123 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

New York Independent System Operator, Inc. — Docket Nos. ER01-3001-019, ER03-647-011

ORDER ACCEPTING IN PART COMPLIANCE REPORTS

(Issued May 27, 2008)

1. In this order, the Commission accepts in part, New York Independent System Operator, Inc.'s (NYISO) January 15, 2008 compliance filing (January 15, 2008 Filing) containing reports providing information on: (1) its Demand Side Management programs; (2) new generation projects in the New York Control Area (NYCA); and (3) the effectiveness of the Installed Capacity (ICAP) Demand Curves.

I. Background

2. On May 20, 2003, in Docket No. ER03-647-000, the Commission conditionally accepted a NYISO proposal to establish ICAP Demand Curves for New York State and required NYISO to file annual compliance reports, beginning December 1, 2003. Each annual filing was to contain two reports: one report on the implementation of the ICAP Demand Curve and the other report on withholding behavior under the ICAP Demand Curve.[1] In a September 22, 2004 order on NYISO's December 2003 annual filing, the Commission required subsequent annual reports on implementation of the ICAP Demand Curve to include an examination of trends in the amount of capacity purchased and the impact of the ICAP Demand Curve on new investment.[2] In its 2004 annual filing, NYISO asserted that it was difficult to reach any definite conclusions on the effects of the

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[1] *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,201, *reh'g denied*, 105 FERC ¶ 61,108 (2003).

[2] *New York Independent System Operator, Inc.*, 108 FERC ¶ 61,280, at P 10 (2004).

Demand Curves on new investment given their relatively brief history and the comparatively long lead time to develop new generation. The Commission agreed and in a June 20, 2005 Order[3] directed NYISO to include in its next (2005) report,[4] either a detailed examination of the impact of the ICAP Demand Curves on new generation or specification of the period of time necessary to begin observing the effects of the Demand Curves on new generation. Further, the June 20, 2005 Order directed NYISO to include documentation that supports its conclusions. On January 3, 2006, following an extension of time to do so,[5] NYISO submitted its 2005 annual compliance filing to comply with the June 20, 2005 Order and earlier orders in Docket No. ER03-647. In an order issued October 23, 2006, the Commission accepted NYISO's 2005 compliance filing, but required NYISO to make further annual filings for the next three years (by December 1st of each year), detailing the effectiveness of the NYISO ICAP Demand Curves.[6] The Commission specifically required NYISO to provide in all such future reports: (1) price and capacity time series data dating back to NYISO's inception; (2) a list of investments in new generation projects in New York (including a description and current status) regardless of the stage of project development; (3) a summary of the analysis of net revenue that it includes in its annual state of the market report (Net Revenue Analysis) for two technologies (a peaking unit and a combined-cycle unit); and (4) information regarding demand response participation in the ICAP market.

3. In addition, in a series of orders issued in Docket No. ER01-3001 beginning in 2001,[7] the Commission directed NYISO to submit two semi-annual reports, beginning December 1, 2001: (1) a report on NYISO's progress on its demand response programs; and (2) a report on the addition of new generation resources in the New York Control Area. By notice issued November 28, 2006, the Commission granted NYISO's request to submit its winter semi-annual reports in Docket No. ER01-3001 and its annual reports in Docket No. ER03-647 (both otherwise due December 1st), by January 15th of each year in combined filings.

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[3] *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,427 (2005) (June 20, 2005 Order).

[4] *Id.* at 62,771 n.7.

[5] The filing deadline was extended in a notice issued on December 1, 2005.

[6] *New York Independent System Operator, Inc.*, 117 FERC ¶ 61,086 (2006) (October 23, 2006 Order).

[7] *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,095 (2001); *New York Independent System Operator, Inc.*, 100 FERC ¶ 61,081; *New York Independent System Operator, Inc.*, 100 FERC ¶ 61,243 (2002); *New York Independent System Operator, Inc.*, 105 FERC ¶ 61,115 (2003).

