

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

New York Independent System Operator, Inc.

Docket No. ER06-291-000

ORDER ACCEPTING AND SUSPENDING TARIFF SHEETS  
AND REFERRING PROCEEDING TO DISPUTE RESOLUTION SERVICE

(Issued December 30, 2005)

1. In this order, the Commission accepts and suspends, subject to refund, revised tariff sheets filed by the New York Independent System Operator, Inc. (NYISO) that would extend the applicability of the rate for Voltage Supply Service (VSS)<sup>1</sup> for 120 days, effective January 1, 2006. In addition, the Commission refers this proceeding to the Commission's Dispute Resolution Service (DRS).

**Background**

2. Since its inception in 1999, NYISO has been providing VSS. Rate Schedule 2 of NYISO's Market Administration and Control Area Services Tariff (Service Tariff) sets forth the annual compensation to suppliers that provide VSS. From 1999 through 2002, the rate paid to generators in New York State was calculated under a complex formula that used actual generator production cost data. Because of problems with that approach, in 2001 NYISO filed a simplified rate methodology based on an estimate of generator costs derived from transmission owners' FERC Form 1 data. The revised methodology resulted in a rate of \$3919/MVAr per year.<sup>2</sup> On February 5, 2002, in an unpublished

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<sup>1</sup> VSS is also referred to as reactive power supply service.

<sup>2</sup> Reactive Power (often referred to as "vars" and measured in "MVar" or megavolt amperes reactive) is analogous to "real power," which is measured in MW or megawatts.

letter order, the Director, Division of Tariffs and Market Rates-East, accepted this rate methodology,<sup>3</sup> which was only intended as an interim measure.

3. Although the interim methodology was to be replaced by a more sophisticated methodology within a year, NYISO states that it has been very difficult to gain market participant support for changes to the rate methodology. Thus, for every year since 2002, NYISO has requested, and has been granted, annual extensions of the currently-effective rate mechanism.<sup>4</sup>

4. NYISO states that, despite its best efforts, it has not been able to forge a consensus among market participants on either (1) a replacement VSS rate mechanism or (2) the proper methodology to compute the VSS rate. Nevertheless, NYISO states that it is optimistic that further negotiations can break the current impasse. Further, NYISO has requested the assistance of the Commission's DRS. Because the currently-effective rate for VSS will expire on December 31, 2005, because VSS is critical to reliability in New York State, and because Commission policy requires that suppliers of voltage control and reactive power services be compensated,<sup>5</sup> NYISO's Board of Directors exercised its "exigent circumstances" authority and directed its staff to make the instant filing.<sup>6</sup>

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<sup>3</sup> *New York Indep. Syst. Operator, Inc.*, Docket No. ER02-617-000 (Feb. 5, 2002) (unpublished letter order).

<sup>4</sup> *New York Indep. Syst. Operator, Inc.*, Docket No. ER03-112-000 (Dec. 19, 2002) (unpublished letter order); *New York Indep. Syst. Operator, Inc.*, Docket No. ER04-144-000 (Dec. 22, 2003) (unpublished letter order); *New York Indep. Syst. Operator, Inc.*, 109 FERC ¶ 61,367, at P 6 (Dec. 28, 2004).

<sup>5</sup> *See, e.g., Midwest Indep. Syst. Operator, Inc.*, 109 FERC ¶ 61,005, at P 33 (2004), *order on reh'g*, 110 FERC ¶ 61,267 (2005).

<sup>6</sup> Under the ISO Agreement, NYISO ordinarily files tariff amendments only with the concurrence of both its Board and its stakeholder management committee. However, the Board is authorized to make filings on its own when "exigent circumstances" are present.

### **Nyiso's Proposal**

5. On December 5, 2005, pursuant to section 205 of the Federal Power Act,<sup>7</sup> section 35.13 of the Commission's regulations,<sup>8</sup> and article 19.01 of NYISO's Independent System Operator Agreement (ISO Agreement), NYISO submitted temporary amendments to Rate Schedule 2 of its Service Tariff. NYISO states that the purpose of the tariff revisions is to delay the expiration of Rate Schedule 2 for 120 days, the maximum time allowed under the ISO Agreement.

6. Rate Schedule 2 currently contains a number of references that establish that it is only applicable in calendar year 2005. NYISO proposes to remove these references and to replace them with new language stating that Rate Schedule 2 will apply between January 1, 2006 and April 4, 2006. NYISO proposes that all other provisions of Rate Schedule 2 remain unchanged. NYISO states that within the next couple of months, there is a good chance that the interested market participants will be able to reach agreement on compensation for VSS for calendar year 2006. Because NYISO anticipates that an annual payment methodology will be established, it requests that the Commission note that the proposed extension is "tentative" and may be adjusted retroactively to January 1, 2006.

