

120 FERC ¶ 61,071  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Long Island Power Authority

Docket No. EL07-16-001

v.

New York Independent System Operator, Inc.

ORDER DENYING REHEARING

(Issued July 19, 2007)

1. In this order, the Commission denies rehearing of an order denying a complaint by the Long Island Power Authority (LIPA) alleging that the New York Independent System Operator, Inc. (NYISO) violated its capacity market rules.<sup>1</sup> The Commission affirms its finding that NYISO properly complied with tariff provisions<sup>2</sup> regarding its capacity market.

**LIPA's Complaint and NYISO's Answer**

**Background**

2. NYISO places a Minimum Capacity Requirement on each of its member Load Serving Entities (LSEs). LSEs may meet this obligation through self-supply, through

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<sup>1</sup> *Long Island Power Authority v. New York Independent System Operator, Inc.*, 118 FERC ¶ 61,109 (2007) (February 15 Order).

<sup>2</sup> NYISO Market Administration and Control Area Services Tariff, FERC Electric Tariff, Original Volume No. 2 (Services Tariff).

bilateral contracts, or through participation in NYISO's long-term and spot-market capacity auctions.

3. LSEs serving New York City and Long Island, moreover, must procure a specific percentage of their Minimum Capacity Obligations from capacity resources located within those constrained localities (the locational component of the Minimum Capacity Requirement). LSEs otherwise can meet the remainder of their capacity obligation from capacity located in the rest of the state.

4. NYISO holds a spot-market auction at the beginning of each month. Each LSE is required to participate in the monthly spot-market auction by certifying to NYISO how much capacity it has already obtained through self-supply or bilateral contracts for that month. Based on the information obtained through each such spot-market auction, NYISO constructs supply curves for the entire New York control area, and also for the two transmission-constrained localities within the state of New York (New York City and Long Island). The supply curves are then combined with the demand curve previously approved by the Commission, and the intersection of those curves determines the resulting capacity obligations for LSEs, and the price for capacity obtained through the spot-market auction.

5. In any given month, LSEs that have obtained enough capacity to meet their Minimum Capacity Requirement need do no more. However, LSEs that have procured capacity in excess of their Minimum Capacity Requirement provide that capacity to NYISO through the certification process, essentially providing that capacity to NYISO for reallocation, and those LSEs that are deficient with regard to their capacity requirements will be allocated (and must pay for, at the price determined by the auction) sufficient additional capacity through the spot-market auction to meet their Minimum Capacity Requirement. NYISO reallocates the excess capacity from "long" LSEs to deficient or "short" LSEs, and the long LSEs receive, and the short LSEs pay, the price set through the auction.

6. Prior to May 2006, LSEs certified their capacity to NYISO before the spot-market auction took place through the manual submission of spreadsheets. Beginning in May 2006, however, NYISO automated the format of its certification process, and required LSEs to enter this information online.

### **Complaint and Answer**

7. On November 17, 2006, LIPA filed the instant complaint with the Commission. LIPA stated that, for the May 2006 spot-market auction, LIPA's total Minimum Capacity Requirement was 5,577 MW, and its locational component was 4,724 MW. LIPA also stated that for the May 2006 auction, it had procured a total of 5,547.6 MW of capacity,

of which 4,995.9 MW was located on Long Island, and that it certified these amounts for the May 2006 auction using NYISO's new automated certification process. Thus, according to LIPA, it had fulfilled its locational component and had 271.9 MW in excess of its locational component.

8. LIPA stated that it believed that it could count that 271.9 MW of Long Island Capacity to meet the remainder of its Minimum Capacity Requirement. However, when NYISO posted the auction results, it excluded from its calculation of LIPA's Minimum Capacity Requirement the 271.9 MW of excess Long Island capacity. This decision, according to LIPA, required LIPA to purchase additional capacity from the rest of the state, and also rendered valueless LIPA's 271.9 excess MW of Long Island capacity.

9. LIPA filed the instant complaint, asserting that NYISO was violating section 5.14.1(a) of its Services Tariff. That provision states:

When the ISO conducts each ICAP Spot Market Auction it will account for all [capacity] that each . . . LSE has certified for use . . . to meet [its Minimum Capacity Requirement] or [locational component]. . . . The ISO shall receive offers of [capacity] that has not previously been purchased . . . . The ISO shall also receive offers of Unforced Capacity from any LSE for any amount of Unforced Capacity that LSE has in excess of its [Minimum Capacity Requirement or locational component], as applicable.

LIPA interpreted this section to mean that all of its capacity, whether in a constrained location or in the rest of the state, can be certified to meet its Minimum Capacity Requirement. It therefore asked the Commission to restate the price of capacity in the May 2006 spot-market to the price that would have resulted if LIPA had been able to use its excess 271.9 MW of Long Island capacity to meet its Minimum Capacity Requirement.

10. NYISO, in its answer, stated that it does not permit LSEs holding excess capacity in a constrained location to use that capacity to meet the rest of state (or ROS) component of their Minimum Capacity Requirements, because to do so would effectively withdraw Long Island capacity from the Long Island market, and thus artificially raise Long Island prices. NYISO noted that, in 2004, when LIPA had similarly sought to offer excess Long Island capacity into the auction as ROS capacity, NYISO informed LIPA of this interpretation of section 5.14.1(a), and, after that discussion, LIPA consistently offered its excess Long Island capacity into the auction in the manner approved by NYISO – until May 2006. In NYISO's view, LIPA's representative simply made a mistake during the process of using the automated certification system for the first time.

