

# FEDERAL ENERGY REGULATORY COMMISSION

## Enforcement Staff Report

### Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New York City Capacity Market



Enforcement Staff Report

Office of Enforcement  
Division of Investigations

## I. Executive Summary

In a July 6, 2007 order, the Commission established paper hearing procedures to consider potential reforms to the in-city ICAP market (Paper Hearing).<sup>1</sup> That proceeding is still pending before the Commission. In the *July 6 Order*, the Commission directed the Office of Enforcement (Enforcement) to investigate under section 1b.5 of the Commission's regulations<sup>2</sup> whether any suppliers in New York City's Installed Capacity (in-city ICAP)<sup>3</sup> market engaged in market manipulation in violation of section 1c.2 of the Commission's regulations.<sup>4</sup>

The *July 6 Order* stated that to the extent Enforcement believes that information learned during the non-public investigation of potential manipulation has a material bearing on potential reforms to the market design that are being considered in the Paper Hearing, Enforcement staff should inform the Commission and place such information in the record of the Paper Hearing as appropriate.<sup>5</sup> In addition, at the conclusion of its investigation, Enforcement was directed to report its findings to the Commission.<sup>6</sup>

Enforcement staff has concluded its investigation and believes that information learned in its investigation has no material bearing on potential reforms to the in-city ICAP market design; however, the staff believes that the information learned in its investigation may help explain how that market functioned in practice. In addition, the

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<sup>1</sup> *New York Independent System Operator, Inc.*, 120 FERC ¶ 61,024 (2007) (*July 6 Order*).

<sup>2</sup> 18 C.F.R. § 1b (2007).

<sup>3</sup> In some states in the United States load serving entities (LSEs) are responsible for providing reserves needed to maintain system reliability by contracting for capacity in excess of their forecasted peak demand. For example, in New York State, the New York Independent System Operator (NYISO) supplements its electric energy market by requiring LSEs to contract reserves in a separate capacity market, the ICAP market. As such, the ICAP market allows LSEs to fulfill their obligation to procure sufficient capacity to meet certain minimum reliability requirements, including serving peak loads and meeting reserve margins to cover generator outages.

<sup>4</sup> 18 C.F.R. § 1c.2 (prohibiting electric energy market manipulation).

<sup>5</sup> *Id.* at P 17.

<sup>6</sup> *Id.*

*July 6 Order* directed Enforcement at the conclusion of its investigation to report its findings to the Commission. The instant report is being submitted to the Commission in response to that direction. If the Commission decides to make this report public, nothing should be construed to release any other documents or information obtained during the course of this investigation.

The Commission's initiation of this investigation was based, in part, on allegations made by various parties to the Paper Hearing that one of the suppliers of capacity in the in-city ICAP market (namely, KeySpan-Ravenswood, LLC (KeySpan)) engaged in economic withholding by consistently offering its capacity at its bid cap and, as a result, raised prices in that market.<sup>7</sup> The Commission has defined the term "economic withholding" as "bidding available supply at a sufficiently high price in excess of a supplier's marginal costs and opportunity costs so that it is not called on to run and where, as a result, the market clearing price is raised."<sup>8</sup> In addition, those parties pointed out that KeySpan entered into a swap<sup>9</sup> agreement with Morgan Stanley Capital Group Inc. (Morgan Stanley) that incentivized KeySpan to raise prices in the in-city ICAP market. Based on the terms of that swap, KeySpan benefits if clearing prices in the in-city ICAP spot auction are higher than the fixed price listed in the swap. In the course of this investigation, Enforcement staff learned that Morgan Stanley entered into an offsetting swap with Astoria Generating Company Acquisitions, LLC (Astoria), which, like KeySpan, is a supplier in the in-city ICAP market.

Although economic withholding can in certain circumstances constitute a violation of the Commission's anti-manipulation regulations, 18 C.F.R. Part 1c, the facts in this case do not support such a conclusion. Rather, Enforcement staff's investigation found no evidence that KeySpan, Astoria, or Morgan Stanley violated the NYISO's Market Administration and Control Area Services Tariff's (Services Tariff) or Part 1c of the Commission's regulations. Specifically, we found:

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<sup>7</sup> *July 6 Order*, 120 FERC ¶ 61,024 at P 6, 12.

<sup>8</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 102 n.57 (2003) (Market Behavior Rules Order).

<sup>9</sup> A swap is a financial trade involving the exchange of two different pricing structures between users of a commodity. Swaps may involve, as here, exchanging cash flows; for example, exchanging the fixed rate of power or capacity for a variable rate (floating price) payment stream, or vice versa, while not swapping the principal component of the power or capacity. Swaps can be conducted directly by two counterparties, or through a third party such as a bank or brokerage house.

- KeySpan's and Astoria's offering behaviors in the in-city ICAP market were consistent with the NYISO's Services Tariff's mitigation rules.
- KeySpan's offering behavior was anticipated by the Commission in its order approving the mitigation rules for the in-city ICAP market.
- KeySpan's offering behavior did not constitute a fraud or fraudulent practice.
- The additional 1,000 MW of capacity, which was added to the in-city ICAP market in 2006, was insufficient to cause KeySpan, based on its risk/reward analysis, to change its offering strategy.
- KeySpan's and Astoria's offering behaviors in the in-city ICAP market were unaffected by their swaps and, given the unique circumstances presented by the ICAP market and its history, were done pursuant to legitimate business purposes.
- KeySpan, Astoria, and Morgan Stanley did not engage in collusion to impair, obstruct, or defeat the functioning of the in-city ICAP market.

Since Enforcement staff has not found any evidence that KeySpan, Astoria, or Morgan Stanley violated the NYISO's Service Tariff or Part 1c of the Commission's regulations, we are closing this investigation unless directed otherwise by the Commission.

## **II. Background to the Investigation**

### **A. The In-City ICAP Market**

As part of New York State's market restructuring in 1998, Consolidated Edison Company (ConEd) filed a restructuring plan to divest approximately 6,600 MW of its generating capacity located in New York City by the end of 2002.<sup>10</sup> The New York Public Service Commission approved that plan, subject to ConEd seeking the Commission's approval for post-divestiture market power mitigation measures applicable to all capacity sales from its divested generating units within the in-city market. ConEd proposed and the Commission approved<sup>11</sup> mitigation measures for the in-city ICAP

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<sup>10</sup> See *Re Consolidated Edison Co. of N.Y., Inc.*, New York Public Service Commission, Case 96-E-0987, 188 P.U.R. 4th 149, 166 (July 21, 1998).

<sup>11</sup> *1998 Order*, 84 FERC ¶ 61,287.

market,<sup>12</sup> which applied to all the divested generation owners (DGOs).<sup>13</sup> The current DGOs are KeySpan,<sup>14</sup> Astoria,<sup>15</sup> and the NRG Companies (NRG).

