

135 FERC ¶ 61,157  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

New York Independent System Operator, Inc.

Docket No. ER10-2220-003

ORDER ON REHEARING

(Issued May 19, 2011)

1. In this order, the Commission denies rehearing of its October 12, 2010 order in this proceeding.<sup>1</sup> The October 12, 2010 Order accepted, subject to conditions, a proposal by the New York Independent System Operator, Inc. (NYISO) to implement a market power mitigation measure that applies to all generators located in the rest-of-state (ROS) capacity region<sup>2</sup> that are committed or dispatched to maintain system reliability.

**I. Background**

2. Attachment H (section 23) of the NYISO Market Administration and Control Area Services Tariff (Services Tariff) sets forth market power mitigation measures to mitigate the market effects of conduct that would substantially distort competitive outcomes in the NYISO markets. Sections 23.3.1 and 23.3.2,<sup>3</sup> respectively, identify the conduct and market impact thresholds used by NYISO to determine whether bids by market participants should be mitigated. In a September 4, 2009 Filing in Docket No. ER09-1682-000, NYISO identified bidding behavior by three specific generators (Specified Generators) that, when the generators were committed for reliability, departed from the conduct that would be expected under competitive market conditions and also met the

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<sup>1</sup> *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,030 (2010) (October 12, 2010 Order).

<sup>2</sup> The rest-of-state capacity region comprises the areas of the New York Control Area located outside of the New York City and Long Island constrained areas.

<sup>3</sup> Previously, the numeration of these sections was section 3.2.2 and 3.2.3, respectively.

market impact threshold contained in section 23.3.2 of Attachment H. As a result of this bidding behavior, NYISO proposed mitigation measures to apply only to the Specified Generators when called upon for reliability in the NYISO day-ahead market.

3. In an order issued May 20, 2010, the Commission found NYISO's proposed mitigation measures to be just and reasonable as they apply to the Specified Generators.<sup>4</sup> The Commission found that NYISO had demonstrated that, during August 2009 when the Specified Generators were called on for reliability and committed out-of-merit in the energy market, the Specified Generators bid at prices substantially above their respective marginal costs as reflected in their reference levels and that this conduct departed significantly from the conduct that would be expected under competitive conditions, thereby breaching the applicable conduct standard of section 23.2.3 of Attachment H. The Commission found that this conduct, in turn, breached the impact threshold of section 23.2.3(2) by receiving significantly increased guarantee payments that effectively caused them to be paid what they bid. The Commission reasoned that "the ability to include and recover costs in excess of marginal cost, including fixed costs, in bids during periods when the generators are required to run for reliability is evidence of market power"<sup>5</sup> and that "mitigation may be required."<sup>6</sup> The Commission explained that "in a competitive market, a generator lacking market power would be expected to submit bids into the NYISO spot market at a level that, if accepted at that bid price, would be expected to cover the generator's marginal costs."<sup>7</sup>

4. With regard to the rest-of-state region, in the May 20, 2010 Order, the Commission expressed its concern "with the absence of a generally applicable mitigation measure to address the exercise of market power in those instances where a generator is the only solution to a reliability need" and encouraged NYISO's efforts to develop such a measure.<sup>8</sup>

5. On August 13, 2010, NYISO submitted, pursuant to section 205 of the Federal Power Act (FPA), revisions to Attachment H (section 23) of the Services Tariff that

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<sup>4</sup> *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,169, at P 1 (2010) (May 20, 2010 Order).

<sup>5</sup> *Id.* P 73.

<sup>6</sup> *Id.* P 78.

<sup>7</sup> *Id.* P 73.

<sup>8</sup> *Id.* P 101.

proposed a market power mitigation measure that will apply to all generators located in the rest-of-state capacity region that are able to exercise market power when committed or dispatched to maintain system reliability. In the October 12, 2010 Order, the Commission accepted the generally applicable rest-of-state mitigation measure and also directed NYISO to make a compliance filing to remove the mitigation measure that applied only to the Specified Generators.

