

134 FERC ¶ 61,178
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. ER11-2224-001

ORDER ON REQUESTS FOR EXPEDITED CLARIFICATION AND REHEARING

(Issued March 9, 2011)

1. In this order, the Commission denies requests for expedited clarification and rehearing of its January 28, 2011 order.¹ In the January 28, 2011 Order the Commission accepted and suspended for the earlier of five months or a date set by subsequent Commission order the New York Independent System Operator Inc.'s (NYISO) proposed revisions to its Market Administration and Control Area Services Tariff (Services Tariff) to update the Installed Capacity (ICAP) demand curves for capability years 2011/2012, 2012/2013, and 2013/2014.

Background

2. NYISO administers an ICAP market which is centered on administratively-determined demand curves for each of three ICAP zones in the New York Control Area (NYCA): New York City (NYC), Long Island (LI), and rest-of state (ROS).² Section 5.14.1.2 of the Services Tariff requires NYISO to perform a triennial review to determine whether the parameters for the ICAP demand curves should be adjusted. On November 30, 2010, NYISO filed proposed revisions to its Services Tariff that implement revised ICAP demand curves for capability years 2011/2012, 2012/2013, and 2013/2014, with a proposed effective date of January 28, 2011. Specifically, the proposed revised demand

¹ *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,058 (2011) (January 28, 2011 Order); Errata Notice issued February 17, 2011. The Commission will act on any other requests for rehearing of the January 28, 2011 Order by separate order.

² The NYC and LI capacity zones are defined as Localities under section 2.12 of the Services Tariff. As defined by section 2.18 of the Services Tariff, rest-of-state refers to the capacity zone within NYCA and located outside of the two defined Localities.

curves are reflected in proposed revised ICAP rates in section 5.14.1.2 of the Services Tariff. The Commission reviewed the parameters for NYISO's demand curves and found that NYISO's proposal had not been shown to be just and reasonable. The Commission accepted the proposed revised rates and suspended their effectiveness for five months, the maximum period allowed by law, to become effective the earlier of June 28, 2011, or a date set by a subsequent Commission order in this proceeding, subject to the conditions set forth in the order to refile the rates to reflect the directives of the January 28, 2011 Order. The Commission required NYISO to submit a compliance filing reflecting the required changes within 60 days of the order, i.e., by March 29, 2011. However, due to the difficulties of implementing the new demand curves in mid-season, the Commission directed NYISO to indicate in its compliance filing when it anticipates implementing the new demand curves, but no later than November 1, 2011, the date of the start of the sixmonth winter capability period. Accordingly, the Commission stated that "the currently effective demand curves will remain in effect until superseded."³

3. On February 9, 2011, NYISO filed a request for expedited clarification with respect to the rate in effect during the suspension period. On February 7, 2011, TC Ravenswood, LLC (Ravenswood) filed a request for emergency rehearing with respect to the maximum suspension period included in the January 28, 2011 Order and the rate in effect during that period. On February 14, 2011, Independent Power Producers of New York, Inc. (IPPNY) filed a request for limited expedited rehearing which also addressed the rate in effect during the suspension period.

4. The New York State Consumer Protection Board, Multiple Intervenors,⁴ and the City of New York (collectively, Consumer Parties); IPPNY; and Ravenswood filed answers opposing NYISO's request for clarification.

NYISO's Request for Clarification

5. NYISO states that it seeks expedited clarification to confirm that it should apply the 1.7 percent escalation factor, which the January 28, 2011 Order found to be just and reasonable, to the currently effective ICAP demand curves, in order to establish the ICAP demand curves that will be effective for the capability period beginning May 1, 2011. NYISO states that the January 28, 2011 Order requires that "the currently effective demand curves. . . remain in effect until superseded."⁵ NYISO further states that the

³ January 28, 2011 Order, 134 FERC ¶ 61,058 at P 168.

⁴ Multiple Intervenors is an unincorporated association of approximately 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York, primarily in the rest-of-state capacity region.

⁵ *Id.*

currently effective demand curves were derived based on the 2008/2009 ICAP demand curves and the use of an escalation factor of 7.8 percent. NYISO asserts that the January 28, 2011 Order did not direct NYISO to escalate the “currently effective ICAP demand curves to reflect inflation but, given that the ICAP demand curves are established for an initial year and are escalated by a Commission-approved escalation factor for the later years, NYISO understands the January 28, 2011 Order to intend that the “currently effective” ICAP Demand Curves be escalated for use during the summer 2011 capability period. NYISO contends that the most reasonable course is to apply the 1.7 percent escalation factor to establish the demand curves that will be effective for the summer 2011 capability period, unless and until the Commission determines an effective date for new ICAP demand curves.

