

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 05-1332

**KEYSPAN-RAVENSWOOD, LLC
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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JUNE 15, 2006

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties are as stated in the Petitioners' briefs.

B. Rulings Under Review:

The rulings under review are as follows:

1. *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, "Order Denying Complaint," 110 FERC ¶ 61,116 (February 10, 2005);

2. *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, "Order Denying Rehearing," 111 FERC ¶ 61,336 (June 1, 2005); and

3. *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, "Order Rejecting Request for Rehearing," 112 FERC ¶ 61,153 (August 1, 2005).

C. Related Cases:

The orders on review have never been before this Court or any other court. Counsel is aware of no other related cases pending in this or any other court.

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April 26, 2006

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GLOSSARY

| | |
|---------------------|--------------------------------------------|
| FERC | Federal Energy Regulatory Commission |
| New York ISO | New York Independent System Operator, Inc. |
| Ravenswood | Petitioner KeySpan-Ravenswood, LLC |
| Reliability Council | New York State Reliability Council |

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**BRIEF FOR RESPONDENT FEDERAL ENERGY
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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) reasonably concluded that the methodology used by the New York Independent System Operator (“New York ISO”) for calculating, for reliability purposes, the capacity that New York utilities were required to purchase and the capacity that generators had available to sell, complied with the New York ISO’s tariff.

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in Addendum A to this brief.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

This case concerns a New York generator's claim that the Commission understated the purchase obligations of New York utilities during the summer of 2002. The generator, KeySpan-Ravenswood, LLC ("Ravenswood"), argued that the Commission allowed the New York ISO, the operator of the electrical grid in New York and the administrator of energy markets designed to protect the reliability of the grid, to erroneously calculate the amount of capacity that New York utilities were obligated to obtain for reliability purposes and the amount of capacity generators had available to sell for that purpose. Specifically, Ravenswood argued that the Commission allowed the New York ISO to violate its tariff obligations when the New York ISO translated "installed capacity" deemed necessary for reliability by the New York State Reliability Council ("Reliability Council") into "unforced capacity" units.

The Commission denied Ravenswood's complaint. *See KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, "Order Denying Complaint," 110 FERC ¶ 61,116 (February 10, 2005) ("Complaint

Order”) (R 25, JA 725); “Order Denying Rehearing,” 111 FERC ¶ 61,336 (June 1, 2005) (“Rehearing Order”) (R 31, JA 752); and “Order Rejecting Request for Rehearing,” 112 FERC ¶ 61,153 (August 1, 2005) (“Second Rehearing Order”) (R 33, JA 782).¹ The Commission found that the New York ISO had applied the methodologies in place at the time, methodologies that had been adopted through a tariff-mandated stakeholder process and approved in Commission orders. The Commission also determined that, even if the New York ISO had not complied with its tariff obligations, Ravenswood had failed to satisfy its burden of proving that it was entitled to any refunds, let alone the \$23.3 million in refunds it claimed.

II. Statement of Facts

A. Regulatory Background

FPA § 201(b), 16 U.S.C. § 824(b), confers upon the Commission jurisdiction over all rates, terms, and conditions of electric transmission service provided by public utilities in interstate commerce, as well as over the sale by public utilities of electric energy at wholesale in interstate commerce. The Commission’s wholesale jurisdiction includes the sales of capacity commitments (installed capacity and unforced capacity) made by generating utilities to retail utilities to assure that retail utilities meet system capacity requirements. *See*

¹ “R” refers to a record item. “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

KeySpan-Ravenswood, LLC v. FERC, 348 F.3d 1053, 1054 (D.C. Cir. 2003) (“*KeySpan I*”).

Under FPA § 205(c)-(d), 16 U.S.C. § 824d(c)-(d), utilities must file tariff schedules with the Commission showing their rates and service terms, along with related contracts, for jurisdictional service. The Commission on its own motion or on complaint may investigate any existing rate. FPA §206(a), 16 U.S.C. § 824e(a).

