

129 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. ER09-1142-000

ORDER ON COMPLIANCE FILING

(Issued November 20, 2009)

1. On May 15, 2009, New York Independent System Operator, Inc. (NYISO) submitted a compliance filing, pursuant to Order No. 719,¹ that proposes revisions to its Market Administration and Control Area Services Tariff (Services Tariff) and Open Access Transmission Tariff (OATT). NYISO requests that its proposed tariff revisions be made effective 15 days after acceptance by the Commission. In this order, we accept NYISO's compliance filing, including the revised tariff sheets subject to further compliance filing to be filed within 90 days of this order, to be effective upon issuance of this order, as discussed below.

I. Background

2. In Order No. 719, the Commission established reforms to improve the operation of organized wholesale electric power markets² and amended its regulations under the Federal Power Act (FPA) in the areas of: (1) demand response, including pricing during periods of operating reserve shortage; (2) long-term power contracting; (3) market-

¹ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719 or Final Rule).

² Organized market regions are areas of the country in which a regional transmission organization (RTO) or independent system operator (ISO) operates day-ahead and/or real-time energy markets. The following Commission-approved RTOs and ISOs have organized markets: PJM Interconnection, L.L.C. (PJM); New York Independent System Operator, Inc. (NYISO); Midwest Independent Transmission System Operator, Inc. (Midwest ISO); ISO New England, Inc. (ISO New England); California Independent System Operator Corp. (CAISO); and Southwest Power Pool, Inc. (SPP).

monitoring policies; and (4) the responsiveness of RTOs and ISOs to their customers and other stakeholders. The Commission stated that these reforms are intended to improve wholesale competition to protect consumers in several ways: by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, removing barriers to demand response, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers.³

3. In the area of demand response, Order No. 719 required each RTO and ISO to: (1) accept bids from demand response resources in the RTO's or ISO's markets for certain ancillary services, on a basis comparable to other resources; (2) eliminate, during a system emergency, a charge to a buyer that takes less electric energy in the real-time market than it purchased in the day-ahead market; (3) in certain circumstances, permit an aggregator of retail customers (ARC) to bid demand response on behalf of retail customers directly into the organized energy market; and (4) modify its market rules, as necessary, to allow the market-clearing price, during periods of operating reserve shortage, to reach a level that rebalances supply and demand so as to maintain reliability, while also providing sufficient provisions for mitigating market power.⁴

4. Additionally, the Commission recognized that further reforms may be necessary to eliminate barriers to demand response in the future. To that end, the Commission required each RTO or ISO to assess and report on any remaining barriers to comparable treatment of demand response resources that are within the Commission's jurisdiction. The Commission further required each RTO's or ISO's Independent Market Monitor to submit a report describing its views on its RTO's or ISO's assessment to the Commission.⁵

5. With regard to long-term power contracting, Order No. 719 required each RTO and ISO to dedicate a portion of its website for market participants to post offers to buy or sell power on a long-term basis.⁶

6. To improve market monitoring, the Commission required each RTO and ISO to provide its Market Monitoring Unit (MMU) with access to market data, resources and personnel sufficient to carry out its duties. The Commission further required that the

³ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 1.

⁴ *Id.* P 4, 15.

⁵ *Id.* P 274.

⁶ *Id.* P 301.

MMU (or the external MMU in a hybrid structure and, in some cases, the internal MMU) report directly to the RTO or ISO board of directors.⁷ In addition, the Commission required that the MMU's functions include the core functions of: (1) identifying ineffective market rules and recommending proposed rules and tariff changes; (2) reviewing and reporting on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities; and (3) notifying appropriate Commission staff of instances in which a market participant's behavior may require investigation.

7. The Commission also took the following actions with regard to MMUs: (1) expanded the list of recipients of MMU recommendations regarding rule and tariff changes, and broadened the scope of behavior to be reported to the Commission; (2) modified MMU participation in tariff administration and market mitigation, required each RTO and ISO to include ethics standards for MMU employees in its tariff, and required each RTO and ISO to consolidate all its MMU provisions in one section of its tariff; and (3) expanded the dissemination of MMU market information to a broader constituency, with reports made on a more frequent basis than in the past, and reduced the time periods before energy market bid and offer data are released to the public.

8. Finally, Order No. 719 established an obligation for each RTO and ISO to establish a means for customers and other stakeholders to have a form of direct access to the RTO or ISO board of directors and thereby to increase its responsiveness to customers and other stakeholders. The Commission stated that it will assess each RTO's or ISO's compliance filing using four responsiveness criteria: (1) inclusiveness; (2) fairness in balancing diverse interests; (3) representation of minority positions; and (4) ongoing responsiveness.

9. The Commission required the RTOs and ISOs to make compliance proposals to implement the reforms adopted in Order No. 719. In each of the four areas described above, the Commission required each RTO or ISO to consult with its stakeholders and make a compliance filing within six months of the date that the Final Rule is published in the *Federal Register*. The compliance filing must explain how the RTO's or ISO's existing practices comply with the Final Rule's reforms, or describe the entity's plans to attain compliance.⁸ Order No. 719 also required RTOs and ISOs to assess the technical feasibility and value to the market of smaller demand response resources providing

⁷ The use of the phrase "board of directors" also includes the board of managers, board of governors, and similar entities.

⁸ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 8, 578-83.

ancillary services and report to the Commission within one year of the date that the Final Rule is published in the *Federal Register*.⁹

10. On July 16, 2009, the Commission issued an Order on Rehearing, Order No. 719-A.¹⁰ With few exceptions, the Commission denied the requests for rehearing.¹¹

II. Notice of Filings and Responsive Pleadings

11. Notice of NYISO's filing was published in the *Federal Register*, 74 Fed. Reg. 25527 (2009), with interventions and protests due on or before June 12, 2009.

12. Potomac Economics, Ltd., (Potomac Economics) filed comments. Exelon Corporation, Calpine Corporation, Dynegy Power Marketing, Inc., Mirant Parties, Astoria Generating Company, LP, Constellation Energy Commodities Group and Constellation New Energy, Inc. filed motions to intervene. Electricity Consumers Resource Council (ELCON), Independent Power Producers of NY, Inc. (Independent Power Producers), Wal-Mart Stores, Inc. (Wal-Mart), EnerNOC, Inc. (EnerNOC), Electric Power Supply Association (EPSA), DC Energy LLC, the Portland Cement Association and ArcelorMittal USA, Inc. (Industrial Consumers), Energy Curtailment Specialists, Inc. (ECS), and CPower, Inc. (CPower),¹² filed motions to intervene and comments.

13. Orange and Rockland Utilities, Inc., New York Power Authority, Central Hudson Gas & Electric Corporation, New York State Electric and Gas Corporation, Long Island Power Authority, Niagara Mohawk Power Corp, d/b/a/ National Grid, Rochester Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., (collectively the

⁹ *Id.* P 97, 581. See also Errata Notice, Docket No. RM07-19-000 (Mar. 23, 2009) (clarifying deadline).

¹⁰ *Wholesale Competition in Regions with Organized Electric Markets, order on rehearing*, 74 Fed. Reg. 37776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009) (Order No. 719-A).

¹¹ Order No. 719-A, FERC Stats. & Regs ¶ 31,292 at P 69 (July 16, 2009). Each RTO and ISO is required to make a compliance filing within 180 days of the issuance date of Order No. 719-A; accordingly these compliance filings are required to be filed on or before January 16, 2010 and will be addressed by the Commission in subsequent orders.

¹² ECS and CPower filed identical comments.

New York Transmission Owners) jointly filed a motion to intervene and limited protest. Portland Cement Association filed a motion to intervene and protest.

14. Independent Power Producers and New York Transmission Owners filed answers.

15. On June 17, 2009, NYISO filed an errata transferring language in its Services Tariff, Attachment H, Sheet No. 467.00 to Sheet No. 467.00A.

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest, unless otherwise ordered by the decisional authority. We will accept Independent Power Producers and New York Transmission Owners' answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

18. We find that, with certain modifications, NYISO's filing complies with Order No. 719 in the areas of: (1) demand response and pricing during periods of operating reserve shortage; (2) long-term power contracting; and (3) market-monitoring policies. Accordingly, we accept NYISO's filing with respect to those issues, to be effective upon issuance of this order, subject to a further compliance filing as discussed below. NYISO is directed to make the compliance filing within 90 days of the date of issuance of this order.

19. This order makes no findings as to NYISO's compliance with the fourth area of reforms identified in Order No. 719: the responsiveness of RTOs and ISOs to their customers and other stakeholders. The Commission recently issued a notice announcing that its staff will hold a technical conference in the near future to provide a forum for interested participants to discuss that topic.¹³ Following that technical conference, the Commission will issue a separate order addressing NYISO's compliance with this aspect of Order No. 719.

¹³ See First Notice of Technical Conference on RTO/ISO Responsiveness, Docket Nos. ER09-1048-000, *et al.*, November 13, 2009.

1. Demand Response and Pricing During Periods of Operating Reserve Shortages in Organized Markets

a. Ancillary Services Provided by Demand Response Resources

20. Order No. 719 required each RTO and ISO to accept bids from demand response resources, on a basis comparable to any other resources, for ancillary services (energy imbalance, spinning reserves, supplemental reserves, reactive and voltage control, and regulation and frequency response) that are acquired in a competitive bidding process, if such demand response resources: (1) are technically capable of providing the ancillary service within the response time requirements and meet reasonable requirements adopted by the RTO or ISO as to size, telemetry, metering and bidding; and (2) submit a bid under the generally-applicable bidding rules at or below the market-clearing price, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. All accepted bids will receive the market-clearing price.¹⁴

21. Additionally, Order No. 719 directed each RTO and ISO to file, as part of its compliance filing, a proposal to adopt reasonable standards necessary for system operators to call on demand response resources, together with mechanisms to measure, verify, and ensure compliance with any such standards.¹⁵ Further, Order No. 719 required RTOs and ISOs to describe their efforts to develop adequate customer baselines.¹⁶ It also required RTOs and ISOs to coordinate with their stakeholders in the development of technical requirements for demand response resources participating in ancillary services markets, and provide the Commission with a technical and factual basis for any necessary regional variations.¹⁷ Finally, Order No. 719 required each RTO and ISO to allow demand response resources to specify limits on the duration, frequency and amount of their service in their bids to provide ancillary services or their bids into the joint energy-ancillary services markets in the co-optimized RTO and ISO markets.¹⁸

¹⁴ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 47, 49.

¹⁵ *Id.* P 61.

¹⁶ *Id.* P 57.

¹⁷ *Id.* P 59.

¹⁸ *Id.* P 81.

i. NYISO Filing

22. NYISO states that it already allows demand response resources to participate in its ancillary services markets on terms comparable to generators.¹⁹ NYISO also states that it is in compliance with the bidding flexibility and scarcity pricing requirements of Order No. 719.²⁰ NYISO also states that it is already fully in compliance with the demand response and operating reserve requirements of Order No. 719. NYISO notes, regarding the necessary technical requirements of demand response resource participation in its ancillary services markets, that there is still a one-hour sustainability requirement to provide operating reserves set by the Northeast Power Coordinating Council (NPCC) and a separate New York State Reliability Council (NYSRC) rule restricting some resources' ability to provide operating reserves.²¹ In addition, NYISO asserts that because it does not operate organized markets for energy imbalance, voltage support or quick start resources, these services are beyond the scope of Order No. 719. NYISO states that energy imbalances are handled through NYISO's real-time energy market.

