

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

H.Q. Energy Services (U.S.), Inc.	Docket Nos. EL01-19-004
v.	EL01-19-005
New York Independent System Operator, Inc.	EL01-19-006
PSEG Energy Resources & Trade LLC	EL02-16-004
v.	EL02-16-005
New York Independent System Operator, Inc.	EL02-16-006

ORDER DENYING REHEARING, GRANTING CLARIFICATION,
AND SETTING REFUNDS FOR HEARING

(Issued November 21, 2005)

1. In this order, the Commission denies rehearing and grants clarification of its March 4, 2005 Order in which the Commission found that the New York Independent System Operator (NYISO) was not justified in invoking its Temporary Extraordinary Procedure (TEP) authority to recalculate prices for May 8 and 9, 2000.¹ The NYISO had invoked its TEP process, claiming that a market design flaw existed because its bidding procedures did not permit the New York Power Authority (NYPA), the owner of the Blenheim-Gilboa pump storage facility, to submit a bid that reflected its willingness to provide energy during emergency situations at lower prices than the bid it actually submitted. The Commission affirms its finding that no market design flaw existed because Blenheim-Gilboa could have achieved its desired goal of supporting the market during emergency situations by utilizing an alternative bidding mechanism, and because the NYISO market design did not prevent NYPA from bidding its true opportunity costs.

¹ *H.Q. Energy Services (U.S.), Inc. v. New York Independent System Operator, Inc.*, 110 FERC ¶ 61,243 (2005) (March 4 Order).

2. The Commission also ordered NYISO to file a refund report showing how it proposed to pay refunds and collect surcharges to reinstate the original market clearing prices for energy for the real-time market determined on May 8 and 9, 2000. In the instant order, the Commission sets for hearing and settlement judge proceedings the issues raised as to the amount and collectibility of the refunds required to be paid.

I. Background

A. NYISO's Use of its Temporary Extraordinary Procedure Authority to Change Prices on May 8 and 9, 2000

3. The TEP provisions of NYISO's tariff are intended to enable NYISO "to address unanticipated market design flaws and transitional abnormalities."² The TEP defines a market design flaw as "a market structure, market design or implementation flaw giving rise to situations in which market conditions or the application of [Independent System Operator (ISO)] Procedures would result in inefficient markets or prices that would not be produced in a workably competitive market."³ The TEP additionally stipulates, however, that Market Design Flaws do not include "situations in which prices rise to levels based on demand and supply levels determined by efficient competition in periods of relative scarcity."⁴

4. Under the TEP, in the event of a NYISO declaration of a market design flaw that would impair reliability or market prices, NYISO can take one or more Extraordinary Corrective Actions (ECAs) to address those problems. If NYISO finds that the Location-Based Marginal Price (LBMP) has reached a level substantially unrelated to the price that would be derived absent a market design flaw, the TEP allows NYISO to recalculate the LBMP as it should have been but for the market design flaw, "[i]f possible with reasonable certainty."⁵

² TEP, NYISO Market Administration and Control Area Tariff (Services Tariff), Attachment E, section A.

³ *Id.*

⁴ *Id.*

⁵ TEP, NYISO Services Tariff, Attachment E, section C.2.c(2).

B. NYISO's Use of its TEP Authority Regarding Events of May 2000

5. NYISO operates Day-Ahead and Real-Time Markets for energy. Generating resources submit bids into the Day-Ahead Market, and NYISO determines how much generation it is likely to need for the next day and commits resources on that basis. If, during the next day, NYISO needs to procure more energy, it does so from quantities available in the Real-Time Market.

6. On May 8 and 9, 2000, unexpected high temperatures and outages caused NYISO to dispatch generating capacity in real time that had been bid in the Day-Ahead Market, but not scheduled on a day-ahead basis. This included unscheduled capacity from the Blenheim-Gilboa pumped storage hydroelectric unit, which was offered into the Real-Time Market at bids of \$3000/MWh and higher. NYISO's rules required that, because Blenheim-Gilboa was dispatched, its \$3000+ bids be used to determine the market clearing price, thus raising the prices to be paid to all suppliers for those hours.

7. On May 12, 2000, NYISO concluded that the dramatic increase in prices that resulted from use of Blenheim-Gilboa's bid as the clearing price was the result of a market design flaw. Blenheim-Gilboa is owned by the New York Power Authority (NYPA). NYPA has asserted that, on those two days, it was willing to provide energy from Blenheim-Gilboa if NYISO needed it to ensure system reliability, at a much lower price, but unless the plant was necessary for reliability, NYPA's preference for May 8 and 9 was not to sell energy from Blenheim-Gilboa, because it wanted to engage the unit in pumping mode in order to refill the reservoirs of the plant's pump-storage facilities. Therefore, NYPA deliberately offered Blenheim-Gilboa's energy to NYISO in real time at an extremely high price, in order to minimize the possibility of being dispatched by NYISO. NYISO found that, because the bidding system did not allow NYPA to indicate this dual preference – that NYPA would prefer not to offer Blenheim-Gilboa's capacity, but that, if necessary for reliability, NYPA would be willing to offer Blenheim-Gilboa's capacity at a low price – the tariff contained a market design flaw.⁶

8. To remedy what it perceived as prices for energy on May 8 and 9 that were caused by this market design flaw, NYISO invoked its authority under TEP to correct market clearing prices by resetting the Blenheim-Gilboa bids to \$0 per MWh. As a result, the Real-Time Market clearing price for energy on May 8 was reduced from \$3,487 per MWh

⁶ NYISO's tariff now permits Energy Limited Resources such as Blenheim-Gilboa to designate all or a portion of their bids as out-of-merit, resource-limited blocks, so that if in real-time operations the resource-limited portion of an Energy Limited Resource needs to be dispatched, its bid does not set the market-clearing price.

to \$331 per MWh, and for May 9 from approximately \$3,000 per MWh to approximately \$350 per MWh.

C. Complaints and Court of Appeals Proceedings

9. H.Q. Energy Services (U.S.), Inc. (HQUS) and PSEG Energy Resources & Trade LLC (PSEG) filed complaints asking the Commission to order NYISO to restore the original real-time market-clearing prices for energy on May 8 and 9, 2000. The Commission denied both complaints.⁷ It found that the Blenheim-Gilboa bid was "an attempt by NYPA to manage the dispatch of the Blenheim-Gilboa unit by bidding at a level high enough so that the unit would not be considered as a viable resource by the software NYISO uses to dispatch generation resources,"⁸ and agreed with NYISO that "the bidding rules' inability to allow pump storage units to reflect their operational constraints, and instead force such an entity to guess at a bid level that would be high enough to avoid dispatch, is a market design flaw."⁹ The Commission therefore endorsed NYISO's use of its TEP authority to correct this flaw.

