

120 FERC ¶ 61,024  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. EL07-39-000

ORDER ESTABLISHING PAPER HEARING AND REFERRING CERTAIN  
MATTERS FOR INVESTIGATION

(Issued July 6, 2007)

1. On May 4, 2007, the Independent Power Producers of New York, Inc. (Independent Power Producers) filed a request to establish a paper hearing in the instant proceeding, augmented by a technical conference, if needed, to investigate New York City's in-city Installed Capacity (ICAP) market rules. As discussed below, we will establish paper hearing procedures. We also refer to the Office of Enforcement, for investigation under Part 1b of the Commission's regulations,<sup>1</sup> the issue of whether any entity has engaged in manipulation of the in-city ICAP market in violation of 18 C.F.R. § 1c.2 (2006).

**Background**

2. On March 6, 2007, in Docket No. ER07-360-000, the Commission issued an order rejecting proposed tariff revisions filed by the New York Independent System Operator, Inc. (New York ISO)<sup>2</sup> pursuant to section 205 of the Federal Power Act (FPA).<sup>3</sup> In the same order, in Docket No. EL07-39-000, the Commission instituted a proceeding pursuant to section 206 of the FPA<sup>4</sup> to investigate "the justness and reasonableness of the New York ISO's in-city [ICAP] market and whether and how market rules need to be revised to provide a level of compensation that will attract and retain needed

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<sup>1</sup> 18 C.F.R. Part 1b (2006).

<sup>2</sup> *New York Independent System Operator, Inc.*, 118 FERC ¶ 61,182 (March 6 Order), *reh'g denied*, 118 FERC ¶ 61,251 (2007).

<sup>3</sup> 16 U.S.C. § 824d (2000).

<sup>4</sup> *Id.* § 824e.

infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators.”<sup>5</sup> The Commission provided, however, that the hearing be held in abeyance to provide time for settlement judge procedures, and stated that further procedures would be ordered if settlement discussions were to fail.<sup>6</sup>

3. On March 13, 2007, the Chief Administrative Law Judge appointed a settlement judge and scheduled a settlement conference. On May 2, 2007, the Chief Administrative Law Judge notified the Commission that the participants had reached an impasse and he recommended that the settlement judge process be terminated.

### **Independent Power Producer’s Proposal and Comments**

4. Independent Power Producers state that the issues under investigation are well suited for disposition through a paper hearing. Independent Power Producers state that the Commission’s approval of capacity market reforms in neighboring markets provides fully vetted templates for many of the issues in the instant case, that to the extent there are material fact questions, such questions concern the economic effects of changing the in-city ICAP market rules, and that there are no factual questions dependent upon credibility of witnesses that would necessitate a trial-type hearing.

5. The following parties oppose the Independent Power Producers’ request for a paper hearing: New York Transmission Owners;<sup>7</sup> Consolidated Edison Solutions, Inc. (Con Edison Solutions); Multiple Intervenors, the New York State Consumer Protection Board and Consumer Power Advocates; New York State Public Service Commission; and the New York Association of Public Power (New York APP).

6. Those parties argue that a trial-type evidentiary hearing is required to investigate, *e.g.*, allegations of economic withholding,<sup>8</sup> and the need for and effectiveness of market mitigation measures and the cost support for such measures.<sup>9</sup> A trial-type evidentiary

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<sup>5</sup> March 6 Order at P 17.

<sup>6</sup> *Id.* at P 20 and Ordering Paragraph B.

<sup>7</sup> The New York Transmission Owners include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, New York Power Authority, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

<sup>8</sup> Answer of New York Transmission Owners at 7; Answer of Con Edison Solutions at 2; Answer of Multiple Intervenors, *et al.* at 4-7.

<sup>9</sup> Answer of Con Edison Solutions at 2.

hearing is also favored by these parties because “the issues . . . are extremely complex and controversial and involve significant disagreements over several material facts, such as . . . economic withholding . . . the ability of competition to produce just and reasonable prices, and what price level is necessary to meet New York’s standard for the adequacy of electric facilities.”<sup>10</sup>

7. In addition to opposing a paper hearing, the New York Transmission Owners, Con Edison Solutions, and the New York APP request that the Commission adopt phased evidentiary hearing procedures.<sup>11</sup> Phase I would address shorter term market mitigation, while Phase II would address longer term structural in-city ICAP market issues. The New York Transmission Owners in particular request that Phase I include the degree of market manipulation by certain in-city sellers of capacity and related issues. The New York Transmission Owners further request that the Commission limit the scope of the proceeding to the in-city ICAP market, while including longer term in-city market pricing issues, as well as the shorter term in-city market mitigation measures, “to address economic withholding in the [New York ISO] In-City market as identified by the NYISO’s independent market monitor and other parties.”<sup>12</sup>

8. The New York Municipal Power Agency (New York MPA) filed an answer in support of the Independent Power Producers’ motion for a paper hearing, and in opposition to motions for an evidentiary hearing.

9. The Independent Power Producers filed an answer in opposition to the various motions to establish a trial-type evidentiary hearing.

10. The New York ISO filed a response proposing that the Commission: establish paper hearing procedures to address market design issues; direct that, within 120 days of the Commission’s order establishing paper hearing procedures, the New York ISO file a proposal for a revised in-city ICAP market; direct that comments by all interested parties on the New York ISO filing or alternative proposals be filed within 45 days of the New York ISO’s filing, with reply comments submitted 20 days thereafter; provide for a discovery period overseen by an administrative law judge if the Commission finds, after submission of the foregoing filings, that there are material issues of disputed fact that

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<sup>10</sup> Answer of the New York State Public Service Commission at 2.

