

133 FERC ¶ 61,178
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 No. ER10-3043-000

ORDER ON PROPOSED REVISIONS TO IN-CITY BUYER-SIDE MITIGATION
MEASURES

(Issued November 26, 2010)

1. On September 27, 2010, the New York Independent System Operator, Inc. (NYISO) submitted, pursuant to section 205 of the Federal Power Act (FPA),¹ proposed revisions to its market power mitigation measures applicable to the New York City (in-City) Installed Capacity (ICAP) market. In this order, the Commission accepts in part and rejects in part the proposed tariff provisions, effective November 27, 2010, subject to the conditions of this order, as discussed below.

I. Background

2. Attachment H (section 23) to NYISO's Market Services Tariff² establishes, among other things, market power mitigation measures that are applicable to the in-City ICAP market that NYISO administers. One of the purposes of the mitigation measures is to guard against the exercise of market power by those who buy ICAP and who thus benefit from a low price. This is commonly referred to as "buyer side mitigation."

3. The in-City buyer-side mitigation measures provide that, unless exempt from this mitigation, in-City ICAP suppliers that enter the capacity market must do so at a price no lower than the applicable offer floor.³ The offer floor is set at the lower of the in-City

¹ 16 U.S.C. § 824d (2006).

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

³*Id.* at section 23.4.5.7.

ICAP supplier's cost of new entry (CONE) for the specific unit, i.e., "unit" net CONE, or 75 percent of NYISO's Installed Capacity Demand Curve's CONE.⁴ The duration of this mitigation is currently the longer of: (1) six capability periods (approximately three years) starting with the capability period in which the supplier first offers to supply unforced capacity or (2) the period of years that it takes the demand for capacity to grow into available supply.⁵ Generation that went into service before November 1, 2008, is exempt from mitigation. Further, the current in-City mitigation rules provide for an exemption from the offer floor if the capacity price is projected to be accepted by the market for certain minimum periods after initial start-up.

4. NYISO states that the offer floor is a powerful deterrent to uneconomic entry because the ICAP supplier subject to it would only receive capacity revenue in months when its offer floor was above the ICAP spot market auction clearing price. However, NYISO states that it has been exploring improvements to its in-City buyer-side mitigation measures for at least a year, and its market monitor recommended NYISO review thresholds and procedures used to implement the offer floor and identify those that may cause uneconomic entry to be exempted from the floor or erect an inefficient barrier to economic entry. NYISO states that the instant proposal has been approved in the stakeholder process and that action for additional potential improvements is being deferred to allow more time for further stakeholder consideration.

5. NYISO proposes revisions to the methodology for calculating offer floor mitigation durations, revisions to the offer floor exemption process, which are described in more detail below, and certain ministerial clarifications and corrections.⁶ NYISO states that, taken together, these proposed tariff revisions improve the existing buyer-side mitigation measures while reasonably balancing the divergent economic interests of capacity suppliers and purchasers, and they provide a greater degree of certainty and transparency for all stakeholders. NYISO adds that the proposed revisions were developed through its shared governance process with active participation of

⁴ Currently, the default unit for purposes of establishing net CONE is the LMS-100 peaking unit. NYISO describes the alternative default offer floor as "mitigation net CONE" consistent with its proposal to add the defined term "mitigation net CONE" to Attachment H in its August 6, 2010 compliance filing in Docket No. ER10-2210-002, which is currently pending before the Commission.

⁵ The formula for this calculation is provided in the Services Tariff section 23.4.5.7.

⁶ The proposals only concern mitigation of large generation resources. Mitigation of in-City Special Case Resources (SCR) is not addressed.

stakeholders, and were supported by more than 64 percent of the stakeholders in a formal Management Committee vote. Further, according to NYISO, they were developed in close consultation with the Market Monitoring Unit (MMU).⁷

II. Notice of Filing, Interventions, Comments, Protests, and Answers

6. Notice of NYISO's September 27, 2010 filing was published in the *Federal Register*, 75 Fed. Reg. 61,733 (2010) with comments, interventions, and protests due on or before October 12, 2010. By notice of October 1, 2010, the comment period was extended to and including October 22, 2010.

7. Constellation Energy Commodities Group, Inc, and Constellation NewEnergy, Inc.; Calpine Corporation; Entergy Nuclear Power Marketing, LLC; GDF Energy Suez North America, Inc.; Bayonne Energy Center, LLC (Bayonne); Central Hudson Gas & Electric Corporation, New York State Electric & Gas, and Rochester Gas & Electric filed timely motions to intervene.

8. Astoria Generating Company, L.P., the NRG Companies, and TC Ravenswood, LLC (collectively New York City Suppliers); Hudson Transmission Partners, LLC (Hudson Transmission); Independent Power Producers of New York, Inc. (IPPNY); Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York Power Authority, Long Island Power Authority and its operating subsidiary, Long Island Lighting Company, Niagara Mohawk, City of New York and the New York State Consumer Protection Board (collectively, the Indicated LSEs); New York State Public Service Commission (New York Commission); and Potomac Economics, the NYISO Market Monitoring Unit (MMU) filed motions to intervene and comments and protests.

9. On November 1, 2010, New York City Suppliers filed an answer to the New York Commission, and NYISO filed an answer to the MMU's comments and certain other arguments raised in the proceeding. On November 2, 2010, Bayonne filed an answer to the New York City Suppliers' comments and protest. On November 5, 2010, the Indicated LSEs filed an answer to the comments of the New York City Suppliers and the MMU. On November 12, 2010, New York City Suppliers filed an answer to NYISO and the Indicated LSEs. On November 17, 2010, the City of New York filed an answer to the answer of New York City Suppliers.

⁷ NYISO notes, however, that there is one specific element of the proposed amendments that the MMU proposes to address differently. NYISO September 27, 2010 Filing at 8, n. 24.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010) prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Offer Floor Duration

1. NYISO's Proposal

12. NYISO proposes to revise its approach to offer floor duration. As noted earlier, currently, the duration of mitigation is the longer of: (1) six capability periods (approximately three years) starting with the capability period in which the supplier first offers to supply unforced capacity or (2) the period of years that it takes the demand for capacity to grow into available supply. NYISO's new proposal would subject an ICAP supplier to an offer floor for a number of years equal to the shorter time period calculated using two alternative methodologies, with a maximum duration of 30 capability periods (approximately 15 years) and a minimum duration of six capability periods (approximately three years). NYISO states that the existing tariff provisions have the unintended potential to impose offer floors on ICAP suppliers for excessively long periods in that, in a period of limited, or zero, load growth, mitigation might last for decades and might even surpass the life of a new entrant's facility. According to NYISO, this goes far beyond what is needed to discourage any realistic uneconomic entry strategy, and Commission precedent disfavors mitigation measures that are broader in scope, or last longer, than necessary.⁸

⁸ NYISO September 27, 2010 Filing at 6 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,297, at P 63 (2008); *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172, at P 121 (2008); *Southwest Power Pool, Inc.*, 117 FERC ¶ 61,110, at P 21 (2006)).