## **II. Summary of the October 12, 2010 Order**

6. The mitigation measure accepted in the October 12, 2010 Order is similar to the mitigation measure that was accepted by the Commission in the May 20, 2010 Order that had applied to three Specified Generators. It is applicable in the specifically defined circumstance where a supplier has market power when used for reliability. Pursuant to section 23.3.1.2.3.2, a supplier may be subject to mitigation if one of the following three conditions is met:

- i. the Market Party (including its affiliates) that owns or offers the generator is the only market party that could effectively solve the reliability need for which the generator was committed or dispatched, or
- ii. when evaluating a Supplemental Resource Evaluation (SRE) that was issued to address a reliability need that multiple market parties' generators are capable of solving, NYISO only received bids from one market party (including its affiliates), or
- iii. when evaluating a Day-Ahead Reliability Unit (DARU), if the market party was notified of the need for the reliability commitment of its generator prior to the close of the day-ahead market.<sup>9</sup>

7. If such a pivotal supplier engages in bidding conduct that breaches the conduct thresholds of section 23.3.1.2.3.3, it is mitigated to its reference level. Section 23.3.1.2.3.3 provides:

The Bids or Bid components submitted for the Generator that were accepted outside the economic evaluation process to protect or maintain New York Control Area or local system reliability:

- i. exceeded the Generator's Minimum Generation Bid reference level by the greater of 10 percent or \$10/MWh, or

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<sup>9</sup> NYISO Services Tariff, section 23.3.1.2.3.2.

- ii. exceeded the Generator's Incremental Energy Bid reference level by the greater of 10 percent or \$10/MWh, or
- iii. exceeded the Generator's Start-Up Bid reference level by 10 percent, or
- iv. exceeded the Generator's minimum run time, start-up time, and minimum down time reference levels by more than one hour in aggregate, or
- v. exceeded the Generator's minimum generation MW reference level by more than 10 percent, or
- vi. decreased the Generator's maximum number of stops per day below the Generator's reference level by more than one stop per day, or to one stop per day.

8. In the October 12, 2010 Order, the Commission rejected contentions that: (1) NYISO should inform a supplier whether it could be subject to mitigation before it submitted its bid;<sup>10</sup> (2) if a generator's bid did not trigger the section 23.3.1.2.3.3 conduct threshold, it should not be subject to market power allegations under any provisions of NYISO's tariffs;<sup>11</sup> (3) a unit meeting a DARU out-of-merit request must be the only unit that can respond to a reliability need in order for NYISO to apply the mitigation measures;<sup>12</sup> (4) a supplier is not in a position of market power when multiple generators are capable of solving a reliability need, but NYISO only receives bids from one market party;<sup>13</sup> and (5) generators need to change their bid components in response to being committed for reliability in order for the bids to be mitigated.<sup>14</sup>

9. The Commission also found the fixed cost recovery issues raised by the protesting parties to be outside the scope of this proceeding, which is focused on market power mitigation.<sup>15</sup> The Commission stated that fixed cost recovery issues do not go to whether

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<sup>10</sup> October 12, 2010 Order, 133 FERC ¶ 61,030 at P 45.

<sup>11</sup> *Id.* P 46.

<sup>12</sup> *Id.* P 47.

<sup>13</sup> *Id.* P 48.

<sup>14</sup> *Id.* P 49.

<sup>15</sup> *Id.* P 53-54.

NYISO's mitigation proposal is in itself just and reasonable and, in addition, commenters failed to provide factual evidence demonstrating that market participants generally will be unable to recover their costs due to application of the proposed mitigation provisions.<sup>16</sup>

### **III. Requests for Rehearing**

10. Requests for rehearing of the October 12, 2010 Order were filed by Independent Power Producers of New York (IPPNY), TC Ravenswood, LLC and TransCanada Power Marketing, Ltd. (collectively, Ravenswood), and The Alliance Utilities (Alliance).<sup>17</sup> On November 24, 2010, the New York Transmission Owners (NYTOs)<sup>18</sup> and NYISO filed answers to the requests for rehearing.