10. PSEG appealed the Commission's orders to the U.S. Court of Appeals for the D.C. Circuit, which remanded the case to the Commission to further address PSEG's assertion that no market design flaw existed, given NYPA's ability to express its preferences by withholding Blenheim-Gilboa's energy from the Real-Time Market, and waiting to be dispatched, if necessary, solely when NYISO declared an emergency condition. The court stated:

By not bidding in the Real-Time Market – or, more precisely, by withdrawing its Day-Ahead bid so that bid did not also serve as its Real-Time bid – NYPA, PSEG insists, could have ensured that NYISO would use Blenheim's electricity only to guarantee system reliability, exactly what NYPA wanted. Blenheim's electricity would have remained available to maintain system reliability because NYISO's tariff allowed it to call on ELRs [Energy Limited Resources] during emergencies even if they had not submitted a Real-Time Market bid. *See Services Tariff*, § 5.12.8(c) ("The ISO may call on Energy Limited Resources at any time during

⁷ *H.Q. Energy Services (U.S.), Inc.*, 97 FERC ¶ 61,218 (2001) (November 20 Order), *reh'g denied*, 100 FERC ¶ 61,028 (2002) (July 3 Order).

⁸ November 20 Order at 61,964.

⁹ *Id.*

emergencies."). Moreover, if after declining to submit a bid Blenheim had been called on in an emergency, then the price it received for its electricity would not have set the market clearing price.¹⁰

The court stated that the Commission did not successfully answer PSEG's contention that NYPA could have sent precisely the "complex signal" it wished, namely, that it was willing to sell energy on May 8 and 9 only under emergency situations, but if necessary, would do so at a low price. The court further stated that NYPA's ignorance of its bidding options under NYISO's tariff did not fall within the definition of a market design flaw.¹¹

11. The court also stated that, "[w]ithout pre-judging issues unnecessary to resolve at this stage, we are skeptical that FERC could reach the same outcome on remand without addressing" PSEG's argument on rehearing that NYPA's high Blenheim-Gilboa bid was not an attempt to signal NYISO not to take Blenheim-Gilboa, but rather reflected Blenheim-Gilboa's actual operating costs. The court stated:

[C]ontrary to FERC's statement that "nothing required NYISO to let a flawed bid set the market price when it had TEP authority to correct the flaw," the tariff itself required NYISO to "let a flawed bid set the market price" unless NYPA would have made a different bid absent any flaw. A market structure that co-existed with but had no effect on market-driven (including scarcity-driven or opportunity-cost-driven) prices could not justify the use of TEP.¹²

D. The Commission's March 4 Remand Order

12. On remand, the Commission found that there was no market design flaw in NYISO's tariff, and that, therefore, NYISO could not exercise its TEP power to recalculate prices for May 8 and 9 to exclude the effect of dispatching Blenheim-Gilboa.

13. The court's remand required the Commission to consider two questions: (1) whether NYPA could have used a different bidding mechanism, available under the terms of the NYISO tariff in place in May 2000, and achieved the two results it desired;

¹⁰ *PSEG Energy Resources & Trade LLC v. FERC*, 360 F.3d 200, 203 (D.C. Cir. 2004) (*PSEG*).

¹¹ *Id.* at 204.

¹² *Id.* at 205.

and (2) whether the NYISO market design prevented NYPA from bidding its opportunity and scarcity costs into the market.

14. With regard to the first question, the Commission found that NYPA could have achieved its dual goal by bidding Blenheim-Gilboa's capacity into the market at a high price in the day-ahead market, and then, in real time, withdrawing the portion of its bid that had not been accepted in the day ahead market.¹³

15. The Commission further found that NYISO's tariff did not contain a market design flaw, as required by TEP, because a market design flaw is "a market structure, market design or implementation flaw giving rise to situations in which market conditions or the application of the ISO Procedures would result in inefficient markets or prices that would not be produced in a workably competitive market." The Commission found that NYISO's market design was not flawed, because it permitted NYPA to bid its true opportunity costs and did not result in "inefficient markets or prices" or prices that would not have been obtained in a workably competitive market.

16. NYISO had concluded that the price spike on May 8 and 9 was the result of bids submitted for Blenheim-Gilboa, and that those bids were the result of a market design flaw because NYPA did not intend its bids to set the market clearing prices for energy and it was willing to accept a lower price. The Commission did not, however, consider this to be a market design flaw. It stated:

The crux of NYPA's goal was to be able to conserve its power supply (due to the opportunity costs facing a pumped storage resource – namely, giving up the opportunity to refill its reservoirs), for when it determined that the market needed assistance, either due to an emergency or a perceived need to reduce prices. In order to achieve this goal within the existing market design, NYPA was able to set an energy bid that was high enough to avoid supplying power until conditions reached the level it deemed necessary to help out the market. In an LBMP-based market, all system emergencies and instances of tight supply are reflected in market prices. All NYPA had to do to implement its strategy would be to choose that price at which it wanted to help the market, and submit an energy bid at that price.¹⁴

¹³ March 4 Order at P 26.

¹⁴ *Id.* at P 29.

17. As the Commission pointed out, evidence suggested that NYPA was, in fact, adjusting its bids in real time to reflect different market conditions, so that its capacity would help to reduce prices at times when it anticipated that NYISO might be facing a reserve shortage, and that NYPA's bidding strategy was designed to assure that Blenheim-Gilboa would not be called to supply its limited energy too early and that at least some of its energy would be available later in the day when its value to the system was likely to be greatest. The Commission therefore found that the NYISO market design provided the NYPA with the ability to bid its opportunity costs into the market and to assist the market at a price that it chose.