All capacity that ConEd divested and any that it retained is subject to mitigation. The DGOs' capacity generation units that were not part of ConEd's divestiture (*i.e.*, new generating capacity built or repowered by DGOs since 1998) and other capacity suppliers are not subject to the mitigation measures in the in-city ICAP market and, therefore, may offer and receive prices higher than the cap. With the exception of NRG, all the owners of mitigated generation also own unmitigated in-city ICAP. For mitigated ICAP, the Commission approved bid caps for the DGOs based on ConEd's 1996 cost of service associated with the divested units.<sup>16</sup> Specifically, under those measures, an offer and revenue cap of \$105/kW-year applies to all capacity offered into the in-city ICAP market from any of the divested capacity generation units owned by the DGOs.

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<sup>12</sup> Capacity is "[t]he capability to generate or transmit electrical power, measured in megawatts." New York ISO FERC Electric Tariff, Original Vol. No. 2, Art. 2, Third Revised Sheet No. 29, § 2.18 (defining "capacity"). Unforced capacity (UCAP) is the unit for buying and selling ICAP that is actually available at any given time.

<sup>13</sup> See *1998 Order*, 84 FERC ¶ 61,287 at n.1 ("market analyses indicated that in-city generators could exercise localized generation market power").

<sup>14</sup> All of the generating units that KeySpan owns, which are eligible for making UCAP offers in the in-city ICAP market, are located in New York City (Zone J). Those generators consist of approximately 2,250 MW summer net capacity rating of UCAP. This figure includes approximately 230 MW of capacity that is not subject to KeySpan's bid and price cap.

<sup>15</sup> Astoria's generation facilities, which are located in New York City (Zone J), are eligible for making UCAP offers in the in-city ICAP market. The Astoria assets have an aggregate summer net capacity rating of 2,098 MW of UCAP. In February 2006, Astoria generation assets were acquired from Reliant Energy (Reliant) by Madison Dearborn Partners LLC (Madison Dearborn) and other investors. On March 13, 2007, the Commission approved a merger transaction that resulted in Astoria becoming a wholly-owned subsidiary of US Power Generating Company (USPowerGen). *EBG Holdings LLC*, 119 FERC ¶ 62,172 (2007) (authorizing merger and disposition and acquisition of jurisdictional facilities). As a result, USPowerGen is currently the owner of Astoria.

<sup>16</sup> See *1998 Order*, 84 FERC ¶ 61,287 at 62,357-58.

As a result of ConEd's divestiture, it became an LSE, which needed, based on the New York State Reliability Council's and NYISO's reliability rules, to purchase capacity from the three entities that acquired its generation (*i.e.*, the DGOs). Reliability rules for New York City require that 80 percent of in-city peak load be met by resources within NYISO's Zone J in New York City, which is a load pocket.<sup>17</sup> Excluding resources controlled by the largest LSEs in New York City (ConEd and the New York Power Authority), the majority of available in-city resources that can meet this requirement are owned by the DGOs.

The Commission required that the DGOs offer all their divested capacity in three auctions administered by the NYISO and conducted for each winter and summer capability period (the summer period is between May and October and the winter is between November and April).<sup>18</sup> As a result, DGOs cannot physically withhold divested capacity from the market. They are also not permitted to enter into physical bilateral contracts for divested capacity. The three auctions are: (1) the capability period auction (also known as the strip auction) (held 30 days before a capability period and for which delivery is made during the following six months of the capability period); (2) the monthly auction (held 15 days before the next month and for which buyers can transact for any month in the remainder of the capability period); and (3) the spot market auction (also known as the deficiency auction) (held two through four days before the beginning of a month and for which delivery occurs in the following month). Pursuant to the rules in NYISO's Services Tariff, capacity suppliers offer their capacity in those auctions, and LSEs bid to purchase their capacity.<sup>19</sup>

The NYISO uses a UCAP methodology to determine the amount of capacity that each resource, including the DGOs, is able to supply to the New York control area and to determine the amount of capacity that LSEs must procure.<sup>20</sup> The LSEs purchase UCAP, which is the unit used for buying and selling ICAP and represents the amount of ICAP

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<sup>17</sup> A "load pocket" is an area in which the total electrical import capacity into an area is less than what is required to serve the load and, therefore, necessitates operating local generating units within that area.

<sup>18</sup> See *1998 Order*, 84 FERC ¶ 61,287 at 62,357.

<sup>19</sup> The ICAP market provisions are discussed at sections 5.9 through 5.16 of the NYISO's Services Tariff.

<sup>20</sup> See Section 4.2 of the Installed Capacity Manual, *available at* <http://www.nyiso.com/public/products/icap/manuals.jsp> (last viewed on January 25, 2008).

that is actually available at any given time.<sup>21</sup> The translation of ICAP into an equivalent UCAP takes into account an individual supplier's units' forced outages. A rolling twelve-month average of each generator's monthly forced outage rate is used to determine the amount of ICAP available for sale in units of UCAP.<sup>22</sup> For various reasons, this value may vary on a monthly basis. Since generators have different UCAP values, the DGOs have different bid and price caps. Due to the nature of KeySpan's units, it has the highest bid and price cap of any of the DGOs and also happens to have the largest volume.

On May 20, 2003, the Commission approved the implementation of a demand curve for the ICAP spot market, which was intended to eliminate volatility in the capacity market.<sup>23</sup> The demand curve represents LSEs' bids in the spot auction. The intersection of the demand curve with the supply curve, based on suppliers' offers, determines the market price for UCAP.

## **B. May 2006 ICAP Spot Market Auction**

Since the inception of the NYISO, the in-city ICAP market capacity prices have generally been at or near the bid and price caps of the DGOs. In addition, since the inception of the demand curve, the spot auction prices typically have been set by KeySpan at its bid cap.

In the spring and summer of 2006, the NYISO control area added approximately 1,000 MW of in-city UCAP. Specifically, two new 500 MW generators came online by June 2006 (one in January 2006 and the other in May 2006). Due to retirements and load growth, the additional 1,000 MW of additional capacity only came to a net gain of about 850 MW to the total amount of in-city capacity. In addition, the resulting surplus from

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<sup>21</sup> In other words, ICAP represents a defined value of generating capacity that is physically on the ground, and UCAP is the percentage of ICAP that is available after a unit's forced outage rate is calculated. See NYISO's Web Site, available at [http://www.nyiso.com/public/services/customer\\_relations/faqs/index.jsp](http://www.nyiso.com/public/services/customer_relations/faqs/index.jsp) (explaining the difference between ICAP and UCAP) (last viewed on January 25, 2008).