#### **A. Requests for Rehearing**

11. IPPNY states that in order for the rest-of-state mitigation proposal to meet the just and reasonable standard, generators needed for reliability must be given a reasonable opportunity to recover their costs, including a return on and of their investment and that the Commission should direct NYISO to submit a compliance filing within 120 days that provides a defined cost recovery mechanism directed to generators operating to meet reliability needs.

12. IPPNY states that the Commission's failure to address IPPNY's arguments and the attached affidavit of Dr. Roy Shanker was arbitrary and capricious. According to IPPNY, Dr. Shanker's affidavit addressed the inadequacy of cost recovery mechanisms under the NYISO tariff, explained how that inadequacy would be exacerbated by the adoption of the proposed mitigation measures, and proposed a cost recovery mechanism for the limited circumstances when generators are needed for reliability.<sup>19</sup> IPPNY states that Dr.

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<sup>16</sup> October 12, 2010 Order, 133 FERC ¶ 61,030 at P 54.

<sup>17</sup> The Alliance Utilities are AER NY-Gen, LLC, Alliance Energy Marketing, LLC, AG-Energy, L.P., Seneca Power Partners, L.P., and Sterling Power Partners, L.P.

<sup>18</sup> The NYTOs consist of 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.

<sup>19</sup> IPPNY November 11, 2010 Filing at 6 (citing IPPNY September 3, 2010 Filing at Exhibit 1).

Shanker established that units subject to the mitigation measures may not be able to earn sufficient capacity revenues due to the lack of locational definition in the capacity markets beyond the New York City and Long Island locational zones. Moreover, IPPNY states that such reliability situations may be so location specific that the capacity market cannot be honed to address them adequately.

13. IPPNY also states that the Commission should have rejected Dr. Patton's objections to Dr. Shanker's proposal because they are incorrect and inconsistent with Dr. Patton's advocacy of mitigation measures in the Midwest ISO.<sup>20</sup> IPPNY adds that Dr. Patton offered no empirical evidence in his affidavit to support his claim that capacity revenues are sufficient to sustain generators needed for reliability and he does not address the revenue adequacy mechanism in effect in PJM. IPPNY also states that several generators in NYISO have recently filed deactivation notices, and that one of these has been subject to DARU calls on essentially a daily basis in 2010. IPPNY states that the issues of generator mitigation under these specific circumstances and that of cost recovery are intertwined, and therefore, the Commission erred in stating the cost recovery issue is outside the scope of the proceeding.

14. IPPNY further states that the Commission's failure to impose a firm deadline for NYISO to file a cost recovery mechanism and the Commission's requirement of status reports for informational purposes only are arbitrary and capricious and not the result of reasoned decision making. According to IPPNY, that portion of the October 12, 2010 Order fails to address IPPNY's assertion that the stakeholder process is inadequate in addressing this issue. IPPNY asserts that NYISO agrees that the stakeholder process is not likely to produce a resolution of this issue any time soon.<sup>21</sup> IPPNY adds that without a firm Commission-imposed deadline, such discussions could potentially go on indefinitely. IPPNY argues that having the proposed mitigation measures in place without companion fixed cost recovery provisions limited to generators needed for reliability violates the FPA section 205 requirement that rates must be just and reasonable.

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<sup>20</sup> IPPNY November 10, 2010 Request for Rehearing at 11 (citing *inter alia*, *Midwest Independent Sys. Operator, Inc.*, 105 FERC ¶ 61,147, at P 42 (2003)).