13. NYISO states that under its proposed first methodology, the offer floor duration would be equal to: (a) the initial Dependable Maximum Net Capability⁹ value of the ICAP supplier plus the amount of surplus capacity at the time that the ICAP supplier first offers to supply unforced capacity (UCAP),¹⁰ divided by (b) the forecasted average annual growth in megawatts of the ICAP requirement for the New York City locality over the six capability periods following the ICAP supplier's first offer of UCAP using the forecast values in NYISO's Load and Capacity Data Report (referred to as the "Gold Book"). NYISO states that the change from reliance on historic load growth data to forecasts is an improvement because potential new entrants make their entry decisions, and evaluate the costs and benefits on a forward-looking basis.

14. NYISO states that, under the second proposed methodology, mitigation would end when the ICAP supplier's "total cleared UCAP was greater than its "total nominal UCAP." NYISO proposes defining the "cleared UCAP" as the ICAP supplier's offers that were accepted in the in-City ICAP spot market auction, so long as that amount was equal to at least 50 percent of the ICAP supplier's initial Dependable Maximum Net Capability value. NYISO proposes that "total cleared UCAP" would be the cumulative amount of an ICAP supplier's "cleared UCAP." NYISO proposes that "nominal UCAP" would be calculated using the megawatt value that was identified in the Interconnection Facilities Study for the ICAP supplier's facility.¹¹ NYISO states that "total nominal UCAP" would equal the product of nominal UCAP and 12.

15. NYISO states that, in short, under the second methodology, an ICAP supplier's offer floor would be eliminated when the total number of its megawatts that cleared in the

⁹ "Dependable Maximum Net Capability - the sustained maximum net output of a Generator, as demonstrated by the performance of a test or through actual operation, averaged over a continuous time period as defined in the ISO Procedures." *See* NYISO Services Tariff definition list, at page 25 of 287.

¹⁰ "Unforced Capacity: The measure by which Installed Capacity Suppliers will be rated, in accordance with formulae set forth in the ISO Procedures, to quantify the extent of their contribution to satisfy the NYCA Installed Capacity Requirement, and which will be used to measure the portion of that NYCA Installed Capacity Requirement for which each LSE is responsible." *See* NYISO Services Tariff definition list, at page 51 of 287.

¹¹ If such a study was not required, then NYISO states that it would use the megawatt value that the ICAP supplier presented to the proposed interconnecting transmission owner, multiplied by one minus the applicable equivalent demand forced outage rate.

in-City ICAP spot market auction, during months when at least 50 percent of its capacity cleared, exceeds its nominal UCAP. Thus, according to NYISO, in principle, an ICAP supplier could satisfy the cleared UCAP test in 12 months if all of its capacity cleared in the auctions for 12 consecutive months (which equates to 24 months if 50 percent cleared).¹²

16. NYISO states that under either methodology, there is a minimum offer floor duration of six capability periods and a maximum offer floor duration of 30 capability periods. With respect to terminating mitigation after 30 capability periods, NYISO argues that it is implausible that a rational potential entrant would be willing to accept mitigation for such a long period in the hope of thereafter reaping the benefits of uneconomic entry, especially given the difficulty of accurately predicting market conditions so far in advance. NYISO states that this 30 capability period maximum was also acceptable to a super-majority of NYISO stakeholders.

17. NYISO contends that its minimum mitigation period is warranted even when an offer floor might otherwise be eliminated more quickly under the proposed methodologies. NYISO adds that the shorter the potential duration of the offer floor, the greater the risk that a market participant might conclude that uneconomic entry would ultimately be a profitable strategy. NYISO states that the MMU has advised that, with the current and proposed duration calculation methodologies, this minimum mitigation period is important to maintaining the deterrent value of the offer floor provisions. NYISO also asserts that this minimum period will act as a reasonable check against the possibility that the provisions might allow some projects to escape mitigation prematurely. In addition, according to NYISO, a three-year period has previously been accepted by the Commission as a suitable “default” mitigation period,¹³ which reinforces the appropriateness of using six capability periods as a minimum period in the future.

18. NYISO states that no forecasting model will ever be perfect and if a new resource proves to be economic, as evidenced by having a significant portion of its capacity clear in the market over time, then it is appropriate to relieve it from mitigation -- subject to the need to preserve the offer floor’s overall deterrent impact. NYISO further states that developers that choose to rely on their own forecasts to make investment decisions will not be locked into an excessive mitigation period if actual market conditions prove to be

¹² NYISO notes that even if a unit subject to an offer floor satisfied the cleared UCAP test in 12 months after entry, it would still be mitigated for the minimum period of six capability periods. *See infra* P 16.

¹³ NYISO September 27, 2010 Filing at 9 (citing *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 113-16 (2008)).

consistent with their own forecasts. NYISO argues that the Commission has treated Special Case Resources (SCR)¹⁴ similarly in that it required mitigation to apply until the new SCR's capacity has been accepted in the market at a price at or above its offer floor for a total of 12, not necessarily consecutive, months. NYISO states that the Commission reasoned that if an SCR met this requirement it would have shown that its "capacity is economic over several different seasons even though the capacity might not be accepted in all months of a calendar year when offered at that price level."¹⁵

19. NYISO states that the proposed requirement that an ICAP supplier must clear at least 50 percent of its capacity in a given month for that capacity to be counted as cleared UCAP (50 Percent Rule) is the result of stakeholder negotiations. According to NYISO, this represents a reasonable balance between the dual goals of preventing uneconomic entry and not discouraging economic investments.¹⁶

2. Comments and Protests

20. The Indicated LSEs state that with some limited exceptions, NYISO's proposed changes represent a reasonable first step in striking an appropriate balance between promoting competition and important public policies and protecting against the exercise of market power. The Indicated LSEs propose modifications to two provisions and maintain that, with these changes, NYISO's proposed tariff revisions would strike an appropriate balance in preventing uneconomic entry while ensuring that economic entry is not unreasonably discouraged.¹⁷

21. First, the Indicated LSEs assert that the requirement that new generation be subject to an offer floor for a minimum of three years, even if the generator has demonstrated that it is economic, serves no legitimate purpose and constitutes an unjustifiable barrier to competition. The Indicated LSEs state that the purpose of the offer floor is to provide a

¹⁴ SCRs include demand side resources that are capable of being interrupted upon demand and eligible to participate in the ICAP market as ICAP suppliers. *See Services Tariff definition list at page 57 of 287.*

¹⁵ NYISO September 27, 2010 Filing at 8 (citing *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 107 (2010)).

¹⁶ NYISO notes that the MMU has expressed concern that the 50 Percent Rule might allow mitigation to end prematurely for some projects because it does not require that capacity clear in both the winter and summer capability periods.

¹⁷ Indicated LSEs October 22, 2010 Comments at 4-5.

deterrent to the entry of uneconomic capacity while making sure that the measures adopted do not deter new economic capacity. According to the Indicated LSEs, the three-year minimum provision will improperly inflate capacity prices and the Commission should reject this provision.

