

121 FERC ¶ 61,039
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. ER07-748-001

ORDER DENYING REHEARING

(Issued October 18, 2007)

1. Keyspan-Ravenswood, LLC (Ravenswood) requests rehearing of the Commission's order issued May 11, 2007¹ accepting a filing by the New York Independent System Operator, Inc. (NYISO) to provide recovery to dual-fuel generators of the variable operating costs of burning alternative fuels pursuant to the New York State Reliability Council's Local Reliability Rule I-R3 (Rule I-R3), also known as the Minimum Oil Burn Rule. For the reasons discussed below, the Commission denies rehearing.

Background

2. On April 13, 2007, NYISO submitted revisions to its Market Administration and Control Area Services Tariff (Services Tariff) and its Open Access Transmission Tariff (OATT) to permit dual-fuel generators to recover the variable operating costs of burning alternative fuels pursuant to local reliability Rule I-R3² and to allow NYISO to recover the costs of this payment from the loads, except for third party station power loads, in the load zone in which the generator is located on a monthly load ratio share basis.³

¹ 119 FERC ¶ 61,130 (2007) (May 11 Order).

² FERC Electric Tariff, Original Volume No. 2 (Services Tariff), section 4.1.7a, Incremental Cost Recovery for Units Responding to Local Reliability Rule I-R3, Second Revised Sheet No. 87.02 and Original Sheet No. 87.03.

³ FERC Electric Tariff, Original Volume No. 1 (OATT), section 2(B)(6), Payments Made to Generators Pursuant to Incremental Cost Recovery for Units Responding to Local Reliability Rule I-R3, First Revised Sheet No. 233A.01.

3. NYISO explained that Rule I-R3 requires certain generators to utilize a minimum level of an alternative fuel other than gas (usually oil), when loads are forecast to reach certain levels in order to prevent the loss of electric load within the New York City or Long Island zones in the event of the loss of a gas facility. NYISO also explained that when the alternative fuel is more expensive than natural gas, a generator subject to Rule I-R3 is put at an economic disadvantage. This is because, if known prior to the close of the Day-Ahead market, the requirement to burn the alternative fuel increases the costs in the subject generator's bid in the Day-Ahead market, thus reducing the schedule the generator receives in the Day-Ahead market, or, if not known until after the close of the Day-Ahead market, the subject generator's costs are increased by the cost of the alternative fuel and there is no mechanism in NYISO's Services Tariff for compensating the generator for the increased costs. NYISO stated that the reliability service under Rule I-R3 was likely to be needed every day during the coming summer and asked for an effective date of May 13, 2007.

4. NYISO proposed to add a new section 4.1.7a in its Services Tariff, providing that a generator designated pursuant to Local Reliability Rule I-R3 to burn an alternate fuel shall be eligible to recover the additional variable operating costs associated with burning the required alternate fuel as long as these costs would not have been incurred but for the invocation of Rule I-R3. NYISO proposed that this compensation be made for the full amount of the approved additional costs without offset for the margin earned in the energy market(s) for that day.

5. NYISO stated that its proposal did not compensate I-R3 specified generating facilities for the storage and delivery infrastructure required to be able to burn an alternative fuel at any given time. It stated that this was an unresolved issue and that it was committed to bringing it back to its stakeholders for further work over the next several months. NYISO stated it would propose a recovery mechanism for fixed costs if and when it and its stakeholders agreed on its necessity and design.

6. Ravenswood, a dual-fuel generator subject to Rule I-R3, protested NYISO's filing stating that it should also receive compensation for its incremental costs for maintaining storage and deliverability infrastructure and its fixed costs for capital and operation and maintenance associated with facilities that enable it to switch fuels. It asked the Commission to direct NYISO to make a compliance filing providing mechanisms for generators subject to Rule I-R3 to recover these costs.

7. In its May 11 Order, the Commission accepted NYISO's filing to be effective May 13, 2007. The Commission stated that the new tariff provisions will ensure that dual-fuel generators are appropriately compensated for additional fuel costs when required to burn oil in response to Rule I-R3. The Commission denied Ravenswood's protest as beyond the scope of this proceeding. The Commission stated that the NYISO

stakeholder process is the appropriate mechanism to address the further compensation that Ravenswood seeks and declined to require NYISO to file a compliance filing requiring the compensation mechanisms requested by Ravenswood.