23. Regarding customer baselines, NYISO notes that it uses three different methodologies for demand resources participating in its (1) Installed Capacity (ICAP) markets; (2) emergency demand response (EDRP) and Special Case Resources (SCR); and (3) ancillary services markets where "baseline" is defined as demand resources' actual load immediately prior to the real-time ancillary services schedule coming from NYISO, i.e. NYISO does not use historical data to establish a baseline. NYISO asserts that its current processes satisfy Order No. 719 requirements.

24. NYISO also states that it has raised with its transmission owners the issue of it providing a contact list for each New York Transmission Owner to facilitate registration of demand response resources to provide ancillary services.²²

ii. Comments

25. EnerNOC asserts that the market design for demand response participation in NYISO's ancillary service markets cedes the authority for administration to the electric distribution company (EDC). EnerNOC states that under NYISO's interpretation of its Commission-jurisdictional rules and agreements, all Demand-Side Ancillary Services

¹⁹ NYISO Filing at 3.

²⁰ *Id.* 7 and 13.

²¹ *Id.* 4 – 5.

²² *Id.* 15.

Program (DSASP) hardware must be approved and installed by the EDC, and the data must be submitted to the EDC and then to NYISO. According to EnerNOC, this puts EDCs in the position of effectively administering NYISO's tariff by dictating rates, terms, and conditions under which demand response providers may participate in the DSASP. EnerNOC asserts this is unjust and unreasonable because some EDCs may have economic incentives to discourage demand response participation. EnerNOC requests that the Commission require NYISO to develop and publish technical requirements for DSASP metering and telemetry to allow direct communication of information solely to NYISO by the demand response provider.

26. EnerNOC also asserts that imposing identical metering, control and telemetry requirements on DSASP participants as on central power stations puts unnecessarily high costs on DSASP participants discouraging participation while not meeting the spirit of Order No. 719. EnerNOC states that NYISO's market rules require installation of expensive, unneeded remote telemetry units (RTUs) like those used by large generating facilities to communicate with NYISO and the EDC. EnerNOC contends demand response resources should be able to collect information from each of their customers using existing internet-based, AMI or smart grid infrastructure, compile it, and communicate it to NYISO via the internet or leased line in real-time.

27. Potomac Economics agrees that applying the same metering standards to demand response resources as to generators can serve as a barrier. Potomac Economics believes this can be resolved by adjusting meter intervals to match usage. Potomac Economics adds that an alternative to metering is the use of statistical methods to measure demand response resources that are under direct control of the ISO, utility, or Curtailment Service Provider (CSP). ECS and CPower support Potomac Economics' conclusion regarding metering standards. ECS, CPower and Wal-Mart cite the lack of enrollment in DSASP as an example of similar metering standards posing a challenge for demand side resources. ECS and CPower state that NYISO's control systems and software, originally designed to accommodate generation resources, now serves to impede demand response participation.

28. An associated problem, according to ECS and CPower, is that a list of contacts to each New York Transmission Owner has not been provided by NYISO resulting in a delay to demand response integration. According to ECS and CPower providing a list of contacts would smooth the process of contacting the appropriate department at each transmission owner responsible for metering and communication installation.

29. Potomac Economics also asserts that dynamic real-time retail pricing could be introduced at the state-level to align consumers' incentives with the true costs of their consumption to the system. Potomac Economics states that another option would be to provide real-time economic demand response resources the same incentives that they would have under a dynamic retail pricing regime. Paying consumers at the cost of their consumption would align the incentives of the loads with the value of energy to the system allocating the costs to the corresponding LSE who might otherwise receive a

windfall when the load curtails, according to Potomac Economics. ECS and CPower agree with Potomac Economics stating that NYISO should provide incentives for demand response resources that will foster participation in real-time energy markets. However, Potomac Economics asserts that better metering standards are needed to accurately establish a customer's baseline and measure the service provided to the ISO before dynamic real-time pricing can be implemented.

30. Potomac Economics states that NYISO is supportive of the development of a "Smart Grid" to enable the distribution of real-time price signals and/or network conditions to consumers of electricity and that such communications will facilitate the participation of small demand response resources in ancillary service programs.

31. According to EnerNOC, NYISO deprives demand response resources of access to its real-time energy markets because demand response participants dispatched in real-time receive no compensation for their participation. According to EnerNOC, the only compensation for demand response resources in the DSASP program is the day-ahead availability payment that is paid when a demand response resource is accepted to be potentially dispatched for reserves in the real-time.

32. EnerNOC contends that the Commission should direct NYISO to develop a real-time demand response program in this proceeding because the stated purpose is to eliminate barriers to demand response. True comparability, according to EnerNOC, requires the creation of a real-time economic demand response program because of the existence of co-optimized energy and ancillary service markets. Further, EnerNOC states that NYISO should seek the necessary state regulatory reform if dynamic pricing does not materialize. It is unrealistic, according to EnerNOC, to think that mandatory dynamic pricing for small customers could materialize in a year or two, preventing NYISO from realizing its benefits.

iii. Commission Determination

33. The Commission directed the ISOs and RTOs to allow demand response resources to bid into ancillary services markets if they are technically capable of providing ancillary services and meet reasonable requirements adopted by the RTO or ISO as to size, telemetry, metering and bidding.²³ The Commission directed the ISOs and RTOs to allow demand response to bid directly into the RTO or ISO markets in accordance with a series of requirements which, among other things require data which is as "verifiable," "transparent," "able to be documented," and "ensure compliance."²⁴ Embedded in

²³ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 49.

²⁴ *Id.* P 158.

NYISO's proposed use of the demand resources' actual load immediately prior to the real-time ancillary services schedule to create demand response baselines, is a requirement that demand response resources use the same telemetry and communications equipment used by generators. As the commenters point out, there may be alternative ways for a demand response resource to provide the same information needed by NYISO to ensure technical requirements are met; NYISO has not explained whether it considered such alternatives. Therefore, we direct NYISO to demonstrate the reasonableness of its proposed requirement for demand response resources to use the same telemetry and communications equipment as that used by generators, and to explain why other alternatives are not appropriate.

34. As we have stated previously, Order No. 719 requires comparable treatment of demand response resources and generators with respect to the provision of ancillary services, including energy imbalance service, provided that the resources are technically capable. Order No. 719 states that this requirement applies to "competitively bid markets, if any, for energy imbalance, spinning reserves, supplemental reserves, reactive supply and voltage control, and regulation and frequency response as defined in the pro forma OATT, or to the markets of their functional equivalents in an RTO or ISO tariff."²⁵ Although NYISO does not have a separate energy imbalance market, it provides energy imbalance services through its real-time energy market. For that reason, NYISO must allow for qualified demand response resource participation in its real-time energy market. Therefore, we direct NYISO to modify its tariff to allow technically capable demand response resources to participate in the real-time energy market to provide energy imbalance service. We recognize that the technical issues involved in allowing demand response participation in the real-time energy market may take longer than 90 days to implement, however we direct NYISO to provide a plan of action identifying the necessary changes and anticipated completion dates with the compliance report ordered below.

b. Eliminating Deviation Charges During System Emergencies

35. In Order No. 719, the Commission required RTOs and ISOs to modify their tariffs to eliminate a deviation charge to a buyer in the energy market for taking less electric energy in the real-time market than was scheduled in the day-ahead market. This charge would be eliminated only during a real-time market period for which the RTO or ISO declares an operating reserve shortage or makes a generic request to reduce load in order to avoid an operating reserve shortage.²⁶ Order No. 719 also directed RTOs and ISOs to

²⁵ *Id.* P 49.

²⁶ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 111.

modify their tariffs to eliminate deviation charges for virtual purchasers, during the same period as they are eliminated for physical purchasers, unless the RTO or ISO makes a showing upon compliance that it would be appropriate to assess such deviation charges for virtual purchasers during this period.²⁷

i. NYISO Filing

36. NYISO states that it does not assess a deviation charge on either physical or virtual purchasers in its day-ahead market that purchase less power in the real time market during a real time operating reserve shortage or load reduction. Thus, it states, no revision is necessary.

ii. Commission Determination

37. We find that NYISO is in compliance with the requirement to eliminate deviation charges during system emergencies.

c. Aggregation of Retail Customers

38. Order No. 719 required RTOs and ISOs to amend their market rules as necessary to permit an ARC to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized markets, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. The Commission determined that allowing an ARC to act as an intermediary for many small retail loads that cannot individually participate in the organized market would reduce a barrier to demand response participation.²⁸

39. The Commission directed RTOs and ISOs to submit compliance filings to propose amendments to their tariffs or otherwise demonstrate how their existing tariffs and market rules comply with the Final Rule.²⁹ The Commission indicated that tariff revisions are to be made in accordance with certain specified criteria and flexibilities:

²⁷ *Id.* P 127.

²⁸ *Id.* P 154. The requirement to accept bids from ARCs was modified in Order No. 719-A. FERC Stats. & Regs. ¶ 31,292 at P 51, 59. As noted earlier, the Commission will address compliance with Order No. 719-A once the filings required by that order are filed. *Supra*, n.12.

²⁹ Order No. 719 at P 163.

(1) The ARC's demand response bid must meet the same requirements as a demand response bid from any other entity, such as a load-serving entity. For example:

- Its aggregate demand response must be as verifiable as that of an eligible load-serving entity or large industrial customer's demand response that is bid directly into the market;
- The requirements for measurement and verification of aggregated demand response should be comparable to the requirements for other providers of demand response resources, regarding such matters as transparency, ability to be documented, and ensuring compliance;
- Demand response bids from an ARC must not be treated differently than the demand response bids of a load-serving entity or large industrial customer.

(2) The bidder has only an opportunity to bid demand response in the organized market; it does not have a guarantee that its bid will be selected.

(3) The term "relevant electric retail regulatory authority" means the entity that establishes the retail electric prices and any retail competition policies for customers, such as the city council for a municipal utility, the governing board of a cooperative utility, or the state public utility commission.

(4) An ARC can bid demand response either on behalf of only one retail customer or multiple retail customers.

(5) Except for circumstances where the laws and regulations of the relevant retail regulatory authority do not permit a retail customer to participate, there is no prohibition on who may be an ARC.

(6) An individual customer may serve as an ARC on behalf of itself and others.

(7) The RTO or ISO may specify certain requirements, such as registration with the RTO or ISO, creditworthiness requirements, and certification that participation is not precluded by the relevant electric retail regulatory authority.

(8) The RTO or ISO may require the ARC to be an RTO or ISO member if its membership is a requirement for other bidders.

(9) Single aggregated bids consisting of individual demand response from a single area, reasonably defined, may be required by RTOs and ISOs.

(10) An RTO or ISO may place appropriate restrictions on any customer's participation in an ARC-aggregated demand response bid to avoid counting the same demand response resource more than once.

