

**ORAL ARGUMENT IS SCHEDULED FOR OCTOBER 18, 2004**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 03-1228**

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**EDISON MISSION ENERGY, INC., *ET AL.*,  
Petitioners,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
Respondent.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**MAY 25, 2004**

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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Pursuant to Circuit Rule 28(a)(1), Respondent Federal Energy Regulatory Commission hereby certifies as follows:

### **A. Parties and Amici**

All parties and intervenors appearing before the Commission and this Court are listed in Petitioners' brief. There are no *amici*.

### **B. Rulings Under Review**

The following orders of the Federal Energy Regulatory Commission are under review here:

1. *New York Independent System Operator, Inc., et al.*, “Order on Compliance Filings,” 99 FERC ¶ 61,246 (May 31, 2002), R. 195, J.A. \_\_ (Compliance Order); and

2. *New York Independent System Operator, Inc., et al.*, “Order on Requests for Rehearing and Motion,” 103 FERC ¶ 61,291 (June 5, 2003), R. 216, J.A. \_\_ (Rehearing Order).

**C. Related Cases**

On April 23, 2003, this Court dismissed, as moot, an appeal (*Dynegy Power Marketing, Inc. v. FERC*, D.C. Cir. No. 02-1009) challenging the Commission's initial, limited-term authorization of an earlier version of the AMP.

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Robert H. Solomon  
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May 25, 2004

## TABLE OF CONTENTS

	<b>PAGE</b>
STATEMENT OF THE ISSUE.....	1
STATUTES AND REGULATIONS.....	2
STATEMENT OF THE CASE.....	2
I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW.....	3
II. STATEMENT OF FACTS.....	3
A. NYISO and the Energy Markets It Administers.....	3
B. Development of Market Mitigation Measures.....	5
C. Development and Initial Authorization of the AMP.....	7
D. Further Extension and Refinement of the AMP.....	10
E. The Challenged Orders.....	12
SUMMARY OF ARGUMENT.....	15
ARGUMENT.....	16
I. STANDARD OF REVIEW.....	16
II. THE COMMISSION REASONABLY BALANCED COMPETING CONCERNS IN ALLOWING THE AMP TO REMAIN IN EFFECT, SUBJECT TO REEXAMINATION.....	17
A. The Commission’s Balance Respected Competing Goals and Perspectives.....	17
B. Edison Mission Views the ISO’s Compliance Filing and the Commission’s Review of That Filing Out of Context.....	19

**TABLE OF CONTENTS**

	<b>PAGE</b>
C. Substantial Evidence Supports the Commission’s Approval of the AMP Extension.....	23
D. Edison Mission’s Submissions Do Not Upset the Commission’s Findings and Conclusions.....	26
E. The Commission’s Approval of the AMP Extension Was Not Permanent, and Is Subject to Reexamination.....	33
CONCLUSION.....	36

## TABLE OF AUTHORITIES

COURT CASES:	PAGE
<i>American Airlines, Inc. v. CAB</i> , 359 F.2d 624 (D.C. Cir. 1966).....	35
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156 (1962).....	16
<i>City of Nephi v. FERC</i> , 147 F.3d 929 (D.C. Cir. 1998).....	23
<i>Consolidated Edison Co. of New York, Inc. v. FERC</i> , 347 F.3d 964 (D.C. Cir. 2003).....	3,21
<i>Consolidated Hydro, Inc. v. FERC</i> , 968 F.2d 1258 (D.C. Cir. 1992).....	16
<i>Dynegy Power Marketing, Inc. v. FERC</i> , D.C. Cir. No. 02-1009 (dismissed Apr. 23, 2003).....	8
<i>East Texas Electric Cooperative, Inc. v. FERC</i> , 331 F.3d 131 (D.C. Cir. 2003).....	16
* <i>Florida Municipal Power Agency v. FERC</i> , 315 F.3d 362 (D.C. Cir. 2003).....	27
<i>FPL Energy Maine Hydro LLC v. FERC</i> , 287 F.3d 1151 (D.C. Cir. 2002).....	17
<i>Georgia Industrial Group v. FERC</i> , 137 F.3d 1358 (D.C. Cir. 1998).....	23
<i>In re California Power Exchange Corp.</i> , 245 F.3d 1110 (9th Cir. 2001).....	5,26

---

\* Cases chiefly relied upon are marked with an asterisk.

## TABLE OF AUTHORITIES

	PAGE
<b>COURT CASES: (con't)</b>	
* <i>Interstate Natural Gas Ass'n of America v. FERC</i> , 285 F.3d 18 (D.C. Cir. 2002).....	32,35
<i>KeySpan-Ravenswood, LLC v. FERC</i> , 348 F.3d 1053 (D.C. Cir. 2003).....	3
<i>Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	16
<i>New York v. FERC</i> , 535 U.S. 1 (2002).....	4
<i>PSEG Energy Resources &amp; Trade, LLC v. FERC</i> , 360 F.3d 200 (D.C. Cir. 2004).....	3,4,5
<i>Public Service Commission of the State of New York v. FPC</i> , 463 F.2d 824 (D.C. Cir. 1972).....	35
<i>Sithe/Independence Power Partners v. FERC, L.P.</i> , 165 F.3d 944 (D.C. Cir. 1999).....	16
<i>Sithe/Independence Power Partners, L.P. v. FERC</i> , 285 F.3d 1 (D.C. Cir. 2002).....	4
<i>Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000).....	4
<i>United States Postal Service v. Gregory</i> , 534 U.S. 1 (2001).....	16
* <i>Wisconsin Valley Improvement Co. v. FERC</i> , 236 F.3d 738 (D.C. Cir. 2001).....	27

## TABLE OF AUTHORITIES

	PAGE
<b>ADMINISTRATIVE CASES:</b>	
<i>California Independent System Operator Corp.</i> , 100 FERC ¶ 61,060, <i>order on reh'g</i> , 101 FERC ¶ 61,061 (2002).....	31
<i>Central Hudson Gas &amp; Electric Co., et al.</i> , 83 FERC ¶ 61,352 (1998), <i>order on reh'g</i> , 87 FERC ¶ 61,135 (1999).....	4
<i>Central Hudson Gas &amp; Electric Co., et al.</i> , 86 FERC ¶ 61,062 (1999), <i>order on reh'g</i> , 88 FERC ¶ 61,138 (1999).....	4,5
<i>Mirant Americas Energy Marketing, L.P., et al.</i> , 95 FERC ¶ 61,189 (2001).....	7
<i>New York Independent System Operator, Inc., et al.</i> , 89 FERC ¶ 61,196 (1999).....	5
<i>New York Independent System Operator, Inc., et al.</i> , 90 FERC ¶ 61,317, <i>clarified</i> , 91 FERC ¶ 61,154 (2000).....	6
<i>New York Independent System Operator, Inc., et al.</i> , 95 FERC ¶ 61,471 (2001), <i>reh'g denied</i> , 97 FERC ¶ 61,176 (2001).....	8,30
* <i>New York Independent System Operator, Inc., et al.</i> , 97 FERC ¶ 61,242 (2001).....	9,17,20,32
<i>New York Independent System Operator, Inc., et al.</i> , 99 FERC ¶ 61,147 (2002).....	12
<i>New York Independent System Operator, Inc., et al.</i> , 99 FERC ¶ 61,246 (2002).....	passim
<i>New York Independent System Operator, Inc., et al.</i> , 103 FERC ¶ 61,291 (2003).....	passim