8. On June 11, 2007, Ravenswood filed a request for rehearing of the May 11 Order. On June 29, 2007, Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (Con Edison) filed a request for leave to file answer and an answer to Ravenswood's request for rehearing.

Discussion

A. Procedural Matters

9. Rule 713(d) of the Commission Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2007), prohibits answers to rehearing requests. Accordingly, we will reject the answer filed by Con Edison.

B. Whether New Section 4.1.7a is Just and Reasonable

1. Rehearing Requests

10. Ravenswood contends on rehearing that, in addition to the incremental variable costs provided by section 4.1.7a, it should also receive its incremental costs for oil storage and delivery infrastructure. Ravenswood asserts that section 4.1.7a is unjust, unreasonable, and unduly discriminatory because it does not include compensation for the incremental costs of storage, delivery infrastructure, and related items necessary to provide reliability service under Rule I-R3.⁴ Ravenswood claims that, just like the incremental variable costs of burning oil pursuant to Rule I-R3, it would not incur these incremental infrastructure costs but for maintaining its fuel switching capabilities to respond under Rule I-R3. Ravenswood asserts that it is not restored to the same competitive position it would have occupied without Rule I-R3 unless it is compensated for these incremental costs and asserts that this is the purpose of section 4.1.7a.

11. Ravenswood asserts that the scope of a proceeding under section 205 of the Federal Power Act (FPA) is not limited to the applicant's specific rate revisions, but includes whether the integral parts of a rate, old and new, in their entirety, are just and reasonable and not unduly discriminatory. Ravenswood relies on *Cities of Batavia v. FERC (Batavia)*⁵ and *Laclede Gas Co. v. FERC (Laclede)*.⁶ Ravenswood asserts that in

⁴ Rehearing Request at p. 10.

⁵ 672 F.2d 64, 77 (D.C. Cir. 1982).

⁶ 670 F.2d 38, 42 (5th cir. 1982).

the instant case there is an integral rate consisting of section 4.1.7a's allowance of recovery of incremental commodity costs of fuel oil and that same section's denial of recovery of incremental oil storage and delivery infrastructure costs. Ravenswood opines that the Commission must determine whether this alleged integral rate is just and reasonable and nondiscriminatory.

2. Commission Decision

12. The Commission denies Ravenswood's rehearing request and declines to find that NYISO's proposed new section 4.1.7a is unjust and unreasonable because it does not include provisions to pay dual fuel generators subject to Rule I-R3 the costs of storage and delivery infrastructure. Instead, the Commission affirms its original finding that NYISO's proposed section 4.1.7a is just and reasonable and not unduly discriminatory and that issues concerning compensation for fixed oil storage and delivery infrastructure costs should be addressed, in the first instance, through the NYISO's stakeholder process.

13. For the reasons discussed below, the Commission finds that it would have to proceed under FPA section 206 in order to require NYISO to provide the compensation for fixed oil storage and delivery infrastructure costs requested by Ravenswood. This would require the Commission to bear the burden of showing both that the failure of NYISO's current tariff to provide such compensation is unjust and unreasonable and that the replacement tariff provision required by the Commission is just and reasonable. There may be a number of different ways to address the issue of compensation for fixed oil storage and delivery infrastructure costs. In its filing, NYISO committed to presenting the issue to its stakeholders in the next several months.⁷ In these circumstances, we find it appropriate to give NYISO and its stakeholders an opportunity to consider this issue before the Commission takes any further action. If Ravenswood is not satisfied with the results of the stakeholder process, it may file a complaint.

14. The United States Court of Appeals for the District of Columbia has held the Commission must comply with FPA section 206, when it seeks to alter aspects of a utility's rate structure which the utility did not propose to change under FPA section 205.⁸ Here, NYISO's only FPA section 205 proposal was to add a provision to its tariff which would compensate generators for additional variable operating costs associated with burning the required alternate fuel. NYISO's existing tariff does not provide any

⁷ Tariff filing at 7.

⁸ *Western Resources, Inc. v. FERC*, 9 F.2d 1568, 1578-9 (D.C. Cir. 1993), and cases cited. Cases under the Natural Gas Act and the Federal Power Act typically are read *in pari material*, that is, in the same way when they involve similar provisions. See, e.g., *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956) and *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n. 7 (1981).

compensation for fixed oil storage and delivery infrastructure costs, and NYISO did not propose to add any such provision to its tariff. Therefore, the Commission would bear a section 206 burden to justify any requirement that NYISO provide such compensation.