<sup>21</sup> IPPNY November 10, 2010 Request for Rehearing at 14 (citing NYISO Market Mitigation and Analysis Manager, *Proposed Mitigation of ROS Generators Committed for Reliability and Next Steps*, at 15 (May, 2010), available at [http://www.nyiso.com/public/webdocs/committees/mc/meeting\\_materials/2010-05-28/MC\\_ROS\\_Reliability\\_Mitigation5\\_28\\_10FINAL.pdf](http://www.nyiso.com/public/webdocs/committees/mc/meeting_materials/2010-05-28/MC_ROS_Reliability_Mitigation5_28_10FINAL.pdf)).

15. Alliance seeks rehearing on the grounds that the Commission erred (1) in approving market mitigation measures that deny seldom-run generators needed for reliability a reasonable opportunity to recover costs,<sup>22</sup> (2) in not responding to evidence in the record,<sup>23</sup> and (3) in approving a new mitigation regime without offering some other effective solution for the fixed-cost recovery issue facing seldom-run units.

16. Alliance states that the Commission approved the new mitigation measures without ever coming to terms with how they would affect overall market revenues of seldom-run units needed for local reliability and, in fact, the Commission expressly rejected calls to consider fixed cost recovery as part of this proceeding. Alliance contends that the Commission must address whether the individual components of the overall rate design work together to achieve an overall result that is just and reasonable.<sup>24</sup> Alliance argues that resources must have a reasonable opportunity to recover their costs<sup>25</sup> and seldom-run generators needed for reliability have no such opportunity because generators primarily used for reliability do not earn significant margins. Alliance contends that it is being “commandeered” to ensure reliability without compensation, and, from an overall market perspective, this means that there is no price signal whatsoever for load to invest in other infrastructure solutions that would resolve whatever underlying reliability problem is causing the out-of-merit dispatch. Alliance further contends that the Commission has, in other cases, rejected market rate designs that denied generators “a sufficient opportunity to recover their fixed costs”<sup>26</sup> and has also approved “fixed cost adders.”<sup>27</sup>

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<sup>22</sup> Alliance Request for Rehearing at 6 (citing *FPC v. Hope Natural Gas Co.* 320 U.S. 591, 603 (1944)).

<sup>23</sup> *Id.* (citing *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005) (*Wallingford*); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000); *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1268-69 (D.C. Cir. 1996)).

<sup>24</sup> *Id.* (citing *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987)).

<sup>25</sup> *Id.* at 9 (citing, *inter alia*, *Hope Natural Gas*, 320 U.S. at 603; *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 77 (1st Cir. 2002)).

<sup>26</sup> *Id.* at 10 (citing *Indep. Energy Producers Assoc. v. Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,069, at P 35-38 (2006)).

<sup>27</sup> *Id.* (citing *Wis. Pub. Power v. FERC*, 493 F.3d 239, 259-60 (D.C. Cir. 2007)).

17. Alliance also states that the Commission failed to meaningfully respond to record evidence that seldom-run generators cannot recover their fixed costs. Alliance points to NYISO State of the Market Reports and expert testimony entered in the record as evidence that current market prices are insufficient to cover costs and to attract investments. Alliance argues that seldom-run resources face even more hurdles in that they have very limited opportunities to earn infra-marginal rents in the energy markets. Alliance argues that the instant proceeding is a virtual repeat of an earlier case where the Commission failed to respond to record evidence that a new mitigation regime for seldom-run generators needed for reliability prevented them from recovering their fixed costs.<sup>28</sup>

18. Alliance also contends that the new mitigation measures over-mitigate seldom-run units in that the mitigation measures bid a resource at its reference level, which is based on short-run marginal costs, and given that these resources have little ability to earn infra-marginal rents, they are unable to otherwise recover their costs. Alliance asserts that over-mitigation is unjust and unreasonable<sup>29</sup> and that there is no viable way to determine if a seldom-run resource is being over-mitigated if fixed-cost recovery issues are ignored. Therefore, according to Alliance, fixed cost recovery issues should be resolved as part of this proceeding, and the Commission erred in punting these issues to an open-ended stakeholder process.

