

127 FERC ¶ 61,086  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

KeySpan-Ravenswood, LLC

Docket Nos. EL05-17-003  
EL05-17-004  
EL05-17-005  
EL05-17-006

v.

New York Independent System Operator, Inc.

ORDER APPROVING UNCONTESTED SETTLEMENT AND ACCEPTING  
COMPLIANCE FILING

(Issued April 24, 2009)

1. In this order, the Commission approves an uncontested offer of settlement (Settlement) filed on January 27, 2009, by Reliant Energy, Inc. (Reliant); Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, Oswego Harbor Power LLC, and NRG Power Marketing, LLC (collectively, NRG); Dynegy Power Marketing, Inc., and Dynegy Northeast Generation, Inc. (together, Dynegy);<sup>1</sup> Consolidated Edison Company of New York, Inc. (Con Edison), Orange and Rockland Utilities, Inc. (O&R), Central Hudson Gas & Electric Corporation (Central Hudson), New York State Electric & Gas Corporation (NYSEG), Rochester Gas and Electric Corporation (RG&E), Niagara Mohawk Power Corporation (National Grid), Long Island Power Authority (LIPA), New York Power Authority (NYPA) (collectively New York Transmission Owners), the New York Independent System Operator, Inc. (NYISO), Consolidated Edison Solutions, Inc. (Solutions), Constellation NewEnergy,

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<sup>1</sup> Reliant, NRG, and Dynegy are referred to herein and in the Settlement individually as a “Settling Supplier” and collectively as the “Settling Suppliers.”

Inc. (Constellation), and Gateway Energy Services Corporation (Gateway).<sup>2</sup> The Settlement resolves all outstanding issues in the above-captioned proceedings.

2. In this order, the Commission also accepts a compliance filing submitted by NYISO in response to the Commission's July 18, 2008 Order.<sup>3</sup> In addition, in this order, the Commission dismisses as moot KeySpan-Ravenswood's (Ravenswood's) request for clarification of the July 18, 2008 Order.

## **I. Background**

3. On October 27, 2004, Ravenswood filed a complaint under section 206 of the Federal Power Act (FPA) alleging that NYISO violated its tariff and the filed rate doctrine when, in computing the amount of installed capacity (ICAP) that load-serving entities (LSEs) were required to buy for the Summer 2002 capability period, NYISO used a formula for translating ICAP into unforced capacity (UCAP) that was not contained in its tariff. Ravenswood asserted that it lost approximately \$23.3 million in sales as a result of the improper translation. The Commission denied Ravenswood's complaint and subsequently denied rehearing.<sup>4</sup> On appeal, the United States Court of Appeals for the District of Columbia (D.C. Circuit) granted Ravenswood's appeal, found that NYISO had violated its tariff, and remanded the case to the Commission for further proceedings.<sup>5</sup>

4. Subsequent to the D.C. Circuit's order, Ravenswood and the Settling Parties filed an offer of settlement. The settlement provided that Ravenswood's claims to refunds for NYISO's violation of its tariff should be resolved by negotiated one-time payments by the eight in-City LSEs that served load during the relevant period. The settlement provided that Ravenswood would file a motion withdrawing the complaint within ten business days of a Final Order by the Commission accepting the Settlement without

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<sup>2</sup> Con Edison, O&R, Central Hudson, NYSEG, RG&E, National Grid, LIPA, NYPA, NYISO, Solutions, Constellation, Gateway and the Settling Suppliers are referred to herein and in the Settlement individually as a "Settling Party" and collectively as the "Settling Parties."

<sup>3</sup> *KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,062 (2008) (July 18, 2008 Order).

<sup>4</sup> *KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,116, *reh'g denied*, 111 FERC ¶ 61,336 (2005).

<sup>5</sup> *KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 474 F.3d 804 (D.C. Cir. 2007).

modification. NRG and Dynegy opposed the settlement on the grounds it did not provide any refunds to them.