(11) The market rules shall allow bids from an ARC unless this is not permitted under the laws or regulations of relevant electric retail regulatory authority.

i. NYISO Filing

40. NYISO states that it currently allows demand response aggregators to bid on behalf of small resources in its day-ahead energy market and those aggregators also actively participate in the ICAP and EDRP market. NYISO states that it is working with its stakeholders to define the technical requirements that will govern aggregators of small demand response resources bidding directly into its ancillary services market.³⁰ NYISO states that unlike its ICAP and EDRP programs, which only require after-the-fact validation of aggregator performance, ancillary services markets require real-time communications and telemetry equipment. In addition, NYISO states that it is currently putting emphasis on ISO/RTO Council efforts to develop rules for plug-in hybrid electric vehicles to participate in the ancillary services markets. NYISO views the communication and control issues for plug-in hybrid electric vehicle aggregation efforts and aggregating other small demand response resources as being similar, but sees technical differences between the two, and therefore, NYISO anticipates developing rules for plug-ins and non-plug-ins on parallel tracks. NYISO acknowledges that it still has to improve its ARC rules so that retail customers are able to bid into its markets. NYISO states that it could not complete its stakeholder process in time for this filing and requests that the Commission allow it to address the technical issues before it directs tariff changes.³¹ NYISO also states that it does not have any current plan to change its minimum size requirement of 1 MW for demand resource participation because it is a basic component of its market software and is the same requirement applied to generators.

ii. Comments

41. Wal-Mart notes that one barrier to participating in the SCR ICAP Market and other demand response programs is that demand-side resources must offer 1 MW of load reduction, which makes participation by smaller, non-centralized demand-side resources

³⁰ NYISO Filing at 9.

³¹ *Id.* 10. NYISO made its progress report on October 28, 2009.

prohibitive.³² CPower also notes that stakeholders have inquired with NYISO about reducing the 1 MW aggregation threshold. Similarly, EnerNOC explains that the DSASP program is limited to individual, very large customers (e.g. those with at least 1 MW of sheddable load).³³ EnerNOC states the customers best suited to performing in the ancillary service markets are small, distributed resources that are aggregated for control and metering purposes. EnerNOC provides the example of an entire chain of 200 grocery stores, each able to provide only 75 kW of demand reduction, but able to do so nearly instantaneously by remote control from a central location. EnerNOC explains that this 15 MW of demand response might be more responsive than a similarly sized quick-start turbine, but it would be prohibited from participating because of the 1 MW threshold.

iii. Commission Determination

42. The Commission commends NYISO on its efforts to date to incorporate aggregated demand resources into its energy, ICAP and emergency demand response markets. However, Order No. 719 also requires ISO/RTOs to amend their market rules as necessary to permit technically qualified aggregators to bid directly into ISO/RTO organized markets including NYISO's ancillary services markets, unless not permitted by the laws or regulations of the retail regulatory authority.³⁴ We recognize that NYISO has yet to develop market rules to allow aggregators to provide ancillary services, including baseline calculations, metering requirements, and settlement rules. Because NYISO is actively engaged in developing market rule changes that will allow aggregators to participate in its ancillary markets, we will not, at this time, direct market rule changes. However, we will direct NYISO to file its market rules governing aggregators bidding directly into the ancillary services market at the conclusion of its stakeholder process currently connected to the "Price Responsive Load Working Group."³⁵

³² *Id.*

³³ EnerNOC Comments at 8.

³⁴ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 154; *order on reh'g*, Order 719-A, 74 FR 37776 (July 29, 2009), FERC Stats & Regs. ¶ 31,292 at P 54 (2009).

³⁵ NYISO Filing at 10; *see also* NYISO's October 28, 2009 report in Docket No. RM07-19-001 at 6. ("The NYISO proposes to provide FERC with semi-annual updates regarding its market rules development for aggregations of small demand resources providing ancillary services as part of the semi-annual demand response compliance filings submitted in January and June of each year, beginning with the January 2010 filing.").

43. We will not require NYISO to reduce its 1 MW minimum threshold for demand response because Order No. 719 did not require a minimum threshold. We note that NYISO states that the 1MW threshold is a basic component of its market software and that it anticipates that its ongoing efforts to accommodate demand response aggregators will resolve this concern.³⁶

d. Market Rules Governing Price Formation During Periods of Operating Reserve Shortage

44. In Order No. 719, the Commission established reforms to remove barriers to demand response by requiring RTOs and ISOs to reform their market rules in such a way that prices during operating reserve shortages more accurately reflect the value of energy during such shortages. Order No. 719 required each RTO or ISO to reform or demonstrate the adequacy of its existing market rules to ensure that the market price for energy reflects the value of energy during an operating reserve shortage.³⁷ As such, it stated that each RTO or ISO may propose in its compliance filing one of four suggested approaches to pricing reform during an operating reserve shortage, or develop its own alternative approach to achieve the same objectives.³⁸ Each RTO or ISO must address how its selected method of shortage pricing interacts with its existing market design.³⁹

45. Order No. 719 also required each RTO or ISO to provide adequate factual support for its compliance filing. To that end, the Commission outlined six criteria it will consider in reviewing whether the factual record compiled by the RTO or ISO meets the

³⁶ NYISO Filing at 15.

³⁷ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 194.

³⁸ The four approaches are: (1) RTOs and ISOs would increase the energy supply and demand bid caps above the current levels only during an emergency; (2) RTOs and ISOs would increase bid caps above the current level during an emergency only for demand bids while keeping generation bid caps in place; (3) RTOs and ISOs would establish a demand curve for operating reserves, which has the effect of raising prices in a previously agreed-upon way as operating reserves grow short; and (4) RTOs and ISOs would set the market-clearing price during an emergency for all supply and demand response resources dispatched equal to the payment made to participants in an emergency demand response program. *Id.* P 208.

³⁹ *Id.* P 204.

requirements of the rule.⁴⁰ The Commission allowed an RTO or ISO to phase in any new pricing rules over a few years, provided that this period is not protracted.⁴¹ The phase-in period must be justified as part of the RTO's or ISO's overall proposal to change its pricing rules.

i. NYISO Filing

46. NYISO states that its existing shortage pricing regimes satisfies Order No. 719. NYISO states that it was the first ISO/RTO to use ancillary services demand curves to incorporate scarcity pricing provisions. In 2005, NYISO implemented demand curves for operating reserves and regulation service and has used them to establish real-time energy clearing prices during operating reserve shortages. According to NYISO, the demand curves allow market-clearing prices to rise in response to shortage conditions and their performance is reviewed annually by the Independent Market Advisor through the State of the Market Report.⁴² NYISO states that its ancillary services demand curves were established through the stakeholder process and have a proven record of allowing market-clearing prices to rise in response to scarcity during shortage conditions, while also preserving reliability and preventing market power abuses. Accordingly, NYISO proposes no changes to this section.

ii. Comments

47. Potomac Economics outlines the four approaches to maintain operating reserves described in Order No. 719, but states that the third approach, establishing demand curves, as used by NYISO, is its preferred approach. Potomac Economics states the third approach has the effect of raising prices in a previously agreed-upon way as operating

⁴⁰ The six criteria of any shortage pricing mechanism are that it: (1) improve reliability by reducing demand and increasing supply during periods of operating reserve shortages; (2) make it more worthwhile for customers to invest in demand response technologies; (3) encourage existing generation and demand resources to continue to be relied upon during an operating reserve shortage; (4) encourage entry of new generation and demand resources; (5) ensure that the principle of comparability in treatment of and compensation to all resources is not discarded during periods of operating reserve shortage; and (6) ensure market power is mitigated and gaming behavior is deterred during periods of operating reserve shortages including, but not limited to, showing how demand resources discipline bidding behavior to competitive levels. *Id.* P 246-47.

⁴¹ *Id.* P 258.

⁴² NYISO Filing at 12.

reserves grow short and that efficient shortage pricing requires the use of this approach. Potomac Economics explains that demand curves establish economic values for reserves that are reflected in energy prices. Values are reflected in energy prices, according to Potomac Economics, because there is an explicit value attached to the reserves and that if purchased optimally, reserves should only be purchased until the cost of procuring additional reserves equals the incremental reduction in the expected cost of losing load.⁴³ Potomac Economics also points out that demand curves do not require generators to alter their offers or withhold supply to get efficient price signals. Potomac Economics states operating reserve demand curves are most effectively used in the context of jointly-optimized energy and ancillary services markets, which NYISO has. Potomac Economics adds operating reserve demand curves should be set at levels that reflect the value of the reliability they provide to consumers, according to Potomac Economics.

48. Potomac Economics also notes setting the market-clearing price during an emergency for all supply and demand response resources dispatched equal to the payment made to participants in an emergency demand response program is a valuable complement to operating reserve demand curves because reserve curves alone do not ensure that prices are set efficiently when the ISO or RTO must take other emergency actions for reliability purposes. Effective shortage pricing, according to Potomac Economics, requires an RTO to employ a combination of approaches to ensure prices are set efficiently under all shortage conditions. Potomac Economics notes that NYISO allows emergency demand response to set energy prices and has some of the longest standing and most effective emergency demand response programs.

49. EPSA commends NYISO for its leadership as the first RTO to develop and implement operating reserve demand curves. EPSA cites Potomac Economics' statement that NYISO has the "most complete set of market rules governing shortage pricing."⁴⁴

iii. Commission Determination

50. We find that NYISO complies with the requirements of Order 719 with respect to operating reserve shortage pricing. NYISO's approach to ensuring that the market price for energy reflects the value of energy during an operating reserve shortage through the use of operating reserve demand curves is reasonable and NYISO's experience with the use of operating reserve demand curves during shortage conditions has adequately

⁴³ Potomac Economics' Report on Shortage Pricing at 7.

⁴⁴ *Report on Demand Response of Potomac Economics Economics, Ltd.* Independent Market Advisor for the New York ISO, Docket No. ER09-1142 (May 15, 2009) at 16.

demonstrated the reasonableness of its shortage pricing mechanisms.⁴⁵ Further, as Potomac Economics notes, NYISO allows emergency demand response to set energy prices which provides a valuable complement to operating reserve demand curves to ensure that prices are set efficiently when the ISO or RTO must take other emergency actions for reliability purposes. NYISO's shortage pricing mechanism goes a long way toward meeting Order No. 719's objective that RTO/ISO's have a scarcity pricing mechanism that provides for improved reliability and efficient pricing signals that encourage investment in both generation and demand resources, as well as the comparability in the treatment of and compensation to all resources. Therefore, we will not require NYISO to phase-in additional shortage pricing mechanisms at this time.⁴⁶

51. We clarify that we expect NYISO to continue to work with its stakeholders to improve scarcity pricing rules where possible. For example, NYISO has stated that it is currently discussing measures that would allow for transactions to be scheduled more frequently at NYISO's interfaces with its neighbors, which NYISO believes will result in clearing prices that more accurately reflect changing system conditions.⁴⁷ We clarify that by accepting NYISO's compliance filing to address operating reserve shortages, we do not want to foreclose on any fruitful stakeholder discussions underway currently or future discussions that may revise and improve scarcity pricing.

e. **Reporting on Remaining Barriers to Comparable Treatment of Demand Response Resources**

52. Order No. 719 required each RTO and ISO to assess and report on any remaining barriers to comparable treatment of demand response resources that are within the Commission's jurisdiction, and to submit its findings and any proposed solutions to the Commission, along with a timeline for implementation.⁴⁸ The Commission required RTOs and ISOs to identify all known barriers, to provide an in-depth analysis of those that are practical to analyze in the compliance time frame given, and to supply a time frame for analyzing the remainder, including, but not limited to, technical requirements

⁴⁵ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 234.

