

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: <http://www.dps.state.ny.us>

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May 30, 2003

Honorable Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. ER03-836-000 - New York Independent
System Operator, Inc.

Dear Secretary Salas:

For filing, please find the Notice of Intervention and Motion for Clarification of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler
Assistant Counsel

Attachment

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent) Docket No. ER03-836-000
System Operator, Inc.)

**NOTICE OF INTERVENTION AND MOTION FOR CLARIFICATION
OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION**

Pursuant to the Notice of Filing issued May 14, 2003, and Rules 212 and 214 of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure, the New York State Public Service Commission (NYPSC) hereby submits its Notice of Intervention and Motion for Clarification in the above-captioned proceeding.

Copies of all correspondence and pleadings should be addressed to:

Dawn Jablonski Ryman, Esq.
David G. Drexler, Esq.
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223
david_drexler@dps.state.ny.us

Mark Reeder
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223
mark_reeder@dps.state.ny.us

INTRODUCTION AND SUMMARY

The last time the 10-Minute Non-Synchronized Reserves (10-minute NSR) (also referred to as non-spinning reserves) market operated without a bid cap was in 2000, when the market had only three major suppliers, but a significant amount of excess

supply. Under this scenario, market prices for 10-minute NSR rose significantly to uncompetitive levels, signaling the need to impose market mitigation measures in the form of a \$2.52/MWh bid cap. The lesson learned from 2000 is clear; any market with so few competitors must be watched closely to protect consumers against uncompetitive outcomes in which price greatly exceeds the underlying cost of providing the service.

On May 9, 2003, the New York Independent System Operator, Inc. (NYISO) submitted revisions to its Market Administration and Control Area Services Tariff (Services Tariff) to modify the current Market Mitigation Measures for 10-minute NSR. The NYISO's filing notes several improvements in competitive conditions since the bid cap was imposed in 2000.¹ Accordingly, the NYISO proposed to remove the current \$2.52/MWh bid cap on 10-minute NSR, and establish \$2.52 as the upper limit on the

¹ These changes in competitive conditions include: (1) the modeling of the Blenheim-Gilboa pumped storage plant in the NYISO's market software has been changed to allow it to offer larger quantities of 10-minute NSR; (2) the NYISO's Market Mitigation Measures now allow the NYISO to mitigate economic withholding by restating the offer of a withheld resource as a default bid based on the applicable reference level; (3) a reserve sharing agreement with New England has allowed the NYISO to reduce its typical NSR purchases in eastern New York from 1,200 MW to 1,000 MW; and (4) the quantity of 10-minute NSR available exceeds the quantity required by a greater margin than it did in 2000, and 10-minute NSR prices have generally cleared in the range of \$1.10 to \$1.80.

reference levels that the NYISO uses in evaluating the competitiveness of future 10-minute NSR bids. In addition, the NYISO committed to undertaking various safeguards during the first year after the bid cap is removed to prevent an abuse of market power. These safeguards include conducting an assessment of the performance of the 10-minute NSR market 12 months after the bid cap is removed and reserving 10-minute NSR prices (referred to as "flagged prices") for a determination of whether they may reflect a significant abuse of market power and thus require adjustment. In the event the NYISO flags 10-minute NSR prices, it will determine whether to seek the reimposition of a bid cap or some other market power mitigation measure for 10-minute NSR. The NYISO proposes to implement these safeguards through an amendment to the Market Mitigation Measures, which would be in effect for a period of 12 months after the requested effective date of July 8, 2003.

Lifting the \$2.52/MWh bid cap on 10-minute NSR represents a step toward greater reliance on market forces rather than administrative intervention. Despite the ongoing risks of the 10-minute NSR market behaving anticompetitively, the NYPSC supports lifting the bid cap if accompanied by vigorous monitoring and mitigation that the NYISO has committed to doing. However, the Commission should clarify that the new tariff provision in the NYISO's filing does not take precedence over

existing Market Mitigation Measures, which require the NYISO to identify anticompetitive behavior and to rectify those behaviors through a mandatory Federal Power Act (FPA) §205 filing to impose appropriate mitigation measures. The NYISO has sufficient information to use in identifying anticompetitive behavior. Moreover, the Commission should recognize the NYISO's commitment to make reports more frequently than 12 months after the bid cap is removed as further support for lifting the 10-minute NSR bid cap.

DISCUSSION

I. The NYISO's Proposed New Tariff Provision Should Not Take Precedence Over Provisions That Allow The NYISO To Address Anticompetitive Behavior

The NYISO proposed to add a new §5.4 to the Market Mitigation Measures, which states that:

(i) if any 10-Minute Non-Synchronized Reserve prices are determined by the NYISO, with the concurrence of the NYISO Market Advisor, to reflect a significant abuse of market power, the NYISO shall so notify the Market Parties within 24 hours of the initial posting of such prices (such prices being hereinafter referred to as "flagged prices"); (ii) the NYISO shall determine, with the concurrence of the Market Advisor, within five business days of such notification whether a filing seeking the reimposition of a bid cap or some other market power mitigation measure for 10-Minute Non-Synchronized Reserves is warranted, and if such a filing is not warranted the NYISO shall notify the Market Parties that the flagged prices are final, subject to price correction procedures for other reasons if applicable; and (iii) if the NYISO determines, with the concurrence of the Market Advisor, that a

filing seeking reimposition of a bid cap or some other market power mitigation measure for 10-Minute Non-Synchronized Reserves is appropriate, such filing will request authorization from the Commission to redetermine the flagged prices in accordance with such bid cap or other mitigation measure as may be approved by the Commission.