## TABLE OF AUTHORITIES

	<b>PAGE</b>
<b>ADMINISTRATIVE CASES: (con't)</b>	
<i>New York Independent System Operator, Inc., et al.</i> , 106 FERC ¶ 61,111 (2004).....	33
<i>Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities</i> , Order No. 888, FERC Stats. Regs. <b>&amp;</b> 31,036 (1996), <i>order on reh'g</i> , Order No. 888-A, FERC Stats. & Regs. <b>&amp;</b> 31,048 (1997), <i>order on reh'g</i> , Order No. 888-B, 81 FERC <b>&amp;</b> 61,248 (1997), <i>order on reh'g</i> , Order No. 888-C, 82 FERC <b>&amp;</b> 61,046 (1998).....	4
<i>Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design</i> , Notice of Proposed Rulemaking, 67 Fed. Reg. 55,452, 55,504-06, FERC Stats. & Regs. <b>&amp;</b> 32,563 at 34,366-69 (2002).....	31
<b>STATUTES:</b>	
Administrative Procedure Act	
5 U.S.C. § 706(2)(A).....	16
Federal Power Act	
Section 205, 16 U.S.C. § 824d.....	7
Section 313(b), 16 U.S.C. § 825l(b).....	16

**GLOSSARY**

AMP	Automated Mitigation Procedure, which accelerates the identification of questionable bidding behavior under the MMM
Commission or FERC	Respondent Federal Energy Regulatory Commission
Compliance Order	<i>New York Independent System Operator, Inc., et al.</i> , “Order on Compliance Filings,” 99 FERC ¶ 61,246 (May 31, 2002), R. 195, J.A. ___
Edison Mission	Petitioners Edison Mission Energy, Inc. and Edison Mission Marketing & Trading, Inc.
FPA	Federal Power Act
ISO	Independent System Operator
J.A.	joint appendix page
MMM	Market Mitigation Measures, NYISO’s procedures, containing conduct and market impact thresholds, for identifying bidders that appear to exercise market power
MMP	Market Monitoring Plan, which identifies questionable bidding behavior under the MMM on a manual basis
NYISO	New York Independent System Operator, Inc.
Pet. Br.	Petitioners’ opening brief
R.	record item

Rehearing Order

*New York Independent System Operator, Inc., et al.*, “Order on Requests for Rehearing and Motion,” 103 FERC ¶ 61,291 (June 5, 2003), R. 216, J.A. \_\_\_

Services Tariff

NYISO Market Administration and Control Areas Services Tariff

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**BRIEF FOR RESPONDENT  
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**STATEMENT OF THE ISSUE**

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably balanced competing concerns by: (1) granting a proposal by the New York Independent System Operator (“NYISO” or “ISO”) to allow an Automated Mitigation Procedure (“AMP), previously approved by the Commission for a limited term, to remain in effect, with enhancements to improve its effectiveness; and (2) requiring reevaluation of the AMP in two years on the basis of additional operating data.

## **STATUTES AND REGULATIONS**

Pertinent sections of the Federal Power Act (“FPA”) are set out in the Addendum to this brief.

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW**

This case concerns two in a series of FERC orders addressing market mitigation measures adopted to restrain prices in wholesale electricity markets served by the NYISO. In earlier orders, the Commission: (1) directed the NYISO to adopt market monitoring and mitigation procedures to identify and curtail the exercise of market power in energy markets throughout New York State; (2) approved specific Market Mitigation Measures (“MMM”) that constrain prices in the NYISO-administered Day-Ahead Market that exceed specific conduct and market impact thresholds; (3) permitted the NYISO to implement an AMP, as a means to eliminate a one-day lag in the manual implementation of mitigation procedures, only after filing with and approval by the Commission; (4) limited operation of the AMP to a term that ultimately ended May 31, 2002; and (5) required the NYISO to make a “comprehensive” market mitigation filing demonstrating how the AMP would work with other market mitigation measures and responding to Commission and supplier concerns as to the AMP’s effectiveness.

In the instant orders, the Commission, after considering and balancing the concerns of over two dozen intervenors, allowed the AMP to remain in effect. *See New York Independent System Operator, Inc., et al.*, “Order on Compliance Filings,” 99 FERC ¶ 61,246 (2002), J.A. \_\_\_ (Compliance Order), and “Order on Requests for Rehearing and Motion,” 103 FERC ¶ 61,291 (2003), J.A. \_\_\_ (Rehearing Order). The Commission agreed with the NYISO and others that the enhanced AMP, with additional safeguards, should be permitted to continue as a means of identifying and mitigating the exercise of market power in the Day-Ahead Market. The Commission nevertheless required the NYISO to monitor the AMP’s operation and the effectiveness of its triggers, and to report by December 2, 2004 as to the need for further refinements.

## **II. STATEMENT OF FACTS**

### **A. The NYISO and the Energy Markets It Administers**

This Court has addressed the operation of the NYISO, certain markets that it administers, and certain price mitigation measures that it implements, in several recent opinions. *See Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003) (operation of Market Monitoring Plan and Temporary Extraordinary Procedures in market for ancillary services, including operating reserves); *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053 (D.C. Cir. 2003) (recalculation of price cap in New York City capacity market); *PSEG Energy*

*Resources & Trade, LLC v. FERC*, 360 F.3d 200 (D.C. Cir. 2004) (exercise of Temporary Extraordinary Procedures in Day-Ahead and Real-Time energy markets).

The NYISO is a non-profit corporation that operates the bulk power transmission system in New York, provides open access transmission service and maintains system reliability in accordance with the Commission's Order No. 888.<sup>1</sup> See generally *Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1, 2-3 (D.C. Cir. 2002) (explaining restructuring of New York wholesale electricity markets); see also *Central Hudson Gas & Electric Co., et al.*, 83 FERC ¶61,352 (1998), *order on reh'g*, 87 FERC ¶61,135 (1999) (finding the ISO restructuring proposal to be consistent with principles identified in Order No. 888).

Operating under FERC-approved tariffs, the ISO also administers competitive, bid-based electricity markets, including the Day-Ahead Market and the Real-Time Market, both of which are single-price clearing auction markets. See *Central Hudson Gas & Electric Co., et al.*, 86 FERC ¶61,062 at 61,222-23

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<sup>1</sup> See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶61,046 (1998), *aff'd in part and rev'd in part, Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom., New York v. FERC*, 535 U.S. 1 (2002).

(1999), *order on reh'g*, 88 FERC ¶61,138 (1999) (conditionally accepting, with modifications, proposed NYISO tariff, market rules, and market-based pricing, and describing markets). Both also are volatile markets, subject to possible price spikes, particularly on days with unexpectedly high demand. *See PSEG Energy*, 360 F.3d at 202 (explaining price spike in Real-Time Market on May 8-9, 2000); *see also In re California Power Exchange Corp.*, 245 F.3d 1110, 1116 (9th Cir. 2001) (noting problems in California energy markets). Market mitigation measures are needed in these markets to distinguish between high bids resulting from operation of competitive conditions and those reflecting the exercise of market power or the existence of market design flaws. *See, e.g., PSEG Energy Resources*, 360 F.3d at 203-05.