<sup>22</sup> The total qualified in-city UCAP supply in May 2006 was 9,863.8 MW. 56 percent of the total in-city ICAP, or 5498.6 MW, was subject to mitigation in that month. With respect to that amount, KeySpan owned 1987.2 MW; Astoria owned 1815.2 MW; NRG owned 1403.8 MW; and ConEd owned 292.4 MW.

<sup>23</sup> *New York Independent System Operator, Inc.*, Order Conditionally Accepting for Filing Tariff Revisions, 103 FERC ¶ 61,201 at P 5 (2003) (*Demand Curve Order*).

those additions is likely to be temporary, because the construction of one of the new units is tied to the retirement of an older steam unit, which is projected to occur in 2010.

Despite that capacity growth, the prices for in-city UCAP in the May 2006 ICAP spot auction remained at the same level as prices in previous spot auctions (*i.e.*, at the level of KeySpan's bid cap). The failure of the additional in-city ICAP to reduce in-city prices was surprising to some market watchers and investment advisers, who expected a decline in in-city UCAP prices because of the addition of the 1,000 MW in 2006. Since the May 2006 spot auction, the capacity prices in that auction have remained at the level of KeySpan's bid cap.

### C. NYISO's Proposal to Modify the ICAP Market Mitigation Measures

Following meetings of NYISO's working groups that addressed the results of the May 2006 spot auction, the NYISO filed, in December 2006, tariff revisions that sought to modify the current mitigation measures in the in-city ICAP market. The NYISO proposed to reduce the bid cap for offers from DGOs' divested capacity generation units to a reference price of \$82/kW-year. On March 6, 2007, in Docket No. ER07-360-000, the Commission issued an order rejecting those proposed tariff revisions, because, among other things, the filing did not offer cost support for the proposed reference price.<sup>24</sup> In that same order, the Commission instituted, in Docket No. EL07-39-000, a proceeding to investigate, pursuant to section 206 of the Federal Power Act (FPA),<sup>25</sup> "the justness and reasonableness of the [in-city ICAP] market and whether and how market rules need to be revised to provide a level of compensation that will attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators."<sup>26</sup> However, the Commission held the hearing in abeyance to provide time for settlement judge procedures and stated that further procedures would be ordered if settlement discussions failed.<sup>27</sup>

On May 2, 2007, the Chief Administrative Law Judge notified the Commission that the participants had reached an impasse and, therefore, recommended that the

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<sup>24</sup> *New York Independent System Operator, Inc.*, 118 FERC ¶ 61,182 (*March 6 Order*), *reh'g denied*, 118 FERC ¶ 61,251 (2007).

<sup>25</sup> 16 U.S.C. § 824e (2006).

<sup>26</sup> *March 6 Order*, 118 FERC ¶ 61,182 at P 17.

<sup>27</sup> *Id.* at P 20 and Ordering Paragraph B.



settlement judge process be terminated. In response to that recommendation, in the *July 6 Order*, the Commission established the Paper Hearing to consider potential reforms to the in-city ICAP market.<sup>28</sup>

In the *July 6 Order*, the Commission also referred to Enforcement, for investigation under section 1b.5 of the Commission's regulations, the issue of whether any entity had engaged in manipulation of the in-city ICAP market in violation of section 1c.2.<sup>29</sup> The *July 6 Order* further directed:

To the extent the Office of Enforcement believes that information learned during the non-public investigation of potential manipulation has a material bearing on potential reforms to the market design that are being considered in the paper hearing, the Office of Enforcement shall so inform the Commission and place such information in the record of the paper hearing as appropriate. Finally, at the conclusion of its investigation, the Office of Enforcement is directed to report its findings to the Commission.<sup>30</sup>

The Commission also noted that "it has been publicly reported that the United States Department of Justice has begun an investigation into possible manipulation in the in-city ICAP market."<sup>31</sup>

On October 4, 2007, the NYISO made a compliance filing in Docket No. EL07-39-000, proposing revised market rules for the in-city ICAP market. Its proposal retains the existing ICAP market structure, including the current set of ICAP auctions and the

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<sup>28</sup> *July 6 Order*, 120 FERC ¶ 61,024 at P 12-17.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at P 17.

<sup>31</sup> *Id.* at n.18 (citing KeySpan Corp. Form 8-K at 4 (filed with Securities and Exch. Comm'n June 6, 2007) (stating that "[o]n May 31, 2007, [KeySpan] received a Civil Investigative Demand from the United States Department of Justice, Antitrust Division, requesting the production of documents and information relating to its investigation of competitive issues in the New York City electric energy capacity market"), *available at* <http://www.sec.gov/Archives/edgar/data/1062379/000106237907000017/0001062379-07-000017.txt> (last accessed on January 25, 2008)).

use of ICAP demand curves but refines the mitigation measures for the in-city ICAP market.

#### **D. Allegations of Economic Withholding**

The NYISO's December 2006 filing with the Commission included an affidavit by Dr. David Patton, the NYISO's Independent Market Monitor, which stated: "[T]he ICAP Spot Market Auctions during the 2006 Summer Capability Period have been characterized by economic withholding of Capacity to exercise market power to the maximum extent allowed by the existing offer cap for the DGOs."<sup>32</sup> Dr. Patton based that conclusion on his findings that:

Beginning in January 2006, more than 1,000 MW of new Capacity [was] installed in NYC. Given that the marginal cost of selling Capacity is close to zero for most units, the amount of Capacity sold in New York City under the NYC Locality Demand Curve have increased by this quantity if the market were performing competitively. However, the total ICAP sales actually fell slightly. . . . This occurred because one incumbent supplier reduced its sales by approximately the same amount as the new capacity. . . . The unsold Capacity in question was not sold because [a] DGO supplier offered the Capacity at the level of its offer cap, which exceeded \$12 per KW-month in the Summer Capability Period. Had all Capacity been sold, the price during the May 2006 auction would have cleared at less than \$6 per KW-month.<sup>[33]</sup>

During Enforcement staff's discussions with Dr. Patton, he confirmed that he was referring to KeySpan when he referred to the "DGO supplier" in the quote above.

In comments supporting the NYISO's December 2006 proposal, ConEd estimated that the impact on New York State's consumers from economic withholding by KeySpan during the 2006 Capability Year was approximately \$157 million.<sup>34</sup> In addition, several other parties' comments/answers concurred with Dr. Patton's and ConEd's allegations

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<sup>32</sup> NYISO, Proposed Revisions to Services Tariff, Attachment II at 3-5 (Affidavit of David B. Patton, Ph.D.), Docket No. ER07-360-000 (Dec. 22, 2006) (Patton Affidavit) (footnote added).

<sup>33</sup> *Id.* at P 14 (footnote omitted).