⁴⁶ *Id.* P 254.

⁴⁷ NYISO Filing at 13.

⁴⁸ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 274.

and performance verification limitations.⁴⁹ Finally, Order No. 719 required RTOs and ISOs to identify any significant minority views in its report.

i. NYISO Filing

53. NYISO states that after discussions with stakeholders it believes that there are no longer any significant barriers to the comparable treatment of jurisdictional demand response resources in New York. NYISO states that it is working on improvements, such as the development of an automated demand response information system and the development of a Smart Grid. NYISO requests that action be deferred until more is known about the technological changes necessary in connection with Smart Grid and RT Dynamic pricing. NYISO states that a minority of stakeholders support tariff changes that would allow demand-side resources to be compensated for participating directly in the real-time energy market, as is the case with the day-ahead energy market. NYISO states it is considering these suggestions, but states that it is outside the scope of Order No. 719 compliance because Order No. 719 only imposes requirements related to demand response participation in bid-based ancillary services markets.

ii. Protest and Comments

54. Potomac Economics notes that NYISO has the highest level of demand response participation and is well-ahead of most other RTOs, particularly in its development of emergency demand response capability. Potomac Economics also notes NYISO is the only RTO it is aware of that allows emergency demand response to set energy prices and has some of the longest standing and most effective emergency demand response programs.

55. However, Potomac Economics sees some barriers to further integration of demand response resources into NYISO. First, Potomac Economics notes NYISO could consider alternative approaches to foster real-time economic demand response. But, Potomac Economics acknowledges that until retail regulatory reform in New York State is enacted, little can be done to provide incentives to retail load from the wholesale market.

56. A second area identified by Potomac Economics for possible reform is in the accommodation of the inflexibility of demand response resources. Potomac Economics explains that rules and processes should be developed to include specialized settlement provisions because most resources in the real-time market are dispatched on a 5 to 15 minute basis and settle on the real-time price. Potomac Economics believes that controllable load or 'behind the meter generators' are the easiest resources to integrate

⁴⁹ *Id.* P 275.

into wholesale energy markets because they can be dispatched on a five to fifteen minute basis comparable to generation.

57. Potomac Economics also states the lack of existing metering, communication and control device infrastructure serves as a barrier. Although, Potomac Economics notes that NYISO is supportive of Smart Grid upgrades to address this concern.

58. Potomac Economics further notes NYISO is working to reduce some barriers to demand response integration and is currently engaged in vendor selection to develop a Demand Response Information System (DRIS), which will automate much of what is currently done manually through spreadsheets.

59. EnerNOC, ECS and CPower and Wal-Mart assert that cost is a barrier for demand-side ancillary services market participants. ECS and CPower state that some companies have been quoted costs over \$100,000 for installing metering and communications devices. ECS and CPower contend that the requirement to post collateral as a condition of participating as a direct customer of NYISO is a barrier. ECS and CPower state that while DSASP resources are granted comparable treatment in NYISO's market, when compared to generators, the costs associated with participation are unreasonable for demand response participants. According to ECS and CPower, cost of metering, communications and long lead times for installation of metering and communication equipment can produce delays in DSASP enrollment.

60. EnerNOC states NYISO's DSASP rules allowing participation of demand response in ancillary service markets are insufficient to comply with Order 719 because demand response resources are not being treated in a comparable manner that eases barriers to entry. EnerNOC also cites the requirement that real-time information flow continuously from each individual customer directly to NYISO's computers as a barrier to demand response programs.

61. Wal-Mart cites a lack of uniformity in interconnection agreements and technical requirements for meter or Remote Terminal⁵⁰ facilities by transmission owners as a barrier for demand response participants. Wal-Mart sees compensation of demand response resources for participation in real-time energy markets as a good idea but, defers judgment to the Commission as to whether it is prudent. Wal-Mart supports creating a broad menu of opportunities for demand response participation in New York for businesses to meet their needs.

⁵⁰ A Remote Terminal Unit transmits telemetry data to the control system and/or receives data from the control system.

62. In comments addressing all of the RTO/ISO compliance filings, ELCON argues that the compliance filings fail to implement Order No. 719's directives on comparability, incorrectly equating "comparable treatment" with "identical treatment." It contends that the ISOs have proposed to place conditions on demand response providers identical to those for generators based on systems that were originally established to meet the needs of generators. ELCON argues that demand response providers should not be penalized because the control systems were originally designed to operate generation resources, as this will inhibit demand response.

63. Industrial Consumers argues that none of the RTO demand response programs offers a level playing field for the participation of demand response products in organized markets. They argue that the barriers to entry in all of these markets need to be removed.

64. New York Transmission Owners commit to continue working to achieve increased participation of demand response. They note that there are technical issues and incremental costs at the local distribution level in order to reliably integrate such programs into the NYISO market. They also note that there must be accurate measurement and verification for demand response resources and, at a minimum the local utility should have access to that data. New York Transmission Owners indicate they are prepared to work with affected parties to include appropriate measurement and verification mechanisms.⁵¹

iii. Commission Determination

65. Commentors have identified several additional barriers to demand response. NYISO states that it is working with stakeholders to address many of the issues.⁵² As NYISO is already making progress on these issues we will not establish a separate deadline for NYISO to report on steps that will be taken to remove barriers to comparable treatment of demand response resources in NYISO.⁵³

⁵¹ New York Transmission Owners at 3 – 4.

⁵² See NYISO's October 28, 2009 report in Docket No. RM07-19-001 at 6 ("[t]he NYISO proposes to provide FERC with semi-annual updates regarding its market rules development for aggregations of small demand resources providing ancillary services as part of the semi-annual demand response compliance filings submitted in January and June of each year, beginning with the January 2010 filing.").

⁵³ NYISO's report and the comments and answers filed in this proceeding will provide information that will be considered by the Commission staff in its evaluation of remaining barriers to demand response participating in NYISO's wholesale markets.

66. Regarding ELCON's request that the Commission conduct thorough, independent analyses of all Order No. 719 compliance filings, we note that the Commission is required under section 205 of the FPA, to ensure that rates are just and reasonable and not unduly discriminatory or preferential, and the instant filing in this proceeding is no exception.

67. We agree with ELCON that "comparability" is not achieved by setting conditions for demand response resources the same as those set for generating resources. We address a few specific issues in this order and require NYISO to adequately address "comparability" in a way which enables demand response resources to participate on terms that both address the characteristics of demand response resources and to ensure reliable operations.

68. ELCON also requests that the Commission pursue uniform demand response standards. In Order No. 719, the Commission specifically chose not to develop "a standardized set of minimum requirements for minimum size bids, measurement, telemetry and other factors, and instead allowed RTOs and ISOs to develop their own minimum requirements, including bidding parameters."⁵⁴ It would be inappropriate to use the compliance filing process as a forum to reconsider that determination in the Final Rule. However, we note that the North American Energy Standards Board (NAESB) has adopted Phase I business practice standards for the measurement and verification of demand response, a first step in a process that may lead to greater standardization through the NAESB consensus process.⁵⁵ The Commission will continue to examine the need for further generic policy reforms to identify and eliminate barriers of comparable treatment to demand response, and ELCON's concerns with standardization can be addressed in relevant future Commission proceedings.

2. Long Term Power Contracting In Organized Markets

69. In Order No. 719, the Commission required each RTO and ISO to dedicate a portion of its website for market participants to post offers to buy and sell electric energy on a long-term basis.⁵⁶ The Commission did not mandate any specific form for the

⁵⁴ *Id.* P 87.

⁵⁵ Standards for Business Practices and Communication Protocols for Public Utilities, Notice of Proposed Rule, Docket No. RM05-5-017, 128 FERC ¶ 61,263 (Sep. 17, 2009).

⁵⁶ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 277. The Commission defined "long-term" as one year or more, but stated that RTOs and ISOs may include offers for contracts of less than a year on their websites as well. *Id.*

website, but instead allowed each RTO or ISO to work with its stakeholders to implement the website. This discretion includes decisions over the type and amount of data to be posted by participants, whether participants must include a proposed price in their posting, and password and security requirements.⁵⁷ Order No. 719 directed each RTO or ISO to explain in its compliance filing the actions it has taken to comply with these requirements and to provide information on the bulletin board that it has chosen to implement.⁵⁸

a. NYISO Filing

70. NYISO proposes to provide a link on its website to a multi-ISO/RTO bulletin board page that will be hosted by PJM. NYISO explains that its stakeholders were supportive of this proposal, favoring the broader scope and greater efficiency that a multi-ISO/RTO bulletin board would bring. NYISO believes the multi-ISO/RTO bulletin board will allow sellers and buyers to voluntarily post and read offers for long-term power.

b. Comments

71. CPower and ECS are supportive of NYISO's effort to date in establishing a critical tool that will seek to foster greater trading ability for demand response aggregators, and the market as a whole.

c. Commission Determination

72. We find that NYISO has complied with the requirements of Order No. 719 regarding long-term power contracting by providing a link on its website to the multi-ISO/RTO bulletin board. We note that PJM's Order No. 719 compliance filing is pending in Docket No. ER09-1063-000.

3. Market Monitoring Policies

a. Structure and Tools

73. In Order No. 719, the Commission required each RTO or ISO, through its stakeholder process, to decide on an MMU structure – external, internal, or hybrid.⁵⁹ The

⁵⁷ *Id.* P 303.

⁵⁸ *Id.* P 309.

⁵⁹ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 326.

Commission declined to mandate a specific structure for all MMUs. Additionally, Order No. 719 required each RTO and ISO to include provisions in their tariffs: (1) obliging themselves to provide their MMUs with access to market data, resources, and personnel sufficient to enable them to carry out their duties; (2) granting MMUs full access to the RTO or ISO database; and (3) granting MMUs exclusive control over any MMU-created data.⁶⁰

i. NYISO Filing

74. NYISO will adopt an external MMU structure, and Potomac Economics will serve as NYISO's MMU. NYISO's current internal Market Monitoring and Performance Department will be renamed as the Market Mitigation and Analysis Department (MMA), and will not be responsible for performing the Core Market Monitoring Functions.

75. NYISO also addresses the following required provisions:

- (1) NYISO expects to complete a feasibility assessment and develop a plan for inclusion in NYISO's 2010 budgeting process to streamline and enhance the MMU's access to necessary market data.⁶¹ NYISO's tariff states that the MMU will be given sufficient access to NYISO resources, personnel, and market data to carry out its functions.⁶²
- (2) NYISO states that Potomac Economics, as NYISO's Independent Market Advisor, currently has direct, unfettered access to a broad range of NYISO's market data via its access to NYISO intranet.⁶³ NYISO's tariff states that the MMU will have complete access to NYISO's databases of market information.⁶⁴
- (3) NYISO's tariff grants exclusive control of data that the MMU creates to the MMU.⁶⁵

⁶⁰ *Id.* P 328.

⁶¹ NYISO Filing at 19.

⁶² Proposed NYISO Market Monitoring Plan, Attachment O, § 4.7.1.

⁶³ NYISO Filing at 18.

⁶⁴ Proposed NYISO Market Monitoring Plan, Attachment O, § 4.7.1.

