an economic evaluation of the real-time price that would have resulted in the absence of the curtailment. On October 30, 2005, NYISO's software error produced erroneous real-time prices that did not reflect any economic basis of demand/supply and which, therefore, had to be corrected.

45. The final issue with regard to the October 30, 2005 transactions is the process NYISO followed in correcting prices. Relying on the TEP of the tariff, Black Oak argues that changing real-time prices requires consultation and cooperation with market participants and jurisdictional agencies. Further, Black Oak argues that Attachment E of the NYISO tariff requires NYISO to post notice as soon as reasonably practicable that it is considering correcting prices and, to the extent possible, do so prior to submittal of bids.

46. As discussed above, the TEP procedures did not apply here and therefore NYISO was not constrained to follow the TEP correction procedures. Moreover, even if the TEP applied, the Commission finds that Attachment E provided NYISO with broad leeway regarding notice, providing only for notice "as soon as reasonably practicable," and "to the extent possible." Similarly, contrary to Black Oak's claim that Attachment E requires

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<sup>28</sup> NYISO October 11, 2007 Answer at 11; NYISO November 13, 2007 Answer at 8.

NYISO to consult with market participants to remedy the error, Attachment E states: “The ISO shall undertake this work in consultation and cooperation with Market Participants and jurisdictional agencies, as appropriate and as time permits.”

47. The Commission agrees that NYISO should, to the extent possible, keep stakeholders informed of the information surrounding a necessary price change in a timely manner. However, we find that, considering the circumstances, NYISO acted appropriately. The extent to which NYISO did or did not notify stakeholders of the proposed changes in a timely manner does not justify Black Oak’s request to settle its transactions at clearly erroneous prices.

## **B. April 4, 2005 Transactions**

### **1. Details of the Complaint**

48. Black Oak states that it had two transactions on April 4, 2005, that should have settled against the real-time price: a 125 MW Day-Ahead import of power from PJM into NYISO of which 115 MW was curtailed and a 50 MW “contingency bid” real-time export that flowed from NYISO into PJM that was to flow only if the real-time price was \$11/MW or less.<sup>29</sup> Black Oak asserts that the RTC (real-time) market price at the PJM–NYISO interface was -\$999.70 and that both of its transactions should have settled at that -\$999.70 price. Instead, it states, NYISO replaced the real-time price in both instances with a binding price of \$68.06/MW. In total, Black Oak asserts that the substitution of a price other than the -\$999.70 price resulted in a loss to Black Oak on April 4, 2005, of \$178,180.

49. Black Oak asserts that its 50 MW export should have settled at the -\$999.70 real-time price and, thus, it should have received money from NYISO (i.e., Black Oak would “pay” NYISO a negative price for the purchase of the 50 MW from NYISO), because the external proxy bus was constrained. In that circumstance, it asserts, the tariff requires the real-time price to apply to all transactions at the interface. Black Oak states that because the RTC market price at the PJM–NYISO interface was -\$999.70, (i.e., less than the \$11 contingent maximum) NYISO accepted the contingent contract and Black Oak’s 50 MW export transaction into PJM flowed. Black Oak states that, as a price taker on the \$11/MW or less contract, it should have been paid at whatever the real-time price was for that hour, but, subsequently, NYISO substituted a price of \$68.06/MW despite the fact

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<sup>29</sup> Although Black Oak states in its Complaint, at 16, that the 50 MW export was scheduled in the real-time market, in an affidavit appended to the Complaint, Black Oak’s Managing Director, Serge Picard, asserted that the 50 MW export was scheduled in the Day-Ahead market. However, he nonetheless asserted that the transaction should have settled at the real-time price of -\$999.70. Black Oak Complaint, Appendix A, Affidavit of Serge Picard at 2.

that Black Oak's export was contingent upon a price of \$11/MW or less. Accordingly, it claims it is owed the difference between that -\$999.70 price and the \$68.06 price at which NYISO settled the transaction.

50. In regard to its 125 MW import transaction, Black Oak asserts that NYISO curtailed 115 MW of this transaction as the MIS computer system determined that this portion of the import was uneconomic. Black Oak acknowledges that there was a Transmission Load Relief (TLR) order in effect on April 4, 2005, but contends that its import transaction was curtailed by NYISO 11 minutes after the TLR had been lifted due to NYISO's having lowered the Desired Net Interchange (DNI).<sup>30</sup> Thus, it asserts that its import was curtailed not because of the TLR but because the DNI was reduced, and, the same as with the export, it claims it is owed the difference between the -\$999.70/MW price that should have applied and the \$68.06/MW price that NYISO charged it. That is, it claims it should have "paid" the -\$999.70 real-time price for the purchase of 115 MW from NYISO to clear the imbalance created by NYISO's curtailment of the 115 MW import.

