

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell and Joseph T. Kelliher.

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| New York Independent System Operator, Inc. and Consolidated Edison Company of New York, Inc. | Docket Nos. ER01-3155-007 EL01-45-015 ER01-1385-016 |
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ORDER ON REMAND

(Issued June 16, 2005)

1. This case is before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit.¹ On January 14, 2005, as clarified on March 24, 2005, the court vacated two Commission orders, dated May 31, 2002 and June 5, 2003,² and remanded the case to the Commission. The Commission's orders addressed the New York Independent System Operator, Inc.'s (NYISO) and Consolidated Edison Company of New York, Inc.'s compliance filings proposing a comprehensive market power mitigation plan for New York which, as relevant here, included enhanced Automated Mitigation Procedures (AMP).³ Pursuant to the court's Remand Order, the Commission here directs NYISO to file revised tariff sheets to remove language permitting the application of AMP outside New York City.

¹ *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005) (Remand Order), *clarified*, No. 03-1228 (D.C. Cir. March 24, 2005) (unpublished).

² *New York Independent System Operator, Inc.*, 99 FERC ¶ 61,246 (2002), *order on reh'g*, 103 FERC ¶ 61,291 (2003).

³ The AMP is a computer program that reviews bids submitted by generators into the day-ahead market and automatically and quickly mitigates bids if specific thresholds for both bidding conduct and market impact are crossed. The AMP does not change the bidding conduct and market impact thresholds of the otherwise applicable market mitigation measures, or the reference prices used to mitigate the bids. The AMP simply eliminates the 24-hour lag that occurs when these procedures are implemented manually rather than automatically.

I. Background

A. Market Mitigation

2. In earlier orders, the Commission: (1) directed the NYISO to adopt market monitoring and mitigation procedures to identify and curtail the exercise of market power in energy markets throughout New York State; (2) approved specific Market Mitigation Measures (MMM) that constrain prices in the NYISO-administered Day-Ahead Market (DAM) that exceed specific bidding conduct and market impact thresholds; (3) permitted the NYISO to implement AMP, as a means to eliminate a one-day lag in the manual implementation of mitigation procedures, only after filing with and approval by the Commission; and (4) limited operation of AMP (to a term that ultimately ended May 31, 2002).⁴ In November 27, 2001 orders, the Commission directed NYISO to file a comprehensive mitigation proposal demonstrating how AMP would work with other market mitigation measures.⁵ The Commission stated that NYISO had several mitigation measures in place or proposed, which included the MMM, in-city mitigation, and AMP. The Commission expressed concern that the measures would not "fully fit together in a way that adequately addresses market power problems while avoiding unnecessary mitigation."⁶

3. On March 20, 2002, NYISO filed its Comprehensive Mitigation Filing. As relevant here, NYISO filed a revised, enhanced AMP. NYISO stated that its proposed AMP did not introduce new mitigation standards, but merely automated the application of the bidding conduct and market impact test thresholds which are outlined in the MMM. NYISO proposed enhancements to the AMP that included: a minimum quantity exemption (50 MW) to ensure that AMP does not automatically mitigate apparent withholding of a quantity too small to represent an exercise of market power; adding an additional computer run to the software that schedules resources in the DAM (the

⁴ *New York Independent System Operator, Inc.*, 89 FERC ¶ 61,196 (1999); *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,317, *clarified*, 91 FERC ¶ 61,154 (2000); *New York Independent System Operator, Inc.*, 95 FERC ¶ 61,471 (2001).

⁵ *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,242 (2001); *Consolidated Edison Company of New York, Inc.* 97 FERC ¶ 61,241 (2001).

⁶ *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,242 at 62,098 (2001).

Security Constrained Unit Commitment (SCUC)⁷ algorithm) to limit mitigation to specific zones and hours; enhancement of modeling reference curves; and the addition of automated mitigation of minimum generation and start-up bids. NYISO proposed that thresholds for in-city mitigation would also be modified. NYISO proposed to bring market mitigation of in-city units under the bidding conduct and market impact methodology used throughout the state.