⁶⁵ *Id.* § 4.7.2.

ii. Comments

76. No comments or protests were filed on this issue.

iii. Commission Determination

77. NYISO's proposal concerning structure and tools is compliant with Order No. 719.

b. Oversight

78. Order No. 719 required that an MMU report to its RTO's or ISO's board of directors concerning oversight and supervision of their market monitoring functions, rather than management, with management representatives on the board excluded from this function.⁶⁶ This is the case for external MMUs, such as NYISO's MMU, or internal MMUs. For hybrid MMUs (i.e., MMUs with both an external and internal market monitor), the Commission stated that an internal market monitor may report to management, provided that, if the internal MMU is responsible for carrying out any Core Functions,⁶⁷ both it and the external market monitor must report to the board.⁶⁸

i. NYISO Filing

79. NYISO's tariff states that the MMU will be accountable to the non-management members of the Board and shall serve at the pleasure of the non-management members of the Board.⁶⁹ The MMU will perform the Core Functions defined in Order No. 719.⁷⁰ NYISO is reassigning certain duties to ensure that the MMU will be solely responsible for performing all of the Core Functions.⁷¹

⁶⁶ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 333.

⁶⁷ Core Functions include identifying ineffective market rules, reviewing the performance of the markets, and making referrals to the Commission. These are discussed more fully below.

⁶⁸ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 341.

⁶⁹ NYISO Market Monitoring Plan, Attachment O, § 4.2.

⁷⁰ *Id.* § 4.5.

⁷¹ NYISO Filing at 18.

80. The MMA will report to NYISO management.⁷² The MMA will not be responsible for performing any of the Core Functions, and, thus, will not be the MMU.⁷³ The MMA will act at the discretion of NYISO Chief Executive Officer (CEO), and the CEO will ensure that the MMA has adequate employees, funding, and resources to carry out NYISO's Market Power Mitigation Measures.⁷⁴ The MMA will provide support to NYISO's MMU and will work with the MMU to assist NYISO's efforts to carry out its tariff responsibilities, including the obligation to provide data and support for the MMU.⁷⁵

ii. Comments

81. No comments or protests on this issue were filed.

iii. Commission Determination

82. NYISO's proposal concerning oversight of the MMU and MMA is compliant with Order No. 719.

c. Core Functions and Formal Referrals

83. Order No. 719 required each RTO and ISO to assign the following Core Functions to its MMU in its tariff:

- (1) evaluate existing and proposed market rules, tariff provisions, and market design elements, and recommend proposed rule and tariff changes to the RTO or ISO, and also to the Commission's Office of Energy Market Regulation and to other interested entities (i.e., state commissions and market participants);

⁷² NYISO Market Monitoring Plan, Attachment O, § 3.4. The Market Power Mitigation Measures are intended to provide the means for NYISO to mitigate the market effects of any conduct that would substantially distort competitive outcomes in their markets. The Market Power Measures may be found in the NYISO Market Services Tariff, Attachment H.

⁷³ *Id.* § 3.3.

⁷⁴ *Id.* §3.4.

⁷⁵ *Id.* §3.3.

(2) review and report on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities (i.e., state commission and market participants);⁷⁶ and

(3) identify and notify the Commission's Office of Enforcement of instances in which a market participant's behavior, or that of the RTO or ISO, may require investigation, including suspected tariff violations, suspected violations of Commission-approved rules and regulations, suspected market manipulation, and inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.⁷⁷

84. In Order No. 719, the Commission also adopted protocols for referrals by MMUs to the Commission of suspected market violations and perceived market design flaws to be included in RTO and ISO tariffs.⁷⁸ The Commission stated that, pursuant to Commission rule, all information and documents obtained during the course of a Commission investigation are non-public, and may not be released except to the extent the Commission directs or authorizes such a release in a given instance, unless the material is already made public during an adjudicatory proceeding or disclosure is required by the Freedom of Information Act.⁷⁹

i. NYISO Filing

85. NYISO's tariff incorporates the MMU functions cited in Order No. 719 in the tariff section titled, "Core Market Monitoring Functions," and are as follows:

(1) The MMU shall evaluate existing and proposed market rules, tariff provisions and market design elements, and recommend proposed rules and tariff changes to the ISO, to the Commission's Office of Energy Market Regulation Staff, and to other interested entities, including the New York Public Service Commission (NYPSC), and participants in the ISO's stakeholder governance

⁷⁶ Order No. 719 provided that an RTO or ISO may require its MMU to submit its reports in draft form to the RTO or ISO for review, but the RTO or ISO may not alter the reports generated by the MMU or dictate its conclusions. Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 360.

⁷⁷ *Id.* P 354.

⁷⁸ *See* 18 C.F.R. § 35.28(g)(iv) and (v).

⁷⁹ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 465 (*citing* 18 C.F.R. § 1b.9).

process.⁸⁰ The MMU will not be responsible for systematic review, will not effectuate its proposed market design, and will make recommendations that are solely advisory in nature.⁸¹ Also, the MMU will limit distribution of issues or concerns it identifies and its recommendations to the ISO and to Commission staff in the event it believes broader dissemination could lead to exploitation.⁸²

(2) The MMU shall review and report on the performance of the wholesale markets to the ISO, Commission, and other interested stakeholders such as the NYPSC and participants in its stakeholder governance process.⁸³ Reports will be made on at least a quarterly basis, there will be a more comprehensive annual state of the market report, and the MMU may issue additional reports as necessary.⁸⁴ The MMU shall submit drafts of each of its reports to the ISO for review and comment sufficiently in advance of the report's issuance to provide an effective opportunity for review and comment by the ISO. The MMU may disregard any suggestion with which it disagrees.⁸⁵ The ISO may not alter the MMU reports nor dictate the MMU's conclusions.⁸⁶

(3) The MMU will identify and notify the Commission staff of instances in which a Market Party's or the ISO's behavior may require investigation, including, but not limited to, suspected Market Violations.⁸⁷

86. NYISO's Market Monitoring Plan defines "Market Violation" as

(i) a tariff violation, (ii) violation of a Commission-accepted or approved order, rule or regulation including, but not limited to, violations of FERC's Market Behavior Rules,

⁸⁰ NYISO Market Monitoring Plan, Attachment O, § 4.5.1.

⁸¹ *Id.* §§ 4.5.1.1, 4.5.1.2, 4.5.1.3.

⁸² *Id.* § 4.5.1.4.

⁸³ *Id.* § 4.5.2.

⁸⁴ *Id.*

⁸⁵ *Id.* § 4.5.2.1.

⁸⁶ *Id.*

⁸⁷ *Id.* § 4.5.3.

18 C.F.R. Section 35.41, or any successor provisions thereto, (iii) market manipulation (see 18 C.F.R. Section 1c.2, or any successor provision thereto), or (iv) inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.⁸⁸

87. The tariff states that the MMU will identify and notify the Commission staff of instances in which a Market Party's or the ISO's behavior may require investigation, including, but not limited to, suspected Market Violations.⁸⁹ The tariff further states that the MMU will submit a non-public referral to the Commission in all instances where it has obtained sufficient credible information to believe a Market Violation has occurred. Once the MMU has obtained sufficient credible information to warrant referral to the Commission, the MMU will immediately refer the matter to the Commission and desist from further investigation or independent action related to the alleged Market Violation, except at the express direction of the Commission or Commission staff. The MMU may continue to monitor for repeated instances of the reported activity by the same or other entities and will respond to requests from the Commission for additional information in connection with the alleged Market Violation it has referred.⁹⁰

88. NYISO proposes modification of the Commission's Core Function regarding referrals to the Commission of suspected Market Violations such that the MMU would not refer a matter to the Commission if violation includes a matter that: (a) is expressly set forth in the ISO's tariffs, (b) involves objectively identifiable behavior, and (c) subjects the Market Party to a sanction or other consequences that are expressly set forth in the ISO's tariffs.⁹¹

89. NYISO states that it added this clarification because NYISO believes this addition is practical, since the definition of Market Violations includes routine tariff violations. NYISO does not believe that the Commission wants the MMU to report on routine violations.⁹² Further, NYISO states that this clarification is consistent with the reporting requirements set forth in the Commission's May 27, 2005, *Policy Statement on Market*

⁸⁸ *Id.* § 2.9.

⁸⁹ *Id.* § 4.5.3.

⁹⁰ *Id.* §4.5.3.1.

⁹¹ *Id.*

⁹² NYISO Filing at 23.

Monitoring Units in Regional Transmission Organizations and Independent System Operators,⁹³ and the Commission's November 17, 2003, *Order Amending Market-Based Rate Tariffs and Authorizations*.⁹⁴

90. Regarding market design flaws, the tariff states that the MMU will identify and notify the Commission staff of perceived market design flaws that could be effectively remedied by rule or tariff changes.⁹⁵ Further, the MMU will submit a referral to the Commission when the MMU has reason to believe that a market design flaw exists that the MMU believes could effectively be remedied by rule or tariff changes.⁹⁶ The tariff states that if the MMU believes broader dissemination of the possible market design flaw, and its related recommendation, could lead to exploitation, the MMU will limit distribution of its referral to NYISO and to the Commission, and that the referral will explain why further dissemination should be avoided.⁹⁷ Following referral of a possible market design flaw, the tariff states that the MMU will continue to provide to the Commission additional information regarding the perceived market design flaw, its effects on the market, any additional or modified observations concerning the MMU's proposed market rule or tariff change, any recommendations made by the MMU to the ISO, its stakeholders, market participants, or state public service commissions regarding the perceived market design flaw, and any actions taken by NYISO regarding the perceived market design flaw.⁹⁸

91. NYISO has added a provision to its virtual bidding mitigation measures that states that "[t]o implement the mitigation measures set forth in this [section], the ISO shall monitor and assess the impact of Virtual Bidding on the ISO Administered Markets."

ii. Comments

92. New York Transmission Owners and Independent Power Producers raise issues concerning whether the MMU should be allowed to participate in NYISO's stakeholder process.

⁹³ 111 FERC ¶ 61,267, Appendix A at p. i.

⁹⁴ 105 FERC ¶ 61,218 at P 182.

⁹⁵ Proposed NYISO Market Monitoring Plan, Attachment O, § 4.5.4.

⁹⁶ *Id.* § 4.5.4.1.

⁹⁷ *Id.* § 4.5.4.1.1.

⁹⁸ *Id.* § 4.5.4.1.2.

