137 FERC ¶ 61,218
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

New York Independent System Operator, Inc. Docket Nos. ER11-2224-007
ER11-2224-008

ORDER ON REHEARING

(Issued December 15, 2011)

1. In this order the Commission denies rehearing of its April 4, 2011 order[1] and its May 19, 2011 order[2] in this proceeding relating to updates to the demand curve rates for the Installed Capacity (ICAP) market administered by the New York Independent System Operator, Inc. (NYISO). The April 4, 2011 Order accepted a filing made by NYISO to establish that, in light of the Commission's conditional acceptance and suspension of NYISO's proposed updated demand curve rates, the then-effective ICAP demand curves would remain in effect on and after May 1, 2011, until a date set by Commission order. The May 19, 2011 Order, granted rehearing of the Commission's January 28, 2011 Order[3] as to the Commission's ruling that NYISO include New York City property taxes in the calculation of the cost of new entry (CONE) for the proxy peaking unit used to set the demand curve rates for the New York City (NYC) capacity zone, denied rehearing on other matters, and directed compliance filings.

I. Background

2. NYISO administers the ICAP monthly spot market that uses NYISO-determined demand curves for each of the three NYISO ICAP zones: the New York Control area

[1] *New York Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,002 (2011) (April 4, 2011 Order).

[2] *New York Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,170 (2011) (May 19, 2011 Order).

[3] *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,058 (2011) (January 28, 2011 Order).

(NYCA or rest-of-state), New York City (NYC) and Long Island (LI). Pursuant to section 5.14.1.2 of its Market Administration and Control Area Services Tariff (Services Tariff), NYISO performs a triennial review to determine the parameters of ICAP demand curves for the next three capability years and to file revised ICAP demand curves with the Commission. The new demand curve rates are effective May 1 of each year through April 30 of the next year. On November 30, 2010, NYISO filed proposed revisions to its Services Tariff to implement revised ICAP demand curve rates for capability years[4] 2011/2012, 2012/2013, and 2013/2014. NYISO's proposal included, *inter alia*, revisions to cost components and parameters of the CONE used to establish the revised ICAP demand curves. As relevant to the rehearing requests here, these cost components include estimates of NYC property taxes.

3. In the January 28, 2011 Order, the Commission accepted and suspended NYISO's proposed demand curves for five months until the earlier of June 28, 2011, or a date set by the Commission, and directed NYISO to file to revise the proposed demand curve rates to reflect certain rulings, including a ruling that NYISO must revise the demand curve rates to reflect the cost impact of NYC property taxes.[5] However, the Commission suggested that NYISO may wish to defer implementation of the compliance rates given the difficulties with implementing such rates during the summer capability period. On March 9, 2011, the Commission denied requests for expedited clarification and rehearing of its January 28, 2011 Order.[6] The Commission reiterated its statement in the January 28, 2011 Order that "the currently effective demand curves will remain in effect until superseded" without escalation or adjustment.[7]

4. On March 28, 2011, in recognition that the suspension of its proposed demand curve rates ordered by the January 28, 2011 Order could potentially result in a gap in rates after the then-existing (2010/2011) demand curve rates terminate on April 30, 2011, NYISO filed to modify section 5.14.1.2 of its Services Tariff to establish that the same rates as the existing 2010/2011 ICAP demand curve rates would remain in effect beyond the April 30, 2011 termination date until a date set by Commission order. In the April 4,

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[4] NYISO's capability year consists of the summer capability period that runs from May 1 through October 31 and the winter capability period that runs from November 1 through April 30.

[5] *See generally* January 28, 2011 Order, 134 FERC ¶ 61,058, and at P 90, 168.

[6] *New York Indep. Sys. Operator, Inc*., 134 FERC ¶ 61,178 (2011) (March 9, 2011 Order).

[7] March 9, 2011 Order, 134 FERC ¶ 61,178 at P 16 (citing January 28, 2011 Order, 134 FERC ¶ 61,058 at P 168).

2011 Order, the Commission accepted NYISO's March 28, 2011 revisions to its Services Tariff, effective as proposed, subject to further action by the Commission, finding them to be ministerial changes necessary to maintain the existing ICAP demand curves beyond April 30, 2011, consistent with the January 28, 2011 Order until superseded by compliance rates.[8] On March 29, 2011, as modified later, NYISO filed revised demand curve rates to comply with the conditions of the January 28, 2011 Order.

5. In the May 19, 2011 Order, as relevant here, the Commission denied TC Ravenswood's request for rehearing of the ruling of the March 9, 2011 Order rejecting Ravenswood's argument that the rates in effect during the suspension period could not remain in effect beyond June 28, 2011, and that the demand curve rates filed by NYISO on November 30, 2010, must go into effect on that date if the Commission has not yet acted. In addition, the Commission granted rehearing with respect to inclusion of the matter of the NYC property tax, ruling that NYC tax abatement would apply in the calculation of the CONE, as discussed further below. On September 15, 2011, the Commission accepted NYISO's Filings reflecting revised demand curve rates effective September 15, 2011, in compliance with the Commission's orders in this proceeding.[9]

II. Request for Rehearing of the April 4, 2011 Order

A. Procedural Matters

6. On May 4, 2011, New York City Suppliers[10] submitted a request for rehearing of the April 4, 2011 Order. On May 17, 2010, NYISO filed an answer to New York City Suppliers' request.

7. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2011) prohibits an answer to a request for rehearing. Accordingly, NYISO's answer is rejected.

B. Suspension of Proposed Demand Curve Rates

8. New York City Suppliers assert that acceptance of NYISO's March 28, 2011 filed tariff revisions in the April 4, 2011 Order was contrary to law because the Commission has no authority to authorize a suspension period in excess of the five-month maximum

[8] April 4, 2011 Order, 135 FERC ¶ 61,002 at P 10.

[9] *New York Indep. Sys. Operator, Inc*., 136 FERC ¶ 61,192 (2011) (September 15, 2011 Order).

[10] For purposes of this proceeding, New York City Suppliers are: Astoria Generating Company, L.P. and TC Ravenswood, LLC (Ravenswood).

suspension period established by section 205(e) of the Federal Power Act (FPA).[11] They state that five months from January 28, 2011, is June 28, 2011, and no legal argument can extend the five-month suspension period beyond that date. Therefore, New York City Suppliers seek rehearing of the Commission's acceptance of NYISO's proposal to revise section 5.14.1.2 of the Services Tariff to keep the currently effective rates in effect until a "date determined by Commission Order," as they assert that this would potentially allow the existing rates to remain in effect until well after June 28, 2011, and result in a suspension period potentially until April 30, 2012—the expiration of the 2011/2012 capability period rates.[12] Instead, New York City Suppliers contend that the rates proposed in the November 30, 2010 Filing must be placed into effect, either as modified by the January 28, 2011 Order or "as-filed," subject to refund because no other rate is permissible under FPA section 205(e).

9. New York City Suppliers also argue that the Commission's determination that the revisions proposed in the March 28, 2011 Filing were "ministerial" was arbitrary and capricious and not the product of reasoned decision making because it ignores the harm to competitive markets and suppliers of keeping the existing ICAP demand curves in place and thereby artificially suppresses capacity prices for the New York City market. New York City Suppliers argue that the Commission made determinations in the January 28, 2011 Order that would either require NYISO to file revisions that would lead to a higher ICAP demand curve rate than those proposed in the November 30, 2010 Filing or that would accept NYISO's proposed rates as filed. New York City Suppliers state that either of these alternatives results in rates which are higher than the existing ICAP demand curve rates. According to New York City Suppliers, the decision to accept NYISO's proposal to maintain the 2010/2011 ICAP demand curve rate until as late as April 30, 2012, would impose a rate significantly lower than the rate that the Commission implicitly found to be too low in the January 28, 2011 Order. New York City Suppliers argue, therefore, that the Commission's finding that the March 28, 2011 Filing "reflects ministerial changes" is clearly erroneous.

[11] New York City Suppliers Request for Rehearing at 6 (citing *Connecticut Light & Power Co. v. FERC*, 627 F.2d 467 (D.C. Cir. 1980)).

[12] In addition, New York City Suppliers note that the March 28, 2011 Filing accepted by the Commission in the April 4, 2011 Order provides for the proposed November 30, 2010 filed rates to be effective for the 2012/2013 and 2013/2014 capability periods. *Id*. at n.17.

Commission Determination

10. We deny New York City Suppliers' request for rehearing of the April 4, 2011 Order for the reasons discussed below. In the January 28, 2011 Order, the Commission, pursuant to section 205(e) of the Federal Power Act, accepted and suspended NYISO's proposed rates for the earlier of five months or a date set by subsequent Commission order. In the April 4, 2011 Order, the Commission accepted NYISO's March 28, 2011 Filing of superseding tariff revisions that provided that the currently effective demand curves, which would otherwise have expired on April 30, 2011, would remain in effect on and after May 1, 2011, until the Commission acts on NYISO's Filing to comply with the January 28, 2011 Order. Thus, by permitting NYISO to file to revise its filed rates during the suspension period of the original November 30, 2010 rates, the original rates were superseded and rendered moot, as the Commission later explained in the May 19, 2011 Order. The interim rates that NYISO filed on March 28, 2011, were not suspended but were accepted, effective April 21, 2011, subject to all the conditions set by the January 28, 2011 Order, with the next superseding set of rates for the remainder of the 2011/2012 Capability Year to take effect on a date set by subsequent Commission order on compliance, as proposed by NYISO.

11. New York City Suppliers also argue that the Commission's determination in the April 4, 2011 Order that the March 28, 2011 Filing was ministerial was not reasoned decision-making because the Commission ignored the harm to competitive markets by maintaining the existing, outdated rates. They assert that the November 30, 2010 proposed demand curves accepted by the Commission on compliance, or some version of them, should be put in place on June 29, 2011, when the suspension period set by the January 28, 2011 Order ends. The Commission addressed a similar issue in the March 9, 2011 Order where it rejected a proposal to order increased demand curve rates during the suspension period that reflect the existing rates inflated by the inflation factor NYISO proposed in its November 30, 2010 Filing. The Commission stated that precedent does not allow for a piecemeal review of a single component of a filed rate.[13] New York City Suppliers are in effect asking us to ignore the conditional acceptance of NYISO's March 28, 2011 Filing and unilaterally replace those rates with rates of our own design simply to raise the rates until the Commission accepts the compliance rates, which the Commission subsequently did in the September 15, 2011 Order. As explained in the May 19, 2011 Order, NYISO elected to file to supersede the November 30, 2010 proposed demand curve rates with its March 28, 2011 Filing and used its discretion to defer implementation of new demand curves until a date set by the Commission when it accepts NYISO's compliance filing.[14]

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[13] March 9, 2011 Order, 134 FERC ¶ 61,178 at P 16-17.

