

BACKGROUND

A. NYISO's TEP Authority

2. Before beginning operation, NYISO filed the TEP as an amendment to its open access tariff.¹ The purpose of the TEP is to enable NYISO "to address unanticipated market design flaws and transitional abnormalities."² The TEP defines a market design flaw as

a market structure, market design or implementation flaw giving rise to situations in which market conditions of the application of ISO Procedures would result in inefficient markets or prices that would not be produced in a workably competitive market.³

The TEP additionally stipulates that Market Design Flaws do not include "situations in which prices rise to levels based on demand and supply levels determined by efficient competition in periods of relative scarcity."⁴

3. Under the TEP, in the event of a NYISO declaration of a market design flaw that would impair reliability or market prices, NYISO could take Extraordinary Corrective Actions to address those problems. If NYISO found that the Location-Based Marginal Price (LBMP) has reached a level substantially unrelated to the price that would be derived absent a market design flaw, the TEP allowed NYISO to recalculate the LBMP or clearing price as it should have been but for the market design flaw, "[i]f possible with reasonable certainty."⁵ The Commission approved the TEP on September 14, 1999, and has since that date reauthorized the TEP.⁶

¹ *New York Independent System Operator, Inc.*, 88 FERC ¶ 61,228 (1999) (First TEP Order).

² TEP, NYISO Market Administration and Control Area Tariff (Services Tariff), Attachment E, section A.

³ *Id.*

⁴ *Id.*

⁵ TEP, NYISO Services Tariff, Attachment E, section C.2.c(2).

⁶ *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,320 (2000).

B. Commission Orders on HQUS and PSEG Complaints

4. NYISO operates Day-Ahead and Real-Time Markets for energy. Generating resources submit bids into the day-ahead market, and NYISO determines how much generation it is likely to need for the next day, and commits resources on that basis. Committed resources must submit bids for scheduled Day-Ahead quantities into the real-time market at Real-Time bids that do not exceed the accepted Day-Ahead offer. Unscheduled Day-Ahead quantities may be offered into the Real-Time Market at bids that exceed any unaccepted Day-Ahead offer. If, during the next day, NYISO needs to procure more energy, it does so from quantities from committed units offered into the Real-Time Market that were not scheduled day-ahead, and other real-time offers based on the merit order of the bids submitted into the Real-Time Market.

5. On May 8 and 9, 2000, the NYISO control area experienced significantly higher temperatures than had been projected in NYISO's day-ahead forecast, and a significant amount of generating capacity was simultaneously experiencing outages. NYISO was therefore forced to dispatch generating capacity that had not been scheduled day ahead. This included unscheduled capacity from the Blenheim-Gilboa pumped storage hydroelectric unit (Blenheim-Gilboa), which is operated by the New York Power Authority (NYPA), that had been offered to the Real-Time Market at bids of \$3000 per megawatt hour and higher. By dispatching the unscheduled Blenheim-Gilboa capacity, NYISO's rules required that Blenheim-Gilboa's \$3000+ bids be used to determine the market clearing price. The result was a sharp price spike for energy for certain hours on May 8 and 9.

6. On May 12, 2000, NYISO concluded that the dramatic increase in prices that resulted from use of Blenheim-Gilboa's bid as the clearing price was the result of a market design flaw. On May 8 and 9, NYPA wished to stand ready to provide energy from Blenheim-Gilboa if NYISO needed it to ensure system reliability. At the same time, however, NYPA preferred not to sell energy from Blenheim-Gilboa, if possible, because it wanted to engage the unit in pumping mode in order to refill the reservoirs of the plant's pump-storage facilities. NYPA's strategy to accomplish these two goals was to offer Blenheim-Gilboa's energy to NYISO in real time at an extremely high price in order to minimize the possibility of being dispatched by NYISO. If NYISO needed Blenheim-Gilboa's energy to maintain reliability, however, NYPA would have been willing to offer that energy to NYISO at a significantly lower price.⁷ NYISO found that

⁷ NYISO answer Inc. to H.Q. Energy Services, Inc. (HQUS) complaint, Exhibit D, affidavit of Robert Deasy (Deasy Affidavit), at pages 3-4, paragraphs 7-8. *See also* Exhibit B, Affidavit of James H. Savitt (Savitt Affidavit), at page 4, paragraph 9-10.

its tariff contained a market design flaw because the bidding system prevented NYPA from communicating this dual preference – that it preferred not to sell Blenheim-Gilboa's energy, but if necessary would be willing to do so at a low price – to NYISO by submitting two bids, a lower bid for emergency situations and a higher bid for non-emergency situations. Instead, NYPA's only way to signal to NYISO that it preferred that Blenheim-Gilboa's energy not be taken was to offer a single bid at a very high price.

