

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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October 31, 2001

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

Re: Consolidated Edison Company of New York, Inc.
Docket Nos. EL01-45-001 and ER01-1385-001

Dear Secretary Boergers:

For filing please find the Motion to File Answer and Answer 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) 486-2652.

Very truly yours,

Saul A. Rigberg
Assistant Counsel

Enclosures

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

CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC.) Docket No. EL01-45-001
) Docket No. ER01-1385-001
)

**MOTION TO FILE ANSWER AND ANSWER OF THE PUBLIC SERVICE
COMMISSION OF THE STATE OF NEW YORK ON OPPOSITION TO EXTENSION
OF LOCALIZED MARKET-POWER MITIGATION MEASURES**

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, the Public Service Commission of the State of New York (NYPSC) hereby submits its answer to protests in the above-captioned proceeding. Although Rule 213(a)(2) does not permit replies to answers unless otherwise ordered by the Commission, the Commission has accepted pleadings for good cause, such as when the information will ensure a complete and accurate record, clarify issues or factual disputes, or aid the Commission in its understanding and resolution of the issues raised.¹ Good cause exists to allow this answer because it will

¹ See, e.g., UtiliCorp United Inc. v. City of Harrisonville, Order On Complaints, 95 FERC ¶ 61,054 (2001) (allowing an answer to an answer in order to assist in Commission's understanding and contribute to the resolution of the issues raised); UtiliCorp United Inc., Order Conditionally Authorizing Mergers, 92 FERC ¶ 61,067 (2000)(allowing an answer to an answer that contributes to the Commission's understanding of filing and issues); Southern Indiana Gas and Electric Company, Order Approving Disposition of Jurisdictional Facilities, 89 FERC ¶ 61,288 (1999). ("Although we do not generally permit answers to protests and answers to answers, we will allow them in this case since they have helped to clarify the issues.")

contribute to the development of a complete and accurate record and assist the Commission's understanding and deliberations on this important issue.

On October 5, 2001, Consolidated Edison Company of New York, Inc. (Con Edison) filed a motion to extend for one year the Revised Localized Market-Power Mitigation Measures (Revised LMMs) that were first approved by the Commission on July 20, 2001 to protect against the exercise of market power in New York City's various load pockets.² The Public Service Commission of the State of New York (NYPSC), the New York State Consumer Protection Board (NYSCP), the City of New York (NYC), and the New York State Independent System Operator, Inc. (NYISO) filed comments supporting continuation of the Revised LMMs because they are essential to ensuring that energy prices in New York City are just and reasonable.

Orion Power New York GP, Inc. (Orion), NRG Companies (NRG), KeySpan-Ravenswood, Inc. (Ravenswood), Mirant Companies (Mirant), Independent Power Producers of New York, Inc. (IPPNY), Electric Power Supply Association (EPSA), and the Power Authority of the State of New York (Power Authority) (collectively, Opponents) filed pleadings in opposition to Con

²Consolidated Edison Co. of N.Y., Inc., Order on Rehearing Accepting Revised Market Power Mitigation Measures, as modified, for Filing, 96 FERC ¶ 61,095 (2001)(July 20 Order).

Edison's motion. Most of their arguments were raised previously and have been rejected by the Commission; they do not warrant further consideration unless the Opponents provide evidence in support of their allegations.³ Other arguments, such as the issue of reference prices, should be addressed in consultation with market participants, which can be accomplished on a priority basis while the Revised LMMs remain in effect.

The system and market conditions that convinced the Commission just three months ago to approve the Revised LMMs for New York City, with some of the world's most complex transmission constraints, are basically unchanged.⁴ Moreover, the Commission has consistently approved similar specialized mitigation measures for neighboring control areas in the early stages of their markets' operations; these specialized measures

³ Review of the NYISO's bid and pricing data would show the need for and fairness of the Revised LMMs, belying the Opponents' claims.

⁴ Obviously, however, the events of September 11 have had a deleterious effect on New York City's economy.

have remained in place for three years.⁵ We respectfully urge the Commission to analyze the bid data and billing data in the possession of the NYISO to see for itself how, before the imposition of the Revised LMMs, dramatically high unmitigated bids were used to successfully exert market power.⁶

BACKGROUND

The Revised LMMs approved by the Commission in its July 20 Order closed several gaps in the Original LMMs. The Opponents raise a variety of objections to extension of the Revised LMMs, both procedural and substantive. The overriding substantive theme of the Opponents' filings is that there is little or no market power in New York City and even if there were, the NYISO's general mitigation measures can protect against its exercise. As for procedural arguments, the Opponents fault Con Edison and the NYISO for failing to initiate a market

⁵ See Atl. City Elec. Co., 96 FERC ¶ 61,248 at 61,899 n.50, 61,902, clarified, 86 FERC ¶ 61,310 (1999) (accepting specially designed bid caps "intended to address market-power in load pockets where customers are dependent on must run generators, that often are few in number within the load pocket"); New England Power Pool, 8 FERC ¶ 61,147 at 61,490 (1999) (recognizing that additional, special mitigation measures in NEPOOL are essential to prevent real-time market-power caused by constrained transmission).