B. New York ISO And The Reliability Council

FERC Order No. 888² encouraged formation of independent system operators (“ISOs”) to administer transmission services and new markets for wholesale electricity transactions. In response, members of the New York Power Pool, comprised of eight utilities, established the New York ISO as an independent, non-profit administrator of transmission services and of the markets for wholesale electricity transactions in New York. *Central Hudson Gas and Elect. Corp.*, 83 FERC ¶ 61,352 (1998), *order on reh’g and clarification*, 87 FERC 61,135 (1999). *See generally Sithe/Independence Power Partners v. FERC*, 285

² *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., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d sub nom. 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).

F.3d 1, 2 (D.C. Cir. 2002) (explaining the initiation of restructured New York markets).

Going beyond Order No. 888's "functional unbundling" directive, the New York utilities have largely divested themselves of their generation facilities. The purchasers of the divested facilities have no retail service obligations and sell wholesale power under FERC-approved tariffs at market-based rates. Ravenswood operates such facilities, having purchased them from Consolidated Edison. *See Consolidated Edison Company of New York*, 95 FERC ¶ 61,216 at 61,717 n.2 (2001).

In establishing the New York ISO, the transmission owners filed several tariffs relevant here. *See Central Hudson*, 83 FERC at 62,405. First, the ISO Agreement established the scope of the ISO, defined the membership classes, and prescribed such matters as the ISO voting procedures. *Id.* at 62,406.

Second, the New York State Reliability Council Agreement ("Reliability Council Agreement") authorized the Reliability Council to develop Reliability Rules and to determine the state-wide annual installed capacity requirement. *Id.* at 62,406; Agreement at p. 6 (Brief Addendum B); Rehearing Order at P 3 (JA 753). Third, under the ISO-New York State Reliability Council Agreement ("New York ISO-Council Agreement"), the New York ISO must require retail utilities (also known as "load serving entities") to maintain appropriate levels of installed

capacity consistent with the rules developed by the Reliability Council. *Central Hudson*, 83 FERC at 62,406; Agreement at Article 3.4 (Brief Addendum C); Rehearing Order at P 2 (JA 752).

Finally, the New York ISO Service Tariff sets forth the services that the New York ISO provides. *Central Hudson*, 83 FERC at 62,406. The Service Tariff incorporates by reference ISO procedures, including the ICAP Manual containing the formulas the New York ISO uses to translate installed capacity into unforced capacity. *See* Complaint Order at P 26 (JA 731).

C. Reserve Capacity Requirements

Under a transitional proposal accepted by FERC in 2000, the New York ISO adopted market-based measures designed to assure reliability. *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,319 (2000) (order accepting transitional market design proposal) (“*New York ISO*”). These measures require load serving entities to maintain sufficient generating capacity (either owned directly or via contractual commitments from generating utilities) to meet their forecasted peak load plus sufficient reserve capacity (as determined by the Reliability Council). *Id.* at 62,061; *see generally* *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 73-74 (1st Cir. 2002) (describing similar FERC-approved mechanism for use in New England). The market design included an auction through which owners of generating facilities would sell capacity to load

serving entities, enabling them to adjust their capacity holdings up or down to reflect gain or loss of customers. *New York ISO*, 90 FERC at 62,060.

The transitional New York ISO market design employed the installed capacity measure of capacity, so that the reserve capacity that retail utilities must acquire, the amount of capacity held by generators, and the capacity units that could be bid and purchased in the auction were stated in terms of rated (*i.e.*, installed) capacity, *see id.* at 62,061; *New York Independent System Operator, Inc.*, 96 FERC ¶ 61,251 at 61,991 (2001) (order accepting the unforced capacity methodology) (“*UCAP Order I*”). The amount of capacity generators could sell into the system did not account for their individual facilities’ forced outage rates. *UCAP Order I*, 96 FERC at 61,991. The transitional market design recognized such potential shortfalls in installed capacity by using a system average “forced outage” (*i.e.*, unplanned) rate in the calculations.

Subsequently, participants in the New York State market agreed on the New York ISO’s proposal to adopt the unforced outage capacity methodology “to recognize in the market design the reality that because of forced outages, a generating resource is not always available to supply [installed capacity],” and to increase the incentive for improving efficiency. *Id.* at 61,991 and 61,993. Instead of a system-wide forced outage rate, “the [unforced capacity] methodology attempts to incorporate the probability that a resource will actually be available to

supply [installed capacity]” by separately considering each generating facility’s forced outage rate. *UCAP Order I*, 96 FERC at 61,991.