7. NYISO considered this a market design flaw, and changed it prospectively.⁸ The prospective change allows units such as Blenheim-Gilboa to submit very high bids, as it did on May 8 and 9, but without permitting those bids to set the market clearing price. To remedy the situation on May 8 and 9, NYISO invoked its TEP authority and recalculated market clearing prices after resetting the Blenheim-Gilboa bids to \$0 per megawatt hour. As a result, the Real-Time Market clearing price for May 8 was reduced from \$3,487 per MWh to \$331 per MWh, and for May 9 from approximately \$3,000 per MWh to approximately \$350 per MWh.

8. H.Q. Energy Services (U.S.), Inc. (HQUS) filed a complaint against NYISO asking the Commission for an order directing NYISO to restore the original real-time market-clearing prices for energy on May 8, 2000. PSEG Energy Resources & Trade LLC (PSEG) filed a similar complaint seeking restoration of the original real-time market-clearing prices for May 9, 2000. The Commission denied both complaints.⁹

⁸ NYISO now permits Energy Limited Resources such as Blenheim-Gilboa to designate all or a portion of their bids as out-of-merit, resource-limited blocks, so that if in real-time operations the resource-limited portion of an Energy Limited Resource needs to be dispatched, its bid does not set the market-clearing price.

⁹ *H.Q. Energy Services (U.S.), Inc.*, 97 FERC ¶ 61,218 (2001) (November 20 Order), *reh'g denied*, 100 FERC ¶ 61,028 (2002) (July 3 Order).

9. The Commission initially found, contrary to arguments made by the parties, that the Blenheim-Gilboa bid "was not based on scarcity" but rather was "an attempt by NYPA to manage the dispatch of the Blenheim-Gilboa unit by bidding at a level high enough so that the unit would not be considered as a viable resource by the software NYISO uses to dispatch generation resources."¹⁰ The Commission further noted that:

We believe that the bidding rules' inability to allow pump storage units to reflect their operational constraints, and instead force such an entity to guess at a bid level that would be high enough to avoid dispatch, is a market design flaw.¹¹

The Commission therefore endorsed NYISO's use of its TEP authority to correct this flaw.

10. On rehearing, PSEG argued that the Commission erred in finding that Blenheim-Gilboa's bid was not the result of scarcity or of the plant's opportunity costs. It also stated that, contrary to NYISO's representation and the Commission's finding, NYISO's tariff did provide NYPA with a means of communicating its dual preference to NYISO. While the Blenheim-Gilboa facility was required to submit a bid into the Day-Ahead Market because of its Installed Capacity (ICAP) obligations, it was not required to submit a bid into the Real-Time Market, yet did so nonetheless.¹² If NYPA had not submitted a bid into the Real-Time Market, NYISO could still have used its emergency powers to direct Blenheim-Gilboa to provide its unscheduled capacity in the event of a reliability emergency,¹³ in which event that Blenheim-Gilboa capacity would not have set the market clearing price. Additionally, throughout May 8 and May 9, NYPA could have changed its bid into the Real-Time Market at any time up to 90 minutes before the beginning of a given hour. PSEG therefore maintained that the tariff did not contain the market design flaw alleged by NYISO, and that NYISO's use of its TEP authority to correct prices was thus in error.

¹⁰ November 20 Order at ¶ 61,964.

¹¹ *Id.*

¹² PSEG rehearing petition at 19.

¹³ NYISO's tariff provides at section 5.12.8(c) that "the ISO may call on Energy Limited Resources at any time during emergencies;" *see also* NYISO Emergency Operations Manual, section 3, at 5 (ISO may order all generation to full operating capability in the event of a major emergency).

