

151 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Astoria Generating Company, L.P. and
TC Ravenswood, LLC

Docket No. EL11-50-001

v.

New York Independent System Operator, Inc.

ORDER ON CLARIFICATION AND REHEARING

(Issued April 16, 2015)

1. In this order, the Commission grants clarification, in part, and grants, in part, and denies, in part, rehearing of its September 10, 2012 order,¹ which granted, in part, and denied, in part, a complaint filed by Astoria Generating Company, L.P., (Astoria) and TC Ravenswood, LLC (Ravenswood) (collectively, Complainants) against the New York Independent System Operator, Inc. (NYISO). Complainants alleged that NYISO improperly implemented its buyer-side market power mitigation provisions in the New York City (NYC) installed capacity (ICAP) market and violated its Market Administration and Control Area Services Tariff (Services Tariff). Complainants requested relief with respect to the July 2011 auction and any subsequent ICAP spot market auctions conducted until prospective relief is in place.

I. Background

2. NYISO administers market power mitigation rules in the NYC ICAP market to guard against the exercise of market power. In the case of existing resources, market power mitigation entails applying bid caps to prevent higher prices attributable to economic withholding. Competitive capacity offers from existing resources are expected to be quite low since most existing resources recover their operating costs through

¹ *Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 (2012) (September 10, 2012 Order).

participation in energy and ancillary services markets. In the case of new resources, market power mitigation entails applying bid floors to prevent lower prices attributable to below-cost bids from uneconomic entry. Competitive capacity offers from new entrants are expected to be higher than those of existing resources because they should reflect the net cost of new entry. In this way, market power mitigation protects the NYC ICAP market from both seller-side and buyer-side market power. Market power mitigation ensures that market clearing prices are a reliable competitive indication of the value of capacity to guide efficient decisions to build new capacity and retire existing capacity. Unless exempt from this mitigation, new NYC generator ICAP suppliers that enter the capacity market must do so at a price no lower than the applicable Offer Floor.² As relevant, the Offer Floor of section 23.4.5.7 of the Services Tariff is defined in section 23.2.1 as the lower of: (1) 75 percent of the net cost of new entry of the proxy peaking unit in NYC that is used to establish the NYC ICAP demand curve, which NYISO refers to as Mitigation Net CONE³ or (2) the new entrant's actual net cost of new entry for the specific unit, which we refer to in this proceeding as the Unit Net CONE.⁴ We refer here to the first Offer Floor as the Default Offer Floor, and to the second as the Unit Offer Floor.

² Services Tariff, § 23.4.5.7.

³ *Id.* This section provides that what we refer to here as the Default Offer Floor is 75 percent of “Mitigation Net CONE,” a term NYISO proposed in a proceeding that initially established the buyer-side mitigation rules of Attachment H (*See* August 24, 2010 compliance filing in Docket No. ER10-2371-000). The Commission accepted NYISO's proposed definition of Mitigation Net CONE on March 19, 2015, in *New York Indep. Sys. Operator*, 150 FERC ¶ 61,208, at P 47 (2015). Mitigation Net CONE is defined as “the capacity price on the currently effective [NYC] Demand Curve corresponding to the average amount of excess capacity above the [NYC] Installed Capacity requirement, expressed as a percentage of that requirement, that formed the basis for the Demand Curve approved by the Commission.” Stated another way, Mitigation Net CONE is the price equal to what the Commission defined as the “net CONE” used to design the NYC demand curves. *See New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 31 (2010) (May 20, 2010 Order).

⁴ Services Tariff, § 23.4.5.7.3.6.

3. On September 27, 2010, NYISO filed revisions to its mitigation provisions. These were accepted, in part, and rejected, in part, in a Commission order issued November 26, 2010.⁵ We refer to those rules that were in place prior to the November 27, 2010 effective date of the tariff revisions as the Pre-Amendment Rules and they govern all determinations made prior to the effective date of the new rules. Of relevance in the instant proceeding, the Pre-Amendment Rules (redesignated section 23.4.5.7.2) governing the mitigation exemption test provided that:

ii) An Installed Capacity Supplier shall be exempt from an Offer Floor if:
(a) any ICAP Spot Market Auction price for the two Capability Periods beginning with the first Capability Period for any part of which the Installed Capacity Supplier is reasonably anticipated to offer to supply [unforced capacity (UCAP)] (the “Starting Capability Period”) is projected by the ISO to be higher, with the inclusion of the Installed Capacity Supplier, than the highest Offer Floor based on Net CONE that would be applicable to such supplier in such Capability Periods, or (b) the average of the ICAP Spot Market Auction prices in the six Capability Periods beginning with the Starting Capability Period is projected by the ISO to be higher, with the inclusion of the Installed Capacity Supplier, than the reasonably anticipated Unit Net CONE of the Installed Capacity Supplier. The Developer or Interconnection Customer may request the ISO to make such determinations upon execution of all necessary Interconnection Facilities Study Agreements for the Installed Capacity Supplier.⁶

⁵ *New York Indep. Sys. Operator*, 133 FERC ¶ 61,178 (2010) (November 26, 2010 Order), *order on compliance*, 134 FERC ¶ 61,083 (February 2, 2011 Order), *order on reh’g*, 136 FERC ¶ 61,077 (2011) (August 2, 2011 Order).

⁶ NYISO, FERC Electric Tariff, Original Vol. No. 2, Attachment H, First Revised Sheet No. 476.03-476.04.

4. The exemption test is explained in detail in the September 10, 2012 Order.⁷ For purposes here, it suffices to recognize that the prong (b) Unit exemption test measures whether the generator's expected capacity revenues would exceed its reasonably anticipated Unit Net CONE during the first three years of operation.

5. On July 11, 2011, Complainants filed the instant Complaint which alleged that NYISO improperly implemented its buyer-side market mitigation rules that existed prior to November 26, 2010.⁸ Complainants in the instant docket alleged that NYISO's implementation of its (Pre-Amendment) buyer-side mitigation rules violated the requirements of its Services Tariff and prior Commission orders in that NYISO erred in its mitigation exemption determination for the new 575 MW generating facility owned by Astoria Energy II LLC (Astoria II project) and the approximately 512 MW generating facility being developed by Bayonne Energy Center, LLC (Bayonne project). In particular, Complainants alleged that NYISO permitted the Astoria II project to offer into the July 2011 ICAP auction at a price that was below competitive levels and below its estimated cost. Similarly, Complainants asserted that the Bayonne project could not properly qualify for an exemption.