22. Second, the Indicated LSEs contend the proposed 15-year maximum duration of the mitigation is unreasonably long and it could inhibit competition, provide an unjust advantage to existing suppliers, and impede the advancement of important public policies. The Indicated LSEs have a substantial concern that some new entrants could be mitigated for the entire 15 years due to a confluence of factors unrelated to market power. For example, the Indicated LSEs note there have been dramatic changes to the economy over the past few years which have significantly lowered present and forecast future energy usage.¹⁸ The Indicated LSEs also assert that other policies related to energy efficiency and greenhouse gas emissions will place increasing downward pressure on electricity usage.¹⁹ Thus, they argue that, for reasons having nothing to do with market power, a new entrant may be unable to become exempt from mitigation under NYISO's proposal. Therefore, according to the Indicated LSEs, the minimum mitigation period of three years should be eliminated, and the maximum period of fifteen years should be reduced to no more than six years.

23. The MMU expresses reservations about the proposed new test to determine the duration of the offer floor. The MMU contends that new resources that are uneconomic could still pass the test and be exempted from the offer floor mitigation. The MMU states that under NYISO's proposal, only months where at least 50 percent of the resource has cleared would be counted in the test, and a resource needs to accumulate a total equal to the entire resource for twelve months to terminate the mitigation. Therefore, a resource will pass the test if 50 percent of its capacity clears the test for 24 months. The MMU is concerned about the reliability of this indicator for two reasons. First, the resource may only be clearing part of its capacity in a single capability period that may, for example, be all summer months, but the "cost of new entry" is an annual number that is apportioned to each month. A supplier could still be uneconomic if it is recovering this cost in half the months according to the MMU. Second, the MMU argues that the entire resource would be counted as economic even though only part of the resource is economic, which could mean that the resource is uneconomic even though it has passed the test.

¹⁸ *Id.* at 14.

¹⁹ *Id.* at 15.

24. The MMU asks the Commission to consider an alternative proposal for terminating the offer floor mitigation. Under the MMU's proposal, NYISO would only exempt the average portion of the resource that cleared in the prior like capability period (summer or winter).²⁰ As an example, the MMU states that if 40 percent of a resource cleared on average in one winter capability period, then 40 percent of the resource would be exempt from mitigation in all subsequent winter capability periods. Further, under the MMU's proposal, this exemption amount would rise if and when the average portion of the new resource clearing in a future winter capability period rises until all of the resource clears, at which time all of the resource would be exempt from future mitigation. Under the MMU's proposal the summer capability period would be independently determined as well. The MMU believes this is a superior approach to NYISO's proposal because it would ensure that only the portion of a resource that has been demonstrated to be economic would be exempted, and it would reduce the risk that an uneconomic resource will be exempted from the mitigation offer floor. The MMU states that it has confirmed with NYISO that its alternative proposal is operationally feasible.

25. The New York Commission states that NYISO's proposed tariff revisions represent an improvement over the existing in-City ICAP buyer-side mitigation measures. It adds that the amended provisions should help to provide greater certainty and transparency to potential new entrants while avoiding several scenarios that could result in unreasonable mitigation outcomes. The New York Commission states that it supports the use of a three-year average of forecasted load growth, rather than the current methodology of using historical load growth, since it will better reflect future conditions in the market. The New York Commission explains the forward-looking approach more closely aligns the decision-making process of new entrants to the financial commitments based on those future market conditions.²¹

26. However, the New York Commission states that it objects to the retention of an offer floor for a minimum of six capability periods. The New York Commission is concerned that the application of buyer-side mitigation measures with a mandatory minimum offer floor will still act as a barrier to new entry by creating additional financial risk that entrants will not be eligible to receive ICAP payments for some length of time, and this risk could add to the cost and difficulties of financing new projects in or into the City.²² According to the New York Commission, if NYISO is going to measure when a new resource is deemed economic, by ensuring that a sufficient amount of capacity has

²⁰ MMU October 22, 2010 Comments at 4.

²¹ New York Commission October 22, 2010 Comments at 4.

²² *Id.* at 4–5.

cleared the market, then a minimum mitigation period of six capability periods is unnecessary.

27. Furthermore, the New York Commission asserts that the Commission's rule against market manipulation should provide sufficient authority to remedy any unforeseen circumstances²³ and that NYISO's suggestion that a minimum mitigation period will act as a check against unforeseen circumstances is too speculative to warrant the broad application of a mandatory minimum mitigation period.

28. In addition, the New York Commission believes the 15-year maximum for the application of the offer floor is too long. The New York Commission asserts it is highly unlikely that a new entrant would enter the market to suppress prices knowing they may not get paid for 15 years.²⁴ Therefore, New York Commission asserts the Commission should reject the proposed 15-year maximum, and direct the implementation of a shorter timeframe that would still accomplish the objective of deterring "uneconomic" new entry, but would be a just and reasonable period.²⁵

29. The New York Commission states that the minimum and maximum mitigation provisions are of particular concern in the New York City market because it faces a number of reliability, economic, and environmental challenges. The New York Commission maintains that the city is under federal and state mandates to improve air quality, and reducing emissions from New York City generation is important to meeting those mandates. Further, the New York Commission notes that because the city is a load pocket that requires a minimum amount of generation capacity to be physically located within the city (i.e., 80 percent of peak load), those emissions reductions cannot be achieved without the introduction of new, cleaner resources in the city.

30. IPPNY asserts that NYISO's proposal, with respect to the duration of the offer floor, is irrational and fails to adequately guard against uneconomic entry. IPPNY argues that NYISO's proposed total cleared UCAP test dramatically increases the likelihood that the duration of mitigation will be too short to serve as a deterrent to uneconomic entry. IPPNY characterizes NYISO's support for the 50 Percent Rule included in the total cleared UCAP test as dubious. IPPNY also opposes a predetermined, 15-year maximum period for the duration of the offer floor. IPPNY notes that no corresponding changes

²³ *Id.* at 6 (citing 18 C.F.R. § 1c.2 (2010)).

²⁴ *Id.*

²⁵ The New York Commission states that a maximum of no more than six years appears reasonable. New York Commission October 22, 2010 Comments at n. 9.

have been made to supplier side mitigation measures. IPPNY also argues that NYISO has not provided any evidence to support why either of these measures will be sufficient to combat against uneconomic entry.

31. New York City Suppliers state that the proposed revisions would impermissibly undermine the existing buyer side mitigation measures by implementing an “arbitrary 15-year hard cap.”²⁶ According to the New York City Suppliers, changes to the offer floor duration were not adequately supported, contravene past Commission decisions, and will foster uneconomic entry. New York City Suppliers state that NYISO errs in claiming that current mitigation rules make no allowance for the possibility that a project which is expected to be uneconomic at the time of entry might actually prove to be economic. According to New York City Suppliers, current Uneconomic Entry rules permit a new entrant to sell its capacity as soon as it is economic – even when that occurs prior to the three year term or calculated duration.²⁷

32. With respect to the total cleared UCAP test, New York City Suppliers maintain a new entrant could evade mitigation even if it is only able to sell half of its capacity in half the months of a year. New York City Suppliers assert that NYISO’s proposal does not attempt to correct for the likely result that the uneconomic unit would sell more capacity in the winter even when bidding its winter offer floor.²⁸ New York City Suppliers state that NYISO has effectively redefined economic entry through both its total cleared UCAP test proposal and its proposed 30 capability period maximum to mean a showing that “some portion” of a unit’s capacity clears in the market over time, thus flouting the Commission’s prior finding that “all uneconomic entry has the effect of depressing prices below the competitive level.”²⁹

33. New York City Suppliers offer an alternative proposal that implements a process that phases out the offer floor bidding requirements as load growth or unit retirements absorbs the new entrant’s capacity.³⁰ New York City Suppliers state that as a new entrant shows that part of its unit is economic by clearing that capacity bid in at the Offer

²⁶ New York City Suppliers October 22, 2010 Protest at 21.

