

136 FERC ¶ 61,077
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

New York Independent System Operator, Inc.

Docket Nos. ER10-3043-002
ER10-3043-004

ORDER ON REHEARING AND CLARIFICATION

(Issued August 2, 2011)

1. In this order the Commission denies clarification or rehearing of its November 26, 2010 order,¹ which accepted, in part, and rejected, in part New York Independent System Operator, Inc.'s (NYISO) proposed revisions to its market power mitigation measures applicable to the New York City (in-City) Installed Capacity (ICAP) market. The Commission also denies clarification or rehearing of its February 2, 2011 order,² which accepted, subject to condition, NYISO's filing in compliance with the November 26, 2010 Order.

I. Background

2. Attachment H (section 23) of NYISO's Market Administration and Control Area Services Tariff (Services Tariff)³ establishes, among other things, market power mitigation measures that are applicable to the in-City ICAP market that NYISO administers. To guard against the exercise of market power by those who buy ICAP and who thus benefit from a low price, the mitigation measures establish an offer floor, the

¹ *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178 (2010) (November 26, 2010 Order).

² *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,083 (2011) (February 2, 2011 Order).

³ *New York Independent System Operator FERC Tariff, Original Vol. 2 (Services Tariff)*.

duration of the offer floor, and a test for exemption from the offer floor, for new uneconomic generation. The offer floor for uneconomic new entry into the capacity market is the lower of 75 percent of the cost of new entry net of energy and ancillary services revenues (net CONE) or the ICAP supplier's CONE for the specific unit. New capacity is exempt from offer floor mitigation if it is projected to be economic upon entry.

3. On September 27, 2010, NYISO submitted proposed revisions to its in-City mitigation measures in Attachment H of its Market Services Tariff. As relevant here, NYISO proposed to make an offer floor exemption determination before the capacity resource obtains authority to sell its capacity in the ICAP market. Further, NYISO proposed to allow a project that has not obtained authority to sell its installed capacity in the ICAP market to get a reevaluation of its exemption determination if it enters a new Class Year. These proposed provisions were protested by Astoria Generating Company, L.P., the NRG Companies,⁴ and TC Ravenswood, LLC (New York City Suppliers).

4. Further, at the time of NYISO's filing, a new generation resource could be granted an exemption from offer floor mitigation by showing that the ICAP spot market auction price for the two capability periods beginning with the first capability period in which an ICAP supplier "is reasonably anticipated to offer to supply [unforced capacity (UCAP)]" is projected to be higher than the offer floor for the same two periods (Reasonably Anticipated Entry Date Rule). In its September 27, 2010 filing, NYISO proposed to modify this rule to, instead, require that the foregoing exemption test economic analysis assume a project start date of three years after the project's Class Year⁵ (Three-Year Rule) irrespective of the project's actual projected date. This proposal also was protested, *inter alia*, by the New York City Suppliers.

5. In the November 26, 2010 Order, the Commission accepted, in part, and rejected, in part, NYISO's proposed revisions to the mitigation exemption test, effective November 27, 2010, subject to conditions. Of relevance here, the Commission found that

⁴ For purposes of this filing, the NRG Companies are NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC

⁵ NYISO's Open Access Transmission Tariff (OATT) defines "Class Year" as "[t]he group of generation and merchant transmission projects included in any particular Annual Transmission Reliability Assessment and Class Year Deliverability Study, in accordance with the criteria specified herein for including such projects." *See* NYISO OATT, Attachment S, section 25.1.2.

NYISO failed to provide sufficient support for the Three-Year Rule. The Commission directed NYISO, in its compliance filing, to either provide the required support for the Three-Year Rule or to delete the provision. New York City Suppliers filed a request for clarification or, in the alternative, rehearing of the November 26, 2010 Order regarding the timing of offer floor mitigation exemption determinations under the proposed provisions. NYISO and Bayonne Energy Center, LLC (Bayonne) filed answers to the request for clarification.

6. On December 6, 2010, as supplemented December 7, 2010, NYISO filed to comply with the November 26, 2010 Order. In its filing, NYISO provided support for its proposed Three-Year Rule. New York City Suppliers and Hudson Transmission Partners, LLC (Hudson Transmission) protested the filing.

7. In the February 2, 2011 Order, the Commission accepted, subject to conditions, NYISO's support for the Three-Year Rule as part of its initial filing in compliance with the November 26, 2010 Order. However, the Commission adopted Hudson Transmission's proposal and found that projects in NYISO's Class Year 2008 should be evaluated under the existing rules. The New York City Suppliers filed for clarification or, in the alternative, rehearing of the February 2, 2011 Order. NYISO and Bayonne filed answers to the request for clarification.