11. NYISO stated that section 5.14.1(a) requires it to distinguish capacity located in New York City or Long Island from capacity located in the rest of the state. Since NYISO derives the capacity requirement for each LSE and the resulting capacity price in each spot-market auction by a calculation, that calculated derivation must reflect the fact that some capacity is within a constrained location and other capacity is not. Under section 5.14.1(a), NYISO must allow LSEs to submit offers of capacity in excess of their Minimum Capacity Requirement. However, it must also ensure that all capacity receives a market value commensurate with its location relative to transmission constraints, so that capacity within a constrained area will be valued more highly than capacity outside of a constrained area.<sup>3</sup>

### **February 15 Order**

12. The Commission denied LIPA's complaint, and found that LIPA did not meet its burden of showing that NYISO violated a statute, regulation, or its own tariff.

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<sup>3</sup> NYISO also stated that LSEs are required accurately to state the location of the capacity offered into the spot market, and LIPA failed to do so. NYISO further stated that, since capacity within constrained localities has historically been more expensive than capacity in the rest of New York State, LIPA would not have been financially harmed by NYISO's interpretation of the Services Tariff if it had correctly certified its 271.9 MW of excess capacity. According to NYISO's view, for example, if LIPA owns Long Island capacity in excess of its locational requirement, it can, in essence, "sell" that excess Long Island capacity to NYISO (at the price for capacity on Long Island), and "purchase" ROS capacity at a lower price. So, assuming, for the purpose of argument, that at the conclusion of the May 2006 auction, Long Island capacity cleared at \$2/MW and ROS capacity cleared at \$1/MW, LIPA could have offered its excess Long Island capacity into the market, and received \$2/MW. At the same time, LIPA would have had to purchase an equal amount of ROS capacity in the spot market auction, but it would only have had to pay \$1/MW.

According to NYISO, the only reason that any LSE would take the position that LIPA is taking here would be if it wished to exercise market power. NYISO stated that, if Long Island capacity can be offered to the market as ROS capacity, that capacity is in effect withdrawn from the Long Island market, thus creating a shortage of Long Island capacity, and a seller with substantial Long Island capacity to sell (as is the case with LIPA) will thus be able to command a higher price for that capacity.

13. The Commission first found that NYISO's interpretation of section 5.14.1(a) of the Services Tariff is more reasonable than LIPA's interpretation.<sup>4</sup> It stated that section 5.14.1(a) (quoted above) "puts LSEs on notice that, since the NYISO must account for capacity as either locational capacity or ROS capacity, LSEs must certify whether the capacity that they are providing to the market is locational capacity or ROS capacity,"<sup>5</sup> relying specifically on the "as applicable" phrase in section 5.14.1(a), which the Commission found required LSEs with both a Minimum Capacity requirement and a locational component of that requirement to specify whether the capacity they were offering to the system was locational capacity or ROS capacity. The Commission stated that, under section 5.14.1(a), NYISO was required to accept all offers of capacity and must reallocate capacity to deficient LSEs as necessary, and that "[a]bsent clear notification by LSEs of the nature of the capacity that the LSEs are offering back into the system, NYISO cannot properly fulfill its task of reallocation."<sup>6</sup>

14. The Commission then found that NYISO's interpretation of section 5.14.1(a) was consistent with the purpose of its capacity market rules. It pointed to the fact that, when the Commission approved NYISO's current capacity market in 2005,<sup>7</sup> it found that the market would benefit customers by encouraging the construction of new capacity and by "reduc[ing] incentives to withhold capacity."<sup>8</sup> Further, the Commission had "expressly approved the feature of NYISO's capacity market design under which NYISO seeks to value capacity in constrained areas more highly than capacity in unconstrained areas, so as to send appropriate price signals for the development of such higher-valued capacity."<sup>9</sup>

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<sup>4</sup> February 15 Order at P 29.

<sup>5</sup> *Id.* at P 30.

<sup>6</sup> *Id.* at P 32.

<sup>7</sup> *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,201 (Capacity Market Order), *reh'g denied*, 105 FERC ¶ 61,108 (2003) (Capacity Market Rehearing Order), *aff'd sub nom. Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232 (ELCON) (2005).

<sup>8</sup> Capacity Market Order at P 35-36.

<sup>9</sup> February 15 Order at P 37, *citing* Capacity Market Rehearing Order at P 25.