## **2. NYISO's October 11, 2007 Answer**

51. NYISO responds that, contrary to Black Oak's claim that the 50 MW export was a real-time export, both of these transactions on April 4, 2005, were scheduled in the Day-Ahead market and both involved hours where NYISO corrected the real-time clearing price. NYISO states that Black Oak's transactions were, in fact, curtailed due to a TLR order that was in effect during the relevant time period. It contends that Black Oak errs in failing to convert Central Standard Time (which the North American Electric Reliability Corporation (NERC) uses in its logs) to Eastern daylight saving time, which is the time NYISO records the TLR order being lifted. NYISO states that the TLR order had been declared by the Ontario Independent Electricity Market Operator (IMO) and that it was the IMO, not NYISO, that cut Black Oak's 125 MW transaction and consequently, the transaction failed NYISO's checkout process. According to NYISO, NYISO reduced its DNI in order to comply with the IMO TLR order in accord with NYISO's practice at the time. NYISO states that its dispatcher's actions to preserve reliability resulted in an "artificial" -\$999.70/MW real-time market clearing price for the relevant hour. It asserts that this "artificial" price did not result from a constraint that should be considered in determining real-time clearing prices under NYISO market rules, and thus NYISO was required under the filed rate doctrine to correct the erroneous

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<sup>30</sup> Section 2.41 of NYISO's Services tariff defines Desired Net Interchange as: "A mechanism used to set and maintain the desired Energy interchange (or transfer) between two control areas; it is scheduled ahead of time and can be changed only manually in real-time." NYISO Market Services Tariff, Original Volume No. 2, First Revised Sheet No. 34B.

clearing price with the prices that resulted from a valid economic evaluation of market participants' bids and offers for the relevant hour, i.e., the \$68.06/MW price.

### **3. Black Oak's October 29, 2007 Answer**

52. Black Oak argues that the April 4, 2005 price of -\$999.70 was the result of choices made by NYISO dispatchers to lower the amount of power allowed to flow over the NYISO-PJM interface. Black Oak states that the decision to reduce the interface limit, rather than to curtail specific transactions, was a conscious decision of NYISO and resulted in the interface becoming constrained, re-dispatch of the system and the creation of new transactions, including the acceptance of Black Oak's 50 MW export transaction. Black Oak also disagrees with NYISO's "false congestion" characterization, instead insisting that the congestion was reflective of actual system constraints caused by dispatch decisions.

53. Black Oak argues that prices on April 4, 2005, reflect the decision by NYISO dispatchers to curtail transactions in a particular manner in response to operational constraints on the system. Black Oak then reiterates the arguments it made in regard to the October 30, 2005 transactions. It asserts that NYISO's tariff does not allow NYISO to simply ignore the results of its real-time market, and that the tariff provides that real-time price results are binding on both market participants and NYISO.<sup>31</sup> Further, it asserts that the only time the tariff explicitly permits NYISO to re-compute prices is when prices are not calculated in accord with the filed rate, but the original prices on April 4, 2005, *are* the filed rate. Accordingly, Black Oak asserts that NYISO is required to settle these transactions at the real-time prices. Black Oak states that, although it agrees with NYISO that the TLR remained partially in effect until 4:31 a.m. CST, nonetheless, this is irrelevant to the price that it should have received for the power contracts that flowed over the PJM-NYISO interface. Black Oak states that the mere existence of a TLR has no bearing on the authority of NYISO to administratively replace real-time price results, and that NYISO's replacement of real-time prices with \$68 is inconsistent with its acceptance of an \$11-or-less export transaction. Black Oak states that NYISO dispatchers chose, from among alternatives, to respond to the TLR by reducing the DNI amount to lower the total flow of power over the interface. Black Oak adds that this had immediate real-time consequences, i.e., the interface was constrained and a -\$999.70 price resulted, signaling the need to decrease the number of imports into NYISO. Black Oak contends that the choice of reducing the DNI had immediate advantages to NYISO's system operations, in that the resultant -\$999.70 price enabled NYISO to accept additional Hour-Ahead contingent exports of power into PJM that otherwise would not have flowed, and, consequently, aided NYISO dispatchers in maintaining system stability.

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<sup>31</sup> *Citing* NYISO Market Services Tariff, Attachment B, section 1a.

54. Black Oak further states that the replacement of real-time prices at the PJM–NYISO interface with a \$68 price is inconsistent with NYISO’s acceptance of the \$11 or less contingent export transaction. Black Oak contends that the export would never have been accepted unless the real-time price was \$11 or less. Black Oak states that because the real-time price results showed that the price was -\$999.70 and the contingent export was accepted and flowed, the only possible correct price is the -\$999.70 price.