7. NYISO notes that if the market participants are not able to resolve their differences, it will nevertheless make some type of filing to ensure that generators are compensated for providing VSS. NYISO notes that there are many issues that need to be resolved to develop a permanent VSS rate methodology. Such issues, which will require further data collection and new analyses, include: (1) identifying the best method for calculating VSS rates using actual generator costs rather than cost estimates; (2) determining the actual VSS needs of the New York transmission system with greater certainty, including whether there should be any location-specific requirements; (3) determining whether VSS costs should be allocated to customers on a locational basis, or using some other measure, instead of being assessed uniformly to all customers in New York; (4) determining whether and how to adjust VSS compensation to include a supplier's ability to produce both MVars ("lagging" capability) and absorb them ("leading" capability). NYISO states that its goal is to finalize work on these issues as soon as practicable, so that NYISO will be in a position to make a filing under section 205 of the FPA to establish a comprehensive and permanent VSS rate methodology as soon as practicable.

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<sup>7</sup> 16 U.S.C. § 824d (2000).

<sup>8</sup> 18 C.F.R. § 35.13 (2005).

8. Finally, NYISO requests waiver of the cost support requirement of the Commission's regulations.<sup>9</sup>

### **Notice Of Filings And Responsive Pleadings**

9. Notice of NYISO's filing was published in the *Federal Register*, 70 Fed. Reg. 74,310 (2005), with interventions and protests due on or before December 15, 2005. Timely motions to intervene were filed by Mirant Parties<sup>10</sup> and the New York Municipal Power Agency, with no comments. Timely motions to intervene and comments were filed by AES Eastern Energy, L.P. (AES); NRG Companies;<sup>11</sup> Independent Power Producers of New York, Inc. (Independent Power Producers); Keyspan-Ravenswood, LLC; Long Island Power Authority and LIPA; Multiple Intervenors;<sup>12</sup> Indicated New York Transmission Owners;<sup>13</sup> Edison Mission Energy and Edison Mission Marketing & Trading, Inc.; and Dynegy Northeast Generation, Inc., et al. No protest was filed.

### **Discussion**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>9</sup> *Id.*

<sup>10</sup> The Mirant Parties are: Mirant Americas Energy Marketing, LP, Mirant New York, Inc., Mirant Bowline, LLC, Mirant Lovett, LLC, and Mirant NY-Gen, LLC.

<sup>11</sup> The NRG Companies are: NRG Power Marketing, Inc.; Arthur Kill Power, LLC; Astoria Gas Turbine Power LLC; Dunkirk Power LLC; Huntley Power LLC; and Oswego Harbor Power LLC.

<sup>12</sup> Multiple Intervenors is an unincorporated association of approximately 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State.

<sup>13</sup> The Indicated NY Transmission Owners are: Consolidated Edison Company of New York, Inc.; Orange & Rockland Utilities, Inc.; Central Hudson Gas & Electric Corporation; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation d/b/a National Grid; Rochester Gas and Electric Corporation; and the New York Power Authority.

11. All of the commentors support NYISO's proposal to extend the currently-effective rate for VSS for 120 days while negotiations continue. The commentors also support the use of DRS to help resolve the outstanding issues.

12. As noted by Indicated New York Transmission Owners, failure to have a defined rate in the NYISO Service Tariff would lead to operational uncertainties and potential litigation concerning the rights, obligations, and responsibilities of NYISO, generators, and loads. Further, it would raise potentially serious reliability concerns. Finally, it would place NYISO in the position of requiring a service without having an effective rate to pay for such service, in contravention of the filed rate doctrine.

13. In addition, the commentors support NYISO's request that the rate they expect to establish during upcoming negotiations be made effective retroactive to January 1, 2006. For example, Independent Power Producers note that a revised rate for the entire 2006 calendar year is important because it removes the incentive for parties that would benefit from delay in establishing a revised rate to engage in delay tactics.

14. Certain commentors note that there are additional issues that need to be resolved, including (1) whether non-generation sources of VSS, such as the Cross-Sound Cable, should be compensated; (2) whether consumers should be required to pay for more VSS than is needed to maintain reliability; and (3) the appropriate methodology for allocating VSS-related costs to consumers.

15. In addition, Independent Power Producers request that the Commission order NYISO to immediately commence whatever studies and analyses are necessary to determine appropriate, cost-based rates for 2006 and in future years. Further, AES requests that defined milestones be established by the Commission.

### **Commission Conclusion**

16. NYISO's proposal raises two questions. First, would it violate the filed rate doctrine to allow NYISO's proposed VSS rate to become effective on January 1, 2006, but then allow a replacement rate to become effective on January 1, 2006, if the parties are able to reach agreement on a new rate? Second, is the proposed extended VSS rate just and reasonable? We address each of these questions below.