II. Summary of the September 10, 2012 Order

6. In the September 10, 2012 Order, the Commission granted, in part, and denied, in part, the Complaint and directed NYISO to redo its exemption determinations for the Astoria II and Bayonne facilities consistent with the September 10, 2012 Order. With respect to the timing of the exemption determination, the Commission found that the Services Tariff required that the exemption determination occur after the relevant cost

⁷ As pertains to new entry, the Commission recently directed, pursuant to FPA section 206, modifications to NYISO's buyer-side mitigation rules to allow for private investors that certify they are a purely merchant investment, with no out-of-market subsidy, and relying solely on market revenues to enter the ICAP market unmitigated. *Consolidated Edison Company of New York, Inc.*, 150 FERC ¶ 61,139, at PP 4, 45 (2015).

⁸ As relevant here, in the summer of 2011, the Commission received a second complaint contesting NYISO's implementation of the buyer-side market mitigation rules. On June 23, 2011, Astoria, NRG Companies, and TC Ravenswood filed a complaint in Docket No. EL11-42-000 alleging that NYISO, on an ongoing basis, was violating the requirements of its Services Tariff in its implementation of the buyer-side market power mitigation rules. The Commission issued an order on the complaint on June 22, 2012. *Astoria Generating Co., L.P., et al. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 (2012) (June 22, 2012 Order), *order on reh'g*, 151 FERC ¶ 61,043 (2015).

allocation is accepted by the project developer and the cost allocation process is final and complete. Accordingly, the Commission ruled that NYISO's exemption decisions at issue violated section 23.4.5.7.2 of the Pre-Amendment Rules by reason of NYISO's failure to wait to perform the determinations until a revised interconnection cost allocation was accepted and became final.⁹ The Commission, however, waived this tariff requirement given the inordinately long time it took NYISO to complete the final Project Cost Allocation for the 2009 and 2010 class years and accepted the exemption determinations based on the most-recent interconnection process cost allocation to each project developer at the time in 2010.¹⁰

7. One issue raised by the Complaint was from what time frame should NYISO have used data and information to make the cost and price projections required to perform the mitigation exemption determination for the Astoria II project. The Commission referred to this date as the "Analysis Reference Date." In the September 10, 2012 Order, the Commission found that NYISO's decision to project capacity prices for Astoria II based on the information available on a so-called project "going-forward date" of July 11, 2008, was neither reasonable nor consistent with the Pre-Amendment Rules in the Services Tariff. Rather, the Commission found that the Unit mitigation exemption analysis for the Astoria II project should be based on the most up-to-date information available during the period when NYISO was evaluating the request to exempt Astoria II and Bayonne from Offer Floor mitigation, i.e., during 2010.¹¹

8. Another issue raised by the Complaint dealt with the requirement of the Pre-Amendment Unit mitigation exemption test to calculate energy and ancillary services revenues, which must be subtracted from Unit gross CONE in order to arrive at Unit Net CONE. The September 10, 2012 Order concluded that NYISO's methodology for calculating these revenues was reasonable and that NYISO appropriately used natural gas futures prices in estimating revenues instead of historical gas prices as proposed by Complainants.

9. The Complainants also raised concerns with the treatment of sunk costs in the calculation of Unit Net CONE. Complainants asserted that NYISO erred when it excluded from the calculation of Unit Net CONE an amount Astoria II paid to Astoria Energy LLC (Astoria I) for shared facilities on the theory that those costs were sunk by virtue of having been incurred by Astoria I. The Commission found that NYISO's exclusion of these costs was improper based on the tariff definition of Unit Net CONE as

⁹ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 63.

¹⁰ *Id.* P 64.

¹¹ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 78.

the “localized levelized embedded costs of a specified Installed Capacity supplier, including interconnection costs. . . net of likely projected annual Energy and Ancillary Services revenues.”¹² The Commission found that the term “embedded costs” includes all costs that have been incurred in the past.¹³

10. The cost of capital is another factor in the calculation of Unit Net CONE. With respect to cost of capital, in the September 10, 2012 Order, the Commission agreed with Complainants that NYISO’s use of the actual cost of capital was inappropriate because that cost resulted from a discriminatory request for proposals (RFP) process. Drawing on *PJM Power Providers Group v. PJM Interconnection, L.L.C.*,¹⁴ the Commission concluded that the New York Power Authority’s (NYPA) RFP process, which resulted in Astoria II entering into a power purchase agreement with NYPA, was discriminatory because the RFP was limited to new resources and thus, the resulting lower financing costs do not reflect competitive market processes. Accordingly, the Commission rejected use of Astoria II’s actual cost of capital and directed that NYISO should, instead, use the proxy unit’s cost of capital used to derive Mitigation Net CONE.

11. Finally, the September 10, 2012 Order directed NYISO to recalculate its exemption determinations using different, updated data on prices, revenues, and costs as of October 2012 and to recalculate Astoria II’s Unit Net CONE to include its share of the cost of common facilities, its share of class year 2010 Project Cost Allocation, and its out-of-pocket costs (if any) of transferred capacity deliverability rights as of October 2010.¹⁵ The September 10, 2012 Order also establishes that even if NYISO finds that Astoria II or Bayonne is subject to an Offer Floor, NYISO will not be required to rerun auctions, but rather the Offer Floor will be applied prospectively.

III. Requests for Rehearing

12. On October 10, 2012, Bayonne Energy Center, LLC, Hess Corporation, and ArcLight Energy Partners Fund III, L.P. (collectively BEC) filed a request for clarification and/or rehearing but requested that the Commission defer action on the filing until BEC makes a subsequent filing to request Commission action or to withdraw the October 10, 2012 filing. Also on October 10, 2012, NYPA, the City of New York, the

¹² September 10, 2012 Order, 140 FERC ¶ 61,189 at P 121 (quoting Services Tariff, § 23.2.1).

¹³ *Id.*

¹⁴ 137 FERC ¶ 61,145 (2011) (*PJM*).

¹⁵ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 140.

Metropolitan Transportation Authority, the Port Authority of New York and New Jersey, the New York State Office of General Services, and the New York City Housing Authority (collectively, Governmental Customers); Complainants; Indicated New York Transmission Owners (NYTOs);¹⁶ American Public Power Association and the New York Association of Public Power (jointly, Public Power Entities); NYISO; and NRG Companies¹⁷ filed requests for rehearing and/or requests for clarification.

13. On October 11, 2012, the New York State Public Service Commission (New York PSC) filed a request for rehearing out-of-time. On October 15, 2012, the New York PSC filed a motion for waiver of Commission procedures to allow its late-filed rehearing request to be deemed timely and a motion for a stay of the portion of the September 10, 2012 Order that subjected Astoria to a new mitigation exemption determination.