II. Clarification and Rehearing of the November 26, 2010 Order

8. In its September 27, 2010 filing, NYISO proposed to amend the exemption provisions, *inter alia*, to provide in new section 23.4.5.7.3 three categories of generation projects (defined as "Examined Facilities") for which NYISO will make a determination of whether a generation project qualifies for an exemption from the offer floor. For example, the first category of such Examined Facilities ("Category I") is defined in section 23.4.5.7.3:

(I) each proposed new Generator and proposed new UDR project, and each existing Generator that has ERIS [Energy Resource Interconnection Service, i.e., authority to sell energy] and no CRIS [Capacity Resource Interconnection Service, i.e., no authority to sell installed capacity⁶], that is a member of the Class Year that

⁶ Section 25.1.2 of Attachment S of NYISO's OATT defines the "Capacity Resource Interconnection Service" (CRIS) as "[t]he service provided by NYISO to interconnect the Developer's Large Generating Facility, Merchant Transmission Facility or Small Generating Facility larger than 2 MW to the New York State Transmission System, or to the Distribution System under Attachment Z, in accordance with the

(continued...)

requested CRIS, or that requested an evaluation of the transfer of CRIS rights.

9. Further, NYISO proposed new section 23.4.5.7.3.5 which provides for the reevaluation of such “Category I” facilities:

An Examined Facility for which an exemption or Offer Floor determination has been rendered may only be reevaluated for an exemption or Offer Floor determination if it meets the criteria in Section 23.4.5.7.3(I) and either (a) enters a new Class Year for CRIS or (b) intends to receive transferred CRIS rights at the same location.

10. In its protest to NYISO’s filing, New York City Suppliers expressed concern about the foregoing provisions. They noted that the offer floor mitigation was to prevent uneconomic new entry that would artificially suppress capacity market clearing prices. They asserted that the existing mitigation provisions provide for an exemption for an economic project at the time the decision to proceed with the project investment is made. By allowing retesting for an exemption, they asserted that this proposed exemption test allows a generator that has already made a substantial investment decision, and has even completed construction, to seek an exemption from the offer floor mitigation. Thus, they asserted, the proposed provisions would allow a generator to “class shop,” i.e., wait to enter a Class Year until such time as economic conditions are favorable so it that can secure an exemption. They asserted that if a generator elects to enter the market as an energy (ERIS) resource, its subsequent decision to sell capacity (CRIS) does not warrant an exemption retesting. They argued that the exemption determination should, instead, occur before the developer makes its decision to go forward with the project so that it influences the decision-making process and deters uneconomic entry. Further, they argued that the proposed provisions themselves are vague and subject to varying interpretations. They asked that the tariff be clarified in a number of specific ways.

11. In the November 26, 2010 Order, the Commission accepted NYISO’s proposed revisions to the mitigation exemption test effective November 27, 2010, subject to conditions. With regard to NYISO’s proposed exemption tests, the Commission stated in paragraph 71, in pertinent part:

NYISO Deliverability Interconnection Standard, to enable the New York State Transmission System to deliver electric capacity from the Large Generating Facility, Small Generating Facility or Merchant Transmission Facility, pursuant to the terms of the NYISO OATT.”

We accept NYISO's proposals for revising its exemption tests, subject to the conditions discussed below. . . . It is reasonable for NYISO to provide an exemption test before a supplier begins construction of a new resource, as NYISO's tariff current[ly] provides, and to apply such a test to all new entrants. An entity whose resource is forecast to be economic at the time its construction begins is not attempting to artificially depress market prices through uneconomic entry. Thus, it would not be reasonable to impose an offer floor on such a resource that prevented it from clearing in the capacity auction if market conditions unexpectedly worsened by the time that construction is completed.⁷ Furthermore, we find that NYISO's proposals to revise these tests are reasonable improvements on these tests because they distinguish between categories of facilities that it will examine for exemptions and clarify the information submission requirements for examined facilities.

12. The Commission also later stated: “[W]e find that the New York City Suppliers’ request for clarifications to the exemption test are unnecessary as we find that NYISO’s proposal, as modified herein, is just and reasonable.”⁸

A. Requests for Clarification and Rehearing

13. On December 22, 2010, Astoria Generating Company, L.P., the NRG Companies,⁹ and TC Ravenswood, LLC (New York City Suppliers) jointly submitted a request for clarification or, in the alternative, rehearing of one limited aspect of the November 26, 2010 Order. New York City Suppliers state that the sole subject of their request is the Commission’s determination concerning NYISO’s exemption testing proposal. Bayonne Energy and NYISO each filed answers to the request for clarification.

