

112 FERC ¶ 61,284
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 Nos. ER04-230-012,
ER01-3155-010
ER01-1385-019
EL01-45-018

ORDER ON REHEARING AND CLARIFICATION

(Issued September 15, 2005)

1. On June 24, 2005, the Commission issued an order on rehearing in this proceeding.¹ The June 24, 2005 Order (June 24, 2005 Order) granted requests for rehearing of the Commission's August 10, 2004 Order (August 10, 2004 Order).² Among other things, the June 24, 2005 Order granted rehearing of the Commission's prior acceptance of New York Independent System Operator, Inc.'s (NYISO) proposed implementation of Automated Mitigation Procedures (AMP) in the Real Time Market (RTM) outside New York City, and directed NYISO to remove from its tariff the provisions permitting the application of AMP in the RTM outside New York City. This order addresses NYISO's request for rehearing, or, in the alternative, clarification of the June 24, 2005 Order.

I. Background

2. On November 26, 2003, as amended on December 1, 2003, NYISO submitted revisions to its Open Access Transmission Tariff (OATT) and Market Administration and Control Area Services Tariff (Services Tariff) to implement new Real Time Scheduling (RTS) software and related new market rules. The new RTS software and the related

¹ *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,468 (2005).

² *New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 (2004).

new market rules: (1) permitted the adoption of co-optimized two-settlement markets for regulation service and operating reserves; (2) supported greater market participation by demand side resources; (3) facilitated the resolution of seams; and (4) served as the foundation for future improvements. They also enhanced the NYISO's market power mitigation measures and related software.

3. On February 11, 2004, the Commission issued an order accepting NYISO's November 26, 2003 filing, as amended, subject to modification.³ Specifically, the Commission: (1) required the NYISO to submit revised tariff sheets indicating that the default availability bid for Operating Reserves applies only to Installed Capacity (ICAP) suppliers; (2) rejected NYISO's proposal to extend AMP into the RTM outside New York City; and (3) required NYISO to incorporate one of the three options suggested by Sithe Energy Marketing, L.P. (Sithe) as an alternative to the RTS proposal to remove the ability of off-dispatch suppliers to receive payments for uninstructed over-generation.

4. On March 5, 2004, NYISO filed a request for rehearing of the February 11, 2004 order with respect to the Commission's ruling denying the application of a default availability bid to non-ICAP suppliers. On May 7, 2004,⁴ the Commission granted rehearing and accepted NYISO's proposal to implement the automatic bid rejection rule and directed the NYISO to submit a compliance filing implementing the automatic bid rejection rule.⁵ On June 7, 2004, NYISO submitted its filing to comply with the May 7, 2004 Order.

5. On March 12, 2004, NYISO and the New York Transmission Owners⁶ filed requests for rehearing of the February 11, 2004 order. On March 12, 2004, NYISO also submitted a filing to comply with the February 11, 2004 order. NYISO's compliance filing was protested.

6. On August 10, 2004 (August 10, 2004 Order) the Commission issued an order on rehearing and compliance filings. The August 10, 2004 Order accepted the March 12,

³ *New York Independent System Operator, Inc.*, 106 FERC ¶ 61,111 (2004).

⁴ *New York Independent System Operator, Inc.*, 107 FERC ¶ 61,134 (2004).

⁵ The automatic bid rejection rule would allow the NYISO to reject any day-ahead market offers that do not include an operating reserves availability bid.

⁶ The New York Transmission Owners are Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., Rochester Gas and Electric Corporation and Niagara Mohawk Power Corporation.

2004 compliance filing with respect to the mitigation provisions, effective May 1, 2004, and the rest of the revisions were accepted as of the effective date of RTS implementation. The August 10, 2004 Order granted rehearing and accepted implementation of RTM-AMP outside New York City and directed the NYISO to file, within 150 days after the effective date of RTS, to implement its 15-minute scheduling in combination with improved modeling of combined cycle units. (The August 10, 2004 Order also accepted a June 7, 2004 compliance filing implementing the automatic bid rejection rule.)⁷

7. On September 9, 2004, NYISO and Edison Mission Energy, Inc. and Edison Mission Marketing & Trading, Inc. (jointly, Edison Mission) filed requests for rehearing of the August 10, 2004 Order. On September 24, 2004, Sithe, Dynegy Power Marketing, Inc., PSEG Power LLC, and PSEG Energy Resources & Trade LLC filed a joint answer to NYISO's request for rehearing (Sithe Answer).