14. On October 16, 2012, Multiple Intervenors¹⁸ filed a motion to intervene out of time and on October 17, 2012, Multiple Intervenors filed comments. On October 19, 2012, Complainants filed an answer to the request for stay contained in the New York PSC's late-filed request for rehearing. Also on October 19, 2012, Natural Resources Defense Council filed a motion to intervene out-of-time. On October 25, 2012, IPPNY and Complainants filed answers. Also on October 25, 2012, as supplemented on October 31, 2012, Hudson Transmission Partners, LLC (Hudson) filed an answer to NYISO's request for clarification or rehearing. On October 26, 2012, the New York Energy Consumers Council filed an answer endorsing Governmental Customers' request for rehearing. On November 8, 2012, Governmental Customers and NYPA filed a motion for stay of the portion of the September 10, 2012 Order that subjected Astoria II to a new mitigation exemption determination. On November 9, 2012 NYPA and the City of New York filed an answer to Complainants' October 25, 2012 Answer.

¹⁶ Indicated NY Transmission Owners consists of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

¹⁷ The NRG Companies consist of NRG Power Marketing, Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power.

¹⁸ Multiple Intervenors states that it is an unincorporated association of over 55 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

A. Procedural Matters

15. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2014) prohibits an answer to a request for rehearing. Accordingly, we reject the answers filed in this proceeding. We also deny New York PSC's motion for waiver of Commission procedures and the motion for stay. We grant the requests to intervene out-of-time as late intervention did not harm other parties or delay the proceeding.

B. Substantive Matters

16. One or more of the parties requesting rehearing raise allegations regarding (1) general issues related to the September 10, 2012 Order and the application of the buyer-side mitigation principles; (2) specific legal errors; (3) the timing of the mitigation exemption determination; (4) the analysis reference date; (5) the treatment of sunk costs; (6) the cost of capital; (7) the failure to adjust for seasonal differences in capacity ratings; and (8) the projection of energy and ancillary services revenues. In addition to these issues, NYISO asks for clarification with respect to certain rulings in the June 22, 2012 Order and the September 10, 2012 Order that, according to NYISO, appear to be broadly applicable to buyer-side mitigation determinations regardless of whether they are conducted under the Pre-Amendment Rules or the current buyer-side mitigation rules.

1. Application of Buyer-Side Mitigation Principles

17. Governmental Customers argue that the September 10, 2012 Order represents an unwarranted and largely undefined expansion of NYISO's buyer-side market power rules and that these rules, originally designed to protect the market from manipulative entry have been expanded into a general policy that micro-manages all new entry and appears to protect incumbents from competition. Governmental Customers argue that, on its face, the September 10, 2012 Order addresses technical mitigation issues such as capital costs and going-forward date, but its impact is more pervasive and it delegitimized an arms-length power purchase agreement with a merchant generator. Governmental Customers contend that NYPA's decision to contract for the output of the Astoria II project: (1) was motivated by a desire to find for its customers a new source of capacity that was cleaner and more efficient than the last-generation plants that had dominated the highly-concentrated New York City market; (2) followed an arms-length, open and transparent process, in which a host of independent suppliers submitted proposals, and which was consistent with the requirements imposed on governmental agencies under New York law; and (3) resulted in a unit that is a state-of-the-art baseload facility built to serve NYPA's Governmental Customers and to address what were, at the time the decision was

made to proceed with the project, undisputed significant concerns about the future reliability of the electric system.¹⁹

18. Governmental Customers assert that the September 10, 2012 Order effectively nullifies the benefits that Governmental Customers were to receive under the Astoria II power purchase agreement. They state that if Astoria II is deemed mitigated, NYPA's customers must replace that capacity as if Astoria II is not available to produce energy and NYPA's customers will be required to pay tens of millions of dollars in duplicative capacity payments to the incumbent generators. They add that a hugely capital intensive investment in a state-of-the-art combined cycle facility that will contribute to system reliability and improved environmental conditions in New York City for decades should not be deemed uneconomic or unneeded by attributing to the investor perfect foresight of the prices that would be the result of a six-month strip auction for residual capacity a few years into the future, which is what the September 10, 2012 Order does. Governmental Customers assert that while the dysfunction in the capacity market rules is not at issue here, the Commission's interpretation of those rules in this case will result in significant over-mitigation both for Astoria II and others. Further, according to Governmental Customers, such a result is anti-competitive and inefficient, and it puts the interests of a select few market participants ahead of competition and the interests of customers by effectively closing off new entry into the nation's most constrained market and largest city.

Commission Determination

19. We directly address the technical issues related to NYISO's mitigation determination later in this order, but here reject Governmental Customers' general contentions regarding the September 10, 2012 Order's impacts on the NYC ICAP market. As an initial matter, Governmental Customers' contention that the September 10, 2012 Order uses NYISO's buyer-side market power rules to impede new entry to the NYC ICAP market and thereby protect incumbent generators from competition is without merit. The September 10, 2012 Order found that NYISO did not properly apply the mitigation exemption provisions of its Services Tariff, which may have resulted in flawed exemption determinations for the Astoria II and Bayonne projects. Although there undoubtedly are significant benefits associated with bringing efficient and environmentally friendly new generation to New York City, the issue before the Commission is whether such new generation was economic as measured by the test incorporated into NYISO's tariff. Our September 10, 2012 Order found that certain determinations made by NYISO in conducting the test did not conform to the

¹⁹ Governmental Customers Request for Rehearing at 8-10.

requirements of its tariff and, therefore, we required NYISO to redo the tests in conformance with such requirements.

20. Contrary to Governmental Customers' contention that the September 10, 2012 Order is anti-competitive and inefficient, the provisions of NYISO's tariff at issue are designed to ensure that competition will not be harmed by the entry of uneconomic investment. The tariff does this by requiring NYISO to re-determine whether the entry of Astoria II and Bayonne were economic as measured by the tariff. Our adherence to the provisions of NYISO's tariff will ensure that prospective new entry will be able to rely on it for determinations of whether prospective new entry may be mitigated, rather than be faced with the uncertainty that unknown factors will enter into such mitigation determination. This will, contrary to Governmental Customers' assertions, enhance new competitive entry rather than impede it. We also disagree that our decision will result in over-mitigation for Astoria II and others, as the mitigation test provisions of NYISO's tariff were designed to impose mitigation only when a new entrant is determined to be uneconomic; if a new entrant is determined to be economic, it will not be mitigated.²⁰ Furthermore, this complaint proceeding addresses the *application* of the mitigation test provisions of NYISO's tariff that we have previously found to be just and reasonable. No party has challenged the tariff provisions themselves.²¹

21. In addition to finding that NYISO had not adhered to certain provisions of its Services Tariff, the September 10, 2012 Order found that the RFP process that resulted in the NYPA power purchase agreement with Astoria II was discriminatory because it was limited to new resources, and that it resulted in financing costs for Astoria II that were not reflective of competitive market processes. The Commission therefore deemed the power purchase agreement an irregular or anomalous cost advantage and directed NYISO to use the proxy cost of capital.