18. Therefore, since under the TEP, a market design flaw is defined as "a situation in which the application of the ISO Procedures would result in inefficient markets or prices that would not be produced in a workably competitive market," and here the NYISO market design permitted the NYPA to bid its true opportunity costs in a way that reflected the supply scarcity in the market, the Commission stated that it "cannot find that the market design produced 'inefficient' prices or prices that would not reflect those in a workably competitive market."¹⁵ The Commission therefore ordered NYISO to "pay refunds and collect surcharges designed to reinstate the original market clearing prices for energy for the real-time market determined on May 8 and 9, 2000, and to file a refund report."¹⁶

II. Requests for Rehearing and Clarification of the March 4 Order

19. NYISO, Indicated New York Transmission Owners (NYTOs), and Consolidated Edison Solutions (ConEd Solutions) sought rehearing of the March 4 Order. Independent Power Producers of New York (IPPNY) and KeySpan-Ravenswood, LLC (KeySpan) filed requests for clarification or rehearing of the March 4 Order.¹⁷ They raise issues regarding the Commission's ruling that no market design flaw existed, the refund requirement, and procedural issues.

¹⁵ *Id.* at P 34.

¹⁶ *Id.* at Ordering Paragraph B.

¹⁷ KeySpan also filed a motion on August 1, 2005 to supplement its request for clarification with regard to the payment of lost opportunity costs to suppliers of non-spinning reserves.

A. Market Design Flaw

20. The Commission denies rehearing and reaffirms its finding that no market design flaw existed warranting the invocation of TEP. On remand, we reconsidered the issues set forth by the court and concluded no market design flaw existed that justified the use of TEP, as defined in the NYISO tariff. The court's opinion required the Commission to address two issues: could NYPA, the operator of the Blenheim-Gilboa facility, have achieved substantially the same goals by withdrawing its unaccepted bids in the Real-Time market and being dispatched as an emergency resource under the NYISO's emergency procedures; and whether the NYISO market design prevented NYPA from bidding its opportunity cost into the market, thereby producing prices that did not reflect scarcity rents. As discussed below, the Commission reaffirms its finding that NYPA could have achieved its goals through the use of a bid withdrawal strategy and that no market design flaw exists because NYPA could have bid its opportunity costs.

1. Withdrawal of Bids**a. Arguments on rehearing**

21. NYISO disputes the Commission's conclusion, in the March 4 Order, that "NYPA could have achieved its desired goal of reserving its capacity for emergency uses within the available NYISO market design by bidding at a high price into the day-ahead market and then withdrawing, in real time, the portion of its energy bid that had not been accepted in the day ahead market."¹⁸ NYISO states that, as an installed capacity supplier, NYPA was required either to bid all of Blenheim-Gilboa's capacity into the market, or else to claim that some portion of Blenheim-Gilboa's output was not available and thus that the unit should be derated. According to NYISO, this approach would have been contrary to Good Utility Practice and the integrity of NYISO's operating protocols. NYISO states that it was, in fact, the need to keep some of Blenheim-Gilboa's capacity available for reserves that required NYPA to bid the high energy prices that it did, and that thus revealed the market design flaw. Thus, NYISO argues that NYPA could not have implemented the strategy of withdrawing Blenheim-Gilboa's capacity from the market in real time and simply waiting to be called in an emergency. NYISO argues that the Commission did not give sufficient weight to the affidavits by witnesses Rougeux, Gonzales and Deasy that, according to NYISO, demonstrate that, under section 2.1 of the NYISO's Service tariff, once NYPA had bid Blenheim-Gilboa's capacity into the Day-Ahead Market for May 8

¹⁸ March 4 Order at P 25.

and 9, it could not withdraw in real time that portion of Blenheim-Gilboa's capacity that had not been accepted on a day-ahead basis.¹⁹

b. Commission ruling

22. NYISO has failed to show that its tariff would have prevented the relevant strategy (which PSEG proposed) of withdrawing from the Real-Time market the portion of NYPA's bids that were not accepted in the Day-Ahead Market and yet still being eligible to be dispatched in an emergency under the NYISO's emergency procedures. Using this strategy, NYPA could have achieved its goal of reserving capacity from use except in the event it was needed for a system emergency.²⁰

23. As a capacity resource, Blenheim-Gilboa was required to offer all of its capacity into the Day-Ahead Market, and it did so. On both May 8 and 9, 220 MW of Blenheim-Gilboa capacity were accepted in the Day-Ahead Market and scheduled to provide reserves.²¹ NYISO has not shown, however, that its tariff prevented NYPA from withdrawing the unscheduled portion of Blenheim-Gilboa's capacity (*i.e.*, the amount that had *not* been accepted as reserves day-ahead, which NYPA sought to reserve unless needed for a system emergency) from the real time market entirely. The tariff language to which NYISO cites, section 2.1 of its Services Tariff, stated:

¹⁹ NYISO petition for rehearing at 14-15, *citing* Affidavits of Ricardo Gonzales, Attachment 1 to NYISO motion to reopen record filed on August 20, 2004 (Gonzales Affidavit) and Paul Rougeux, Attachment 2 to NYISO motion to reopen record (Rougeux Affidavit); Deasy Affidavit.

²⁰ NYISO alleges, in its July 15 motion to file a reply and reply in Docket No. EL01-19-006, that on May 9, 2000, NYISO issued a Supplemental Resource Evaluation (*i.e.*, emergency) call for additional energy, and NYPA did not immediately respond by offering additional capacity from Blenheim-Gilboa, although subsequently NYPA did respond to a request by NYISO to offer additional capacity after the unit had been declared Out of Merit (OOM), in which case that capacity did not set the clearing price. There is a dispute among the parties as to precisely what happened on May 9, 2000. Nevertheless, it is clear that NYPA did provide capacity from Blenheim-Gilboa to NYISO, once the NYISO system was in an acute shortage situation, in such a way that the Blenheim-Gilboa capacity did not set the clearing price.

²¹ Rougeux Affidavit at paragraph 7.

Suppliers of Spinning Reserve scheduled Day-Ahead shall either provide Spinning Reserve or shall generate energy when requested by the ISO to do so, in all hours for which they have been selected to provide Spinning Reserve.²²

24. This tariff language requires only that the generator stand ready to provide the power that has been “selected to provide Spinning Reserve.” The provision does not prevent the withdrawal of real-time bids for capacity not accepted in the Day-Ahead Market. Moreover, as pointed out in the March 4 Order, the only issue here is whether the withdrawal strategy could have been used to substantially achieve NYPA’s goal of being available in emergencies, not whether such a strategy would maximize operating reserve payments. Indeed, NYISO concedes that NYPA’s strategy was not based on maximizing revenue. Blenheim-Gilboa, therefore, could have used the bid withdrawal strategy and still would have achieved its goal of being available in emergency situations pursuant to the emergency provisions of NYISO’s tariff.