93. The New York Transmission Owners request that the Commission direct NYISO to clarify that the MMU will not be involved in NYISO stakeholder processes with respect to the development of specific market rules and tariff language.⁹⁹ New York Transmission Owners argue that, while one of the responsibilities of the MMU is to recommend improvements to NYISO's market rules, the implementation of a market improvement often is subject to alternative approaches favored by different sectors within NYISO's governance process.¹⁰⁰ New York Transmission Owners state that it is for the stakeholders to resolve any issues and to develop appropriate adjustments and compromises.¹⁰¹ New York Transmission Owners state that the MMU should not be acting in the role of either a consultant to NYISO staff or a supervisor of NYISO staff within NYISO stakeholder process, as alternate approaches to market issues are being considered.¹⁰² New York Transmission Owners are also concerned that the MMU could take sides with respect to competing positions within the stakeholder process.¹⁰³ New York Transmission Owners argue that such involvement by the MMU risks interfering with NYISO's governance process, and will diminish the MMU's status among stakeholders as a disinterested evaluator of NYISO's markets.¹⁰⁴

94. Independent Power Producers filed an answer in which they argue that the MMU should participate in NYISO's stakeholder process.¹⁰⁵ Independent Power Producers argue that, since the MMU is responsible for evaluating rules and tariff changes and to make recommendations concerning those rules and tariff changes to, among others, market participants, it does not make sense to preclude the MMU from the stakeholder process.¹⁰⁶ Independent Power Producers maintain that it would only make sense for the MMU to provide these recommendations within the context of the stakeholder process.¹⁰⁷

⁹⁹ New York Transmission Owners comments at 5.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 5-6.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 7.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Further, Independent Power Producers state that the MMU's guidance is most useful during the stakeholder process when the attention of market participants and NYISO staff is focused on the proposed rule or tariff change.¹⁰⁸ Further, according to Independent Power Producers, the MMU's advice and recommendations are important because they are free from market participant bias and influence.¹⁰⁹ Lastly, Independent Power Producers argue that the New York Transmission Owners have not provided evidence that the former independent market advisor's¹¹⁰ past, or the MMU's future, involvement in the stakeholder process has harmed or will harm the MMU's status as a disinterested evaluator of NYISO's markets.¹¹¹ Therefore, Independent Power Producers contend that the Commission should reject the New York Transmission Owners' request that the Commission require NYISO to prohibit the involvement of the MMU in the stakeholder process.¹¹²

95. EPSA and Independent Power Producers make reference to discussions among market participants and NYISO prior to the filing of the instant proposal concerning the definition of Market Violation. NYISO describes these discussions as follows:

In discussions leading up to NYISO's Order No. 719 compliance filing, the New York Transmission Owners, Long Island Power Authority and New York Power Authority (collectively, the "TOs") offered a proposed modification to the definition of a "Market Violation" to NYISO that would incorporate an "act, practice or course of business by a Market Participant that (a) is intended to avoid and shift to another entity charges or costs resulting from a transaction undertaken by the Market Participant and (b) has a detrimental effect on the efficiency of one or more of NYISO's markets." The objective of the TOs in proposing this amendment is to clarify that the described conduct is a violation of NYISO's Tariffs, and to provide greater support

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ NYISO's Independent Market Advisor has been Potomac Economics Economics, who will be the new MMU.

¹¹¹ Independent Power Producers' answer at 7.

¹¹² *Id.* at 8.

for subsequent requests to the Commission for relief to Market Participants that are harmed by such conduct. NYISO has agreed to Market Participant requests to consider possible revisions to its Tariffs that would provide greater protection for Market Participants that are harmed as a result of market errors or market manipulation. NYISO intends to consider the TO's proposed definition, along with other proposals, in its stakeholder process.¹¹³

EPSA and Independent Power Producers assert that any changes to the definition of Market Violation which go beyond the definition provided in Order No. 719 must be undertaken through a rulemaking proceeding.¹¹⁴ EPSA further states that consideration of such changes is not an appropriate matter for the stakeholder process.¹¹⁵ EPSA requests that the Commission direct NYISO to refrain from consideration of proposed changes to the definition of Market Violation.¹¹⁶ DC Energy states that it supports Independent Power Producers' comments on this issue.¹¹⁷

iii. Commission Determination

96. NYISO's definition of Market Violation is consistent with Order No. 719.¹¹⁸ Regarding EPSA's and Independent Power Producers' concerns, NYISO is free to make such filings as it deems appropriate. Therefore, we will not prohibit NYISO from making future filings regarding the definition of Market Violation. Nor will we prohibit NYISO from addressing any matters relevant to its markets through its stakeholder process.

97. We agree that the MMU should be allowed to participate in NYISO stakeholder processes. Potomac Economics, as NYISO's Independent Market Advisor, has been involved in the stakeholder process as has NYISO's previous internal MMU. The Commission is unaware of any problems that have arisen out of this arrangement that would warrant prohibiting the new MMU from participating in the stakeholder process.

¹¹³ NYISO Filing at 21-22 n.58.

¹¹⁴ EPSA comments at 12; Independent Power Producers comments at 3-4.

¹¹⁵ EPSA comments at 12.

¹¹⁶ *Id.* at 12-13.

¹¹⁷ DC Energy at 4.

¹¹⁸ Order No. 719 FERC Stats. & Regs. ¶ 31,281 at P 354.

Therefore, we will reject New York Transmission Owners' request to prohibit the MMU from participating in NYISO stakeholder processes.

98. NYISO's tariff provision stating that the MMU will notify staff of suspected Market Violations is important in assuring that the Commission is aware of potential violations in a timely fashion.¹¹⁹ If the MMU does not notify the Commission of such actions by a market participant or NYISO itself, the Commission will not be able to uphold its responsibility to take appropriate enforcement action, where warranted, when such matters arise. NYISO is correct that "traffic ticket" type behaviors may be sanctioned by NYISO without such referral if they meet the following criteria:

- (i) the activity must be expressly set forth in the tariff,
- (ii) the activity must involve objectively identifiable behavior, and
- (iii) the activity does not subject the actor to sanctions or consequences other than those expressly approved by the Commission and set forth in the tariff, with the right of appeal to the Commission.¹²⁰

Examples of such activities would include late payments, failure to notify NYISO of an outage, failure to respond to an operational directive, and the like. However, it is insufficient for NYISO simply to state generally that it will not refer to the Commission matters that fall within this category, as that would leave the determination of whether a particular type of activity qualified for exclusion up to NYISO, rather than to the Commission. Therefore, we will require NYISO to remove from its tariff NYISO's proposed modification to the Core Functions in section 4.5.3.1,¹²¹ which modification would exempt certain matters from referral.

99. NYISO may add a new provision to its tariff in which it lists the specific existing provisions in its tariff that it believes meet the three requirements for exclusion from the referral requirement, and state that these activities constitute "internally sanctionable infractions," or some other such term of NYISO's choosing, and are exempted from the requirement that they be referred to the Commission. NYISO should carefully review the tariff provisions it proposes be included in this category with a view to determining whether they indeed meet the criteria set forth above for behaviors that need not be

¹¹⁹ *Id.* § 4.5.3.

¹²⁰ Market Monitoring Units in Regional Transmission Organizations and Independent System Operators, 111 FERC ¶ 61,267, at P 5 (2005).

¹²¹ Proposed NYISO Market Monitoring Plan, Attachment O, § 4.5.3.1.

referred to the Commission. If NYISO chooses to submit such a listing to the Commission, it must clearly set forth in its filing how any particular provision meets the necessary criteria. In the event NYISO chooses not to provide such a listing, NYISO must make a referral to the Commission in accordance with section 4.5.3.1 (as modified by the preceding directive) in *all* instances where the MMU has reason to believe that a market violation has occurred. Further, in the event the MMU observes activity that may be questionable, but it does not yet have sufficient grounds to make a referral, the MMU should notify Commission staff informally in order to comply with section 4.5.3 of NYISO's proposed tariff.

100. NYISO's tariff also needs clarification regarding the performance of the MMU's responsibilities under the Core Functions and with regard to the monitoring of virtual bidding. Regarding the Core Functions, NYISO's proposed tariff states:

The MMA shall not be responsible for carrying out any of the Core Functions. ... The MMA's duties shall include: (1) administering mitigation in accordance with the ISO's Tariffs, *which will include performing daily monitoring of the ISO's markets to identify potential violations of the Market Mitigation Measures*, ... [and] (5) working collaboratively with other ISO departments to *analyze market outcomes*.¹²²

It should be understood that the MMU has primary responsibility under the Core Functions for performing daily monitoring and identifying potential Market Violations. While NYISO may certainly choose to have the MMA duplicate these efforts, the primary responsibility is that of the MMU. In that regard, in Order No. 719, the Commission declined to adopt the ISO-NE's proposal for a fourth Core Function regarding daily monitoring, "as this function is included in the existing requirement to review and report on the performance of the wholesale markets."¹²³ Therefore, it is the MMU who is the responsible party for performing daily monitoring. Also, it would seem that in order to report on the performance of the wholesale markets, as required under the second Core Function, it would be necessary to analyze market outcomes. To the extent this is the case, this is the responsibility of the MMU to do so. NYISO's tariff provisions concerning the MMU's responsibilities do not reflect these responsibilities. NYISO is required to revise its tariff accordingly. NYISO must also ensure that its new structure reflects this requirement.

¹²² NYISO Market Monitoring Plan, Attachment O, § 3.3 (emphasis added).

¹²³ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 355.

101. With regard to monitoring of virtual bidding, NYISO's tariff revisions to its mitigation measures raise questions. While NYISO may be responsible for mitigation regarding virtual bidding, the MMU is responsible for the daily monitoring of virtual bidding in the first instance. However, the tariff does not state that the MMU will (or will not) monitor virtual bidding.¹²⁴ While one may assume that daily monitoring of the wholesale markets would include virtual bidding, clarification in NYISO's tariff and/or mitigation measures of this is needed. NYISO is required to provide such clarification.

d. Mitigation and Operations

102. In Order No. 719, the Commission expressed concern that the unfettered conduct of mitigation by MMUs makes them subordinate to RTOs and ISOs and raises conflict of interest concerns. However, it also acknowledged that there were a number of advantages, such as expertise and impartiality, in retaining MMU input in the mitigation process. The Commission adopted a balanced approach that allows modified participation by the MMUs in mitigation, while protecting against the conflict of interest and subordination concerns inherent in their unfettered participation. Specifically, the Commission drew a distinction between prospective and retrospective mitigation, and directed that a sole internal or sole external MMU may only conduct retrospective mitigation, not prospective mitigation.¹²⁵ However, in the event an RTO or ISO employs a hybrid MMU structure, it may authorize its internal MMU to conduct either or both types of mitigation, but only if it also assigns to its external MMU the responsibility, and gives it adequate tools, to monitor the quality and appropriateness of that mitigation.¹²⁶

103. Finally, Order No. 719 directed RTOs and ISOs to specify in their tariffs which functions are to be performed by MMUs, and which by RTOs and ISOs. Also, it required RTOs and ISOs to review their mitigation tariff provisions (whether performed by the MMU or by the RTO or ISO) with a view to making them as non-discretionary as possible, and to reflect any needed changes in their compliance filing.¹²⁷

¹²⁴ NYISO Market Services Tariff, Attachment H, § 4.6.1.

¹²⁵ Prospective mitigation is that which can affect market outcomes on a forward-going basis, such as altering prices or physical parameters of offers (i.e., ramp rates and start-up times) at or before the time they are considered in a market solution. All other mitigation is retrospective. Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 375.

¹²⁶ *Id.* P 375.