14. New York City Suppliers ask for clarification of paragraph 71 of the November 26, 2010 Order because they assert the Commission’s ruling may be given different interpretations. New York City Suppliers assert that the November 26, 2010 Order can be read either to maintain what it asserts is the status quo and thus reject NYISO’s

⁷ November 26, 2010 Order, 133 FERC ¶ 61,178 at P 71.

⁸ *Id.* P 74.

⁹ For purposes of this filing, the NRG Companies are NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

exemption testing proposal and therefore continue to ban exemption testing after a unit has begun construction, or it could be read to indicate that the Commission accepts NYISO's exemption testing proposal to allow retesting for a mitigation exemption at any time after the decision to proceed with the investment is made. Therefore, the New York City Suppliers request that the Commission clarify its order. However, their own request for clarification is unclear as they express it in two different ways: first, at page 4, they request us to clarify "that the NYISO must continue to conduct a supplier's exemption test 'before a supplier begins construction of a new resource,'" and second, at page 13, they request us to clarify "that the Mitigation Exemption Test will continue to be conducted for all new entrants, once, at the time of the developer's initial project investment decision."¹⁰

15. New York City Suppliers state that, in the alternative, if the Commission intended to approve NYISO's exemption testing proposal in the November 26, 2010 Order, then rehearing should be granted on the grounds that the determination marks a substantial departure from past Commission decisions without any basis and is otherwise arbitrary and capricious. In support, New York City Suppliers contend that the following excerpt from the March 7, 2008 Order accepting NYISO's proposal to incorporate an offer floor exemption specified that NYISO must test the project when the investor makes its decision to proceed with its project:

To ensure that the mitigation rules do not deter economic entry, the Commission agrees that units should be exempted when their decision to enter was based on price signals that the market sent indicating that entry was needed. If NYISO predicts in some future year that market prices will be greater than the net CONE then this indicates that building new capacity to begin operation in that year is economically rational. Such new capacity should not be penalized after-the-fact for a decision to build that was economically rational at the time the decision was made.¹¹

16. New York City Suppliers also point to NYISO's filing in the March 7, 2008 Order proceeding, wherein Dr. Patton, NYISO's Independent Market Advisor, stated that the

¹⁰ Based on the various iterations of its requested ruling in the request for rehearing portion of its pleading, we interpret the second statement of its request for clarification referencing the time of the decision to invest to be its intended clarification.

¹¹ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 117 (2008) (March 7, 2008 Order).

evaluation of whether a project is economic was to be conducted before the developer commits to go forward with the project and accepts its cost allocation from the facilities study and makes a security deposit in the interconnection process.¹² New York City Suppliers argue that NYISO's September 27, 2010 filing sought to fundamentally alter the underlying principle that was supported by Dr. Patton in that under NYISO's expanded exemption testing proposal, a generator would be permitted to test for a mitigation exemption repeatedly, including after it has proceeded with construction. As a result, according to New York City Suppliers, an exemption may subsequently be granted even though the project was uneconomic at the time the "go forward" decision was made based on then projected market conditions. New York City Suppliers contend that section 23.4.5.7.3.5 of NYISO's proposed tariff language explicitly allows a facility to test for a possible mitigation exemption if it qualifies as a "Category One" resource and enters a new Class Year seeking CRIS rights or intends to receive transferred CRIS rights. If approved, they assert, this would reverse the Commission's prior ruling "that units should be exempted when their decision to enter was based on price signals the market sent indicating that entry was needed."¹³

17. New York City Suppliers request that the Commission clarify or rule on rehearing that the mitigation exemption test must continue to be applied at the time of the go forward decision to maintain the deterrent effect of the buyer-side mitigation rules. New York City Suppliers attach the affidavit of Mark Younger who argues that just as a developer should be able to rely on a finding that its project is economic, the converse must also be true, i.e., once a project deemed uneconomic chooses to proceed, it should generally be precluded from attempting to escape mitigation prematurely and reverse the financial consequences of its ill-informed investment decision in a way that artificially suppresses market prices.¹⁴ Otherwise, according to New York City Suppliers, the intent and goals of buyer-side mitigation rules, i.e., to ensure appropriate investment decisions based on accurate market signals and to rely on mitigation measures to deter uneconomic entry, will be eviscerated and the market could become flooded with uneconomic entrants requesting mitigation exemption tests whenever the market fluctuates. New York City

¹² NYISO Filing, Docket No. EL07-39, Attachment 1 at P 70 (filed October 4, 2007).

