

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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PUBLIC SERVICE COMMISSION

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February 28, 2011

SENT VIA ELECTRONIC FILING  
Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Room 1-A209  
Washington, D.C. 20426

Re: Docket No. ER11-2224-000 - New York Independent  
System Operator, Inc.

Dear Secretary Bose:

Attached, for filing, is the Request for Rehearing of the New York State Public Service Commission in the above-entitled proceeding. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler  
Assistant Counsel

Attachment  
cc: Service List

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System            )     Docket No. ER11-2224-000  
Operator, Inc.                            )

REQUEST FOR REHEARING  
OF THE NEW YORK STATE  
PUBLIC SERVICE COMMISSION

INTRODUCTION

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure, the New York State Public Service Commission (NYPSC) respectfully submits its Request for Rehearing of the Commission's Order issued in the above-referenced proceeding on January 28, 2011 (January 28 Order).<sup>1</sup> The January 28 Order accepted, with modifications, and suspended for five months, the New York Independent System Operator, Inc's (NYISO) proposed tariff revisions updating the parameters for the Installed Capacity (ICAP) Demand Curves over the next three Capability

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<sup>1</sup> Docket No. ER11-2224-000, New York Independent System Operator Inc., Order Accepting Tariff Revisions Subject To Modification, Suspending For Five Months, And Directing Compliance Filing, 134 FERC ¶61,058 (issued January 28, 2011). The January 28 Order accepted the NYPSC's Motion to File Comments and for Intervention, which was filed on December 24, 2010.

Years.<sup>2</sup> In particular, the Commission rejected the NYISO's proposal to recognize the New York City (NYC) property tax abatement program in estimating the Cost of New Entry (CONE) for the hypothetical peaking unit (i.e., the LMS 100 unit) used to establish the NYC Demand Curve parameters.<sup>3</sup>

The Commission based its decision to not assume any tax abatement for the LMS 100 unit "because of the questionable eligibility of a peaking unit and the fact that such abatement is discretionary."<sup>4</sup> Specifically, the Commission found that it was unclear whether an LMS 100 peaking unit would be capable of achieving the necessary heat rate for eligibility under the NYC tax abatement program. The Commission also based its conclusion on the fact that the tax abatement program was discretionary on the part of NYC, rather than the abatements being granted as "a

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<sup>2</sup> The NYISO is required to conduct a review every three years to determine appropriate parameters for the ICAP Demand Curves over the next three Capability Years. NYISO Services Tariff, §5.14.1(b), Sheet 157. On November 30, 2010, the NYISO filed amendments to its Market Administration and Control Area Services Tariff (Services Tariff), proposing updated ICAP Demand Curves for the three upcoming Capability Years (i.e., 2011/2012, 2012/2013, and 2013/2014).

<sup>3</sup> The ICAP Demand Curves are based on estimates of the CONE, net of energy and ancillary services revenues, and are used in the NYISO-administered ICAP Spot Market Auctions to establish the price of ICAP relative to the amount of supply.

<sup>4</sup> January 28 Order, ¶90.

matter of right as it was under the predecessor [tax abatement] program."<sup>5</sup> Accordingly, the Commission directed the NYISO to exclude any recognition of the NYC tax abatement program from the estimation of the CONE for NYC.

#### STATEMENT OF ISSUE

Issue: Whether the Commission's decision to exclude any recognition of the NYC tax abatement program from the estimation of the CONE for NYC was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with the law (i.e., unjust and unreasonable).<sup>6</sup>

#### DISCUSSION

##### The Commission Erred In Determining That The Estimated CONE For The NYC Demand Curves Should Exclude Any Recognition Of The NYC Tax Abatement Program

The NYPSC seeks rehearing of the Commission's determination to exclude outright the likely favorable treatment a peaking unit would receive under NYC's tax abatement program.

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<sup>5</sup> January 28 Order, ¶88.

<sup>6</sup> In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right...; or, unsupported by substantial evidence." See, 5 U.S.C. §706; see also, Sithe New England Holdings, LLC v. FERC, 308 F.3d 71, 77 (1<sup>st</sup> Cir. 2002) (indicating that FERC uses the 'just and reasonable' rubric in regulating ICAP charges, though generators have no statutory entitlement to ICAP payments).

According to the testimony provided by Maureen Babis, the Executive Director of the New York City Industrial Development Authority (NYCIDA), NYC's tax abatement program was expressly modified in 2010 to provide tax abatements for "new peaking generating units."<sup>7</sup> The tax abatement program "establishes transparent, specific, and particularized criteria by which applications for tax abatements will be evaluated."<sup>8</sup>

It is likely that NYC will grant tax abatements for peaking units in accordance with the specified criteria, because such abatements are consistent with the NYCIDA's statutory mandates to "promote the economic welfare [of NYC] inhabitants, ... [and to] promote, attract, encourage and develop economically sound commerce and industry through governmental action for the purpose of preventing unemployment and economic deterioration."<sup>9</sup> Moreover, it is in NYC's financial interest to grant the tax abatements because the rate impact to NYC consumers of excluding the tax abatements from the Demand Curves, which we estimate below may be over \$1.0 Billion over

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<sup>7</sup> ER11-2224-000, Motion to Intervene, Protest, and Comments of the City of New York, Affidavit of Maureen Babis, ¶9 (Babis Affidavit).

<sup>8</sup> Babis Affidavit, ¶11.