<sup>34</sup> Comment of ConEd at 15, Docket No. ER07-360-000 (Jan. 24, 2007).

that economic withholding by KeySpan in the in-city ICAP market raised prices in that market.<sup>35</sup>

### **E. Morgan Stanley's Swaps with KeySpan and Astoria**

Some of the parties supporting the NYISO's proposed tariff revisions also alleged that a swap agreement between KeySpan and Morgan Stanley gave the former an incentive to exercise its market power (*i.e.*, engage in economic withholding) in the in-city ICAP market by offering at its cap to set the clearing price for that market.<sup>36</sup> It was later revealed that Astoria had entered into a swap with Morgan Stanley that offset its swap with KeySpan.

Based on responses to Enforcement staff's data requests to KeySpan, Astoria, and Morgan Stanley and testimony at depositions conducted by staff of certain individuals at those companies, the following represents the chain of events that led to KeySpan and Astoria entering into the swaps with Morgan Stanley. In 2005, Madison Dearborn and other investors sought to acquire the Astoria power plants from Reliant and desired to finance that acquisition with various debt instruments. In July 2005, Madison Dearborn approached Morgan Stanley about facilitating the financing of its acquisition of the Astoria assets. As part of that financing, Astoria sought to enter into a financial hedge<sup>37</sup> agreement with Morgan Stanley for both energy and capacity that would allow for greater predictability and stability with respect to cash flows from those power plants' sales of power and capacity. In particular, with respect to the capacity market, since Madison Dearborn was concerned about the risk that prices might be depressed in the in-city ICAP market from the additional capacity coming online in 2006, the hedge created more certainty for price and volume for Astoria's sales in the in-city ICAP market.

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<sup>35</sup> See, e.g., Answer of ConEd at 2, Docket No. ER07-360-000 (Feb. 28, 2007); Comments of Multiple Intervenors, *et al.* at 4-7, Docket No. ER07-360-000 (Jan. 24, 2007); Comments of the NYPSC at 2-3, Docket No. ER07-360-000 (Jan. 24, 2007).

<sup>36</sup> See, e.g., Comments of the City of New York, New York City Economic Development Corporation, and Consumer Power Advocates at 6-7, Docket No. ER07-360-000 (Feb. 24, 2007); Answer of ConEd at 4, Docket No. ER07-360-000 (Feb. 28, 2007).

<sup>37</sup> A hedge is an investment that is taken out specifically to reduce or cancel out the risk in another investment. Hedging is a strategy designed to minimize exposure to an unwanted business risk, while still allowing the business to profit from an investment activity. A swap can serve as a hedge.

Although Morgan Stanley expressed its willingness to facilitate the financing by providing a financial hedge agreement for energy, it was not initially inclined to commit to a financial hedge agreement for capacity. According to Morgan Stanley, capacity is not a product that it normally trades, and as such, it was not familiar with the in-city ICAP market. Therefore, to hedge any risk from the proposed capacity swap with Astoria, Morgan Stanley told Enforcement staff that it attempted to find a party willing to enter into an offsetting swap and approached several entities (but not KeySpan).

Meanwhile, KeySpan had forecasted a shortfall in revenue because of the new additions of capacity scheduled to come online in 2006, which it predicted would cause less of its capacity to clear. Therefore, KeySpan was looking for ways to offset some of the financial impact from that shortfall. One of the ways KeySpan conceived to mitigate that revenue shortfall was a capacity swap. Unlike many market observers that thought the additional capacity coming online in 2006 would depress prices, KeySpan concluded that the additional supply was insufficient to affect the clearing prices in the in-city ICAP market. In light of those different projections for the in-city ICAP market, KeySpan saw an arbitrage opportunity and, to capitalize on it, sought out parties to enter into a capacity swap.

In August 2005, after Astoria had already contacted Morgan Stanley about entering into a swap, KeySpan contacted Morgan Stanley and expressed an interest in a capacity swap for the in-city ICAP market. After discussions with KeySpan, Morgan Stanley contacted Astoria, which had previously inquired about a swap, and advised it that Morgan Stanley would be willing to enter into the capacity swap with Astoria. Morgan Stanley thereafter had a number of separate communications with Astoria and KeySpan to arrive at the final terms in their respective swaps, which were both executed in January 2006.

Under the Morgan Stanley and KeySpan swap agreement, which runs from May 1, 2006 to April 31, 2009, the former pays the latter an amount equal to 1,800,000 kW times the difference between a floating price,<sup>38</sup> which is the lesser of a monthly spot auction price or the average of the DGOs' monthly bid and price cap, and a fixed price (\$7.57/kW-month) when the value is positive. When this value is negative, KeySpan pays Morgan Stanley. Thus, the payment in either direction is the difference between the fixed price and the market price times the transaction quantity. Although the transaction is purely financial and does not transfer any physical control of capacity, KeySpan, in effect, buys 1,800 MW-month of capacity from Morgan Stanley at the fixed price of

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<sup>38</sup> A floating price is a price specified in a transaction that is based upon a publication (or such other origin of reference, including an exchange) containing (or reporting) the specified price (or prices from which the specified price is calculated) specified in the relevant transaction.

\$7.57/kW-month and sells the same quantity back to Morgan Stanley at a value close to the spot auction price.

Under the Morgan Stanley and Astoria swap, which runs for the same duration as the KeySpan swap, Morgan Stanley buys capacity from Astoria at a fixed price below the fixed price in the Morgan Stanley and KeySpan swap times the amount of capacity listed in the swap (expressed, as in KeySpan's swap, in KWs of capacity). Thus, if, in a given month, the fixed price is less than the floating price, Astoria pays Morgan Stanley the difference between those prices multiplied by the quantity of capacity, and if the fixed price is more than the floating price, Morgan Stanley pays Astoria an amount calculated pursuant to that methodology.

In short, based on the terms of the swaps, if the floating price (which is linked to the clearing price in the in-city ICAP market) is above the fixed price, Astoria pays Morgan Stanley the difference between them, and Morgan Stanley pays that amount to KeySpan. On the other hand, if the floating price is below the fixed price, KeySpan pays the difference between them to Morgan Stanley, which, in turn, pays Astoria that amount. In addition, since there is a difference between the fixed prices in Astoria's and KeySpan's swaps, Morgan Stanley receives that amount for each kW per month sold times the total volume listed in the swaps.