11. The Commission disagreed, stating that:

Regardless of whether bids submitted on May 8 and 9 reflected a scarcity premium, NYISO's market was flawed in that NYPA could not, under the NYISO bidding rules then existing, submit the complex bid it sought to make: a bid for normal operating conditions and a bid for limited periods when dispatch of the unit is required to ensure the reliability of the grid.¹⁴

12. Thus, the Commission believed that NYISO was not "required . . . to let a flawed bid set the market price when it had TEP authority to correct the flaw,"¹⁵ and denied rehearing.

C. Court Remand

13. PSEG appealed the Commission's orders to the United States Court of Appeals for the District of Columbia Circuit, which remanded the case to the Commission to further address PSEG's assertion that no market design flaw existed given NYPA's ability to express its preferences by withholding any bid from the Real-Time Market.¹⁶ The court stated that the Commission "offered no answer at all to PSEG's argument that NYPA's ability to withhold a bid from the Real-Time Market meant that NYPA could have sent precisely the 'complex signal' it wished," namely, that NYPA's ability to withhold a bid from the Real-Time Market could have sent its desired price signal that it was willing to sell energy on May 8 and 9 only under emergency situations, but if necessary, would do so at a low price.¹⁷ The court held that the Commission's statement that it would not be "quick to second guess NYPA's actions" and that "NYPA's bidding strategy . . . had been working well enough even under NYISO's flawed bidding rules until May 8 and 9"¹⁸ did not sufficiently address PSEG's argument in this regard. The court further noted that NYISO's tariff defined a market design flaw as a market structure, market design or

¹⁴ July 3 Order at P 17.

¹⁵ *Id.*

¹⁶ *PSEG Energy Resources & Trade LLC v. FERC*, 360 F.3d 200 (D.C. Cir. 2004) (*PSEG*).

¹⁷ *PSEG* at 204.

¹⁸ *Id.*, citing July 3 Order at ¶ 61,074.

implementation flaw giving rise to situations in which market conditions or the application of NYISO procedures would result in inefficient markets or prices that would not be produced in a workably competitive market: the court stated that NYPA's ignorance of its bidding options under NYISO's tariff did not fall within the definition of a bidding flaw. The court therefore remanded this case to the Commission for further consideration of PSEG's argument.

14. The court also stated that, "[w]ithout pre-judging issues unnecessary to resolve at this stage, we are skeptical that FERC could reach the same outcome on remand without addressing" PSEG's argument on rehearing that NYPA's high Blenheim-Gilboa bid was not an attempt to signal NYISO not to take Blenheim-Gilboa, but rather reflected Blenheim-Gilboa's actual operating costs. The court stated:

[C]ontrary to FERC's statement that "nothing required NYISO to let a flawed bid set the market price when it had TEP authority to correct the flaw," the tariff itself required NYISO to "let a flawed bid set the market price" unless NYPA would have made a different bid absent any flaw. A market structure that co-existed with but had no effect on market-driven (including scarcity-driven or opportunity-cost-driven) prices could not justify the use of TEP.¹⁹

D. Post-Remand Motions

15. After the court's remand order, NYISO submitted a motion to reopen the record to enable NYISO to submit further evidence to respond to PSEG's allegation that NYPA could have chosen not to submit a Real-Time bid for Blenheim-Gilboa. NYISO seeks to provide further support for its assertion that its tariff contained a market design flaw because NYPA could only fulfill both of its goals – conserving Blenheim-Gilboa's water supply, yet also making Blenheim-Gilboa available to provide reserves at a low price - by submitting bids that did not fully reflect those preferences. That further evidence consists of affidavits by NYISO representative Ricardo Gonzales (Gonzales Affidavit) and NYPA representative Paul Rougeux (Rougeux Affidavit), together with additional material regarding the offers and scheduling of the Blenheim-Gilboa unit.

¹⁹ *PSEG* at 205.

16. PSEG filed an answer to NYISO's motion, proffering the affidavit of its consultant Dr. Roy Shanker (Shanker Affidavit), which provides a separate analysis of the new information provided in NYISO's motion. Answers were also filed by the Long Island Power Authority (LIPA), Aquila Merchant Services, Inc. (Aquila) and KeySpan-Ravenswood, Inc. (KeySpan). LIPA and Aquila similarly ask the Commission to deny NYISO's motion. NYISO then sought to respond to PSEG's, LIPA's and KeySpan's answers, to which KeySpan then sought to file a further response. New York Transmission Owners (NYTOs) also sought to file comments on NYISO's answer to the parties' answers, which the Commission will consider also to be an answer to those answers.