²⁷ *Id.* at 27.

²⁸ *Id.* at 36.

²⁹ *Id.* at 32 (citing *New York Independent System Operator, Inc.*, 124 FERC ¶ 61,301 (2008)).

³⁰ *Id.* at 37.

Floor for a sufficient number of auctions, the portion of the capacity that the new entrant has cleared would cease to be subject to the offer floor bidding requirement. New York City Suppliers propose that NYISO track the winter and summer capability periods separately to avoid the need to develop rules to identify an equivalent translation for winter sales. Further, they propose that the new entrant must clear the MWs at issue for six summer months and six winter months before it is exempt for the summer capability periods and winter capability periods, respectively, on a going forward basis. To prevent gaming, New York City Suppliers propose to require that the future capacity from a new entrant that clears the market first come from the portion of its facility that is exempt from the offer floor mitigation. This proposal, according to New York City Suppliers, would address the concerns that other parties have raised without eviscerating the ability of the offer floor mechanism to prevent price distortions produced by uneconomic entry.³¹

3. Answers

34. New York City Suppliers filed an answer addressing arguments of the New York State Commission and the Indicated LSEs that generally support NYISO's filing but also propose changes to the in-City capacity market. New York City Suppliers maintain these pleadings contain material mischaracterizations of past Commission decisions and factual errors and provide no evidence to support their positions.

35. The New York City Suppliers contend that the Indicated LSEs ignore past Commission decisions finding that load side market mitigation measures are as necessary to protect long term reliability and the sustainability of the market as supplier side measures. The New York City Suppliers assert that the Commission's past decisions require buyer side mitigation measures to prevent prices from being artificially suppressed because all uneconomic entry has the effect of depressing prices below competitive levels.³² The New York City Suppliers maintain these impacts of uneconomic entry are by no means theoretical, adding that 1,000 MW of load-backed generation artificially lowered prices in the first three months of the 2009-2010 Winter Capability Period.³³ The New York City Suppliers state that the Indicated LSEs make no

³¹ *Id.* at 39.

³² New York City Suppliers November 1, 2010 Answer at 8 (citing *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 1 (2008)).

³³ *Id.* at 9-10 (citing Indicated LSE's October 22, 2010 Protest, Affidavit of James T. Gallagher at P 12).

attempt to distinguish these prior Commission decisions, and thus, this aspect of their pleading should be rejected as a collateral attack on past Commission determinations.³⁴

36. With respect to the NYISO's Total Cleared UCAP approach, the New York City Suppliers state the Indicated LSEs mischaracterize the Commission's decision in its May in-City ICAP Order which actually prohibited uneconomic SCR capacity from entering the market. The New York City Suppliers contend that in its May in-City ICAP Order the Commission rejected the NYISO's proposal to arbitrarily limit SCR offer floor mitigation to one year contrary to the Indicated LSEs assertion, holding that mitigation must remain in place "until the new SCR's capacity has been accepted in the market at a price at or above its offer floor for a total of 12, not necessarily consecutive months."³⁵

37. With respect to currently existing uneconomic entry duration provisions, the New York City Suppliers maintain that the New York Commission and Indicated LSEs' position is factually deficient because as Mr. Younger's affidavit demonstrates these provisions are necessary and that attempting to characterize a full unit as economic when only 50 percent of its capacity has cleared the market fosters uneconomic entry and artificially suppresses prices.³⁶ Furthermore, the New York City Suppliers assert the provision is flawed on its face because each additional MW contributes equally to a decrease in market price, which was recognized in the May 2010 in-City ICAP Order³⁷ and should be reaffirmed here.

38. With respect to offer floor durations, the New York City Suppliers state the positions of the New York Commission and Indicated LSEs reflect a fundamental lack of understanding or mischaracterization of the mechanism because the Commission specifically addressed the inadequacy of a pre-defined "hard-cap" to prevent uneconomic new entry.³⁸ The New York City Suppliers maintain that the Commission approved an Offer Floor bidding requirement based on the size of the entrant and the existing surplus

³⁴ *Id.* at 10.

³⁵ *Id.* at 11 (citing *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 107 (2010) (in-City ICAP Order)).

³⁶ *Id.* (citing New York City Suppliers October 22, 2010 Protest, Younger Affidavit at P 43-46).

³⁷ *Id.* at 11 (citing in-City ICAP Order, 131 FERC ¶ 61,170 at P 107).

³⁸ *Id.* at 14 (citing *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 114-116).

capacity to prevent uneconomic entry from perpetuating indefinitely because a “hard-cap” would not be sufficient to adequately prevent a new entrant from clearing its capacity while it was uneconomic. The New York City Suppliers contend that the currently effective 3-year minimum Offer Floor duration provision does not prevent capacity from clearing the market when it is actually economic.

39. The New York City Suppliers state that claims of the New York Commission and Indicated LSEs that the duration of mitigation is unreasonably long lack credence because the arguments misapprehend the core need for the mitigation measure itself. According to the New York City Suppliers the Commission has previously determined that uneconomic entry must be addressed because it causes the artificial suppression of prices and that the intent underlying such entry is irrelevant.³⁹ The New York City Suppliers contend the need to guard against uneconomic entry becomes even more pronounced during periods of low or negative growth and the Indicated LSE’s argument for shortening mitigation because a sluggish economy might render a new entrant unable to terminate mitigation is tantamount to abandoning the competitive market in favor of State-dictated investment and retirement.⁴⁰

40. The New York City Suppliers further state that the Indicated LSEs’ proposed six-year period suffers from the exact same infirmity as the NYISO’s 15-year proposal, the Indicated LSEs offer no evidence in support of their proposal, and it should not be adopted. According to the New York City Suppliers, a six-year offer floor duration provision is not sufficient to prevent uneconomic entry from artificially depressing prices. In addition, they contend the suppression of prices would be longer if the new entrant were larger than the 550 MW assumed in the example because it could crash capacity clearing prices after six years regardless of whether it is economic.

41. The Indicated LSEs filed an answer addressing comments of the New York City Suppliers, IPPNY, and the MMU. The Indicated LSEs argue that the comments of IPPNY and the New York City Suppliers indicate that these entities continue to seek preferential status for incumbent generators over new entrants. The Indicated LSEs note that a new entrant may seek to compete with incumbents on the basis of being more efficient, more reliable, and more environmentally friendly, arguing that this undercuts the Indicated LSEs’ and Mark Younger’s reliance on meeting the demands of additional load as the only legitimate reason for a new entrant to enter the market. The Indicated LSEs further argue that the comments of IPPNY and the New York City Suppliers

³⁹ *Id.* at 15 (citing *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 29).