6. NYISO requests expedited action by March 9, 2011, and states that this would allow NYISO to calculate and post ICAP demand curve values far enough in advance of its obligation to compute summer capability period UCAP values and for ICAP auction deadlines. In addition, according to NYISO it would allow the values to be available to NYISO’s market participants sufficiently in advance of those auctions.

Answers to NYISO’s Request

7. Consumer Parties argue that the plain language of the January 28, 2011 Order was clear and unambiguous, requiring NYISO to maintain the currently-effective ICAP demand curves, without modification or adjustment for the duration of the limited suspension period. They add that the Commission’s decision to not direct escalation will not result in any reliability concerns or detrimental impacts to incenting the construction of new capacity supply resources, when needed to maintain system reliability. Consumer Parties state that if, however, the Commission determines that it intended that the ICAP demand curves should be maintained subject to application of some escalation factor, then the 1.7 percent escalation factor proposed by NYISO is reasonable and appropriate.

8. IPPNY and Ravenswood agree with NYISO that the ICAP demand curves should be escalated but argue that the 7.8 percent escalation rate, the same rate that was applied to the 2010 summer capability period demand curves, should be used. They argue that the 7.8 percent escalation factor is an essential part of the Commission-approved rates, and cannot be separated from the currently effective demand curves. IPPNY contends that NYISO’s proposal seeks “to cherry-pick a different escalation factor from a multi-component rate package” and the Commission has proscribed a piecemeal approach to a multi-component rate.⁶

⁶ IPPNY February 14, 2011 Answer at 7 (citing *Indep. Power Producers of New York, Inc.*, 125 FERC ¶ 61,311, at P 33 (2008)).

9. Ravenswood also argues that NYISO is not seeking a clarification, but rather, a significant change to the January 28, 2011 Order and thus, NYISO is actually requesting a rehearing with no substantive support.

Requests for Rehearing

10. Ravenswood requests that the Commission grant emergency rehearing with respect to the maximum suspension period specified in the January 28, 2011 Order. Ravenswood contends that the proposed NYC demand curve rate is understated and, as such, imposing the maximum suspension period and maintaining the current NYC demand curve rate results in harm and inequities in the competitive market and is in error. Ravenswood requests that the Commission reduce the suspension period to a nominal period, allow the as-filed rate to go into effect, ultimately subject to being replaced with a higher rate ordered by the Commission. Ravenswood requests that the Commission grant rehearing and order that, in the event NYISO's compliance filing does not become effective and implemented prior to May 1, 2011, the suspension period for NYISO's proposed NYC ICAP demand curve for the 2011/2012 capability year will be for a nominal period such that it will be made effective prior to the start of the summer period, i.e., May 1, 2011.

11. Ravenswood contends that the Commission erred in failing to provide an explanation as to why the maximum suspension period was being imposed or how such a suspension would not have harsh or inequitable results in this case. Ravenswood adds that the cases cited by the Commission⁷ are distinguishable from the case at hand. According to Ravenswood, in both *Boston Edison* and *Great Lakes*, the Commission held that it was unable to conclude that the proposed rate increases were just and reasonable. Ravenswood asserts that the implication of those orders was that the rate the Commission ultimately would approve might be lower than the as-filed proposed rates and that the Commission suspended each rate for the maximum five-month period with the goal of protecting consumers from excessive rates and charges. Ravenswood further asserts that *Boston Edison*, *Great Lakes*, and *West Texas* support the application of the maximum suspension period in cases where the Commission, upon preliminary review, believes a proposed rate increase could be "substantially excessive," and that rationale does not apply in this case. Rather, according to Ravenswood, the flaws that the Commission identified in NYISO's proposal operated to make the proposed rates too low and the Commission-directed changes will increase those rates.

⁷ *Boston Edison Co.*, 12 FERC ¶ 61,211 (1980) (*Boston Edison*); *Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (*Great Lakes*); *West Texas Utilities Co.*, 18 FERC ¶ 61,189 (1982) (*West Texas*).