15. The Commission then stated that:

LIPA is, in essence, seeking the ability to obtain or develop capacity in a constrained area (therefore, valuable capacity), and then offer it into the market as if it were capacity in an unconstrained area (and therefore less valuable). Such actions, if permitted, would be inconsistent with the intent of the capacity market rules to ensure that prices reflect the true value of capacity in constrained areas and thus serve as an incentive for capacity providers to develop or maintain capacity in those areas. LIPA's interpretation of the tariff section in question, therefore, runs counter to that policy goal, whereas NYISO's interpretation supports it.<sup>10</sup>

16. The Commission also found that LIPA's interpretation of the Services Tariff could lead to withholding of capacity, which would be contrary to the intent of NYISO's capacity market design. It cited to the testimony of NYISO's independent market advisor, Dr. David Patton, who stated that "[i]f LIPA has the ability to use its excess Long Island Capacity to satisfy its [New York control area] obligation without offering it into the . . . Spot Market Auction, it would be withholding that Capacity from the distinct Long Island market, in a situation in which other Long Island LSEs may be deficient and there are not effective substitutes for the withheld Capacity."<sup>11</sup> Dr. Patton concluded that such withholding would have the effect of artificially raising prices for capacity on Long Island, and could force additional investment in expensive locational capacity on Long Island when such capacity was not required.<sup>12</sup> The Commission thus rejected LIPA's interpretation of section 5.14.1(a):

When any LSE has the potential to withhold capacity and thereby raise prices, that LSE has market power. LIPA's interpretation of the tariff could result in withholding or provide incentives for manipulating the market price, as discussed in Dr. Patton's affidavit. Such an interpretation thus could lead to unjust and unreasonable results. Accordingly, the Commission rejects LIPA's interpretation of the Services Tariff.<sup>13</sup>

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<sup>10</sup> February 15 Order at P 37.

<sup>11</sup> *Id.* at P 38, *citing* affidavit of Dr. David Patton, Exhibit III to NYISO Answer at page 5, paragraph 14 (Patton Affidavit).

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

<sup>13</sup> February 15 Order at P 39.

17. Although the Commission found that NYISO's interpretation of section 5.14.1(a) was consistent with the intent of New York's capacity market rules whereas LIPA's interpretation could result in withholding and the exercise of market power, and rejected LIPA's interpretation on that basis, the Commission also stated:

To avoid future misunderstandings, we note that NYISO might wish to amend the language of the Services Tariff explicitly stating that when an LSE offers its excess capacity into the spot market auction each month, it must certify either that such capacity is in a constrained area and is therefore being offered into the spot market auction for that location, or that the capacity is not in a constrained area and is being offered into the spot market auction for use as ROS capacity.<sup>14</sup>

### **Request for Rehearing**

18. LIPA's request for rehearing asserts that the Commission erred in the following ways:

- The Commission misinterpreted section 5.14.1(a). LIPA argues that section 5.14.1(a) and other tariff provisions only require NYISO to account for all certified capacity, and to allow an LSE to self-supply capacity to meet its entire capacity obligation, rather than restricting the amount of capacity that an LSE can self-supply from a constrained locality. LIPA further argues that the Commission errs in its assertion that the Minimum Capacity Requirement includes an ROS component.
- The Commission's finding that LIPA is seeking to have its excess Long Island capacity treated as ROS capacity, and/or to withhold such capacity from the Long Island market, runs counter to the record evidence.
- The Commission's interpretation of section 5.14.1(a) is inconsistent with Order No. 888,<sup>15</sup> which established policies preventing any limitation of an LSE's right

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<sup>14</sup> *Id.* at P 36 n.47.

<sup>15</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group*

to self-supply capacity, and with cases affirming the rights of LSEs to self-supply.<sup>16</sup>

**LIPA asserts that the Commission misinterpreted section 5.14.1(a).**

19. LIPA argues that the Commission's interpretation of section 5.14.1(a) is based on a misunderstanding of the nature of NYISO's Capacity Requirement. LIPA states that there is no separate ROS component to the Minimum Capacity Requirement, and therefore LIPA is not seeking to treat its Long Island capacity as ROS capacity, or withhold this capacity from the Long Island market. LIPA states that capacity within Long Island or New York City not only counts towards the applicable locational component but also must be accounted towards an LSE's overall share of the Minimum Capacity Requirement, and that, consequently, section 5.14.1(a)'s directive that NYISO account for all capacity certified by an LSE towards its share of the Minimum Capacity Requirement means simply that the NYISO must account for all of LIPA's certified capacity on Long Island that it attempted to self-supply, rather than requiring LIPA to bid its Long Island capacity in excess of its share of its locational component into the Spot-Market Auction.

20. LIPA points to the fact that the Services Tariff explicitly defines the Minimum Capacity Requirement and the Locational Minimum Capacity Requirement,<sup>17</sup> and states that, by contrast, the tariff does not define a ROS component to the Minimum Capacity Requirement. LIPA further argues that the Services Tariff does not restrict the amount of capacity from a Locality (i.e., a constrained location) that an LSE can use to meet its

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v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>16</sup> Request for rehearing at 4, *citing New York Independent System Operator, Inc.*, 97 FERC ¶ 61,155 at 61,676 (2001), and *New York Independent System Operator, Inc.*, 91 FERC ¶ 61,218 (2000).

<sup>17</sup> LIPA states that the tariff defines the Minimum Capacity Requirement as "the requirement established for the Capability Year by multiplying the [New York Control Area] Peak Load forecasted by the ISO by the quantity one plus the [New York Control Area] Installed Reserve Margin," and the Locational Minimum Capacity Requirement as "the portion of the [New York Control Area] Minimum [capacity requirement] that must be electrically located within a Locality . . . in order to ensure that sufficient Energy and Capacity are available in that Locality and that appropriate reliability criteria are met." Request for rehearing at 7, *citing NYISO Services Tariff*, sections 2.120b and 2.98.

capacity obligations. Rather, LIPA states, section 5.11 of the Services Tariff provides only that LSEs are required to meet their capacity obligations from any capacity suppliers "through Bilateral Transactions, . . . by self-supply . . . or by a combination of these methods."<sup>18</sup> Thus, LIPA states, the Minimum Capacity Requirement and the locational component need not be met using separate and distinct sets of resources, and there is no maximum limit on the amount of capacity resources within a constrained location that an LSE may certify to meet its Minimum Capacity Requirement. LIPA contends that the Commission erred, therefore, in inserting a specific ROS component into the Minimum Capacity Requirement.

