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124 FERC ¶ 61,062
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.

KeySpan-Ravenswood, LLC

v. Docket No. EL05-17-003

New York Independent
System Operator, Inc.

ORDER ON REMAND APPROVING CONTESTED SETTLEMENT, AS MODIFIED, ESTABLISHING HEARING PROCEDURES, AND DIRECTING COMPLIANCE FILING.

(Issued July 18, 2008)

1. This case is before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit)[1] for further consideration of the Commission's determination that the New York Independent System Operator, Inc. (NYISO) had not violated the filed rate doctrine in establishing a pair of formulae for translating "installed capacity" into "unforced capacity." On October 30, 2007, KeySpan Ravenswood, LLC (Ravenswood), NYISO, New York Power Authority (NYPA), and several Load Serving Entities (LSEs)[2] filed an offer of settlement (settlement), providing

[1] *KeySpan-Ravenswood, LLC v. FERC*, 474 F.3d 804 (D.C. Cir. 2007) (*KeySpan-Ravenswood*).

[2] Consolidated Edison Company of New York (Con Edison), Consolidated Edison Solutions, Inc., Constellation NewEnergy, Inc., KeySpan Energy Services, Inc., Strategic Energy, LLC, Hess Corporation, and Econnergy.

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for the LSEs to pay refunds to Ravenswood. Several electric generators[3] oppose the settlement on the grounds it does not provide any refunds to them. This order severs the issue of refunds for generators other than Ravenswood from the settlement, and approves the settlement as modified. With respect to the contesting generators, the Commission finds that NYISO violated its tariff when it failed to enforce the New York State Reliability Council's (NYSRC's) installed capacity (ICAP) requirement as required by NYISO's tariff and that it violated the filed rate doctrine when it failed to file its translation methodology. The Commission sets for hearing factual issues related to the determination of an appropriate remedy for the contesting parties and other similarly-situated entities. The issues for hearing are strictly limited to how to calculate refunds and whether some or all of the refunds that might otherwise be due need to be paid. In addition, this order directs the NYISO to file its translation methodology with the Commission.

I. Background

2. As is explained in more detail in earlier orders in this proceeding,[4] the NYSRC requires that LSEs maintain a reserve margin of ICAP in excess of their expected peak load in order to ensure the reliability of New York's electricity grid. ICAP refers to the nameplate capacity of a generating facility, without consideration of outage rates. NYISO has Commission-accepted rate schedules[5] requiring NYISO to enforce the ICAP requirement. NYISO carries out this obligation by requiring the LSEs to purchase capacity from generators in periodic auctions.

3. During the summer of 2002, the period at issue here, the forecasted statewide peak load of LSEs was 30,475 MW and the NYSRC reserve margin was set at 18 percent. This resulted in a statewide NYSRC purchase requirement of 35,960 MW of ICAP for

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[3] NRG Power Marketing, Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC (collectively, NRG Companies); and Dynegy Power Marketing, Inc. and Dynegy Northeast Generation, Inc. (collectively, Dynegy).

[4] *KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,116, *reh'g denied*, 111 FERC ¶ 61,336, *reh'g rejected*, 112 FERC ¶ 61,153 (2005), *vacated sub nom. KeySpan-Ravenswood, LLC v. FERC*, 474 F.3d 804 (D.C. Cir. 2007).

[5] *See Central Hudson Gas & Electric Corp.*, 83 FERC ¶ 61,352 (1998), *order on reh'g*, 87 FERC ¶ 61,135 (1999); *Central Hudson Gas & Electric Corp.*, 88 FERC ¶ 61,138, at 61,380 n.7, 61,404 (1999).

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LSEs in New York. As required by NYSRC's Reliability Rules, NYISO also established locational ICAP requirements for LSEs serving New York City (in-City). For the summer of 2002, in-City LSEs were required to procure 10,665 MW of ICAP, 80 percent of which (8,532 MW) was required to be supplied by in-City resources due to limitations on the transmission system.

4. Until 2001, NYISO implemented the NYSRC requirements by requiring generators to sell, and LSEs to purchase, capacity measured in terms of ICAP. However, this approach did not account for generator outages and thus failed to provide generators with an incentive to improve their reliability. To correct this problem, starting in 2001, NYISO required LSEs to fulfill capacity requirements in terms of unforced capacity (UCAP), that is, installed capacity adjusted to incorporate generator forced outage rates.[6] Having reduced the amount of capacity generators could sell, NYISO also reduced the amount LSEs were required to buy, given the fact that they were now buying UCAP.

5. The dispute in the instant case centers on the different time periods used by NYISO in establishing forced outage rates to translate ICAP to UCAP for available generator capacity and for LSE capacity purchase requirements. To translate generator ICAP to UCAP, in compliance with the formula contained in revisions to NYISO's Services Tariff filed in 2001, NYISO used the past twelve months of outage data for each generator. The Services Tariff, however, did not specify a time period for outage data for LSEs' UCAP purchase obligations. NYISO responded by placing an explanation of the translation methodology for LSEs in the ICAP Manual,[7] stating that the LSEs' translation would be based on the same data used for calculating the reserve margin. This was understood to mean that the translation methodology would use an average forced outage rate calculated over the past ten years (consistent with the time frame used by the NYSRC to establish the Installed Reserve Margin), as opposed to the past twelve months generators used.