### **B. Development of Market Mitigation Measures**

In approving the restructuring of New York electricity markets, the Commission directed the NYISO to file plans to: (1) monitor the competitive operation of energy markets; and (2) mitigate prices when appropriate to remedy the exercise of market power or to correct market design flaws. *See Central Hudson*, 86 FERC at 61,237-39. The Commission rejected, in part, the NYISO's initial proposed market monitoring and mitigation plan, because the ISO retained too much discretion and flexibility, without adequate oversight, in the setting of appropriate remedies. *See New York Independent System Operator, Inc., et al.*, 89



FERC **¶**61,196 (1999). The Commission directed the ISO to describe with specificity **B**such as through the use of identified thresholds or bright-line tests **B** what types of conduct would trigger the imposition of price mitigation. *See* 89 FERC at 61,605.

In response, the NYISO filed specific Market Mitigation Measures ("MMM"). Under those procedures, the ISO's Market Monitoring Unit, in consultation with an independent Market Advisor, monitors energy markets throughout NYISO's service area for the exercise of market power and mitigates any unjustified conduct. *See* Attachment H (Market Monitoring Plan; Market Mitigation Measures) to the NYISO Market Administration and Control Areas Services Tariff, J.A. \_\_. The Commission accepted the MMM on a prospective basis only and required the ISO to make public what thresholds trigger possible mitigation. *See New York Independent System Operator, Inc., et al.*, 90 FERC **¶**61,317, *clarified*, 91 FERC **¶**61,154 (2000).

The MMM, as approved and in effect, contain specific conduct and market impact thresholds for identifying bids that appear to reflect the exercise of market power.<sup>2</sup> When bids or prices exceed those thresholds, the MMM provide for

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<sup>2</sup> Under the MMM, a mitigation measure would be imposed, absent a satisfactory justification, when the ISO determines that: (1) a bid exceeds a **conduct threshold**, expressed as a bid price that exceeds by a specified percentage or dollar amount a reference bid level specific to that bidder; and (2) any resulting increase in market price exceeds a **market impact threshold**, expressed as a price

consultation between the ISO and the affected market party concerning the possible imposition of any mitigation measure.<sup>3</sup> If the ISO is dissatisfied with the market party's explanation for a particular bid price, the ISO may lower the bid price to a defined reference price.<sup>4</sup>

### **C. Development and Initial Authorization of the AMP**

On March 16, 2001, a group of energy suppliers filed a complaint against the NYISO, alleging that the ISO intended to automate a step in the MMM without seeking the Commission's prior review. In an order dated May 9, 2001, the Commission agreed that the ISO may not implement such an automated step without first (1) filing, under FPA § 205, revised tariff sheets, and (2) responding to concerns, raised by the parties and the Commission, as to the effectiveness of automated mitigation. *See Mirant Americas Energy Marketing, L.P., et al.*, 95 FERC ¶61,189 (2001).

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that exceeds by a specified percentage or dollar amount the price that would prevail if bids are mitigated. *See* Sections 3.1 and 3.2, Attachment H to the NYISO Services Tariff, J.A. \_\_.

<sup>3</sup> *See* Section 3.3 ("Consultation With a Market Party"), Attachment H to the NYISO Services Tariff, J.A. \_\_.

<sup>4</sup> *See* Section 4.2 ("Default Bid"), Attachment H to the NYISO Services Tariff, J.A. \_\_. The ISO tariff defines the reference price as the lower of the mean or median of a unit's accepted bids over the previous 90 days for similar hours or load levels, adjusted for changes in fuel prices. Alternatively, the reference price can be based on a unit's estimated costs if there is insufficient operating data. *See* Section 3.1.4 ("Reference Levels"), Attachment H to the NYISO Services Tariff.

On May 17, 2001, in response to the Commission's directive, the ISO filed a revision to Attachment H of its Services Tariff, *see* J.A. \_\_\_, to incorporate a proposed Automated Mitigation Procedure ("AMP" or "automated procedure"). The AMP did not alter any of the existing (and previously-approved) market mitigation thresholds in the Day-Ahead Market. Rather, it simply automated the identification of bids in excess of those thresholds, thereby eliminating a one-day lag in the prior manual implementation of the MMM. Under the manual procedure, the ISO could not identify conduct and pricing impacts that exceeded the thresholds until after computer runs for a given Day-Ahead Market had been completed – meaning that the ISO could not implement any price mitigation until, at the earliest, the next day. The AMP permitted mitigation on the same day by adding another computer run to detect and, if appropriate, mitigate bids that reflect the possible exercise of market power.

An order dated June 28, 2001 allowed the AMP to go into effect, but only through October 31, 2001. *See New York Independent System Operator, Inc.*, 95 FERC ¶61,471 (2001), *reh'g denied*, 97 FERC ¶ 61,176 (2001).<sup>5</sup> The Commission limited the term of the AMP because of its concern, shared by various parties that opposed the AMP, that it "may mitigate bids in situations where market

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<sup>5</sup> An earlier appeal of these limited term orders was dismissed by this Court, after briefing and argument, as moot. *See Dynegy Power Marketing, Inc. v. FERC*, D.C. Cir. No. 02-1009 (dismissed Apr. 23, 2003).

power is not the cause for high or volatile bids," or "may not provide for sufficient consultation with generators to reasonably establish that particular bids were attempts to exercise market power." 95 FERC at 62,690. Notwithstanding this concern, the Commission agreed with the NYISO and supporting parties that the AMP represented an appropriate "temporary solution" to potential market power problems during the 2001 summer months, "when supplies may still be tight and when the effectiveness of new demand response mechanisms are uncertain. . . ." 95 FERC at 62,690-91.

A subsequent order dated November 27, 2001 further extended the term of the AMP until April 31, 2002. *See New York Independent System Operator, Inc.*, 97 FERC ¶61,242 (2001). The Commission explained that the automated procedure "appropriately attempts to distinguish between market power and scarcity[, . . .] closes the one day lag inherent in the manual application of mitigation measures in the current MMM and thus advances the ability of NYISO to mitigate market power." 97 FERC at 62,098; *see also id.* at 62,097 (noting that, without the AMP, prices spiked by over \$100 million on a single day in 2000). Nevertheless, the Commission again indicated that "implementation of the AMP is not without concerns," *id.* at 62,098, noting that the ISO had committed to make further refinements, prior to the summer of 2002. *Id.* at 62,097-98. As the automated procedure is but one of several market mitigation measures in place or

proposed for New York markets, the Commission expressed concern that "these measures may not fully fit together in a way that adequately addresses market power problems while avoiding unnecessary mitigation." *Id.* at 62,098. Accordingly, the Commission directed the ISO to file a "comprehensive mitigation proposal" to address these concerns.