#### **4. NYISO’s November 13, 2007 Answer**

55. NYISO reiterates its argument that the initially-calculated price of -\$999.70 on April 4, 2005, incorrectly reflected congestion on the interface and that the constraint on the PJM–NYISO interface on April 4, 2005, was not the result of an economic evaluation of transactions that exceeded the interface limit and therefore created congestion. Instead, NYISO states that the constraint resulted from NYISO reducing the interface limit to implement a TLR called by the Ontario IMO to address operational issues external to the NYCA. NYISO notes that as stated in its initial answer, the dispatchers reduced the interface limit to ensure that no transactions above the expected TLR level would be scheduled because they did not have sufficient time to curtail specific transactions prior to the RTC evaluation. NYISO states that, as such, the apparent congestion was not properly included in the calculation of the clearing price at the interface because it was a consequence of operational issues outside the NYCA, and when the real-time price was recalculated by removing the false congestion on the interface, the result was \$68.06.

56. In regard to Black Oak’s Complaint that its 50 MW export transaction was accepted and scheduled to flow at a price of \$11 or less, and subsequently flowed, but NYISO thereafter corrected the price to \$68, NYISO states that in an analogous situation, a generator whose offer price is higher than a subsequently-corrected market clearing price is provided a measure of financial protection through a Bid Production Cost Guarantee payment made pursuant to Attachment C of the Services Tariff. NYISO further states that there is no such analogous provision in the NYISO tariff with respect to an export transaction such as the one at issue. NYISO adds, however, that these circumstances do not warrant Black Oak’s conclusion that “the only ‘correct’ price is the -999.70 price initially set by the real-time market.”

#### **5. Commission Determination**

57. With regard to the April 4, 2005 transactions, the facts differ from those of the October 30, 2005 transactions, but the ultimate finding we make is the same: real-time prices generated by NYISO’s RTC on that date were incorrect and NYISO appropriately corrected them. There was no computer malfunction at issue, but rather there was a TLR called by the Ontario IMO to address operational conditions external to the NYCA. NYISO responded by reducing the DNI on the interface with PJM, that is, by lowering the operational limit on the interface to ensure that no transactions above the expected

TLR level would be scheduled, which resulted in Black Oak's import transaction being curtailed, although the 50 MW export flowed. Because of differences in the facts underlying the two transactions we will address the matter of the curtailed import separately from the contingent 50 MW export that did, in fact, flow.<sup>32</sup>

**a. The 125 MW Import**

58. Black Oak does not object to the curtailment of 115 MW of its import on April 4, 2005; it objects to the price NYISO used for settlement of the transaction. NYISO's tariff provides that, if constraints at an interface associated with an External Transaction are binding, the Real-Time LBMP will be used to settle External Transactions,<sup>33</sup> such as the instant curtailed import transaction, and it establishes the LBMP calculation formula for external transactions,<sup>34</sup> which includes a congestion component. The NYISO tariff defines "congestion" as:

[a] characteristic of the transmission system produced by a constraint on the optimum economic operation of the power system, such that the marginal price of Energy to serve the next increment of Load, exclusive of losses, at different locations on the Transmission System is unequal.<sup>35</sup>

The NYISO tariff defines "constraint" as "an upper or lower limit placed on a variable or set of variables that are used by the ISO in its SCUC, RTC or TRD programs to control and/or facilitate the operation of the [New York State] Transmission System."<sup>36</sup> According to NYISO, the Real-Time LBMP for April 4, 2005 transactions at the interface with PJM incorrectly reflected congestion, and this price needed to be corrected.

59. The Commission concludes that NYISO calculated prices for the April 4, 2005 transaction in a manner consistent with its tariff. NYISO reduced the interface limit to

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<sup>32</sup> In the discussion that follows, we do not need to address and make findings regarding the other issues raised and debated by the parties such as the claim that Black Oak failed to properly schedule transactions, or that NYISO and not the IMO was the source of the Black Oak curtailment, as the disposition of those issues is subsumed by the findings that follow.

<sup>33</sup> NYISO Market Services Tariff, Fourth Revised Sheet No. 97.00E.

<sup>34</sup> See NYISO Market Services Tariff, Attachment B, Third Revised Sheet No. 331.i, Sixth Revised Sheet No. 334, and Third Revised Sheet No. 331.04 through Fourth Revised Sheet No. 333.

<sup>35</sup> NYISO Market Services Tariff, Original Sheet No. 30A.