[14] May 19, 2011 Order, 135 FERC ¶ 61,170 at P 104.

12. New York City Suppliers argue that the Commission erred in failing to respond to its arguments that the March 28, 2011 Filing was inconsistent with the suspension of the November 30, 2010 proposed rates as ordered January 28, 2011 Order. As discussed above, the suspension of the proposed rates in the November 30, 2010 Filing became a moot issue once that filing was superseded by the March 28, 2011 Filing.

13. Finally, New York City Suppliers observe that the demand curve rates accepted by the Commission in the April 4, 2011 Order contain the rates NYISO originally proposed in the November 30, 2010 Filing for the 2012/2013 and 2013/2014 capability periods that were also suspended by the January 28, 2011 Order. They state that, therefore, unless and until the Commission modifies those rates, the demand curve rates for those periods will be the rates as proposed in the November 30, 2010 Filing. That is correct because the April 4, 2011 Order accepted those rates subject to the same conditions set by the January 28, 2011 Order with respect to the identical rates NYISO proposed in its November 30, 2010 Filing. With the issuance of subsequent Commission orders on compliance on September 15, 2011, and October 6, 2011,[15] section 5.14.1.2 of the Services Tariff, as currently in effect, includes Commission-accepted just and reasonable rates for all three capability periods in compliance with the conditions of acceptance of the March 28, 2011 filed rates.

III. Requests for Rehearing of the May 19, 2011 Order

A. Background

14. The May 19, 2011 Order, *inter alia*, granted rehearing of the January 28, 2011 Order requiring NYISO to include New York City property tax in the calculation of CONE for the proxy peaking unit used to set the ICAP demand curves for the NYC capacity zone. At the time of the previous (i.e., 2008) demand curve reset proceeding, the New York City Industrial and Commercial Incentive Program (ICIP) granted, as a right, reductions in real property taxes to new industrial and commercial projects, including power plants. The Commission accepted the previous demand curves that incorporated this reduction into the calculation of the NYC CONE. Subsequently, a revised program was established that effectively removed the tax abatement for new generating facilities in New York City.[16]

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[15] *New York Indep. Sys. Operator, Inc.*, Docket No. ER11-2224-010 (October 6, 2011) (delegated letter order).

[16] In a complaint filed by IPPNY in 2008 to revise the demand curves to reflect a change in the property tax, the Commission held that it would not permit out-of-cycle adjustments. *See generally Indep. Power Producers of New York v. New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,311 (2008) (*IPPNY*).

15. On August 3, 2010, the New York City Industrial Development Authority (NYCIDA), in an attempt to induce the development of in-City peaking generating units, revised its Uniform Tax Exemption Policy (UTEP) by creating a discretionary tax abatement program under which qualifying units could receive a 12-year exemption from property tax and exemption from recording taxes, mortgage recording taxes, and sales and use taxes. In the November 30, 2010 Filing, NYISO proposed to include full tax abatement in the calculation of CONE for the NYC peaking unit, arguing that it was within New York City's economic interest to grant abatement and New York City would likely act in a manner consistent with that interest. However, in the January 28, 2011 Order, the Commission found that it was not reasonable to assume full tax abatement would occur because it was discretionary and therefore, the Commission did not accept it.[17]

16. On May 18, 2011, New York State changed its law (May 18, 2011 Amendment) in order to eliminate NYCIDA's discretion by returning the NYC tax abatement to an as-of-right program. In the May 19, 2011 Order, the Commission found that, upon further review of the record and a change in circumstances, NYC CONE should reflect the assumption that the NYC peaking unit will receive property tax abatement. The Commission found that the amended law removed any ambiguity as to whether tax abatement would be afforded to the peaking unit used to develop the NYC CONE noting that the stated purpose of the new law is to "mak[e] peaking units eligible for benefits, as of right, under the industrial and commercial abatement program."[18] After reviewing the May 18, 2011 Amendment, the Commission concluded that the developer of an LMS 100 peaking unit (i.e. the proxy generator used to develop the NYC CONE) in NYC would be eligible for 100 percent tax abatement for a fifteen-year period provided a building permit is issued on or before April 1, 2015. This amendment ameliorated the Commission's concerns with the discretionary nature of the UTEP.

17. The May 19, 2011 Order also denied requests for clarification or rehearing of the March 9, 2011 Order's rejection of a proposal to clarify that the rates in effect during the suspension period were intended to reflect the 1.7 percent escalation factor of the November 30, 2010 Filing, as well as a 7.8 percent factor proposed by Ravenswood, and the Commission's ruling that NYISO may defer implementation of the compliance rates until the start of the winter capability period (November 1, 2011) and was not thereby illegally extending the suspension period set by the January 28, 2011 Order.[19]

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[17] January 28, 2011 Order, 134 FERC ¶ 61,058 at P 88-90.