### **III. Relevant Legal Authority**

#### **A. NYISO's Services Tariff**

NYISO's Services Tariff, Attachment H, Section 4.5(b), identifies the mitigation measures applicable to specific DGO units and incorporates by reference section 5.13.1 of the tariff. Section 4.5(b) requires that sales or resales from specified in-city generators shall be at prices no higher than \$112.95/kW-year for UCAP, which is the translated equivalent value of the \$105/kW-year price cap for ICAP. Section 4.5(b) also permits retrospective deficiency charges on mitigated in-city generators for "fail[ing] to comply with the Unforced Capacity auction offer requirements in section 5.13.1 of the [NYISO] Tariff." Attachment H, Section 5.13.1, provides: "Unforced Capacity associated with In-City generation that is subject to FERC-approved capacity market mitigation measures is required to be offered for sale in the ICAP Spot Market Auction to the extent that such Unforced Capacity has not sold in prior auctions for the Obligation Procurement Period."

#### **B. Anti-Manipulation Rule**

On August 8, 2005, Congress enacted the Energy Policy Act (EPAct) of 2005, which among other things added section 222 to the FPA. That section gave the

Commission broad statutory authority to regulate market manipulation in connection with the purchase or sale of electric energy.<sup>39</sup> On January 26, 2006, the Commission codified that new authority in regulations that prohibit energy market manipulation previously covered by Market Behavior Rule 2.<sup>40</sup> Section 1c.2(a) of the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2(a), provides as follows:

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,

(1) to use or employ any devise, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.<sup>41</sup>

Order No. 670 clarifies the elements of a violation of the Anti-Manipulation Rule and sets forth three specific elements of a violation: (1) behavior constituting a fraud that had the purpose of impairing, obstructing, or defeating a well-functioning market; (2) scienter (entity engaged in intentional or reckless conduct); and (3) the manipulative or fraudulent conduct was in connection with a jurisdictional purchase or sale.<sup>42</sup> In addition, the Commission's general prohibition of market manipulation applies not only to a seller acting alone but also to market manipulation undertaken by two or more parties acting in concert (*i.e.*, collusion).<sup>43</sup>

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<sup>39</sup> *EPA Act 2005*, Pub. L. No. 109-58, § 1283, 119 Stat. 594 (2005).

<sup>40</sup> *See Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (Order No. 670), *reh'g denied*, 114 FERC ¶ 61,300 (2006).

<sup>41</sup> 18 C.F.R. § 1c.2(a).

<sup>42</sup> *Order No. 670*, 114 FERC ¶ 61,047 at P 50-53.

<sup>43</sup> *Id.* at P 24 (“[P]rohibited actions in Rule 2 (i.e., wash trades, transactions predicated on submitting false information, transactions creating and relieving artificial congestion, and collusion for the purpose of market manipulation) all are prohibited

In its order rescinding Market Behavior Rule 2, the Commission further discussed Part 1c and clarified that:

the intent behind and rationale for actions taken by an entity will be examined and taken into consideration as part of determining whether the actions were manipulative behavior. The reasons given by an entity for its actions are part of the overall facts and circumstances that will be weighed in deciding whether a violation of the new anti-manipulation regulation has occurred.<sup>[44]</sup>

In other words, each case will rely on a determination of all the circumstances concerning the entity's conduct. Economic withholding, for example, is not a per se violation of Part 1c. Rather, all facts surrounding the conduct must be examined and all of Part 1c's elements must be satisfied. Thus, in this situation, among the factors that staff considered were: (1) whether the action taken by KeySpan was explicitly contemplated by the Commission;<sup>45</sup> (2) whether KeySpan's actions served a legitimate business purpose or were economically rational;<sup>46</sup> (3) whether KeySpan's offering behavior or swap were fraudulent or deceitful;<sup>47</sup> and (4) whether KeySpan intended to, or with reckless disregard did, manipulate the market through its offering behavior or by entering into the swap.<sup>48</sup> These factors are part of the overall facts and circumstances that we considered to determine whether KeySpan violated section 1c.2.

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activities under new section 1c.2 of our regulations and are subject to sanctions and remedial action.).

<sup>44</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 at P 29 (*Rescission Order*), *reh'g denied*, 115 FERC ¶ 61,053 (2006).

<sup>45</sup> *Id.* at P 27.

<sup>46</sup> *Id.* at P 29.

<sup>47</sup> *Order No. 670*, 114 FERC ¶ 61,047 at P 49-50.

<sup>48</sup> *Id.* at P 49, 52-53.

## IV. Discussion

### A. Scope of the Investigation

Based on the Commission's directive in the *July 6 Order* to investigate allegations of possible market manipulation by in-city suppliers of ICAP, Enforcement staff's investigation sought to determine if any of the DGOs engaged in market manipulation in that market in violation of Part 1c.<sup>49</sup> Because the allegations of economic withholding in the Paper Hearing were directed at KeySpan and the swaps involved KeySpan, Astoria, and Morgan Stanley, Enforcement staff looked at, among other things, whether:

- capacity additions to the in-city ICAP market in 2006 were sufficient to incentivize the DGOs (in particular, KeySpan) to offer below their bid caps;
- KeySpan's and Astoria's offering behaviors violated the NYISO's Tariff;
- KeySpan's offering behavior constituted market manipulation in violation of section 1c.2; and
- KeySpan's, Astoria's, or Morgan Stanley's swaps were a component of a broader manipulative scheme in violation of section 1c.2.

To that end, we reviewed documents and responses to data requests sent to KeySpan, Astoria, Morgan Stanley, and the NYISO requesting information related to the in-city ICAP market. In addition, we deposed the principal negotiators of the swaps and individuals involved in developing KeySpan's and Astoria's offering strategies.

### B. Findings

#### 1. When It Approved the Mitigation Regime for the In-City ICAP Market, the Commission Contemplated that DGOs Would Likely Offer at Their Bid Caps

In the *1998 Order*, the Commission approved the price cap proposal for the in-city ICAP market,<sup>50</sup> because it recognized that transmission constraints and the degree of

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<sup>49</sup> The investigation focused on behavior that occurred between June 2005 and July 2007.

<sup>50</sup> *1998 Order*, 84 FERC ¶ 61,287 at 62,357-58.



concentration in the in-city ICAP market might support the exercise of localized market power by the DGOs. Specifically, the Commission predicted:

Given the circumstances present here, existing suppliers are likely to bid the price cap and set the market-clearing price at that level *even as new generation* is added and supply increases. This is because, until the supply increases sufficiently to supplant substantial amounts of existing capacity, the existing suppliers will be assured that at least some of their capacity will be selected at any price and so they have an incentive to bid the price cap to maximize revenues on those sales.<sup>[51]</sup>

Thus, the Commission anticipated that individual DGOs, such as KeySpan, would have the capability and incentive to offer all of their capacity at their applicable bid caps, which would have the effect of setting the market-clearing price at those caps, until sufficient amounts of new capacity entered the in-city ICAP market.