Under the proposal, the capacity available from each generator is adjusted by the individual generator’s forced outage rate for the past 12 months to determine the amount of unforced capacity that a generator would be qualified to offer for sale. *Id.* at 61,991 and 61,993. For load serving entities, the installed capacity requirement was converted to unforced capacity using an outage rate based on the data used by the Reliability Council to determine the installed reserve margin initially (a 10-year, historical outage rate). Complaint Order at PP 34-35 (JA 734-35).

In 2001, the New York ISO filed revisions to its Service Tariff to implement the unforced capacity market design. *UCAP Order I*, 96 FERC at 61,990, *order on reh’g*, 98 FERC ¶ 61,180 (2002), *reh’g denied*, 99 FERC ¶ 61,072 (2002) (collectively, “*UCAP Orders*”); opinion on appeal, *KeySpan I*. Ravenswood contested FERC’s calculation of the price cap associated with capacity sales, but did not object to the translation methods. *See UCAP Orders and KeySpan I*, 348 F.3d at 1053-54. Instead, Ravenswood filed a complaint after the New York ISO implemented the methodologies.

D. This Case

On October 27, 2004, Ravenswood filed a complaint against the New York ISO. The complaint contended that, for the Summer 2002 Capability Period (May-October 2002), the New York ISO violated its filed rate schedules by improperly translating installed capacity requirements into unforced capacity requirements, thereby understating the amount of capacity that load serving entities were required to obtain for that period. Complaint Order at P 1 (JA 725). More specifically, Ravenswood objected to the use of an outage rate for the retail utility calculations rate that was different from the outage rate used for the generator calculations. *Id.* at P 23 (JA 730-31). According to Ravenswood, it lost capacity sales totaling \$23.3 million as a result of the alleged error. *Id.*

The Commission denied the complaint, finding that the New York ISO's actions were consistent with then-effective tariffs, rate schedules, and manuals, as well as with FERC orders. *Id.* at P 34 (JA 733); Rehearing Order at 1 (JA 752). The Commission also found that even if the New York ISO had used the installed capacity to unforced capacity translation advocated by Ravenswood, the prices the purchasing utilities actually would have paid were unclear. Rehearing Order at P 27 (JA 758). Consequently, even if Ravenswood were correct in asserting ISO tariff violations, it would not have met its burden to show that it was entitled to any payments, "let alone the \$23.3 million in refunds that it requested." *Id.*

Ravenswood's subsequent rehearing request was rejected on grounds that a second rehearing request is not allowed unless "the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection," a situation not present here. Second Rehearing Order at PP 6-8 (JA 783-84).

SUMMARY OF ARGUMENT

The Commission's conclusion, that the New York ISO complied with its tariffs during the summer of 2002, was reasonable. The procedures the New York ISO followed in translating installed into unforced capacity were consistent with its Service Tariff, the ICAP Manual, and the *UCAP Orders*. Moreover, in developing the translation methodologies, the New York ISO followed the Commission-approved stakeholder procedures established in the ISO Agreement, under which Ravenswood and other stakeholders participated in a 16-month process leading to the methodologies that Ravenswood now challenges.

The fact that the ICAP Manual was not physically filed at the Commission does not change the result. The New York ISO could not have simply complied with the Reliability Rules, as Ravenswood suggests (Br. at 22-24), because the New York ISO Service Tariff required a translation of installed capacity into unforced capacity. As neither the Reliability Rules nor the Service Tariff expressly spelled out the appropriate translation method, the New York ISO's reliance on the

ICAP Manual was reasonable, given that the Service Tariff referred to it and that the ICAP Manual was a product of the collaborative stakeholder process.

The Commission reasonably found that Ravenswood would not have been entitled to payments even if FERC had found that the New York ISO had violated its tariffs. Given the nature of the translation and the capacity auction, it is unclear what prices actually would have been paid by the load serving entities if the New York ISO had used the translation methodologies advocated by Ravenswood. Moreover, the purpose of the Reliability Rules is to promote reliability of the electric system, and there were no reliability problems arising from capacity shortages during the period in question. Thus, the Commission properly exercised its discretion in concluding that refunds would not be warranted.