[18] 2011 N.Y. Laws Chapter 28 (May 18, 2011).

[19] May 19, 2011 Order, 135 FERC ¶ 61,170 at P 106.

B. Procedural Matters

18. On June 17, 2011, New York City Suppliers[20] filed a request for rehearing of the May 19, 2011 Order. On June 20, 2011, TC Ravenswood, LLC (Ravenswood) filed an additional request for rehearing of that order. On June 28, 2011, the City of New York filed an answer to New York City Suppliers' request for rehearing.

19. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2011), prohibits an answer to a request for rehearing. Accordingly, the City of New York's answer to the request for rehearing is rejected.

C. New York City Suppliers Request for Rehearing

1. NYC Tax Abatement – Out-of-Cycle Adjustment

20. New York City Suppliers request rehearing of the Commission's decision in the May 19, 2011 Order that the NYC demand curve rates should reflect the assumption that the NYC peaking unit will receive NYC property tax abatement. New York City Suppliers characterize the Commission decision as an unexplained departure from Commission precedent concerning the limited circumstances under which the Commission will permit out-of-cycle adjustments to the ICAP demand curves.[21] They further assert that if and to the extent that the Commission concluded in the May 19, 2011 Order that *IPPNY* was wrongly decided, the Commission should so state, provide a reasoned explanation, and make clear that, going forward, out-of-cycle adjustments will be available on an even-handed basis.[22]

21. New York City Suppliers argue that the Commission ordered revisions to the NYC ICAP demand curves based not on any error in the January 28, 2011 Order, but solely on a subsequent event in the form of the May 18, 2011 Amendment, and it did so without mentioning, applying, or distinguishing *IPPNY*.

22. New York City Suppliers argue that in *IPPNY*, the Commission explained that "[t]he ICAP Demand Curve process is based on the premise that price stability and certainty are important to the market," and concluded that these concerns outweighed "the need for an out-of-cycle adjustment to provide proper price signals to encourage new

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[20] For purposes of this proceeding, New York City Suppliers are: Astoria Generating Company, L.P., the NRG Companies, and TC Ravenswood, LLC.

[21] New York City Suppliers June 17, 2011 Request for Rehearing at 2 (citing *IPPNY*, 125 FERC ¶ 61,311 at P 34).

[22] New York City Suppliers June 17, 2011 Request for Rehearing at 8.

economic capacity entry."[23] New York City Suppliers add that the Commission further emphasized that "Commission precedent as well as equity considerations requires that we consider all changes that would affect the current rate, including any offsetting factors" in determining whether the elimination of the property tax exemption required an upward adjustment of the demand curves then in effect.[24] They also quote the Commission that "[t]o reopen and start anew the lengthy review process now would re-ignite the debate over all of the factors that determine the Demand Curves and would promote confusion and uncertainty rather than stability in the market with uncertain future benefits."[25]

23. New York City Suppliers contend that the Commission did not apply any of the analysis required under *IPPNY* as noted above. Accordingly, New York City Suppliers argue, equity requires the Commission to consider all changes that would affect the current rate, including offsetting factors that have occurred since the November 30, 2010 Filing. In addition, New York City Suppliers state that it is evident from recent demand curve proceedings that property tax abatement policies are not static and substantially affect NYC CONE, and further, that it is entirely possible that the May 18, 2011 Amendment could be repealed now that it has had the desired effect of reducing the NYC demand curve. New York City Suppliers add that, in any event, the May 18, 2011 Amendment is currently scheduled to expire by its express terms on March 1, 2015, ten months into the first capability year of the next reset cycle.

24. New York City Suppliers further contend that the only material difference between the circumstances in *IPPNY* and the instant case is that *IPPNY* involved a proposed upward adjustment to the demand curves, while the instant case involves a downward adjustment. New York City Suppliers assert that a rule that allows only for downward, but not upward, out-of-cycle adjustments will produce unjust and unreasonable and unduly discriminatory rates in violation of the FPA. New York City Suppliers add that such a rule is irreconcilable with the bedrock principle that setting just and reasonable rates involves a balancing of investor and consumer interests and that the Commission decision does not achieve this balance because over time it would operate to only reduce capacity revenues below the level needed to attract entry when capacity is needed. In addition, New York City Suppliers state that such a rule would be unduly discriminatory to ICAP suppliers and unduly preferential to ICAP buyers, in direct contravention of the FPA.

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[23] *Id*. P 7-8 (citing *IPPNY*, 125 FERC ¶ 61,311 at P 35).

[24] *Id*. at 8 (citing *IPPNY*, 125 FERC ¶ 61,311 at P 33).

[25] *Id*. (citing *IPPNY*, 125 FERC ¶ 61,311 at P 35).

Commission Determination

25. New York City Suppliers argue that granting rehearing on the issue of tax abatement in the May 19, 2011 Order is an unexplained departure from Commission precedent regarding out-of-cycle adjustment to the demand curves, and something the Commission refused to do in *IPPNY*. We find the comparison to *IPPNY* to be inapposite, as the instant case is on a different procedural footing. Additionally, the emphasis the New York City Suppliers place on the timing of the complaint in *IPPNY* does not account for the Commission's finding that the complainants failed to carry their burden.