As discussed further below, the market conditions that the Commission predicted would drive DGOs to offer capacity below their caps have not yet materialized; that is, sufficient capacity has not been added to the in-city ICAP market. For example, Dr. Patton has determined that, despite the 2006 capacity additions, the in-city ICAP market has not yet realized a substantial enough surplus in new capacity to change the market power issues contemplated in the *1998 Order*.<sup>52</sup>

Similarly, KeySpan's analysis of its risk/reward ratio, even with the capacity additions in 2006, the total supply of capacity in the in-city ICAP market has not yet reached the point where it would be economically rational for KeySpan to discontinue offering its capacity at its cap. Given KeySpan's large market share, the majority of its divested capacity still has to be purchased in order for LSEs to meet the 80 percent reliability requirement, even with the capacity additions.

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<sup>51</sup> *Id.* at 62,357 n.17 (emphasis added).

<sup>52</sup> Patton Affidavit at P 9 (stating that the recent entry of approximately 1,000 MW of new generation into the capacity market, while significant, was not large enough to render all of the DGOs no longer pivotal suppliers); *id.* at P 12 (“New entry of generation in amounts that would be sufficient to render all of the DGOs no longer pivotal is highly unlikely to ever occur because such investment would not be economically rational. Therefore, one may conclude that the market power issues in the capacity market in New York City will exist for the foreseeable future.”).

## **2. KeySpan's and Astoria's Offering Behaviors Were Consistent with the NYISO's Services Tariff**

Enforcement staff has found that KeySpan's and Astoria's offering behaviors were consistent with the NYISO's Services Tariff's market mitigation rules at all times during the period under investigation. Specifically, none of their offers ever exceeded applicable, seasonally adjusted bid caps. KeySpan and Astoria also offered, consistent with the requirements set forth in section 5.13.1, all of their available mitigated capacity in the in-city ICAP auctions during each capability period. Section 4.5(b) of Attachment H permits retrospective deficiency charges on mitigated in-city generators for "a fail[ure] to comply with the Unforced Capacity auction offer requirements in section 5.13.1 of the [NYISO] Tariff." As KeySpan's and Astoria's behavior in the capacity market has complied with the various requirements and restrictions in section 5.13.1 of the NYISO's Tariff, they are not subject to such charges.

## **3. KeySpan's Offering Behavior Did Not Constitute Market Manipulation in Violation of Section 1c.2**

There is a difference between engaging in (1) market manipulation in violation of section 1c.2, which includes fraud or deceit as discussed above and (2) a party exercising market power. Of course, an exercise of market power may be a factor to consider in examining whether Part 1c was violated. However, it is not the only relevant factor. Moreover, Enforcement staff emphasizes that the issue of market power, and the appropriate rules to mitigate the exercise of market power, will be addressed by the Commission upon review of the NYISO's proposal to strengthen its market mitigation rules applicable to the in-city ICAP market. With respect to the issue of market manipulation, as discussed below, Enforcement staff found no evidence that its behavior satisfied the elements of a violation of section 1c.2. For instance, Enforcement staff did not find any evidence that KeySpan's offering behavior involved fraud or deception and, therefore, constituted market manipulation. In addition, Enforcement staff did not find any evidence that KeySpan engaged in any activity that lacked a legitimate business purpose given the unique circumstances and history of the ICAP market, was not economically rational, or that it possessed the requisite scienter.

Market participants in the in-city ICAP market have always known that KeySpan, pursuant to the applicable market mitigation rules, was permitted to offer at its cap and set the market-clearing price. In addition, as noted, KeySpan's offering behavior was consistent with market rules and the Commission's announced expectation that DGOs, such as KeySpan, would (in the absence of sufficient capacity additions) offer their capacity at their caps. Furthermore, KeySpan's swap was not deceitful or hidden; KeySpan publicly disclosed the terms and conditions of its swap shortly after executing it.

Under the unique circumstances of the ICAP market and the Commission's explicit expectation in the *1998 Order* KeySpan's offering at its bid cap was based on its legitimate business purpose of maximizing a relatively predictable revenue level and minimizing risk, consistent with its assessment of its risk/reward ratio. Since the winter 2003-2004 capability period, which was the first capability period following implementation in June 2003 of the demand curve in the in-city ICAP market, KeySpan has generally offered its capacity at its bid cap, even if that meant some of its capacity went unsold. KeySpan adopted that strategy as a corporate policy. KeySpan refers to that strategy as a "low risk" offering strategy.<sup>53</sup> Indeed, more to the point, this policy was approved by KeySpan's senior management and incorporated into the company's Market Risk Management Procedures in the summer of 2004 and premised on KeySpan's determination that any potential benefit from selling additional capacity at discounted prices was outweighed by the risk that its revenues would be reduced if its discounted capacity went unsold and clearing prices and overall revenues were lowered.

In light of the prospect of the 2006 capacity additions and their potential to cause less of KeySpan's capacity to clear (an amount equal to the surplus),<sup>54</sup> KeySpan first considered a discounting strategy (offering at a price below its cap) as a means of capturing more revenue by clearing more of its capacity. However, KeySpan decided to continue to follow its strategy of offering its capacity at its bid cap. KeySpan concluded that it was still economically rational for it, in light of its estimation of its tolerance for risk, to offer at its bid cap to keep prices high for its remaining sales, even after the 2006 capacity additions came online. Indeed, KeySpan determined that, even with those additions, it would still clear sufficient quantities at a high enough price to make bidding at its cap its optimal strategy, whereas, a discounting strategy risked lower clearing prices and, in turn, overall revenues.

In choosing whether or not to engage in a discounting strategy, KeySpan considered three capacity revenue models. Under the first scenario, KeySpan concluded that if KeySpan and all the other DGOs were to offer as price-takers<sup>55</sup> and, therefore, the

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<sup>53</sup> KeySpan's senior management committees have been briefed on the continued use of that strategy and have continually approved its retention.

<sup>54</sup> The amount of surplus capacity resulted in an equal number of megawatts of KeySpan's capacity not clearing (*e.g.*, approximately 550 MWs for the summer capability period), since KeySpan, as the highest bidder, always absorbs the entire excess in the market if it bids its cap. Nevertheless, because KeySpan has 1,987 MW of UCAP, the majority of KeySpan's capacity is still needed to meet reliability requirements.