¹³ New York City Suppliers December 22, 2010 Request for Clarification or Rehearing at 11 (citing March 7, 2008 Order, 122 FERC ¶ 61,211 at P 117).

¹⁴ New York City Suppliers December 22, 2010 Request for Clarification or Rehearing (citing New York City Suppliers Protest, Docket No. ER10-3043-000, Younger Affidavit at P 74 (filed October 22, 2010)).

Suppliers state that the intended response for a project that has been deemed to be uneconomic by NYISO is either to forego going forward until market conditions become more favorable, scale the investment to a level where it will be economic, or accept that it will be subject to mitigation until its capacity economically clears the market, rather than go forward and subsequently retest again and again to secure an exemption. They assert that if a market structure were adopted that allowed market signals to be ignored at the time of the “go forward” decision, the in-City market could potentially become unnecessarily flooded with uneconomic entrants requesting the mitigation exemption test whenever the market fluctuates. Thus, according to New York City Suppliers, NYISO’s exemption testing proposal would protect an uneconomic entrant from the consequences of its decision to proceed, rather than deter such decisions to ensure just and reasonable market outcomes.

18. Although we generally reject NYISO’s answer as a prohibited answer to a request for rehearing, as discussed below, we note that NYISO clarifies its intent in its proposed exemption determination provisions by explaining that a key goal of its proposal was:

to better align the Offer Floor and exemption analysis provisions in Attachment H of the Services Tariff with the cost allocation procedures and timetables in the “Class Year” provision of Attachment S to the NYISO OATT. The NYISO’s September 27, 2010 filing which initiated the above-captioned proceeding (“September 27 Filing”) was quite clear that this meant that the NYISO would “provide potential new entrants with the results of the NYISO’s exemption and Offer Floor analyses before they must make the critical decision of whether to accept a Class Year allocation of interconnection project costs (specifically, System Deliverability Upgrade costs [“SDUs”]).” [Footnote omitted.] There was no indication in the filing letter, or in the text of the proposed tariff revisions, that the Attachment H analyses would instead be conducted prior to when a project began construction.¹⁵

B. Commission Determination

1. Procedural Matters

19. Although Bayonne and NYISO contend that their pleadings constitute answers to the request for clarification embodied in the New York City Suppliers’ pleading, in the main their pleadings are effectively answers to New York City Suppliers’ alternative

¹⁵ NYISO January 7, 2011 Answer at 5.

request for rehearing. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2011) prohibits an answer to a request for rehearing. Accordingly, except to the limited extent as discussed below that NYISO's answer helps inform the clarification issue by clarifying the intent behind its tariff revision proposals, the answers are rejected.

2. Substantive Matters

20. We deny New York City Suppliers' request for clarification or, in the alternative, rehearing regarding the timing of exemption testing. We affirm that Commission precedent and the November 26, 2010 Order intended to allow a mitigation exemption determination before the developer decided whether to move forward with a project, but also to allow an exemption determination after the project was constructed. In addition, a mitigation exemption determination once granted cannot be revoked, but an exemption reexamination is possible under section 23 of Attachment H. As explained further herein, requiring that all mitigation determinations be made prior to the decision to construct would undermine NYISO's efforts with the Three-Year Rule to avoid discretionary determinations about when a developer had technically started construction.

21. The Commission clarifies that it accepted the subject protested offer floor exemption provisions without condition and did not direct that the tariff be revised to provide a deadline for an exemption determination before investment decisions are made or construction begins. New York City Suppliers have read too much into paragraph 71 of the November 26, 2010 Order which did not directly address their protest. All that paragraph 71 addressed is whether a project that initially obtains an exemption should later have that exemption reevaluated and removed (and, thus, be subject to the offer floor) if the economics of the project change – a ruling consistent with (but far narrower than) New York City Suppliers' protest position that there should be no re-testing for exemptions at all.

22. Thus, while the fact that we were not directly addressing the New York City Suppliers' protest in paragraph 71 is not entirely clear, there is nothing in paragraph 71 to suggest that our commentary could be extrapolated to indicate that there should be a deadline for the exemption determination that must be pegged to the date of the project's "decision to enter" or "decision to build." If that were the case, then it would be a fair reading of paragraph 71 that the generator should not be allowed to be retested for an exemption. But, as the premise is wrong, the New York Suppliers' claim that we intended to reject NYISO's proposal to allow re-testing for an exemption is unfounded. As noted above, we approved, without condition, the proposed provisions, which do not specify when an offer floor exemption determination must be made with respect to the decision to build.

