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August 13, 2001

Hon. David P. Boergers
Secretary
Federal Energy Regulatory Commission
888 First Street N.E.
Room 1-A209
Washington, DC 20426

Re: Consolidated Edison Company of New York, Inc.
Docket Nos. EL01-45-001 and ER01-1385-002

Dear Mr. Boergers:

For filing please find the Answer of the Public Service Commission of the State of New York to Emergency Motion for Stay and Emergency Request for Rehearing in the above-captioned proceedings. 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)	Docket	EL01-45-001
of New York, Inc.)	Nos.	ER01-1385-002

**ANSWER OF THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK TO EMERGENCY MOTIONS FOR STAY
AND EMERGENCY REQUEST FOR REHEARING**

INTRODUCTION AND SUMMARY

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure,¹ the Public Service Commission of the State of New York (NYPSC) submits this Answer to the Emergency Motions for Stay of Orion Power New York GP, Inc. (Orion) and of the NRG Companies (NRG) submitted on July 26 and July 30, 2001, respectively, and Orion's Emergency Request for Rehearing submitted on July 26, 2001, filed in response to the Commission's July 20, 2001 Order on Rehearing Accepting Revised Market Power Mitigation Measures, as Modified, for Filing (Revised Mitigation Measures Order).² As demonstrated

¹ 18 C.F.R. § 385.213 (2000).

² *Consol. Edison Co. of N.Y., Inc.*, slip op. 96 FERC ¶ 61,095 (July 20, 2001) (Revised Market Mitigation Order).

below, neither Orion nor NRG have shown that: (1) they would suffer irreparable harm without a stay; (2) issuing the stay would not harm other parties; (3) the stay is in the public interest; or, (4) they would probably succeed on the merits.

PROCEDURAL HISTORY

On September 22, 1998, the Commission accepted for filing market power mitigation measures (In-City Mitigation Measures), proposed by Consolidated Edison Company of New York, Inc. (Con Edison), to "mitigate localized generation market power for sales in the City of New York."³ These measures applied only to the successful bidders for Con Edison's generator assets in New York City (Orion Power New York, Arthur Kill Generating LLC., Astoria Gas Turbine, LLC. and KeySpan-Ravenswood, Inc.).

On March 1, 2001, Con Edison proposed "limited revisions in the Mitigated Measures to make them operate as originally intended, and to close certain loopholes in their coverage that have become apparent during the first year and a half of NYISO

³ *Consol. Edison Co. of N.Y., Inc.*, 84 FERC ¶ 61,287 at 62,354 (1998).

operations."⁴ On May 16, 2001, the Commission issued an Order Rejecting Market Power Mitigation Measures.⁵ On June 15, 2001, Con Edison, the City of New York, and the NYPSC each filed a request for rehearing urging the Commission to reverse its prior order. Subsequently, the Commission issued the Revised Mitigation Measures Order, which accepted for filing, through October 31, 2001, Con Edison's Revised In-City Mitigation Measures. The Commission ordered the New York Independent System Operator, Inc. (NYISO) to file within 10 days a timetable for implementing the Revised In-City Mitigation Measures and ordered Con Edison to file within 10 days revised tariff sheets reflecting the October 31, 2001 termination date of its Revised In-City Mitigation Measures.

ORION'S PLEADINGS

Orion's basic contention in the Motion for Stay is that it would suffer irreparable harm under the Revised In-City Mitigation Measures because "generators may not be able to recover their costs." It also argues that Con Edison's ability

⁴ These revisions would allow mitigation of generators' bids in the real-time energy market and cap generators' start-up and minimum generation bids. The revisions would also apply to all New York City generators, not just to the purchasers of the Con Edison assets. Request of Consolidated Edison Company of New York, Inc. to Revise Localized Market Power Mitigation Measures at 1, Docket Nos. EL01-45-000 and ER01-1385-000 (Mar. 1, 2001).

⁵ *Consol. Edison Co. of N.Y., Inc.*, 95 FERC ¶ 61,216 (2001).

to exercise demand-side market power by underbidding in the Day-Ahead Market will be exacerbated by the Revised In-City Mitigation Measures.