¹²⁷ *Id.* P 379.

i. NYISO Filing

104. NYISO's proposed tariff states that the MMA will administer mitigation.¹²⁸ The proposed tariff further states that "[t]he Market Monitoring Unit may (i) provide, or assist the ISO's efforts to develop, the inputs required to conduct mitigation, and (ii) assist the ISO's efforts to conduct "retrospective" mitigation ... that does not change bids or offers (including physical bid or offer parameters) at or before the time such bids or offers (including physical bid or offer parameters) are considered in the ISO's market solution."¹²⁹

105. NYISO's proposal includes descriptions of which functions will be performed by the MMU and/or by the MMA.¹³⁰

106. NYISO has not proposed changes regarding the discretion NYISO may exercise when applying certain types of mitigation. NYISO states that it will be conducting a strategic tariff review of its Market Power Mitigation Measures, and that during that review NYISO will review its existing mitigation measures and consider the limited discretion it exercises when applying mitigation. NYISO expects to file any proposed revisions to its tariff by the end of this year.¹³¹

107. NYISO's proposed tariff revisions ascribe the following responsibility to the MMU: "The ICAP Demand Curve periodic review schedule and procedures shall provide an opportunity for the Market Monitoring Unit to review and comment on the draft request for proposals, the independent consultant's report, and the ISO's proposed ICAP Demand Curves."¹³² Tariff provisions also state that the MMU will be consulted when internal investigations conducted by NYISO concerning the Regulation Service Demand Curve or the Operating Reserves Demand Curve.¹³³

¹²⁸ NYISO Market Monitoring Plan, Attachment O, § 3.3.

¹²⁹ *Id.* § 4.4.

¹³⁰ *Id.* §§ 3.3 and 4.4-4.6, respectively.

¹³¹ NYISO Filing p. 19.

¹³² NYISO Market Monitoring Plan, Attachment O, § 4.6.3.1.

¹³³ *Id.* §§ 4.6.4.1 and 4.6.4.2, respectively.

ii. Comments

108. NYISO's proposal allows for the review and comment by the MMU on "the draft request for proposals, the independent consultant's report, and the ISO's proposed ICAP Demand Curves."¹³⁴ New York Transmission Owners read this tariff provision as allowing for:

participation by the MMU in the periodic review of NYISO's installed capacity ("ICAP") demand curves, including review of the draft request for proposals for the retention of an independent consultant to assist NYISO staff and market participants with the reset process, the review of the independent consultant's report, and the promulgation for stakeholder review of any proposed adjustments recommended by the MMU in the values determined by the independent consultant or in NYISO's proposed ICAP demand curves.¹³⁵

109. New York Transmission Owners state that the demand curve reset process involves the determination of a number of factual issues and projections including (1) the various elements that comprise the cost of new entry for generators in different regions of NYISO control area, (2) the most efficient new generation technologies by region, and (3) the projected revenues to be earned by ICAP suppliers from the sale of energy and ancillary services.¹³⁶ New York Transmission Owners assert that this is tariff administration to which the MMU should be prohibited from participating pursuant to Order No. 719.¹³⁷ For the same reasons, New York Transmission Owners further request that the MMU be prohibited from involvement in Regulation Service Demand Curve or Operating Reserve Demand Curves.¹³⁸

110. Independent Power Producers state that the transmission owners confuse "tariff administration," which Order No. 719 generally prohibits the MMU from performing, with review and comment of proposed tariff provisions, which Order No. 719 expressly

¹³⁴ *Id.* § 4.6.3.1.

¹³⁵ NYTO comments at 3.

¹³⁶ *Id.* at 4.

¹³⁷ *Id.*

¹³⁸ *Id.* at 5.

requires the MMU to perform.¹³⁹ Independent Power Producers direct attention to Order No. 719's first Core Function, which states that the MMU is responsible for:

evaluating existing and proposed market rules, tariff provisions and market design elements, and recommending proposed rule and tariff changes not only to the RTO or ISO, but also to the Commission's Office of Energy Market Regulation staff and to other interested entities such as state commissions and market participants, with the caveat that the MMU is not to effectuate its proposed market design itself (a task belonging to the RTO or ISO). . . .¹⁴⁰

111. Independent Power Producers assert that, although NYISO Services Tariff requires the Demand Curves to be reset periodically, it does not mean that the MMU's involvement in the reset process is tariff administration that is prohibited by Order No. 719.¹⁴¹ Independent Power Producers state that, in Order No. 719, the Commission was concerned with the MMU's involvement in actually implementing programs provided in the tariff, such as mitigation.¹⁴² Independent Power Producers reference the following from Order No. 719:

There is an inherent conflict of interest in an MMU conducting mitigation and also opining on the state of the market, the health of which may in part reflect the results of its mitigation. We also observed that by supporting RTOs and ISOs in tariff administration, MMUs become subordinate to the RTO or ISO, thus weakening their independence.¹⁴³

112. Independent Power Producers state that the Demand Curve reset process is not mitigation, nor any type of implementation of a NYISO program.¹⁴⁴ Further, the

¹³⁹ Independent Power Producers Answer at 3 (*citing* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 370-79).

¹⁴⁰ *Id.* P 354.

¹⁴¹ Independent Power Producers Answer at 4.

¹⁴² *Id.*

¹⁴³ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 371.

¹⁴⁴ Independent Power Producers Answer at 4.

Independent Power Producers assert that the MMU's review and comment with respect to the reset process is simply its evaluation of a proposed tariff change and market design element as part of an open and transparent market participant debate.¹⁴⁵ Independent Power Producers state that if the Commission accepted the New York Transmission Owners' argument, it would lead to the absurd result where the MMU would be prohibited from exercising its Core Function of evaluating tariff changes simply because the tariffs provided procedures for invoking such changes.¹⁴⁶

113. Independent Power Producers further state that the MMU's review and comment during the Demand Curve reset process is valuable and cannot be replicated by any independent consultant.¹⁴⁷ Independent Power Producers point out that NYISO's independent market advisor, which is now the MMU, has been involved in the development of the Demand Curves since their inception.¹⁴⁸ Independent Power Producers explain that, while NYISO utilizes an independent consultant to work with NYISO Staff and recommend revised Demand Curves pursuant to the reset process, the consultant is not necessarily the same in each reset process.¹⁴⁹ Independent Power Producers state that the independent consultant does not have the breadth of experience with NYISO's capacity markets that the MMU has gained since the inception of such markets one decade ago and will continue to have as the markets move forward.¹⁵⁰ According to Independent Power Producers, review and comment from the MMU will provide valuable information to the independent consultant in an efficient manner and aid in a productive reset process.¹⁵¹

114. Lastly, Independent Power Producers state that the New York Transmission Owners have not shown any evidence of conflicts of interests or any other improper conduct on the part of the independent market advisor when it provided its review and comment during the initial development of Demand Curves or the prior two reset

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 5.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 6.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

processes.¹⁵² Also, Independent Power Producers opine that there is no evidence that merely providing review and comments will unduly influence NYISO's Board, the Commission or unduly carry more weight than comments by others in the process, and that to exclude review and comment by the MMU would eliminate the perspective of an important entity in the analysis of the Demand Curves.¹⁵³ Therefore, Independent Power Producers state that the Commission should reject the New York Transmission Owners' request that the Commission remove the MMU from NYISO's Demand Curve reset process.¹⁵⁴ For the same reasons, Independent Power Producers state that the Commission should reject the New York Transmission Owners' request that provisions for the MMU's involvement in NYISO's periodic reviews of the Regulations Services and Operating Revenue Demand Curves be removed.¹⁵⁵

iii. Commission Determination

115. The proposed tariff provisions define the duties and responsibilities of the MMU, as well as the MMA. However, Order No. 719 states that purely administrative matters, such as enforcement of late fees or the untimely submission of outage reports and meter data, should be conducted by the RTO or ISO, rather than the MMU, since such activities are remote from the core duties that this Final Rule assigns to the market monitoring function.¹⁵⁶ NYISO's proposal does not directly address who is responsible for performing purely administrative matters. The general tenor of the descriptions of responsibilities and duties leads to a conclusion that these administrative matters probably would be taken care of by the MMA, but clarification in the tariff would avoid any confusion on that point. Therefore, NYISO must provide this clarification.

116. We find that NYISO's proposal that the MMU review and comment on the ICAP, Regulation Service, and Operating Reserves Demand Curves is not tariff administration as contemplated by Order No. 719. Therefore, we will deny the New York Transmission Owners' requests on these issues.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 377.

e. Ethics

117. In Order No. 719, the Commission adopted minimum ethical standards for MMUs and its employees that RTOs and ISOs must include in their tariffs.¹⁵⁷ Under these standards, the MMU and its employees: (1) must have no material affiliation with any market participant; (2) must not serve as an officer, employee, or partner of a market participant; (3) must have no material financial interest in any market participant or affiliate, with potential exceptions for mutual funds and non-directed investments; (4) must not engage in any market transactions other than the performance of their duties under the tariff; (5) must not be compensated, other than by the Commission-approved RTO or ISO that retains or employs the MMU, for any expert witness testimony or other commercial services, either to the Commission-approved RTO or ISO or to any other party, in connection with any legal or regulatory proceeding or commercial transaction relating to the RTO or ISO or to its markets; (6) may not accept anything of value from a market participant in excess of a *de minimis* amount; and (7) must advise a supervisor in the event they seek employment with a market participant, and must disqualify themselves from participating in any matter that would have an effect on the financial interest of the market participants. RTOs and ISOs are free to propose more stringent ethics standards in their compliance filings.¹⁵⁸

118. Finally, Order No. 719 clarified that the minimum ethics standards do not prohibit employees of MMUs from performing independent monitoring for entities other than RTOs and ISOs. However, if the employing entity is a market participant in the RTO or ISO for whom the MMU performs market monitoring, the proposed work would entail the same conflict of interest as would any other consulting services. The Commission directed RTOs and ISOs to notify the Commission of such engagements in its compliance filing, and to propose a transition plan for dealing with conflicts in a manner consistent with Order No. 719.¹⁵⁹

i. NYISO Filing

119. NYISO proposes required ethics standards (1) through (7) as specified in Order No. 719 nearly verbatim.¹⁶⁰ Proposed clarifications to the ethics standards are as

¹⁵⁷ 18 C.F.R. § 35.28(g)(3)(vi) (2008).

¹⁵⁸ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 384.

¹⁵⁹ *Id.* P 385.

¹⁶⁰ NYISO Market Monitoring Plan, Attachment O, § 4.3.

follows: (1) regarding Ethics Standard 3, NYISO's tariff states that mutual fund investment is permitted if the fund is publicly traded, the fund is not concentrated in the market participant, and the employee does not have ability to control the financial interests of the fund;¹⁶¹ and (2) regarding Ethics Standard 4, NYISO's tariff clarifies that MMU employees may purchase electricity as a retail customer for personal consumption.¹⁶²

ii. Comments

120. No comments or protests were filed on this issue.

iii. Commission Determination

121. NYISO's proposed revisions regarding ethics are compliant with Order No. 719. In Order No. 719-A, the Commission revisited the issue of potentially conflicting engagements of the MMU with entities that are market participants in the RTO or ISO monitored by the MMU. Therefore, we make no determination here as to the instant filing's compliance on this issue, and instead will defer the matter to the compliance filing on 719-A.

f. Tariff Provisions

122. Order No. 719 directed RTOs and ISOs to place all of their MMU provisions in one centralized location of their tariffs, and to include, in the introductory portion of that section, a mission statement setting forth the goals to be achieved by the MMU, including the protection of both consumers and market participants by the identification and reporting of market design flaws and market power abuses.¹⁶³ Under Order No. 719, MMU provisions may be duplicated elsewhere in the tariff if needed for clarity, but must contain a note that the provision in question is also found in the centralized MMU section. Also, Order No. 719 required RTOs and ISOs to include in their tariffs a provision stating that in the event of any inconsistency between provisions in the centralized MMU section and provisions set forth elsewhere, the provisions in the centralized MMU section control.¹⁶⁴

¹⁶¹ *Id.* § 4.3.3.