<sup>36</sup> See NYISO Market Services Tariff, 1<sup>st</sup> Revised Second Revised Sheet No. 31A.

respond to a TLR called by the IMO to address operational limitations *external* to the New York Control Area. The reduction in the DNI apparently was recognized by NYISO's RTC as a constraint on its system which caused congestion on its system, thereby incorrectly triggering a congestion component in the real-time price used for settlement of prices for external transactions when external constraints at the interface are binding. That is, the initially-calculated real-time price incorrectly reflected that there was congestion attributable to operational limitations on NYISO's transmission system, when in fact there were none. Instead, this congestion was attributable to operational limitations external to NYISO. As NYISO points out, its tariff defines "constraint" as "an upper or lower limit placed on a variable or set of variables that are used by the ISO in its SCUC, RTC or TRD programs to control and/or facilitate the operation of *the [New York State] Transmission System*."<sup>37</sup> Therefore, any effect on prices that resulted from the NYISO dispatchers' decision to lower the DNI in response to the TLR should not have been considered "congestion" for purposes of triggering a congestion component of the real-time LBMP at the interface.<sup>38</sup> NYISO's dispatchers took action to lower the DNI to address the threat to the NYISO system due to external events. Accordingly, we find that NYISO acted appropriately when recalculating the real-time price by removing the effects of congestion that arose from operational issues external to NYISO, ultimately arriving at an appropriately-corrected real-time clearing price of \$68.06.

60. In *NRG*, where the Commission concluded that the posted energy prices were not the correct results of the prescribed formula using the actual market data, the Commission held that "[u]nder these circumstances involving the erroneous calculation of a formula rate, the NYISO did not have to rely on any temporary authority or interim procedures to correct incorrect energy clearing prices."<sup>39</sup> Likewise, here, because the -\$999.70 price initially set by the real-time market RTC program on April 4, 2005 wrongly reflected congestion on the PJM interface, NYISO has the authority to correct that price for purposes of settlement. Accordingly, NYISO acted appropriately when settling the market based on a calculation of a price reflective of least-cost dispatch internal to the NYS Transmission System, which it determined would be the Real-Time LBMP price recalculated by excluding congestion. Although NYISO did not clarify how it arrived at

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<sup>37</sup> *Id.*

<sup>38</sup> This finding is consistent with NYISO's determination that internal congestion will not cause a change from using the RTC<sub>15</sub> price to be used as the real-time settlement price at competitive external proxy buses during hours when there is an external constraint. See Black Oak Complaint, Appendix F, NYISO Technical Bulletin 123 at 2 ("Congestion on internal interfaces will not cause a price substitution.").

<sup>39</sup> 91 FERC at 62,166.

the re-calculated real-time price of \$68.06/MW, it appears that it used the Day-Ahead market price for April 4, 2005 transactions. In his affidavit appended to the Complaint, Black Oak's witness Picard indicates that \$68.06 was the "Day-Ahead Market price" for that transaction<sup>40</sup> and NYISO did not contest that statement in its Answer. For the same reasons as found with respect to NYISO's reliance on *NRG* for authority to correct prices, and its use of the Day-Ahead market price to settle the transactions on October 30, 2005, discussed earlier herein, we find that NYISO's correction of the real-time price on April 4, 2005, to \$68.06/MW to be reasonable.

**b. The 50 MW Export**

61. Although the facts are not as clear regarding the 50 MW contingency export on April 4, 2005, as they are with respect to the curtailed import on that date,<sup>41</sup> we nonetheless find that Black Oak has failed to show that its Complaint should be granted as to the 50 MW transaction. At the outset, there is a tariff interpretation issue. As noted earlier herein, Black Oak's witness Picard stated, and NYISO concurs, that the 50 MW export was scheduled in the Day-Ahead market, not the next day's real-time market as Black Oak asserted in its Complaint. Financial settlement of a Day-Ahead transaction would have occurred on April 3, 2005, at the Day-Ahead market price, which Black Oak's witness Picard indicates was \$68.06/MW.<sup>42</sup> Because the 50 MW Day-Ahead scheduled export flowed on April 4, 2005, and we believe that the tariff only intends that Day-Ahead market transactions that do not flow as scheduled, such as the import that was curtailed on that day, be settled at the real-time price, the Day-Ahead market price for the 50 MW export would not be revised and re-settled at the real-time price applicable on April 4, 2005.

62. Black Oak's interpretation of the tariff, that the real-time LBMP price is used to settle *all* transactions at the interface when there is a binding constraint at the interface,

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<sup>40</sup> Black Oak's witness Picard stated: "Black Oak should have received \$176,180 on these two transactions [the import and export], which is equal to 165 MWs of transactions at the interface times the LBMP, plus the Day-Ahead Market price: 165 MWhs \* (\$68.06 + \$999.70) = \$176,180." Black Oak Complaint, Appendix A, Affidavit of Serge Picard at 4.

<sup>41</sup> We also note that we were unable to find any provision of NYISO's Tariff that provides for a transaction scheduled in the Day-Ahead market to be contingent on events or prices occurring the next day when power is to flow.