4. On May 18, 2007, the Commission issued an order conditionally accepting NYISO's combined compliance filing.[8] The May 18 Order required NYISO in future compliance filings to: 1) expand the tables and graphs of price and capacity data and provide an analysis of the price and capacity data to determine the effectiveness of the ICAP Demand Curves on price stability and capacity; 2) submit a complete Net Revenue Analysis as required by the October 23, 2006 Order; 3) provide information regarding withholding and its effect on the ICAP Demand Curves; and 4) submit an analysis of the effectiveness of the ICAP Demand Curves in encouraging new generation projects. Further, on October 26, 2007,[9] the Commission directed NYISO to provide additional analysis of withholding of ICAP in the Rest of State (ROS) region in future reports.

II. <u>Current Filing</u>

5. The January 15, 2008 Filing contains the required compliance reports. In its semi-annual "NYISO 2007 Demand Response Programs" report in Docket No. ER01-3001-019, NYISO states that the Emergency Demand Response Program (EDRP) and Special Cases Resources (SCR) have 2,705 participants enrolled providing a total of 1,801.9 MW of demand response, a slight increase over the 2006 MW registration.[10] Participation in the ICAP/SCR program was up in 2007 and 10 percent more demand response cleared in the summer ICAP auction than 2006. A total of 1998 resources participated in the capacity markets as ICAP/SCR resources; 1986 of those participants cleared, accounting for 1338.5 MW of capacity. Of those ICAP/SCR resources that cleared, 67 were aggregated resources, accounting for 904.9 MW of the total 1338.5 MW of registered ICAP/SCR.

6. In July 2007, NYISO introduced the Targeted Demand Response Program (TDRP), which deploys existing EDRP and ICAP/SCR resources in subzones of Zone J, New York City, for local reliability. The TDRP includes 9 percent of total EDRP participants registered and 52 percent of total ICAP/SCR participants. NYISO explains that since making EDRP and ICAP/SCR mutually exclusive, EDRP registration and MW have decreased and ICAP/SCR registration and MW have increased. NYISO states that it activated its EDRP and ICAP/SCR resources in the TDRP on only two occasions for a total of 20 hours in 2007. NYISO states that EDRP performance in the 2007 TDRP

[8] *New York Independent System Operator, Inc.*, 119 FERC ¶ 61,162 (2007) (May 18 Order).

[9] *New York Independent System Operator, Inc.*, 121 FERC ¶ 61,090 (2007) (October 26, 2007 Order).

[10] NYISO reports that ICAP/SCR represents 73 percent of the total reliability program enrollments and 74 percent of the total reliability program registered MW.

events was above average and average hourly performance exceeded ICAP/SCR energy performance and participating resources by 25 percent or more.

7. For the Day-Ahead Demand Response Program, NYISO states that only four resources submitted offers during the analysis period, but offer activity increased by more than 500 percent over the previous 12-month period and more than twice as many hours of program participation were scheduled as compared to the prior year period. NYISO reports the overall average hourly price reduction did not change from 2006. However, on a monthly basis, the average hourly price reduction was most significant in the months of January and February 2007, more than double that of the same months in 2006.

8. In its other semi-annual report in Docket No. ER01-3001-019, "NYISO Report on New Generation Projects," NYISO submitted a list of 140 Interconnection Request and Transmission Projects for the NYCA as of January 8, 2008. The queue position, owner/developer, date of interconnection request, summer electrical output, winter electrical output, type fuel, location, interconnection point, utility, status, last update, studies available, and proposed in-service date are indicated for each project. NYISO reports that proposed generation and transmission projects undergo up to three studies (feasibility, reliability impact, and facilities studies). NYISO states that the Facilities Study is performed on a Class Year basis and NYISO updates the interconnection queue on a weekly basis and posts the most recent list on its website.

9. In its report in Docket No. ER03-647-011, NYISO submitted a "Report on Implementation of the Installed Capacity Demand Curves." In its report, NYISO states that it believes that the ICAP Demand Curves are beneficial because they provide price stability and predictability, reduce incentives to withhold capacity, and should provide appropriate price signals to generation developers. NYISO explains that the capacity committed to the New York markets continues to trend upward while allowing for modest retirements without threatening the reliability requirements for the NYCA, New York City, and Long Island localities.