19. Alliance also states that the NYISO Attachment Y<sup>30</sup> Gap process does not provide mitigated generators a reasonable back-up opportunity to recover fixed costs because: (1) a resource must announce its intent to retire, to qualify for the Gap process, which may trigger financial consequences; (2) NYISO must determine that there is a critical reliability need that must be fulfilled before GAP can be triggered, but dispatch for reliability purposes does not equate with the reliability need criterion of Attachment Y; and (3) NYISO does not have the authority under the GAP process to enter into a reliability-must-run agreement with the generator in question.

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<sup>28</sup> Alliance Request for Rehearing at 12 (citing *Wallingford*, 419 F.3d at 1194).

<sup>29</sup> *Id.* at 19 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,158, at P 12 (2006) (*Midwest ISO*)).

<sup>30</sup> Referring to Attachment Y of the NYISO Open Access Transmission Tariff (OATT).

20. Alliance argues that the Commission should have adopted less restrictive mitigation and refers to mitigation measures contained in the PJM and the Midwest ISO tariffs.<sup>31</sup>

21. Finally, Alliance asserts that the Commission should require NYISO to address the underlying issue of more efficient locational pricing. Alliance states that most often, the mitigation at issue in this proceeding arises when a local transmission owner concludes that it needs to commit or dispatch a generator solely for localized security reasons, such as voltage support. In such circumstances, according to Alliance, the generator is taken out-of-merit, disallowed from setting the clearing price and paid uplift payments. Alliance argues that local transmission owners have strong financial incentives to dispatch local generation in this manner because such dispatch reduces the local transmission owner's costs, particularly during peak hours. Alliance states that NYISO's solution is, in effect, to make the local generator shoulder the cost of the transmission security issue by denying it fixed cost recovery. Alliance asserts that this is an unjust and unreasonable outcome because it not only under-compensates the local generator, but fails to give proper price signals to resolve the local security issue, and, in fact, creates powerful incentives to *not* resolve such local issues. Alliance argues that NYISO, as a first step in resolving this issue, should model additional, smaller zones in NYISO's other markets.

22. Ravenswood seeks rehearing on the grounds that the Commission failed to require NYISO to develop an increased threshold/scarcity proposal, a load-side mitigation measure, and an adequate cost recovery mechanism for generators forced to run for reliability. Ravenswood also states that the rest-of-state mitigation measure eliminates potentially required revenue opportunities without determining whether the resulting market design is just and reasonable. Ravenswood states that the Commission's own arguments regarding market power and cost recovery justify the relationship between the two.<sup>32</sup> Ravenswood also states that the Commission's approach is not balanced because it ignores market power associated with non-competitive load-side activities and uneconomic entry. Therefore, Ravenswood requests that the rest-of-state mitigation measures be put on hold until NYISO submits a comprehensive and balanced mitigation measure and reasonable cost recovery mechanism.

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<sup>31</sup> *Id.* at 17 (citing *Midwest Indep. Sys. Operator*, 115 FERC ¶ 61,158 at P 12; PJM Operating Agreement section 6.4.2(a)(ii)).

<sup>32</sup> Ravenswood Request for Rehearing at 8 (citing October 12, 2010 Order, 133 FERC ¶ 61,030 at P 54).

#### IV. Discussion

##### A. Procedural Matters

23. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2010) prohibits an answer to a request for rehearing. Accordingly, NYISO's and the NYTO's answers will be rejected.