15. Ravenswood argues that its proposal to provide compensation for oil storage and delivery infrastructure costs is an integral part of NYISO's proposed rate, and, as such, must be considered in this FPA section 205 proceeding. Ravenswood relies on *Batavia* and *Laclede* for this proposition. The Commission rejects this argument. *Batavia* was concerned with whether the Commission could exercise its refund authority under section 205 of the FPA when a public utility filed for a rate increase that included an existing fuel adjustment clause.⁹ The court held that it could. The court held the Commission had jurisdiction under section 205 to determine whether the previously approved fuel clause operated with the new proposed rate provisions to produce an over-recovery and whether the fuel clause interacted so differently in the context of the revised rate schedule that it effected an unjust and unreasonable rate. If the interaction did produce an unjust and unreasonable rate, the court held the Commission had the authority under section 205 to suspend the existing fuel adjustment clause and require refunds. *Laclede* involved a similar situation arising under the Natural Gas Act.

16. In *ANR Pipeline Co. v. FERC*,¹⁰ the D.C. Circuit held that *Batavia* and *Laclede* only concerned the Commission's authority to order refunds, not the burden of proof. The court accordingly held that, even where these cases apply, the Commission would still have the burden of proof under section 206 of the FPA to require the utility to change any part of its rates that the utility did not propose to change.

17. Moreover, in later cases, the court has narrowly interpreted *Batavia* as applying only where an interaction between proposed rates and existing rates "will create results that are unjust or unreasonable under existing Commission policy as it applies to the pipeline at the time it files its proposed rate changes."¹¹ Unlike *Batavia*, this case does not involve a situation where the Commission could find that the interaction between NYISO's proposal to provide additional compensation for the variable costs of burning an alternative fuel with the existing lack of compensation for oil storage and delivery infrastructure costs creates an unjust and unreasonable result. Ravenswood's argument is

⁹ *Batavia*, 672 F.2d at 75-77.

¹⁰ *ANR Pipeline Company*, 771 F.2d 507, 514 (D.C. Cir. 1985).

¹¹ *East Tennessee Natural Gas Company v. FERC*, 863 F.2d 932, 941-44 (D.C. Cir. 1988) (emphasis in original). See also *Sea Robin Pipeline Co.*, 795 F.2d 182, 187 (D.C. Cir. 1986), reversing a Commission order which relied on *Batavia* to justify changing existing tariff provisions without meeting the analogous NGA section 5 requirements.

that the lack of compensation for oil storage and delivery infrastructure costs is unjust and unreasonable, regardless of the treatment of the variable costs. Thus, there is nothing in the interaction between these proposals that creates an unjust and unreasonable result.

18. The Commission concludes that the only rate provisions before it in this proceeding are NYISO's proposal to pay generators subject to Rule I-R3 the variable operating costs of burning oil. Therefore, the Commission affirms its finding in its May 11 Order that Ravenswood's proposal for infrastructure costs is beyond the scope of this proceeding. The Commission further affirms its finding that section 4.1.7a is just and reasonable and not unduly discriminatory as it provides compensation to generators for variable operating costs they incur when required to burn oil under Rule I-R3.

C. Whether the Commission Should Require NYISO to Make a Compliance Filing to Provide Compensation for Oil Storage and Delivery Infrastructure Costs

19. Ravenswood contends that the Commission erred in deferring the treatment of the storage and delivery infrastructure costs of generators subject to Rule I-R3 to a stakeholder process. Ravenswood asserts the Commission should require NYISO to make a compliance filing to compensate these generators for such costs. Ravenswood states NYISO did not commit itself to developing a proposal to provide such compensation or to making a filing in the event that stakeholder consensus cannot be reached.

20. The Commission denies this request. The Commission has determined that section 4.1.7a is just and reasonable. Therefore, there is no reason to condition acceptance of that section on providing further compensation for generators subject to Rule I-R3 or to require NYISO to make a compliance filing providing for such additional compensation.