17. NRG Power Marketing, Inc. (NRG) filed a motion to intervene in the above-captioned proceedings, noting that it had timely intervened in the HQUS proceeding, but not the PSEG proceeding. To protect its interest on remand, NRG now seeks to intervene in the PSEG proceeding.

18. Additionally, in response to a request from Aquila, the Commission issued an order staying the arbitration proceeding between Aquila and NYISO with regard to the events of May 8 and 9 until the Commission issues this order on remand.²⁰ Aquila timely sought rehearing of that order.

DISCUSSION

A. Procedural Issues

19. We will grant NYISO's motion to reopen the record. The Commission may reopen the record in its discretion where there is good cause.²¹ We will allow NYISO's filing for the limited purpose of responding to PSEG's argument that there was no market design flaw.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers to answers filed by NYISO, KeySpan and the NYTOs, and will, therefore, reject them.

²⁰ *H.Q. Energy Services (U.S.), Inc. v. New York Independent System Operator, Inc.*, 107 FERC ¶ 61,291 (2004) (June 22 Order).

²¹ 18 C.F.R. § 385.716 (2004).

21. The Commission denies NRG's motion to intervene in the PSEG complaint proceeding at this late date. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2004), in considering a party's motion for late intervention, the Commission may consider whether (i) the movant had good cause for failing to file the motion within the time prescribed; (ii) any disruption of the proceeding might result from permitting intervention; (iii) the movant's interest is not adequately represented by other parties in the proceeding; and (iv) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention. We find that NRG has not shown that its interest is not adequately represented by other parties here. The Commission therefore denies NRG's motion. Additionally, NRG timely intervened in the HQUS complaint proceeding, and this order is being issued in both proceedings. And finally, the relief ordered here will in any case apply to all generators who sold energy in NYISO's markets on May 8 and 9, 2000.

22. The Commission also denies Aquila's petition for rehearing. While the issues remanded to the Commission stem from complaints filed by HQUS and PSEG concerning NYISO's action to invoke TEP, it is appropriate to address here Aquila's request for rehearing of our June 22 Order. Like HQUS and PSEG, Aquila challenged NYISO's use of TEP to recalculate clearing prices for May 8 and 9, 2000. However, Aquila choose to pursue dispute resolution procedures instead of filing complaints such as those filed by HQUS and PSEG. Although Aquila and NYISO went to arbitration, by agreement of the parties, arbitration proceedings were held in abeyance pending resolution of the Commission proceedings on the HQUS and PSEG complaints, and then the subsequent court appeal. In our June 22 Order, we continued to stay the arbitration since the court's ruling did not definitively address the issue, and the Commission had not yet issued an order on remand. We now find that Aquila's concerns expressed in its rehearing request are moot, as our ruling here governs refunds to all energy suppliers with regard to the events of May 8 and 9, 2000. Therefore, we deny Aquila's request for rehearing.

B. Analysis

23. Upon further review of this proceeding, we find that there was no market design flaw that the NYISO could rectify under the TEP. There are two issues raised by the court remand: 1) whether NYPA could have used a different bidding mechanism, available under the terms of the NYISO tariff in place in May 2000, and achieved the result it desired; and 2) whether the NYISO market design prevented NYPA from bidding its opportunity and scarcity costs into the market.

24. With respect to the first question, PSEG argued the NYPA could have achieved its desired goal of reserving its capacity for emergency uses within the available NYISO market design by bidding at a high price into the day-ahead market and then withdrawing, in real-time, the portion of its energy bid that had not been accepted in the day ahead market. In that case, PSEG maintains the NYPA would still have been able to achieve its goal of being dispatched by the ISO in a system emergency pursuant to the NYISO's emergency procedures.

25. In its post-remand filing, the NYISO argues that this strategy would not completely achieve the NYPA's strategy because the NYPA also wanted to have Blenheim-Gilboa used for operating reserves. In order to be used for operating reserves, the NYISO asserts that the NYPA would have to include real-time bids for the full capability of the unit. Keyspan, among others, respond that it was unnecessary for the NYPA to bid the full capacity of the unit to be dispatch for operating reserves; it claims that a real-time bid is necessary only to cover the amount of operating reserves scheduled.