<sup>9</sup> N.Y. GEN. MUN. LAW §917 (McKinney 1999); Babis Affidavit, ¶13 (indicating the NYCIDA has a statutory responsibility to "promote and encourage economic development, industrial expansion, and job retention and growth").

three years, would jeopardize economic development and job retention, and run counter to the NYCIDA's statutory responsibilities.

While we recognize the Commission's discretion to assume certain tax treatment for the LMS 100 peaking unit, rather than rejecting any tax abatement outright at this time, we urge the Commission to forge a different approach that would address the Commission's concerns as well as those stated by market participants. For example, it is well within the Commission's discretion to accept the NYISO's proposal as filed, but to direct the NYISO to exclude tax abatements from the Demand Curve until and unless a final determination is made by NYC that an LMS 100 peaking unit should be denied a tax abatement or is ineligible for such abatement under the NYC tax abatement program.<sup>10</sup> In the event NYC makes either determination, the Commission's direction that the NYISO promptly file an increase in the Demand Curves as appropriate going-forward would signal to prospective investors that they will be able to adequately recover their costs. Such an approach is consistent with the intended design of the Demand

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<sup>10</sup> See, Sithe New England Holdings, LLC v. FERC, 308 F.3d 71, 77 (1<sup>st</sup> Cir. 2002), (finding that FERC has considerable discretion in regulating ICAP charges and is not bound to ensure generators receive "just and reasonable" ICAP rates under the Federal Power Act.

Curves to incent new entry when needed, which was a key component of the NYPSC's support for the initial implementation of the Demand Curves, and explicitly recognized by the Commission.<sup>11</sup> Furthermore, this approach would obviate the need for the Commission to prematurely reach conclusions regarding the capability of an LMS 100 peaking unit to achieve the necessary heat rates.

This approach should adequately address generation suppliers' stated interests that the NYISO's proposed Demand Curves "will chill potential investments" and not allow generators to recover their costs.<sup>12</sup> Moreover, this approach would address the significant concerns raised by NYC and other consumer representatives that excluding tax abatements fails to comport with the likely outcome of the abatement program and could cost consumers "hundreds of millions of dollars annually."<sup>13</sup> The NYPSC shares those concerns and maintains that the Commission's determination to include NYC property taxes in

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<sup>11</sup> The Commission has explicitly indicated that the NYPSC's position in the development of the Demand Curves is an important factor in its decision-making. See, Docket No. ER03-647, New York Independent System Operator, Inc., Order Conditionally Accepting for Filing Tariff Revisions (issued May 20, 2003), ¶ 15.

<sup>12</sup> January 28 Order, ¶¶ 78 and 80.

<sup>13</sup> January 28 Order, ¶ 73.

the Demand Curve will impermissibly raise ICAP rates to an unjust and unreasonable level.

We estimate that disregarding the NYC tax abatement program outright may increase ICAP prices in NYC by over 40%, potentially costing NYC consumers over \$1.0 Billion over the next three years.<sup>14</sup> This increase is especially troubling given the current economic conditions and the electricity rates for New York City consumers that are already among the highest in the nation. Moreover, such an increase is clearly not supported where the current Demand Curve levels are already producing adequate price signals for new entry, as evidenced by over 1,000 MW of merchant generation that is under construction to serve NYC.<sup>15</sup>

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<sup>14</sup> The amount of generation in NYC receiving market-based capacity payments is over 6.7 million kW. The past 12 months' actual NYC ICAP market prices averaged about \$8 per kW-month, or about \$95 per kW-year. Other aspects of the Commission's Order would increase NYC ICAP prices by about 42%, to about \$135 per kW-year, assuming current levels of supply. Disregarding the property tax exemption would boost market prices another 41%, to almost \$190 per kW-year. Thus, disregarding the property tax exemption could increase market prices by over \$50 per kW-year and cost NYC consumers over \$335 million per year ( $\$50 \text{ per kW} \times 6.7 \text{ million kW} = \$335 \text{ million per year}$ ).

<sup>15</sup> While the entry of over 1,000 MW would ordinarily be expected to lower market prices, this may not occur due to the Commission's imposition of bid floors on new entrants. Depending upon the bid floors adopted by the Commission, new entrants may be prevented from selling into the NYC ICAP market.



However, the Commission appears to have acted contrary to the evidence and without any analysis of whether the resulting rates would be just and reasonable. Therefore, the Commission's decision was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with the law (i.e., unjust and unreasonable).<sup>16</sup> Accordingly, the NYPSC urges the Commission to adopt a compromise approach, such as the one noted above, that will strike an appropriate balance given the uncertainty with the operation of the NYC tax abatement program and the parties' stated interests in this issue.

#### CONCLUSION

For the reasons noted above, the Commission should grant the NYPSC's Request for Rehearing, and direct the NYISO to exclude tax abatements from the Demand Curve until and unless NYC determines that an LMS 100 peaking unit should be denied a

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<sup>16</sup> See, 5 U.S.C. §706; see also, Sithe New England Holdings, LLC v. FERC, 308 F.3d 71, 77 (1<sup>st</sup> Cir. 2002).

tax abatement or is ineligible for a tax abatement under the NYC  
tax abatement program.

Respectfully submitted,



Peter McGowan  
General Counsel  
Public Service Commission  
of the State of New York


By: David G. Drexler  
Assistant Counsel  
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(518) 473-8178

Dated: February 28, 2011  
Albany, New York

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: Albany, New York  
February 28, 2011

  
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