⁴⁰ *Id.* at 15-16.

regarding the NYISO governance process are outside the scope of this proceeding. With regard to comments of the MMU, the Indicated LSEs note that the MMU does not seem to argue that the NYISO's proposal is unreasonable, only that the MMU's proposal might be more reasonable.

42. In its answer, NYISO reiterates its support for its proposed minimum and maximum periods of mitigation, as well as for its proposed total cleared UCAP test, while recognizing that it cannot be proven, in advance, that market power mitigation measures will function exactly as intended. NYISO argues that none of the protestors have shown that the approach favored by NYISO is unreasonable.

43. NYISO avers that New York City Suppliers and IPPNY seem content to leave uncorrected an existing tariff rule that could have severe and clearly unintended consequences. With regard to the alternative solution proposed by the MMU, as well as the alternative proposal presented by Mr. Younger attached to New York City Suppliers' filing, NYISO notes that neither of these proposals were vetted through a stakeholder process and that multiple alternative proposals can simultaneously be just and reasonable without diminishing the justness and reasonableness of others. NYISO states its proposed measures have been designed to allow all market participants to more accurately make their own evaluation of the market by adding transparency and objectivity to the evaluation process. In support, NYISO presents an affidavit of Mr. David Lawrence, explaining that Mr. Younger's attack on the proposed total cleared UCAP test relies on selective, contrived examples, and in any case is not predicated on evidence demonstrating that the existing tariff provisions are unjust or unreasonable. Also, NYISO counters an argument from IPPNY by noting that there is no rule asserting that any change to buyer-side mitigation must be balanced by a corresponding change on the supplier-side. Finally, NYISO describes as false misrepresentations those claims or implications from the New York City Suppliers that NYISO relied exclusively on its stakeholder process to develop its proposal.

44. In regard to certain arguments about the appropriateness of in-City Buyer Side Mitigation, in both the filing from the New York Commission and the filing from the Indicated LSEs, including Professor Cramton's testimony and Professor Gallagher's testimony, NYISO contends that such arguments to remove the minimum duration and arguments to reduce the proposed maximum duration are either outside the scope of this proceeding or irrelevant because these arguments do not address the type and purpose of mitigation at issue.

45. In their November 12, 2010 answer, the New York City Suppliers contend that their supportive affidavit from consultant Mr. Mark Younger demonstrates that NYISO's proposed total cleared UCAP test explicitly allows uneconomic entry of a substantial portion of a new entrant's capacity and will lead to some period of time in which the new entrant will artificially suppress market prices. According to the New York City Suppliers, contrary to statements in Mr. Lawrence's affidavit, Mr. Younger did not

selectively pick and choose data points but, rather, relied on Gold Book data that NYISO produced. The New York City Suppliers state that the Commission is authorized to consider alternative proposals to NYISO's filing to the extent it deems that the existing mitigation provisions should be augmented.⁴¹

46. In response to the New York City Suppliers, the City of New York asserts that the Commission must consider short, medium, and long-term interests and needs of the capacity market, but the New York City Suppliers would like the Commission to focus only on the long-term. Further, the City of New York argues that the Commission is not bound to its earlier decisions if change is warranted based on a continual evaluation of the market conditions to ensure just and reasonable rates.

4. Commission Determination

47. We find that NYISO's proposed methodologies for determining the duration of in-City buyer-side mitigation potentially may over- or under-mitigate the exercise of buyer-market power. If a new generation resource does not qualify for an immediate exemption from buyer-side mitigation, NYISO proposes to use whichever of its two proposed duration methodology options yields the shortest mitigation period, subject to a minimum and maximum duration. As explained more fully below, we reject NYISO's first methodology listed in section 23.4.5.7(a) which uses the capability of the ICAP supplier plus the surplus capacity divided by the forecast load growth over three years to determine offer floor duration, we also reject NYISO's proposal for a 6 capability period minimum and 30 capability period maximum, and we accept as modified below NYISO's second methodology listed in section 23.4.5.7(c) to use 12 months of spot market auction results to determine the duration of mitigation.

48. The Commission initially accepted in-City buyer-side mitigation rules in order to mitigate uneconomic new entry.⁴² Under the current rules, mitigation will be lifted after the later of when the capacity surplus (included that created by the new entry) is expected to be absorbed (based on historical load growth) or three years. NYISO proposes to maintain this approach in its first methodology option in its proposed Services Tariff section 23.4.5.7(a), but proposes to use forecasted instead of historical load growth in the determination. While NYISO also proposes to maintain the current minimum period of mitigation of 6 capability periods (approximately 3 years), it proposes in section 23.4.5.7(b) to add a new maximum of 30 capability periods (approximately 15 years) and

⁴¹ New York City Suppliers November 12, 2010 Answer (citing 16 U.S.C. § 824d (e) (2006); *ISO New England*, 120 FERC ¶ 61,087, at P 51 (2007)).

⁴² *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 113).

in section 23.4.5.7(c) to add a new option based on when the new capacity has been accepted in the market at the offer floor for a certain minimum number of auctions. We find that, although the capacity absorption concept that we previously accepted conceptually is a reasonable one for determining when new resources are likely to become economic, actually observing that the new capacity is accepted in the market at a price approximating its cost of entry, as reflected in NYISO's second duration methodology in proposed section 23.4.5.7(c) discussed below, is not subject to the ambiguities and complexities inherent in a method that relies on forecasts of load growth and other factors to estimate when the absorption of surplus capacity has occurred. Therefore, we reject the first offer floor duration methodology in proposed section 23.4.5.7(a).

49. Although we find reasonable NYISO's proposal to have the duration of in-City buyer mitigation turn on actual acceptance of the resource's capacity in the market at the offer floor, we also find that, as drafted, NYISO's proposed second duration methodology option in section 23.4.5.7(c) will result in under-mitigation. NYISO's proposed second duration methodology option bases the period of mitigation not on the relationship between surplus capacity and load growth (as does the proposed first duration methodology option above), but on the degree to which the new capacity actually clears in a monthly auction when offered at the price floor. Under NYISO's proposed second option, subject to a minimum period of mitigation of six capability period (approximately three years), mitigation would be lifted for a new in-City generation resource when, like new in-City SCRs, the capacity clears in 12 monthly auctions at the offer floor. However, unlike with SCRs, NYISO proposes a "50 Percent Rule" under which mitigation would be lifted when the MWs cleared in monthly auctions where at least 50 percent of the capacity cleared equals or exceeds the specific resource's total capacity times twelve. Thus, mitigation would cease after 12 months if 100 percent of the capacity cleared at the offer floor in all twelve months, or it would cease in 24 months if 50 percent cleared in each auction. As noted by the MMU, this proposed 50 percent provision would deem the entire resource as economic even though only a part of the resource is clearing at the offer floor, which may allow resources that remain uneconomic to be exempted from offer floor mitigation.⁴³ We agree that only the consistently-cleared portion of the capacity of a given resource over a total of 12 monthly auctions should have its offer floor mitigation lifted. Therefore, we find that NYISO should refile to revise section 23.4.5.7(c) to provide that the offer floor mitigation will be

⁴³ MMU comments at 4.

lifted only for the minimum percentage portion of a supplier's resource capacity that has cleared in 12, not-necessarily-consecutive, monthly auctions.⁴⁴

50. We disagree with the MMU that such a resource has to necessarily clear in both the summer and winter capability periods. Nor do we agree with the MMU that NYISO should use the average amount cleared in the prior like capability period. The average amount does not reflect the portion that has consistently cleared over 12 months. It is well-established that there is more capacity available from a given stock of generation resources in the winter than in the summer due to lower ambient temperatures. Additionally, winter peaks in New York City are lower than summer peaks. With both increased supply and decreased demand, capacity prices can generally be expected to be lower in the winter. As a result, some resources that may clear in the summer may not clear in the winter. In order to have enough resources to meet load reliably in the summer, the NYISO market can reasonably be expected to have some surplus capacity in the winter. It is not necessary therefore for a capacity resource, especially one that serves as a peaking unit, to have to clear the market in both capability periods to demonstrate that it is economic.