**LIPA argues that it does not seek to classify the self-supplied 271.9 MW of self-supplied capacity as ROS capacity or to withhold capacity from the Long Island market.**

21. LIPA states that the Commission erred in finding that (a) LIPA intended its excess 271.9 MW to be considered ROS capacity, and (b) LIPA intended in this way to withhold capacity from Long Island. LIPA states that it certified all of its Long Island capacity, including the excess 271.9 MW, as "capacity located on Long Island" in the May 2006 spot-market auction,<sup>19</sup> and that it had sought in its complaint to have all of its certified capacity included in the supply curves for both Long Island and all of New York. LIPA states, therefore, that the Commission's reliance on Dr. Patton's representation that LIPA must have been trying to withhold capacity from the Long Island market was in error. LIPA asserts that, since the Commission (a) based its ruling on a misunderstanding of section 5.14.1(a), (b) incorrectly assumed that LIPA intended its excess 271.9 MW to be considered ROS capacity despite statements to the contrary in LIPA's complaint, and (c) suggested that LIPA is seeking to withhold capacity from the Long Island market when the record shows that LIPA sought the inclusion of its excess 271.9 MW in the Long Island Supply curve, the Commission's ruling on its complaint is in error.

**LIPA argues that the Commission's interpretation of section 5.14.1(a) as requiring excess locational capacity to be bid into the spot-market limits an LSE's ability to self supply, and is thus contrary to law and precedent.**

22. LIPA contends that the tariff does not limit the amount of locational capacity that an LSE may self-supply to meet its Minimum Capacity Requirement. In the February 15 Order, the Commission relied on the language of section 5.14.1.(a), which states that:

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<sup>18</sup> Request for rehearing at 8.

<sup>19</sup> *Id.* at 9.

The ISO shall also receive offers of [capacity] from any LSE for any amount of [capacity] that LSE has in excess of its [Minimum Capacity Requirement or locational component] as applicable.

The Commission found that this provision supported NYISO's claim that it can "require LIPA to offer its Long Island resources to meet its [total Minimum Capacity] requirement in a way that ensures that those resources are also counted in determining the adequacy of capacity resources in the Long Island Locality and are not withheld from other Long Island LSEs that may need to purchase locational resources to satisfy their Long Island obligations."<sup>20</sup>

23. LIPA argues, however, that a plain reading of this language does not support this meaning. Rather, LIPA claims, section 5.14.1(a) is simply a directive to NYISO to accept bids made by LSEs for capacity in excess of their capacity obligations, and does not provide any direction to LSEs as to the manner in which they must meet their capacity obligations. LIPA asserts that the Services Tariff's directive to LSEs as to how to meet their capacity obligations is set forth in section 5.11.2, which states that LSEs may meet their capacity obligations using capacity purchased "from *any* [capacity supplier] through Bilateral Transactions with purchases in ISO-administered [capacity] auction, by self-supply from qualified sources, or by a combination of those methods."<sup>21</sup> That section also provides that an LSE must certify "the amount of [capacity] that it [owns] or has obtained."<sup>22</sup> LIPA states that nowhere in section 5.11 or elsewhere in the Services Tariff is there any further limitation on the amount of capacity that can be self-supplied from a constrained locality for the purpose of meeting an LSE's total Minimum Capacity Requirement. LIPA further states that a tariff must be construed against the utility (here NYISO),<sup>23</sup> and that, since the Services Tariff's language does not support the Commission's ruling, the Commission should reverse itself.

24. LIPA further asserts that NYISO has taken the position that Long Island capacity cannot be used to fulfill the non-locational portion of its capacity requirement, unless it is

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<sup>20</sup> Request for rehearing at 12, *citing* NYISO answer to complaint at 16.

<sup>21</sup> Request for rehearing at 13, *citing* NYISO Services Tariff section 5.11.12.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 13, *citing Trans Alaska Pipeline System*, 108 FERC ¶ 63,030 at P 2438 (2004), *citing Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338, 1340-41 (8<sup>th</sup> Cir. 1971).

sold into the Long Island spot-market and purchased by NYISO (which will then re-distribute it to other Long Island LSEs), and that the Commission has, in effect, agreed with NYISO. LIPA claims, however, that this position limits the amount of capacity that an LSE can self-supply from a constrained location to meet its capacity obligation, which contradicts the policy articulated in Order No. 888 to promote self-supply as a fundamental element of open markets. LIPA further argues that the Commission has previously supported the right of NYISO LSEs to meet their needs through self supply, holding that NYISO participants "should be given the option of self-supplying without being required to bid into the NYISO-administered markets,"<sup>24</sup> and that "[i]f some of the [capacity] resources procured by an LSE in advance of the . . . auction were to be excluded from the auction, the LSE would be forced to buy its full [capacity] requirement through the auction, despite the fact that it had procured some of its requirement in advance of the auction[ which] would not be a reasonable result."<sup>25</sup>