#### **D. Further Extension and Refinement of the AMP**

In its March 20, 2002 "comprehensive" filing, R. 133, J.A. \_\_\_, the NYISO proposed to apply the AMP, for the first time, to markets in New York City. Because transmission into and in the City is constrained, NYISO proposed lower triggering thresholds to reflect a greater potential in that constrained area for the exercise of market power. For NYISO's remaining markets, where market power concerns are not as great as in New York City, the ISO proposed to continue using the existing, and already approved, triggering thresholds. *See supra* pages 6-7 (explaining existing AMP mitigation triggers). The ISO did propose, however, refinements to the existing AMP to improve its effectiveness, including: (1) exempting bids below 50 MW as too small to represent a possible exercise of market power; and (2) adding a third computer run that would enable mitigation, if needed, to apply only in specific zones and hours. Supporting affidavits, including those submitted by NYISO's internal Market Monitor (Dr. James Savitt), J.A. \_\_\_, and its independent Market Advisor (Dr. David Patton), J.A. \_\_\_, attested to the

need for continued operation of AMP, with the proposed refinements, throughout New York State because of the continued possibility of a bidder into NYISO's Day-Ahead Market exercising market power.

Approximately 25 entities submitted interventions, comments, and (in some instances) protests in response to NYISO's filing. A number of wholesale power generators and marketers – including Edison Mission Energy, Inc. and Edison Mission Marketing & Trading, Inc. (collectively, “Edison Mission”), which filed jointly with Aquila Merchant Services, Inc.<sup>6</sup> -- opposed some aspects of the ISO's comprehensive filing, challenging either specific dollar or percentage triggers in specific markets or, more generally, arguing that extension of the AMP would inhibit market entry or restrain prices from reaching competitive levels. *See, e.g.*, R. 145 (Aquila/Edison Mission), J.A. \_\_\_. A number of other entities – primarily utilities serving retail customers, retail customers themselves, and state governmental bodies representing such customers – argued, to the contrary, that extension of the AMP, both temporally (beyond the spring of 2002) and geographically (into New York City), was necessary to protect against possible anticompetitive behavior by wholesale suppliers. *See, e.g.*, R. 152 (New York State Attorney General's Office), J.A. \_\_\_; R. 161 (New York State Consumer

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<sup>6</sup> In the Compliance Order acting on the ISO's comprehensive filing, the Commission referred to Edison Mission and Aquila jointly as “Aquila.”

Protection Board), J.A. \_\_\_; R. 162, 171, 184 (New York State Public Service Commission), J.A. \_\_\_.

### **E. The Challenged Orders**

The first of the challenged orders, dated May 31, 2002,<sup>7</sup> accepted, in relevant respects, the NYISO's proposal to extend the AMP. *See New York Independent System Operator, Inc., et al.*, 99 FERC ¶ 61,246 (2002) (Compliance Order), J.A. \_\_\_. Balancing the concerns of the commenting parties, the Commission concluded that extension of the AMP, throughout the state of New York, and as further refined to focus and improve its effectiveness, "is in the public interest because it protects the New York market from the exercise of market manipulation that could result in rates that are unjust and unreasonable without discouraging the entry of new resources into the market." *Id.* at 62,035, J.A. \_\_\_.

Despite objections from suppliers as to the need for and effectiveness of the AMP outside New York City, the Commission found no reason to upset specific mitigation triggers and thresholds that, outside the City, are little different than those "previously accepted by the Commission," and that represent a "practical compromise" between the promotion of competitive markets and the mitigation of

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<sup>7</sup> The Commission previously had permitted a one-month extension of the automated procedure, until May 31, 2002, to allow for consideration of the ISO's comprehensive mitigation filing. *See New York Independent System Operator*, 99 FERC ¶61,147 (2002).

any anticompetitive behavior. *Id.* at 62,041-43, J.A. \_\_\_. The proposed AMP “enhancements” and “refinements” (e.g., added computer run for greater zone and time specificity), which attracted little opposition, were found acceptable because they “will allow more geographic and temporal selectivity, thus reducing unwarranted mitigation” in the Day-Ahead Market. *Id.* at 62,045, J.A. \_\_\_. On a heavily contested issue, the Commission ultimately agreed with the ISO that the proposed AMP provided for sufficient flexibility and would not unduly burden new entry into New York supply markets, whether inside or outside of New York City, or restrain prices below competitive levels. *Id.* at 62,051-52, J.A. \_\_\_.

Edison Mission and certain other suppliers requested rehearing. The second of the challenged orders, dated June 5, 2003, denied those requests in most respects. *See New York Independent System Operator, Inc., et al.*, 103 FERC ¶ 61,291 (2003) (Rehearing Order), J.A. \_\_\_.

The Commission found that the ISO’s mitigation plan – continuing the effectiveness of the AMP – will neither deter new suppliers from entering the market nor entice existing suppliers to leave the market. *Id.* at 62,135-36, J.A. \_\_\_. Likewise, the Commission found unsupported Edison Mission’s contention that the AMP will inhibit prices from rising to competitive levels, or otherwise prevent suppliers from either recovering their marginal costs or earning a reasonable return on their investment. *Id.* at 62,136, J.A. \_\_\_. In part, these contentions failed to



recognize that the AMP does allow sellers the opportunity to consult with the ISO and explain unusually high bids prior to mitigation. *Id.* at 62,137, J.A. \_\_.

Nevertheless, because “it is difficult to anticipate all market conditions in which the market monitoring and mitigation must operate,” the Commission recognized that future adjustments may be necessary “based on additional operating experience.” *Id.* at 62,134, J.A. \_\_. Accordingly, the Commission directed the ISO to file a report by December 2, 2004 as to the effectiveness of the AMP and related mitigation procedures:

That report shall analyze how well the market monitoring and mitigation procedures met their goals, how often [they] appeared to overmitigate, with what result in terms of how much bids and the market clearing price were improperly reduced, and what revenue effect this had on generators. Similarly, the report must indicate when the AMP apparently failed to indicate market power properly, what bids and prices should have been mitigated to what level, and the financial effect on purchasers. If necessary, NYISO should propose measures to correct both the tariff and the market monitoring and mitigation procedures.

*Id.* at 62,137, J.A. \_\_. This report, to be based on more than two years of operating data, will enable the Commission to determine whether, as Edison Mission alleged but failed to support, the continued operation of the AMP will hinder the competitive operation of energy markets outside New York City. If the operating data demonstrate that the AMP does have such an impact, then “the Commission will require appropriate modifications.” *Id.* at 62,139, J.A. \_\_.

## **SUMMARY OF ARGUMENT**

In extending the AMP, as enhanced to improve its effectiveness, the Commission reasonably balanced the goals of: (1) protecting New York energy consumers against excessive, anticompetitive prices; and (2) limiting intervention in the operation of competitive markets. The Commission also reasonably balanced the competing positions advanced by numerous parties, including energy suppliers (such as Edison Mission), energy consumers, and state agencies representing consumers. There was substantial record evidence to support the Commission's conclusion that the AMP, as enhanced, continued to be needed in the Day-Ahead Market outside of New York City.