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[6] The forced outage rate is the historical percentage of a generator's maximum output lost to forced outages when such output is demanded.

[7] The ICAP Manual was the result of a months-long stakeholder process culminating in approval by NYISO's Business Issues Committee. Ravenswood participated in the process and did not appeal the decision to NYISO's Management Committee, as provided in the ISO Agreement, or seek to have the action reversed by the Commission. Further, NYISO did not file either the ICAP Manual or the translation methodology for the LSEs with the Commission.

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6. The use of two differing methodologies resulted in the generators' UCAP being based on twelve-month outage rates of approximately five percent,[8] while the LSEs' UCAP purchase requirements were based on ten-year outage rates of approximately ten percent. Using a higher outage rate to calculate the LSEs' UCAP purchase requirements effectively reduced the amount of capacity they were required to purchase and correspondingly reduced the amount of capacity sold by generators both statewide and in-City.

7. Specifically, for the Summer 2002 Capability Period (May–October 2002), LSEs were required to obtain or hold 34,189 MW of ICAP, a 1,771 MW reduction from the 35,960 MW otherwise required by the NYSRC reliability rule. According to both NYISO and NYSRC staff, this resulted in a reduction of the reserve margin from the NYSRC-specified level of 18 percent to 12.2 percent. Similarly, the 8106.4 MW of ICAP acquired from in-City generators by in-City LSEs was 425.6 MW less than the 8532 MW of ICAP that in-City LSEs were otherwise required to obtain.

8. On October 27, 2004, KeySpan-Ravenswood, LLC (Ravenswood) filed a complaint against NYISO alleging that NYISO violated its tariff obligation to enforce the NYSRC's installed capacity requirements in the in-City capacity market for the Summer 2002 Capability Period. Ravenswood alleged that by using a lower forced outage rate for generators than for LSEs, NYISO caused an understatement of the amount of capacity that LSEs were required to obtain. According to Ravenswood, the impact of NYISO's violation was twofold: the lower demand by LSEs resulted in Ravenswood selling less capacity than it otherwise would have sold, and the price for that capacity was lower than would have been the case had NYISO not violated the filed rate. Ravenswood calculated that it lost approximately $23.3 million in sales as a result of the improper translation.

9. Ravenswood argued that NYISO's reliance on the ICAP Manual for guidance in translating ICAP to UCAP was improper because the ICAP Manual was never submitted for Commission review under the Federal Power Act (FPA).

10. Ravenswood also requested relief for all in-City suppliers during the period at issue. It calculated that the price, with the increased demand in a tight capacity market, would have been the price cap level of $9.41 per kW per month. Using this figure, Ravenswood asked for reimbursement from the LSEs for the generators' lost sales due to the lower capacity purchase requirement and also for the reduced price on the generators' actual sales.

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[8] Forced outage rates declined significantly during this timeframe.

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11. The Commission rejected Ravenswood's arguments in its February 10, 2005 order[9] holding that the rates NYISO charged were consistent with NYISO's then-effective tariffs, rate schedules, and manuals; that the methodology used in calculating ICAP was adopted through a Commission-approved stakeholder process; and that the Commission approved the new market design, incorporating the UCAP methodology, in September 2001 in the first of the *UCAP Orders*.[10] Further, because the relevant ICAP Manual specified a different outage rate for LSEs than for generators, the Commission rejected Ravenswood's contention that NYISO should have used an alternate methodology. The Commission denied rehearing, stating that its earlier orders on UCAP did not prescribe the use of Ravenswood's recommended methodology and that NYISO's calculation was consistent with the ICAP Manual and with Commission orders and not inconsistent with any requirement in NYISO's tariffs. The Commission further stated that, because of the nature of the translation and the capacity auction, it remained unclear what prices LSEs would actually have paid. This lack of clarity, and the absence of reliability problems stemming from capacity shortages during the period in question, led the Commission to conclude that, even if NYISO had violated its tariff obligations, Ravenswood failed to meet its burden to show that it was entitled to any refunds.

A. D.C. Circuit Decision

12. On appeal, the D.C. Circuit stated that, under the FPA, NYISO may only change its rates or practices affecting such rates after first filing those rates with the Commission. The court observed that the Commission did not dispute that NYISO has a tariff obligation to enforce the NYSRC's ICAP requirements or that the use of different forced outage rates for generators and for LSEs effectively reduced the quantity of capacity purchased. It concluded that, given these two undisputed facts and that NYISO never filed its translation methodology with the Commission, the Commission acted arbitrarily and capriciously in ruling that NYISO had not violated the filed rate doctrine.

13. The court rejected the Commission's argument that it properly relied on the ICAP Manual because that manual is incorporated by reference in the Services Tariff. The court stated that brief references in the Services Tariff to "ISO procedures" did not

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[9] *Keyspan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,116 , *reh'g denied*, 111 FERC ¶ 61,336 (2005) (February 10, 2005 Order).