<sup>42</sup> See Black Oak Complaint, Appendix I, NYISO "Description of the NYISO LBMP Correction Log" at 1 (the Day-Ahead "Market Settlement date refers to the day on which the market actually settles" which is the day before the "Operating Date [which] is the date on which electricity is generated for that market.").

even the subject 50 MW export that flowed, is in error. Contrary to Black Oak's interpretation, the tariff expressly provides that the real-time price is used to settle only such transactions at the interface that are "associated with" the constraint.<sup>43</sup> Here, the constraint was not associated with the 50 MW export as that transaction flowed as scheduled. Moreover, even if Black Oak's interpretation were correct, Black Oak's claim for relief fails because the real-time price, *as corrected by NYISO*, was applied. Black Oak paid the same price, \$68.06/MW, under either interpretation and, therefore, was not harmed.

63. Finally, we find that Black Oak has failed to support any claim for relief based on the fact that, had the \$68.06/MW price that NYISO used for settlement of the real-time price actually been generated by the RTC on April 4, 2005, Black Oak's 50 MW Day-Ahead export would not have flowed because the contingency that the real-time price not exceed \$11/MW would not have been met. Black Oak does not show how it incurred any loss, whether an opportunity or out-of-pocket loss, due to the fact that its Day-Ahead export flowed at a price equal to the Day-Ahead market price. Its proposed measure of the monetary harm it allegedly suffered from its 50 MW export flowing, i.e., the difference between the \$68.06 price it paid and the -\$999.70/MW price, is without support. That -\$999.70/MW price has been shown to be invalid for that date and that difference would be irrelevant in any case since the question is what harm was caused by flowing a transaction that Black Oak claims should not have flowed due to the contingency.

### **C. April 17, 2005 Transaction**

#### **1. Details of the Complaint**

64. All external transactions on NYISO's system, i.e., imports and exports, are given NERC E-Tag designations to ensure matching transactions in the adjoining control areas. Black Oak states that on April 17, 2005, it had a single Day-Ahead transaction scheduled, a 300 MW import of power from ISO New England into NYISO; however, in scheduling the import side of the transaction with NYISO, Black Oak made a typographical error on its E-Tag, transposing two letters. Black Oak states that NYISO market rules require it to notify a market participant of a discrepancy between the E-Tag and the MIS schedule prior to the close of the Hour-Ahead market so that a participant can quickly remedy a discrepancy.<sup>44</sup> Black Oak asserts that, according to NYISO's Technical Bulletin 027 in

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<sup>43</sup> "RTC<sub>15</sub> will calculate the Real-Time LBMP for all External Transactions if constraints at the interface associated with that External Transaction are binding." NYISO FERC Market Services Tariff, Fourth Revised Sheet No. 97.00E.

<sup>44</sup> *Citing* NYISO's Technical Bulletin 027 as in effect on April 17, 2005. Black Oak states that on June 23, 2005, NYISO replaced the then-effective technical bulletin with a new version reflecting a policy that Black Oak asserts is exactly the opposite of the

effect at the time, although subsequently changed, NYISO was required to either “accept” or “deny” the transaction, NYISO accepted the transaction after a two-hour placement in “study mode,” and Black Oak should have been able to rely on that acceptance. Black Oak asserts, however, that NYISO, in violation of its market rules, did not tell Black Oak of the problem until after the close of the Hour-Ahead market and after it was too late to fix the error. According to Black Oak, NYISO market rules in effect on April 17, 2005, address the scenario where a purchasing/selling entity (PSE) “creates an E-Tag with an energy profile that matches the bid/offer in the MIS and a non-matching Tag ID.” Black Oak states that this is exactly the situation on April 17, 2005, in that the energy profile of the transaction matched the MIS, while the Tag-ID did not. Black Oak cites Technical Bulletin 027 which specifies:

The tag is DENIED because the Tag-ID does not match the MIS bid. Because the bids in MIS are ‘frozen’ the PSE cannot change the Tag-ID in MIS after market close. One possibility is to create a second tag, this time with the Tag ID that was incorrectly entered into MIS. As long as the new Tag matches the corresponding MIS bids, it will be APPROVED.

65. Black Oak states that had NYISO denied the transaction due to the incorrect E-Tag prior to the close of the Hour-Ahead market, Black Oak would have known that there was a problem with its transaction and would have submitted a new matching tag in order to get the transaction approved in time to flow.

66. Black Oak adds that NYISO initially showed that the transaction had been “approved” and then “implemented,” and therefore Black Oak had no reason to suspect there was a problem until 55 minutes before real-time when NYISO rejected the transaction, at a point where all changes are automatically rejected.<sup>45</sup>

67. Black Oak contends that once the transaction was approved by NYISO and ISO New England, NYISO no longer had authority under NERC rules to curtail it, and thus the curtailment was in violation of NERC rules which provide: “the curtailment features in E-Tag are intended to be used only for the following reasons: TLR (or other local line-

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policy in place on April 17, 2005. Black Oak attached a copy of Technical Bulletin 027 showing revisions to the earlier, November 10, 2004, version as an appendix to its complaint and states that it believes the November 10, 2004 version of this bulletin was revised in direct response to the April 17, 2007 events at issue here. *See* Black Oak Complaint at Appendix K.