⁶ A review of the data would also demonstrate the crucial need for the full implementation of the Revised LMMs in the Real-Time Market.

participant process, as directed by the Commission, to evaluate implementation of the Revised LMMS and how they operate in conjunction with the NYISO's statewide mitigation measures.

The Commission has determined on more than one occasion that due to transmission constraints there are often times when the New York City market is not workably competitive. In approving the Revised LMMS, the Commission stated in the July 20 Order that it had previously agreed with Con Edison in 1998 that "in-City sellers may have market-power when there are transmission and reliability constraints and supply outside of the constrained area cannot compete for the last increment of demand." Significantly, the Commission declared in the July 20 Order that it was "not prepared to state that the conditions that give rise to potential market power in the City cease to exist."

In our recent October 22, 2001 filing in this docket, we explained that there are occasions in the several subpockets in New York City when only three or two, or frequently, just one generation owner controls the units that are available within the subpocket to meet the system's needs. These extreme load pocket market power problems are currently addressed only by the out-of-merit mitigation features of the Revised LMMS. We also explained why the other measures of the Revised LMMS are necessary to ensure just and reasonable rates. The conditions

that gave rise to serious market power problems on July 20, 2001 exist today, requiring prompt and effective action.⁷

I. THE OPPONENTS FAIL TO SUPPORT THEIR CLAIMS THAT THE NEW YORK CITY DAY-AHEAD AND REAL-TIME MARKETS ARE ALWAYS WORKABLY COMPETITIVE.

The Opponents claim that either the RTM or the DAM, or both, are always (or almost always) workably competitive in New York City. In cases where market power may exist, the Opponents assert that the NYISO's generalized statewide measures provide adequate protection. While many theoretical arguments are presented, the Opponents fail to provide any compelling evidence analyzing market concentrations, bid behavior, or price outcomes that would support their claims. In contrast, the previous pleadings of Con Edison and the NYPSC advocating the implementation of the Revised LMMs provided facts to support the request for protection against market power.⁸

⁷ Several parties assert that Con Edison's motion is fatally flawed because the NYISO was unable to implement fully the Revised LMMs and, therefore, the evaluation ordered by the Commission could not take place. The Commission's obligation to ensure just and reasonable prices should not be diverted by the NYISO's committee process, its workload priorities, and the complexity of the modifications and the short window to make any appropriate changes.

⁸ In addition to the NYPSC's October 22, 2001 filing, see Request of Consolidated Edison of New York, Inc. to Revise Localized Market Power Mitigation Measures (March 1, 2001) and Response of Consolidated Edison Company of New York, Inc. to Protests (April 9, 2001).

The Opponents argue that virtual bidding, which is scheduled to be introduced into the NYISO's markets on November 1, will resolve any lingering instances of market power by allowing load serving entities (LSEs) to hedge by underbidding in the DAM. Their claim is incorrect for three reasons. First, the RTM in New York City is not adequately mitigated by the NYISO's generic measures to the point where it can be a safe haven for buyers that seek competitively-priced power.⁹ As long as the RTM in New York City is not workably competitive or adequately mitigated, purchasers in that market will get hurt in the event that the DAM market produces excessive prices.

Second, if LSEs significantly underbid in the DAM, causing the base load units to remain underutilized, these units may not be able to run in real-time while more costly gas turbines may have to be called upon. Third, there is no effective way for loads to hedge against the excessive uplift charges that would result from market power abuse of unmitigated out-of-merit units

⁹ As we stated in our October 22, 2001 filing, given that the Automated Mitigation Procedure (AMP) does not apply to the RTM, the NYISO's generic mitigation measures often contain a lag between observation of conditions that require real-time mitigation and commencement of mitigation. During this lag period, extremely high, uncompetitive prices can persist. Furthermore, the NYISO's generic measures contain liberal thresholds that keep them from triggering, except for severe instances of market power abuse. Such an approach is not acceptable for the constrained New York City market in which the lack of sufficient competition is a regularly occurring problem.

in the RTM.¹⁰ The Revised LMMs, therefore, are essential to ensure just and reasonable prices in transmission-constrained situations where only a few generation owners are supplying energy to the New York City load pockets.