17. As to the filed rate doctrine, this doctrine forbids a regulated entity from charging rates for its service other than those properly filed with the appropriate federal regulatory authority.<sup>14</sup> Moreover, the Commission has generally disfavored re-determining market

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<sup>14</sup> *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

outcomes after the fact, holding that “retroactivity is not authorized when a new rule is substituted for an old rule that was reasonably clear so that the settled expectations of those who had relied on the old rule are protected.”<sup>15</sup>

18. However, “[c]ourts have consistently held that the filed rate doctrine does not apply where customers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of the service.”<sup>16</sup> Notice “changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.”<sup>17</sup> In addition, the Commission may also make retroactive rate adjustments when the parties have agreed to it.<sup>18</sup>

19. Thus, we find that, if the Commission accepts NYISO’s proposal, we would not be precluded from later authorizing NYISO to make the revised VSS rate effective as of January 1, 2006, because by this order we are putting the parties on notice that this might happen if they reach a settlement on the outstanding issues and NYISO files a revised VSS rate, with a proposed effective date of January 1, 2006. Moreover, to the extent that the parties agree to such a procedure, this would provide an additional basis to allow the requested January 1, 2006 date for the revised rate.

20. As to the question of whether the extension of the current rate is just and reasonable, the Commission recognizes that all parties agree that the currently-effective rate needs to be replaced and that the parties are actively working on developing a rate

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<sup>15</sup> *Wisvest-Connecticut, LLC v. ISO New England, Inc.*, 104 FERC 61,262 at 61,849 (2003); *see also Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1553-55 (D.C. Cir. 1993) (noting that “it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.”)

<sup>16</sup> *E.g., Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 969 (2003) (*Consolidated Edison*); *Exxon Co., USA v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1995).

<sup>17</sup> *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *see also Natural Gas Clearinghouse*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) (per curiam); *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 229 (D.C. Cir. 1995).

<sup>18</sup> *Consolidated Edison*, 347 F.3d at 969.

methodology that would result in a just and reasonable rate. To provide the parties additional time to develop this methodology, the Commission accepts for filing NYISO's proposed revisions to Rate Schedule 2 of its Service Tariff for the period of January 1, 2006 through April 4, 2006.<sup>19</sup> In addition, the Commission suspends the revised tariff sheets, and makes the rate effective subject to refund. Our action is based on the fact that without extending NYISO's currently-effective rate, NYISO would not have a rate for VSS in effect, and voltage supply service is a required ancillary service for which parties providing the service must be compensated. Our decision is further based on the fact that the rate contained in this filing will be replaced, whether by rates contained in a settlement or by rates filed by NYISO before the end of the suspension period. In either case, the rate is subject to refund for the period beginning January 1, 2006, as discussed above.

21. The Commission's policy regarding suspensions is that filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or inconsistent with other statutory standards.<sup>20</sup> It is recognized, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results.<sup>21</sup> Such circumstances do exist here.

22. Moreover, we will grant NYISO waiver of the cost support requirement of the Commission's regulations<sup>22</sup> because the cost support will be provided when NYISO submits its revised VSS rate(s) and methodology for approval.

23. As requested by the parties, the Commission directs the Director of DRS to convene a meeting of the parties to: (1) arrange a process to foster negotiations, (2) develop a timeline for future negotiations, and (3) determine what information is necessary from the parties and what studies are required by the NYISO staff to facilitate

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<sup>19</sup> We will grant waiver of the Commission's 60-day advance notice requirements at 18 C.F.R. § 35.3 (2005), so that NYISO's proposed VSS rates can become effective on January 1, 2006, as requested.

<sup>20</sup> See *Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension).

<sup>21</sup> See *Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one-day suspension).

<sup>22</sup> 18 C.F.R. § 35.13 (2005).

negotiations. The parties must report on the status of the negotiations to the Commission within 30 days of the date of issuance of this order, and every 30 days thereafter. The Commission expects the parties to achieve a resolution of the VSS rate in such time as to allow any settlement to be put into effect before April 4, 2006, the end of the suspension period.

The Commission orders:

(A) NYISO's proposed tariff sheets are hereby accepted for filing, and nominally suspended, subject to refund, as discussed in the body of this order.

(B) NYISO is hereby granted waiver of the Commission's 60-day advance notice requirements found at 18 C.F.R. § 35.3 (2005), so that NYISO's existing VSS rate will remain effective from January 1, 2006 through April 4, 2006, as requested.

(C) NYISO is hereby granted waiver of the cost support requirement found at 18 C.F.R. § 35.13 (2005), as discussed in the body of this order.

(D) This proceeding is hereby referred to the Commission's DRS. NYISO shall report to the Commission on the status of its negotiations within 30 days of the date of issuance of this order and every 30 days thereafter until NYISO makes another filing addressing its VSS rates.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.