[10] *New York Indep. Sys. Operator, Inc.*, 96 FERC ¶ 61,251 (2001), *order on reh'g*, 98 FERC ¶ 61,180, *reh'g denied*, 99 FERC ¶ 61,072 (2002), *opinion on appeal*, 348 F.3d 1053 (D.C. Cir. 2003), *order on remand*, 108 FERC ¶ 61,309 (2004) (collectively, *UCAP Orders)*.

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provide clear and specific notice that NYISO intended to use the translation methodology in the ICAP Manual. Further, the ICAP Manual does not specify that the LSEs' forced outage rate is measured over ten years, but only states that the translation is based on the data the NYSRC used to determine the ICAP reserve margin. The court rejected the Commission's reasoning that requiring NYISO to file its translation methodology went beyond the "rule of reason." The court stated that the *City of Cleveland*[11] exception, which requires filing of only those practices that significantly affect rates and service and that are susceptible to specification, is inapplicable here because the translation methodology does significantly affect rates and can be easily reduced to writing.

14. The court also rejected arguments that Commission approval of the *UCAP Orders* included approval of the translation methodology, noting that the issue of translation methodology was not raised in those orders. The court addressed Ravenswood's participation in the stakeholder process that developed the ICAP Manual, finding that such participation, while perhaps relevant to the issue of refunds, did not relieve NYISO of its statutory obligation to file significant changes to its rates and practices affecting such rates.

15. Finally, the court addressed the Commission's alternative ruling that even if the NYISO had violated the filed rate doctrine, the Commission would deny refunds due to the lack of clarity regarding what prices the LSEs would actually have paid and the absence of reliability problems during the period at issue. The court identified three deficiencies in the Commission's reasoning.

16. First, the court pointed out that the Commission looked only at uncertainty regarding the price of capacity. The court differentiated between losses attributable to reduced price for each unit of capacity sold and losses due to lost sales resulting from the lower quantity of capacity that LSEs must acquire. The court stated that uncertainty over price was insufficient justification for denial of all refunds, suggesting that some refund for lost sales is calculable, irrespective of changes in price. Second, the court stated that the Commission offered no reasons for rejecting Ravenswood's calculation of damages. Third, the court found that the Commission's apparent reliance on an absence of reliability problems during the summer of 2002 was inequitable in light of Ravenswood's argument, undisputed in the record, that an important reason for the lack of reliability problems was that NYISO had ordered Ravenswood to produce electricity at several points during that summer.

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[11] *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (*City of Cleveland).*

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17. Finding the Commission acted arbitrarily and capriciously in arriving at its decision, the court vacated and remanded the case to the Commission for further proceedings.

B. Offer of Settlement

18. Subsequent to issuance of the D.C. Circuit's order, Ravenswood, Con Edison, NYPA, NYISO, Consolidated Edison Solutions, Inc., Constellation NewEnergy, Inc., KeySpan Energy Services, Inc., Strategic Energy LLC, Hess Corporation, and Econnergy (collectively, the parties) entered into settlement negotiations.

19. On October 30, 2007, the parties filed an offer of settlement that provides for a one-time payment of $5,000,000 to Ravenswood without interest in full satisfaction of all claims in this docket and Case No. 05-1332. The Parties agree that the $5,000,000 payment will be the only payment made under this settlement, that Ravenswood will not be entitled to any other additional payment of any kind, and that no party will be required to make any other payment. In return Ravenswood agrees to file a motion withdrawing the complaint, with prejudice, within ten business days of a final order by the Commission accepting the settlement without modification. The settlement provides for the payment obligation to be divided among in-City LSEs that served load during the Summer 2002 Capability Period.[12] Section 4.7 of the settlement also states that changes will be subject to the just and reasonable standard of review.

20. The settlement also provides that the effective date of the settlement shall occur upon the issuance by the Commission of a final order approving the settlement without modification or condition. Section 5 of the settlement states that the parties agree that this settlement fully resolves all issues that were raised or that could have been raised by any person, whether or not they are signatories to this settlement, in the instant docket and in Case No. 05-1332 and that the complaint will be withdrawn, with prejudice, within ten business days of a final order approving the settlement without modification by the Commission.

C. Comments on the Settlement

21. On November 19, 2007, NRG Companies and Dynegy each filed comments in opposition to the settlement. On November 29, 2007 and November 30, 2007,

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[12] The payment obligations are distributed as follows: Con Edison, $4,000,000; NYPA, $449,000; Solutions, $239,000; Constellation $184,000; KeySpan Services, $64,000; Econnergy, $26,000; Strategic, $20,000; Hess, $18,000.

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respectively, Con Edison and Ravenswood filed reply comments in response to the objections. On December 5, 2007, NRG Companies filed an answer to Con Edison and Ravenswood's reply comments. On April 14, 2008 Dynegy filed a motion for an order on remand and a request for refunds. On April 29, 2008, Con Ed and NYPA, New York Transmission Owners,[13] and NYISO filed answers in opposition to Dynegy's motion. On April 29, 2008, Reliant Energy, Inc. filed an answer in support of Dynegy's motion and request.