²⁰ Pursuant to our September 10, 2012 Order, NYISO re-determined whether Astoria II and Bayonne projects were economic under its Services Tariff and found Astoria II to be uneconomic and therefore subject to mitigation, while finding Bayonne to be economic and not subject to mitigation. NYISO, *Notice of BSM Determinations Nov. 6, 2012*, http://www.nyiso.com/public/webdocs/markets_operations/market_data/icap/In-City_Mitigation_Documents/In-City_Mitigation_Documents/NYISO_Notice_of_BSM_Determinations_Nov_6_2012.pdf.

²¹ As stated earlier the tariff provisions applicable to this proceeding were those effective prior to November 27, 2010 (i.e., the Pre-Amendment provisions). Many of the Pre-Amendment provisions have been carried forward and continue in effect after November 27, 2010.

2. Allegations of Legal Errors

22. Governmental Customers assert that the September 10, 2012 Order erred by ordering a re-test for Astoria II without finding a tariff violation.²² Governmental Customers argue that because the tariff was silent on the matters upon which the Commission ruled, under the Federal Power Act (FPA) and Commission precedent, the substantive findings of the September 10, 2012 Order should have applied only to mitigation analyses performed after a properly established refund effective date.²³ They state that retroactive refund relief in the form of a mitigation re-test for Astoria II would have only been legally supported by the Commission finding that NYISO violated its tariff.

23. Governmental Customers state that the Commission ruled on this very question in a case involving PJM Interconnection, L.L.C. (PJM), wherein the Commission concluded:

In order to receive refunds or other remedies with respect to the Meadowbrook Outage, PPL [EnergyPlus, LLC] had to establish that PJM violated its Tariff. . . . If the Commission had found that PJM had not violated its Tariff but had otherwise acted in an unjust and unreasonable or unduly discriminatory manner, PPL Parties would have been eligible for refunds only beginning the date the Complaint was filed.²⁴

24. Governmental Customers argue that the same rule must apply here. They assert that the September 10, 2012 Order provides new guidance, not present in the tariff, on key inputs to the Unit Net CONE analysis including: 1) how NYISO should interpret the term “embedded costs”; (2) when purchase decisions require the use of proxy capital costs in place of actual capital costs; and (3) what reference date to use in mitigation analyses. Governmental Customers state that, with respect to embedded costs, the Commission found that it was “improper for NYISO to exclude the costs associated with

²² Governmental Customers Request for Rehearing, at 12. Governmental Customers note that the September 10, 2012 Order is silent on the standard of review the Commission is applying or upon what authority it bases its order to re-do the mitigation test for Astoria II, a silence which, according to Governmental Customers, is error in and of itself. *Id.* n.23.

²³ *Id.* at 12.

²⁴ Governmental Customers Request for Rehearing at 12-13 (citing *PPL EnergyPlus, LLC v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,060, at P 19 and n.8 (2011) (*PPL*)).

the shared facilities from the calculation of Astoria II's Unit Net CONE based not on the tariff, but on the 'common meaning' of the term 'embedded costs.'"²⁵ They also assert that, with respect to capital costs, the Commission finding that NYISO should use proxy capital costs because NYPA's RFP was discriminatory,²⁶ was a matter of applying new policy, not a test found in the tariff. They further state that, with regard to the reference date, the Commission noted that the tariff was silent on the issue, but nevertheless found NYISO's approach unreasonable.²⁷ Therefore, according to Governmental Customers, like in *PPL*, the Commission interpreted discretion-based tariff provisions, and thus, could not reasonably have concluded that NYISO violated the filed rate. Governmental Customers add that *PPL* makes it clear that, even if NYISO acted in an unjust and unreasonable or unduly discriminatory manner, the Commission is still barred from invoking retroactive remedial measures that pre-date a refund effective date.²⁸ They also state that correcting past errors upon finding a tariff violation is a very different action than providing interpretative guidance on questions the tariff did not address at all, which, according to Governmental Customers, is what the Commission did in this case.²⁹ Governmental Customers argue that the reason why the Commission's tariff interpretation is not sufficient grounds for retroactive relief is that it would violate the foundational premise of the filed rate doctrine by depriving affected parties of prior notice and in the instant case, neither NYISO nor its stakeholders had notice of a rate change or a rate re-interpretation before the Complaint was filed, especially in light of the Commission's prior holding that "a mitigation exemption determination once granted cannot be revoked."³⁰

²⁵ *Id.* at 13 (citing September 10, 2012 Order, 140 FERC ¶ 61,189 at P 121).

²⁶ *Id.* at 13-14 (citing September 10, 2012 Order, 140 FERC ¶ 61,189 at P 135).

²⁷ *Id.* at 14 (citing September 10, 2012 Order, 140 FERC ¶ 61,189 at P 81).

²⁸ Governmental Customers add that *PPL* is consistent with the long-understood operation of FPA section 206, in that in response to a complaint the Commission's ability under FPA section 206 to "fix" a rate is prospective only. *Id.* at 14-15.

²⁹ Governmental Customers argue that the Commission has found that a utility interpreting gaps in the filed rate is not legally equivalent to violating that filed rate and is thus not a sufficient basis for the Commission to order retroactive remedies. *Id.* at 15-16.

³⁰ *Id.* at 16 (citing August 2, 2011 Order, 136 FERC ¶ 61,077 at P 20).

25. Governmental Customers also argue that the Commission erred in substituting its judgment for the objective determinations of NYISO and the MMU. They assert that the Commission has emphasized the need for ISO/RTOs to exercise reasonable discretion,³¹ and that this discretion is particularly applicable where there is an absence of prescriptive tariff detail.³² They further assert that in light of its precedent and its reliance on ISO/RTOs to ensure that rates remain just and reasonable, the September 10, 2012 Order's lack of deference to the independence of NYISO and the MMU is troubling and introduces uncertainty into future such determinations. Therefore, according to Governmental Customers, the Commission should grant rehearing on this question.