10. With respect to the effectiveness of the Demand Curves on price stability and predictability, NYISO states that capacity prices continued to remain stable on a statewide basis and New York City and Long Island prices remained stable partly due to the effects of price caps in New York City and the largely bilateral nature of the Long Island market.[11] NYISO reports that there is no significant physical or economic withholding of ROS capacity in the overall NYCA market or on Long Island, but in New York City NYISO has observed certain bidding behavior that has kept prices at the

[11] NYISO provides market clearing prices and auction activity levels from November 1999 through July 2007 for the New York Control Area (NYCA), New York City and Long Island in Appendix A and Figures 1, 2, and 3 of the report.

Commission-approved cap for certain owners of generation divested from Consolidated Edison before the NYISO was formed.

11. NYISO contends that the clearing prices resulting from the ICAP Demand Curves support the conclusion that the ICAP Spot Market Auctions continue to be attractive to capacity suppliers and provide a venue for them to offer previously unsold capacity resources for the month. NYISO explains that it is difficult to correlate the effects of the ICAP Demand Curves on investment in new generation in New York mainly because New York has had capacity available in excess of the minimum requirements to maintain reliability. However, NYISO believes the behavior of key market variables suggests that the system is geared to providing the signals necessary to provide appropriate incentives to new investment. In addition, NYISO has implemented a program to track the progress of market-based proposals to address the future capacity needs.

12. NYISO asserts that the ICAP Demand Curves by their very design: (i) ameliorate the unstable prices resulting from the prior *de facto* vertical demand curves; (ii) provide market-driven compensation for capacity above minimum capacity requirement; and (iii) reduce incentives for withholding.

13. Regarding the effect of Demand Curves on capacity committed to New York, NYISO states that the amount of capacity committed remains well in excess of minimum requirement levels on a statewide basis, as well as in New York City and Long Island. In support, NYISO states that when compared with the minimum capacity requirements, the average percent excess capacity sold on a statewide basis has increased from 5.5 percent in the 2003 Summer Capability Period to 6.9 percent in the 2006 and 2007 Summer Capability Periods. The report also indicates that the Winter Capability Periods showed excess capacity sold around 8.4 percent in the 2003/2004 Winter Capability Period and 8.9 percent in the 2006/2007 Winter Capability Period with greater excesses in the intervening Winter Capability Periods. NYISO also states that the NYCA Demand Curve price declines to zero when supply exceeds the minimum capacity requirement in the NYCA by 12 percent or more in any case so the NYCA auction clearing prices are consistently at or below half of the estimated net cost of entry for new peaking capacity.

14. Regarding possible withholding, NYISO concludes that there is no significant physical or economic withholding of ROS capacity in the overall NYCA market or Long Island. NYISO states that in order to determine whether any significant economic withholding occurred, it analyzed qualified NYCA capacity available but neither offered for sale nor used as self-supply, qualified capacity offered for sale and not sold, and unsold capacity as a percentage of available capacity. NYISO asserts that examining the MWs of capacity offered but not sold – as distinct from MWs not offered at all – provides a threshold measure of whether economic withholding may have occurred. NYISO explains that the fact Long Island units face a 99 percent locational requirement coupled with the rights to virtually all of the existing capacity on Long Island having

been secured by contract results in an implied offering requirement. With one exception, Long Island has experienced little to no unsold capacity during the past two years. For the entire NYCA, the rise in the relative amount of unsold capacity in New York City coincided with the addition of 1000 MW of new capacity and the growing variability of imports contributed to fluctuations in unsold capacity when measured as a percentage of available capacity.