1. Comments in Opposition

22. NRG Companies state that the D.C. Circuit correctly found that NYISO had violated the filed rate in erroneously translating ICAP to UCAP for the Summer 2002 Capability Period and that the damage caused by NYISO's violation was not just to Ravenswood but, rather, impacted all in-City capacity suppliers, including the NRG Companies. NRG Companies add that this fact was expressly acknowledged in Ravenswood's complaint, where Ravenswood stated that other capacity suppliers for the Summer 2002 Capability Period are entitled to similar relief based upon the same calculation methodology proposed by Ravenswood.[14] NRG Companies point to testimony by Ravenswood's witness, Dr. Jonathan Lesser, who stated that some capacity was left unsold and the market clearing price was artificially low. NRG Companies state that during the period at issue, they were left with 55.1 MW unsold and, in addition, they should have received a higher price on the MWs they did sell.

23. NRG Companies state that they were not provided notice that settlement discussions were underway, and thus were precluded from participating in the settlement negotiations and ultimately the settlement itself. Further, NRG Companies are concerned that the settlement purports to bind non-parties that did not have an opportunity to participate in the negotiations, yet are entitled to refunds based upon the DC Circuit's finding that NYISO violated its Service Tariff to the detriment of in-City capacity suppliers. NRG Companies state that under no circumstances should the settling parties be able to bind non-parties that were not provided with notice and opportunity to participate in the settlement discussion. Finally, NRG argues that there is not an adequate record upon which to accept the settlement; the settling parties have provided no factual

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[13] New York Transmission Owners consists of Central Hudson Gas & Electric Corp., Long Island Power Authority, New York State Electric & Gas Corp., Niagara Mohawk Power Corp., Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corp.

[14] *Citing* Ravenswood October 27, 2004 Complaint at 33–34.

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support of the justness and reasonableness of the $5 million payment to Ravenswood, no basis for the discriminatory treatment of one capacity market supplier *vis-à-vis* other capacity suppliers, and a factual dispute exists with respect to the amount owed to NRG Companies and other capacity suppliers. Accordingly NRG Companies request that the Commission reject the settlement and establish further proceedings to determine payments owed to ICAP suppliers.

24. Dynegy states that while it does not object to the terms of the settlement that provide for payments to Ravenswood, it does object to the section 5 provisions of the settlement that would foreclose the rights of full parties to pursue claims for refunds based on the NYISO's filed rate violations. Dynegy states that, despite being a full party in this proceeding,[15] it was not notified of the settlement negotiations, was not invited to participate in the settlement discussions, and was not even aware that settlement discussions had commenced. Dynegy states that it was unable to sell significant amounts of UCAP in the six-month strip auction and subsequently in the monthly auctions, as a result of the artificial market surplus created by NYISO's error in translating ICAP into UCAP. Dynegy states that, in addition, the artificial surplus had the effect of suppressing the market clearing price for UCAP in the summer 2002 Capability Period. Dynegy argues that, because it was not even notified of the settlement discussions, approval of section 5 of the offer of settlement would constitute a denial of fundamental due process rights.

25. Dynegy states that under Rule 602(h)(1)(i) of the Commission's Rules of Practice and Procedure, the Commission may decide the merits of a contested settlement if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines that there is no genuine issue of material fact.[16] Further, Dynegy contends that where a settlement is contested, the Commission must make "an independent finding supported by substantial evidence on the record as a whole that the proposal will establish just and reasonable rates."[17] Dynegy states that the Commission

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[15] Dynegy cites the February 10, 2005 Commission order which accepted Dynegy's December 9, 2004 motion to intervene out of time and comments in support. *KeySpan-Ravenswood, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,116, at P 15 (2005).

[16] *Citing* 18 C.F.R. § 385.602(h)(1)(i) (2008).

[17] Dynegy November 19, 2007 Comments at 7 (*citing Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974) (Mobil Oil)).

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in *Trailblazer Pipeline Company*[18] established a number of approaches for reviewing contested settlements, only one of which is appropriate here. Dynegy argues that under *Trailblazer*, the settlement, at best, can only be preserved by approving the settlement for the consenting parties and severing the contesting parties, thus permitting the consenting parties to receive the benefits of their bargain while preserving the interests of the contesting parties for further proceedings consistent with the court's decision.[19] Dynegy asserts that it and other non-settling parties in the proceeding should not be foreclosed from asserting their positions and pursuing their refund claims as a result of the settlement terms agreed to without their participation by the settling parties. Dynegy concludes that deletion of section 5 from the settlement would permit the Commission to approve the settlement as uncontested for the settling parties while preserving the opportunity for Dynegy and other parties to obtain a determination of their refunds.

2. Comments in Response to the Opposition

26. Con Edison responds that Dynegy and NRG Companies had ample opportunity over the last five years to pursue any claims and issues they had with respect to NYISO's administration of the 2002 summer capacity market and failed to do so. Thus, according to Con Edison, any claims that Dynegy and NRG Companies may assert for monetary payments are barred by the equitable doctrine of laches.[20] Con Edison cites an order by an administrative law judge (ALJ) in *El Paso Natural Gas Company*[21] as presenting a similar problem in which a late intervention in a rate case was sought after the rates were accepted and then suspended, settlement negotiations had begun, and various parties had already expressed their concerns in the case. The ALJ rejected that late motion for intervention stating that the company, "elected to sleep on its rights," and "indulged in [a] gamble when it elected not to intervene earlier, despite having had ample opportunities to do so."[22] Con Edison states that the situation here is worse in that the company in *El Paso* only waited until the case was ten months old, while NRG Companies and Dynegy

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[18] 85 FERC ¶ 61,345 (1998), *reh'g denied*, 87 FERC ¶ 61,110 (1999) (*Trailblazer*).