26. Governmental Customers assert that the September 10, 2012 Order failed to address significant customer impacts, and that it would result in an unnecessary double-charge, estimated by Governmental Customers to be approximately \$60 million annually. Governmental Customers argue that the Commission must address all significant issues presented to it,³³ and, in addition, the September 10, 2012 Order is inconsistent with the Commission's core statutory responsibility to protect customers. They contend that the September 10, 2012 Order therefore fails to constitute reasoned decision-making.

27. Governmental Customers contend that the Commission erred in the September 10, 2012 Order by making a prudence-based "disallowance" without holding itself to long-held prudence review standards for utility regulators.³⁴ Governmental Customers assert that the Commission's statement that "[it] would expect that a prudent developer contemplating the expenditure of over a billion dollars to build a plant would periodically re-evaluate the economics of its potential investment"³⁵ ignores the realities of developing long-life assets, and is contradicted by the Commission's own bedrock principles of the prudence standard it invokes. Governmental Customers state that the Commission's standard for reviewing prudence is based on the "reasonable person" test and is well established³⁶ and generally, utility management is presumed to have acted prudently.³⁷ They add that the September 10, 2012 Order ignores this presumption and

³¹ *Id.* at 17 (citing, *inter alia*, *PJM*, 137 FERC ¶ 61,145).

³² *Id.* at 18.

³³ *Id.* at 20.

³⁴ *Id.* at 23.

³⁵ September 10, 2012 Order, 140 FERC ¶ 61,189 at n.87.

³⁶ Governmental Customers Request for Rehearing at 22-23.

³⁷ *Id.* at 23.

the prudence standard generally and substitutes information that is available only now, or at least at a time long after the key investment decisions were made.³⁸

Commission Determination

28. We first address Governmental Customers' argument on rehearing that the September 10, 2012 Order erred by ordering a re-test for Astoria II, which they assert constitutes a retroactive refund, without finding a tariff violation. We deny rehearing as Governmental Customers' argument mischaracterizes the September 10, 2012 Order. The September 10, 2012 Order explicitly stated that if NYISO determines, in light of the order, that any projects are not exempt from the Offer Floor, NYISO should only apply the Offer Floor prospectively, meaning that any potential effects of mitigation would occur only prospectively, not retroactively. In any event, contrary to Governmental Customers' assertion, the Commission did find that NYISO violated section 23.4.5.7.2 of its tariff. Therefore, we find Governmental Customers' arguments as to this issue are without merit and reject them.

29. Governmental Customers also contend that the September 10, 2012 Order's interpretation of the appropriate calculation of inputs to Unit Net CONE constituted new guidance, not present in the tariff. Governmental Customers argue that the September 10, 2012 Order therefore violated the filed rate doctrine because it constituted a rate change or rate re-interpretation without any prior notice provided to NYISO or its stakeholders. We disagree. The September 10, 2012 Order did not change the tariff. Rather, it applied what it reasonably found was required by the existing tariff. Moreover, as explained above, the September 10, 2012 Order did not violate the filed rate doctrine because it limited NYISO to applying the Offer Floor prospectively. The Commission, therefore, rejects Governmental Customers' argument on this point. The Commission will address Governmental Customers' specific contentions regarding the September 10, 2012 Order's interpretation of the factors that impact Unit Net CONE in sections 6 through 8 below.

30. Next, we turn to Governmental Customers' assertion that the Commission substituted its own judgment for that of NYISO and the MMU, in conflict with precedent emphasizing the need for ISO/RTOs to exercise reasonable discretion,³⁹ especially with

³⁸ *Id.* Governmental Customers argue that the September 10, 2012 Order directs NYISO to assume 2010 market price data for a project for which a binding power purchase agreement was executed in 2008, financing was secured in 2009, equipment purchase orders were made in 2008 and 2009, construction contracts were executed in 2008 and 2009, and construction started in 2009. *Id.*

³⁹ *Id.* at 17 (citing, *inter alia*, *PJM*, 137 FERC ¶ 61,145).

an absence of prescriptive detail.⁴⁰ However, while the Commission provides NYISO and the other ISO/RTOs a great deal of discretion in interpreting their own tariffs, especially with respect to provisions lacking prescriptive detail, that does not relieve the Commission of its responsibility to determine whether NYISO's interpretation of its tariff is reasonable. In the instant proceeding, for the reasons explained more fully below, we found that certain of NYISO's determinations did not conform to the explicit provisions of its tariff, and others did not consider factors relevant to such determinations, and therefore were not just and reasonable.

31. Governmental Customers assert that the September 10, 2012 Order fails to respond to their protest with respect to customer impact of the mitigation of Astoria II and therefore fails to constitute reasoned decision-making. Governmental Customers asserted that unwarranted mitigation of Astoria II would cause NYPA's Governmental Customers to purchase duplicate capacity in the spot capacity market, that they had already bought from Astoria II under the power purchase agreement, resulting in an unnecessary double charge. To the extent that we failed to address this argument, we do so below. We note that pursuant to our direction in the September 10, 2012 Order, NYISO re-tested Astoria II and found that the Astoria II project was uneconomic at the time it entered the market and, therefore, will be subject to mitigation.⁴¹ As a result, under NYISO's tariff, Astoria II cannot offer its capacity into NYISO's capacity market at a price less than its Offer Floor until it can clear the market for up to twelve, not necessarily consecutive months. We agree with Governmental Customers that this may indeed mean that NYPA's customers will pay more for capacity than if Astoria were found to be economic and mitigation were not imposed. But this is the expected consequence of the Astoria II project failing NYISO's mitigation exemption test, applied according to the provisions of NYISO's tariff. To allow a new entrant that has been found to be uneconomic to escape mitigation would inappropriately allow such entrant to suppress the capacity price in the NYC ICAP market. This is precisely what the buyer-side mitigation provisions were designed to prevent. Once Astoria II can demonstrate that it is needed by the market (i.e., is economic) by its mitigated bids clearing the market for twelve not necessarily consecutive months, the mitigation will be removed. It is at this point that NYISO's tariff provides for the removal of the Offer Floor, as it is at this point that there is no longer the concern that a new entrant such as Astoria II could inappropriately suppress market prices. In this way, NYISO's capacity market is allowed to function competitively and send appropriate market signals supporting efficient market entry and exit. As the Commission stated in Order No. 2000, competition in wholesale electricity markets is the best way to protect the public interest

⁴⁰ *Id.* at 18.