26. We conclude that PSEG's withdrawal strategy would have substantially achieved the NYPA's goal of having its energy available to the NYISO in an emergency, and at least have some of its output scheduled as operating reserves. We need not determine whether every post-hoc possible nuance of this strategy could have been achieved through this mechanism, since we do not find a market design flaw as defined by the NYISO's tariff.

27. The TEP provision defines a market design flaw as: "a market structure, market design or implementation flaw giving rise to situations in which market conditions or the application of the ISO Procedures would result in inefficient markets or prices that would not be produced in a workably competitive market." We find that NYISO's market design was not flawed because it permitted NYPA to bid its true opportunity costs and did not result in "inefficient markets or prices" or prices that would not have been obtained in a workably competitive market.

28. On May 8 and 9, 2000, unusual weather conditions led to an unanticipated surge in electricity demand and a spike in prices. NYISO concluded that the price spike was the result of bids submitted for Blenheim-Gilboa, and that those bids were the result of a market design flaw, because NYPA did not intend for its bids to set the market clearing prices for energy and it was willing to accept a lower price; NYPA had, in fact, only intended to assure that a portion of Blenheim-Gilboa be assigned to provide reserves instead of energy. However, more of the Blenheim-Gilboa capacity was called to provide energy than NYPA had expected and reflected in its bids. As a result, and because NYISO had no lower bid energy available, NYPA's high bids designed to prevent the

conversion of Blenheim-Gilboa's spinning reserves to energy were nevertheless dispatched for energy, causing prices to spike. After the fact, NYPA expressed a willingness to reduce the high bids to zero so that market clearing energy prices would be lower.

29. We do not, however, find a market design flaw as defined by TEP. The crux of NYPA's goal was to be able to conserve its power supply (due to the opportunity costs facing a pumped storage resource – namely, giving up the opportunity to refill its reservoirs), for when it determined that the market needed assistance, either due to an emergency or a perceived need to reduce prices. In order to achieve this goal within the existing market design, NYPA was able to set an energy bid that was high enough to avoid supplying power until conditions reached the level it deemed necessary to help out the market. In an LBMP-based market, all system emergencies and instances of tight supply are reflected in market prices. All NYPA had to do to implement its strategy would be to choose that price at which it wanted to help the market, and submit an energy bid at that price.

30. As Dr. Shanker asserts, that is exactly what the NYPA was doing. During the real-time, it was adjusting its bids to reflect different market conditions, so that its capacity would help to reduce prices at times when it anticipated that NYISO might be facing a reserve shortage. He disputes the assertion that NYPA was not bidding its opportunity costs with regard to Blenheim-Gilboa. He states that Mr. Rougeux's Affidavit shows that in fact, NYPA's bidding strategy in the Real-Time Market was seeking to identify opportunity costs in the market.²² According to Dr. Shanker, NYPA personnel recognized early in the day that the system might need output from the Blenheim-Gilboa facility later in the day. He posits that NYPA's bidding strategy (offering more capacity in real time than had been scheduled day ahead, at lower bids, but maintaining high bids for the remaining output that was not being offered²³) was

²² PSEG answer to NYISO motion to reopen record, Exhibit A, Affidavit of Roy Shanker (Shanker Affidavit) at paragraphs 13-18.

²³ Shanker Affidavit at paragraph 13 ("For example on May 8 for hour beginning 8 [*i.e.*, 8:00 a.m. to 8:59 a.m.] up to 240 MWs were offered at a price of zero in the day ahead market, with the next increment of power being offered at \$3500. In real time, for the same hour, up to 720 MWs of energy were offered at zero. Thus 480 MWs of additional energy, offered at zero price, were voluntarily offered into the real time market by B-G. The same is true for virtually every other hour listed, with increased offers of different amounts and lower prices submitted into the real time market. In some cases the prices was set at zero, in some \$5 per MWH, with the incremental quantities being offered at lower prices being as much as 480 MW").