[19] *Citing Trailblazer*, 85 FERC at 62,344–45.

[20] *Citing California Department of Water Resources*, 120 FERC ¶ 61,057, at P 14 (2007) ("[A]n entity cannot 'sleep on its rights' and then seek untimely intervention.").

[21] 75 FERC ¶ 63,011 (1996) (*El Paso*).

[22] *Id*. at 65,032.

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have waited over five years since NYISO administered the 2002 summer capacity market and over three years since the start of Ravenswood's complaint.

27. Moreover, according to Con Edison, neither Dynegy, nor NRG Companies have ever demonstrated that they were harmed by the NYISO's actions or stated a specific request for relief. Con Edison states that it was only Ravenswood who (1) filed a complaint in the proceeding, (2) filed an answer to parties who filed in opposition to the complaint, (3) filed for rehearing, and (4) filed an appeal with the D.C. Circuit. Further, according to Con Edison, NRG and Dynegy also failed to intervene before the D.C. Circuit once Ravenswood filed its appeal. Con Edison states that the record regarding the amount of refunds that should or should not have been paid dealt solely with Ravenswood's claims in the in-City capacity market and that Dynegy was not even a seller of capacity in the in-City market. Con Edison further states that while NRG is a seller of capacity in the in-City capacity market, it has yet to state a claim for relief. According to Con Edison, none of the settling parties had any way of knowing that Dynegy or NRG Companies thought they were harmed by the NYISO.

28. Con Edison contends that although NRG Companies and Dynegy intervened at the outset, their inactivity in the proceedings effectively rendered them non-parties and their recent assertion of claims should be judged by the same standards as apply to late-filed petitions to intervene, i.e., whether the petitioner demonstrates good cause, whether the proceeding would be disrupted, and whether the delay prejudices or burdens other parties. By this standard, Con Edison argues, the claims of NRG Companies and Dynegy should be rejected. Con Edison further states that there is no litigation by NRG Companies or Dynegy that would be ended by a settlement agreement, nor is there any claim of a monetary harm, or a direction from the D.C. Circuit to address any harm other than that documented by Ravenswood, thus NRG's request for a further and duplicative proceeding should be rejected.

29. In its November 30, 2007 answer, Ravenswood states that to the best of its knowledge, Dynegy and NRG Companies were not apprised of the settlement discussions because none of the active parties were aware of their continuing interest in this remanded proceeding. Ravenswood also states that it did not seek judicial relief for the benefit of Dynegy and NRG Companies; nor did the Dynegy and NRG Companies seek it for themselves. Ravenswood asserts that a fair reading of the D.C. Circuit's opinion reveals that Dynegy and NRG Companies' possible refund claims are not within the scope of the remand. Ravenswood further states that even if the D.C. Circuit's order were read broadly to allow for the possibility of new refund claims, the Commission should deny Dynegy and NRG Companies' requests on the grounds that they did not take advantage of the opportunity to seek refunds and any claim at this stage is too late and would prejudice the parties to the settlement. Ravenswood adds that neither Dynegy nor

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NRG Companies has actually filed a complaint against NYISO nor even proposed a potential level of refunds and to do so now, after the active parties have settled is to ask to reopen the process and nullify the entire proceeding thus far. Ravenswood argues that NRG Companies and Dynegy are trying to blur the distinction between a complainant and an intervenor.[23] Ravenswood states that a complainant has the high burden to make a showing of harm and damages to justify a continued proceeding, and that Dynegy and NRG Companies did not seek rehearing, did not appeal the Commission's decision to the D.C. Circuit, and did not intervene at the D.C. Circuit. Thus, according to Ravenswood, Dynegy and NRG Companies have questionable standing, at best, to challenge the proposed settlement in this case, they are not complainants in this case, and they should not now be able to upset the negotiated settlement of the only complainant in this case.

3. Opponents' Responses

30. In its December 5, 2007 answer, NRG Companies responds that the D.C. Circuit remanded the matter to the Commission for "further proceedings," including determining whether refunds are appropriate.[24] In such circumstances, according to NRG Companies, the Commission is obligated to address the tariff violation, because the in-City capacity prices and quantity purchased and sold did not reflect the filed rate, and thus Con Edison and Ravenswood's criticism that NRG companies should be time-barred from obtaining any relief from the NYISO's tariff violation is without merit. NRG Companies reiterates that it fully supported the request in Ravenswood's complaint for a resettlement of the market on behalf of "in-City suppliers who sold capacity in any NYISO summer 2002 Capacity Auction."[25] NRG Companies adds that its November 19, 2007 Comments demonstrate that it continues to have a clear and material interest in this proceeding, and to the extent that Ravenswood and Con Edison believed that it did not have a material interest in this proceeding, they had an opportunity to seek confirmation, but did not. NRG Companies states that if a potential settlement was to be pursued after the D.C. Circuit remanded the matter to the Commission, such a process should have, at a minimum, included all parties to the underlying FERC proceeding.