25. NYISO also argues on rehearing that NYPA's withdrawal of the unscheduled Blenheim-Gilboa capacity from the Real-Time Market would require a "false derating" of the unit, which would be inconsistent with Good Utility Practice and with maintaining the integrity of NYISO's operating protocols.²³ But, as PSEG points out, withdrawal of bids in the real-time market would not have compromised system integrity, because the NYISO emergency procedures for dispatching energy limited resources protected system integrity. In May 2000, section 5.12.8 (c) of the NYISO’s tariff provided that “[t]he ISO may call on Energy Limited Resources at any time during emergencies.” It contained no qualification that the unit must have submitted a bid in the real-time market. No party has specifically rebutted the contention that under these provisions, the NYISO could still have required the facility to generate in an emergency situation, in which case Blenheim-Gilboa's capacity would not have set the market clearing price.²⁴ Moreover, even if the real-time bids could not have been withdrawn completely, it is clear from the record that NYPA

²² NYISO Services Tariff, section 2.1, *as cited in* NYISO request for rehearing at 15. Mr. Rougeux quotes the same language in his affidavit. He recognizes that under this provision, NYPA could not withdraw from the real-time market “comparable bids” accepted in the day-ahead market. Rougeux Affidavit at paragraph 7.

²³ NYISO request for rehearing at 14.

²⁴ Affidavit of Roy Shanker, Exhibit A to PSEG answer to NYISO motion to reopen record filed on September 7, 2004 at paragraph 9.

could, and did, change its real-time bids throughout the day and therefore, as discussed below, could have reflected its opportunity costs in its bids.

26. On the basis of all of the evidence before it, the Commission properly concluded that NYPA could, in fact, have achieved its dual goal within the market structure in place in NYISO in May 2000, whether NYPA was aware of this or not,²⁵ and we therefore deny rehearing on this question.

2. Ability to Bid Opportunity Costs

a. Arguments on rehearing

27. NYISO argues that the Commission incorrectly stated that the "only issue" here was whether NYPA could bid its opportunity costs for Blenheim-Gilboa. According to NYISO, as a state-owned non-profit entity, NYPA did not desire to maximize profits, but rather wished to assist the market, and the Commission's failure to recognize this difference between NYPA and other market participants in essence deprives New York customers of the benefits of the legitimate bidding strategies of a publicly-owned entity. NYISO further states that even if the bid that NYPA submitted did represent NYPA's opportunity costs to operate Blenheim-Gilboa (which NYISO claims is not proven), since NYISO's amendment to its tariff to allow Energy Limited Resources such as Blenheim-Gilboa to submit opportunity cost bids, NYPA has never chosen to submit such a bid for Blenheim-Gilboa.

b. Commission ruling

28. The Commission denies rehearing on this issue as well. NYISO misstates the Commission's findings with regard to opportunity costs. The "opportunity" that NYPA was foregoing, to which the Commission referred in the March 4 Order, was not the opportunity to maximize profits. Rather, it was the opportunity to avoid emptying Blenheim-Gilboa's reservoir, knowing that it was likely that Blenheim-Gilboa would be

²⁵ See *PSEG*, 360 F.3d at 204-5 ("the tariff's plain language contradicts the Commission's implicit claim that a bidder's ignorance of its options constitutes a Market Design Flaw. The tariff defines a Market Design Flaw as 'a market structure, market design or implementation flaw giving rise to situations in which market conditions or the application of ISO Procedures would result in inefficient markets or prices that would not be produced in a workably competitive market.' Services Tariff at 1. . . . The tariff's plain language precludes the possibility that a single bidder's ignorance can constitute a Market Design Flaw").

needed to provide additional capacity to NYISO later in the summer. NYPA was, in essence, trying to choose between selling Blenheim-Gilboa's capacity in May and solving NYISO's reliability problem at that time, and waiting to offer Blenheim-Gilboa to the system later in the year when the need for the resource to address reliability problems might be even greater. This is the same kind of calculation a profit-making entity must make: should it sell its resource now, and pass up the opportunity to perhaps make a greater profit if it sells later? The fact that a profit-seeking entity seeks to use its resource to earn revenue for its shareholders, and NYPA sought to use its resource to address NYISO's reliability needs, does not change the fact that the nature of the calculation is the same.

29. As the Commission explained in the March 4 Order, in a bid-based market, such as the one run by NYISO, even if NYPA was not interested in profit, it could express its intentions by means of its bid prices. NYPA sought to conserve its power supply (due to the opportunity costs facing a pumped storage resource, namely, giving up the opportunity to refill its reservoirs) for when it determined that the market needed assistance, either due to an emergency or a perceived need to reduce prices. It could achieve this goal by setting an energy bid that reflected the conditions under which it deemed it necessary or useful to help out the market. For example, if NYPA wanted to assist the market and try to limit price increases to no more than \$500, it could have submitted a bid of \$500 to signal the price at which it wanted to help the market (even at the cost of foregoing future profits or a future ability to help the market). Moreover, one of the goals of a bid-based, single price auction market is to create incentives for firms to bid their true opportunity costs to set the market-clearing price. In order for such a market to work effectively an entity with high costs should not be artificially bidding less than its true costs into the market, because that sends improper price signals to the rest of the market about the need for increased capacity.

30. The testimony from Mr. Rougeux demonstrates that the NYPA recognized that the NYISO's bid-based market provided it with the full ability to bid its opportunity costs. His affidavit (and the attached material) shows that NYPA did continually adjust the amounts of capacity from Blenheim-Gilboa offered into the Real-Time Market, and the prices of those increments, throughout the day on May 8 and 9. In May 2000, units were able to offer a single bid curve for energy into the market, but with six dollar/MW points along the curve.²⁶ In order for NYISO's software to recognize Blenheim-Gilboa as available for either reserves or energy in real time, it was necessary for a plant to be scheduled at a minimum generation level greater than 0 MW for that period. NYPA therefore chose a minimum generation level of 2 MW, at a price of \$0, and a bid for its first bid point of 2

²⁶ Gonzales Affidavit at paragraph 4.