15. NYISO explains that since the product transacted in NYISO-administered ICAP auctions is Unforced Capacity (UCAP), the following information was examined: (i) certification data reflecting the certified MW of UCAP available from all resources within New York seeking to supply capacity to the NYCA; (ii) the amount of UCAP supplied in all categories; and (iii) imported capacity. According to NYISO, considering the relatively insignificant amounts of capacity that is unoffered in each region, it is evident that physical withholding is not a significant concern. NYISO states that a small but stable fraction of the unoffered capacity in each of the three regions is attributed to Special Case resources that are not offered by Responsible Interface Parties (RIP) and both Long Island and New York City reveal seasonality in the amounts of unoffered capacity. NYISO says that the Long Island Locality is characterized by capacity procurement ostensibly through bilateral transactions and self-supply, the rise in values in Winter, and very low levels of unoffered capacity. NYISO asserts that the near absence of unoffered capacity in New York City may be due principally to the must-offer requirement applicable to the majority of the generation located there, and likewise, the ROS region has also exhibited insignificant amounts of unoffered capacity as evidenced by offers in excess of 99 percent of the available capacity.

16. According to NYISO's data, all Long Island capacity that was offered was sold in the last several Capability Periods. In addition, NYISO explains that since May 2007 virtually all resources located in ROS that were offered into the ICAP auctions were sold, despite a reduction in the NYCA Installed Reserve Margin. NYISO states that the capacity that was offered but unsold in New York City has fluctuated around 8 percent and has exhibited a gently declining trend since the Winter 2005-2006 Capability Period – when roughly 500 MWs of new capacity were introduced, followed by the addition of another 500 MWs in May 2006. NYISO asserts that this new capacity added in conjunction with the offering behavior of market participants led to the persistence of unsold capacity, but evidence shows that the annual adjustments in the demand curve and steady load growth have begun to erode the share of unsold capacity in New York City.

17. In response to the Commission's request for additional analysis of possible withholding of capacity located in the ROS region, NYISO conducted a detailed analysis of: (1) amount and the composition of ROS capacity that was neither offered for sale, certified to meet a Load Serving Entity's (LSE) capacity obligation, nor committed in bilateral transactions in NYCA or to external control areas; and (2) the amount and composition of ROS capacity offers that were not accepted. NYISO explains that this

issue may be a source of concern if the suppliers associated with the unsold ROS capacity had behaved with the intent of raising NYCA prices and maintaining them at uncompetitive levels on a sustained basis. However, NYISO maintains that just a little over 1 percent of ROS offered capacity were unsold during the Summer 2006 and Winter 2007-2008 Capability Periods and the amount of unsold ROS capacity dropped to zero in the succeeding Capability Periods, which suggests an absence of a protracted strategy.

18. NYISO states that its examination of data pertaining to individual market participants revealed general patterns in unoffered and unsold quantities of ROS capacity that suggest a three-way classification of suppliers – a group of four generation-owning utilities that are responsible for the majority of the unoffered capacity, a group of five generation owners that account for the bulk of the unsold capacity, and a group of other suppliers that includes three RIPs. NYISO states that the average levels of both unoffered and unsold capacity have remained approximately 1 percent of the available capacity. According to NYISO's analysis, the group of four ROS generation-owning utilities have consistently had unoffered capacity and account for a majority share, while the group of five generation owners offered practically all the capacity they own. In addition, NYISO asserts that although the group of generation-owners was largely responsible for the offered but unsold MW in 2006, the group has sold almost all of their capacity for the last two Capability Periods. Finally, NYISO explains that the quantity of capacity unoffered by the "All Others" group has fluctuated greatly and had a significant magnitude only during the Summer 2006 capability period; the "All Others" group was comprised of, on average, 16 market participants a month, each with small amounts of unoffered or unsold capacity, but the market participants with unoffered or unsold MW varied from month to month.