21. The Commission believes that a stakeholder process concerning infrastructure costs is appropriate as there are outstanding questions and concerns regarding such compensation. For example, it is unclear what additional costs Ravenswood is seeking. In its Protest in this proceeding¹² it sought, at times, the "fixed capital and operation and maintenance costs associated with facilities that enable generators to maintain their capabilities to respond to fuel switching instructions under the Minimum Oil Burn Rule."¹³ In its Protest Ravenswood also stated that it should be compensated for fixed costs just as compensation is provided for fixed costs associated with Black Start

¹² Motion to Intervene and Limited Protest of Keyspan-Ravenswood, LLC, Docket No. ER07-748-000 (April 26, 2007) (Protest).

¹³ *Id.* at p. 3.

Service.¹⁴ Ravenswood stated that, like the Black Start fixed cost compensation, the fixed cost recovery mechanism for oil storage and delivery costs should be conditioned upon generators making a multi-year commitment to remain capable of responding to fuel switching instructions under the Minimum Oil Burn Rule and providing advance notice of retirement from such service.¹⁵ At other times in its Protest and in its Rehearing Request, however, Ravenswood's claims for additional compensation are in terms of incremental infrastructure costs.¹⁶ According to Ravenswood, the incremental costs for storage and deliverability are costs such as barge transportation and may be short term costs. In addition, these incremental costs can be avoided, "but for being capable of fuel switching under the Minimum Oil Burn Rule."¹⁷ Thus, it is unclear whether the costs Ravenswood seeks are short term or long term, fixed or variable, incremental or ongoing, or avoidable or unavoidable.

22. Moreover, there are concerns that arise with respect to the costs of oil storage and delivery infrastructure that are not present with respect to the incremental variable costs of burning oil. As NYISO noted in its filing, "the capability to operate a unit using an alternative fuel provides economic opportunities when the primary fuel [in this case, natural gas] is unavailable or less economic than the alternative fuel."¹⁸ In other words, Ravenswood and other dual-fuel generators subject to Rule I-R3 may use the capability to burn oil for reasons other than complying with Rule I-R3. Ravenswood and other dual-fuel generators subject to Rule I-R3 may use the capability to burn oil of their own accord to earn greater Day-Ahead margins when natural gas is unavailable or when the price of oil is less than the price of natural gas. It is unclear how these concerns should be resolved.

¹⁴ *Id.* at p. 4 *citing* NYISO Services Tariff, Rate Schedule 5, §2.0, First Revised Sheet No. 313; *New York Indep. Sys. Operator, Inc.*, Letter Order, Docket Nos. ER06-310-000, *et al.* (March 21, 2006).

¹⁵ Protest at p. 9.

¹⁶ At one point in its Rehearing Request, Ravenswood describes the infrastructure costs it seeks as "barge transportation and lease payments." Request for Rehearing at p.16. Ravenswood also states that generators contract for fuel oil using "all-in" contracts that include a supplier's storage and infrastructure costs in the commodity price, as compared to a generator's separately managing its commodity and storage and infrastructure costs . . ." *Id.* at p. 11.

¹⁷ Protest at p. 7.

¹⁸ NYISO April 13, 2007 Filing at p. 7.

23. Thus, the Commission continues to believe that questions and concerns related to further compensation for Rule I-R3 generators such as those discussed above are best considered initially in the NYISO stakeholder process. The stakeholder process may be able to formulate ways of answering these questions and addressing these concerns. When the stakeholder process is completed, NYISO may propose tariff revisions based on a resolution of these concerns. If Ravenswood is dissatisfied with the length of time that the stakeholder process takes or with the results of the stakeholder process, it may bring a complaint under section 206 of the FPA. In such a proceeding, Ravenswood would have the burden of proof and should put forward its evidence, arguments, and supporting documents with its complaint.¹⁹

The Commission orders:

Ravenswood's request for rehearing is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

¹⁹ See 18 C.F.R. § 385.206 (b)(8) (requiring the submission of all documents supporting the facts in a complaint); *Dominion Cove Point LNG, LP, Dominion Transmission, Inc.*, 118 FERC ¶ 61,007 at P 88 (2007) (noting it is the Commission's general practice not to accept new evidence in a rehearing request but making an exception for safety matters); *Trans Alaska Pipeline System*, 67 FERC ¶ 61,175 at 61,531 (1994) (stating "new matters" may be raised on rehearing only if "based on matters not available for consideration by the Commission at the time of the final decision or order.").