23. Therefore, consistent with NYISO's clarification of the intent behind its proposals, we confirm that the proposed tariff provisions in its September 27, 2010 filing do not specify that an exemption determination must be made prior to the decision to construct as asserted by New York City Suppliers. The tariff at section 23.4.5.7.3 indicates that "Examined Facilities" are analyzed when they enter the Class Year cost allocation process under Attachment S and seek CRIS rights without further conditions.¹⁶ Moreover, section 23.4.5.7.3.5 provides for a reevaluation for an exemption provided the Category I Examined Facility meets certain criteria and either enters a new Class Year to seek CRIS rights or intends to receive transferred CRIS rights at the same location without further conditions. These sections do not require that exemption testing occur prior to the decision to invest or to commence construction. In either situation, the mitigation exemption determination will be made before the resource enters the capacity market. Moreover, we confirm that these approved provisions permit a Category I facility that previously was determined not to qualify for an offer floor exemption to have a reevaluation of the exemption determination and later obtain an exemption if the economics of the project change. Finally, we confirm that there is not a one-time evaluation limit on seeking the offer floor exemption. Since we clarify we did not condition acceptance of these provisions on their being modified as New York City Suppliers urged, we deny their request for clarification and, therefore, turn to New York City Suppliers' request for rehearing.

24. On rehearing, New York City Suppliers appear to raise their concerns in the context of a hypothetical scenario¹⁷ in which the generator petitions to enter a Class Year, is notified that it does not qualify for an exemption from the offer floor mitigation

¹⁶ Specifically section 23.4.5.7.3 of Attachment H states "[e]xamined Facilities...that is a member of the Class Year that requested CRIS, or that requested an evaluation of the transfer of CRIS rights from another location, in the Class Year Facilities Study commencing in the calendar year in which the Class Year Facility determination is being made."

¹⁷ Under Attachment S, the generator petitions to enter a given Class Year by March 1. Thereupon, NYISO commences to evaluate the project along with all others in that Class Year to determine any necessary generator interconnection costs. In addition, NYISO examines the project to determine if it will be exempt from the mitigation offer floor under Attachment H. A generator seeking CRIS rights has 30 days to decide whether to accept its interconnection cost allocation ("Initial Decision Period") and, if it does, receives authority to sell its capacity in the capacity market, i.e., it receives CRIS authority. That "Initial" cost allocation may change depending on whether other developers reject their allocation and choose to drop out of that Class Year.

because its proposed project is expected to be uneconomic three years' hence when it is assumed to enter the capacity market, rejects its cost allocation and drops out of that Class Year but nonetheless proceeds to build its uneconomic project, and commences to sell energy (pursuant to ERIS authority). It then waits for another Class Year (i.e., it "class shops") when the projected economics of its project have changed such that it meets the exemption test's economic analysis, applies for and gets the exemption, and then enters the capacity market after getting CRIS rights. It notes that this would be allowed under NYISO's proposed offer floor mitigation exemption provisions. New York City Suppliers contend, however, that Commission precedent requires that all offer floor mitigation exemption testing must occur at one time only before a developer makes its investment decision and before it begins construction of a new resource. Thus, they assert that it is an error to permit re-testing for an exemption after that decision and/or construction of the project, as would be authorized by NYISO's proposed tariff provisions. We disagree. New York City Suppliers misread Commission precedent. Further, there is nothing unjust or unreasonable about these provisions.

25. Like paragraph 71 of the November 26, 2010 Order, the Commission's discussion in paragraph 177 of the March 7, 2008 Order cited by New York City Suppliers¹⁸ does not address the matter of, or otherwise require, an absolute end time limit for when an exemption determination may be made. Nor did that part of the discussion impose a requirement that only one offer floor exemption determination can ever be made with respect to a project. The March 7, 2008 Order, instead, only clarified that, out of fairness to a new generation project commenced with the expectation of being exempt from offer floor mitigation, the Commission would not allow a redetermination and revocation of the exemption if the economics of the project turn out differently by the time the project enters the capacity market. Nothing more can be extrapolated from that statement, including the New York City Suppliers' unfounded claim that the statement can be read to also require the exemption determination be a one-time event occurring before the ambiguous time when an investment decision is made or construction begins. For the same reasons, the tariff provisions later accepted by the Commission¹⁹ did not establish any such time limit or one-time only restriction on obtaining an offer floor exemption.