<sup>55</sup> A price-taker is a market participant whose buying or selling transactions are assumed to have no effect on the market.

market were to clear at the demand curve price, it could potentially make as little as \$70 million in annual net revenue in the physical market. With respect to the second scenario, KeySpan determined that if it were to bid at its cap and, in turn, set the market price at its cap, it could predictably make \$173 million. As for the third scenario, KeySpan concluded that if it were to offer below the next highest DGO's bid cap and that bid cap set the market-clearing price, KeySpan could potentially make up to \$233 million. Comparing those figures, KeySpan determined that a discounting strategy risked \$103 million in assured 2006 revenues (the difference between the first and the second scenarios) to gain a maximum \$60 million in potential revenue (the difference between the second and third scenarios). In other words, KeySpan determined that any potential reward from clearing more of its capacity at discounted prices was outweighed by the risk that some of its discounted capacity would remain unsold and the remainder of its capacity would clear at lower prices. While a discounting strategy had the potential to produce greater revenues, it also carried the risk of producing lower revenues because KeySpan could not predict or rely on how other DGOs would offer their capacity. In contrast, KeySpan's strategy of offering at its bid cap maximized a relatively predictable revenue level at a low level of risk. Based on KeySpan's assessment of its tolerance level for risk, as discussed above, KeySpan adopted the less risky alternative of the three scenarios, the offer at its cap strategy, even though it potentially forewent potential higher revenues by doing so.

KeySpan retained outside economists to review its offering strategy for capacity in the physical market. In November 2005, independent economists reviewed KeySpan's modeling of the in-city capacity market and concluded that offering physical capacity at KeySpan's cap was its optimal strategy and would remain so in the absence of the swap.<sup>56</sup> In 2007, another independent economist hired by KeySpan confirmed that conclusion. Enforcement staff reviewed the modeling that KeySpan and its independent economists used to determine its optimal offering strategy.<sup>57</sup> Based on our review of KeySpan's modeling, we conclude that KeySpan's strategy of offering its capacity at its cap was economically rational and reasonable.

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<sup>56</sup> That study only considered the first and second scenarios.

<sup>57</sup> Those independent economists submitted affidavits in this investigation. The affidavits supported KeySpan's choice of three capacity revenue models, discussed above, to determine its optimal offering strategy, and KeySpan's decision to adopt its strategy of offering at its bid cap based on those models. *See* William Hieronymus Aff. at 1 ("conclud[ing] that KeySpan's low risk capacity market strategy was and continues to be a rational economic strategy taking into account both risks and reasonably anticipated revenue streams"); Edward Kahn Aff. at ¶¶ 7-14 (explaining why he considered the economic models used by KeySpan to evaluate its optimal offering strategy to be sufficient).

After the adoption of its offering at its cap strategy, KeySpan's traders reviewed market conditions before every auction to determine whether changes in circumstances in the market might warrant offering capacity at a discount below its cap. For virtually every auction, KeySpan determined that the potential benefit of discounting was not sufficient to justify the risks associated with such a strategy.<sup>58</sup> Only once since the implementation of the ICAP demand curve did KeySpan determine that it should discount its capacity offers in the spot auction. In another instance, a KeySpan employee proposed that it should discount its offers in the spot auction. On review of the discounting proposal, it was determined that KeySpan could potentially earn about \$75,000 less in revenue than if it offered its capacity at its cap. As a result, KeySpan's Risk Management Committee rejected the proposal.

#### **4. Astoria's Offering Behavior Did Not Constitute Market Manipulation**

After USPowerGen acquired the Astoria generators in 2006, it offered their mitigated UCAP: (1) at or close to its cap in the seasonal strip and monthly auctions; and (2) at zero in the spot auction, to the extent it had any available mitigated UCAP to sell in that auction. Since Astoria has been consistently offering its capacity in the spot market at a nominal level above zero (as a price-taker), its offering behavior has not caused clearing prices in the physical market to rise. Moreover, Astoria's offering behavior served a legitimate business purpose because its bidding maximized its revenue and ensured that all of its capacity cleared.

#### **5. KeySpan and Morgan Stanley's and Astoria and Morgan Stanley's Swaps Were Not Part of a Broader Manipulative Scheme**

##### **i. KeySpan and Morgan Stanley's Swap**

KeySpan's strategy of offering its capacity at its cap predates its consideration of its swap with Morgan Stanley or any similar transactions. However, KeySpan's swap appears, on its face, to give it an added incentive to continue that strategy, regardless of possible changes to circumstances in the physical market. In particular, under KeySpan's swap with Morgan Stanley, its revenues increase if UCAP prices in the in-city ICAP spot auction (the physical market) rise and decrease if they are lower. However, we have not found any evidence that KeySpan took any actions in the physical market that were any different from those that it would have taken in the absence of its swap. Since KeySpan

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<sup>58</sup> A senior trader for KeySpan confirmed under oath that its strategy of offering at its cap has, based on his calculations, been its optimal strategy.

was already fully incentivized in the physical market to offer at its cap (based on its estimate of its optimal offering strategy, even taking into account the 2006 capacity additions), the added incentive to maintain prices at the level of its bid cap to benefit its swap did not affect KeySpan's offering behavior. Thus, the swap did not provide KeySpan with an independent incentive to change its offering behavior in the physical market (*i.e.*, artificially increase capacity prices) to benefit its derivative position. Rather, KeySpan's offering behavior in the physical market was based on its goal to maximize revenue, while limiting risk, in that single market.<sup>59</sup>

KeySpan had a legitimate business purpose for entering into its swap with Morgan Stanley. KeySpan, as noted, entered into the swap as a means to acquire additional revenues to offset expected revenue reductions due to the 2006 additions of capacity, which had the effect of depressing the amount of capacity sold by KeySpan. We note that KeySpan collects more in the physical in-city ICAP market than it does on the swap. KeySpan's annual net physical revenue in the in-city ICAP market in 2005 was approximately \$250 million and in 2006 was \$170 million. Thus, KeySpan's physical revenue shortfall from the additional 1,000 MW of capacity coming online in 2006 and causing more of its capacity to not clear was approximately \$80 million. KeySpan offset that shortfall, in part, with the swap, which produces almost \$35 million in annual revenue.

## **ii. Astoria and Morgan Stanley's Swap**

Before the effective date of the swap, Astoria had an incentive to maximize revenues in the in-city ICAP auctions by trying to get the highest price for its capacity. After the effective date of the swap, Astoria had an incentive to clear the quantity of capacity listed in its swap and maximize revenues for the remainder of its capacity. Although the swap changed Astoria's incentive from one of maximizing revenues in the physical market to one of being, in effect, indifferent to the clearing price in the in-city ICAP market, it did not translate into a change in Astoria's offering behavior in that market.<sup>60</sup> This is the case because both of those incentives are best served by Astoria adopting a strategy as a price-taker, as long as KeySpan continues to bid at its cap. That

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<sup>59</sup> KeySpan's trader stated under oath that his review of whether changes in market conditions might warrant offering capacity at a discount below the cap were solely based on the physical market and not on a consideration of KeySpan's swap with Morgan Stanley.