5. In its July 18, 2008 Order, the Commission found that NYISO violated its tariff when it failed to enforce the New York State Reliability Council's ICAP requirement as required by NYISO's tariff, and that NYISO violated the filed rate doctrine when it failed to file its translation methodology with the Commission. The Commission severed the issue of refunds for generators other than Ravenswood from the settlement and approved the settlement as modified. The Commission set for hearing factual issues related to the determination of an appropriate remedy for the contesting parties and other similarly-situated entities, including whether and how the violation affected the amount of capacity the generators sold and the prices the generators received for their capacity sales. The Commission also directed NYISO to file its ICAP to UCAP translation methodology within 30 days of the issuance of the order.

6. On August 15, 2008, New York Transmission Owners, Solutions, and Constellation filed a timely request for clarification and rehearing of the July 18, 2008 Order.<sup>6</sup> On September 2, 2008, NRG, Reliant, and Dynegy filed an answer to the request for rehearing.

7. On August 18, 2008, Ravenswood filed a motion for clarification. Ravenswood requests clarification that, notwithstanding continuation of the proceeding with respect to severed issues and parties, the July 18, 2008 Order is a Final Order as applied to the approved uncontested settlement, and the Offer of Settlement, as modified, is now effective with respect to the payment of refunds to Ravenswood.

8. On August 16, 2008, NYISO submitted its compliance filing.

9. The Settling Parties and the Settling Suppliers negotiated in an attempt to narrow or resolve their differences, reached agreement in principle, and, on January 27, 2009, filed the subject Settlement.

10. On February 17, 2009, Commission Trial Staff (Trial Staff) filed comments in support of the Settlement. Trial Staff concludes that the Settlement represents a fair negotiated resolution of the contested issues by the sponsoring Parties and provides substantial potential benefits to ratepayers.

11. On March 3, 2009, the Settlement Judge certified the Settlement as an uncontested settlement.

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<sup>6</sup> Under section 2.3 of the Settlement, requests for clarification and rehearing or other pleadings filed by a Settling Party are deemed withdrawn.

## II. NYISO's Compliance Filing

12. In its August 16, 2008 filing, NYISO proposes revisions to its Market Administration and Control Area Services Tariff (Services Tariff) to incorporate the methodology for determining the New York Control Area (NYCA) and Locality Minimum Unforced Capacity Requirements, and to specify that the translation of ICAP into UCAP for these determinations is to be done on the same basis, and using the same period for assessing generator forced outage performance, as is used for translating ICAP to UCAP for generators.

13. NYISO states that the proposed new language in section 5.10 specifies that the NYCA minimum UCAP requirement for a given Capability Period is to be determined by multiplying the NYCA minimum ICAP requirement by the ratio of the generators' UCAP to their ICAP for that Capability Period. NYISO adds that parallel language is incorporated in section 5.11.4 to specify the methodology for determining the LSE Locational Minimum Installed Capacity Requirements. NYISO also states that the filing incorporates in the Services Tariff the load-side ICAP-to-UCAP translation methodology that has been specified in ISO Procedures and followed by the NYISO since the 2002-2003 Winter Capability Period. NYISO requests an effective date of October 17, 2008, sixty days from the date of its compliance filing.

14. Notice of NYISO's compliance filing was published in the *Federal Register*, 73 Fed. Reg. 51,636 (2008), with interventions and protests due on or before September 5, 2008. None was filed.

## III. Proposed Settlement and Responsive Pleadings

15. The Settlement provides in section one that a \$2.675 million settlement payment will be the only payment made under the Settlement Agreement. It states that no Settling Supplier or any other supplier or other entity will be entitled to any other additional payment of any kind under this Settlement, or otherwise from the Settling Parties, in connection with the issues and claims related to purchases or sales of ICAP or UCAP in any NYISO capacity markets for the 2002 Summer Capability Period, including but not limited to the New York City and Rest-of-State localities, and including but not limited to the calculation or award of damages or remedies for any tariff violation, and including specifically but not limited to those issues and claims before the Commission in Docket No. EL05-17-000, *et seq.* The Settlement allocates responsibility for the payment as follows:

Con Edison	\$ 1,703,500
NYPA	292,500
Central Hudson	112,500
LIPA	112,500
NYSEG/RG&E	112,500

National Grid	112,500
Solutions	100,000
Constellation	100,000
O&R	19,000
Gateway	10,000

16. The Parties also agree that the Settlement Payment will be distributed as follows:

Reliant	\$1,700,000
NRG	300,000
Dynegy	675,000

17. The Parties agree that this Settlement fully resolves the issues set for hearing in this proceeding, including any damages New York generators, other than Ravenswood, suffered as a result of NYISO's violation of the filed rate doctrine, including whether and how the violation affected the amount of capacity the generators sold and the prices the generators received for their capacity sales.