26. In *IPPNY*, the Commission denied a complaint alleging that the elimination of a tax exemption similar to the tax abatement in this proceeding rendered the demand curves no longer just and reasonable.[26] The Commission explained that although the elimination of the tax exemption could have a significant impact on estimated CONE, the true impact on rates was unclear because offsetting factors might exist, and therefore the complainants failed to carry their burden under section 206 of the FPA.[27] The Commission noted that in setting a just and reasonable rate, it looks at all components of the rate, and that "a change in a single component . . . does not therefore necessarily mean that the overall rate has become unjust and unreasonable."[28]

27. In contrast, the Commission reversed its decision on the tax abatement in this proceeding in response to changed circumstances brought to its attention on rehearing. Unlike the complainants in *IPPNY*, the parties proffering evidence of the newly-enacted tax abatement were not required to show that any existing rate was unjust and unreasonable because the Commission had not yet taken final action on the new demand curves. Under the Commission's regulations, parties have 30 days to seek rehearing of a Commission decision.[29] Accepting the New York City Suppliers' argument that we should apply the *IPPNY* ruling to this case would render the right to seek rehearing meaningless.

28. Additionally, we reject the New York City Suppliers' claim that the only difference between the circumstances of the instant case and *IPPNY* is that *IPPNY* involves an upward adjustment to the curve and the instant case involves a downward

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[26] *IPPNY*, 125 FERC ¶ 61,311 at P 33.

[27] *Id*.

[28] *Id*. P 33 (quoting *Houlton Water Co. v. Maine Public Service Co.* 55 FERC ¶ 61,307, at P 61 and 110 (1991)).

[29] 18 C.F.R. § 385.713(b) (2011).

adjustment. As we have explained, the Commission rejected the complaint in *IPPNY* because the complainants failed to carry their burden under section 206 of the FPA, whereas here evidence of the newly-enacted tax abatement was brought before the Commission on rehearing. It was not relevant to the determination in *IPPNY* whether the complaint would have resulted in increased or decreased rates. Likewise, the bias that New York City Suppliers allege regarding the Commission's determination in the instant case has no basis and is not relevant to the Commission's decision to grant rehearing on the tax abatement issue.

29. Although the Commission rejected the complaint because the complainants failed to carry their burden, we recognize that there is some language in *IPPNY* that suggests that the timing of the complaint—namely, the fact that it was outside the demand curve triennial review—was a significant factor in denying the complaint. The New York Suppliers seize on this language in their attempt to compare *IPPNY* to the instant proceeding. As we have explained, however, the Commission rejected the complaint in *IPPNY* because the complainants failed to carry their burden, not just because of the complaint's timing.[30] If the complainants had carried their burden, the Commission would have been required under section 206 of the FPA to set aside the then-existing rate and determine a new just and reasonable rate, regardless of when the complaint was filed. Therefore, we clarify that *IPPNY* does not stand for the proposition that the Commission will reject a complaint merely because it is out-of cycle.

2. NYC Tax Abatement - Interpretation of the May 18, 2011 Amendment

30. New York City Suppliers also contend that the May 19, 2011 Order rests on an erroneous interpretation, by the Commission, of the May 18, 2011 Amendment passed by the New York Assembly. According to New York City Suppliers, the Commission ignored the operative provisions of the law, and failed to recognize important differences between the May 18, 2011 Amendment and the former Industrial and Commercial Incentive Program.

31. New York City Suppliers state that the May 18, 2011 Amendment does not justify, much less mandate, the assumption that tax abatement will apply to any new peaking unit in NYC. New York City Suppliers assert that the May 18, 2011 Amendment, by its express terms, provides that a new peaking generation facility, even the LMS 100 proxy peaking unit used to establish the NYC demand curves, will not qualify for the tax exemption if the cost of the industrial construction work on the generation facility is less than 30 percent of the property's taxable assessed value. New York City Suppliers contend that this exception could easily preclude a new peaking unit from obtaining any

[30] *IPPNY*, 125 FERC ¶ 61,311 at P 33

property tax abatement under the May 18, 2011 Amendment because the brownfield sites of the type well-suited for building new generation typically have relatively high taxable assessed values—in some cases high enough to render an LMS 100 ineligible for tax abatement. New York City Suppliers state that the repealed Industrial and Commercial Incentive Program used a substantially lower 10 percent threshold that was almost certain to be satisfied by a new peaking unit, whether at the site of an existing generation facility or a greenfield site.

32. New York City Suppliers also assert that in the case of a new peaking unit other than the LMS 100 proxy peaking unit, the May 18, 2011 Amendment provides abatement only to a peaking unit that has an annual average run time of less than 18 hours per start (excluding operations during periods covered by major emergency declarations). New York City Suppliers contend that it is likely, if not certain, that a large number of new peaking units in the NYC capacity zone will be denied abatement based on this exception, which had no analogue in the Industrial and Commercial Incentive Program. They add that, at a minimum, because compliance is apparently to be assessed annually, this exception will mean that a significant number of new peaking units will not actually receive full property tax abatement, as the May 19, 2011 Order assumes, but will instead receive abatement in some years and not in others. New York City Suppliers conclude that there is no basis in the record or otherwise for the Commission's assumption that new peaking units will automatically enjoy 100 percent abatement. They state that both the terms of the May 18, 2011 Amendment and the history surrounding property tax abatement, where abatement is here today and gone tomorrow, demonstrate the unreasonableness of this assumption and dictate that, at a minimum, some discount factor must be applied such that the NYC ICAP demand curves would reflect the reasonable assumption that abatement will be something more than zero but less than 100 percent.