25. LIPA also asserts that section 5.14.1(a) required NYISO to account for all the capacity that each LSE has certified to meet its Minimum Capacity Requirement, and that the spot-market will be "conducted and solved simultaneously for [capacity] that may be used by an LSE towards all components" of its capacity obligation, with the construction of supply curves to be consistent with the rules set forth in NYISO's Installed Capacity Manual. That manual, in turn, provides that NYISO will construct a supply curve for the total capacity offered into New York, which includes all capacity that LSEs have designated to meet their respective capacity obligations.<sup>26</sup> Therefore, LIPA argues, NYISO must account for all capacity that has been certified by LSEs, and must recognize that LSEs may meet all of their capacity obligation through self-supply. Instead, LIPA states, NYISO has misinterpreted section 5.14.1(a) and curtailed LIPA's right to self-supply capacity.

26. Thus, LIPA argues, consistent with the filed rate doctrine, NYISO's actions must be corrected by restating the results of the May 2006 auction, and recalculating the applicable market clearing prices.

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<sup>24</sup> *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,155 at 61,676 (2001).

<sup>25</sup> Capacity Market Order at P 7 n. 7.

<sup>26</sup> Request for rehearing at 16-17, *citing* NYISO Services Tariff section 5.14.1(a) and NYISO Installed Capacity Manual section 5.15.2 (Rev. 2005).

## **Discussion**

27. The Commission denies LIPA's request for rehearing. We find that NYISO's response to LIPA's certification of its capacity in the auction was reasonable and consistent with both the language of the governing tariff provisions and the underlying intent of those provisions (as well as Order No. 888). LIPA has again failed to demonstrate that NYISO's actions were inconsistent with the governing tariff provisions or were otherwise unreasonable.

### **The Commission correctly agreed with NYISO's rather than LIPA's interpretation of section 5.14.1(a) of the Services Tariff**

28. We affirm our earlier ruling that the interpretation of the language of section 5.14.1(a) that NYISO supports, and that we upheld in our February 15 Order, is superior to LIPA's interpretation. The Commission considers it a reasonable reading to find that section 5.14.1(a) states that NYISO must account for that capacity that "each . . . LSE has certified for use in the [New York Control Area] to meet their [Minimum Capacity Requirement or locational component], as applicable" – in other words, during the certification process, the LSE must make clear whether it is certifying capacity to meet the LSE's locational component (the amount of capacity required to be in the constrained area), or the Minimum Capacity Requirement (amount of capacity not required to be in the constrained area). LIPA points out that there is no express definition of rest of state capacity in the NYISO tariff. It is true that there is no express definition of rest of state capacity in the NYISO tariff, but that does not end the matter. Rather, the question is, in the absence of an express definition, whose interpretation of the NYISO tariff is more reasonable. The Commission has applied its expertise and considered the facts and the parties' practices in evaluating whether LIPA's interpretation of the NYISO tariff or NYISO's interpretation of the NYISO tariff is more reasonable. The Commission finds NYISO's interpretation is more reasonable. Thus, we find that if the LSE is certifying that some of its capacity is located in a constrained area, then *a fortiori*, the remainder of the capacity must not be located in a constrained area (which, for NYISO's purposes, would mean all of the rest of the state other than New York City and Long Island).<sup>27</sup>

29. As we stated in the February 15 Order, in the Capacity Market Order and Capacity Market Rehearing Order, the Commission expressed its intent to ensure that capacity in

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<sup>27</sup> We further note that the term "ROS Capacity," meaning capacity located in the rest of New York, is used by both LIPA and NYISO witnesses. See affidavit of Dr. Kevin Jones, Exhibit B to LIPA Complaint, at P 5, and affidavit of Matt Rodgers, Exhibit III to NYISO Answer, at P 6.

NYISO's constrained areas is more highly valued than capacity in its unconstrained areas, so as to send appropriate price signals for future development. NYISO's interpretation of section 5.14.1(a) fulfills this intent: it requires LSEs to certify whether the capacity they are submitting to the auction is in a constrained area, or not in a constrained area, and on the basis of this information, NYISO constructs supply curves for constrained areas, and for all of New York State, that accurately reflect the price of capacity in both constrained and unconstrained areas. Under LIPA's interpretation, by contrast, LSEs could use capacity located in both constrained and unconstrained areas in NYISO to meet the portion of their Minimum Capacity Requirement not required to be in a constrained location (*i.e.*, what the Commission dubbed the rest of state requirement); as a result, without the information provided by the LSE's certification, NYISO would have to use all of that capacity to construct supply curves – thus eliminating the distinction between a supply curve reflecting the value of capacity in constrained areas, and a supply curve reflecting the value of capacity in unconstrained areas.<sup>28</sup> Constructing supply curves using this method would not meet the Commission's intent, as stated in the Capacity Market Orders, to send price signals that reflect the differing values of capacity in constrained and unconstrained areas.