In its Request for Rehearing, Orion repeats these two allegations and also claims that: (1) real-time mitigation will decrease market liquidity and the availability of hedging instruments for all market participants; (2) the existing mitigation authority given the NYISO is more than adequate to protect against the exercise of market power; (3) mitigation of out-of-merit generation and additional mitigation of minimum generation and start-up bids is unnecessary because they are already subject to mitigation; and, (4) extending the mitigation measures to all generation in New York City will discourage new investment.

NRG'S PLEADING

The gravaman of NRG's Motion For Stay is that it will suffer irreparable harm because: (1) the Astoria GT can be forced to sell energy below cost; (2) mitigated generators will be unable to recover lost revenues; and (3) NRG is subject to unknown and unknowable risks since the Revised Mitigation Measures Order approved the Revised In-City Mitigation Measures before the NYISO proposed how and when they would be implemented.

ARGUMENT

I. ORION AND NRG HAVE NOT SATISFIED ANY OF THE PREREQUISITES FOR A STAY

Under the federal Administrative Procedure Act, the standard for evaluating a stay request by a federal administrative agency is whether "justice so requires."⁶ The Commission standard for determining whether justice requires a stay is: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing a stay will substantially harm other parties; and (3) whether a stay is in the public interest.⁷ Another factor to be considered is the likelihood that the party seeking the stay will prevail on the merits of the appeal.⁸ The movant has a heavy burden of persuasion because the Commission's established policy "is to refrain from granting a stay of its orders, in order to assure definiteness and finality in Commission proceedings."⁹

The Commission has stated: "If the moving party is unable to demonstrate that it will suffer irreparable harm absent a

⁶ 5 U.S.C. § 705 (1994).

⁷ *Tenn. Gas Pipeline Co., slip op. at 5; CMS Midland, Inc., et al.*, 56 FERC ¶ 61,177 at 61,131 (1991), *aff'd sub nom. Mich. Mun. Coop. Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 990 (1993).

⁸ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *quoting Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) .

⁹ *Tenn. Gas, slip op. at 5; Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217 at 61,710 (2000).

stay, we need not examine other factors."¹⁰ For the reasons discussed below, Orion and NRG have not established irreparable harm nor have they satisfied the other factors that would warrant granting a stay.

A. Orion and NRG Have Not Made A Showing Of Irreparable Harm

Under the Commission's decisions, it is first necessary for a party seeking a stay to "substantiate the claim that irreparable injury is 'likely' to occur."¹¹ In assessing whether a movant satisfies this requirement, the Commission relies on the following criteria enunciated by the D.C. Circuit:

First, the injury must be both certain and great; it must be actual not theoretical. *Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time."* Bare allegations of what is likely to occur are not of value since the court must decide whether the harm will occur. *The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that harm is certain to occur in the future.*¹²

Moreover, "[m]onetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business."¹³

¹⁰ *Id.* at 61,631.

¹¹ *Independence Pipeline Co.*, 92 FERC ¶ 61,268 at 61,896 (2000), quoting *Wis. Gas Co.*, 758 F.2d at 674.

¹² *Id.*; emphasis added.

¹³ *Col. Interstate Gas Co.*, 37 FERC ¶ 61,065 at 61,152 (1986)

Orion's contention of irreparable harm relies on its claims that: (1) under the Revised In-City Mitigation Measures generators "could be forced to sell their energy below their variable costs absent a Reference Price"; and (2) the Revised In-City Mitigation Measures "create[] an additional platform for Con Edison, already a monopoly with unchecked demand-side market power, to abuse further that power and manipulate the market." ¹⁴

Orion provides no evidence to support its claim, repeated by NRG, that it might be forced to sell energy below variable costs.¹⁵ In situations where the unit does not have an established reference level based on previously accepted bids, the Revised In-City Mitigation Measures provide that the mitigated bid will be 110% of estimated costs, determined by first multiplying the unit's heat-rate curve by the previous day's fuel index, adding \$1.00/MWh for variable operating and maintenance costs, and then adding 10% of the total. This formula establishes a unit's "Default Energy Reference Price."

¹⁴ Orion Motion For Stay at 1-2; emphasis added.