MW at \$0 or \$-0.1.²⁷ This ensured that the system would "accept" these amounts and prices, and therefore recognize all of Blenheim-Gilboa as available. However, in order to ensure that the remainder of Blenheim-Gilboa's capacity was not taken for energy in real time, NYPA initially set its remaining bid points (which controlled the prices at which the remaining increments of Blenheim-Gilboa capacity were offered) much higher: \$3,500, \$4,000, \$5,000, and \$6,000.²⁸

31. For the majority of hours of May 8 and 9, 220 MW of Blenheim-Gilboa capacity had been accepted in the Day-Ahead Market as reserves.²⁹ In real time, NYPA offered an additional portion of Blenheim-Gilboa's capacity into the energy market for every hour, but was able to control the amounts offered and the price at which it was offered. Throughout the day, NYPA adjusted the prices for the remaining increments of Blenheim-Gilboa capacity from the prices originally offered in the Day-Ahead Market:

As can be seen from comparing the bid sheets in Exhibit A of Paul Rougeux . . . on May 8 for hour beginning 8 [*i.e.*, 8:00 a.m. to 8:59 a.m.] up to 240 MWs were offered at a price of zero in the day ahead market, with the next increment of power being offered at \$3500. In real time, for the same hour, up to 720 MWs of energy were offered at zero. . . . The same is true for virtually every other hour listed, with increased offers of different amounts and lower prices submitted into the real time market. In some cases the prices [*sic*] was set at zero, in some \$5 per MWH, with the incremental quantities being offered at lower prices being as much as 480 MW. . . . The exact same type of changes were made in the bids for May 9.³⁰

32. Since, on May 8 and 9, NYPA wished to use Blenheim-Gilboa's capacity to assist that market only at the point when it was absolutely necessary for reliability, NYPA's bidding strategy enabled it to select this moment by price. By offering the majority of Blenheim-Gilboa's capacity into the real-time energy market at a relatively high price, NYPA ensured that Blenheim-Gilboa would not be dispatched before all lower-priced resources were dispatched; yet, by adjusting the amounts and prices offered in real-time,

²⁷ Rougeux Affidavit at paragraph 6.

²⁸ *Id.* at paragraph 8.

²⁹ *Id.* at paragraph 7.

³⁰ Shanker Affidavit at paragraph 13, emphasis omitted, citing to the material attached to the Rougeux Affidavit.

NYPA was able to ensure that Blenheim-Gilboa would be taken, and would help the market, at a point when the price was \$3,000 – rather than, for example, the \$10,000 per MWh to which energy prices could theoretically have risen.³¹ This precisely fulfills what NYISO states to be NYPA's goal: to assist the system, at the time when it believes that assistance is most valuable to the system.

33. Under the TEP, a market design flaw is defined as a situation in which the application of the ISO Procedures would result in inefficient markets or prices that would not be produced in a workably competitive market." Here, the NYISO market design permitted the NYPA to bid its true opportunity costs. Moreover, the acceptance of NYPA's bid cannot be found to be a market design flaw, because, at the time, the NYISO's system was experiencing a severe shortage of power. In such a situation, a high LBMP is needed to reflect scarcity, and the NYPA's management of its scarce supply through its bidding reflected that scarcity and perhaps kept prices from rising to \$10,000 or even higher. TEP provides that "market design flaws and transitional abnormalities do not include situations in which prices rise to levels determined by efficient competition *in periods of relative scarcity*."³² A market design, therefore, cannot be considered flawed because it sends appropriate price signals during periods of genuine scarcity.³³

B. Refund Issues Raised on Rehearing

34. The parties raise three issues on rehearing: whether refunds are appropriate, whether interest should be included, and whether lost opportunity costs are subject to refund. The Commission affirms its decision that refunds are appropriate, and that interest and opportunity cost should be included in refunds. The Commission also is establishing a hearing regarding the refund issues. As discussed below, the hearing is to consider some of the issues raised on rehearing, such as whether refunds are uncollectible and the effect of the erroneous invocation of TEP on reimbursement for lost opportunity costs.

³¹ Shanker Affidavit at paragraph 17 ("in the New York market at the time, the anticipation would be that if the NYISO 'ran out' of energy supplies, it could and would accept energy priced up to \$10,000 per MWh").

³² ISO Services Tariff, Attachment E, section A, Sheet No. 222, emphasis added.

³³ *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 969 (D.C. Cir. 2005).

1. Appropriateness of Requiring Refunds

a. Arguments on rehearing

35. Con Ed Solutions argues that refunds are inappropriate in this case, since the refunds would have to be paid by Electric Service Companies (ESCOs) that contracted to sell energy to load through contracts that either contained fixed prices, or else indexed the price to the amount that the ESCO paid NYISO during the term of the contract. ConEd Solutions asserts that the majority of the ESCOs' contracts that were in effect in 2000 are no longer in effect, and that ESCOs will have no contractual ability to recover the costs of refunds from the customers they were supplying in 2000, but also have no mechanism to pass through the charges to their current customers. Therefore, ConEd Solutions states, compelling NYISO to require ESCOs to make refunds would cause significant and unfair hardship to ESCOs,³⁴ and further, would undermine the development of competitive markets in New York, if participants such as ESCOs can never count on a NYISO price being final. ConEd Solutions asserts that the Commission has the discretion to balance equities and to choose not to order refunds,³⁵ and that generators will receive a windfall by obtaining refunds five years after the fact of NYISO's error.

b. Commission ruling

36. We reaffirm our ruling that refunds are appropriate. While, as noted above, the Commission has discretion to order refunds,³⁶ as a general matter, the Commission will grant refunds to make parties whole. The parties here were on notice from the filing of the complaint that refunds would be a possibility should the Commission grant the complaint

³⁴ ConEd Solutions' witness submits an affidavit stating that the total extent of financial harm to parties in this position could be as much as \$60 million, and that the harm to ConEd Solutions specifically could be in excess of \$3 million, and could be more depending on the allocation of bad debt for ESCOs that are no longer in business. Affidavit of Stephen B. Wemple, attachment to ConEd Solutions' request for rehearing, at 2-3.

³⁵ ConEd Solutions cites to *Towns of Concord, Norwood and Wellesley v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992) (*Towns of Concord*) ("[c]ustomer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when 'money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it'").