Commission Determination

33. The issue at hand is the appropriate calculation of CONE for the General Electric LMS 100, the selected proxy unit for the NYC demand curve in accordance with the triennial demand curve reset provisions of section 5.14.1.2 of the Services Tariff. The question before the Commission was whether it is reasonable to assume that such a unit will either pay property tax or that it will receive an abatement of property tax. In the January 28, 2011 Order, the Commission found that it was not just and reasonable to assume the proxy peaking unit would receive tax abatement under the UTEP program that replaced the ICIP as written because the new UTEP program: (1) was discretionary; and (2) it contained eligibility criteria that added uncertainty to the determination of whether a project would indeed qualify.[31] However, in the May 19, 2011 Order, the Commission found that the May 18, 2011 Amendment to the UTEP satisfied the

[31] January 28, 2011 Order, 134 FERC ¶ 61,058 at P 88-90.

Commission's concerns on both of these points and therefore concluded that the proxy peaking unit would receive an abatement.[32] We continue to find this to be the case. The May 18, 2011 Amendment addressed the issues that resulted in the Commission's prior determination to include property taxes in NYC CONE by removing the discretionary nature of tax abatement, as well as the uncertainty regarding eligibility for tax abatement.[33] Accordingly, we deny New York City Suppliers request for rehearing.

34. New York City Suppliers also contend that the Commission incorrectly interpreted the May 18, 2011 Amendment and failed to recognize differences between the Amendment and the former ICIP. We disagree. New York City Suppliers suggest that the substance of the May 18, 2011 Amendment does not achieve the stated purpose because it includes a provision that a new peaking generation facility may not qualify for tax abatement if the cost of the industrial construction work fails to meet the minimum of 30 percent of the property's taxable assessed value or if the unit operates on average less than 18 hours per start. New York City Suppliers also assert that the May 19, 2011 Order stated broadly and erroneously that "tax abatement will apply to any new peaking unit in NYC."

35. Contrary to New York City Suppliers' assertions, the Commission recognized that the May 18, 2011 Amendment, in its totality, strongly supports the assumption that tax abatement will apply to any new peaking unit in NYC. In the May 19, 2011 Order, the Commission stated that "[t]he new law also eliminates the need to consider the UTEP heat rate and other criteria by defining eligible peaking units in such a way as to *mandate the assumption* that tax abatement will apply to any new peaking unit in NYC."[34] New York City Suppliers allege that the 30 percent investment threshold, as well as the 18 hour per start operating criteria, render the May 18, 2011 Amendment generally inapplicable for new generators. New York City Suppliers have provided no evidence to support their claims that no project would qualify for tax abatement because of the 30 percent threshold, including the specific identification of the assessed value of potential power plant sites, whether brownfield or greenfield. As such, we find New York City Suppliers' claim to be without merit. Further, the cost of a new peaking unit, which is defined in the May 18, 2011 Amendment as including "all real property used in connection with the generation of electricity and any facilities used to interconnect the peaking unit with the electric transmission or distribution system," is a requirement

[32] May 19, 2011 Order, 135 FERC ¶ 61,170 at P 43.

[33] 2011 N.Y. Laws Chapter 28, section 1 (May 18, 2011). The purpose of the law is clearly stated in section 1: "for the purpose of making peaking units eligible for benefits, as of right, under the industrial and commercial abatement program."

[34] May 19, 2011 Order, 135 FERC ¶ 61,170 at P 42 (emphasis added).

clearly known up front, thereby enabling developers to make the determination as to whether their project meets the 30 percent taxable assessed value threshold prior to proceeding. The same holds true with the 18 hour per start operating hour requirement. We find, from the preamble, that it is the clear intent of the May 18, 2011 Amendment that as-of-right property tax abatement is to apply only for generators that operate on a peaking basis. We find it is reasonable to conclude that peaking units operate *on average* no more that 18 hours per start (i.e., the peak hours of the day), particularly when reliability needs are specifically excluded as per the May 18, 2011 Amendment. Further, New York City Suppliers fail to support their allegations with factual evidence that "a significant number of new peaking units" would be ineligible for tax abatement on this basis. Accordingly, we find these caveats to be reasonably related to limiting this tax exemption to valid peaking units.

36. As the Commission noted in the May 19, 2011 Order, the May 18, 2011 Amendment states up front that the purpose of the amendment is to "make peaking units eligible for benefits, as of right, under the industrial and commercial abatement program."[35] By not reading beyond the quoted statement from the May 19, 2011 Order taken out of context, New York City Suppliers err in their assertion that the Commission looked no further than the preamble. Nevertheless, the preamble does add weight to our conclusion that tax abatement will most likely apply to any new peaking unit in NYC. As noted above, and in the May 19, 2011 Order, the May 18, 2011 Amendment eliminated the subjective reliability and heat rate criteria that would complicate upfront due diligence on the part of the developer, as well as expanded the scope of qualifying units beyond the LMS 100—changes that resulted in the Commission granting rehearing on this issue. Therefore, we deny rehearing.