¹⁵ Orion's claim pertains only to situations in which the price paid to a unit equals its bid. As the Commission is well aware, in normal conditions the units get paid the market-clearing price, which is higher than the bids of all but the marginal units. The only exception is the situation to which Orion points, namely, a unit dispatched out-of-merit receives its bid rather than the market-clearing price.

Orion argues that this formula does not explicitly "account for environmental compliance costs, fuel costs related to real-time energy production, and other real-time production costs."¹⁶ NRG agrees, stating: "Astoria GT will not even be guaranteed recovery of all its variable costs (given that the NYC Mitigation Measures do not include environmental costs), much less all its fixed costs."¹⁷ Although it has operated the former Con Edison plants for two years, Orion speculates, without evidentiary support, that the 10% adder "could be inadequate" to cover environmental and other costs.¹⁸ Neither Orion nor NRG explains why the 110% figure that the Commission approved for PJM for the differential between day-ahead and real-time operating costs should be different for New York.¹⁹ Their claim, therefore, utterly fails to satisfy the irreparable harm standard.

Next, Orion insists that the current In-City Mitigation Measures allow Con Edison ("a monopoly with unchecked demand-side market power")²⁰ to artificially suppress day-ahead prices

¹⁶ *Id.* at 3.

¹⁷ NRG Motion For Stay at 6; emphasis added. NRG explains that because GTs are generally dispatched infrequently and operate at a low capacity factor, these units do not have established reference levels.

¹⁸ Orion Request for Rehearing at 13; emphasis added.

¹⁹ See *All City Elec. Co.*, 86 FERC ¶ 61,248 at 61,899, n. 50, *clarified*, 86 FERC ¶ 61,130. (1999)

²⁰ Orion Motion For Stay at 1.

and then call on units out-of-merit to meet its reliability needs. From Orion's perspective, the Revised In-City Mitigation Measures exacerbate this situation in that they "give[] Con Edison complete monopoly power" because they allow the utility to "dictate real-time prices through its underbidding strategy."²¹

Orion continues to provide no evidence to support this claim, which the NYISO's independent market advisor, Dr. David Patton, rejected on two occasions in his reviews of load bidding and actual loads for New York State and east of Central-East (the area dominated by Con Edison).²² Thus, Orion has not established that the current In-City Mitigation Measures and the Revised In-City Mitigation Measures allow demand-bidding abuse.

Finally, NRG's claim that it is exposed to irreparable harm because the Commission approved the Revised In-City Mitigation Measures prior to knowing how and when the NYISO proposed to implement them is nonsensical.²³ The general Commission practice, as was followed here, is for a proposal to be approved and then entities are required to file implementation plans. If

²¹ Orion Request for Rehearing at 4; see also Orion Motion for Stay at 4-5.

²² Annual Assessment of the New York Electric Markets - 2000 (April 17, 2001), at Slide 46; The New York Market Advisor's Annual Report on The New York Electric Markets for Calendar Year 2000 (April 2000), at 31-33.

²³ NRG Motion For Stay at 9-10.

NRG does not like NYISO's implementation proposal, it can oppose the filing.

Where, as here, the moving party is unable to demonstrate that it will suffer irreparable harm absent a stay, as noted above, the Commission need not even examine any other factors. Nonetheless, as demonstrated below, evaluation of the other factors confirms a stay would likely harm electricity consumers and the public interest, and that Orion and NRG are not likely to succeed on the merits.

**B. Orion and NRG Have No Basis To Claim That
A Stay Will Not Harm Third Parties Or That
A Stay Is In The Public Interest**

The Commission's fundamental role is to ensure that rates are just and reasonable.²⁴ Protecting consumers from abuses in the bulk power market during the transition to competitive markets is critically important for numerous reasons, including public confidence in the market. Accordingly, the Commission properly concluded in approving the Revised In-City Mitigation Measures that "[w]e are not prepared to state that the conditions that give rise to potential market power in the City cease to exist."²⁵

Orion's and NRG's assertion that a stay will not raise wholesale energy prices charged to retail customers in New York

²⁴ 16 U.S.C. §§ 205d, 205e (1994).

²⁵ Revised Market Mitigation, slip. op. at 5.