ARGUMENT

I. Standard of Review

FERC orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *see, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). That standard requires the Commission to “examine the relevant data and articulate a . . . rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also,*

e.g., *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). Moreover, “because Congress has delegated to FERC a broad range of adjudicative powers . . ., this [Court] gives substantial deference to its interpretation of filed tariffs, even where the issue simply involves the proper construction of language.” *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (internal citation and quotation marks omitted). Indeed, “when agency orders involve complex scientific or technical questions, as here,” *B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004), this Court is “particularly reluctant to interfere with the agency’s reasoned judgments,” *id.*³

II. The Commission’s Conclusion That The New York ISO Had Complied With Its Tariffs Was Reasonable.

Ravenswood based its claim for damages on the theory that the New York ISO violated three rate schedules: the Reliability Council Agreement, the New York ISO-Council Agreement, and the New York ISO Service Tariff. Complaint at 1-2 (JA 2-3). As the Commission found (Rehearing Order at P 1 (JA 725), Ravenswood’s claim lacked merit.

³ *Koch* and *B&J Oil* involve the Natural Gas Act, but courts have applied interpretations of Natural Gas Act provisions to their counterparts in the Federal Power Act because “the relevant provisions of the two statutes are in all material respects substantially identical.” *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

The focus of the Reliability Council is technical; *i.e.*, “to promote and preserve the reliability of electric service.” Reliability Council Agreement, Article 2.02. To accomplish this, the Agreement authorizes the Council to establish the annual installed capacity requirements for New York State. *See* Section 3.03. The installed capacity requirement is a function of the forecasted peak load plus reserve capacity as defined by the installed reserve margin requirement. Reliability Rules at 12 (Introduction) (Brief Addendum D).⁴

The installed reserve margin requirement is derived from various assumptions about the future. Thus, in developing an installed reserve margin requirement, the Reliability Council must make due allowance for scheduled outages and deratings, forced outages and deratings, assistance from neighboring systems, uncertainty of load forecasts, and other factors. Reliability Rule A-R1. Ultimately, the margin requirement must be such that “the probability of disconnecting firm load due to a resource deficiency will be, on the average, no more than once in ten (10) years.” *Id.*

In this case, the installed reserve margin requirement established by the Reliability Council pursuant to Rule A-R1 was 18 percent. Complaint Order at P 4

⁴ The Reliability Rules state that the “Installed Capacity Requirement = (1 + Installed Reserve Margin) x Forecasted New York Control Area Peak Load.” *See* Reliability Rules at 12 (Introduction).

(JA 726). Adding this to the forecasted peak load of 30,475 MW for that period resulted in a statewide installed capacity requirement for load serving entities of 35,960.5 MW, including 5,485.5 MW of reserves. Complaint Order at P 4 (JA 726). New York City retail utilities were required to have 10,665 MW of installed capacity, 80 percent of which had to be supplied by New York City sources. *Id.*

Reliability Rule A-R2 requires load serving entities “to procure sufficient resource capacity” so as “to meet the statewide [installed reserve margin] requirement determined from A-R1.” A-R2; Rehearing Order at P 16 (JA 756). Concomitantly, the New York ISO-Council Agreement instructs the New York ISO to “require [the load serving entities] to maintain appropriate levels of installed capacity consistent with the Reliability Rules” Agreement at Article 3.4.

As indicated, the Reliability Council capacity requirement is measured in units of installed capacity. For the reasons discussed earlier, *see supra* at 7, in 2001, the New York ISO implemented a new capacity market design which measures capacity in units of unforced capacity. Complaint Order at P 5 (JA 726).

As the Commission found, however:

None of the [Reliability Council’s] Reliability Rules (including Rules A-R1 and A-R2) cover the subject of translating [installed capacity] to [unforced capacity] while preserving the [installed reserve margin]. Instead, the applicable tariffs leave the methodology for fulfilling A-R1 and A-R2 (in terms of [installed capacity] and [unforced capacity] translation) for [New York ISO] implementation . . .