##### B. Commission Determination

24. IPPNY, Alliance, and Ravenswood argue that the Commission erred in approving new mitigation measures without also addressing their effect on fixed cost recovery. We deny rehearing. The merits of particular market power mitigation measures are based on whether the measures reasonably identify opportunities to exercise market power and whether the mitigated bids reasonably reflect competitive offers. The issue of whether generators have the opportunity in the NYISO market to recover all of their costs is important, as IPPNY and others have noted, but recovery of costs other than marginal costs must be addressed in a separate proceeding as this proceeding was not initiated to comprehensively review how all elements of the NYISO markets are contributing to cost recovery. This proceeding only addresses the ROS energy market and the Commission has previously ruled in the May 20, 2010 Order,<sup>33</sup> that bidding above marginal cost in the energy market is not conduct expected in a competitive energy market.

25. NYISO's energy markets are not designed or expected to recover more than marginal costs of the energy. In the May 20, 2010 Order, the Commission found that, while the energy market clearing prices may sometimes be higher than a generator's marginal costs and, therefore, may provide additional revenues that contribute the generator's fixed cost recovery, other markets, such as the capacity markets, address the recovery of fixed costs.

26. In sum, the Commission has determined that this proceeding is not the appropriate forum for a review of fixed cost recovery because this proceeding is dealing with a narrowly defined market power mitigation issue that arises in the ROS energy market. As such, requests to direct NYISO to address the issues of fixed cost recovery and the GAP process are beyond the scope of this proceeding.<sup>34</sup>

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<sup>33</sup> May 20, 2010 Order, 131 FERC ¶ 61,169 at P 73.

<sup>34</sup> The Commission notes that while the arguments of Alliance regarding capacity zones are not germane to this proceeding, this issue is currently before the Commission in Docket No. ER04-449-023.

27. IPPNY and Alliance contend that the rest-of-state market mitigation measures exacerbate the inadequacies of NYISO's cost recovery mechanism and that having the mitigation measures in place without corresponding fixed cost recovery provisions limited to generators needed for reliability results in rates that are not just and reasonable. We disagree. The alleged inadequacy of fixed cost recovery is not a basis for rejecting NYISO's proposed mitigation measures, which reasonably limit bids for energy to a competitive level related to the generator's marginal costs in the energy market when market power arises. The parties argue, in effect, that they should be allowed to exercise market power to compensate for what they view as deficiencies in NYISO's capacity markets. We do not agree. If there are deficiencies in the capacity markets, they should be addressed in a separate proceeding and not through the exercise of market power in the ROS energy market. The ROS mitigation measures at issue here mitigate the effects of any conduct that would substantially distort competitive outcomes in the ROS energy market. The exercise of market power in the ROS energy market may result in non-competitive market clearing prices, and lead to consequent costs for other ISO market participants, so it therefore is appropriate for NYISO to employ effective mitigation measures regardless of the effect on overall cost recovery of the generator. As the Commission stated in the May 20, 2010 Order in rejecting similar proposals to allow for the recovery of fixed costs in the mitigation applied in that proceeding to the Specified Generators, a generator's desire for fixed cost recovery does not justify the exercise of market power.<sup>35</sup> That principle applies equally well in this proceeding; the application of measures to mitigate the exercise of market power in the ROS region is the only issue in this proceeding.

28. Alliance is incorrect in arguing that NYISO over-mitigates by failing to take cost recovery into consideration. In support of its argument Alliance cites to *Midwest ISO*. In *Midwest ISO*, the Commission denied an extension of the one-year trial period for the use of mitigation in Broad Constrained Areas, which it had previously approved.<sup>36</sup> The Commission found that because the ISO had available to it alternate mitigation tools to address such market power, continued use of the Broad Constrained Area mitigation approach had not been justified. In contrast to *Midwest ISO*, the question raised by the

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<sup>35</sup> May 20, 2010 Order, 131 FERC ¶ 61,169 at P 81.