19. In regards to unoffered capacity, NYISO asserts that its findings support the view that the reasons why the overwhelming share of capacity that was not offered was due to benign reasons unrelated to strategic motives to raise prices. According to NYISO, with the exception of several isolated one-time occurrences - none of which evidence clear proof of strategic behavior intended to artificially raise prices, most observed instances are the outcomes of firmly established business and engineering practices or regulatory imperatives. NYISO explains that in terms of unsold capacity, several factors still persist, namely that the amount of unsold capacity in the ROS does not exceed a few percent of available supplies, capacity purchased has consistently exceeded the minimum requirements, and prices have been below the costs of entry. NYISO maintains that concerns of economic withholding raised previously were reliant on an analysis performed by an outside consultant that was flawed because of inaccurate information and assumptions. NYISO explains that the combination of decreasing imports and rising exports meant growing quantities of ROS capacity that would not be sold in the NYCA market, but do not constitute "withholding." NYISO contends that the auction results reveal that different suppliers have unsold capacity, which evidences competing offers with different winners and losers from month to month, as well as instances of very

compressed supply stacks. Therefore, NYISO states that only the amount needed to meet the LSE UCAP Obligation is purchased at auction and the remainder of capacity offered at the exact same price will not clear so, even assuming that all capacity offered was at zero dollars, the potential impact on auction clearing prices is modest. NYISO explains that on average, 240 MW and 2 MW were unsold in Summer 2006 and Summer 2007, respectively; thus, if all offered capacity was sold, the spot auction prices would have been to lower by approximately $0.40/kW-month in Summer 2006 and ostensibly unchanged in Summer 2007.

20. NYISO also reports that it has observed certain bidding behavior in New York City that has kept prices at the Commission-approved caps for certain owners of generation divested by Con Edison before the NYISO was formed; however, the Commission has addressed this issue in another ongoing proceeding.[12]

21. In response to the Commission's request for information regarding the effects of the ICAP Demand Curves on investment in new generation in New York, NYISO states that New York has had capacity available in excess of the minimum requirements to maintain reliability, and the behavior of key market variables suggests that the system is geared to providing the signals necessary to provide appropriate incentives to invest in new generation. To consider this issue, NYISO's Reliability Needs Assessment (RNA) process has identified future capacity needs and NYISO has solicited and received market-based proposals to address those needs. NYISO states that in the next few years, new generation projects should be built that were planned and constructed since NYISO implemented the ICAP Demand Curve.

22. NYISO explains that generally, the amount of generation in its Interconnection Queue has increased since the inception of the ICAP Demand Curves in June 2003. NYISO states that the majority of this new capacity is associated with new wind generation projects in the ROS zone, likely the result of a combination of factors, including legislative, policy, and tax measures. NYISO notes that if constructed, these projects will likely participate in the ICAP markets as ICAP suppliers. NYISO states that in the 2008 RNA, it identified a need for new resources in New York beginning in 2012 and additional generation capacity or equivalent resources will be needed in that year in the lower Hudson Valley region or in New York City. NYISO reports that an equivalent of 500 MWs in New York City, or a total of 750 MWs with 250 MWs each in the Capital

[12] NYISO states that in the New York City zone, the majority of capacity has been subject to Commission-approved ICAP market mitigation measures that include bid caps that are specific to each divested generation owner (owners of capacity divested from Con Edison). The Commission recently approved changes to the market mitigation measures in the New York City zone that effectively lower the bid caps of pivotal suppliers. See *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 (2008).

region, the mid-Hudson Valley, or New York City, will be required to meet the anticipated power needs in 2012. NYISO identified nine projects that were submitted in response to the 2007 RNA and accepted as market-based solutions to the reliability needs in the 2008 Comprehensive Reliability Plan (CRP).

23. NYISO implemented the Comprehensive Reliability Planning Process Manual as a framework of monitoring criteria that solution proponents must use to periodically update NYISO on the status of their projects, which will help NYISO track the progress of market-based solutions toward meeting reliability needs by the need date. NYISO states that the status updates will be required by the solution proponents on a quarterly basis and will require reporting various metrics.