<sup>60</sup> Astoria had a small exposure with regard to price in the physical market, since there is a slight difference between its bid cap and the lesser of the clearing price or average of the DGOs' bid caps, which is the floating price under the swap.

is, Astoria maximizes its revenue and ensures that a sufficient amount of its capacity clears (for purposes of the swap) if it allows KeySpan to set the clearing price. Accordingly, since Astoria was a price-taker in the spot auction in-city ICAP market both before and after entering into the swap and KeySpan was the marginal bidder for that period, Astoria's offers in the in-city ICAP market were not affected by the swap (albeit its incentives for adopting its offering strategy were).

Astoria, like KeySpan, had a legitimate business purpose for entering into its swap with Morgan Stanley: (1) to help facilitate USPowerGen's financing of Astoria assets from Reliant; and (2) to hedge its risk in the physical market. With respect to the latter, Astoria has mitigated, through the swap, any risk with respect to the clearing price in physical market, as it receives the clearing price in the physical market and pays to Morgan Stanley the difference between that and the fixed price; that is, they cancel each other out. As such, Astoria is indifferent to the clearing price in the physical market as long as at least the amount of its capacity listed in the swap clears in that market. Under the swap, Astoria receives a fixed payment below the one in KeySpan and Morgan Stanley's swap for up to the amount of the quantity in the swap per month for the three-year duration of the swap, which allowed it to secure the financing it needed to purchase the Astoria assets.

### **iii. Morgan Stanley**

Based on the spread between the fixed prices in the two swaps, Morgan Stanley is paid the difference per KW between them per month for being a broker. Since that payment is tied to the fixed prices in the swaps and the floating prices in the two swaps cancel each other out from Morgan Stanley's perspective, it is paid the same amount regardless of what occurs in the physical market. In addition, Morgan Stanley does not have an independent ability to influence capacity prices in the in-city ICAP market, since it does not have any physical assets in the in-city ICAP market. Therefore, Morgan Stanley does not have an incentive to encourage market price increases above or below the fixed prices in the swaps.

### **iv. The Swaps Did Not Involve Collusion**

The Commission's general prohibition of market manipulation applies not only to a seller acting alone but also to market manipulation undertaken by two or more sellers acting in concert (*i.e.*, collusion). Under the swaps, Morgan Stanley hedged its position with Astoria by entering into a swap with a competitor of Astoria's, KeySpan (both of which have been deemed by the Commission to have market power). As such, the swaps could be viewed as a coordinated bidding strategy between competitors in the in-city ICAP market to the extent that they appear to lock competitors (via additional incentives) into offering their capacity within a certain range (above the fixed price for KeySpan and below it for Astoria).

Enforcement staff, however, did not find any evidence that either KeySpan or Astoria engaged in collusion. For example, Enforcement staff found no evidence that any of KeySpan's or Astoria's employees actually coordinated such a strategy, such as communicating the terms and conditions of their swaps with Morgan Stanley to each other or sharing any documents related to the swaps.<sup>61</sup> In addition, Enforcement staff found no evidence that Morgan Stanley facilitated such collusion by brokering the swaps. For instance, Enforcement found no evidence that Morgan Stanley divulged the terms and conditions of the Astoria swap to KeySpan or vice versa. Although Morgan Stanley was aware that the swaps might give KeySpan and Astoria an incentive to offer their capacity within a certain range (based on the fixed prices in the swaps), Enforcement staff found no evidence that Morgan Stanley thought that such a result would occur. Morgan Stanley, like many other market observers at the time, was unable to predict the effect of the additional capacity coming online in 2006 would have for prices in the in-city ICAP market and, in turn, on the DGOs bidding behaviors.

Not only has Enforcement staff not found any evidence that suggests that overt collusion occurred, we also have not found any evidence that KeySpan and Astoria had an implied understanding (tacit collusion) that the other party would be the offsetting party to its swap with Morgan Stanley. Moreover, Enforcement staff has not found any evidence that the swaps, when considered together, caused any harm on competition in the physical market.

Even though KeySpan and Astoria have an added incentive from their swaps to continue their offering strategies (price-maker and price-taker, respectively), Enforcement staff does not have any evidence that the avoidance of a price war was a motivating factor for either of them entering into their respective swaps. As noted, KeySpan and Astoria appear to have had legitimate business purposes for entering into their respective swaps. To reiterate, through the swaps, the latter sought to hedge a substantial portion of its net revenue in the in-city ICAP spot market and lock in future cash flows for financing purposes and the former sought to offset a revenue shortfall. Perhaps most important, we have not found any evidence that KeySpan in the absence of the swap, as discussed above, would have pursued a strategy other than bidding at its cap.

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<sup>61</sup> After a public report was issued in October of 2005, stating that Morgan Stanley was entering into hedge with USPowerGen, KeySpan told Enforcement staff that it speculated at that time that Astoria was the offsetting party to its proposed swap with Morgan Stanley. However, KeySpan did not learn of the price and terms of Astoria's swap until the summer of 2007, although it speculated as to them much earlier. In addition, Astoria did not learn that KeySpan was the offsetting party to its swap with Morgan Stanley until that information was disclosed by KeySpan in its January 2006 8-K form, which also disclosed the price and terms of that swap.



Since KeySpan has the largest bid cap of the DGOs, if it bids at its cap, as it did, the clearing price is set at that level and a price war in the in-city ICAP market will not take place.

For the reasons discussed above, the swaps (taken together) did not change KeySpan's and Astoria's bidding behavior in the in-city ICAP market. In other words, although the swaps could have enhanced their ability to exercise market power (especially KeySpan's), we have not found any evidence that the swaps actually limited KeySpan's or Astoria's incentive to compete or resulted in KeySpan raising prices in a manner different than what would have occurred in the absence of its swap. In short, we found no evidence that the state of competition with the swaps as compared to the state of competition without in the in-city ICAP market was different, and therefore, find that the swaps did not constitute collusion under Part 1c.

## **V. Conclusion**

Enforcement staff concludes that, based on all the facts and circumstances surrounding the bidding in the ICAP market and the swaps, KeySpan, Astoria, or Morgan Stanley did not violate section 1c.2 or NYISO's Services Tariff's mitigation rules. In particular, we found: (1) KeySpan's offering behavior was anticipated by the Commission's 1998 Order; (2) KeySpan's offering behavior did not constitute a fraud or fraudulent practice; (3) the capacity additions in 2006 to the in-city ICAP market were insufficient to cause KeySpan, based on its analysis of its risk/reward ratio, to change its offering strategy; (4) KeySpan's and Astoria's offering behaviors in the in-city ICAP market were not affected by the fact that they had entered into swaps; and (5) KeySpan, Astoria, and Morgan Stanley did not engage in collusion to impair, obstruct, or defeat the functioning of the in-city ICAP market in violation of section 1c.2.