B. Commission Orders on Comprehensive Market Power Mitigation Plan

4. On May 31, 2002,⁸ the Commission issued an order which accepted the NYISO's Comprehensive Mitigation filing, including the NYISO's proposed revised, enhanced AMP. The order found that application of the enhanced AMP throughout New York protected the New York market from the exercise of market manipulation that could result in rates that are unjust and unreasonable without discouraging the entry of new resources into the market. The order accepted the specific mitigation triggers and thresholds for outside the city, which were little different than those previously accepted by the Commission, finding that they were a practical compromise between the promotion of competitive markets and the mitigation of any anticompetitive behavior. The order accepted the proposed AMP enhancements because they would allow more geographic and temporal selectivity, thus reducing unwarranted mitigation in the DAM. The Commission found that the proposed AMP provided flexibility and would not unduly burden entry into New York markets, inside or outside New York City, or restrain prices below competitive levels.

5. Edison Mission filed a request for rehearing of the May 31, 2002 Order, arguing that outside New York City the AMP would mitigate when temporary shortages, rather than market power, caused price hikes. Edison Mission contended that this would deprive suppliers of scarcity rents and would deter new suppliers from entering the market.

⁷ The SCUC is NYISO's Day-Ahead Software computer algorithm. It performs a series of passes, or computer runs, that sequentially evaluate the generation resources bid into the DAM against demand bids, NYISO load forecasts, ancillary services needs and reliability requirements. The SCUC selects the optimal least-cost, security-constrained dispatch of generation to meet load.

⁸ *New York Independent System Operator, Inc.*, 99 FERC ¶ 61,246 (2002) (May 31, 2002 Order).

6. On June 5, 2003,⁹ the Commission issued an order which denied Edison Mission's request for rehearing of the May 31, 2002 Order. The Commission found that continuing the effectiveness of AMP would neither deter new suppliers from entering the market nor entice existing suppliers to leave the market. The Commission found that Edison Mission's contention that AMP would inhibit prices from rising to competitive levels, or otherwise prevent suppliers from either recovering their marginal costs or earning a reasonable return on their investment, was unsupported. The order stated that the AMP does allow sellers the opportunity to consult with the NYISO and explain unusually high bids prior to mitigation. However, the Commission recognized that future adjustment may be necessary based on additional operating experience and directed the NYISO to file a report by December 2, 2004 as to the effectiveness of the AMP and related mitigation procedures. The Commission stated that, if the operating data demonstrate that continued operation of the AMP will hinder competitive markets outside New York City, the Commission would require appropriate modifications.

C. Court Remand

7. Edison Mission appealed the Commission's May 31, 2002 and June 5, 2003 Orders to the United States Court of Appeals for the District of Columbia Circuit. On January 14, 2005, as clarified on March 24, 2005, the court vacated the Commission's orders as they apply to AMP outside New York City.¹⁰ The court stated that AMP may well protect against price increases due to the exercise of market power, but the Commission gave no reason to suppose that the AMP does not also cause harm by curtailing price increases attributable to genuine scarcity that could be cured only by attracting new sources of supply. The court stated that the Commission's orders contradict its prior rulings acknowledging the potential ill effects of forcing down prices absent structural market distortions.¹¹ The court found that the Commission failed to adequately address Edison Mission's evidence supporting its contentions, including the contentions that the New York market outside New York City is "workably competitive"

⁹ *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,291 (2003). (June 5, 2003 order).

¹⁰ *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005) (Remand Order), *clarified*, No. 03-1228 (D.C. Cir. March 24, 2005) (unpublished).

¹¹ *Id.* at 969.

and AMP may deter suppliers from entering the market.¹² The court also dismissed the Commission's arguments that the orders only allowed the AMP to remain in effect for a limited period.¹³

II. Discussion

8. In light of the court's ruling vacating the Commission's May 31, 2002 and June 5, 2003 Orders in this proceeding as they apply to the application of AMP outside New York City, the Commission directs NYISO to file revised tariff sheets removing provisions permitting the application of AMP outside New York City within 15 days of the issuance of this order.

The Commission orders:

NYISO is hereby directed to make a compliance filing to remove from its tariff provisions providing for the application of AMP outside New York City, within 15 days of the issuance of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.

¹² *Id.* at 968.

¹³ *Id.* at 969-70.