12. Ravenswood asserts that the purpose of a five-month suspension period is to prevent unjust and unreasonable rates from becoming effective due to statutory time constraints. Ravenswood further asserts that the Commission refrains from ordering such maximum suspension where proposed rates are not substantially excessive and its long-standing policy is to impose shorter suspension periods when the maximum period may lead to harsh and inequitable results.⁸ Ravenswood contends that the Commission imposes a nominal suspension period for the same reason it imposes a maximum suspension period, i.e., to provide maximum protection from unjust and unreasonable rates.

13. Ravenswood states that here, the effect of the five-month suspension is to indirectly provide approval of a rate that is well below a just and reasonable rate as determined by the Commission in the January 28, 2011 Order. Ravenswood argues that use of the outdated NYC demand curve rate will cause undue harm to the competitive capacity markets and all NYC suppliers because it will result in artificially suppressed capacity prices for the New York City market. According to Ravenswood, a five-month suspension exacerbates, rather than mitigates, the harm produced by the rate the Commission found may be unjust and unreasonable, leaving in effect a rate that is less than the rate the Commission effectively found was unreasonably low.

14. Similar to Ravenswood, IPPNY argues that the Commission erred in its January 28, 2011 Order by requiring the 2010/2011 NYC demand curve rate to be effective during the suspension period because Commission precedent demands that it allow the rate that is closest to the just and reasonable rate to go into effect during the suspension period. IPPNY states that the Commission found that the filed NYC demand curve rate was significantly below the just and reasonable rate, and the January 28, 2011 Order will cause the filed NYC demand curve rate to increase. IPPNY states that in situations where the Commission determines the proposed rate change, which is greater than the current rate, is below the level that is just and reasonable, equity requires that at a minimum the proposed filed rate become effective no later than the requested date rather than leaving the current lower rate in place as a result of suspension. IPPNY requests that the Commission grant rehearing and suspend the filed rates to be effective April 22, 2011, for the May 2011 ICAP Spot Market Auction if the revised NYC demand curves filed in accordance with the January 28, 2011 Order are not yet approved, effective and implemented by that time.

⁸ Ravenswood February 7, 2011 Request for Rehearing at 7 (citing *Columbia Gas Transmission Corp.*, 82 FERC ¶ 61,301, at 62,200 (1998)).

Commission Determination

15. We deny the requests for clarification and rehearing. As a preliminary matter, we will treat NYISO's pleading as a request for clarification. However, we note that, even if we were to treat it as a request for rehearing, we would deny NYISO's request.

16. Regarding NYISO's request for clarification, we find the language in the January 28, 2011 Order to be clear and unambiguous. In the January 28, 2011 Order we found NYISO's proposed rate may be unjust and unreasonable and, thus, we accepted and suspended the effectiveness of the proposed rates for the earlier of the maximum five month suspension period (ending June 28, 2011) or a date set by subsequent Commission order, subject to condition of refiling the rates to comply with the directives of the order, but allowing for NYISO to defer implementation of the modified rates until as late as November 1, 2011. Accordingly, consistent with our suspension of the proposed demand curves and rates, we stated that "the currently effective demand curves will remain in effect until superseded."⁹ This language does not provide for or authorize any escalation or adjustment of the current demand curves rates during the suspension period; therefore the current 2010/2011 demand curve rates are to remain in effect without adjustment during the suspension period until superseded by rates that comply with the January 28, 2011 Order. Moreover, even if we were to deem NYISO's request as seeking rehearing to modify the January 28, 2011 Order to provide for an interim rate during the suspension period, we would deny that request.¹⁰ Commission precedent does not provide for piecemeal review of a single component of a filed rate.¹¹ That is, if the Commission suspends a proposed rate for more than a nominal period, the Commission cannot put one element used to calculate the proposed rate into effect during the suspension period by establishing an interim rate based on a recalculation of the existing rate without first meeting its obligation under section 206 to find that the existing rate is not just and

⁹ January 28, 2011 Order, 134 FERC ¶ 61,058 at P 168.

¹⁰ We note that, by requesting a January 28, 2011 effective date for its proposed ICAP rates, NYISO would have replaced rates found just and reasonable and made effective by the last demand curves rest proceeding that section 5.14.2.1 of the Services Tariff provides are to be effective through April 30, 2011.