In contrast, Edison Mission's position – that the AMP cannot be justified in workably competitive markets without structural defects – was not supported and, in any event, failed to reflect the limited assignment for the NYISO in making the subject compliance filing. Nevertheless, the Commission recognized that additional operating data would better enable it to determine whether, as Edison Mission claimed in theory, the AMP serves in practice as a barrier to market entry and an intolerable hindrance to competition. The Commission's decision to allow the AMP to remain in effect for now, but to commit to revisit its effectiveness upon the ISO's submission of two years' of actual data, represents a reasonable, balanced decision that should be upheld.

## ARGUMENT

### I. STANDARD OF REVIEW

Judicial review of Commission orders proceeds under the arbitrary and capricious standard. *See* 5 U.S.C. § 706(2)(A); *see also, e.g., Sithe/Independence Power Partners v. FERC, L.P.*, 165 F.3d 944, 948 (D.C. Cir. 1999). That standard requires the court to satisfy itself that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). A reviewing court determines whether the agency "has met the minimum standards set forth in the statute," and does not "substitute its own judgment for that of the [agency]." *United States Postal Service v. Gregory*, 534 U.S. 1, 11 (2001). Review of the Commission's ratemaking determinations, as long as they are explained, is particularly deferential. *E.g., East Texas Electric Cooperative, Inc. v. FERC*, 331 F.3d 131, 136 (D.C. Cir. 2003).

Findings of fact by the Commission, if supported by substantial evidence, are conclusive. FPA § 313(b), 16 U.S.C. § 825l(b); *see, e.g., Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258, 1261 (D.C. Cir. 1992). Because substantial evidence is more than a scintilla, but something less than a preponderance of the evidence,

the possibility of drawing two different conclusions from the same evidence does not prevent one of those conclusions from being deemed reasonable. *See, e.g., FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002).

## **II. THE COMMISSION REASONABLY BALANCED COMPETING CONCERNS IN ALLOWING THE AMP TO REMAIN IN EFFECT, SUBJECT TO REEXAMINATION**

### **A. The Commission's Balance Respected Competing Goals and Perspectives**

In reviewing any market mitigation plan, the Commission must balance the need for monitoring and mitigation against the need to allow competitive markets to operate. In the challenged orders, the Commission recognized that, in deciding whether to extend the operation of the AMP, it must balance two specific goals: (1) “protect[ing] the New York market from the exercise of market manipulation that could result in rates that are unjust and unreasonable;” (2) “without discouraging the entry of new resources into the market.” Compliance Order, 99 FERC at 62,035, J.A. \_\_\_; *see also id.* at 62,043 (ISO’s use of conduct and impact tests represents a “practical compromise”), J.A. \_\_\_.

The Commission’s stated goals follow from its earlier November 27, 2001 order, directing the ISO’s filing of a “comprehensive” mitigation proposal because existing mitigation measures may not “fully fit together in a way that adequately addresses market power problems while avoiding unnecessary mitigation.” 97 FERC at 62,098. The Commission’s goals also reflect the ISO’s efforts, in

its March 20, 2002 compliance filing, to implement “a better and more selective [mitigation] process.” Compliance Order, 99 FERC at 62,035, J.A. \_\_\_; *see also id.* at 62,041 (noting ISO’s efforts to craft mitigation triggers that will allow it to distinguish between scarcity and market power while maintaining integrity of markets), J.A. \_\_\_.

Edison Mission agrees, in principle, with the Commission’s stated goals, noting that the “critical objective of any mitigation measure is to strike an appropriate balance between undue administrative interference in the markets and the protection of consumers from significant abuses of market power.” Pet. Br. 5 (citing the ISO’s explanation of its conduct and impact approach to market power detection and mitigation, R. 133 at 7, J.A. \_\_\_). Nevertheless, Edison Mission focuses entirely on the former goal, through the prism of its own submissions, and ignores completely the submissions of numerous other parties promoting vigorously the latter goal. Moreover, Edison Mission failed to support its position – that continued operation of the AMP outside New York City cannot be justified – with convincing evidence. *See, e.g.*, Rehearing Order, 103 FERC at 62,136 (noting that “Edison Mission submits no evidence that NYISO’s mitigation plan keeps prices from rising to competitive levels”), J.A. \_\_\_.

That the Commission, in most respects, ultimately adopted the competing position advanced by the ISO and supporting parties, by allowing the AMP to

remain in effect throughout New York State, does not mean, as Edison Mission asserts (Pet. Br. 8, 25, 28), that the Commission “ignored” Edison Mission’s position or failed to confront its supporting testimony. Rather, the Commission balanced the competing interests advanced by all parties. Recognizing that future events and actual operating data could provide additional insight as to the actual effectiveness (or ineffectiveness, as Edison Mission claims) of the AMP, the Commission directed the ISO to analyze two years’ of operating data and submit a report in 2004, in order to help the Commission determine whether the AMP should be kept intact, further refined, or abandoned altogether.

**B. Edison Mission Views the ISO’s Compliance Filing and the Commission’s Review of That Filing Out of Context**

Edison Mission mischaracterizes the context of the Commission’s action by stating repeatedly (*e.g.*, Pet. Br. 2, 14, 20, 22) that the challenged orders “authorized” the “implementation” of the AMP outside New York City. In fact, by the time the Compliance Order issued, the AMP already had been in effect for a year in the Day-Ahead Market outside New York City. *See, e.g.*, Rehearing Order, 103 FERC at 62,139 (noting that “NYISO’s filing as applied outside of the New York City area was largely a continuation of the existing market monitoring and mitigation procedures”), J.A. \_\_\_. Further, manual market mitigation measures, with largely the same triggering criteria, had been in effect throughout New York State for several years. Indeed, in its compliance filing, and in response to the

Commission's request for greater coordination, NYISO sought to "bring [New York City] under th[e] same measures" that already had been implemented in other parts of the state, "with an additional refinement." Compliance Order, 99 FERC at 62,038, J.A. \_\_.

The narrow issues confronted in the instant orders were: (1) whether the AMP should be extended for the first time to the New York City market, to replace another form of "in-city" mitigation; and (2) what types of "enhancements" to the AMP design were necessary to improve the AMP's operation throughout NYISO's entire control area. *See id.* at 62,038, J.A. \_\_. The ISO was not instructed to make a comprehensive market power study of New York energy markets. *See* Rehearing Order, 103 FERC at 62,139 (ISO's comprehensive mitigation filing, while "of unusual breadth," was simply a "compliance filing" responding to specific implementation questions in November 27, 2001 order), J.A. \_\_. Moreover, the ISO's compliance filing, "as applied outside of the New York City area[,] was largely a continuation of the existing market monitoring and mitigation procedures." *Id.* at 62,139, J.A. \_\_. Accordingly, the Commission was not obligated to revisit its prior finding, established years earlier as one of the critical bases for approving the creation of the New York ISO, that the ISO be vigilant in monitoring for, and, if appropriate, mitigating the exercise of, market power throughout New York. *See supra* pages 5-6 (orders requiring the NYISO to

implement a vigorous market monitoring and mitigation program).