26. Further, like their interpretation of the March 8, 2008 Order, New York City Suppliers read too much into the affidavit of Dr. Patton, NYISO's Independent Market Advisor, in his October 4, 2007 affidavit in the Docket No. EL07-39 proceeding. Dr.

¹⁸ See *supra* P 14.

¹⁹ *New York Indep. Sys. Operator, Inc.*, Docket No. ER10-3043-003 (March 17, 2011) (delegated letter order).

Patton was fundamentally making the same statement that the Commission later made in the March 8, 2008 Order and in paragraph 71 of the November 26, 2010 Order. The full text of his comments are:

It is important to recognize that an investor might expect a new unit to be economical at the time the investor commits resources three years in advance of entering the market. Therefore, I propose that units be exempted from mitigation if the NYISO determines that at the time for which the investor is committing to the investment that near-term spot market-clearing prices, post entry, are forecasted to be greater than 75 percent of CONE in the area where the new unit is proposed. The evaluation of whether or not the new entrant would be economic should be conducted before the developer commits to go forward with the project and accepts its cost allocation from the facilities study and makes a security deposit in the interconnection process.²⁰

27. Thus, Dr. Patton merely was pointing out the reasonableness of not requiring the project sponsor to accept its cost allocation and make a security deposit to obtain the right to sell its capacity without first knowing whether it would be subject to the offer floor mitigation. Once again, nothing more can be read into that statement. Moreover, his statement supports exactly what happens under these new provisions now at issue here. Irrespective of whether the exemption determination is initially made by NYISO for the first time in a given Class Year or is the result of a reevaluation of the economics of a project in a later Class Year upon request of the project sponsor, the initial exemption determination or redetermination occurs prior to when the project accepts its cost allocation and enters the capacity market. In particular, we find that it is reasonable to permit a reevaluation of an offer floor exemption determination when the originally-projected economics of the project change upon entry into the capacity market and the project is then expected to be economic upon such entry. The reverse, i.e., the scenario addressed by both orders of a re-determination resulting in taking away a previously-authorized exemption, is not reasonable. Finally, we do not believe it is reasonable to bind NYISO and project developers to a timeline where NYISO must determine what constitutes the ambiguous “beginning of construction” or alternatively when a developer’s “investment decision” is made.

28. In the end, the issue is whether we should have rejected a proposal that allows an economic project to enter the capacity market without being subject to offer floor

²⁰ NYISO October 4, 2007 Filing, Docket No. EL07-39, Attachment 1 at P 70.

mitigation. The answer is decidedly no. The whole purpose of the NYC mitigation program is to deter uneconomic entry, not economic entry. The possibility that the project may have previously been forecasted to be uneconomic upon entry three years later should not prevent its later entry on a level playing field with all other economic projects that enter the capacity market if the project's economics change and it becomes economic. New York City Suppliers' argument, that NYISO's mitigation exemption proposal may cause the capacity market to become "unnecessarily flooded with uneconomic entrants requesting a mitigation exemption test whenever the market fluctuates," begs the issue of whether the requests will be granted. If the projects remain uneconomic, their requests to be permitted to enter the market will not be granted unless they are subject to offer floor mitigation. Therefore, NYISO's mitigation rules prevent the capacity from artificially suppressing capacity market prices. If the capacity still is uneconomic, the capacity will be subject to offer floor mitigation; conversely, if the capacity is economic at the time it actually enters the market, by definition it will not artificially suppress market prices. And, under either scenario, the project can't enter the capacity market without first accepting its cost allocation, exactly as NYISO, and the Commission, originally intended. Accordingly, we reject New York City Supplier's request for rehearing on this issue.

III. Clarification and Rehearing of the February 2, 2011 Order

29. As noted above, in its September 27, 2010 filing, NYISO proposed to revise the time period its test for exemption from the offer floor mitigation uses to determine whether the project will be economic when it enters the ICAP market. At the time of the proposal, a resource could be granted an exemption from offer floor mitigation by showing that the ICAP spot market auction price for the two capability periods beginning with the first capability period in which an ICAP supplier "is reasonably anticipated to offer to supply [unforced capacity (UCAP)]" is projected to be higher than the offer floor for the same two periods (Reasonably Anticipated Entry Date Rule). In its September 27, 2010 filing, NYISO proposed to modify this rule to, instead, require in new section 23.4.5.7.2 that the exemption test economic analysis must assume a project start date of three years after the project's Class Year (Three-Year Rule) irrespective of when the actual start date is expected to be.