D. Ravenswood's Request for Rehearing

1. Mootness of the Suspension of the November 30, 2010 Rates

37. Ravenswood argues that the finding in the May 19, 2011 Order that the suspension period is moot and irrelevant is arbitrary and capricious and without rational basis because it is an unexplained departure from precedent set in the January 28, 2011 Order without a reasoned explanation, and it will upset expectations regarding revenue adequacy of the ICAP demand curves. According to Ravenswood, the March 9, 2011 Order stated that the existing 2010/2011 rates would remain in effect during the suspension period until superseded but did not say that the existing 2010/2011 rates would supersede rates proposed in the November 30, 2010 Filing. Ravenswood states that it was not until the May 19, 2011 Order that the Commission concluded that the existing 2010/2011 rates superseded rates proposed in the November 30, 2010 Filing,

[35] May 19, 2011 Order, 135 FERC ¶ 61,170 at P 42.

rendered the suspension period moot, and rendered the June 28, 2011 date irrelevant. Ravenswood asserts that no support for this conclusion can be found in the January, March, or April Orders in this proceeding or in the NYISO Services Tariff and, therefore, it should be reversed.

38. Ravenswood argues that the May 19, 2011 Order could result in further unnecessary deferral of otherwise just and reasonable rates and instead allow unjust and unreasonable rates to remain in effect beyond June 28, 2011, and potentially even beyond November 1, 2011.

Commission Determination

39. Ravenswood first takes issue with the Commission's conclusion in the May 19, 2011 Order that the suspension period set by the January 28, 2011 Order is moot and irrelevant and that the rates were superseded. Ravenswood's request for rehearing on these grounds suggests that the tariff record NYISO filed on March 28, 2011, which was conditionally accepted by the April 4, 2011 Order, was ordered by the Commission[36] and has no effect as it had to be superseded by the November 30, 2010 filed rates at the end of the suspension period—the reverse of what the Commission held. Ravenswood is incorrect. NYISO was not ordered to make such filing and did so of its own volition only to prevent a potential gap in rates from occurring starting May 1, 2011, due to the suspension of its November 30, 2010 Filing. The March 28, 2011 Filing was not, as Ravenswood appears to believe, a filing to comply with a condition of acceptance of the proposed November 30, 2010 rates. Thus, as the Commission explained in the May 19, 2011 Order, the demand curve rates in that tariff record superseded the proposed November 30, 2010 rates and further superseding compliance rates would later become effective if and at such time as ordered by the Commission—a proposed effective date fully within the discretion of the filing entity to request. Like any superseded rates, the November 30, 2010 rates cannot become effective once they are superseded and can have no more effect than if they were withdrawn by the filing entity. Thus, with the November 30, 2010 rates having been superseded by rates filed by NYISO without ever having become effective, any statements in the January 28, 2011 Order regarding the suspension or effectiveness of such superseded rates are moot.

40. In addition, Ravenswood's claim that such ruling by the May 19, 2011 Order was "unexpected"[37] does not render the ruling in error. The Commission was clear in the January 28, 2011 Order that the rates were suspended until the earlier of five months or a further Commission order. Likewise, the Commission was clear in the April 4, 2011

[36] Ravenswood June 20, 2011 Rehearing Request at 6.

[37] *Id*. at 10.

Order that, consistent with the January 28, 2011 Order, it accepted the 2010/2011 tariff record to be in effect from May 1, 2011. Accordingly we reject Ravenswood's claim that the May 19, 2011 Order is a departure from the Commission's findings in the January 28, 2011 Order. Further, the April 4, 2011 Order stated "parties were on notice with the issuance of the January 28, 2011 Order and the March 9, 2011 Order that NYISO's current demand curve rates could remain in effect after April 30, 2011, without escalation, until a date set by further Commission Order, if the Commission does not act before May 1, 2011, to place revised demand curve rates into effect on that date."[38]

2. Failure to Object to Extension of Suspension Period for Accepted Rates Beyond Five Months

41. Ravenswood argues that the Commission erred in asserting that Ravenswood failed to seek rehearing of the January 28, 2011 Order on the basis that the Commission has no authority to extend the suspension period of an accepted rate beyond five months. Ravenswood argues that, on rehearing of the January 28, 2011 Order, it asserted that the Commission's statement that NYISO can defer implementation of the rates it filed gives NYISO excessive discretion, resulting in unnecessary market uncertainty. Ravenswood asserts that Commission orders and the Services Tariff require an update of the demand curve rates every three years and any delay in implementing such rates must be justified. It asserts that throughout this entire proceeding it has voiced concerns over unnecessary delays in implementing just and reasonable rates, which rates could theoretically be delayed beyond November 1, 2011.

Commission Determination

42. We deny Ravenswood's request for rehearing on this issue, in part, for the same reasons as discussed above; i.e., its claims are moot because the original November 30, 2010 Filing has been superseded. Further, the FPA gives the power to the filing entity to seek any effective date it wishes. Our regulations only require special Commission permission to authorize proposed rates that are to take effect more than 120 days in the future.[39] Thus, contrary to Ravenswood, NYISO does have the discretion to request a deferred effective date which NYISO did by proposing that the interim rates are to remain in effect until a date determined by Commission action on further compliance. NYISO also requested a "flexible implementation date" as part of its subsequent compliance filing.[40] Further, as the Commission observed in the May 19, 2011 Order,

[38] April 4, 2010 Order, 135 FERC ¶ 61,002 at P 10.