Similarly, Edison Mission misapprehends the compliance assignment for the ISO by underemphasizing the effect of the preexisting manual mitigation procedure (“MMP”) and overemphasizing the effect of the improved automated procedure. It expresses no opposition to the manual procedure, which it claims minimizes interference with markets by allowing the ISO only to engage in discussions to resolve market power issues informally or to issue cease and desist orders. Pet. Br. 5. But the MMP is not so limited. As explained *supra* page 7, under the MMP, the ISO, if dissatisfied with a supplier's explanation for a questionable bid price, could itself lower the bid price to a defined reference price. *See also Consolidated Edison*, 347 F.3d at 970 (noting that the MMP authorizes the ISO “to undertake remedial measures to correct problems associated with the exercise of market power” on a prospective basis).

The AMP merely accelerates the operation of the MMP by one day; it does not alter any of the preexisting conduct and impact thresholds for market mitigation. *See Compliance Order*, 99 FERC at 62,037 (mitigation thresholds remain the same), J.A. \_\_\_, and 62,038 (AMP merely automates preexisting mitigation thresholds, thereby eliminating 24-hour time lag), J.A. \_\_\_; Rehearing Order, 103 FERC at 62,134 n.2, 62,139 (same), J.A. \_\_\_. Nor does the AMP eliminate the opportunity for consultation prior to mitigation. Any seller bidding



into NYISO markets still may consult with the ISO and explain any bid in relationship to prevailing market conditions, at the time of submission, before mitigation occurs, or even after mitigation occurs. If the seller shows that its bid reflects market scarcity, not market power, its bid will not be mitigated or the bidder will later be made whole for any improper mitigation. *See* Rehearing Order, 103 FERC at 62,137, J.A. \_\_; *see also* Section 3.3, Attachment H to the NYISO Services Tariff, J.A. \_\_ (providing for consultation).<sup>8</sup>

Thus, there is little basis for Edison Mission's claim that the AMP, unlike the MMP, "punishes" generators and marketers by limiting the prices they can receive in workably competitive markets "[a]t all times during the day and year." Pet. Br. 2-3, 30, 33. Both the challenged automated procedure and the unchallenged manual procedure operate during all hours of the year, and both provide the opportunity for consultation. In sum, the ISO's compliance filing, merely requesting continuation of the AMP as refined in several respects to improve its effectiveness, hardly represented the radical step that Edison Mission now claims. As a result, the ISO in its compliance filing, and the Commission in its orders, were obligated only to justify the continued use of the AMP in the Day-Ahead Market outside New York City; they were not obligated to reiterate the need

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<sup>8</sup> The recognition in the Rehearing Order that consultation opportunities remain under the AMP corrects an earlier statement in the Compliance Order, 99 FERC at 62,042, J.A. \_\_, that the AMP, "by its very nature," precludes market participants from justifying bidding behavior that triggers mitigation.

or effectiveness of market mitigation in general or the need or effectiveness of preexisting mitigation triggers that had been addressed in prior orders.

For this reason, the Commission viewed another supplier's challenge to preexisting mitigation triggers as a collateral attack on previously-approved orders and mitigation procedures. *See* Rehearing Order, 103 FERC at 62,136 n.11, J.A. \_\_\_. To the extent that Edison Mission strays beyond the context of the ISO's compliance filing and argues, implicitly or explicitly, that preexisting and previously-approved thresholds and triggers remaining in the AMP are inappropriate, it, too, is collaterally attacking earlier final orders that are not properly before this Court for review. *See, e.g., City of Nephi v. FERC*, 147 F.3d 929, 934 (D.C. Cir. 1998); *Georgia Industrial Group v. FERC*, 137 F.3d 1358, 1363 (D.C. Cir. 1998).

### **C. Substantial Evidence Supports the Commission's Approval of the AMP Extension**

There is ample record evidence upon which to base the Commission's decision authorizing the extension of the AMP. The ISO's compliance filing contained a detailed explanation of: (1) the AMP's existing operation in markets outside New York City; and (2) the proposed refinements to improve its effectiveness. *See* Compliance Order, 99 FERC at 62,036-39, J.A. \_\_\_. In support of the proposed AMP extension and refinements, the ISO offered the expert testimony of several witnesses. Two witnesses particularly familiar with the

operation of NYISO-administered energy markets – ISO Market Monitor James Savitt and ISO Market Advisor David Patton – offered expert testimony as to the continuing need for market monitoring and mitigation throughout New York, the effectiveness of the AMP, as refined, and its minimal interference in the operation of New York energy markets. *See* R. 133, J.A. \_\_ (Dr. Savitt) and \_\_ (Dr. Patton).

The need for AMP extension was supported by numerous intervenors – utilities serving retail customers, retail customers themselves, and state governmental bodies representing such customers. *See supra* pages 11-12 (explaining supporting positions); *see also* Compliance Order, 99 FERC at 62,042-46 (noting parties’ agreement with ISO’s approach), J.A. \_\_. They argued that continued operation of the AMP outside New York City, and its expansion inside the City, were necessary to protect against possible anticompetitive behavior by wholesale suppliers. *See, e.g.*, R. 162 at 2-7, J.A. \_\_ (supporting comments by New York Public Service Commission, that NYISO markets outside New York City, while generally competitive, still are susceptible to the occasional exercise of market power when supplies are tight). Indeed, some intervenors argued that the ISO did not go far enough in taking proactive steps, and that applicable thresholds were too high or not detailed enough, to identify and mitigate questionable bidding behavior. *See* Compliance Order, 99 FERC at 62,042 (noting intervenor argument that fact that mitigation thresholds only rarely have been exceeded indicates that

thresholds are too high), J.A. \_\_\_, and 62,043 (noting intervenor argument that generator-specific reference levels, against which bids are evaluated to determine presence of market power, lack transparency and detail), J.A. \_\_\_.

The Commission considered the ISO's application and supporting testimony, the supporting comments by customers and customer representatives, and the opposing comments by suppliers such as Edison Mission, before concluding, on balance, that the AMP should continue to be applied in markets throughout New York State. As for continuation of the existing conduct and market impact tests, the Commission found "no compelling argument" to upset them. Compliance Order, 99 FERC at 62,043, J.A. \_\_\_. As for reference levels, the Commission found that they afford the ISO sufficient flexibility and market participants sufficient transparency, and thus warrant approval. *Id.* at 62,044-45, J.A. \_\_\_. The ISO's proposed AMP enhancements, *see supra* page 10, which attracted little opposition, "allow more geographic and temporal selectivity" and thus appropriately "reduce[e] unwarranted mitigation." *Id.* at 62,045, J.A. \_\_\_.

Moreover, the Commission agreed with the ISO that the AMP's reference levels and mitigation triggers should not set the market clearing price, and that suppliers thus have both an incentive to bid at their marginal costs and the ability to capture scarcity rents. *Id.* at 62,051-52, J.A. \_\_\_. The long queue of generation projects, identified by the ISO, suggests that new entrants do not view the AMP as

restricting market entry. For this reason, the Commission concluded that the AMP, as enhanced to improve its effectiveness, would not unduly burden the entry of new market participants. *Id.*<sup>9</sup>

As operation of the AMP is still in its early stages, however, the Commission required the ISO to report on and justify the continued retention of the AMP based on two years of actual operating data and to make further enhancements as appropriate. *See supra* page 14 (explaining ISO reporting responsibilities). This balance of the dueling concerns of numerous market participants represents an appropriate "middle ground" that, "considering the competing interests involved, is neither arbitrary nor discriminatory." *See In re California Power Exchange Corp.*, 245 F.3d at 1124 (upholding market mitigation procedures for California energy markets).