<sup>11</sup> New York Transmission Owners Answer at 2-3. In this proposal, Phase I would address market mitigation, while Phase II would address longer term structural in-city ICAP market issues.

<sup>12</sup> Answer of New York Transmission Owners at 1-2.

need to be addressed; and allow that the New York ISO's stakeholder processes addressing ICAP issues to continue.<sup>13</sup>

11. The Independent Power Producers filed an answer supporting the New York ISO's proposal for a paper hearing. The Independent Power Producers also request that the Commission convene a technical conference following the filing of the New York ISO's proposal, to allow all parties and the Commission's staff an opportunity "to gain a better understanding of the NYISO's proposal and to discuss the issues with the NYISO's technical experts."<sup>14</sup>

### **Commission Determination**

12. The Commission finds that, at this juncture, a single-phase paper hearing will most efficiently and expeditiously address the issues in this case and bring about a solution to New York City's capacity market problems,<sup>15</sup> with the exception of the allegations of manipulation which we are referring to the Office of Enforcement as discussed more fully below. As we have explained in the past, "[a] trial-type hearing is required only when the written submissions do not afford an adequate basis for resolving disputes about material facts . . . [and that a] policy argument is not sufficient to bring a factual assertion into question."<sup>16</sup> The issues in this case primarily involve policy determinations that, at this juncture, we believe can be best resolved without the need for a trial-type evidentiary hearing.

13. Various parties ask the Commission to limit the scope of the paper hearing by phasing the issues, first addressing market mitigation measures and then addressing long term in-city market structure issues. As we stated in our earlier orders, the purpose of this proceeding is to address "the justness and reasonableness of the New York ISO's [ICAP] market and whether and how market rules need to be revised to provide a level of compensation that will attract and retain needed infrastructure and thus promote long-

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<sup>13</sup> New York ISO May 21 filing at 1-2.

<sup>14</sup> Independent Power Producers June 1 Filing at 1-2.

<sup>15</sup> In a similar case involving PJM Interconnection, L.L.C., the Commission recently conducted a paper hearing. *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, at P 6-8 (2006) (discussing issues to be considered in a paper hearing).

<sup>16</sup> *Iroquois Gas Transmission System, L.P.*, Opinion No. 357-A, 54 FERC ¶ 61,103, at 61,346 (1991) (*citing Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969)), *reh'g denied*, 58 FERC ¶ 61,280 (1992).

term reliability while neither over-compensating nor under-compensating generators.”<sup>17</sup> The Commission believes that it is best to address both the short and long term aspects of the in-city ICAP market together in a single proceeding in order to find a comprehensive solution for the in-city ICAP market problems. We expect the New York ISO and the other parties to formulate comprehensive solutions to the problems of the in-city ICAP market that will provide a level of compensation that will attract and retain needed generating capacity and thus promote long-term reliability, while not over compensating generators. With regard to the matter of coordination with broader New York state issues, we agree with the New York ISO that the New York ISO stakeholder process should continue concurrently with this proceeding.

14. The Commission emphasizes that the New York ISO’s proposed in-city ICAP market, as well as counter-proposals, must be fully supported with affidavits, exhibits, and illustrative examples of how such proposals would work.

15. We will adopt the New York ISO’s proposed procedural schedule, with the exception that we will reduce to 90 days its proposed deadline for submitting its proposal to revise the in-city ICAP market. The procedural schedule for the paper hearing will be as follows:

- a. Within 90 days of the date of this order, the New York ISO is to file a fully-supported proposal for a revised in-city ICAP market;
- b. Within 45 days of the date that the New York ISO’s proposal is filed, all parties seeking to be heard may file initial comments and fully-supported alternative proposals;
- c. Within 20 days of the date on which initial comments and alternative proposals are filed, reply comments may be filed.

16. The Commission will not, at this time, establish discovery procedures, as it is not clear that discovery will be necessary.

17. The Commission is concerned, however, that parties such as the New York Transmission Owners have raised allegations of possible market manipulation by certain in-city sellers of ICAP. The Commission also notes that it has been publicly reported that the United States Department of Justice has begun an investigation into possible manipulation in the in-city ICAP market.<sup>18</sup> On the facts of this case, the Commission

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<sup>17</sup> *New York Independent System Operator, Inc.*, 118 FERC ¶ 61,251, at P 3 (2007); March 6 Order at P 17.

<sup>18</sup> KeySpan Corp. Form 8-K at 4 (filed with Securities and Exch. Comm’n June 6, 2007) (stating that “[o]n May 31, 2007, [KeySpan] received a Civil Investigative Demand from the United States Department of Justice, Antitrust Division, requesting the

believes that our investigation is most appropriately conducted under Part 1b of the Commission's regulations. This referral will not, however, delay or impede the resolution of the remaining issues in this section 206 proceeding. To the extent the Office of Enforcement believes that information learned during the non-public investigation of potential manipulation has a material bearing on potential reforms to the market design that are being considered in the paper hearing, the Office of Enforcement shall so inform the Commission and place such information in the record of the paper hearing as appropriate. Finally, at the conclusion of its investigation, the Office of Enforcement is directed to report its findings to the Commission.

The Commission orders:

(A) A paper hearing to resolve issues in this proceeding related to potential reforms to the in-city ICAP market, as discussed in the body of this order, is hereby established in accordance with the procedural schedule described in the body of this order.

(B) The issue of whether any entity has engaged in manipulation of the in-city ICAP market in violation of 18 C.F.R. § 1c.2 (2006) is referred to the Commission's Office of Enforcement for investigation under 18 C.F.R. § 1b.5 (2006).

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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production of documents and information relating to its investigation of competitive issues in the New York City electric energy capacity market"), available at <http://www.sec.gov/Archives/edgar/data/1062379/000106237907000017/0001062379-07-000017.txt>.