Rehearing Order at P 17 (JA 756). Consequently, the New York ISO turned to the ISO Agreement.

Under the ISO Agreement, New York ISO procedures are developed by the Business Issues Committee and are implemented by ISO staff unless suspended or overruled by the Management Committee or ISO Board. New York ISO Agreement at Section 9.01 (JA 478-79). Representation on both the Management Committee and the Business Issues Committee is by sector, with generator owners (such as Ravenswood) having 21.5 percent of the vote. ISO Agreement at Sections 7.06(a) and 9.02 (JA 468, 480); *Central Hudson Gas & Electric Corp., et al.*, 88 FERC ¶ 61,229 at 61,758 (1999).

No one contests the fact that the New York ISO complied with the stakeholder provisions set forth in the ISO Agreement in developing the Service Tariff revisions and the ICAP Manual translation methodologies. Rehearing Order at PP 12, 22 (JA 755, 757); Complaint Order at PP 36, 37 (JA 734). “The ICAP Manual setting forth the outage rate methodologies that were in effect for the 2002 Summer Capability Period was developed by and approved by market participants at the New York ISO’s [Business Issues Committee] meeting held on July 19, 2001, after 16 months of stakeholder processes and 18 [Installed Capacity] Working Group meetings.” New York ISO Answer at 11 (JA 428).

To implement the new methodology, the New York ISO revised its Service Tariff to, *inter alia*, provide for the translation of installed capacity to unforced capacity. *See UCAP Order I*, 96 FERC at 61,990. Ravenswood did not make the objections then that it does now; indeed, during the FERC *UCAP* proceeding, Ravenswood commented that “the market participants were able to agree on all of the necessary translations” except for the price cap translation.⁵

Section 5.10 of the revised Service Tariff, which addresses the translation on the load serving entity side, states that the New York ISO will translate the Reliability Council’s installed reserve margin (and the derived installed capacity requirement) into an unforced capacity requirement “in accordance with the ISO procedures.” *See* JA 487. Similarly, Section 5.12.6 states that the amount of

⁵ The comments filed in the *UCAP* proceeding by “Mitigated In-City Generators,” which included Ravenswood, stated as follows:

Because the current NYISO-administered capacity market is [installed capacity] based, NYISO had to convert or translate several measures to [an unforced capacity-based] methodology. These measures included: the amount of [installed capacity] in-City [load serving entities] had to purchase; the amount of [installed capacity] that all New York [load serving entities] had to purchase; the penalty imposed on [load serving entities] for failing to purchase the required [installed capacity], the amount of [installed capacity] generators had available to sell; and the . . . price cap for [installed capacity]. After a negotiation process lasting more than a year and a half, the market participants were able to agree on all of the necessary translations, except for the appropriate bid and price cap translation measure.

See Comments at 4 (attached to this brief as Addendum E).

unforced capacity that each generator is qualified to supply will be determined “in accordance with formulae provided in the ISO Procedures.” *See* JA 498.

The procedures incorporated by Sections 5.10 and 5.12.6 of the Service Tariff were set out in the New York ISO ICAP Manual. Complaint Order at PP 34-35 (JA 733-34). It is undisputed that the New York ISO followed its ICAP Manual in making the installed to unforced capacity translation. Rehearing Order at P 18 (JA 756). Accordingly, as FERC concluded, the New York ISO’s actions were consistent with its then-effective tariffs, rate schedules, and manuals:

[The New York ISO’s] translation of [installed capacity] to [unforced capacity] for the Summer 2002 Capability Period applied the methodologies that were in place at that time, methodologies that were adopted through a Commission-approved stakeholder process and methodologies that the Commission approved for [the New York ISO’s] use in September of 2001 in the first of the UCAP Orders. This being the case, we find Ravenswood’s allegation that [the New York ISO’s] actions violated its tariffs and the [Reliability Council’s] Reliability Rules, and thus the filed rate, without merit.

Complaint Order at P 34 (JA 733); Rehearing Order at P 7 (JA 753-54).