**D. Edison Mission's Submissions Do Not Upset the Commission's Findings and Conclusions**

Edison Mission alleges that the Commission relied on mere "assertions" or "opinions," leading to findings that are "conclusory," "uncorroborated," or even "Kafkaesque." Pet. Br. 2, 4, 16, 29. Edison Mission's witnesses, in its view,

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<sup>9</sup> Edison Mission is thus mistaken (*see* Pet. Br. 2, 16, 25, 33-34) in arguing that the Commission had no basis upon which to find that extension of the AMP, as enhanced, would not act as an appreciable barrier to entry and would have little impact on the operation of New York energy markets. *See, e.g.*, R. 133, J.A. \_\_\_ (testimony of Dr. Patton (at 5, 29) that AMP will operate only when market power is exercised, and will not inhibit suppliers from raising their bid prices and realizing scarcity rents during legitimate shortage conditions).

offered real “evidence” that is “overwhelming” and “uncontroverted.” Pet. Br. 16, 22-23.

Edison Mission’s solipsistic view does not accurately reflect the record presented to the Commission. Its witnesses and submissions represent only a small part of that record. *See, e.g.,* Compliance Order, 99 FERC at 62,051 (Aquila/Edison and ISO competing views as to the effect of mitigation thresholds and reference levels on new entry), J.A. \_\_\_. It fails to explain why the witnesses and submissions offered by the ISO and supporting intervenors are any less worthy of evidentiary support. In these circumstances, the Commission’s determination as to the value of particular testimony, and its weighing of the competing testimony of one set of witnesses against another, is entitled to judicial respect. *See Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 746-47 (D.C. Cir. 2001) (deference afforded to Commission’s choice between “disputing expert witnesses”); *see also Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003) (under substantial evidence standard, relevant question is not whether record evidence supports petitioner’s version of events, but whether it supports the Commission’s).

As for Edison Mission’s two witnesses, one offered testimony that was stale and the other offered testimony that was unsupported. Edison Mission acknowledges that it incorporated Dr. Ruff’s affidavit from earlier protests. *See*

Pet. Br. 11, 21. Accordingly, Dr. Ruff did not testify directly to the ISO's March 20, 2002 compliance filing or the specific AMP refinements it contained. His general challenge to market mitigation measures and previously-approved triggers, which, he claims, will prevent suppliers from realizing scarcity prices, Pet. Br. 24, thus is little more than a collateral attack on prior Commission rulings. *See supra* page 23.

Edison Mission's other expert, Mr. Klein, presumes that energy markets outside New York City are "workably competitive" without "structural market power problems" deserving of possible mitigation. *See* Pet. Br. 2, 11-14, 23. As Edison Mission explains, however, *see* Pet. Br. 6 nn. 10-11, 11, 22 (citing its Protest, R. 145 at 25-27, J.A. \_\_), Mr. Klein based his "workably competitive" presumption on earlier "findings" by NYISO Market Advisor Dr. Patton and others. But Dr. Patton did not think that his earlier statements, made in other contexts, obviated the need for (or effectiveness of) the AMP and other market mitigation protections in New York. *See, e.g.*, R. 133, J.A. \_\_ (testimony of Dr. Patton (at 5, 9, 29) that conduct-impact framework minimizes intervention in the market by triggering only in response to the infrequent exercise of market power rather than scarcity ).<sup>10</sup>

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<sup>10</sup> Edison Mission and Mr. Klein also relied on data reported elsewhere by the New York Public Service Commission, which here intervened in support of NYISO's filing and in vigorous opposition to Edison Mission's conclusion that

In any event, the Commission did not agree that workably competitive markets outside New York City, even if they do exist, required immediate elimination of the AMP from markets outside the City.<sup>11</sup> Because the AMP applies only in the Day-Ahead Market, a volatile market that can be affected by numerous unforeseen events, it offers some protection from the potential exercise of market power that may arise in exceptional circumstances. This protection, even if rarely used in workably competitive markets, is nonetheless important to assuring just and reasonable rates without constraining the exercise of market forces. “If the NYISO markets outside of New York City are and continue to be as competitive as Edison Mission maintains, the AMP should not be triggered and should have virtually no impact on the markets.” Rehearing Order, 103 FERC at 62,139, J.A. \_\_. The Commission thus found that Edison Mission “has not made

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“workably competitive” markets deserve no protection from possible anticompetitive behavior. Finally, the Northeast Power Coordinating Council, whose data also were cited by Edison Mission, did not intervene in this proceeding or otherwise take any position on the need for the proposed AMP extension.

<sup>11</sup> The Commission recognized that market conditions are different in New York City (where transmission is particularly constrained) than in the rest of the State – that is why it agreed with the ISO that lower AMP thresholds are appropriate “in-city” and higher thresholds are appropriate elsewhere in the State. *See* Compliance Order, 99 FERC at 62,039 (lower thresholds in New York City, according to ISO, “recognize the higher potential exposure of these constrained areas to market power relative to the rest of the New York market”). The higher potential for the exercise of market power “in-city” does not mean, however, that markets elsewhere – even “workably competitive markets” – are undeserving of protection from any unwarranted, even if unexpected, exercise of market power.



its case” that the AMP will trigger, or otherwise restrain market prices, in competitive circumstances. *Id.* See *supra* pages 23-26 (describing substantial evidence, presented by NYISO and supporting intervenors, for findings).

Nonetheless, the Commission called for a NYISO report based on two years of actual operating data. See *supra* page 14. If Edison Mission is later able to make its case, based on that report, the Commission then “will require appropriate modifications” to the ISO’s implementation of the AMP. *Id.*; see also Compliance Order, 99 FERC at 62,054 (requiring NYISO to monitor AMP triggers to verify they “reflect accurately current market parameters”), J.A. \_\_\_.

Just as the Commission has not insisted that the ISO prove the absence of workably competitive markets in New York to justify mitigation measures, manual or automated, it similarly has not insisted that the ISO demonstrate the existence of structural market problems necessitating mitigation measures in the Day-Ahead Market. See Pet. Br. 14-15, 22 (arguing that the ISO had the burden of demonstrating such problems, which it failed to sustain). To be sure, in its June 28, 2001 order first allowing the AMP to go into effect, but only for a limited term, see *supra* pages 8-9, the Commission expressed its opinion that market power mitigation “may be most appropriate where it is tied to structural market power problems such as must-run situations where generators would otherwise be in a position to name their price.” 95 FERC at 62,690. But neither that order nor the

November 27, 2001 order, obligating the ISO to make a “comprehensive” filing (and providing the framework for the Commission’s review of that filing), required the ISO to prove affirmatively the existence of such structural problems to justify continuation of the AMP outside New York City.