³⁶ *Towns of Concord, supra*.

or if the Commission's determination were reversed on appeal. In *Southeastern Michigan Gas Company v. FERC*³⁷ the court agreed that FERC "may undo what was wrongfully done by virtue of a prior order,"³⁸ and that FERC's decision to approve a retroactive remedy was within its discretion.³⁹ As the court has also previously stated, the agency's decision in this regard may only be overturned for abuse of that discretion, such abuse being defined as a "conflict with the core purpose of the statute [the agency] administers, or if is not otherwise reasonable that is based upon a reasonable accommodation of all the relevant considerations and not inequitable under the circumstances."⁴⁰ The Commission now finds that NYISO erroneously reset the prices for energy on May 8 and 9, 2000, and therefore orders NYISO to restore the prices to what they would have been, absent that error. If NYISO had not erred in this way in 2000, the energy suppliers would have received the correct prices, and would have had the time value of those funds since 2000. Thus, it is not a windfall to suppliers to grant refunds at this time, and the Commission will not reconsider its decision to grant refunds.

37. It is true that in another order involving TEP,⁴¹ the Commission determined not to order refunds for a tariff violation by the NYISO. But as the Commission explained, in that case, the tariff violation was a technical one. The pricing decision made by the NYISO in that case corrected what was, in its tariff, an incorrect market design for determining prices. In contrast, in this case, the NYISO improperly changed prices when there was no market design flaw and TEP should not have been invoked. Thus the recalculated prices were incorrect and refunds are appropriate.

38. The parties, especially ConEd Solutions, have raised questions as to whether they will be able to pay the NYISO the surcharges to reimburse the NYISO for the refunds it must pay. In *Northern Natural Gas Co.*,⁴² which presented a similar situation in terms of

³⁷ 133 F.3d 34 (D.C. Cir. 1998) (*Southeastern Michigan*).

³⁸ *Southeastern Michigan* at 42, (1998), citing *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965).

³⁹ *Id.*

⁴⁰ *Connecticut Valley Electric Co. v. FERC*, 208 F.3d 1037, 1044-45 (D.C. Cir 2000).

⁴¹ *New York Independent System Operator*, 110 FERC ¶ 61,244 (2005).

⁴² 82 FERC ¶ 61,195 (1998) (*Northern Natural*).

the difficulty of recovery,⁴³ the Commission noted that, if appropriate, it would follow the "procedure in such situations of authorizing each entity in the chain through which the refunds have flowed to recover the amounts they paid from the next person in the chain."⁴⁴ The courts have authorized utilities to collect surcharges from former customers no longer under contract to the utility.⁴⁵ Additionally, in some cases, when one party is unable to obtain reimbursement from another responsible party, the Commission may consider the amount uncollectible.⁴⁶ As discussed later, the Commission is setting for hearing and settlement judge proceedings issues related to the ability of the NYISO to collect surcharges from certain customers.

2. Interest

a. Request for clarification

39. KeySpan asks the Commission to clarify that, when making refunds, NYISO must include interest on the difference between the original real-time market clearing price for the relevant hours on May 8 and 9, and the prices incorrectly imposed under NYISO's exercise of its TEP authority. KeySpan states that energy suppliers are entitled to the time

⁴³ In *Northern Natural*, sellers of natural gas feared that they might pay a disputed amount to a pipeline, the pipeline would disburse that amount to its customers, and then even if the sellers prevailed in the dispute, they might not be able to obtain the return of the disputed amounts from the pipeline's customers.

⁴⁴ *Id.* at 61,775, citing *Panhandle Eastern Pipe Line Co. v. FERC*, 95 F.3d 62, 73-74 (D.C. Cir. 1996) (*Panhandle*).

⁴⁵ See *Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co.*, 937 F. Supp. 641 (E.D. MI 1996) (holding former pipeline customer responsible for paying surcharges to the pipeline resulting from the correction of prices during the period of the contract); *Panhandle Eastern Pipe Line Co. v. Utilicorp United Inc.*, 928 F. Supp. 466 (D. Del. 1996) (same).

⁴⁶ See *Wylee Petroleum Corp.*, 33 FERC ¶ 61,014 at 61,034 (1985) ("the Commission holds that in cases where the well operator and royalty interest owners do not have an ongoing contractual relationship which would permit the operator to collect . . . refunds through billing adjustments, refunds owed by a royalty interest owner will be deemed uncollectible" under circumstances including the bankruptcy of the royalty interest owner, and "the Commission will consider the refund uncollectible and will waive the obligation").

value of the money they would have received, absent NYISO's error, that interest is generally awarded (absent compelling reasons not present here), and NYISO itself has recognized that interest is appropriate in similar contexts.

b. Commission ruling

40. The Commission grants the requested clarification that NYISO must include interest in the refunds it makes to suppliers. It is "the general rule" of the Commission that "a customer entitled to a refund should also be awarded interest in order to make it whole."⁴⁷ The purpose of ordering interest paid is so that the recipient can be made whole for the time value of money that it otherwise would have available for its use.⁴⁸ As the Commission previously stated,

In cases where full refunds are required, both the Commission and the courts have consistently treated interest as a necessary element of those refunds. . . . Interest, which merely represents use of the money, is ordinarily part of the refund of any overcharge, absent compelling reasons for not requiring its payment to the injured party.⁴⁹

41. No party has alleged the existence of compelling reasons against the payment of interest. The Commission will therefore require the payment of interest on the refunds in question.

3. Payment for Lost Opportunity Costs

a. Request for Clarification

42. KeySpan asserts that in an earlier order issued on April 29, 2002, *New York Independent System Operator*,⁵⁰ the Commission found that, after the imposition of a bid cap on non-spinning reserves (NSR) in NYISO, from March 28, 2000 forward, suppliers of non-spinning reserve should receive their lost opportunity costs for periods when their

⁴⁷ *Panhandle* at 72 (D.C. Cir. 1996).

⁴⁸ *New Charleston Power, L.P.* 83 FERC ¶ 61,281, 62,168 (1998).

⁴⁹ *Public Service Co. of Colorado*, 82 FERC ¶ 61,058 at 61,215 (1998), footnotes omitted.

⁵⁰ 99 FERC ¶ 61,125 (2002) (April 29 Order).

energy bids are below the applicable energy price and their units could have been selected for the energy market, but NYISO instead holds their units in reserve to supply NSR, and such lost opportunity cost payments should be tied to the projected LBMP that each supplier would have received if it had supplied energy. KeySpan and IPPNY ask the Commission to clarify that, since such opportunity cost payments are tied to LBMP, now that NYISO is reinstating the original LBMP, it must also pay suppliers of NSR based on the reinstated LBMP rather than the price incorrectly imposed through NYISO's use of TEP.

b. Commission ruling

43. The Commission will grant the requested clarification, and finds that all payments based on the erroneous prices determined by the NYISO, including payments of lost opportunity costs, are subject to refund. The parties can litigate at the hearing the extent to which lost opportunity costs were affected by the erroneous invocation of TEP and the extent of refunds required.