24. In response to the Commission's directive to provide a net revenue analysis to assess whether revenue from all sources is adequate in regions where capacity is needed, NYISO states that where there is a growing pressure on existing capacity, there should be a rise in combined revenues from energy and capacity markets. NYISO examined the level of need for capacity by looking at the percentage of capacity in excess of the applicable minimum requirement. Next, NYISO looked at possible revenues from the capacity and energy markets for a hypothetical combustion turbine. In general, according to NYISO, there is a tendency for revenues to increase as the excess capacity margin decreases, and vice versa. NYISO explains that due to a new modeling technology introduced in 2005, earnings from Ancillary Services rose in both absolute and relative terms. NYISO states that while revenue margins for the hypothetical unit have been rising steadily since 2004, revenues remain well below levels necessary to attract new entry of a hypothetical benchmark gas-fueled simple-cycle, combustion turbine in the ROS zone.

25. NYISO states that although Long Island revenues in 2006 for the hypothetical unit attained above-Cost of New Entry values, 2007 saw revenues drop significantly due mainly to relatively lower locational prices. According to NYISO, its data suggests that as Capacity Margins have declined, there is evidence that revenues have tended to respond as expected. NYISO states that, discounting for the additions of combined cycle capacity in New York City and Long Island that were initiated prior to the ICAP Demand Curves, evidence points to a strong tendency of revenues beginning to rise along with the growing need for new capacity. NYISO concludes that market forces in the NYISO-administered ICAP markets are indeed behaving appropriately with revenue signals responding as expected to changes in the capacity margins. NYISO states that if the analysis is restricted to non-wind projects, the volume of MWs being placed in the interconnection queue seem to coincide with changes in the strength of revenue signals. NYISO also states that while the capacity margin remains relatively high in New York City, the rising capacity market revenues do exhibit a positive correlation with additions to the interconnection queue.

III. Notice

26. Notice of the January 15, 2008 Filing in Docket Nos. ER03-647-011 and ER01-3001-019 was published in the *Federal Register*, 73 Fed. Reg. 4,552 with comments or protests due on or before February 5, 2008.

27. A timely motion to intervene and comments was filed by the New York Transmission Owners (NY Transmission Owners) on February 5, 2008.[13] On February 27, 2008, NYISO filed an answer to the comments. On March 13, 2008, the NY Transmission Owners filed an answer in opposition to NYISO's answer and requested that the Commission reject NYISO's answer. The comments and answers are discussed below.

IV. Discussion

A. Procedural Matters

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

29. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits answers to protests or answers unless otherwise ordered by the decisional authority. We will accept NYISO's and the NY Transmission Owners' answers because they have provided information that assisted us in our decision-making process.

B. Compliance Reports

30. The Commission finds that NYISO has partially complied with the compliance reporting directives contained in both the ER03-647 and ER01-3001 dockets, including those specified in the Commission's October 26, 2007 Order, and accepts, in part, the January 15, 2008 Filing, as explained further below.

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[13] The NY Transmission Owners are comprised of: Central Hudson Gas & Electric Corporation; LIPA; Consolidated Edison Company of New York, Inc.; Long Island Power Authority; New York Power Authority; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

1. NY Transmission Owners' February 5, 2008 Comments

31. The NY Transmission Owners claim that NYISO's ICAP Report partially complies with the Commission's May 18 Order, but does not provide a complete analysis of whether ICAP in the ROS region has been economically withheld from the NYISO's ICAP markets with the intent of driving up the price for the remaining ROS ICAP. The NY Transmission Owners explain that NYISO demonstrated that the total amount of UCAP in ROS that either was not offered or was offered, but not sold was smaller than the NY Transmission Owners had estimated. Thus, the potential impact on ROS prices was also smaller than had been feared. NY Transmission Owners maintain that NYISO must proactively monitor whether ICAP is being physically or economically withheld, instead of relying upon market participants to perform the necessary analyses and alert the NYISO to possible instances of withholding.

