

200201075046 Received FERC OSEC 01/07/2002 04:09:00 PM in Docket#: EL01-118-000

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

INVESTIGATION OF TERMS AND CONDITIONS)
OF PUBLIC UTILITY MARKET-BASED) Docket No. EL01-118-000
RATE AUTHORIZATIONS)

NOTICE OF INTERVENTION AND COMMENTS OF THE
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK

Pursuant to the Order Establishing Refund Effective Date and Proposing to Revise Market-Based Rate Tariffs and Authorizations (Order) issued November 20, 2001, the Notice of Extension of Time dated November 30, 2001, and Rule 214 of the Federal Energy Regulatory Commission's (FERC's or Commission's) Rules of Practice and Procedure, the New York Public Service Commission (NYPSC) hereby submits its Motion to Intervene and Comments.

Copies of all correspondence and pleadings should be addressed to:

Lawrence G. Malone, Esq.
David G. Drexler, Esq.
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223

Ronald Liberty
Director Fed. En. Interv.
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223

INRODUCTION

The Commission's Order proposes to revise all existing market-based rate tariffs and authorizations to include the

200201075046 Received FERC OSEC 01/07/2002 04:09:00 PM in Docket#: EL01-118-000

provision that: "As a condition of obtaining and retaining market-based rate authority, the seller is prohibited from engaging in anticompetitive behavior or the exercise of market power. The seller's market-based rate authority is subject to refunds or other remedies as may be appropriate to address any anticompetitive behavior or exercise of market power."¹

The proposed condition establishes a refund effective date, which will ensure that rates are just and reasonable under the Federal Power Act (FPA).² This condition will act as a backstop for dealing with anticompetitive behavior that is either initially undetected or incapable of being mitigated due to design shortcomings in the New York Independent System Operator's (NYISO's) mitigation measures. It will also deter suppliers from engaging in improper behavior since FERC intervention could strip them of their ill-gotten gains and/or their authority to sell at market-based rates.

DISCUSSION

I. The Proposed Condition Will Ensure That Rates Are Just and Reasonable

The Federal Power Act mandates that rates be just and reasonable. Currently, the NYISO may only correct for anticompetitive behavior by adjusting rates prospectively.

¹ Order at p. 4.

² 16 U.S.C. §§ 824d and 824e.

200201075046 Received FERC OSEC 01/07/2002 04:09:00 PM in Docket#: EL01-118-000

Because mitigation measures do not take effect immediately, wholesale (and subsequently retail) customers may have often paid unjust rates in the past. For example, on many occasions this past summer (i.e., July 1, 10, 25, August 13, 20, 27), real-time prices in the New York City zone reached \$700/MWh or more as a result of anticompetitive behavior, and stayed at that artificially high level for several hours until the initiation of the New York ISO's (NYISO's) generic mitigation, at which time prices declined.³

In protecting consumers from the rate effects of unmitigated anticompetitive behavior, the proposed condition will preserve their statutory entitlement to just and reasonable rates.⁴

II. The Proposed Condition Will Act as a Deterrent to Anticompetitive Behavior

The proposed condition will give the NYISO and the Commission considerable leeway in remedying anticompetitive behavior. In particular, FERC could issue refunds or impose

³ Due to confidentiality concerns, our statement encompasses only the real-time mitigation that the NYISO has made public. In addition, NYISO non-public data indicates there were similar delays in real-time mitigation, which the Commission may wish to investigate further.

⁴ Moreover, evidence of physical withholding must be investigated before any penalty is imposed. Thus, the refund effective authority will provide the time necessary to fully investigate and address this behavior.

200201075046 Received FERC OSEC 01/07/2002 04:09:00 PM in Docket#: EL01-118-000

further conditions, such as precluding suppliers from selling at market-based rates. Suppliers will be less likely to engage in anticompetitive behavior because the potential for financial gain is diminished and the supplier may also forfeit the future profits it otherwise would garner from sales at market-based rates. Thus, these remedial actions will be strong deterrents to such behavior.

CONCLUSION

The proposed condition is appropriate and necessary for the Commission to ensure just and reasonable rates. Moreover, the condition will deter suppliers from engaging in anticompetitive behavior. As such, the Commission should require that the condition be made part of all market-based rate tariffs and authorizations.

Respectfully submitted,

Lawrence G. Malone
General Counsel
By: David G. Drexler
Assistant Counsel
Public Service Commission
Of the State of New York
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

Dated: January 7, 2002
Albany, New York