51. Finally, we reject NYISO's proposed minimum period of mitigation of 6 capability periods (approximately 3 years), and its proposed maximum of 30 capability periods (approximately 15 years). We agree with the Indicated LSEs and the New York Commission that a specified minimum period of mitigation is not needed. We find it unreasonable that under NYISO's proposed revisions, even if a resource were to clear more than its total nominal UCAP, it would still be subject to a six-capability period minimum mitigation time period. In addition, we do not agree with NYISO that a thirty capability period maximum is justified or linked to the need for buyer-side mitigation.⁴⁵

⁴⁴ In the case where different amounts of capacity clear in different months of the auction, the proportion of the resource's capacity that satisfies the 12-month test would increase over time. For example, suppose that in each year, a resource clears 30 percent of capacity for each of six months, 70 percent for four months, and 100 percent for two months. In this case, at least 30 percent of the resource's capacity would clear in every month, and thus, the test would be satisfied for 30 percent of the capacity after the first year. At least 70 percent of the resource's capacity would clear in six months of every year, and thus, the test would be satisfied for an additional 40 percent of the resource's capacity some time in the second year. Since the remaining capacity would clear in only two months per year, the test for the remaining capacity would be satisfied at the end of the sixth year.

⁴⁵ Indicated LSEs believe the 15-year maximum duration is too long and believe it could interfere with important public policies. Indicated LSEs October 22, 2010

(continued...)

NYISO justifies this maximum with the argument that a rational potential market entrant will not be willing to accept mitigation for such a long time-period on the uncertain hope that it will reap the benefits of uneconomic entry. This assertion may be true, but a thirty-capability period maximum is arbitrary and not related to the central objective of buyer-side mitigation, which is prevention of uneconomic entry by those that have the ability and incentive to use uneconomic entry as a tool of price suppression. If a resource is not clearing in the market, it is uneconomic and mitigation should continue, regardless of how long it has already been subject to mitigation.

52. In summary, we direct NYISO to revise its tariff to remove the first offer floor duration methodology in section 23.4.5.7(a), the six-capability period minimum in section 23.4.5.7, and the thirty-capability period maximum in section 23.4.5.7(b), and to revise the second methodology of testing for when total cleared UCAP exceeds total nominal UCAP in section 23.4.5.7(c) (which will be the only approved methodology) as discussed above.

C. Offer Floor Exemption Process

1. NYISO's Proposal

53. NYISO states that the currently-effective version of section 23.4.5.7.2 provides that a developer or interconnection customer may request that NYISO determine whether it would be exempt from the offer floor upon execution of all necessary Interconnection Facilities Study Agreements for the ICAP supplier. NYISO states that section 23.4.5.7.2 also requires NYISO to inform the requesting entity of its offer floor and exemption determinations not later than the commencement of the initial decision period for the applicable Interconnection Facilities Study. NYISO states that this language: (1) does not expressly address NYISO's responsibilities if it does not receive a request for an exemption; (2) does not encompass certain types of potential new entrants that might qualify for an exemption; and (3) lacks precision with respect to the deadline for exemption requests, the information that must be provided to NYISO, and the inputs that would be used in the exemption analysis. NYISO states that the current provision also gives potential entrants substantial influence over which in-service dates would be used in the exemption analysis. In addition, NYISO states that the existing language is imperfectly aligned with the "class year" processes provided under Attachment S of NYISO's OATT to determine and allocate the interconnection costs of new projects.

Comments at 12. We note that a prior Commission order stated the New York Commission may request an exemption from buyer-side mitigation for legitimate public policy goals. *See New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 38.

54. NYISO proposes a new section 23.4.5.7.3 to specify that NYISO will make exemption determinations regardless of whether (or when) one is requested and to clarify that NYISO would make the determination for all “examined facilities.”⁴⁶ NYISO also states that this section provides that NYISO will make a Unit Net CONE determination for developers, interconnection customers, and ICAP suppliers for examined facilities and thus, these entities will need to submit certain data and information depending on the category to which they belong.

55. Under the currently effective version of section 23.4.4.7.2, new capacity suppliers are exempt from the offer floor if NYISO’s forecast for: (1) “any” ICAP spot market auction price for the first two capability periods that the ICAP Supplier is reasonably anticipated to offer supply UCAP is greater, with the inclusion of the ICAP supplier, than the highest offer floor based on mitigation net CONE; or (2) the average of the ICAP spot market auction prices in the six capability periods beginning with the first capability period for which the ICAP Supplier is reasonably anticipated to offer UCAP is higher, with the inclusion of the ICAP supplier than the unit net CONE. NYISO proposes to revise the first test to provide that it will use the average of the ICAP spot market auction price during each month of the two starting capability periods instead of the price in “any” one month during that timeframe (Annual Average Rule). NYISO states that using the price from “any” one month has the potential to result in an exemption determination being made based on unrepresentative market conditions that may only exist briefly. NYISO also proposes to add new section 23.4.5.7.3.2 to state that NYISO will compute the “reasonably anticipated ICAP spot market auction forecast price” after accounting for “expected retirements”⁴⁷ for each of the three categories of examined facilities. NYISO states that the tariff would also specify that load forecasts, and information regarding SCR participation, from the most-recently published Gold Book would be used in the calculation. NYISO proposes tariff revisions that direct NYISO to post on its website inputs to the reasonably anticipated ICAP spot market auction forecast prices, expected retirements, and the examined facilities before the initial project cost allocation. In

⁴⁶ NYISO proposes to distinguish three categories of examined facilities and states that the differences among them necessitate the application of different rules in order to timely capture the projects. Services Tariff at proposed section 23.4.5.7.3.

⁴⁷ NYISO states that “expected retirements” would include any generator that provided written notice to the New York Commission that it intends to retire, plus any Unforced Capacity Deliverability Rights or generator smaller than 2 MW that provided written notice to NYISO that it intends to retire. NYISO September 27, 2010 Filing at 12.

addition, NYISO proposes additional minor clarifying edits to the existing exemption test calculation language.

56. NYISO also proposes revisions that clarify and update the timetable for conducting exception analyses and disclosing results. NYISO states that its revised language is intended to more clearly establish that potential entrants will receive exemption and offer floor information that may be critical to their project development decisions in advance of the deadline for deciding whether to accept project cost allocation.

2. Comments and Protests

57. IPPNY states that it supports NYISO's proposal to base the test for exemption from mitigation on the average price during each month of the two starting capability periods (Average Annual Rule), instead of the price in any one month during that time frame.