<sup>36</sup> The Commission stated that Broad Constrained Areas are those in which sufficient competition usually exists, even when one or more transmission constraints are binding, or into which the transmission constraints bind infrequently, but within which a transmission constraint can result in substantial locational market power under certain market or operating conditions. *Midwest ISO*, 115 FERC ¶ 61,158 at P 6 (citing section 1.24 of the Midwest ISO Open Access Transmission and Energy Markets Tariff).

parties here is whether to allow bidding that exceeds the competitive level in order to recoup fixed costs; not whether other NYISO provisions adequately address the potential market power issues raised when generators are called out-of-merit to meet a reliability need. Indeed, unlike in *Midwest ISO*, it is precisely because NYISO's other existing mitigation provisions do not satisfactorily address this market power issue in the ROS region that NYISO filed to change its tariff in the instant proceeding. Accordingly, *Midwest ISO* is inapposite in the instant case.

29. Alliance also argues that this case is a virtual repeat of *Wallingford*, where, according to Alliance, the Commission failed to respond to record evidence that a new mitigation regime for seldom-run generators needed for reliability prevented them from recovering their fixed costs. This characterization is incorrect. In *Wallingford*, the central issue of the case was cost recovery. Specifically, the central issue was whether the Commission's new methodology, which had a stated goal of providing a market mechanism for high cost, seldom-run units to recover their fixed costs,<sup>37</sup> was a just and reasonable replacement for the reliability-must-run contract filed by PPL Wallingford pursuant to section 205 of the FPA. As we state above, here, mitigation of market power is at issue, not fixed-cost recovery.

30. IPPNY asserts that the Commission erred in that it failed to address the affidavit of Dr. Roy Shanker. Dr. Shanker attempts to link the issue of fixed cost recovery to market power mitigation by virtue of the fact that mitigation will require a generator to bid at its variable (marginal) cost instead of including its fixed costs, and thus mitigation will reduce the generator's revenue and its corresponding ability to offset fixed costs. According to Dr. Shanker, because these units operate infrequently, it is more likely for such units to become unprofitable and cease operations. He argues that "for a mechanism to be deemed workable, it is necessary to be able to claim that there is the reasonable opportunity for recovery of costs."<sup>38</sup> Dr. Shanker asserts that his argument is not "a justification for allowing the exercise of market power. It is a realistic view of the subjective window that was previously deemed acceptable regarding 'workable' competition in the past, versus the size of that window under the new proposed mitigation rules"<sup>39</sup> In Dr. Shanker's opinion, alternative mitigation measures that apply in other markets would better satisfy overall competitive objectives and reduce the likelihood that generators needed for reliability will seek to retire under the proposed mitigation. However, the possibility that other alternate mitigation mechanism options recommended

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<sup>37</sup> *Wallingford*, 419 F.3d 1194 at 1198–99.

<sup>38</sup> IPPNY September 3, 2010 Protest, Shanker Affidavit at P 18.

<sup>39</sup> *Id.* P 20.

by Dr. Shanker, such as a bid adder for frequently mitigated units as permitted in PJM Interconnection, Inc., might achieve positive results in curbing the exercise of market power does not render NYISO's proposal unjust and unreasonable. We find the NYISO proposal to be just and reasonable on its own merits. NYISO's proposal establishes criteria that, we agree, identify generators that face little or no competition and, therefore, have market power and have exercised such power through their bidding conduct. NYISO's proposal would limit offers from such generators to pre-determined default values, i.e. reference levels, that reflect the generator's marginal costs and operating parameters. We agree with NYISO that these are reasonable competitive values in the ROS energy markets.

31. Like Dr. Shanker, other parties have stated their preference for mitigation measures used in Midwest ISO and PJM. There are multiple just and reasonable methods that can be used, and different methods may be suited to particular markets and stakeholder preferences. NYISO stakeholders are free to propose modifications to NYISO's existing mitigation measures through NYISO's stakeholder process. However, it is the NYISO proposal that is before us and, in the October 12, 2010 Order, we found it to be just and reasonable.

32. Accordingly, we deny the requests for rehearing of the October 12, 2010 Order.

The Commission orders:

The requests for rehearing of the October 12, 2010 Order are hereby denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.