designed to assure that Blenheim-Gilboa would not be called to supply its limited energy too early and that at least some of its energy would be available later in the day when its value to the system was likely to be greatest, and NYISO would have had to pay an even greater price for real-time energy from external sources, given that at this time, prices in NYISO could have risen as high as \$10,000/MWH.²⁴ Thus, Dr. Shanker argues, the bids NYPA offered are consistent with the opportunity cost that would have arisen if a shortage arose later in the day, possibly sufficiently to cause prices to rise to the \$10,000 cap, and Blenheim-Gilboa was unable to provide energy and/or reserves at that time.²⁵ He concludes:

This is exactly what the concept of opportunity costs is meant to capture. While Mr. Rougeux's intent may be expressed paternalistically as a desire to keep prices down, the reality is that his actions are exactly the same as would be taken by someone trying to maximize revenues under the same circumstances, e.g. make the energy available at the time of highest demand. . . . [Mr. Rougeux was attempting to] ration the output of the reservoir to assure reliability, and in doing so avoid the potential for prices being set at an even higher level, the market cap price of \$10,000 later in the day.²⁶

31. NYISO states that, contrary to other parties' assertions, NYPA's bid did not reflect Blenheim-Gilboa's opportunity costs, and that the reason for the apparent precision of Blenheim-Gilboa's bid (\$3,487) is misleading: in fact, NYISO asserts, NYPA submitted a bid curve with six points at round numbers (\$3500, \$4000, \$5000 and \$6000), and NYISO's software interpolated between two points on NYPA's bid curve to derive a price for the quantity needed from Blenheim-Gilboa during the relevant hour.²⁷ But whether \$3,487 was the exact bid price of the NYPA does not determine whether a market design

²⁴ *Id.* at paragraph 17.

²⁵ While commonly "opportunity costs" are viewed as costs to the seller of a product, in this context Dr. Shanker argues in essence that NYPA sought to protect NYISO from the possible "opportunity cost" of using up all of Blenheim-Gilboa's output too early in the day, and being forced to purchase external resources later in the day at a much higher price. Shanker Affidavit at paragraph 18.

²⁶ Shanker Affidavit at paragraph 18.

²⁷ NYISO motion to reopen record at page 13.

flaw existed under TEP. The only issue is whether NYISO's market design permitted NYPA to bid its opportunity costs or to assist the market by introducing additional supply at the price of its choosing in order to prevent further price increases.

32. We find that the NYISO market design provided the NYPA with the ability to bid its opportunity costs into the market and to assist the market at a price that it chose. NYPA in fact used the NYISO market design in exactly that fashion by putting in a number of bids at different output levels, so that its energy would be dispatched when it was best able to help the market. Had NYPA bid into the market too early, at too low a price, there was a risk that later in the day prices would go above its \$3,500 level due to even greater scarcity of supply and after the NYPA had exhausted its ability to provide energy.²⁸

33. Indeed, the acceptance of NYPA's bid cannot be found to be a market design flaw, since at the time, the NYISO's system was experiencing a severe shortage of power.²⁹ In a situation of extreme supply shortage, a high LBMP is needed to reflect scarcity, and the NYPA's management of its scarce supply through its bidding reflected that scarcity.³⁰

²⁸ While there may be other market designs or bidding methods that could have been used, the NYISO's bidding method certainly provided the NYPA with the ability to bid opportunity costs and to indicate when it wanted to be used to alleviate a crisis, and therefore, is not so flawed as to constitute a market design flaw. For instance, there are numerous methods of conducting an election, winner-take-all, proportional, and instant run-off, all with potentially different results in a particular circumstance. But all of these methods, like NYISO's, provide a reasonable opportunity for people to express their preferences.

²⁹ Shanker Affidavit at paragraph 19 (NYISO's statements and the Rougeux and Gonzales Affidavits, together with the new information on the Blenheim-Gilboa schedule supplied by the NYISO as attachments to the Rougeux Affidavit, suggest that NYISO was in a shortage situation).

³⁰ See *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, slip op. at 15 (D.C. Cir. 2005) (remanding NYISO automatic market mitigation plan because "the Commission gave no reason to suppose that [the plan] does not also wreak substantial harm--in curtailing price increments attributable to genuine scarcity that could be cured only by attracting new sources of supply").