¹⁶² *Id.* § 4.3.4.

¹⁶³ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 392.

¹⁶⁴ *Id.* P 393.

i. NYISO Filing

123. NYISO's proposal states that provisions concerning the MMU are centralized in the Market Monitoring Plan.¹⁶⁵ NYISO tariff indicates that in the event of inconsistency between provisions of the Market Monitoring Plan and any other provisions, the Plan shall control.¹⁶⁶ Further, NYISO tariff contains the mission statement in the introductory section of the MMU tariff.¹⁶⁷

ii. Protest and Comments

124. No comments or protests were filed on this issue.

iii. Commission Determination

125. The mission statement provides that market design flaws and market violations will be identified and reported, but the provision does not identify to whom the report will be made. NYISO will be required to clarify that these reports will be made to the Commission consistent with NYISO's other provisions regarding referrals.

g. Enhanced Information Dissemination

126. Order No. 719 required each RTO or ISO to include in its tariff a requirement that the MMU prepare an annual state of the market report on market trends and the performance of the wholesale market, as well as less extensive quarterly reports. These reports must be disseminated to Commission staff, staff of interested state commissions, the management and board of the RTO or ISO, and market participants, with the understanding that dissemination may be accomplished by posting on the RTO's or ISO's website.¹⁶⁸ Also, Order No. 719 directed that MMUs be available for regular conference calls, which may be attended by the Commission, state commissions, representatives of the RTO or ISO, and market participants. The information to be provided in the MMU reports and in the conference calls may be developed on a case-by-case basis, but is generally to consist of market data and analyses of the type regularly gathered and

¹⁶⁵ NYISO Market Monitoring Plan, Attachment O, § 4.6.1.

¹⁶⁶ *Id.* § 4.6.1.

¹⁶⁷ *Id.* § 4.1.

¹⁶⁸ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 424.

prepared by the MMU in the course of its business, subject to appropriate confidentiality restrictions.¹⁶⁹

127. Additionally, Order No. 719 required RTOs and ISOs to release offer and bid data on a three-month lag. An RTO or ISO may propose a shorter lag time for the release of offer and bid data and provide accompanying justification. If the RTO or ISO demonstrates a potential collusion concern, it may propose a four-month lag period or some other mechanism to delay release of the data if it were otherwise to occur in the same season as reflected in the data.¹⁷⁰ The identity of market participants must remain masked, although the RTO or ISO may propose a time period for eventual unmasking. Order No. 719 requires RTOs and ISOs to include in their compliance filings a justification of their policies on the aggregation (or lack of same) of offer and cost data, discussing participant harm, collusion and transparency.¹⁷¹

i. NYISO Filing

128. NYISO's filing provides that the MMU will prepare an annual report of the New York Electric Markets. The report will be forwarded to the Commission and the NYPSC and will be made publicly available on NYISO's website.¹⁷² Three less extensive quarterly reports will also be prepared and made available in the same manner.¹⁷³

129. NYISO has amended its Services Tariff to state that public bid information, including bids submitted for virtual transactions, but not the names of the bidders, shall be made available three months after the bids are submitted. NYISO will mask the name of the bidder, but data will be posted in a way that permits third parties to track each individual bidder's bids over time.¹⁷⁴ NYISO does not propose a time period for eventual unmasking of the bidder.¹⁷⁵ NYISO states that there does not seem to be a reason to disclose the identities of masked bidders and any necessary analyses can be

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² NYISO Market Monitoring Plan, Attachment O, § 10.1.

¹⁷³ *Id.* § 10.2.

¹⁷⁴ NYISO tariff, Original Volume No 2, § 6.3.

¹⁷⁵ NYISO Filing at 31.

performed without knowing bidder identities. NYISO fears that unmasking bidders could facilitate collusion by revealing the bidding practices of specific competitors. Furthermore, NYISO does not indicate a need to go beyond masking bidder identities with a generic alias, and argues that releasing bid data only in aggregate form would preclude an analysis of trends or patterns, reducing the value of the data as a form of market intelligence.¹⁷⁶

130. In addressing its policies regarding aggregation of cost data, NYISO does not publish data on individual market participant costs in either masked or aggregated form. NYISO states that, in clearing-price auctions such as those administered by NYISO, market participants have a compelling incentive to bid their marginal costs, and such bids will produce the most efficient market results.¹⁷⁷ Therefore, NYISO argues that publishing costs is not necessary to produce optimal market outcomes and that revealing cost information could facilitate collusion.¹⁷⁸

ii. Comments

131. In its intervention, DC Energy states that it supports NYISO's proposal on this issue.¹⁷⁹

iii. Commission Determination

132. NYISO makes no mention in its proposal of having the MMU be available for regular conference calls, to be attended telephonically or in person, by Commission and state commission staff, representatives of the RTO/ISO, and by market participants. NYISO must amend its filing to include this requirement.

¹⁷⁶ *Id.*

¹⁷⁷ NYISO cites the following as support: *PJM Interconnection, LLC*, 112 FERC ¶ 61,031, at P 88 (2005) (finding that suppliers would be expected to bid at the level of their marginal costs in a clearing-price auction); see also *Central Hudson Gas & Electric Corp.*, 86 FERC ¶ 61,062, at p. 61,222 (1999) (holding that the pricing at each node in NYISO energy market “would equal the marginal cost to the ISO of producing and delivering energy to the node, based on the bids submitted in an energy auction”).

¹⁷⁸ NYISO Filing at 31.

¹⁷⁹ DC Energy at 3.

h. Tailored Requests for Information

133. In Order No. 719, the Commission stated that MMUs are to entertain state commissions' tailored requests for information regarding general market trends and performance of wholesale market, but not requests for information designed to aid state enforcement actions.¹⁸⁰ The Commission noted that granting or refusing such requests is at the MMU's discretion, based on its agreements with the RTO or ISO and the states, or otherwise based on time and resource availability.¹⁸¹ Order No. 719 also states that market participants must be given the opportunity to provide context to data related to them, so long as the process does not unduly delay release of the information, and to contest release of the information.¹⁸²

134. Order No. 719 also directs RTOs and ISOs to develop confidentiality provisions to protect commercially sensitive material that may be included in responses to tailored requests for information.¹⁸³

i. NYISO Filing

135. NYISO's proposed tariff revisions state that NYISO and the MMU will collect and maintain the information necessary for implementing the Market Monitoring Plan.¹⁸⁴ The revisions further state that NYISO will provide information to market participants, state commissions, or interested government agencies relating to general market trends or the performance of any of the New York markets.¹⁸⁵ Further, the proposed tariff provisions state that the MMA will respond to information and data requests from FERC and the NYPSC.¹⁸⁶

¹⁸⁰ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 446.

¹⁸¹ *Id.* P 424, 459.

¹⁸² *Id.* P 455.

¹⁸³ *Id.* P 459.

¹⁸⁴ NYISO Market Monitoring Plan, Attachment O, § 6.5.1.

¹⁸⁵ *Id.* § 6.5.4.

¹⁸⁶ *Id.* § 3.3.

136. NYISO notes that Order No. 719 allows for confidentiality provisions to be provided in a separate, future filing.¹⁸⁷ NYISO plans on making a separate filing and expects to complete its discussions with stakeholders and submit proposed tariff revisions to the Commission so that the revisions can become effective in the first quarter of 2010.¹⁸⁸ NYISO states that because its new confidentiality provisions are not yet in place, NYISO will not provide Protected Information, as defined in its current tariff language, in response to requests made until new confidentiality protections are developed, filed, and accepted by the Commission.¹⁸⁹

ii. Comments

137. EPSA and the New York Transmission Owners point out that NYISO's filing does not include provisions for market participants to provide context to information included in requests for information, nor does it allow for market participants to contest the release of information.¹⁹⁰

138. EPSA also argues that request for information from state commissions be restricted to requests from the NYPSC, since NYISO is a single state ISO.¹⁹¹ EPSA references the Order No. 719 compliance filing made by CAISO, wherein EPSA states the proposed tariff language only allows for the CAISO to provide information to the California Public Utility Commission.¹⁹² EPSA argues that other state commissions should be required to work through their own MMUs to procure information.¹⁹³

139. EPSA further suggests that NYISO, in developing new confidentiality provisions, look to ISO-NE's tariff language as a model.¹⁹⁴

¹⁸⁷ NYISO Filing at 19; Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 448.

¹⁸⁸ NYISO Filing at 19-20.

¹⁸⁹ *Id.* at 20.

¹⁹⁰ EPSA comments at 9-10; New York Transmission Owners at 5-6.

¹⁹¹ EPSA comments at 11.

¹⁹² *California Independent System Operator Corporation*, Docket No. ER09-1048-000 (April 28, 2009), First Revised Sheet No. 1466, Section 8.1 through 8.4.

¹⁹³ EPSA comments at 10.

¹⁹⁴ *Id.*

iii. **Commission Determination**

140. Order No. 719 adopted provisions “allowing state commissions to make tailored requests for information from MMUs regarding general market trends and performance, not to include information designed to aid state enforcement actions against individual companies.”¹⁹⁵ Therefore, it is the responsibility of the MMU to respond to such tailored requests for information from state commissions not NYISO.¹⁹⁶ Order No. 719 does not address whether ISOs or RTOs may also provide this information, but the clear implication is that the Commission intends for this to be a function carried out by the MMU. While NYISO may collect and maintain information as it deems appropriate for its needs, the MMU has specific delineated responsibilities regarding tailored requests for information; these responsibilities need to be reflected in NYISO’s tariff. Further, as the entity responsible for reviewing and reporting on the wholesale markets, the MMU, not the MMA, must respond to information and data requests from the Commission. The tariff should reflect this as well.

141. Order No. 719 states that “[t]he enhanced information sharing provisions we adopt in this Final Rule significantly expand the materials that state commissions may receive.”¹⁹⁷ The purpose of these provisions is to expand information sharing to the extent possible by MMUs, not to restrict it unnecessarily. We see no reason why NYISO’s MMU may not respond to information requests from other commissions, within the scope provided by Order No. 719. Therefore, we will deny EPSA’s request on this point and accept NYISO’s filing as proposed.

142. NYISO must amend its tariff language to allow market participants the opportunity to provide context to data related to them that has been requested through a tailored request, so long as the process does not unduly delay release of the information, and to contest release of that information.

143. NYISO’s proposal regarding developing new confidentiality provisions through its stakeholder process and subsequently filing those provisions to become effective the first quarter of 2010 is acceptable.

¹⁹⁵ Order No. 719, FERC Stats & Regs. ¶ 31,281 at P 425.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* P 446.

The Commission orders:

(A) NYISO's compliance filing is hereby accepted, as modified, effective as of the date of this order, as discussed in the body of this order.

(B) NYISO is hereby directed to submit a compliance filing, within 90 days of the date of this order, as discussed in the body of this order.

(C) NYISO is hereby directed to re-file its tariff sheets listing an effective date of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.