30. In the November 26, 2010 Order, the Commission found that NYISO failed to provide sufficient support for the proposed Three-Year Rule. The Commission directed NYISO, in its compliance filing, to either provide the support or to delete the provision. On December 7, 2010, NYISO submitted an initial compliance filing in which it offered support for the Three-Year Rule. According to NYISO, use of the existing Reasonably Anticipated Entry Date Rule is neither sufficiently transparent nor predictable, in that in-service dates change significantly throughout the time a project is in the Interconnection Queue, and the exact date a supplier anticipates first offering unforced capacity (UCAP) is open to disagreement. NYISO argued that, in contrast, the proposed Three-Year Rule

is based on actual entry date experience, is consistent for all projects, and is a reasonable approximation of the length of time between the Class Year cost allocation process and when the developer can be reasonably expected to enter the market, based on recent data. Hudson Transmission and the New York City Suppliers filed protests.

31. In the February 2, 2011 Order, the Commission accepted, subject to conditions, NYISO's support for the proposed Three-Year Rule. The Commission found that three years is a reasonable approximation of the length of time between the Class Year entry and when the developer can be reasonably expected to begin selling UCAP and, therefore, is a reasonable time frame to use for the mitigation exemption analysis. However, in response to Hudson Transmission's protest, the Commission found that projects in NYISO's "Class Year 2008" should be evaluated under the existing Reasonably Anticipated Entry Date Rule because cost allocations for that Class Year were made prior to the existence of the new Three-Year Rule and have been approved by NYISO's Operating Committee. In addition, the Commission stated that Class Year 2008 projects accepted their cost allocations under Attachment S of NYISO's Tariff before the filing of NYISO's proposed revisions to its mitigation exemption and therefore did not have adequate notice of a change in terms and conditions of service.²¹ In contrast, the Commission stated that projects in Class Year 2009 and Class Year 2010 had not yet accepted their cost allocations under Attachment S and that it did not believe a transition period²² was needed even though some of those projects may have commenced construction.²³

A. Requests for Clarification or Rehearing

32. On March 4, 2011, New York City Suppliers jointly submitted a request for clarification or, in the alternative, rehearing of February 2, 2011 Order. On March 14, 2010, NYISO and Bayonne filed answers New York City Suppliers' request.

33. New York City Suppliers assert that, in the February 2, 2011 Order, the Commission erred in rejecting their proposal to retain the Reasonably Anticipated Entry

²¹ February 2, 2011 Order, 134 FERC ¶ 61,083 at P 25.

²² New York City Suppliers argued that there should be a "transition period" to the new Three-Year Rule so that the Reasonably Anticipated Entry Date Rule would continue to apply to Class Years 2009 and 2010 participants.

²³ February 2, 2011 Order, 134 FERC ¶ 61,083 at P 25.

Date Rule as a transitional rule for Class Year 2009 and Class Year 2010 projects.²⁴ New York City Suppliers assert that they demonstrated that application of the Three-Year Rule to Class Year 2009 and Class Year 2010 projects could have unjust and unreasonable results when they pointed to publicly available information that some of the Class Year projects were already well under way with construction and, thus, their expected date of commercial operation was both publicly known and reasonably certain. New York City Suppliers further assert that while the Commission acknowledged that these projects may have begun construction, the Commission focused on the fact that none of these projects had yet accepted their cost allocations and, therefore, the Commission found no need for a transition rule. New York City Suppliers argue that the decision to forego applying a transition rule to the Class Year 2009 and Class Year 2010 projects was arbitrary and capricious.

34. New York City Suppliers argue that the projects assigned to Class Years 2009 and 2010 are well defined, have already completed substantial construction activities, and the in-service dates for some of these Class Year projects are not unpredictable. They further argue that if the Three-Year Rule is applied, for example, to Class Year 2010 projects, the year tested will be 2013, even though there is substantial evidence that some of these projects will commence commercial operations well in advance of this date. According to New York City Suppliers, projects tested on the basis of a 2011 load forecast would be less likely to secure an exemption than those tested on the basis of a 2013 load forecast. New York City Suppliers assert that where, as here, there is easily verifiable, public information concerning construction and in-service dates for facilities that are coming on line close in time, Class Year 2009 and Class Year 2010 projects must not become eligible for an exemption simply by virtue of a rule change. New York City Suppliers contend that applying the Three-Year Rule to Class Year 2009 and Class Year 2010 projects may improperly skew the results of the mitigation exemption test directly resulting in under-mitigation, and concomitantly, under-compensation for existing generators.