18. The Settlement provides that each Settling Party shall be deemed to have withdrawn any complaint, request for rehearing, appeal, or other pleading with respect to the matters resolved by this Settlement.

19. The Settlement provides that the Settlement is not subject to change by the Settling Parties pursuant to sections 205 and 206 of the FPA, and that the standard of review applicable to non-parties and the Commission acting *sua sponte* to modify the Settlement will be the most stringent standard permissible under applicable law.

#### **IV. Discussion**

20. The Settlement is fair, reasonable, and in the public interest and is hereby approved. The Settlement resolves a longstanding, complex dispute with respect to NYISO's method of converting ICAP to UCAP during the Summer 2002 Capability Period and resultant damages. The parties have negotiated an agreement to which no party objects. Further, the controversy underlying the proceeding has been resolved and is unlikely to recur.

21. We accept for filing the proposed revisions to NYISO's Services Tariff, effective October 17, 2008, as consistent with the July 18, 2008 Order.

22. Ravenswood's Request for Clarification is dismissed as moot.

#### **The Commission orders:**

(A) The Settlement is hereby approved, as discussed in the body of this order.

(B) NYISO's compliance filing is hereby accepted, effective October 17, 2008, as discussed in the body of this order.

(C) Ravenswood's request for clarification is hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner Kelly and Chairman Wellinghoff concurring in part with a joint statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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EL05-17-006

(Issued April 24, 2009)

KELLY, Commissioner, and WELLINGHOFF, Chairman, *concurring in part*:

The proposed standard of review in the settlement would have the Commission apply the “most stringent standard permissible under applicable law” to any changes proposed by non-parties or the Commission acting *sua sponte*.

The U.S. Supreme Court has held that whenever the Commission reviews certain types of contracts, the Federal Power Act (FPA) requires it to apply the presumption that the contract meets the “just and reasonable” requirement imposed by the FPA.<sup>1</sup> The contracts that are accorded this special application of the “just and reasonable” standard are those “freely negotiated wholesale-energy contract[s]” that were given a unique role in the FPA.<sup>2</sup> In contrast, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) determined that the proper standard of review for a different type of agreement, with regard to changes proposed by non-contracting third parties, was the “‘just and reasonable’ standard in section 206 of the Federal Power Act.”<sup>3</sup> The agreement at issue in *Maine PUC* was a multilateral settlement negotiated in a Commission adjudication of a utility’s proposal to revise its tariff substantially to enable it to establish and operate a locational installed electricity capacity market. The D.C. Circuit’s rationale in *Maine PUC* applies with at least equal force to changes to an agreement sought by the Commission acting *sua sponte*.<sup>4</sup>

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<sup>1</sup> *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

<sup>2</sup> *Id.*

<sup>3</sup> *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 478, *petition for reh’g denied*, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008) (*Maine PUC*).

<sup>4</sup> *See Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Comm’rs Wellinghoff and Kelly dissenting in part).

Our review of the agreement in question here indicates that it more closely resembles the *Maine PUC* adjudicatory settlement than the *Morgan Stanley* wholesale-energy sales contracts, which, for example, were freely negotiated outside the regulatory process. Therefore, the “most stringent standard permissible under applicable law” as applied here to changes proposed by either non-parties or the Commission acting *sua sponte* means the “just and reasonable” standard of review. In those instances, the Commission retains the right to investigate the rates, terms, and conditions of the settlement under the “just and reasonable” standard of review set forth under FPA section 206.<sup>5</sup>

For these reasons, we concur in part.

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Suedeem G. Kelly

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Jon Wellinghoff

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<sup>5</sup> 16 U.S.C. § 824e (2006).