**The Commission's finding that LIPA did not correctly certify its excess Long Island capacity was based on record evidence, and the Commission properly found that LIPA's proposed method of certification could lead to the exercise of market power**

30. LIPA asserts that, contrary to the Commission's description of its actions and its Complaint, at the time that it certified capacity for the May 2006 auction "LIPA specifically sought the inclusion of the excluded 271.9 MW of Long Island [capacity] in the construction of the Long Island supply curve" and "[a]t no time did LIPA ever claim that the 271.9 MW of [capacity] should be considered 'ROS' capacity or otherwise withheld or excluded from the Long Island supply curve."<sup>29</sup> This statement, however, is contradicted by evidence provided by NYISO, whose witness Matthew J. Rodgers testified that:

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<sup>28</sup> LIPA explicitly makes this argument in both its original complaint and its request for rehearing. LIPA stated in its rehearing request that in its complaint, it had asserted that "all of [its certified capacity] should have been included in the [capacity] supply curves for *both* Long Island and the [entire New York Control Area]." Request for rehearing at 9, *citing* Complaint at 29, emphasis in original.

<sup>29</sup> Request for rehearing at 9.

In the May 2006 [auction] . . . LIPA [had] an overall LI long position of 271.9 MW . . . . But for reasons that are not known to the NYISO, LIPA failed to offer the long Capacity in the [auction]. . . . Since May 2004, LIPA has certified its Capacity in a consistent manner . . . offering all of its long [Long Island] Capacity into the [auction]. Its conduct in the May 2006 [auction], when LIPA failed to offer any Capacity in the [a]uction, is the exception.<sup>30</sup>

31. Moreover, contrary to LIPA's representation in its petition for rehearing, the Commission did not find that LIPA deliberately sought to withhold capacity during the May 2006 auction. It may be, as NYISO surmised, that because the May 2006 auction was the first occasion on which New York LSEs had to use NYISO's new automated certification procedure, LIPA's representative simply erred while using the automated process for the first time and failed to correctly state LIPA's capacity position, and LIPA's complaint is "a self-serving attempt to avoid the financial consequences of its own error."<sup>31</sup> But whether LIPA acted deliberately with an intent to withhold capacity from the market, or merely erred during the certification process, is unimportant for present purposes. The Commission finds that LIPA failed to certify its excess 271.9 MW of Long Island capacity during the May 2006 auction in accordance with section 5.14.1(a) of the tariff. As the Commission found in the February 15 Order, a contrary interpretation could lead to the exercise of market power:

LIPA's interpretation of the Services Tariff could lead to withholding of capacity, which would be contrary to the intent of NYISO's capacity market design. . . . When any LSE has the potential to withhold capacity and thereby raise prices, that LSE has market power. LIPA's interpretation of the tariff could result in withholding or provide incentives for manipulating the market price . . . . Such an interpretation thus could lead to unjust and unreasonable results.<sup>32</sup>

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<sup>30</sup> Affidavit of Matthew J. Rodgers, Exhibit IV to NYISO Answer at page 12, paragraph 17-18.

<sup>31</sup> NYISO answer at 9.

<sup>32</sup> February 15 Order at PP 38-39, relying on Patton Affidavit at page 5, paragraph 14. We note that we did not say that LIPA was deliberately withholding capacity, but rather that its interpretation "could" lead to or result in withholding.

32. Therefore, the Commission will uphold its earlier determinations that LIPA did not correctly certify its excess 271.9 MW, and that LIPA's interpretation of the Services Tariff could lead to the exercise of market power and could thus lead to unjust and unreasonable results.

**The Commission's interpretation of section 5.14.1(a) preserves the ability of LSEs to self-supply their capacity needs and does not make such self-supplied capacity valueless**

33. LIPA errs in its assertion that the Commission's interpretation of section 5.14.1(a) prevents LSEs from self-supplying their own capacity needs or is inconsistent with precedent affirming the right to self-supply. Nor, under the Commission's interpretation of the Services Tariff, is there any limitation on the amount of capacity that an LSE may self-supply from a constrained location to meet its total Minimum Capacity Requirement.

34. LIPA's request for rehearing would suggest that, if an LSE has self-supplied capacity in a constrained location that is in excess of its Locational Minimum Capacity Requirement (such as the 271.9 MW of Long Island capacity at issue here), that LSE is precluded from making any use of that excess. But that is not the case. In the February 15 Order, the Commission cited to evidence provided by NYISO demonstrating that LSEs, could, in fact, get the benefit of such excess:

With regard to any Long Island capacity owned by LIPA that is in excess of its Locational Requirement, even if it cannot use its excess capacity on Long Island to fulfill its ROS obligation, LIPA can, in essence, "sell" that Long Island capacity to NYISO (at the appropriate price for capacity on Long Island) and [NYISO will] reallocate that capacity to deficient Long Island LSEs. . . . [I]f LIPA properly offers its excess locational capacity into the Long Island spot market auction rather than using that capacity to meet its ROS obligation, then it will be required to purchase ROS capacity; but, it will be able to sell its excess locational capacity at higher prices than the price it pays to NYISO for the ROS capacity that NYISO will reallocate to it.

. . . .