8. On June 24, 2005, the Commission issued an order on rehearing of an August 10, 2004 Order (June 24, 2005 Order). As relevant here, the June 24, 2005 Order granted Edison Mission's request for rehearing and directed NYISO to file revised tariff sheets removing provisions permitting the application of AMP in the RTM outside New York City.⁸

9. On July 25, 2005, NYISO filed a request for rehearing of the Commission's determination to reject NYISO's implementation of AMP in the RTM outside New York City.

II. Discussion

A. NYISO's Request for Rehearing

10. The June 24, 2005 Order granted rehearing and rejected NYISO's proposed implementation of AMP in the RTM outside New York City. NYISO requests rehearing of the June 24, 2005 Order's requirement that NYISO file to remove provisions permitting the application of AMP in the RTM outside New York City, or, in the

⁷ On January 28, 2005, as amended on February 8, 2005, the NYISO made a filing to comply with the February 11 Order and provide official notice that the RTS markets enhancements would go into effect on February 1, 2005. The compliance filing was conditionally accepted on March 29, 2005, in an unpublished, delegated letter order in Docket Nos. ER04-230-007 and ER04-230-008.

⁸ June 24, 2005 Order, 111 FERC ¶ 61,468 at P 11, Ordering Paragraph (A).

alternative clarification of the scope of the Commission's order. NYISO explains that the proposed RTM-AMP for outside New York City required that (1) a seller be observed breaching the applicable conduct and impact tests for the detection of market power abuse, and (2) NYISO initiate consultations with the seller to determine that there is no legitimate cost basis for the bid breaching the applicable conduct and impact tests. The proposed provisions also provide that, for a generator that is not in a constrained area, AMP may be used for a period not longer than six months from the submission of a bid breaching the applicable conduct and impact tests.

11. NYISO argues that the June 24, 2005 Order exclusively and erroneously relied on the United States Court of Appeals for the District of Columbia Circuit's ruling in a proceeding involving NYISO's application of AMP in the Day Ahead Market (DAM) outside New York City⁹ and the Commission's order on remand¹⁰ in that proceeding (Edison Mission proceeding). NYISO contends that the Commission did not recognize the critical distinctions between the tariff provisions and markets at issue here and those at issue in the Edison Mission proceeding. NYISO further contends that the Edison Mission proceeding dealt only with application of AMP in the DAM outside New York City, and in the Edison Mission proceeding neither the court nor the Commission considered AMP in the RTM outside New York City.

12. NYISO asserts that, in contrast to the proposed DAM-AMP provisions for outside New York City, the more recent RTS filing added a new section 3.2.2(d) to Attachment H to the NYISO's Services Tariff, which provides that the RTM-AMP provisions for outside New York City may be applied only when the conduct and impact thresholds are crossed and after "the ISO, in consultation with the Market Advisor, determines that the bid is inconsistent with competitive conduct." NYISO also asserts that the proposed consultation procedures provide a market participant the opportunity to demonstrate to NYISO that a bid was based on legitimate costs, as specified in the tariff provisions for determining a unit's reference levels, rather than an ability to exercise market power.¹¹ Under conduct and impact mitigation, the applicable reference levels provide the benchmark for assessing whether a bid meets the conduct test, which is set in the tariff at

⁹ *Edison Mission Energy, Inc., v. FERC*, 394 F.3d 964 (D.C. Cir. 2005) (Remand Order), *clarified*, No. 03-1228 (D.C. Cir. March 25, 2005) (unpublished).

¹⁰ *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,399 (2005) (Order on Remand).

¹¹ Services Tariff, Attachment H § 3.1.4.

a specified dollar or percentage increase in a bid over the reference level.¹² NYISO notes that, in the August 10, 2004 Order the Commission stated, “As with the current rest-of-state manual procedures, under the requested extension of the AMP, an initial breach of the conduct and impact tests would result in consultations with the seller, without mitigation being imposed.”¹³ Thus, NYISO insists that the RTM-AMP provisions for outside New York City directly address the court’s concern that the AMP might not distinguish between prices that reflect scarcity and those that reflect the exercise of market power. NYISO concludes that the Commission should grant rehearing, and direct NYISO to reinstate the RTM-AMP provision for outside New York City in its tariff.

13. The Commission will deny NYISO’s request for rehearing. The June 24, 2005 Order appropriately relied on the court’s Remand Order and the Commission’s Order on Remand in the Edison Mission proceeding. NYISO contends that the Edison Mission proceeding dealt only with the use of DAM-AMP for outside New York City. However, the court Remand Order stated more generally that the use of AMP in a workably competitive market, such as the market outside New York City, may cause harm by curtailing price increases attributable to genuine scarcity. The Commission’s Order on Remand reflected the court’s determination. The concern that the use of AMP may curtail price increases attributable to genuine scarcity applies no less to the RTM for outside New York City.