Section 5.4 allows the NYISO to reserve prices (i.e., "flagging") that may represent an abuse of market power and to adjust those prices in accordance with the mitigation measures that the Commission approves. However §5.4 is ambiguous regarding the standard the NYISO will use in determining whether to seek reimposition of mitigation measures for 10-minute NSR. Section 5.4 appears to only allow such reimposition where the NYISO determines there has been a "significant abuse of market power." This provision is too limited, provides too much discretion, and is inconsistent with the intent and language of the NYISO's Market Mitigation Measures.

For instance, section 3.2.3 of the NYISO's Market Mitigation Measures provides that "the NYISO shall make a filing under §205 with the Commission seeking authorization to apply an appropriate mitigation measure to conduct that [is] deemed to have an effect on market prices. . .that is significant." A significant effect on market prices is defined as "an increase of [greater than] 100 percent in the hourly day-ahead or real-time energy LBMP at any location, or of any other price in a New York Electric Market administered by the NYISO."

Section 3.2.3 clearly defines "conduct that departs significantly from the conduct that would be expected under competitive market conditions" as the standard the NYISO will use in making a §205 filing to impose mitigation measures. Accordingly, the Commission should clarify that the NYISO is expected to make a filing to reimpose mitigation measures under §3.2.3 or any other relevant Tariff provision when the thresholds contained therein are met. The new §5.4 of the Market Mitigation Measures should be construed to only apply to the standard for flagging prices.

The NYISO has sufficient information for determining whether anticompetitive behavior is occurring, and thus whether mitigation measures should be reimposed. For example, there is evidence indicating that the marginal costs of supplying 10-minute NSR are below \$2.52/MWh. This evidence can be used by the NYISO in evaluating the competitiveness of future 10-minute NSR prices under the NYISO's Market Mitigation Measures.

Over the past three years, the bids of suppliers have revealed the marginal costs of providing 10-minute NSR. The vast majority of these bids have been well below \$2.52/MWh.² Assuming that a supplier would not offer to sell at a price

² See NYISO's May 9, 2003 filing, Patton Affidavit (Patton Affidavit) at ¶31 (showing that 71% of the bids during 2002 were below \$2.52/MWh).

below its marginal costs, these bids provide evidence that the marginal cost of providing 10-minute NSR for most generators is well below \$2.52/MWh. This holds true even though there was a bid cap in place. If a supplier's marginal costs of providing 10-minute NSR were equal to or above a \$2.52 bid cap, then its bids would be expected to naturally equal the \$2.52 cap in an attempt to minimize being selected (and having to produce 10-minute NSR at a price below marginal costs) or to maximize the price received if selected (and take a loss on marginal costs above the \$2.52 cap). However, this was not the case for the majority of 10-minute NSR providers.

Given that there are large amounts of excess supply of 10-minute NSR (the NYISO generally purchases 400 to 700 MWs while the capability is between 1,400 to 1,700 MWs),³ along with the evidence that the marginal cost for most suppliers is below \$2.52/MWh, a competitive market can be expected to yield a market clearing price below \$2.52/MWh. In fact, the market has been consistently clearing below \$2.52/MWh for the vast majority of the hours over the past 24 months.⁴

³ Patton Affidavit at ¶22.

⁴ Patton Affidavit at ¶25 (stating that the "10-Minute NSR prices have generally been clearing in the range of \$1.10 to \$1.80 per MW).

Given that average market prices have been \$1.64/MWh over the last 24 months, any future price that averages \$3.28/MWh or higher, on a sustained basis, would represent a doubling of the market price, and thus the need to seriously consider reimposition of mitigation measures for 10-minute NSR.

II. The Commission Should Recognize The NYISO's Commitments To Perform Studies More Frequently Than After 12 Months

The Commission should recognize the NYISO's commitment to conduct reports more frequently than just after one year. Although the NYISO's May 9, 2003 filing did not explicitly state them, the NYISO made several commitments at its March 20, 2003 Management Committee meeting. Among these commitments was an agreement that the NYISO's Market Advisor will conduct two reports after lifting the bid cap (one report three months after and one report six months after). When and if price spikes occur, additional reports would be provided by the Market Advisor. These reports will assist the NYISO, market participants and FERC in assessing the competitiveness of the 10-minute NSR market. They will also provide a greater degree of certainty that market abuse is not going undetected. A report 12 months after the cap is lifted is too long for market participants to wait to evaluate the performance of the 10-minute NSR market. As such, the Commission should clarify the NYISO's commitments regarding such studies.

CONCLUSION

As discussed above, the Commission should clarify the NYISO's May 9, 2003 filing.

Respectfully submitted,

Dawn Jablonski Ryman
General Counsel

By: David G. Drexler
Assistant Counsel
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

Dated: May 30, 2003
Albany, New York

CERTIFICATE OF SERVICE

I, Jacquelynn Nash, do hereby certify that I will serve on May 30, 2003 the foregoing Notice of Intervention and Motion for Clarification of the Public Service Commission of the State of New York by depositing a copy thereof, first class postage prepaid, in the United States mail, properly addressed to each of the parties of record, indicated on the official service list compiled by the Secretary in this proceeding.

Date: May 30, 2003
Albany, New York

Jacquelynn Nash