C. Procedural Issues

44. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Con Ed Solutions' answer and IPPNY's response to NYISO's and ConEd Solutions' motion for a stay because they have provided information that assisted us in our decision-making process.

45. NYISO and Con Ed Solutions request a stay of NYISO's obligation to make immediate refunds, as required by the March 4 Order. Because the refund issue is being set for hearing, we will grant rehearing and not require NYISO to pay refunds and collect surcharges pending the outcome of the hearing.

46. The Commission denies KeySpan's August 1, 2005 motion to supplement its request for clarification with regard to the payment of lost opportunity costs to suppliers of non-spinning reserves. As noted below, the Commission is setting for hearing all issues related to the refunds in this matter. KeySpan will be able to raise its concerns regarding the payment of lost opportunity costs in that forum.

III. NYISO's June 2 Refund Report

47. On June 2, 2005, in Dockets No. EL01-19-006 and EL02-16-006, NYISO filed its refund report, setting forth "the prices that would have been posted for the relevant

intervals on May 8 and 9, 2000 if [NYISO's use of its TEP power to change prices] had not been implemented."⁵¹ Attached to that report, it submitted an affidavit by NYISO's consultant, Dr. Andrew Hartshorn (Hartshorn 2005 Affidavit), setting forth his proposed corrections to those real time prices.⁵² To date NYISO has paid no refunds. The refund report was noticed in the *Federal Register*,⁵³ with comments, protests and motions for intervention due on or before June 23, 2005.⁵⁴

48. Several parties filed responses to the NYISO refund report. KeySpan, ConEd Solutions, NYTOs and IPPNY filed protests, and the Mirant parties moved to intervene and filed comments. NYTOs also ask the Commission to rule on the pending requests for rehearing and motions for stay before requiring NYISO to make refunds. On July 15, 2005, NYISO filed a motion for leave to reply and reply, to which KeySpan and PSEG sought to respond, and NYISO subsequently filed an answer to PSEG's response.

A. Procedural Issues

49. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the Mirant parties' timely, unopposed motion to intervene in the refund report proceeding serves to make them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (a) (2) (2005), prohibits an answer to a petition for rehearing unless otherwise ordered by the decisional authority. In Docket No. EL01-19-006, the subdocket involving NYISO's

⁵¹ NYISO June 2, 2005 refund report at 1.

⁵² Dr. Hartshorn states that he reviewed each of the real-time market dispatch solutions in which NYISO's change to prices under its TEP authority had been used as a basis for correcting the prices, focusing on whether the conditions that resulted in price corrections for other reasons on May 8 and 9, 2000, would have, but for the application of NYISO's change to prices, have resulted in price corrections; and made those corrections as appropriate. Dr. Hartshorn also states that the reasons for those price corrections were those set forth in an earlier May 16, 2000 memo from him and Scott Harvey (Hartshorn/Harvey 2000 Memo). Affidavit of Andrew Hartshorn, Attachment 1 to NYISO Refund Compliance Report filed June 2, 2005 (Hartshorn 2005 Affidavit), at 2-3; *see also* Hartshorn/Harvey 2000 Memo attached to Hartshorn 2005 Affidavit.

⁵³ 70 Fed. Reg. 35664 (2005)

⁵⁴ The Commission subsequently granted an extension of time to file protests until July 8, 2005.

refund report, we will accept NYISO's July 15, 2005 reply to the protests, and KeySpan's and PSEG's responses to that reply, as well as the answers filed by NYISO and ConEd Solutions.

B. Refund Issues

50. In the March 4 Order, the Commission required the NYISO to pay refunds and collect surcharges designed to reinstate the original market clearing prices for energy for the real-time market determined on May 8, 2000, and May 9, 2000. It also required the NYISO to file a refund report. The NYISO filed a preliminary refund report on June 2, 2005, but did not pay refunds.

51. In its June 2 refund report, NYISO stated that that it was setting forth "the prices that would have been posted for the relevant intervals on May 8 and 9, 2000 if [NYISO's use of its TEP power to change prices] had not been implemented."⁵⁵ NYISO's consultant, Dr. Hartshorn, states that, to calculate those prices, he "review[ed] the real-time pricing intervals originally changed by [NYISO's TEP-based changes] and determine[d] what, if any, corrections would have been made to those real time pricing intervals" absent NYISO's actions.⁵⁶ He further stated that, in the instances when he made price corrections, he did so based on the reasons earlier set forth in the Hartshorn/Harvey 2000 Memo.⁵⁷ Dr. Hartshorn also stated that he made price corrections based, in part, on the fact that a unit was taken out of merit (OOM), and thus could not set the clearing price.

1. Issues raised in protests

52. NYTOs, Con Ed Solutions, KeySpan and IPPNY protested aspects of NYISO's calculation of refunds. NYTOs assert that any calculation of refunds is premature, given that the parties are continuing to negotiate concerning this issue. Con Ed Solutions claims that the refund report fails to identify a total refund calculation or interest charges and is inconsistent with subsequent information released by NYISO. KeySpan and IPPNY assert that NYISO is improperly seeking to put into place prices for May 8 and 9 that are different from the original prices that the Commission ordered reinstated for those days and which alter those original prices in ways that violate NYISO's tariff.

⁵⁵ June 2 refund report at 1.

⁵⁶ Hartshorn 2005 Affidavit at P 5.

⁵⁷ *Id.* at P 7.

53. In its July 15, 2005 motion for leave to reply and a reply to the protests, NYISO states that the refund report does not raise new issues or violate NYISO's tariff, and rather is implementing the price corrections described in the Hartshorn/Harvey 2000 Memo, rather than making new changes.⁵⁸ KeySpan and PSEG filed answers opposing introduction of what they allege is new factual material. KeySpan states that NYISO has now waived the ability to undertake price corrections for May 8 and 9, 2000. PSEG challenges the credibility of NYISO's new factual representations, and argues that the D.C. Circuit's finding in *PSEG* precludes submission of new factual material by NYISO to justify the changes to the May 9 prices that it is now seeking to make. According to PSEG, when the court issued its *PSEG* decision, it did so on the basis that "NYPA's accepted bid [for Blenheim-Gilboa capacity] . . . set the market clearing price."⁵⁹ Thus, PSEG argues, principles of *res judicata* prevent relitigation of the question of whether Blenheim-Gilboa should have set the clearing price on May 9. KeySpan and PSEG also make arguments with regard to the 200 MW emergency sale to PJM. NYISO subsequently filed an answer to PSEG's motion for leave to reply.