City and undermine confidence in the NYISO-administered markets is contradicted by the Commission's finding in its Revised Market Mitigation Order "that the 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."²⁶ This finding by the Commission establishes the likelihood that New York City electricity consumers will face unjust and unreasonable prices when transmission and/or reliability constraints bind. Moreover, because of restrictions against retroactive refunds absent the establishment of a refund effective date,²⁷ harm suffered by New York City consumers cannot be remedied by future action of the Commission.

Contrary to NRG's assertion that the NYISO has the tools to effectively mitigate the real-time market,²⁸ the Revised Mitigation Measures Order acknowledges that the NYISO's generic mitigation authority is insufficient to protect New York City consumers from the exercise of market power when transmission and reliability constraints bind. In failing to specifically address the exercise of market power due to frequent

²⁶ Revised Mitigation Measures Order, slip. op. at 5.

²⁷ See *New York Independent System Operator, Inc.*, 93 FERC ¶ 61,142, slip. op. at 22 (1999)

²⁸ NRG Motion For Stay at 13. "...New York City LSEs will not be harmed by granting the Stay because an effective mitigation plan for the RT market in NYS [is] already in place."

transmission and reliability constraints in New York City, the NYISO's generic mitigation authority is flawed. For example, it permits bids to rise to the lower of 300 percent or \$100/MWh above reference levels before mitigation can occur. These parameters are acceptable from a state-wide perspective because of the relatively few instances market power can be exercised outside of New York City. However, not only does this permit sellers to charge excessive prices, but in the summer months, when transmission and/or reliability constraints bind almost daily in New York City, the reference prices themselves may rise to artificially high levels for sellers that consistently submit very high bids.

Absent the Revised In-City Mitigation Measures, the NYISO's more limited generic state-wide mitigation authority could result in the transfer of tens of millions of dollars from New York City ratepayers to sellers not by virtue of a competitive market, but due to unaddressed market dysfunctions that can be exploited to the full extent of the NYISO's generous thresholds in the presence of transmission and reliability constraints.

Since granting the Stay would expose consumers to unjust and reasonable prices, Orion and NRG fail to meet the no harm to third parties and public interest standards for granting an emergency stay. Its request must be denied.

**C. The Petitioners Have Not Established A
Likelihood Of Success On The Merits**

The arguments set forth by Orion and NRG have already been presented in these proceedings in more than 450 pages of briefs, testimony and exhibits.²⁹ Given the lack of new evidence or new arguments, it is highly unlikely they will succeed on rehearing. The Commission is bound to ensure that rates are just and reasonable, and the finding that New York City is a load pocket subject to market abuse has not been refuted.³⁰ Moreover, the Commission has approved special mitigation measures in adjacent regions where it has recognized the threat of market power created by must-run conditions and transmission constraints. For example, in approving market-based rate authority for PJM, the Commission concluded that the proposal to mitigate localized market power, combined with other measures, "will serve to minimize opportunities for the sustained exercise of market power."³¹ The Commission also approved mitigation measures

²⁹ Request for Rehearing at 3.

³⁰ See *Elizabeth Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990); *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984).

³¹ *Atl. City Elec Co., et al.*, 86 FERC ¶ 61,248 at 61,899 n.50, 61,902 (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").

affecting must-run units in the New England Power Pool (NEPOOL) "that, because of their unique location or other characteristics, the ISO must call upon to provide certain services to ensure reliability."³² Consistent with its decisions in PJM and NEPOOL, therefore, the Commission has properly approved effective mitigation measures to address the exercise of market power when transmission constraints bind and/or conditions require in-City units to run out-of-merit for reliability reasons.

Orion and NRG have not shown likelihood of success on the merits.

II. ORION'S REQUEST FOR REHEARING IS WITHOUT MERIT

A. Procedural Claim

Orion finds fault with the Revised Mitigation Measures Order on a process ground, asserting that the Order "never even attempts to provide a rational connection between the facts and its holding."³³ Orion does not take into account that this order is part of continuing consideration of market power issues in New York City that the Commission addressed in 1998 when Con

³² New England Power Pool, 88 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).

³³ Orion Request for Rehearing at 6.