<sup>45</sup> Black Oak cites Technical Bulletin 027 and notes that it contains a diagram detailing when a market participant is allowed to modify its E-Tag that indicates that, starting at 20 minutes before real-time [power flows], all changes are automatically rejected.

loading relief procedure); Loss of Generation; [or] Loss of Load. All other changes should be made using market adjustments.”<sup>46</sup> As a result, Black Oak asserts that it was exposed to real-time prices costing it over \$7,000.

68. Black Oak also claims that NYISO compounded the harm to Black Oak by charging Black Oak a penalty of \$12,000. Black Oak asserts that applying a penalty designed to deter market gaming to a minor typographical error represents a serious abuse of NYISO’s enforcement protocols. Black Oak quotes the Commission’s statement in accepting NYISO’s tariff proposal to impose Extraordinary Corrective Action (ECA) penalties, that the “NYISO-proposed tariff revisions impose penalties on entities that make deliberate attempts to manipulate prices by causing scheduled transactions to fail in real-time.”<sup>47</sup> Black Oak states that the Commission dismissed concerns that NYISO could abuse this authority by noting that “Scheduling Entities are adequately protected if the failure of a transaction was not within their control.”<sup>48</sup> Black Oak contends that, contrary to NYISO’s claims, the facts show this was an innocent mistake -- a minor error that interchanged two letters -- and one that NYISO and ISO New England were easily able to figure out since the transactions were initially approved. Black Oak further contends that it is unreasonable to penalize Black Oak when: (1) it would have had the ability to fix the error prior to real-time had NYISO denied the transaction as required; (2) Black Oak had nothing to gain from having its transaction curtailed, so was not trying to game the system; and (3) the decision to curtail the Black Oak transaction was wholly in the hands of NYISO Operators.

## 2. NYISO’s October 11, 2007 Answer

69. In its answer, NYISO agrees that Black Oak entered an erroneous E-Tag and was penalized \$12,154.75, but NYISO contends that its actions were consistent with its tariff and technical bulletins. NYISO states that, within one minute of Black Oak’s erroneous submission, the Open Access Technology International (OATI) System went into “study mode” because of the discrepancy between the E-Tag and the information on NYISO’s MIS and remained there for two hours, the predetermined amount of time defined by NERC E-Tag rule,<sup>49</sup> at which point the E-Tag was “passively approved” by the OATI

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<sup>46</sup> Citing NERC discussion of proper curtailment of E-Tags, *available at* [http://www.nyiso.com/public/market\\_data/pricing\\_data.jsp?display=7](http://www.nyiso.com/public/market_data/pricing_data.jsp?display=7).

<sup>47</sup> Citing *New York Indep. Sys. Operator, Inc.*, 97 FERC ¶ 61,206, at 61,900 (2001).

<sup>48</sup> *Id.*

<sup>49</sup> NYISO October 11, 2007 Answer at 24, citing NERC Policy 3, Appendix 3A1, Table 1.

system. NYISO states that "study mode" indicates to the market participant that an unresolved problem is preventing the E-Tag approval. NYISO adds that the OATI system posted the appropriate indication that there was a problem with the E-Tag for the transaction, such indication was available for review by Black Oak, and Black Oak had the ability to take corrective measures for over 30 hours prior to the close of the Hour-Ahead market. NYISO further states that Black Oak's receipt of a Day-Ahead market schedule for its transaction did not imply that its E-Tag had been approved, but rather, is consistent with the "passive approval" explained in NERC policy. NYISO also states that on April 17, 2005, after the close of the Hour-Ahead market, but prior to posting the Hour-Ahead schedules, all parties to the E-Tag were notified that the bid did not exist in the New York market because there was "no corresponding bid in MIS for this hour" and the transaction was cut during checkout.

### **3. Black Oak's October 29, 2007 Response**

70. In its October 29, 2007 response, Black Oak reiterates its argument that FIC penalties are only to be imposed on "entities that deliberately cause transactions to fail."<sup>50</sup> Black Oak states that, contrary to NYISO's claim that its tariff permits it to impose the market gaming penalty any time a transaction fails checkout, in a filing for approval of modifications to the penalty authority, NYISO stated that changes "will make it easier to distinguish penalty charges . . . imposed on market participants found to have engaged in manipulative behavior, from charges related to the normal operation of the two-settlement."<sup>51</sup> Black Oak contends that because it is clear that it did not engage in manipulative behavior, the Commission should find that NYISO abused its penalty authority and direct the removal of the \$12,000 market gaming penalty.