31. Finally, NRG Companies state that Con Edison and Ravenswood's assertion that NRG Companies' failure to precisely quantify its damages should erect a bar to refunds

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[23] *Citing* an ALJ's order in *Texaco Refining and Marketing Inc., v. SFPP, L.P.*, 99 FERC ¶ 63,009, at P 6–10 (2002) (*Texaco*).

[24] *Citing KeySpan-Ravenswood*, 474 F.3d 804, 810 (D.C. Cir. 2007).

[25] *Citing* Ravenswood October 27, 2007 Complaint at 33–34.

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misses the mark since the court only recently determined that NYISO violated its tariff and directed further proceedings to determine whether refunds were appropriate and to identify the amount of such refunds resulting from the violation.[26] NRG Companies adds that the court did not (nor could it) quantify Ravenswood's (or any other parties') damages in its decision. According to NRG Companies, it is disingenuous to suggest that NRG Companies should be barred from obtaining relief because it has failed to quantify its damages when the Court ordered further proceedings on remand to determine refunds.

32. In its April 14, 2008 filing, Dynegy requests that the Commission issue its order on remand in this proceeding and direct NYISO to provide refunds plus interest. Dynegy reiterates its argument that it is entitled to relief as a result of NYISO's filed rate violation, that its claim for refunds should not be foreclosed, that it was granted intervenor status and expressly supported the Ravenswood complaint, and that it has clearly asserted in its intervention that it, too, had been harmed by the violations alleged in Ravenswood's complaint. Dynegy states that the question of whether NYISO violated its rate has been firmly resolved by the court, no other appeal is pending, and the Commission should direct NYISO to pay refunds to Dynegy and all other affected market participants who have not settled their claims in this proceeding. Dynegy contends that the Commission should direct NYISO to pay Dynegy no less than $6,232,000 in damages as a result of the filed rate violation at issue, a figure it supports with an analysis developed by an independent consultant.[27] Dynegy adds that Dr. Lesser's analysis indicates that the harm to suppliers of UCAP as a result of NYISO's translation error is not speculative, but requests that, to the extent refunds are not directed based upon this analysis, that the Commission establish procedures to determine the appropriate level of refunds due from NYISO.

4. <u>Con Edison's Answer to Dynegy</u>

33. In its April 29, 2008 answer to Dynegy's motion, Con Edison responds that the Commission should deny Dynegy's motion finding that Dynegy has no entitlement to relief in this remand proceeding because it failed to timely raise a claim of harm and failed to preserve any such right because it neither sought rehearing of the Commission's order nor appeal that order. Secondly, Con Edison states, even if Dynegy could pursue

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[26] *Citing KeySpan-Ravenswood*, 474 F.3d at 812.

[27] Dynegy submits a calculation of harm to Dynegy developed by Dr. Jonathan Lesser, the same independent consultant who developed the economic analysis underlying the Ravenswood complaint. Dr. Lesser's affidavit concludes Dynegy's harm falls in the range of $6,232,000 and $7,070,000.

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any such claim, the Commission should deny Dynegy's request for refunds because it slept on its rights, and its claim is precluded by the equitable doctrine of laches, would create a harmful level of uncertainty in the NYISO market, and is based on unsupported hypothetical assumptions. In addition, according to NYISO, refunds cannot be calculated at this late date with any reasonable degree of certainty and would unjustly establish a precedent casting doubt on future results of the market.

II. Commission Determination

A. Disposition of the Settlement

34. Ravenswood has reached a settlement with NYISO and the in-City LSEs regarding refunds. The settlement, however, is contested. For the reasons discussed below, we sever the contested issues from the settlement and approve the settlement, as modified, as an uncontested settlement.

35. As a preliminary procedural matter, we address the question of the intervenors' standing as raised by Ravenswood and Con Edison. Both assert that Dynegy and NRG Companies "slept on their rights" when they failed to file a complaint, file for rehearing, or file an appeal or intervention with the D.C. Circuit, and thus their claims are barred. Con Edison cites *El Paso* and *California Department of Water Resources* in support of its argument, but neither is dispositive here. In *El Paso*, the opposing parties, despite numerous earlier opportunities, filed to intervene very late in the proceeding, after an offer of settlement was filed. In *California Department of Water Resources*, the opposing parties filed to intervene two years out of time. In both cases the opposing parties failed to show good cause to support their motions and the Commission denied late intervention. In the instant case, the Commission, at the outset of the proceeding, noted NRG Companies' timely intervention and granted Dynegy's late-filed intervention, which was filed at an early stage of the proceeding.[28] Rule 214 of the Commission's Rules of Practice and Procedure provides that timely, unopposed motions to intervene serve to make the entities that filed them parties to a proceeding and also that the Commission may grant late intervention,[29] thus making that late intervenor a party to the proceeding. Accordingly, NRG Companies and Dynegy are parties to this proceeding.