⁴¹ *See supra* note 21.

and ensure that electricity consumers pay the lowest price possible for reliable service.⁴² Thus, we did consider the effect on customers of proper application of NYISO's market mitigation provisions and, therefore, the Commission rejects Governmental Customers' arguments to the contrary.⁴³

32. Next we turn to Governmental Customers' contention that in the September 10, 2012 Order the Commission made a prudence-based "disallowance" without holding itself to long-held prudence review standards. The language to which Governmental Customers object is contained in a footnote to our discussion of why the Unit exemption determination should not be based on data and information as of the ambiguous date of the decision to move forward with a project.⁴⁴ It merely states that a prudent developer would periodically re-evaluate the economics of its potential investment and adjust any related expenditures accordingly,⁴⁵ in support of the proposition in the body of the order that no such single date generally exists as there are a series of decision points, rather than a single point at which the decision to move forward is made. Thus, contrary to Governmental Customers' assertions, the September 10, 2012 Order did not disallow any cost of any type, nor did it disallow any cost based on a finding of imprudence. Rather, we reasonably concluded that the exemption determination should be based on the most up-to-date data and information as of the same time frame as the final cost allocation. Therefore, we reject Governmental Customers' argument.

33. Governmental Customers also contend that this statement in the foregoing footnote is inconsistent with the Commission's traditional "reasonable person" standard. The Commission rejects this line of argument for two reasons. First, as noted above, the September 10, 2012 Order was explaining why it was rejecting NYISO's use of data and

⁴² *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089, at 30,993 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092, at 31,354 (2000).

⁴³ Governmental Customers' contention that the September 10, 2012 Order prevents customers from benefitting from Astoria II's more efficient, cleaner generation is inapposite. The issue in this proceeding is not whether Astoria II is more efficient or cleaner than other generation, or whether cleaner, more efficient generation should be attracted to the marketplace, but rather whether NYISO's mitigation exemption determinations for Astoria II and Bayonne were performed in accordance with the mitigation provisions of its Services Tariff.

⁴⁴ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 84.

⁴⁵ *Id.* n.87.

information as of an undefined, ambiguous date referred to as the “going forward date,” relying on its similar ruling in the August 2, 2011 Order.⁴⁶ The point being made was that no one point can be designated the “going forward date” without considerable litigation. Governmental Customers’ focus on the Commission’s use of the term “prudent” in the footnote misses that point. Second, and as noted by NYISO’s expert Mr. Younger, by any definition of “reasonable person,” a developer could be expected to periodically re-evaluate to determine whether it should go forward with a more than \$1 billion expenditure.

34. Lastly, and as stated above, we address below Governmental Customers’ contentions concerning specific calculations contained in the mitigation exemption test.

3. Timing of the Mitigation Exemption Determination

35. In the September 10, 2012 Order, the Commission determined that the Pre-Amendment Rules required NYISO to wait for the final cost allocation at the completion of the cost allocation process, and to use updated data as of the time frame of the final cost allocation, to make a developer’s exemption determination. The Commission stated that Attachment S in effect at the time of the exemption determinations at issue provided that the “completion” of the interconnection cost allocation occurs when none of the remaining projects gives notice of non-acceptance of its cost allocation or all developers have dropped out.⁴⁷ The Commission, however, waived both requirements with respect to NYISO’s Astoria and Bayonne determinations. The cost allocations for Astoria II and Bayonne did not become final until November 30, 2011, so NYISO should have waited until that date to complete the determinations and should have used data updated as of that time.⁴⁸ The Commission stated that to be an effective deterrent to uneconomic entry, mitigation and Offer Floor determinations should at least be provided before the unit enters the capacity market. The Commission noted that Astoria had been providing service since July 2011 and Bayonne began service in the summer of 2012. Accordingly, because of that waiver, NYISO was allowed to make the determination in October 2010 before the final cost allocations and also was allowed to use data as of the October 2010 time frame.

⁴⁶ August 2, 2011 Order, 136 FERC ¶ 61,077 at P 27.

⁴⁷ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 61. *See* NYISO OATT, Attachment S, Definitions, section 25.8.4. *See also id.*, section 25.1.2 (“Final Decision Round: The round of NYISO-communicated cost estimates and Developer responses for a Class Year Interconnection Facilities Study in which all remaining eligible Developers issue an Acceptance Notice and post Security.”) and section 25.8.2.1.

⁴⁸ *See* June 22, 2012 Order, 139 FERC ¶ 61,244 at P 132.

36. In finding that NYISO had to wait for the final cost allocation to do the exemption determination, the Commission reasoned that subsection (g)(ii) of the Pre-Amendment Rules of the Services Tariff⁴⁹ provided (1) a timeframe for the developer to request that NYISO make an exemption determination, (2) a timeframe during the interconnection facilities study agreement process for when NYISO must give the developer specified information, and (3) a timeframe for NYISO to give revised price projections to developers that proceed to a subsequent decision period, but, “the only time that NYISO informs the developer of its exemption determination and whether the Unit exemption is applicable is ‘as soon as practicable after completion of the relevant Project Cost Allocation or Revised Project Cost Allocation in accordance with methods and procedures specified in ISO Procedures.’”⁵⁰

37. Governmental Customers assert that section 23.4.5.7.2 of the Services Tariff provides that NYISO shall inform the requesting entity whether the exemption is applicable as soon as practicable after completion of the relevant Project Cost Allocation or Revised Cost Allocation. According to Governmental Customers, NYISO, in proposing the provision, generally referred to it as an “ex ante” or “before the fact” test that was to occur as of the time the developer decided to proceed with its project, not at some later date. Governmental Customers assert that this tariff provision provides for the *ex ante* mitigation exemption determination to be made *during*, not at the end of, the interconnection cost allocation process. Governmental Customers argue that this interpretation is supported by NYISO’s October 4, 2007 submission of the conceptual structure for a new entrant mitigation test,⁵¹ and by the MMU’s affidavit attached to that filing.⁵² Further, according to Governmental Customers, in approving NYISO’s

⁴⁹ NYISO, FERC Electric Tariff, Original Volume No. 2, Attachment H, First Revised Sheet No. 476.03-476.04 (currently section 23.4.5.7.2 - 23.4.5.7.3, et seq.).

⁵⁰ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 62.

⁵¹ Governmental Customers Request for Rehearing at 24-25 (citing NYISO Filing, Docket No. EL07-39-000, at 30 (filed October 4, 2007) (“The units will be exempted from mitigation if the NYISO determines that at the time for which the investor is committing to the investment (*e.g.*, three years in advance) that near-term capacity price levels, post-entry are forecasted to be greater than 75% of net CONE in the area where the new unit is proposed.”)).