35. New York City Suppliers also request that the Commission clarify or alternatively, determine on rehearing that mitigation exemptions that are granted under the Three-Year Rule will begin to be applied in the year tested. New York City Suppliers assert that a project that is tested on the basis of a year 2013 load forecast would not necessarily be deemed eligible for an exemption if tested on the basis of an earlier year. New York City

²⁴ Under the NYISO Tariff, the Class Year begins on March 1. New York City Suppliers had requested that the Three-Year Rule be applied only to those analyses begun after Commission action on the Three-Year Rule, i.e., it would first be applied to Class Year 2011.

Suppliers are concerned that a project might come on line earlier than anticipated. In such case, they argue that the supplier should not be deemed eligible for exemption. Thus, they ask the Commission to clarify that any exemption granted under the Three-Year Rule cannot begin until the year tested.

B. Commission Determination

1. Procedural Matters

36. Although Bayonne and NYISO contend that their pleadings constitute answers to the request for clarification embodied in the New York City Suppliers' pleading, in the main their pleadings are effectively answers to New York City Suppliers' alternative request for rehearing. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2010), prohibits an answer to a request for rehearing. Accordingly, NYISO's and Bayonne's answers are rejected.

2. Substantive Matters

37. We deny New York City Suppliers' request for clarification or, in the alternative, rehearing of the February 2, 2011 Order. New York City Suppliers raised the same arguments in their December 21, 2010 protest to NYISO's compliance filing and the Commission addressed them in the February 2, 2011 Order. They raise no new arguments here that warrant granting rehearing of this ruling in the February 2, 2011 Order.

38. Our decision to apply the Three-Year Rule to projects assigned to Class Years 2009 and 2010 was reasonable. As we stated in the February 2, 2011 Order, NYISO provided sufficient support to show that the Three-Year Rule is an improvement over the Reasonably Anticipated Entry Date Rule. We found that it is more transparent, predictable, and less prone to manipulation by the project developer. New York City Suppliers contest neither the merits of the Three-Year Rule, nor NYISO's contention that it is an improvement over the Reasonably Anticipated Entry Date Rule. Rather they wish to delay its application on the basis that some projects will commence commercial operations in advance of the three-year date and, thus, should be tested based on an earlier load forecast. The application of any change in rules necessitates some line drawing with respect to when the new rule takes effect. It is reasonable to draw that line at the 2008 Class Year, as we explained in the February 2, 2011 Order, because developers of projects in the 2008 Class Year accepted their cost allocations under Attachment S before the filing of NYISO's proposed revision to its mitigation exemption. In contrast, developers of projects in Class Years 2009 and 2010 were on notice of the proposed change to the exemption test prior to accepting their cost allocations.

39. We also responded in the February 2, 2011 Order to New York City Suppliers' contention that the Commission needed the answers to a number of questions New York

City Suppliers posed with respect to the application of the Three-Year Rule.²⁵ We were not persuaded that it was necessary that NYISO answer the questions posed by the New York City Suppliers in order for us to reach a decision on the reasonableness of NYISO's proposal because the questions addressed the application of the exemption test, not the reasonableness of the assumption of a market entry date of three years after the start of the project's Class Year.

40. We also deny clarification and rehearing with respect to one of those questions here. New York City Suppliers request clarification or, alternatively, rehearing that any exemption granted under the Three-Year Rule shall begin in the year tested.²⁶ They correctly assert that the February 2, 2011 Order is silent as to this request. We deny clarification as we find that NYISO's proposal does not require the exemption to be deferred until the third year after the exemption determination. Further, New York City Suppliers failed to provide any support for their proposed clarification. Moreover, we find that denial of the exemption for up to two years prior to the year of entry assumed for the purpose of the exemption tested may inappropriately cause mitigation of projects that have met the requirements for mitigation exemption and enter the market before the third year after their exemption determination was made.

41. Accordingly, we deny New York City Suppliers request for rehearing of the February 2, 2011 Order.

The Commission orders:

The requests for clarification or rehearing of the November 26, 2010 Order and the February 2, 2011 Order are hereby denied as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁵ February 2, 2011 Order, 134 FERC ¶ 61,083 at P 24.

²⁶ New York City Suppliers March 4, 2011 Request for Rehearing at 9.