¹¹ See *Houlton Water Co. v. Maine Public Service Co.*, 55 FERC ¶ 61,037, at 61,110 (1991). While the Commission has approved interim rate proposals pending final approval of settlement agreements, we have not done so with respect to alternate rate proposals for the five-month suspension period. *Black Marlin Pipeline Co.*, 117 FERC ¶ 61,253, at P 21 (2006).

reasonable and that the replacement interim rate is just and reasonable. NYISO has not made the requisite section 205 showing to implement such a Commission-imposed rate.¹²

17. Turning to the requests for rehearing of Ravenswood and IPPNY, we find that the Commission's suspension ruling was consistent with Commission precedent¹³ and is fully supported as discussed below.¹⁴ Ravenswood and IPPNY argue that the Commission erred in suspending the proposed rates such that increased rates (whether NYISO's proposed rates or the rates as modified to comply with the January 28, 2011 Order) might not take effect in time for the May 2011 ICAP Spot Market Auction. IPPNY notes that NYISO intended for the originally proposed demand curve rates to take effect for the 2011/2012 capability period that begins on May 1, 2011. Ravenswood argues that the Commission typically orders a shorter suspension period to avoid harsh and inequitable results and any delay in implementing the as-filed rate in time for the May 2011 spot NYC auctions will lead to such results. However, Ravenswood's only support for a shortened suspension period is its observation that the demand curve rates will increase following NYISO's compliance with the January 28, 2011 Order, and the existing rate is lower than both the as-filed rate and the rate as modified by the Commission's January 28, 2011 Order. Ravenswood's observation does not show that permitting the existing rates to remain in effect until replaced by rates ordered by the Commission is harsh and inequitable as neither Ravenswood nor IPPNY has shown that the existing rates are unjust and unreasonable. In addition, the ICAP demand curve rates are used in monthly ICAP auctions and if the rates as modified to comply with the January 28, 2011 Order are not in effect in time for the May auction, then they can be used for the next monthly auction. However, it is premature at this time to assume that the rates as modified in compliance with the January 28, 2011 Order will not be accepted in a time frame as requested, provided that NYISO fully complies with the order as directed by March 29,

¹² Nor has NYISO properly filed to implement such an interim rate if we treat its request as if made pursuant to section 205 of the FPA.

¹³ *West Texas*, cited by Ravenswood, allows for extraordinary circumstances and gives the Commission flexibility to take these into account. *West Texas*, 18 FERC ¶ 61,189 at 61,375. We find that extraordinary circumstances exist in this case because of the unique nature and purpose of the rates filed, in contrast to the typical rates at issue in cases where we have applied *West Texas*.

¹⁴ The courts review suspension decisions to determine whether the reasons given are "in some way related to FERC's interim or ultimate inquiries." *Exxon Pipeline Co. v. United States*, 725 F.2d 1467, 1473 (D.C. Cir. 1984). We believe we have met this standard here.

2011. We remind NYISO that it is not required to wait until the March 29, 2011 deadline to make its compliance filing.

18. In the January 28, 2011 Order, we found that NYISO's proposed demand curves and resulting ICAP rates reflected a number of improperly calculated components and, therefore, directed to NYISO to refile to correct the rates.¹⁵ Of importance, certain of those directives permit or require NYISO to propose estimates of certain costs¹⁶ or to further support a cost component¹⁷ and, therefore, the exact revised ICAP prices that comply with the January 28, 2011 Order cannot be predicted with any certainty at this juncture. Because the ICAP demand curves and rates are used in monthly ICAP auctions, market participants should have the actual re-calculated rates before them when they bid in the ICAP auctions. Accordingly, it was reasonable to suspend the proposed rates until the *earlier of* a date set by the Commission in an order accepting revised rates that comply with the January 28, 2011 Order, or five months. And, as reflected in the January 28, 2011 Order, NYISO may choose to defer the effective date even further if it does not wish to implement the revised rates during the summer Capability Period. Accordingly, our decision to suspend the proposed ICAP rates was reasonable, and we deny the requests for clarification and rehearing.

The Commission orders:

NYISO's request for clarification and the requests for rehearing of Ravenswood and IPPNY are hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁵ See listing of the Commission's rulings in Ravenswood's Request for Rehearing at 10-12.

¹⁶ See January 28, 2011 Order, 134 FERC ¶ 61,058 at P 53, 114.

¹⁷ See *id.* P 140.