II. THE REVISED LLMS SHOULD REMAIN IN PLACE EVEN IF THE REFERENCE PRICE LEVELS NEED TO BE EVALUATED.

Opponents assert that the reference prices used in conjunction with the Revised LMMs do not allow for them to recover their operating costs. Several also argue that instead of one set of reference prices for the Revised LMMs and a second set for the NYISO's statewide measures, generators should have only one set of reference prices. The NYPSC agrees that these issues should be discussed by the NYISO market participants.

While generators must be adequately compensated, with incentives sufficient to ensure that new generation is built, the oft-repeated allegation that the energy reference prices used in the RTM mitigation do not cover a generator's costs and

¹⁰ An LSE can hedge its DAM energy costs through bilateral purchases or Contracts For Differences, protecting it (at least for the duration of the contract) from DAM energy price increases. However, LSEs generally must pay for uplift because these costs are not in the contracts. Shifting costs from the DAM to uplift thus hurts the hedged LSEs because they pay for the higher uplift costs while receiving no benefits from the lower DAM energy prices. In addition, hedges are not a cure-all for lack of a workably competitive market because inflated RTM prices lead to higher DAM prices, which lead to higher contract prices.

therefore, should be raised, must be supported by evidence. The Opponents, however, have presented no support for their position.

The reference prices used in the Revised LMMs were based on formulas known to the new owners of Con Edison's generation before they submitted their offers to buy the plants. Those formulas were cost-based, reflecting the actual characteristics of each unit. Thus, the new owners made their decisions to bid on the plants taking into account their reference prices. To now change those prices would result in a certain windfall to these generators.

Further, the generators have not established that they are not covering their costs. These owners have access to their own costs and revenue, but have failed to provide any factual showing. We are willing to work with the generators and the NYISO to review and evaluate reference prices but the Commission should not delay continuation of the Revised LMMs while waiting for the generators to put forth the facts.

The Opponents place special emphasis on their concern that the fuel cost part of the reference price used in the RTM comes from a previous day and thus does not reflect costs of purchasing fuel on the day service is provided. However, the reference prices used in real-time contain a 10 percent adder on

top of the DAM reference prices. This adder was proposed specifically "to assure that the reference price covers all variable costs, which may be higher when a unit is given short notice..."¹¹ The Opponents have presented no information to show that the 10 percent adder is inadequate.

The Opponents further urge that the reference prices developed by the NYISO for its statewide mitigation be used in place of the Revised LMMS' reference prices. It would be improper at this late stage in this proceeding for the Commission to replace the Revised LMMS' reference prices, which were fully litigated in the spring of this year and ruled on by the Commission, with the NYISO's reference prices, which have received no such airing. For example, while the formulas used for the Revised LMMS' reference prices are known to all, the formulas used by the NYISO are completely secret.

The NYPSC agrees that those issues should be addressed promptly. But leaving New York City unprotected while this discussion ensues would not fulfill the Commission's statutory duty to assure just and reasonable rates.

¹¹ Request of Consolidated Edison Company of New York, Inc. to Revise Localized Market Power Mitigation Measures at 12 (March 2001).

III. EVALUATING THE INTERRELATIONSHIP OF THE VARIOUS MITIGATION MEASURES SHOULD OCCUR WHILE THE REVISED LMMs REMAIN IN PLACE.

In the NYPSC's pleading in support of Con Edison's motion, we suggested that the Commission convene a technical conference to explore the conditions under which the Revised LMMs would be unnecessary. The NYISO, in its pleading in support, proposed a process for review and evaluation by it and its stakeholders of any future revisions to the Revised LMMs and of the inter-relationship of the various mitigation measures. Both of these initiatives are worthwhile and both should begin as soon as possible. But neither initiative should halt the continuation of measures that are essential to ensure just and reasonable prices.

CONCLUSION

For the reasons expressed above, the Revised LMMs should remain in effect.

Respectfully submitted,

Lawrence G. Malone
General Counsel
By: Saul A. Rigberg
Assistant Counsel
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

Dated: October 31, 2001
Albany, New York

CERTIFICATE OF SERVICE

I, Karen Houle, do hereby certify that I will serve on October 31, 2001, the foregoing Answer 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: October 31, 2001
Albany, New York

Karen Houle