58. However, IPPNY strongly opposes NYISO's proposed amendments to the mitigation exemption test that it characterizes as allowing a generator to "class-shop" until such time that it can secure an exemption from application of the offer floor. IPPNY characterizes the proposal as contrary to NYISO's comprehensive in-City capacity market mitigation measures and the portion of the Commission's orders accepting this mechanism.⁴⁸ In short, IPPNY asserts that the proposal fails to mandate that a generator determine, at the time the decision to proceed with investment is made, whether it would be able to secure an exemption from mitigation.

59. Hudson Transmission opposes NYISO's tariff changes because, according to Hudson Transmission, they provide only one opportunity to obtain an exemption from market mitigation, and if the new developer fails to obtain an exemption, it could be prohibited from selling capacity through bilateral contracts for up to 15 years.⁴⁹ Hudson Transmission maintains that the fifteen-year exclusion from the ICAP market would be severe for developers who are taking full market risk to develop new transmission infrastructure into New York City, and ratepayers who will be artificially denied the benefits of purchasing capacity over the new transmission line through bilateral contracts.

60. The Indicated LSEs support NYISO's proposal to revise the exemption test by comparing the forecasted clearing prices in the in-City ICAP spot market to a proposed

⁴⁸ IPPNY October 22, 2010 Comments at 8.

⁴⁹ Hudson Transmission October 22, 2010 Comments at 4.

unit's CONE or mitigation net CONE for the three-year period beginning three years from the Class Year because, they assert, this proposal more accurately reflects the actual market conditions at the time the new generating unit is likely to commence commercial operations.⁵⁰ The Indicated LSEs also support NYISO's approach to require each developer to provide its unit net CONE information, regardless of whether it is seeking Energy Resource Interconnection Service or Capacity Resource Interconnection Service rights because this provision will ensure that the developer receives advance information of its likely mitigation status.⁵¹

61. The New York Commission makes limited comments regarding the Offer Floor Exemption Process, stating that an exemption for new entry by merchant developers should be pursued, given that such developers are merely interested in competing for revenues rather than suppressing prices.

62. New York City Suppliers state the Average Annual Rule is consistent with NYISO's prior filings and past Commission orders in the in-City ICAP proceeding.⁵² New York City Suppliers state the Commission should approve this clarification to NYISO's Services Tariff to specify more clearly that average annual data will be used for the first prong of the mitigation exemption test; in this regard, New York City Suppliers state that they agree with NYISO's proposal. New York City Suppliers assert that analyzing the first prong of the mitigation exemption test based upon the average expected clearing price during each month of the two starting capability periods (i.e. one year) is consistent with NYISO's proposal for this exemption to the offer floor bidding requirement, and is superior to using a monthly determination.⁵³

63. However, New York City Suppliers assert the fundamental flaw of proposed new section 23.4.7.3.5 is that it would allow a generator that has already made the substantial investment decision, and has even completed construction, to seek an exemption from mitigation. The New York City Suppliers allege that this is a possibility because a new resource can choose to participate in other markets and wait to participate in the ICAP market until favorable conditions would allow the new resource to be granted an exemption from mitigation.⁵⁴ According to New York City Suppliers, this proposed new

⁵⁰ Indicated LSEs October 22, 2010 Comments at 6.

⁵¹ *Id.* at 7.

⁵² New York City Suppliers October 22, 2010 Protest at 17.

⁵³ *Id.*

⁵⁴ *Id.* at 41.

section 23.4.7.3.5 removes the necessary deterrent to new entry by uneconomic new resources. New York City Suppliers maintain that in order to influence the decision making process of the new entrant and deter uneconomic entrants from entering the market, the exemption determination should occur before the developer commits to go forward with the project.⁵⁵ Furthermore, New York City Suppliers contend if a unit or an Unforced Delivery Capacity Rights project elects to enter the market as an Energy Resource Interconnection Service resource, the subsequent decision to sell capacity does not warrant an exemption retesting. However, if allowed at all, the New York City Suppliers contend that retesting should be available in limited circumstances.⁵⁶

64. The New York City Suppliers also protest NYISO's proposed revisions to the mitigation exemption test, proposed in the new section 23.4.5.7.3, which states that entities may receive offer floor exemptions creating categories of "examined facilities."⁵⁷ New York City Suppliers asserts that various aspects of the section are vague, while others could be read to undercut the efficacy of certain provisions. Likewise, New York City Suppliers contend the proposed data assumption provisions for the mitigation exemption test are based on outdated information. New York City Suppliers maintain the NYISO Services Tariff should be clarified to assure that: (1) generators are considered for exemptions as part of their designated class year; (2) the mitigation exemption test for any class year correctly accounts for all generation that is under construction and will be entering service, (3) it is clear how multiple generators in a class year would be treated; (4) sequential forecasts for purposes of the mitigation exemption test would not be permitted; and (5) it is clear how retirements will be modeled in the mitigation exemption test.⁵⁸ New York City Suppliers also requests that NYISO be required, in an attempt to avoid the usage of outdated information, to update the information used in the mitigation exemption test, including its forecasts and demand curve assumptions, before it performs its mitigation exemption test each year.⁵⁹

65. Hudson Transmission maintains that the Commission should either reject the data request and penalty language as it relates to the offer floor exemption analysis in sections 23.4.5.7.3.3 and 23.4.5.7.3.4 of Attachment H, or direct NYISO to establish

⁵⁵ *Id.* at 42.

⁵⁶ *Id.* at 45.

⁵⁷ *Id.* at 46.

⁵⁸ *Id.* at 47-51.

⁵⁹ *Id.* at 53.

some reasonable bounds on the scope of data requested, the time for responding, and the results of failing to timely respond to a data request.

66. Hudson Transmission states the proposed penalty for failing to provide the data is automatic mitigation and prohibition from selling bilateral capacity for up to 15 years and Hudson Transmission believes this could empower NYISO to engage in undue discrimination against similarly situated parties. Hudson Transmission states that NYISO's proposal to have plenary authority over interconnection customers, with severe consequences, is analogous to the plenary authority of PJM over interconnection customers that the Commission rejected in *Neptune*.⁶⁰

67. Hudson Transmission states that the Commission should instruct NYISO to develop a process for revising or correcting deficiencies in the response to the data request, rather than allowing NYISO to impose the all or nothing penalty proposed by NYISO. Hudson Transmission states that this could also include a dispute resolution process for such data requests, data responses, and the analysis itself, much like the Commission includes as part of the standard large facility interconnection process. Hudson Transmission does not oppose NYISO's proposal to collect data and information, but the Commission should either reject the instant NYISO proposals outright, or direct NYISO to establish a just and reasonable process for issuing and responding to such data requests.