Edison first filed its proposal for In-City Mitigation Measures. Thus, the Commission's conclusion that "[w]e are not prepared to state the conditions that give rise to potential market power in the City cease to exist"³⁴ is a clear reference to findings made previously; it need not recite every step it took to reach that conclusion in 1998.

The Commission originally rejected Con Edison's proposal for revisions on the grounds that the company failed to use the NYISO stakeholder process, not on the merits of the proposal. The Commission explained that "if Con Edison continues to believe the NYISO should have additional mitigation authority, it should work with NYISO within the NYISO stakeholder process to formulate a feasible mitigation proposal..."³⁵ Thus, Con Edison's proposal was rejected on a procedural ground. The Revised Mitigation Measures Order completely explains the Commission's reasons for granting rehearing, namely, that Con Edison has an independent right to file with the Commission for changes in *its* tariff and that, while using the stakeholder process is preferred, it is not obligatory. Accordingly, there is no deficiency.

³⁴ Revised Mitigation Measures Order, slip op. at 5.

³⁵ Consol. Edison Co. of N.Y., Inc., at 95 FERC ¶ 61,216 (2001).

B. Substantive Claims

Repeating various arguments advanced in its Motion For Stay and the claims made in previous pleadings in this docket, Orion asserts that the Revised In-City Mitigation Measures constitute "cost of service regulation -- and potentially below cost of service regulation - in the New York City real-time market."³⁶ Orion speculates that "[t]he most significant problem with Con Edison's proposal is that they create re-regulation that *could* result in rates below generators' costs and give Con Edison complete control over day-ahead and real-time prices."³⁷ We have already pointed out the infirmities of these claims. Further, this inventive argument ignores the issue in this docket, specifically, mitigating market power possessed by the owners of generation in New York City to ensure that wholesale prices are just and reasonable.

Orion repeats the claim that "Con Edison intentionally underbids its load in the day-ahead market, thereby artificially suppressing prices, and then calls units out-of-merit to meet its reliability needs."³⁸ Orion complains:

Imposition of real-time mitigation will undermine the day-ahead market by reducing further Con Edison's incentive to bid its load accurately in the day-ahead market. The Commission has

³⁶ Request for Rehearing at 1.

³⁷ *Id.* at 4; emphasis added.

³⁸ *Id.* at 11.

repeatedly emphasized that accurate day-ahead bidding is essential to ensuring reliability and efficient dispatch.³⁹

As noted above in Section I, when Con Edison's bidding behavior was reviewed by the NYISO's market advisor, it was not found to have been problematic.⁴⁰

Although Orion claims that real-time mitigation will decrease market liquidity by reducing forward contracting,⁴¹ real-time mitigation will actually increase forward contracting by removing the suppliers' perverse incentive to avoid the day-ahead market in order to escape mitigation. Furthermore, if the Commission's approval of real-time in-City mitigation moves real-time prices toward competitive outcomes, then the amount of forward contracting that occurs is more likely to reflect a proper, economic level of forward contracting, whether that be an increase or a decrease from recent levels. Orion's claim can be restated as a recommendation that the Commission permit market power in the real-time market as a way of artificially inducing buyers to the forward markets.

³⁹ *Id.*

⁴⁰ Hedging, too, is not the panacea Orion claims. When sellers have the ability to exercise market power, they have little incentive to enter into forward contracts at lower prices than the inflated prices they can earn in the spot markets through the use of market power. Effective mitigation of market power in the real-time market is critical to a properly functioning forward market.

⁴¹ Request for Rehearing at 11.

Further, Orion argues that mitigation of out-of-merit generation is unnecessary and inappropriate.⁴² However, out-of-merit generation is typically required to meet local reliability needs, in which case there are likely few, if any, alternative resources. This is precisely the case where market power is most likely to arise, requiring mitigation to ensure just and reasonable retail rates (which must cover any uplift paid for out-of-merit generation).

CONCLUSION

For the foregoing reasons, the NYPSC respectfully requests that the Commission deny the relief sought by Orion and NRG.

Respectfully submitted,

Lawrence G. Malone
General Counsel

By Saul A. Rigberg
Assistant Counsel

Dated: August 13, 2001
Albany, New York

⁴² Id. at 12.