71. Black Oak also states that it was never informed by NYISO that there was a typographical error in its schedule and that it only learned of the error after the fact, when it was too late to remedy the problem. Black Oak contends that placing its tag in study mode did not constitute notice. Black Oak contends that NERC rules make it absolutely clear that NYISO is required to notify Black Oak of any problem and to approve or deny the tag prior to the close of the Hour-Ahead market. Black Oak quotes the NERC requirements that describe the Passive Approval process:

The approver has actively decided to defer their decision to approve or deny until a later time within their approval window, but wishes to communicate their acknowledgement of the request back to the sender.

The action of placing an E-Tag in a "STUDY" state does not extend the

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<sup>50</sup> *Citing New York Indep. Sys. Operator*, 97 FERC ¶ 61,206, at 61,900 (2001).

<sup>51</sup> *Citing NYISO November 26, 2003 filing*, Docket No. ER04-240-000 at 45.

approval window. The Approval Entity must still act in a timely manner to set the Approval State to “APPROVED” or “DENIED” before the Request evaluation deadline has passed. . . . Once an E-Tag has reached a final state, all parties are informed of the resolution.

Black Oak asserts that NYISO violated this requirement by failing to either affirmatively accept or deny the Black Oak transaction “before the Request evaluation deadline has passed.” Black Oak reiterates that had NYISO followed these rules, Black Oak would have been informed there was a problem with its transaction and would have corrected the error.

72. Black Oak further contends that NERC rules provide that the curtailment features in E-Tag are intended to be used only for TLR, loss of generation, or loss of load. It asserts that all other changes should be made using market adjustments. Thus, Black Oak adds, once the transaction was approved by the inter-control area scheduling system, NYISO no longer had authority, consistent with NERC rules, to curtail the Black Oak transaction.

73. Finally, Black Oak adds that NERC operating rules were created to ensure proper and seamless operations between control areas and to maintain reliability, and the curtailment of 300 MW of imports with only 15 minutes notice could have caused serious reliability concerns for both systems. Black Oak states that NERC rules requiring that curtailments be made through “market adjustments” would normally protect against these dangers. Black Oak further contends that this curtailment caused prices throughout the New York energy markets to as much as quadruple.

#### **4. NYISO’s November 13, 2007 Response**

74. In its November 13, 2007 answer, NYISO responds that it is required to determine only whether the transaction failed for reasons within a market participant’s control, and it is not required to meet any formal, evidentiary burden of proof as to a market participant’s intent before imposing a financial impact charge (FIC). NYISO adds that after a thorough review of Black Oak’s objection to the charge, it determined that the cause of the transactions’ failure was fully within Black Oak’s control. NYISO further states that Black Oak does not dispute that NYISO system communicated with the OATI system that the transaction had been put in study mode because no financially responsible party had been confirmed for the transaction. NYISO contends that Black Oak had 30 hours before the close of the market to take measures to correct the error and that NYISO’s actions were entirely consistent with Technical Bulletin 027 and NERC policies.

## 5. Black Oak's November 28, 2007 Answer

75. Black Oak cites NERC rules, which state: "The Approval Entity must still act in a timely manner to set the Approval State to 'APPROVED' or 'DENIED' before the Request evaluation deadline has passed."<sup>52</sup> Black Oak states that the close of the Hour-Ahead market is the "evaluation deadline" to which the NERC rules refer, yet NYISO did not deny the Black Oak transactions until 15 minutes before real-time. Therefore, Black Oak contends that NYISO failed to deny the transaction and notify Black Oak of the denial in a timely manner.

## 6. Commission Determination

76. The fact that there was an error in the E-Tag with respect to the April 17, 2005 transaction is undisputed. The parties' disagreement is over whether NYISO complied with NYISO's practices regarding NERC E-Tag rules in providing adequate notice of the error and with NYISO's tariff regarding whether the application of a penalty was unjust or unreasonable in this case.<sup>53</sup> Specifically, NYISO argues that it provided sufficient notice when it placed the transaction in "STUDY" mode with a notation of "no financially responsible party," while Black Oak argues that this does not constitute notice and does not comply with either NYISO's tariff or NERC rules.

77. Black Oak is mistaken in its assertion that Technical Bulletin 027 in effect at the time required NYISO to either approve or deny its request. The example in the technical bulletin specifying approval or denial to which Black Oak refers applies to requests made within 75 minutes of dispatch (T-75), not requests made in the Day-Ahead market as was the case here. Page 4 of Technical Bulletin 027 provided that, E-Tag requests received before T-75, including those received in the Day-Ahead market, will be placed in "Study" mode, and the specific reason behind why it is placed in such mode will be provided to customers through the "Reason" field of the E-Tag. That occurred here. Black Oak had two hours to respond to the notice that there was a problem with its E-Tag requiring it to be placed in "Study" mode but failed to take action.