32. NY Transmission Owners argue that NYISO did not include an analysis of capacity offers that were not accepted, but rather just assumed that market power has not been exercised. The NY Transmission Owners believe that much of the ROS UCAP that was offered but not sold was offered at prices considerably in excess of reasonable estimates of their going-forward costs. According to NY Transmission Owners, NYISO claims the going-forward costs for most units are zero or near zero, but yet during the Summer 2006 Capability Period, ROS UCAP prices ranged from \$2.77-\$3.33/kW-mo. Therefore, the NY Transmission Owners assert that NYISO must conclude that, to the extent that this offered but unsold ROS UCAP would have been provided by generating units whose owners were not contemplating mothballing or retiring them, it was offered at prices well above going-forward costs.

33. The NY Transmission Owners claim that NYISO must be even more vigilant than the market monitoring units of its neighbors because the ICAP markets in New England and PJM Interconnection, L.L.C. contain extensive structural measures intended to mitigate any attempts to economically or physically withhold capacity, while NYISO has no specific structural mechanisms to discourage withholding. Therefore, the NY Transmission Owners encourage the Commission to direct NYISO to revise its ICAP Report to comply with the instructions of the October 26, 2007 Order.

2. NYISO's Answer

34. In its answer, NYISO disputes the NY Transmission Owners' claim that the Demand Curves Report is deficient because it does not compare the going-forward costs of each resource with unsold capacity with the offers to sell capacity from each such resource. However, NYISO argues that NY Transmission Owners' claim ignores the fact that NYISO does not have data on the going-forward costs of each capacity resource located in the ROS, and thus is not in a position to apply a going-forward costs test to make an economic withholding determination. Accordingly, NYISO maintains that it

complied with the second prong of the Commission's October 26, 2007 Order by doing an analysis of the upper bound of any possible effects on prices from possible economic withholding of ROS capacity. According to NYISO, its analysis in the Demand Curves Report shows that the quantities offered but not sold are small, and that any price effects would at worst be minimal, if non-existent, and so complies with the October 26, 2007 Order.

35. NYISO argues that the NY Transmission Owners do not show, either from their own efforts or from anything in the Demand Curves Report, any evidence of market power that may call for undertaking the burden and expense of gathering and analyzing such data. NYISO states that such an effort is not warranted and provides data from its Demand Curves Report as evidence. Therefore, NYISO contends that the NY Transmission Owners' assertion that NYISO did not comply with the Commission's instructions is simply wrong and requests that the Commission reject the NY Transmission Owners' comments.

3. NY Transmission Owners' March 13, 2008 Comments

36. In its March 13, 2008 comments, the NY Transmission Owners claim that NYISO's answer is inaccurate as NYISO has not complied with the Commission's October 26, 2007 Order to include an analysis of bidding behavior for unsold ICAP in the ROS region. The NY Transmission Owners claim that NYISO's answer admits that the initial filing did not include an analysis of bidding behavior for unsold ICAP in the ROS region and simply seeks to excuse its failure to do so and therefore NYISO's answer is simply an out-of-time request for rehearing.

37. First, the NY Transmission Owners explain that under the terms of the October 26, 2007 Order, NYISO was only directed to compare the offers submitted for unsold capacity to a reasonable estimate of their going forward costs so NYISO is not required to have data on the going-forward costs of each ROS capacity resource. According to the NY Transmission Owners, NYISO recently represented to the Commission that going-forward costs for most units are near zero and that only units that may be economic to mothball or retire have significant going-forward costs; therefore, NYISO could have prepared reasonable estimates of the going-forward costs of units that offered capacity in NYISO-administered auctions at prices that were high enough to cause that capacity not to be sold.

38. According to the NY Transmission Owners, NYISO's second excuse for not performing the required analysis is that the quantities of ICAP that were offered but not sold are small and any price effects would at worst be minimal, if not non-existent. However, the NY Transmission Owners state that NYISO acknowledged in its report that if all of the capacity that was offered but not sold during the Summer 2006 Capability Period had actually been sold, capacity prices would have been lower by an average of

$0.40/kW-mo. The NY Transmission Owners argue that while NYISO claimed that the impact was *de minimis,* the failure to sell this capacity caused a 15 percent increase in ROS ICAP prices, on average, during that summer, which cost New York customers millions of dollars, but NYISO did not address the significant harm that could result from its failure to comply.