To the contrary, in allowing the AMP to remain in effect, the Commission noted that it previously had approved AMP procedures for California and had requested comment in a proposed rulemaking as to whether “all regions should include automated mitigation of the type adopted in New York and California.” Rehearing Order, 103 FERC at 62,139 n.19 (emphasis added), J.A. \_\_\_.<sup>12</sup> Consistent with its desire for greater consistency across regions, the Commission also instructed NYISO to continue to collaborate and coordinate with neighboring ISOs in New England (ISO-NE) and the Mid-Atlantic (PJM) in the development of market mitigation strategies. See Compliance Order, 99 FERC at 62,052 (finding, in response to Edison Mission protest, that commitment of all three regional ISOs to engage in further consultations and to attempt to achieve further coordination

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<sup>12</sup> See *California Independent System Operator Corp.*, 100 FERC ¶61,060, order on reh'g, 101 FERC ¶61,061 (2002) (adopting automated procedures as part of comprehensive market mitigation program in California); *Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,452, 55,504-06, FERC Stats. & Regs. ¶32,563 at 34,366-69 (2002) (seeking comments on whether market power mitigation procedures applicable to all regions should include automated mitigation of the type adopted in New York and California).

“satisfies the requirements of the November [27, 2001] Order”), J.A. \_\_\_; <sup>13</sup> *see also id.* at 62,054 (requiring continued coordination with other ISOs), J.A. \_\_\_.

Edison Mission’s observation that the Commission, guided by experience, has decided to limit the application of mitigation measures in a neighboring region (New England) does not prove Edison Mission’s contention, *see* Pet. Br. 12, 26-27, that the Commission acted in an inconsistent and unreasonable manner in approving the proposed AMP extension in New York. Rather, the Commission reasonably decided to accept NYISO’s “comprehensive” filing as consistent with its instructions in its November 27, 2001 order to achieve greater conformity within New York State, while at the same time encouraging it to consider further limitations to achieve greater conformity across multi-state regions. In pursuing a particular goal (here, greater compatibility among, first, New York market mitigation measures and, later, among regional measures), the Commission may choose to proceed “one step at a time” instead of all at once. *Interstate Natural Gas Ass’n of America v. FERC*, 285 F.3d 18, 35 (D.C. Cir. 2002) (explaining that the court will upset the agency’s “gradualism” only if “it truly yields unreasonable discrimination or some other kind of arbitrariness”).

Edison Mission acknowledges, Pet. Br. 13, that the Commission has continued to move toward its goal of achieving greater inter-regional coordination,

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<sup>13</sup> *See also id.* (New York Consumer Protection Board finds that NYISO and PJM approaches to mitigation, although different, “can co-exist”), J.A. \_\_\_.

by recently disallowing a NYISO proposal to extend the AMP to the NYISO-administered Real-Time Market. *See New York System Operator, Inc.*, 106 FERC ¶ 61,111 at 61,404-05 (2004).<sup>14</sup> This action does not establish Edison Mission's position, *see* Pet. Br. 14, 26, that there has been a "fundamental change" or "apparent shift" in the Commission's desire for neighboring ISOs to achieve greater uniformity in market mitigation techniques. Rather, it establishes only that the Commission's continuing commitment to reexamination of the AMP, and desire for regional conformity, is genuine. When the Commission is presented with two years' of operating data collected by NYISO, it may then agree with Edison Mission's argument – now unsupported – that the AMP should be removed altogether from all NYISO markets that lack structural market problems.

**E. The Commission's Approval of the AMP Extension Was Not Permanent, and Is Subject to Reexamination**

Finally, while the Commission agreed with the ISO that the AMP should continue in effect, it recognized that the AMP remains a work in progress. Specifically, in recognition of the concerns expressed by Edison Mission and

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<sup>14</sup> The recent Real-Time NYISO order does not support Edison Mission's argument that markets outside New York State are workably competitive and lack structural problems, and thus do not deserve mitigation measures, as the Commission explicitly did not make that finding. Rather, citing its mitigation approach in New England, it simply directed NYISO, if it wished to extend the AMP to the Real-Time Market, to demonstrate the existence of such problems. As explained *supra* at page 30, NYISO was given no such directive in the earlier compliance proceeding.

others, and echoing its earlier term-limited approval of the AMP, the Commission again committed to revisiting the effectiveness of the AMP after the ISO had compiled two years of operating data and had reported back to the Commission with recommendations for further revisions. *See* Compliance Order, 99 FERC at 62,054 (requiring the ISO to continue “to monitor the various inputs that serve as triggers to mitigation to verify that they are neither too high nor too low, but reflect accurately current market parameters”), J.A. \_\_\_; Rehearing Order, 103 FERC at 62,137 (requiring detailed report from the ISO, by December 2, 2004, on the operation of the AMP and suggestions as to necessary corrective measures), J.A. \_\_\_.

In other words, and contrary to Edison Mission’s claims, the Commission did not accept the AMP as a “permanent measure.” Rehearing Order, 103 FERC at 62,139, J.A. \_\_\_. Rather, the Commission explicitly left the AMP open for modification, either upon generic, nation-wide review of market mitigation in an ongoing rulemaking, *see supra* page 31, or upon specific, further review of New York markets by NYISO and New York market participants. *Id.*

By allowing the AMP to remain in effect for a limited period, while the ISO obtains additional real-world experience and empirical data to evaluate its continuing effectiveness and determine if further refinements are appropriate, the Commission approved precisely the type of experiment for which it is entitled to

an "extra layer of deference." *E.g., Interstate Natural Gas Ass'n of America*, 285 F.3d at 30 (noting that the court "has given special deference to agency development of such experiments, precisely because of the advantages of data developed in the real world"). As explained in *Public Service Commission of the State of New York v. FPC*, 463 F.2d 824 (D.C. Cir. 1972) (emphasis original), the presence of possible flaws in an experimental plan does not necessarily require its rejection where the plan offers distinct consumer benefits:

[I]t cannot be determined for certain that the Commission's . . . policy *will* work, . . . but it is nonetheless true that the record does not show that such a policy *will not* work. We must recognize that the formulation of such an experimental policy (where the probability of success is uncertain) is the type of activity that the [Commission] was created to perform, and we give great weight to the Commission's determination regarding this policy.

*Id.* at 828.

Upon receipt of additional operating data and NYISO's recommendations, the Commission may decide on any number of possible courses of action on the AMP. It may decide to take no further action, may decide to limit further the reach of the AMP in the Day-Ahead Market outside New York City through additional enhancements, or, indeed, may agree with Edison Mission that the AMP should be removed altogether if it agrees that the Day-Ahead Market lacks structural market problems. *See American Airlines, Inc. v. CAB*, 359 F.2d 624, 633 (D.C. Cir. 1966) (allowing for reexamination based on real world data "is part of the genius of the

administrative process[,] that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience”). In these circumstances, the Commission’s deliberate approach to market mitigation in New York, guided by experience, is reasonable and should not be upset.

### **CONCLUSION**

For the foregoing reasons stated, the Commission submits that the challenged orders should be upheld as reasonable in all respects.

Respectfully submitted,

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***Edison Mission Energy, Inc., et al. v. FERC***  
**FERC Docket Nos. ER01-3155, et al.**  
**D.C. Cir. No. 03-1228**

**CERTIFICATE OF COMPLIANCE**

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 7,541 words, not including the tables of contents and authorities, the certificate of counsel, this certificate and the addendum.

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