78. Black Oak asserts that its transaction was "curtailed," but that NERC E-Tag rules restrict when a "curtailment" can occur to: "TLR (or other local line-loading relief

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<sup>52</sup> Section 1.6.3.1.1 of NERC's "Electronic Tagging – Functional Specifications, Version 1.7.097".

<sup>53</sup> Section 5.1 of NYISO's Tariff states, in pertinent part, that NYISO "will provide Control Area Services in accordance with the standards and criteria of NERC." NYISO Market Services Tariff, Original Volume No. 2, Original Sheet No. 111.

procedure); Loss of Generation; [or] Loss of Load.”<sup>54</sup> However, there was no curtailment within the meaning of NYISO’s tariff. Section 2.33 of NYISO’s Services Tariff defines “curtailment” as: “A reduction in Firm or Non-Firm Transmission Service in response to a transmission Capacity shortage as a result of system reliability conditions.” The transaction was never scheduled and was cut during the checkout process because NYISO could not identify a matching bid, which is not a result of system reliability conditions. Indeed, it would not make sense, and would be inconsistent with the tariff, to restrict the ability of NYISO to deny transactions only in the limited circumstances reasons set forth in the cited NERC curtailment rule.

79. Further, while Black Oak may be correct that other ISOs would have provided notification of the “STUDY” status by telephone, the notification practices of other ISOs are irrelevant here. The Commission finds that NYISO provided adequate notice through notification on the OATI system. Black Oak does not deny that NYISO’s MIS communicated directly with OATI -- which Black Oak utilizes -- indicating that the E-Tag had been placed in “STUDY” mode with an appropriate response in the “Reason” field, i.e., “no corresponding bid in MIS for this hour.” The E-Tag remained in study mode for two hours. While that status was subsequently automatically changed by the system to indicate approval, Black Oak should have known that the problem with its scheduling request remained unresolved (as Black Oak had not responded and thus had not resolved it) and that the transaction could later be rejected. In fact, Black Oak failed to make any inquiry for the remainder of the evaluation and checkout period, some 28 additional hours. NERC rules in effect at the time provided that “[a]n Approval entity [i.e., NYISO] has the option to change its Approval State at will, until the Request State has reached a final state.”<sup>55</sup> Although we agree that NYISO, likewise, could have more timely reviewed the E-Tag, the burden nevertheless ultimately is on Black Oak as the entity responsible for submitting correct and complete E-Tags. Black Oak inappropriately seeks to shift its obligation to submit correct E-Tags and to follow-up on their status to NYISO.

80. In these circumstances, we find that NYISO’s denial of Black Oak’s transaction 55 minutes before real-time was made in a “timely manner” as required by NERC E-Tag rules.<sup>56</sup> In accordance with the timeline in its Technical Bulletin 027 in effect at the time,

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<sup>54</sup> *Citing* <http://www.nerc.com/dcf/forum/DCForumID7/3.html>. We note that the citation is not to NERC rules but, rather, to a comment given by a NERC instructor in an online forum.

<sup>55</sup> NERC Electronic Tagging rules, section 1.6.3.1 version 1.7.097.

<sup>56</sup> NERC Electronic Tagging rules, section 1.6.3.1 version 1.7.097 (“Approval Entity [NYISO] must still act in a timely manner to set the approval state to “APPROVED” or “DENIED” before the request evaluation deadline has passed.”).

it was not required, contrary to Black Oak's claims, to deny the transaction earlier than 55 minutes before power flows so that Black Oak could schedule in the Hour-Ahead market instead of correcting its erroneous E-Tag.

81. Finally, the Commission agrees with NYISO that NYISO's tariff requires only that it determine whether a transaction failed for reasons within a market participant's control when evaluating the appropriateness of an FIC.<sup>57</sup> Black Oak does not dispute that it submitted an erroneous E-Tag and that this erroneous E-Tag was the result of a typographical error fully within its control. The fact that the correction of the E-Tag error was also within NYISO's control is not a factor that determines whether or not the FIC will be imposed. Nor is NYISO required to show an intent on Black Oak's part to manipulate the market (albeit the prevention of market manipulation is a goal of the FIC). Accordingly, under these circumstances, we find that NYISO appropriately applied its FIC penalty.

The Commission orders:

The Complaint is denied as discussed in the body of the order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>57</sup> See NYISO Market Services Tariff §§ 4.5(C)(2), 4.5(D)(2), First Revised Sheet No. 102.00, Fourth Revised Sheet No. 102B. Technical Bulletin 027 at 5 stated that "A Market Participant that fails to get a matching E-Tag Implemented at least 20 minutes prior to flow will be subject to Financial Impact Charges for transactions that do not flow."