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New York's electricity market is a scam

State operators rig prices not to fall, thanks to lax regulators

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by **David Cay Johnston** - @DavidCayJ

If you agree with legislators in about half the states that the most efficient way to provide electricity is through wholesale auctions, take a leap down the rabbit hole into world of the New York Public Service Commission.

Electricity should be cheap in New York because the state's capacity to generate power far outstrips demand. Its surplus is huge, as much as 63 percent in May, and never less than 4.6 percent, New England Power Coordinating Council reliability reports show.

Prices should fall when demand is below capacity. But when capacity falls short of demand by even 1 percent, electricity market prices soar. Demand in New York is falling, primarily because of "a decrease in upstate industrial" electricity use, the Northeast Power Coordinating Council's latest report shows.

Yet instead of enjoying cheaper power, New Yorkers pay 40 percent more than the average for the 48 contiguous states, federal pricing data show. Adjusted for inflation, electricity in New York costs almost 17 percent more than a decade ago (though it is down a bit from last year).

So why does capacity-rich New York suffer the fifth most expensive electricity among the 48 states? The answer lies in the Alice in Wonderland rules of the Pubic Service Commission, the regulator; the Independent System Operator, which runs the so-called markets; and the independent power producers.

Publicly available secrets

The regulator, the operator and the producers all agree, at least for the moment, that the electricity market must be veiled in secrecy to protect trade secrets and prevent collusion by the bidders (which would be a crime).

Assemblyman James F. Brennan was skeptical and asked to see the data. He was refused, prompting a Public Service Commission inquiry into whether the data should be disclosed.

Lawyers, economists and executives for the System Operator and the power companies have told the commission that the data must remain secret or a truly competitive market will not exist.

Marc L. Potkin of Entergy, the New Orleans-based electricity company, warned regulators of “the potential harm to the competitive markets” if producers know each other’s costs. Entergy subsidiaries “take extensive steps to protect the confidentiality of this data and have not knowingly released their confidential Information on the internet or through any other avenue,” Potkin told the commission. “Entergy does not publish this data nor does Entergy otherwise provide — or intend to provide — this data to the public.” Potkin also testified that the company keeps the data secret because disclosure “may either confuse, or, worse, mislead” people. □

Yet that very data on Entergy power plants is all publicly available, much of it published by Entergy.

Utility economist Robert McCullough demonstrated this in a 190-page report filed on behalf of Assemblyman Brennan. McCullough devoted six pages to examples of what Potkin told regulators must be kept secret but that Entergy publishes in various places. McCullough then went on for page after page showing how other companies making similar claims either publish the data or how “any reasonably competent analyst” can distil the facts from a host of published reports.

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The Independent Power Producers of New York, the electricity makers’ state trade association, insists that heat rates, which determine the efficiency of each plant, must be held in confidence. Yet Massachusetts publishes the heat rate data for each New York power plant.

If McCullough can figure all this out, so can the competing power producers. And if the insiders all know each other’s costs, there is simply no reason for secrecy.

The power plant witnesses were careful to not assert that they do not know or cannot figure out the heat rates and other cost factors of their competitors. If they could not, it would suggest gross incompetence and invite litigation by securities lawyers over corporate mismanagement.

If I knew, I would tell you what the System Operator and the producers' trade association think about McCullough revealing that the facts they insist must not be revealed are already disclosed in other places. Unfortunately, neither responded to my emails and calls.

A state-sanctioned cartel

In previous columns back to May 2014 I have documented how Wall Street manipulates the rules, notably in New England's so-called market, to inflate electricity prices.

The New York Independent System Operator rules do something a little different: They help prevent prices from falling. Thus they run against the traditional reasons for anti-trust laws, better called the competitive market laws.

Professor Robert H. Lande of the University of Baltimore, an antitrust specialist, reminded me that the railroad and other cartels of the late 1800s were not formed to jack up prices, but to keep them from falling. That is exactly what the New York Independent System Operator does through its secrecy and other rules.

What New Yorkers now suffer is a state-sanctioned cartel, something far worse than what Congress anticipated when it passed the Sherman Antitrust Act in 1890 that made any conspiracy to raise prices a felony. The New York legislature has institutionalized price gouging and made it legal.

The case Assemblyman Brennan brought about has now produced the best evidence, in a two decade long history of mounting evidence, that the electricity markets are shams.

This case carries huge economic consequences for New York, and yet beyond my own work I cannot find any serious coverage in the news.

Brennan's case also should be considered in light of the huge discounts that New York state government agencies have awarded to industrial customers such as Alcoa and Yahoo.

Industrial electricity customers are paying 28 percent less than a decade ago. Alcoa got a 30-year deal worth at least $5.6 billion in below-market electricity rates. For each smelter job Alcoa maintains producing aluminum it gets all of its labor costs paid plus $90,000 per worker each year.

Sham markets

My case against electricity markets is not an argument for traditional utility regulation. Monopoly utilities also pose serious economic problems that I have been writing about for more than four decades. But the ease with which the so-called markets are gamed, making them shams in my view, suggests that they are no better and arguably worse. Keep in mind that Enron wrote the original market rules.

What we need in all cases are regulatory agencies staffed by competent people with the authority and resources to pursue the facts. Above them we need regulatory commissions whose appointees are scrupulously fair and deeply informed. Instead we get boards filled with past and future utility executives who do favors for their past and former employers at tremendous expense to consumers and the economy. It’s as if the Knave of Hearts were installed as Wonderland’s tart regulator.

What we see in the New York case is, at its most blatant, how democracy that should serve people is being perverted into government of the corporations, by the corporations and for the corporations. We must take our government back.

David Cay Johnston, an investigative reporter who won a Pulitzer Prize while at The New York Times, teaches business, tax and property law of the ancient world at the Syracuse University College of Law. He is the best-selling author of “Perfectly Legal,” “Free Lunch” and “The Fine Print” and the editor of the new anthology “Divided: The Perils of Our Growing Inequality.”