For instance, assuming, for the purpose of argument, that at the conclusion of the May 2006 auction, Long Island capacity cleared at \$2/MW and ROS capacity cleared at \$1/MW, LIPA would have offered its excess Long Island capacity into the market, and received \$2/MW for it. At the same time, LIPA would have had to purchase an equal amount of ROS capacity

in the spot market auction, but it would only have had to pay \$1/MW to make up its ROS deficiency.<sup>33</sup>

35. Thus, if LIPA had properly indicated that its excess 271.9 MW were located on Long Island, it could, in every meaningful sense, have used all of its MW located on Long Island, in that it could have "self-supplied" its full locational component and sold the excess capacity. It is therefore inaccurate for LIPA to argue that the Commission's interpretation of section 5.14.1(a) deprives it of its ability fully to self-supply its capacity needs, or to argue that the Commission's interpretation makes any excess valueless.<sup>34</sup>

The Commission orders:

LIPA's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Moeller concurring in part and dissenting in part with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>33</sup> February 15 Order at P 21; P 21 n.35.

<sup>34</sup> This interpretation is also consistent with Commission orders pre-dating the Capacity Market Orders. The Commission stated in *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,155 at 61,676 (2001), citing *New York Independent System Operator, Inc.*, 91 FERC ¶ 61,218 (2000), that "NYISO may require that the right of customers to self-supply comes with the obligation to self-supply generation capacity that meets all applicable technical requirements, including locational requirements."

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Long Island Power Authority and LIPA

Docket No. EL07-16-000

v.

New York Independent System Operator, Inc.

(Issued July 19, 2007)

MOELLER, Commissioner, concurring in part and dissenting in part:

On rehearing, the Long Island Power Authority and its operating subsidiary LIPA (collectively “LIPA”) argue, *inter alia*, that the Commission’s underlying order<sup>1</sup> misinterpreted the nature of the New York Control Area’s (“NYCA”) Minimum Capacity Requirement. Since the underlying decision was based on an explicit understanding of this Requirement, an understanding that LIPA claims on rehearing to be inaccurate, I have taken a *de novo* review of the pleadings and the arguments made in this complaint proceeding.

At the core of this case is the interpretation of Section 5.14.1(a) of the New York Independent System Operator’s (“NYISO”) Services Tariff and an understanding of how load-serving entities (“LSEs”) certify their unforced capacity (“UCAP”) to satisfy a specified NYCA Minimum Capacity Requirement, and if applicable, a Locational Minimum Capacity Requirement.<sup>2</sup> In relevant part, Section 5.14.1(a) states:

When the ISO conducts each ICAP Spot Market Auction *it will account for all* Unforced Capacity that each NYCA LSE has certified for use in the NYCA to meet their NYCA Minimum Installed Capacity Requirement or Locational Minimum Installed Capacity Requirement, *as applicable.... The ISO shall also receive* offers of Unforced Capacity from any LSE for any amount of Unforced Capacity that LSE has in excess of its NYCA

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<sup>1</sup> *Long Island Power Auth. and LIPA v. New York Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,109 (2007).

<sup>2</sup> The Locational Minimum Capacity Requirement applies only to LSEs located on Long Island or in New York City.

Minimum Unforced Capacity Requirement or Locational Minimum Unforced Capacity Requirement, as applicable. (Emphasis added).

LIPA argues that contrary to NYISO's reading of this tariff provision, neither the tariff nor the ICAP manuals impose an upper limit on the amount of UCAP that may be provided by resources within a locality such as Long Island. If NYISO's interpretation is affirmed (*i.e.*, that an LSE cannot use locational capacity to fulfill its overall capacity requirement),<sup>3</sup> LIPA fears that UCAP that is either procured or self-supplied in excess of the locational requirement will not be counted towards its NYCA Minimum Capacity Requirement. Overall, the arguments framed by LIPA are plausible.

I agree with LIPA that Section 5.14.1(a) is not a model of clarity and that the potential exists for conflicting interpretations. For instance, the facts demonstrate and NYISO admits that 271.9 megawatts of LIPA's certified UCAP were excluded from the Long Island Spot Market Auction. Yet NYISO's action to exclude LIPA's excess capacity appears to conflict with the tariff's position that NYISO "will account for all" UCAP certified by an LSE. Additionally, the term "as applicable" can be viewed as either addressing: (1) whether a particular LSE has a locational requirement; or (2) whether UCAP will be "accounted for" only to the extent that the minimum requirement is satisfied. Finally, tariff language stating that "[t]he *ISO shall receive* offers of [UCAP] from any LSE" that exceeds its minimum requirement is not akin to stating that "the *LSE must offer* UCAP into the auction that is in excess of its capacity requirements" – language which, in my opinion, more accurately reflects NYISO's intent.

Upon reconsideration, I believe that the underlying order should have required NYISO to revise Section 5.14.1(a) of its Services Tariff (and other market rules, as necessary) instead of merely suggesting that NYISO may wish to amend its tariff.<sup>4</sup> This clarification may prevent other LSEs from encountering a similar misunderstanding of NYISO's intent in the future. However, my revised decision to require NYISO to clarify its tariff does not result in a default judgment for LIPA. Despite NYISO's less than artful ability to explain the way in which LSEs must certify capacity, I have determined, upon review of the evidence in the record that LIPA knew or should have known that the

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<sup>3</sup> See LIPA Complaint at Exh. J (Correspondence from NYISO representative Matthew J. Rodgers to LIPA personnel explaining the method that LIPA must use to certify its capacity.) See also NYISO Answer at Exh. IV, Affidavit of Matthew J. Rodgers.