⁵² *Id.* (citing Attachment 1, David B. Patton Aff. ¶ 70) (stating “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% of CONE. . . . The evaluation . . . should be conducted *before the developer commits to go forward with the project and accepts its*

(continued...)

proposal, the Commission fully endorsed the concept of a test performed as of the time the developer decided to proceed.⁵³ Governmental Customers state that NYISO filed tariff amendments in compliance implementing the *ex ante* test and explaining that the exemption decision would be made in an initial decision period or subsequent decision period in the OATT interconnection process, a point at which a project would be beyond the mere planning stage, and beyond which a developer would have to make a significant financial commitment to continue with a project.⁵⁴ Governmental Customers add that no party challenged the timing of this determination and the Commission accepted it as proposed.⁵⁵

38. Governmental Customers maintain that it is important to focus on the tariff's use of defined terms because the words "Project Cost Allocation" and "Revised Project Cost Allocation" have specific meanings.⁵⁶ Governmental Customers argue that the provisions provide that the *ex ante* mitigation exemption determination would be made upon completion of the Project Cost Allocation or revised Project Cost Allocation; not at the end of the Interconnection Facilities Study described in OATT Attachment X, which incorporates the cost allocation rules in OATT Attachment S. Governmental Customers

cost allocation from the facilities study and makes a security deposit in the interconnection process").

⁵³ Governmental Customers Request for Rehearing at 26 (citing *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 117 (2008)).

⁵⁴ *Id.* (citing NYISO May 6, 2008 Filing, Docket No. ER08-695-003, at 8-9).

⁵⁵ *Id.* at 27 (citing *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 1 and ordering para. (C) (2008)).

⁵⁶ Section 25.1.2 of OATT Attachment S defines the two terms as follows:

Project Cost Allocation: The dollar figure estimate for a Developer's share of the cost of the System Upgrade Facilities required for the reliable interconnection of its project to the transmission system and/or the share of the cost of the System Deliverability Upgrades required for the Developer's project to meet the NYISO Deliverability Interconnection Standard.

Revised Project Cost Allocation: The revised dollar figure cost estimate and related information provided by the NYISO to a Developer following receipt by the NYISO of a Non-Acceptance Notice, or upon the occurrence of a Security Posting Default by another member of the respective Class Year.

contend the definitions of “Project Cost Allocation” and “revised Project Cost Allocation” refer to a dollar figure “*estimate*.” Governmental Customers state that, according to section 23.4.5.7.2 of the Services Tariff and section 25.8 of OATT Attachment S, Project Cost Allocations and revised Project Cost Allocations are prepared (i.e., completed) and provided to class year members *during* the cost allocation process, not at the end of the process.

39. Governmental Customers further argue that the Commission conflated the completion of the Project Cost Allocation with the completion of the Interconnection Facilities Study and its cost allocation process but, in fact, these are two different points in the interconnection process. Governmental Customers argue that the Commission stated in the September 10, 2012 Order that “Attachment S . . . provided that the ‘completion’ of the interconnection cost allocation *process* occurs either when none of the remaining projects gives notice of non-acceptance of their cost allocation or all developers have dropped out.” However, according to Governmental Customers, section 23.4.5.7.2 does not provide for the determination to be made at the completion of the “process” but, rather, after completion of the Project Cost Allocation (or Revised Project Cost Allocation, as appropriate).

40. Governmental Customers also take issue with the Commission’s assertion that its interpretation was reasonable because the net CONE for a unit cannot be fully calculated until the interconnection costs for the unit are known. Governmental Customers contend that the tariff does not call for the exemption determination to be made based on the final amounts; rather, they assert, the definitions of Project Cost Allocation and revised Project Cost Allocation refer to “estimates” and the tariff requires only that the determination be made once those estimates are completed.

41. Governmental Customers also contend that, prior to the September 10, 2012 Order, it was clear to market participants, market observers, developers, the public, NYISO, and even the Commission that the new entrant mitigation exemption test would be performed *ex ante*, and the Commission’s new interpretation is inconsistent with the very premise underlying the timing of the determination and with its prior treatment of this tariff provision. Governmental Customers note that it is well-settled that when the Commission deviates from its precedent, such as it has done here, it must state that it is changing its policy and provide a reasoned explanation for the change.

42. Governmental Customers assert that, in the September 10, 2012 Order, the Commission stated that granting a waiver of the exemption determination timeline was consistent with its ruling in the August 2, 2011 Order in Docket No. ER10-3043, where the Commission stated that “the initial exemption determination or redetermination occurs prior to when the project accepts its cost allocation and enters the

capacity market.”⁵⁷ According to Governmental Customers, this language, which the Commission cited and emphasized in the September 10, 2012 Order, further demonstrates that the Commission’s new interpretation of section 23.4.5.7.2 is erroneous, as the cited language carries forward the exact same concept as existed under the prior tariff provision – that the exemption determination should be made before the end of the cost allocation process.

43. Similar to Governmental Customers, NYISO argues that its issuance of exemption determinations for Astoria II and Bayonne before completion of the Attachment S class year process was reasonable, and was consistent with Commission precedent, the principles underlying buyer-side mitigation, and the informed opinion of the MMU. NYISO argues that the September 10, 2012 Order does not substantially address NYISO’s key arguments demonstrating that section 23.4.5.7.2 gave it discretion to issue final determinations before the completion of the class year interconnection cost allocation process. NYISO states that, as it previously explained, section 23.4.5.7.2 expressly states that developers could request that NYISO “make” an exemption determination “upon” the execution of an Interconnection Facilities Study Agreement. NYISO states that the Commission apparently read this language as defining the moment when a developer could first ask for a determination but read other language as requiring that the actual determination wait until much later. NYISO states that it explained why such a reading was not reasonable. NYISO asserts that its interpretation of section 23.4.5.7.2 was consistent with the Commission’s February 2, 2011 Order,⁵⁸ and with a key rationale for modifying the Pre-Amendment Rules and the formulation of the buyer-side mitigation rules, including the adoption of the “Three Year Rule.” NYISO asserts that those changes were meant to address the fact that the Pre-Amendment Rules were not as closely tied to the Class Year cost allocation timetable as the September 10, 2012 Order assumes. NYISO adds that the Pre-Amendment Rules provided the developers with flexibility to request and receive, and NYISO with flexibility to make, final buyer-side mitigation exemption determinations before the class year was complete.