39. Finally, in response to NYISO's claim that the NY Transmission Owners submitted no evidence demonstrating ROS capacity is being economically withheld, the NY Transmission Owners maintain that NYISO cannot avoid the important obligation to investigate whether such withholding is actually occurring by attempting to shift this responsibility to others.

4. Commission Determination

40. The Commission will accept, in part, NYISO's analysis of possible physical or economic withholding in the ROS region, as directed by the October 26, 2007 Order and require NYISO to submit a complete analysis of possible ROS withholding, as explained below.

41. In accordance with the October 26, 2007 Order, NYISO was required in this report and in future reports to "provide a complete analysis of withholding (including an analysis of bidding behavior) in the Rest of State region, (as well as in the other regions of New York State)."[14] We further stated:

> To the extent that NYISO is able to estimate the amount of unsold capacity that reflects withholding, it should present that estimate and its likely effects on capacity prices. To the extent that NYISO is unable to determine the amount of unsold capacity that reflects withholding, it should include an analysis similar to that provided in NYTOs' comments to estimate the upper bound of the effect of withholding on capacity prices.
>
> We agree with NYISO that withholding is less likely to occur when: (1) the amount of unsold capacity in the Rest of State does not exceed a few percent of available supplies; (2) capacity purchased has consistently exceeded the minimum requirements; and (3) prices have been below the costs of entry. Nevertheless, in the report due in January 2008 and in future reports, NYISO's analysis of bidding behavior in the Rest of State should include, for capacity offers that were not accepted, an examination of how

[14] October 26 Order at P 37.

> many (if any) of the offers significantly exceeded a reasonable estimate of their going forward costs.[15]

42. We find that NYISO has not complied with all of the directives of the October 26, 2007 Order. Regarding cost data, NYISO points out that it does not have data on the going-forward costs of each ROS capacity resource. However, in the October 26, 2007 Order, we directed NYISO to use a reasonable estimate of the going forward costs of resources whose capacity offers were not accepted. NYISO has neither provided this analysis nor estimated the going forward costs of these resources. Thus, NYISO is directed to submit an analysis of ROS capacity offers that were not accepted by comparing the capacity offers submitted to a reasonable estimate of the resources' going forward costs.

43. Regarding the NY Transmission Owners' argument that NYISO did not complete the analysis of the quantities of ICAP that were offered but not sold, we disagree. NYISO did analyze the upper bound of any possible effects on prices from possible economic withholding of ROS capacity. As required, NYISO was able to show that the average monthly quantity of unsold ROS capacity has been quite small and there was virtually no unsold capacity during the Summer 2007 and Winter 2007-2008 Capability Periods. NYISO complied with the requirement in the October 26, 2007 Order to present the estimated amount of unsold capacity and its likely effects on capacity prices by stating that 2 MW were unsold in Summer 2006 and that if all offered capacity was sold, then the spot auction prices would have been lower by ostensibly the same in Summer 2007 as Summer 2006, which was $0.40/kW-month.

44. NYISO's conclusion that no significant physical or economic withholding occurred in the ROS zone may be accurate. The Commission has previously stated that withholding is less likely to occur when: (1) the amount of unsold capacity in the ROS does not exceed a few percent of available supplies; (2) capacity purchased has consistently exceeded the minimum requirements; and (3) prices have been below the costs of entry. NYISO has shown this is the case still and there is no apparent market power among ROS suppliers. Without market power, a supplier will be unlikely to be able to successfully exercise and profit from a withholding strategy. Nevertheless, NYISO has failed to provide a complete analysis of ROS bidding behavior to ensure that no withholding has occurred, and is thus required to submit an analysis within 60 days of the issuance of this order, as discussed above.

[15] *Id.* at P 37 and n19.

<u>The Commission orders</u>:

NYISO's January 15, 2008 Filing is accepted in part, and NYISO is required to submit a complete analysis of possible ROS withholding, within 60 days of the issuance of this order, as discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.