<sup>4</sup> 118 FERC ¶ 61,109 at n. 47.

manner in which it was certifying capacity had the potential to cause problems. In reaching this decision, I relied upon three pieces of information.

First, I find it perplexing that LIPA chose not to offer its excess 271.9 megawatts into the Long Island Spot Market Auction, but instead sought to have such capacity counted towards its NYCA Minimum Capacity Requirement. Aside from arguing the right to self-supply its full requirements, LIPA does not sufficiently explain why it made this choice. Second, evidence was presented to show that LIPA previously attempted to offer excess locational capacity towards its NYCA Minimum Capacity Requirement in Spring 2004, and was instructed by NYISO that such action was not permitted since it has the potential to withhold local capacity from the local market.<sup>5</sup> Third, NYISO provided testimony to substantiate that LIPA personnel attended training sessions on how to properly certify capacity using NYISO's new software application.<sup>6</sup> Moreover, during one training session, attendees (including the market analyst who certified LIPA's capacity at issue in this proceeding) received a handout that specifically addressed the question of whether excess locational capacity must be offered into the Long Island Spot Market Auction.<sup>7</sup> Reviewing these pieces of evidence against the backdrop of an unclear tariff provision and LIPA's consistent certification practice since the inception of the capacity markets in 2003, I arrive at the conclusion that LIPA should have known that applying excess locational UCAP towards its overall minimum requirement could be problematic. On this basis, I concur with the Commission's decision to deny LIPA's rehearing request with respect to the question of whether the Commission misinterpreted Section 5.14.1(a).

With regard to LIPA's more generic question of whether LSEs have the right to self-supply, today's decision addresses this question in an indirect and puzzling manner. While the order appears to support NYISO's position that there is indeed a fixed limit to which LSEs on Long Island (or in New York City) can self-supply, there are also statements to imply that there is no limitation on the amount of capacity that an LSE may self-supply from a constrained location to meet its NYCA Minimum Installed Capacity Requirement.<sup>8</sup> At best, the discussion of whether LSEs in LIPA's position have the right to self-supply is unclear.

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<sup>5</sup> See NYISO Answer at Exh. I, Affidavit of John W. Charlton.

<sup>6</sup> See NYISO Answer at Exh. II, Affidavit of Michele Goyette.

<sup>7</sup> See NYISO Answer at Exh. II, Attachment A ("ICAP Automated Market Frequently Asked Questions", March 28, 2006).

<sup>8</sup> Order Denying Rehearing at P 33.

LIPA cites to instances where the Commission has clearly found that LSEs that participate in New York's capacity markets should be able to self-supply its needs.<sup>9</sup> However, exceptions to the rule may be necessary to accommodate a particular market design for good cause. Here, NYISO's implicit requirement in Section 5.14.1(a) is intended to ensure that there are sufficient locational resources for every LSE on Long Island, and NYISO offers compelling testimony by its Market Monitor to support this market arrangement.<sup>10</sup> That said, notwithstanding the current design, if LIPA believes that it can demonstrate that LSEs on Long Island should be permitted to self-supply its full NYCA Minimum Installed Capacity Requirement with locational capacity (and also show that there are no associated adverse market consequences) LIPA should bring this market design proposal to NYISO's attention.<sup>11</sup>

Finally, while LIPA has undoubtedly learned a costly lesson about the design of the capacity markets, NYISO's involvement (or lack thereof) in this matter has not gone unnoticed. As the system operator, NYISO owes a level of responsibility to its customers, the market participants. In this case, LSEs were using a brand new software application for the very first time to certify capacity and NYISO should have anticipated problems despite the operator training and the similarity of the new software application to the previous system. After reviewing LIPA's certification and identifying that LIPA's excess capacity was not being offered,<sup>12</sup> NYISO should have contacted LIPA and warned LIPA that if it did not offer its excess capacity into the auction, and that if no further action was taken, then NYISO would exclude the excess capacity from the auction. However, there is no indication that NYISO made any attempt to contact LIPA even

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<sup>9</sup> See LIPA Complaint at 26, citing *New York Indep. Sys. Operator Inc.*, 103 FERC ¶ 61,201 at n.7 (2003), *reh'g denied*, 105 FERC ¶ 61,108 (2003).

<sup>10</sup> See NYISO Answer at Exh. III, Affidavit of David B. Patton, Ph.D.

<sup>11</sup> Additionally, LIPA may wish to file comments in Docket Nos. RM07-19-000 and AD07-7-000 to express any concerns that it may have with regard to the question of whether ISO responsiveness to market participants can be improved. See *Wholesale Competition in Regions with Organized Electric Markets*, 119 FERC ¶ 61,306 (2007).

<sup>12</sup> See LIPA Complaint at Exh. E (NYISO's screenshot of LIPA's certified capacity indicating that LIPA's excess locational capacity of 271.9 megawatts appears under the heading "Overall Position" and not under the heading "Excess Capacity." The screenshot is misleading in the sense that it states that LIPA's total overall position is deficient by only 29.4 megawatts.)

though such an action would have resolved the matter on the spot and obviated the need for this complaint. Thus, while I find that NYISO's lack of action is regrettable, ultimately I cannot find a basis upon which to grant LIPA relief.

Accordingly, for the reasons expressed above, I respectfully concur in part, and dissent in part, from today's rehearing order.

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Philip D. Moeller  
Commissioner