68. In addition, Hudson Transmission states it has a fundamental concern with NYISO's proposal to remove its analysis of each facility based on that facility's anticipated operating date, and instead analyze all facilities by assuming that every facility will start three years after its Class Year. Hudson Transmission maintains that this is an artificial and incorrect assumption that will lead to erroneous results from the exemption tests. Hudson Transmission states that the consequences of the market mitigation and exemption analysis are so significant and so severe (possible prohibition from selling bilateral capacity for up to 15 years), it makes no sense to make an arbitrary assumption on one of the key factors for each facility.⁶¹ Hudson Transmission states that NYISO's proposal to revise section 23.4.5.7.2 of the tariff to replace the actual reasonably anticipated starting date for each facility with an arbitrary and inaccurate assumed starting date of three years after the Class Year is not just and reasonable, would result in undue discrimination against facilities that do not fit the assumption and should be rejected by the Commission.

⁶⁰ Hudson Transmission October 22, 2010 Comments at 7 (citing *Neptune Regional Transmission System, LLC*, 110 FERC ¶ 61,098 (2005) (*Neptune*)).

⁶¹ *Id.* at 8.

3. Answers

69. Bayonne states that, as a new entrant into the Zone J (New York City) Market, it seeks to avoid confusion and possibly inappropriate outcomes by clarifying certain aspects of the New York City Suppliers' requests to the Commission.⁶² Bayonne disagrees with the contention of the New York City Suppliers that "[a]ny projects expected to be online by summer 2011 should be incorporated into the projected ICAP spot market auction price when evaluating the Bayonne Energy project in class year 2009."

70. Bayonne states that the New York City Suppliers are attempting to dictate how the NYISO should handle a specific competitor's (Bayonne's) mitigation exemption test.⁶³ Further, Bayonne maintains that because the NYISO's filing is generic, it is inappropriate and beyond the scope to prescribe the treatment of any proposed generator's capacity in the instant proceeding.⁶⁴ Bayonne contends the only issue in this proceeding is whether the amendment to Attachment H is just and reasonable, not its application to specific generators, which is beyond the scope of this proceeding.⁶⁵

4. Commission Determination

71. We accept NYISO's proposals for revising its exemption tests, subject to the conditions discussed below. We find it reasonable that under the proposed revisions, NYISO will make exemption determinations regardless of whether or not an exemption test is requested and NYISO will clarify that these provisions include all potential new market entrants. It is reasonable for NYISO to provide an exemption test before a supplier begins construction of a new resource, as NYISO's tariff current 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. 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

⁶² Bayonne November 2, 2010 Answer at 1-2.

⁶³ *Id.* at 3.

⁶⁴ *Id.* at 3-4.

⁶⁵ *Id.* at 4.

it will examine for exemptions and clarify the information submission requirements for examined facilities.

72. We find that NYISO's proposed language in section 23.4.5.7.3.3 regarding its data submission requirements for qualification for exemptions or offer floor mitigation to be too vague without a reference to the procedures it will follow for establishing deadlines. However, we do not agree with Hudson Transmission that NYISO should be required to list all of the data and include a dispute resolution process in the tariff. We note that the Commission has already accepted similar, relevant language for SCRs that references data response requirements in the "ISO Procedures" in section 23.4.5.7.5. We find that a similar reference is appropriate here. Therefore, we direct NYISO to clarify its data submission requirements in section 23.4.5.7.3.3 within 60 days of the date of this order.

73. NYISO assumes in its mitigation exemption determination a start date that is three years after a project's class year. As explained by Hudson Transmission, NYISO's proposed revision would mean that Hudson Transmission's HVDC line would be assumed to enter the market in 2011 rather than its actual projected date of 2013. NYISO has not provided sufficient support for its inclusion of this assumption beyond its general statement that it is part of NYISO's overall effort to better coordinate the exemption test with its interconnection procedures. Therefore, we direct NYISO to either file support for a start date three years after a project's class year or to delete this provision, in a compliance filing to be made within 60 days of the date of this order. With regard to Hudson Transmission's concern that a resource's failure to secure an exemption, on the one-time basis as proposed by NYISO, could unreasonably mitigate such a resource, we find that such concern is addressed by the Commission's modifications to the proposed in-City Buyer Side Mitigation procedures, as described *infra*.

74. We agree with Bayonne that is inappropriate and outside the scope of this proceeding to prescribe the treatment of any proposed supplier's capacity in the instant proceeding. Moreover, we find that the New York City Suppliers' requests for clarifications to the exemption test are unnecessary as we find that NYISO's proposal, as modified herein, is just and reasonable. Although, we do not find additional clarifications necessary at this time, we note that New York City Suppliers can take up their requests in the ongoing NYISO stakeholder process regarding in-City mitigation.⁶⁶

⁶⁶ In the instant filing, NYISO states that "action on additional potential improvements [to the exemption test] is being deferred to allow more time for further stakeholder consideration, in some cases as a result of stakeholder votes expressly asking the NYISO to do so." See NYISO September 27, 2010 Filing at 4.

D. Effective Date**1. NYISO's Proposal**

75. NYISO originally requested that the Commission issue an order no later than October 27, 2010, and that the Commission waive the 60-day prior notice period and make this filing effective the day after the Commission order is issued, i.e., October 28, 2010, with the exception of certain provisions for which NYISO sought a September 28, 2010 effective date. NYISO stated, however, that if the Commission does not issue an order by October 27, 2010, NYISO did not seek a waiver of the sixty-day notice period. It stated that, if that is the case, it asked that all of the proposed tariff provisions go into effect at the conclusion of the usual notice period. On October 1, 2010, NYISO filed a motion to amend its request for expedited Commission action stating that it requests Commission action by November 10, 2010, with an effective date for most of the proposed tariff provisions one day after the Commission issues its order. NYISO states that it is still requesting an effective date of September 28, 2010, for changes to the portions of proposed new sections 23.4.5.7.3 and 23.4.5.7.3.3 that would establish information and data submission requirements and new section 23.4.5.7.3.4 which would define the consequences of non-compliance with those obligations.

2. Protests

76. Hudson Transmission states that NYISO's request for an expedited decision on its proposed revisions leaves market participants insufficient time to analyze and understand the proposal. Hudson Transmission maintains that the proposed changes are extensive, complex, and will have a fundamental impact on the management of NYISO's capacity markets and therefore the Commission should not rush to issue a decision, but rather proceed in due course. Hudson Transmission maintains that a contentious process preceded this filing because of the complicated nature of the proposal and that because of this the Commission should reject the request for expedited treatment.

77. In addition, Hudson Transmission states that it requests the Commission to reject NYISO's request for a waiver of prior notice requirements, and to make the proposed tariff revisions, as modified, effective when the Commission issues its order in this proceeding. Hudson Transmission maintains this will prevent the potential for harm in the event NYISO decides to impose offer floor mitigation penalties on parties for failure to comply with data requests NYISO issued before the Commission has acted on the proposed revisions.

3. Commission Determination

78. As we are acting after November 10, 2010, NYISO's alternate request to accept the subject proposed tariff provisions effective at the conclusion of the normal 60-day prior notice period will be granted. Therefore, except to the extent certain proposed tariff

provisions are rejected, we will accept the proposed tariff provisions effective November, 27, 2010, subject to the conditions of this order.

The Commission orders:

(A) NYISO's proposed tariff revisions are hereby accepted in part and rejected in part, to be effective November 27, 2010, subject to the conditions discussed in the body of this order.

(B) NYISO is hereby directed to file revised tariff provisions or support as discussed in the body of this order, within 60 days of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.