[39] 18 C.F.R. § 35.3(a)(1) (2011).

[40] NYISO March 29, 2011 Filing at 13 in Docket No. ER11-2224-004.

Commission action on compliance can occur at any time without conflict with section 205 suspension power.[41]

3. Escalation of Existing Rates Based

43. Ravenswood argues that it was contrary to precedent not to escalate the then-existing 2010/2011 demand curve rates by the 7.8 percent escalation factor approved for those rates as part of the prior demand curve reset in 2008 because those rates are only just and reasonable for that period. Ravenswood also argues that its request to escalate existing 2010/2011 rates based on the existing demand curve rate design principles was rejected in contradiction of existing precedent. Ravenswood states that the January 28, 2011 Order specifically determined that the existing 2010/2011 rates should not be used for the upcoming three-year rate period. Ravenswood contends that excluding the escalation factor results in piecemeal implementation of a rate and that the Commission should reverse its decision and apply a 7.8 percent escalation factor to the existing 2010/2011 rates until they are replaced with the compliance rates.

Commission Determination

44. The Commission addressed and rejected identical arguments in the March 9, 2011 Order as well as on rehearing in the May 19, 2011 Order;[42] and, for the same reasons, we reject Ravenswood's arguments again here.

4. Extension of Suspension Period

45. Ravenswood argues that, viewed in the extreme, the May 19, 2011 Order provides for suspension of the accepted November 30, 2010 Filing rates not just beyond the five-month maximum, but potentially, beyond November 1, 2011, depending on the compliance rate implementation schedule and provides no rationale. Ravenswood adds that FPA section 824d(e) mandates the Commission provide a statement of reasons for suspension of a rate schedule,[43] but argues that even had the Commission provided a rationale, it is without authority to grant such a suspension. Ravenswood states that in its January 28, 2011 Order, the Commission accepted the proposed revisions to the tariff, subject to modifications, and suspended the rates for five months. Ravenswood states that rehearing of that ruling has not been granted. Ravenswood asserts that on June 29,

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[41] May 19, 2011 Order, 135 FERC ¶ 61,170 at P 105.

[42] March 9, 2011 Order, 134 FERC ¶ 61,178 at P 16, and May 19, 2011 Order, 135 FERC ¶ 61,170 at P 106.

[43] Ravenswood June 20, 2011 Request for Rehearing at 16 (citing *Connecticut Light & Power Co. v. FERC*, 627 F.2d 467 (D.C. Cir. 1980)).

2011, either the proposed rates, as modified by the January 28, 2011 Order must be placed into effect, or the accepted November 30, 2010 Filing rates must be placed into effect.

Commission Determination

46. Ravenswood essentially makes the same arguments here that it made as a member of New York City Suppliers in their request for rehearing of the April 4, 2011 Order discussed above. For the same reasons as discussed above, we reject Ravenswood's arguments.

5. Waiver

47. Ravenswood states that the record of this case lacks a clear request from NYISO to waive the June 28, 2011 implementation of the accepted but suspended November 30, 2010 Filing rate. Further, it asserts, there is no justification for such a waiver in any filing in the record. Ravenswood asserts that, accordingly, the Commission must reverse its determination that implementation of the November 30, 2010 Filing rate was waived such that the November 30, 2010 Filing rate and suspension period are moot and no longer relevant.

48. Ravenswood further asserts that once a tariff rate is accepted with a maximum suspension period, a waiver of such tariff may only be granted after balancing the interests of investors and consumers. Ravenswood contends that the May 19, 2011 Order violates the requirements of the FPA because in light of the actual increases in costs approved by the Commission, there was no balancing of investor interests with consumer interests and the resulting rates are unjust, unreasonable, and unduly discriminatory.

Commission Determination

49. In effect, Ravenswood's argument is simply an alternate way of asserting that the March 28, 2011 rate filing conditionally accepted by the April 4, 2011 Order did not supersede the original proposed demand curves by rates effective May 1, 2011, as the Commission stated in the May 19, 2011 Order.[44] Had NYISO not filed revisions to its Services Tariff, or had the Commission not accepted them, then the suspension of the November 30, 2010 Filing's proposed rates would have a legal impact. However, as the Commission stated in the May 19, 2011 Order, the April 4, 2011 Order accepted rates that superseded the November 30, 2010 filed rates. Moreover, NYISO clearly requested a deferred implementation date in its filing, which we have pointed out is within its right to request. That action does not, however, constitute a waiver of the suspension period as that is a statutory matter. Accordingly, waiver is not even relevant. Therefore,

[44] May 19, 2011 Order, 135 FERC ¶ 61,170 at P 104.

Ravenswood is incorrect in its statement that the Commission in the May 19, 2011 Order waived implementation of the November 30, 2010 Filing rate.

50. Accordingly, we reject Ravenswood's arguments with respect to waiver and we deny rehearing on this issue.

The Commission orders:

The requests for rehearing of the April 4, 2011 Order and the May 19, 2011 Order are hereby denied as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.