14. NYISO asserts that there are critical distinctions between the rejected tariff provisions regarding the use of AMP in the DAM outside New York City and the proposed tariff provisions regarding the use of AMP in the RTM outside New York City. However, the distinctions described by NYISO do not justify the granting of NYISO’s request for rehearing for the reason discussed above. That is, the same rationale applicable to the DAM-AMP for outside New York City applies equally to the RTM-AMP for outside New York City.

15. Section 3.2.2(d), Attachment H of the Services Tariff provides that RTM-AMP provisions for outside New York City apply only when both the conduct and impact thresholds are crossed and after the NYISO has consulted with the Market Advisor. However, section 3.3, Attachment H of the Services Tariff does not clearly state that the Market Monitoring Unit must consult with the Market Participant before the RTM-AMP provisions are applied outside New York City; section 3.3 indicates that a Market Participant may contact the ISO. Thus, it appears that the RTM-AMP provisions for

¹² Services Tariff, Attachment H § 3.1.2.

¹³ *New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 at P 14 (2004).

outside New York City may be applied before it is determined whether the Market Participant's conduct is consistent with competitive behavior, and the burden is placed on the Market Participant to initiate the consultation. This procedure does not sufficiently ensure that price increases attributable to genuine scarcity are not curtailed or allow the Market Participant to demonstrate that its behavior is not anticompetitive before the RTM-AMP provisions for outside New York City are applied.

B. NYISO's Clarification Request

16. In the alternative, NYISO requests that the Commission clarify that the June 24, 2005 Order does not preclude the use of the RTS software to apply conduct and impact mitigation on an interval by interval basis after appropriate consultation with the relevant market participant has occurred.

17. NYISO contends that, with the current capabilities of RTS software, the distinction between "manual" and "automated" mitigation is largely outmoded. NYISO explains that previously, under "manual" mitigation, when a seller triggered the conduct and impact thresholds, NYISO would consult with the seller. If NYISO was not satisfied that the seller was acting in a competitive manner, NYISO could mitigate the seller by placing it on a "watch list" for future mitigation for a period not to exceed six months. NYISO further explains that, because the predecessor to RTS software did not operate quickly enough to apply both the conduct and impact tests to a given RTM interval, a seller on the watch list would be mitigated whenever its bids crossed the conduct threshold with impact from such bids being presumed to occur. NYISO asserts that RTS software is capable of applying both the conduct and impact tests for each RTM interval. Thus, NYISO states that, under mitigation with RTS, if, after consultation, it is determined that a bid improperly breached the conduct and impact tests, NYISO would thereafter, for as long as the conditions giving rise to market power continue but not longer than six months, replace the seller's bid with a default bid if RTS determined on an interval by interval basis that the bid breached both the conduct and impact tests.

18. The Commission clarifies that the June 24, 2005 Order does not preclude the use of RTS software to apply conduct and impact mitigation on an interval by interval basis outside New York City after appropriate consultation with the relevant Market Participant has occurred. In its March 25, 2005 clarification of the Remand Order, the court clarified that the Commission "orders under review are vacated only insofar as they apply to Automated Mitigations Procedure (AMP) outside of New York City." Therefore, the court did not vacate or remand the manual mitigation outside New York City.

19. The Commission's intention in the June 24, 2005 Order was to ensure that price increases outside New York City attributable to genuine scarcity are not curtailed. Consultation with the relevant Market Participant alleviates the concern that price

increases outside New York attributable to genuine scarcity will be curtailed. As NYISO indicates, with the added requirement for prior consultation with the Market Participant, the mitigation for the RTM outside New York City accepted in this order is basically the same as the manual mitigation already accepted. However, the requirement that NYISO consult with the Market Participant to allow the Market Participant to demonstrate that its behavior is not anticompetitive before mitigation for outside New York City must be clearly stated in NYISO's tariff.

20. Accordingly, NYISO is directed to file revised tariff language within 30 days of the issuance of this order to clarify that NYISO is required to make a reasonable attempt to consult with the relevant Market Participant before the RTS software is used to apply conduct and impact mitigation outside New York City. NYISO must also keep records showing it made reasonable attempts to consult with the relevant Market Participant in case reasonable attempts to consult with the Market Participant fail.

The Commission orders:

(A) NYISO's request for rehearing is hereby denied, as discussed in the body of this order.

(B) NYISO's request for clarification is hereby granted, as discussed in the body of this order.

(C) NYISO is hereby directed to file revised tariff language to clarify that the NYISO is required to make a reasonable attempt to consult with the relevant Market Participant before the RTS software is used to apply conduct and impact mitigation outside New York City, within 30 days of the issuance of the order. NYISO must also keep records showing its attempts at consultation with the Market Participant, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.