The ICAP Manual, moreover, specified different outage rates to be used for load serving entities as opposed to generators:

For [load serving entities], Section 2.5 of the manual provided that the ISO would calculate the [New York Control Area] [unforced capacity] requirement using an outage rate based on the data used by [the Reliability Council] to determine the [installed reserve margin] (implying a 10 year, historical outage rate). However, for generators, Attachment J of the manual stated that a rolling, cumulative, 12-month outage rate would be used in the calculation of [unforced capacity].

Complaint Order at P 35 (JA 733). Consequently, as FERC found, Ravenswood's contention that the New York ISO should have used different outage rates for unforced capacity calculations for the capability period at issue is without merit. *Id.*; Rehearing Order at P 8 (JA 754).

The New York ISO's actions, moreover, were consistent with the *UCAP Orders*. While instructing the New York ISO to translate installed capacity to unforced capacity, the orders "did not prescribe the use of Ravenswood's recommended particular methodology to translate [installed capacity] to unforced capacity for generators and [load serving entities] and, albeit in a different context, spoke approvingly of the approach [the New York ISO] took (i.e., using short-term generator outage rates)." Rehearing Order at P 24 (JA 758).

III. Ravenswood's Arguments Otherwise Are Unavailing.

For its part, Ravenswood contends (Br. at 13-19) that the Reliability Rules impose a specific result and that FERC rejected, "without explanation," evidence that the New York ISO's calculations did not come up with the right numbers. FERC, however, did address this argument, finding that it was trumped by the fact that the Reliability Rules specify no particular translation methodology and that the New York ISO had, in fact, complied fully with the methodologies required of it by the Service Tariff and ICAP Manual. Rehearing Order at PP 16-19 (JA 755-56). Moreover, "the methodology now endorsed by Ravenswood was not directly

prescribed in [the New York ISO's] tariffs and, in fact, is inconsistent with the ICAP Manual as it existed at that time.” *Id.* at P 19 (JA 756).

Implicit, moreover, in Ravenswood's argument is the idea that Ravenswood may sit on its hands through 16 months of stakeholder meetings and the ensuing FERC tariff revision proceeding,⁶ and then complain after the Reliability Council has examined the results of applying actual outage data to the translation formulas. The Commission properly declined to accept that construction of the tariffs. As the New York ISO had complied with all of the tariff-mandated stakeholder proceedings in developing the methodologies in the first instance, filed the appropriate revisions to its Service Tariff, and implemented the methodologies as stated, the Commission reasonably and appropriately determined that its actions were consistent with its tariffs and the orders accepting the tariffs.

Ravenswood also contends (Br. at 20) that the earlier *UCAP Orders* do not support the challenged orders because they do not address the use of inconsistent ten-year and twelve-month outage rates. This argument lacks merit. The Commission cited the *UCAP Orders* correctly for the proposition that the orders had approved, “in a different context, translation from [installed capacity] to

⁶ See Rehearing Order at P 22 (JA 757) (finding that Ravenswood could have voiced its concerns during the stakeholder process, and not only did “not raise its objections in that forum, it appears that it actually took a contrary position on the issue at that time”) and discussion *supra* at 15-16.

[unforced capacity] using a short-term generator outage rate.” Complaint Order at P 34 n.12 (JA 733). Ravenswood should not fault the Commission for failing to discuss the non-matching outage rate issue in the *UCAP Orders*, when neither Ravenswood nor any other party raised the issue in the *UCAP* proceeding.

IV. The Commission’s Determination That The New York ISO Could Rely On Its ICAP Manual Was Proper.

Ravenswood contends that reliance on the ICAP Manual, which was not filed at the Commission, violated FPA § 205 and that the New York ISO should have followed the Reliability Rules instead. *See* Br. at 22-24; Rehearing Order at P 18 (JA 756). However, this argument ignores the fact that while the Reliability Rules speak in terms of installed capacity, the New York ISO markets operate in terms of unforced capacity. Consequently, there must be some established translation method to avoid arbitrary results. The Service Tariff provides this translation method by referring to the ICAP Manual. As FERC found:

. . . nothing in the . . . Rules governs how these calculations should be made, nor do the tariffs themselves expressly spell out the appropriate methodology. Hence, there could be no violation of a filed rate, the Reliability Rules, nor the tariffs, based on [the New York ISO] using the methodology described in the ICAP Manual to translate [installed capacity] to [unforced capacity]. Second, the argument improperly presupposes that the methodology prescribed in the ICAP Manual conflicts with [the New York ISO’s] tariffs. Again, this is simply not the case; there is no conflict as there is no methodology expressly delineated in [the New York ISO’s] tariffs. Third, and likewise, the methodology now endorsed by Ravenswood was not directly prescribed in [the New York ISO’s] tariffs and, in fact, is inconsistent with the ICAP Manual at that time. Thus, the use of Ravenswood’s

recommended methodology has less support than [the New York ISO's].

Rehearing Order at P 19 (JA 756). As the Commission pointed out, moreover, it relied not only on the ICAP Manual as a basis for its conclusion, but also on the fact that the New York ISO's actions were consistent with the *UCAP Orders*. *Id.* at P 20 (JA 757); *see also* discussion *supra* at 18, 19-20.

Finally, not all matters pertaining to rates and service must be filed; this Court has upheld the Commission's "rule of reason" approach to how much detail a utility must provide in its rate schedules:

[T]here is an infinitude of practices affecting rates and services. The statutory directive [of Section 205] must reasonably be read to require the recitation of only those practices that affect rates and services *significantly*, that are realistically susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous. It is obviously left to the Commission, within broad bounds of discretion, to give concrete application to this amorphous directive.

City of Cleveland v. FERC, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (upholding FERC's refusal to grant customer's request that a tariff provide more detail).

Here, the challenged orders do not directly address the issue as to whether the ICAP Manual should be physically filed at the Commission rather than incorporated by reference in the Service Tariff. Nevertheless, as then-Commissioner Kelliher's dissent to the Complaint Order makes clear, incorporation by reference of the ICAP Manual is in accord with Commission

practice with respect to regional transmission organizations and independent system operators. Moreover, here the ICAP Manual involves a technical procedure, the purpose of which is to preserve the physical reliability of the system. *See* Council Agreement, Article 2.02. *Compare, e.g., Quest Energy, L.L.C. v. Detroit Edison Co.*, 106 FERC ¶ 61,227 (2004) (handbook at issue focused on pricing) (cited by Ravenswood, Br. at 22).

Additionally, the ICAP Manual was the product of stakeholder consensus; all market participants knew (or should have known) the methodologies contained in the Manual. Finally, as the *Midwest* order cited by Ravenswood (Br. at 22) indicates, the appropriate time for Ravenswood to have litigated the filing issue was at the time the Service Tariff was revised and filed. *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,157 at PP 550-564 (2004).

V. Assuming that the New York ISO Had Violated Its Tariffs, the Commission Reasonably Concluded That Ravenswood Had Not Met Its Burden Of Proof To Show That It Would Have Been Entitled To Refunds.

The Commission has considerable discretion with respect to remedies. *See Towns of Concord v. FERC*, 955 F.2d 67, 72, 75 (D.C. Cir. 1992); *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 1999) (the breadth of agency discretion at its zenith when related to the fashioning of policies, remedies and sanctions). Here, FERC found that even if the New York ISO had actually used the translation methodologies advocated by Ravenswood, “it still remains

unclear what prices would actually have been paid by the [purchasing utilities]” given the “nature of the translation and the auction.” Rehearing Order at P 27 (JA 758). Given that there were no instances of reliability problems arising from capacity shortages during the period in question, and Ravenswood’s failure to raise its objections during the stakeholder deliberations, the Commission’s conclusion that Ravenswood was not entitled to any refunds (let alone the \$24 million it claims) is a reasonable exercise of the Commission’s remedial discretion.

In addition, the conclusion accords with the purposes of the filed rate doctrine, one of which is to provide predictability. *See Towns of Concord v. FERC*, 955 F.2d at 75. Here, because of the tariff-mandated stakeholder process, all market participants knew (or should have known) the translation methodologies that the New York ISO would be using. Ravenswood should not be permitted to upset the apple cart, after failing to raise its objections at the appropriate time and when it had ample opportunity to do so.

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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