36. We also do not agree with the assertion that Dynegy and NRG Companies "slept on their rights." Ravenswood argued in its complaint that "the Commission must restore

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[28] February 10, 2005 Order, 110 FERC ¶ 61,116 at P 15.

[29] 18 C.F.R. § 385.214 (2008).

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market participants, such as Ravenswood, to the same position they would have occupied had filed rates not been violated."[30] Both Dynegy and NRG Companies filed comments in support of the complaint and argued that all capacity providers should be placed in the position they would have been in had NYISO calculated the ICAP as recommended by Ravenswood. Further Ravenswood acknowledges that it did not provide Dynegy and NRG Companies notice of the settlement discussions.

37. Ravenswood's reliance on the ALJ's order in *Texaco*, to argue that Dynegy and NRG are improperly seeking to blur the distinction between intervenors and complainants is misplaced. *Texaco* was an oil pipeline case decided under the Interstate Commerce Act (ICA). In the order relied upon by Ravenswood, the ALJ stated that the distinction was crucial because, among other things, "the payment of reparations . . . hinges upon the filing of a complaint."[31] As the United States Court of Appeals for the D.C. Circuit has held,[32] section 16.1 of the ICA (49 U.S.C. App § 16.1 (1988)) expressly provides that only those who actually file a complaint against an oil pipeline are eligible to receive reparations. However, this case involves the FPA, not the ICA. The FPA contains no provision comparable to ICA section 16.1. In fact, FPA section 206(b) provides for refunds to be made "to those persons who have paid those rates or charges which are subject to the proceeding," without limiting refunds to the parties that actually filed a complaint against the pipeline. Accordingly, *Texaco* has no application to this case.

38. Accordingly, we reject the argument that intervenors have no standing in the proceeding.

39. In order to accept a contested settlement, such as the instant settlement, the Commission must make "an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates."[33] When the settlement is contested and the Commission lacks an adequate record to make a finding on the merits that the settlement rates are just and reasonable, the Commission may sever the contesting parties or contested portions and approve the settlement as

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[30] Ravenswood October 27, 2004 Complaint at 4.

[31] *Texaco*, 99 FERC ¶ 63,009 at P 7.

[32] *BP West Coast v. FERC*, 374 F.3d 1263, 1310-11 (D.C. Cir. 2004).

[33] *Mobil Oil*, 417 U.S. at 314; *Trailblazer*, 85 FERC ¶ 61,345 at 12.

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uncontested for the consenting parties.[34] However, the severance must provide the contesting parties an opportunity to obtain a litigated decision of the issues in which they have a legitimate interest.[35]

40. In the instant proceeding, the Commission finds the settlement provides a fair and reasonable resolution of the issues in this case as between Ravenswood and the other consenting parties. They have agreed that Ravenswood's claims to refunds for NYISO's violation of its tariff should be resolved by negotiated one-time payments by the eight in-City LSEs that served load during the relevant period. The settlement avoids litigation concerning the appropriate level of the refunds due Ravenswood and provides the parties certainty concerning the amount of those refunds.

41. However, the Commission cannot approve the settlement provision excluding other generators from any refunds without addressing on the merits whether there is any justification for such a denial of refunds. As the settling parties recognize in the explanatory statement supporting the settlement, "The court granted Ravenswood's petition for review and found that NYISO had violated its tariff. However, the Court remanded the case back to the Commission for further review and to determine the refund amount, if any."[36] When the Commission has committed legal error, the Commission generally seeks a remedy "that puts the parties in the position they would have been in had the error not been made,"[37] although there may be policy or equitable reasons to deny refunds.[38] Here, if the Commission had found in its original orders on Ravenswood's complaint that NYISO had violated the filed rate doctrine, it would have extended any remedy provided to Ravenswood to all generators affected by the violation. Ravenswood's complaint asked for relief for all such generators, and Dynegy and the NRG Companies filed responsive pleadings requesting such relief. In these circumstances, we find that, the settlement provision excluding generators other than

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[34] 18 C.F.R. § 385.602(h)(1)(iii) (2008); *United Municipal Distributors Group v. FERC*, 732 F.2d 202, 209–10 (D.C. Cir. 1984); *Arctic Slope Regional Corp. v. FERC*, 832 F.2d 158, 167 (D.C. Cir. 1987).

[35] *Southern California Edison Co. v. FERC*, 162 F.3d 116, 119 (D.C. Cir. 1998) (holding that severance should "fully protect the objecting party's interest").

[36] Explanatory Statement at 2-3.

[37] *Pub. Util. Comm'n of Cal. v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993).

[38] *Towns of Concord v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992).

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Ravenswood from refunds could only be approved if we could find that (1) NYISO did not violate the filed rate doctrine or (2) there are equitable reasons that justify denying refunds to all generators, including Ravenswood, consistent with the court's decision. As discussed in the next section, NYISO did violate the filed rate doctrine, and the current record is insufficient to determine the effect of that violation on the generators or whether, for equitable reasons or otherwise, some or all of any refunds need not be paid.