34. Under the TEP, a market design flaw is defined as a situation in which the application of the ISO Procedures would result in inefficient markets or prices that would not be produced in a workably competitive market." Here, the NYISO market design permitted the NYPA to bid its true opportunity costs in a way that reflected the supply scarcity in the market. Therefore, the Commission cannot find that the market design produced "inefficient" prices or prices that would not reflect those in a workably competitive market. As the court stated:

A market structure that co-existed with but had no effect on market-driven (including scarcity-driven or opportunity-cost-driven) prices could not justify the use of TEP.³¹

The Commission orders:

(A) NYISO's motion to reopen the record is granted.

(B) NYISO is hereby ordered to pay refunds and collect surcharges designed to reinstate the original market clearing prices for energy for the real-time market determined on May 8, 2000, and May 9, 2000. NYISO must file a refund report with the Commission within 30 days of the date of this order.

By the Commission. Commissioner Kelliher concurring with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

³¹ *PSEG* at 205.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

H.Q. Energy Services (U.S.), Inc.

Docket Nos. EL01-19-002
EL01-19-003

v.

New York Independent System Operator, Inc.,

PSEG Energy Resources & Trade LLC

Docket Nos. EL02-16-002
EL02-16-003

v.

New York Independent System Operator, Inc.

(Issued March 4, 2005)

Joseph T. KELLIHER, Commissioner *concurring*:

This order addresses the question remanded by the United States Court of Appeals for the District of Columbia Circuit of whether the New York Independent System Operator, Inc. (NYISO) properly exercised its authority under its Temporary Extraordinary Procedures (TEP) to recalculate energy prices in May 2000. I agree with the Commission's determination that the NYISO erred when it exercised its TEP authority to retroactively recalculate prices in these circumstances. I write separately, however, to address what I believe is the more significant question underlying this order, namely whether the TEP itself constitutes an improper delegation to the NYISO of the Commission's authority under section 205 of the Federal Power Act (FPA).¹

The law on delegation of federal authority is relatively clear and was expressed well by the D.C. Circuit in *U.S. Telecom Ass'n v. FCC*.² Under *U.S. Telecom*, delegations of federal authority to "outside parties are assumed to be improper absent an affirmative showing of congressional authorization."³ This rule is entirely sensible. One reason for

¹ 16 U.S.C. § 824d (2000).

² 359 F.3d 554 (D.C. Cir. 2004)(*U.S. Telecom*).

³ *Id.* at 565.

the prohibition of delegations of authority is that “when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making.”⁴ Another reason is that “delegation to outside entities increases the risk that these parties will not share the agency’s ‘national vision and perspective’ and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.”⁵

Under the TEP, the NYISO was authorized to retroactively change wholesale power rates in the event it determined that a market design flaw impaired market prices. If the NYISO makes such a determination, it has subjective discretion to reset rates to what it believes they would have been but for the market design flaw. But section 205 of the FPA vests exclusive authority with the Commission to set the rates and charges for wholesale electric sales of energy. In my view, because the TEP authorizes the NYISO to change rates, the TEP represents a delegation of the Commission’s authority under section 205 to set rates. Applying the law on delegation from *U.S. Telecom*, since there is no provision of the FPA that authorizes such a delegation, the Commission cannot lawfully vest its rate setting authority with the NYISO through the TEP.

Moreover, the TEP seems to delegate more authority to the NYISO than the Commission itself possesses. Under the FPA, the Commission can change rates retroactively in the event of a tariff violation as a means of enforcing the filed rate. However the TEP authorizes the NYISO to reset rates in circumstances in which the tariff has not been violated. The NYISO need only determine that there is a flaw in the design of the market in order to reset rates, and to do so retroactively. Even if the FPA authorized a delegation of the Commission’s ratemaking authority, which it does not, the Commission could not delegate more authority than it possesses under the Act.⁶

I do not view the fact that the Commission can review decisions by the NYISO invoking its TEP as diminishing the extent of this delegation. The Commission’s review seems largely to be limited to determining whether the NYISO abused its discretion in

⁴ *Id.*

⁵ *Id.* at 565-66 (citations omitted).

⁶ See *Commonwealth of Massachusetts v. United States*, 729 F.2d 886, 888 (1st Cir. 1984).

exercising its TEP authority. Since the discretion afforded the NYISO appears to be so great, the Commission's review is largely circumscribed.

Joseph T. Kelliher