2. Commission ruling

54. As discussed below, the Commission affirms its determination that the refund obligation should not be waived and that any refunds should include interest. However, we will set for settlement judge and hearing proceedings the issues raised as to the amount of refunds and the means by which NYISO may determine them, the inclusion of opportunity costs, and the determination and treatment of amounts that the NYISO may be unable to collect from its customers.

55. The Commission cannot resolve at this point the issues raised with respect to NYISO's proposed recalculation of prices for May 8 and 9, 2000, and is therefore establishing a hearing to determine the amount of refunds owed. The pleadings here do not clearly set forth the issues in contest. It is not clear: whether any of recommendations

⁵⁸ In this reply, NYISO also states that one of the adjustments it was making to the prices reflected its view that, when NYPA released unscheduled capacity from Blenheim-Gilboa to the system on May 9, 2000, it did so at a time when all generation in New York had been placed in OOM status, so that all Blenheim-Gilboa capacity would be considered out of merit and would not set the clearing price. Additionally, NYISO states that a 200 MW emergency sale of energy to PJM would affect the clearing price in NYISO on that day. *See* NYISO July 15, 2005 motion for leave to reply and reply.

⁵⁹ PSEG August 22, 2005 motion for leave to reply and reply at 7-8, *citing PSEG*, 360 F.3d at 202.

in Dr. Harshorn's affidavit were implemented in the year 2000 and were not contested at the time; whether such adjustments were considered at the time, but were not implemented due to the invocation of TEP; or whether these are new adjustments being proposed at this stage of the proceeding. Nor is it clear whether such adjustments are appropriate in light of the finding that no market design flaw existed and TEP cannot be used to recalculate prices. For this reason, the ALJ will need to make detailed findings as discussed below as to each adjustment and whether such an adjustment is in accordance with NYISO's tariff at the time and should be permitted.

56. PSEG asserts that examination of the new material presented by NYISO now is prevented by *res judicata*. Ruling on this issue now is premature, since it is not clear whether this material is newly introduced or reflects considerations made at the time. Until the hearing record on refunds is complete, the Commission cannot determine whether any party should be precluded from raising certain issues. PSEG is free at the hearing to raise issue preclusion with respect to any issue, and the ALJ should rule on such assertions.

57. NYISO also filed a motion for an extension of time to submit its refund report, which was opposed by Aquila Merchant Services, Inc. (Aquila). Before Aquila's answer in opposition was received, however, by notice dated April 4, 2005, the Commission granted NYISO an extension of time to file its refund report until June 2, 2005.

3. Rehearing Request of Grant of Extension of Time

58. Aquila requests rehearing of the Commission's April 4 notice on the basis that it was denied due process since the Commission granted the extension before receipt of Aquila's answer. We deny Aquila's petition for rehearing of the April 4 notice granting NYISO an extension of time to file its initial refund report. The NYISO requested the extension for legitimate reasons.⁶⁰ In any case, NYISO filed a refund report on June 2, 2005, which the Commission is setting for hearing, and final determinations about the amount of refunds due. Any aggrievement Aquila may have suffered from granting the

⁶⁰ The March 4 Order required that NYISO submit a refund report by April 4, 2005. Rule 213(d) provides that, unless otherwise ordered, answers must be made within 15 days of the motion. Aquila argues that answers should have been allowed until April 9, 2005, when the 15 day period to submit answers expired, but if the notice had been issued after April 4, NYISO would not have known whether it needed to submit a refund report on that date. Further, given the analysis and data recovery that NYISO was required to complete to implement the Commission's order, the Commission finds that the extension of time was reasonably granted.

extension of time to NYISO to file the refund report (and, thereafter, to make refunds) will be addressed, in that, when refunds are finally made, interest will be included in the calculation of those refund payments.

IV. Hearing and Settlement Judge Proceedings

59. The protests to NYISO's preliminary refund report contest the amounts that NYISO is proposing to refund, and the methods by which NYISO is calculating those refunds. These issues raise questions of both law and fact, and must be resolved before refunds can definitively be awarded. We will, therefore, set for hearing and settlement judge procedures the determination of the appropriate amounts of refunds.

60. The purpose of the hearing is to determine the prices that would have obtained in the NYISO markets, had NYISO not exercised its TEP authority to recalculate prices, and , the appropriate refunds and surcharges to be paid by the NYISO. The ALJ, therefore, needs to determine the market clearing prices that would have obtained and make careful findings as to each proposed adjustment to such prices. With respect to each challenged adjustment, the ALJ should make finding that: (1) identify the issue in dispute, (2) determine whether this is a challenge to the methodology used previously, or is a newly raised adjustment not used in determining prices in May of 2000, (3) determine the reason the adjustment was not made in May of 2000, and whether and how such a decision relates to the NYISO's determination to remove Blenheim-Gilboa's capacity from the clearing price calculations pursuant to its TEP authority, (4) determine the propriety of making the adjustment, including whether such an adjustment was in accordance with the NYISO's tariff and (5) determine the impact that each such adjustment would have on prices. The ALJ also should address any other issues that bear upon the propriety of making the adjustment.

61. As discussed earlier, the Commission also will set for hearing and settlement judge proceedings the issue of what parties are responsible for paying surcharges to NYISO, whether the NYISO will be able to collect these surcharge amounts, whether some of the entities from whom these surcharges may be due are no longer able to collect all of those amounts from their customers, and whether, as a result, some or all of those refund amounts should be designated as uncollectible.

62. To aid the parties in settlement efforts, the hearing will be held in abeyance and a settlement judge shall be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁶¹ If the parties desire, they may, by mutual agreement, request a

⁶¹ 18 C.F.R. § 385.603 (2005).

specific judge as the settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.⁶² The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) The petitions for clarification and rehearing are granted or denied as discussed in the body of the order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the refunds ordered here, specifically: (a) what are the appropriate refund amounts, (b) who must make refunds, (c) are refunds still collectible from those entities, (d) if some of those entities are no longer in existence or able to pay, what parties are liable for the uncollectible amounts, as discussed above, and (e) all questions regarding whether NYISO may recalculate prices as stated in Dr. Hartshorn's June 1, 2005 affidavit, as set forth above. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (D) and (E) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

⁶² If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.