42. In sum, to preserve as much of the benefit of the settlement as possible for the consenting parties, we will approve the settlement's resolution of the provision of Ravenswood's refunds; however, as to the issue of what the LSEs may owe other parties, we are severing that issue from the settlement.[39] Accordingly, the Commission modifies the settlement by deleting that portion of section 2.2 that states that the $5,000,000 payment will be the only payment made under this settlement and that no party will be required to make any other payment. The Commission also modifies the settlement by deleting section 5.1, which states that the parties agree that the settlement resolves all issues that were raised or that could have been raised by any person in this docket, whether or not they are signatories to the settlement.

B. Resolution for Contesting Parties

43. On reconsideration, the Commission finds that NYISO violated the filed rate doctrine. The filed rate doctrine arises from the filing requirements of section 205(c) of the FPA, 16 U.S.C. § 824d(c) (2006), and "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."[40] NYISO's tariff requires it to enforce the NYSRC's installed capacity requirements. However, in the summer of 2002 it failed to do so, because it used two different methodologies to translate the generators' and LSEs' ICAP requirements into UCAP. As a result, while the NYSRC had determined the LSEs should purchase 35,960 MW of ICAP, NYISO in effect only required them to purchase 34,189 MW. Moreover, NYISO failed to file with the Commission the translation methodology it used to determine the LSEs' UCAP purchase requirements, a methodology that the D.C. Circuit found both significantly affected NYISO's compliance with the Reliability Rules and could easily be reduced to writing and so must be filed.

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[39] *See* 18 C.F.R. § 385.602(h)(iii) (2008) ("If . . . contested issues are severable, the . . . uncontested portions may be severed.").

[40] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

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44. Consistent with the court's directive, we direct NYISO, in conformity with section 205(c) of the FPA, to make a compliance filing no later than 30 days after the issuance of this order to include its current translation methodology in its Services Tariff. We caution that the translation methodology is the only provision of the ICAP Manual that is at issue in this proceeding and that is subject to the compliance filing directive. We make no findings regarding any other provision of the ICAP Manual.

45. We are left with the question of a remedy for the contesting parties. Uncertainty exists over two issues of material fact: 1) how to calculate the effect of NYISO's filed rate doctrine violation on the contesting parties, and 2) whether some or all of the refunds that might otherwise be due need not be paid on equitable or other grounds. We set both of these issues for evidentiary hearing.[41]

46. In regard to the first issue, the parties disagree over whether, as Ravenswood contends, all auctions would have cleared at the price cap and all the incremental capacity would have cleared in the strip auction. The LSEs contend that results from prior auctions support their position that the market would not necessarily have cleared at the price cap. At the hearing, the parties should address issues concerning the determination of any damages New York generators, other than Ravenswood, suffered as a result of NYISO's violation of the filed rate doctrine, including whether and how the violation affected the amount of capacity the generators sold and the prices the generators received for their capacity sales.

47. With respect to the second issue, we note that the courts have held that the Commission has discretion in determining the appropriate remedy, if any, for violations of the filed rate doctrine.[42] At the hearing, parties may address whether there are any equitable or policy reasons that might justify finding that some or all of any refunds that may otherwise be due need not be paid.

The Commission orders:

(A) The settlement is hereby approved as modified, as discussed in the body of this order for consenting parties.

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[41] While we are setting these matters for a trial-type evidentiary hearing, we also encourage the parties to make every effort to settle these matters.

[42] *Towns of Concord v. FERC*, 955 F.2d 67, 75–76 (D.C. Cir. 1992).

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(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Dynegy and NRG Companies' requests for relief.

(C) A presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. The Presiding Judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(D) NYISO is hereby directed to file its ICAP to UCAP translation methodology with the Commission in compliance with this order within 30 days of the date this order is issued.

By the Commission. Commissioner Moeller concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

KeySpan-Ravenswood, LLC

v. Docket No. EL05-17-003

New York Independent System Operator, Inc.

(Issued July 18, 2008)

MOELLER, Commissioner *concurring*:

While there is no question that both Dynegy and the NRG Companies are parties to this proceeding, I am troubled by the manner in which they participated in this case. Party status brings rights, but parties should ensure that their rights are adequately represented at all stages of a proceeding.

Incumbent on parties is the responsibility to actively monitor the proceeding and to anticipate foreseeable developments. In the wake of the D.C. Circuit's opinion, Dynegy and NRG should have contacted other parties to this case to determine if settlement discussions were ongoing. Alas, it appears they did not. Instead, only after years of silence did they awake from their slumber to complain that they were not made aware of the settlement talks. After all, since Ravenswood performed all the heavy lifting in this proceeding, perhaps they expected that Ravenswood would send an invitation informing them of the settlement discussions. I contend that Ravenswood had no such obligation.

While it is unfortunate that this case cannot be terminated today, I recognize the legitimacy of Dynegy and NRG's party status and the need to conduct additional proceedings. However, I am also mindful that extending the life of this proceeding could endanger the instant settlement and will force the parties and this Commission to incur additional costs in time and resources; costs that would not have been incurred had these parties advocated their interests in a more timely manner. At this late stage, I hope and expect that any remaining issues can be settled in an expedited fashion.

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Philip D. Moeller
Commissioner

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