44. NYISO argues that its interpretation is consistent with the August 2, 2011 Order and with the nature of the Unit exemption test. Moreover, NYISO maintains that even if the Commission concludes that the Commission’s interpretation of section 23.4.5.7.2 is more reasonable, it still should not have ruled that NYISO’s interpretation constituted a

⁵⁷ Governmental Customers Request for Rehearing at 29 (citing August 2, 2011 Order, 136 FERC ¶ 61,077 at P 27 (emphasis in Governmental Customers’ Request for Rehearing)).

⁵⁸ NYISO Request for Rehearing at 4 (citing February 2, 2011 Order, 134 FERC ¶ 61,083 at P 23; and August 2, 2011 Order, 136 FERC ¶ 61,077 at P 27).

“violation” of the tariff. NYISO states that the Commission waived section 23.4.5.7.2 because NYISO’s class year process took an “inordinately long time” to conclude, and it also recognized that “to be an effective deterrent to uneconomic entry, the mitigation and Offer Floor determinations should at least be provided before the unit enters into the capacity market, not after.”⁵⁹ Thus, according to NYISO, its interpretation was reasonable, and to conclude that there was a tariff violation is unreasonable.

Commission Determination

45. The requests for rehearing essentially ask the Commission to reconsider its determination that the language of the Services Tariff in conjunction with the relevant language of the NYISO OATT must be given its plain, common meaning to require the mitigation determination for the Astoria II and Bayonne units to be made after they and all other remaining project developers accept their final Revised Project Cost Allocations and the cost allocation process has concluded, i.e., is completed, rather than at some earlier, ambiguous point in time.

46. Governmental Customers contend that the terms “Project Cost Allocation” and “Revised Project Cost Allocation” found in OATT Attachment S and Services Tariff Attachment H refer to the initial cost allocation NYISO provides the developer or, if the developer so requests, the revised project cost allocation, but not necessarily the penultimate final cost allocation. The Commission in the September 10, 2012 Order found, to the contrary, that the project cost allocation referred to in Attachment H is the final Attachment S cost allocation., i.e., the figure provided at the end, i.e., at the completion, of the project cost allocation process.⁶⁰ Section 23.4.5.7.2 (Attachment H) states that NYISO shall inform the requesting entity of its exemption determination “as soon as practicable after completion of the relevant Project Cost Allocation or Revised Project Cost Allocation.” The Commission applied the common meaning of the term “completion” used in the Services Tariff in reference to the interconnection cost allocation process to conclude that the exemption determination is to occur when there are no more iterations of cost allocations because all remaining eligible project developers have accepted their respective cost allocations. Governmental Customers argue that this statement in the Service Tariff refers to something other than the final cost

⁵⁹ NYISO Request for Rehearing at 7 (citing September 10, 2012 Order, 140 FERC ¶ 61,189 at P 63).

⁶⁰ Services Tariff, § 25.10.2.1,25.10.2.2 explains that for Class Years 2009 and 2010, special provisions for the Assessments, Annual Transmission Baseline and Annual Transmission Reliability, were in place. These provisions had to do with the combined evaluation of Class Year 2009 and 2010.

allocation provided at the completion of the Project Cost Allocation process. We disagree. Their interpretation effectively would read the word “completion” out of the tariff. Until the “completion” of that allocation process and the final Project Cost Allocations are known, neither the Unit CONE nor the forecasted capacity prices to which the Unit CONE is compared, can be determined and therefore a binding mitigation exemption determination cannot be made by NYISO. An essential component of the developer’s cost of new entry (Unit CONE) is its share of the final Project Cost Allocation, and that amount is not known until the completion of the Final Decision Round, i.e., until all developers have accepted their share of Project Costs and the iterative cost allocation process has concluded. Similarly, because NYISO revises its capacity price projections to reflect the inclusion of only those remaining projects that have accepted their Project Cost Allocations, it cannot determine capacity prices until the Final Decision Round is completed. Therefore, the Commission’s finding that NYISO’s Services Tariff requires the exemption determination be made using the final cost allocation is fully consistent with the most reasonable application of the plain language of the tariff as well as with the interconnection procedures in effect at that time. For this reason we disagree with Governmental Customers’ argument that Project Cost Allocations and Revised Project Cost Allocations as described in the Services Tariff are provided to Class Year members *during* the cost allocation process, not at the end of the process. Accordingly, we affirm our original determination in this regard.

47. As stated in the September 10, 2012 Order, although the original intent may have been to provide a developer with an exemption determination before it would have to decide whether or not to accept its cost allocation, the provisions of the Services Tariff did not reflect such intent. Indeed, this did not occur in this case.⁶¹ NYISO reasonably was required to follow its tariff, wait to perform the determinations until a cost allocation was accepted, became final, and the interconnection cost was completed. By not doing so, NYISO violated section 23.4.5.7.2 of its Services Tariff.

⁶¹ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 64. *See* June 22, 2012 Order, 139 FERC ¶ 61,244, at P 132 (stating “Class Year 2009 and 2010 process concluded in November 2011 with all remaining parties accepting cost allocations”). NYISO notified remaining parties in Class Years 2009 and 2010 of the completion of the process November 30, 2011. *See* http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Documents_and_Resources/Interconnection_Studies/Notices_to_Market_Participants/Class_2009_Notice_of_completion_of_decision-settlement_process_11-30-2011.pdf; http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Documents_and_Resources/Interconnection_Studies/Notices_to_Market_Participants/Class_2010_Notice_of_completion_of_decision-settlement_process_11-30-2011.pdf.

48. We also believe that, while it is true that the definitions of Project Cost Allocation and Revised Project Cost Allocation use the word “estimate,” there is no support for Governmental Customers’ assertion that this shows that the Commission erred in rejecting Governmental Customers’ claim of an unwritten requirement that the mitigation exemption determination must be made even before those estimates are made at some far earlier, ambiguous “going-forward” decision date. The Commission reasonably pointed out that the Unit Net CONE cannot be calculated until the final cost allocation is known. We believe the simple explanation for the use of the word “estimate” is that, although the final Project Cost Allocation caps the amount a developer must pay, it too is an estimate in the sense that under certain very limited conditions (e.g., circumstances that are not under the control of the transmission owner), the actual, total cost could change by the time the project enters the market.⁶² In contrast, the Services Tariff explicitly states that the exemption determination is made as soon as practicable after “completion” of the relevant Project Cost or Revised Project Cost Allocation, i.e., it must await the final Project Cost Allocation.⁶³

49. Further, we find that, contrary to Governmental Customers’ argument, our September 10, 2012 Order was correct with respect to the specific cost allocation “process” required to be “completed” before the exemption determination can be made. Governmental Customers assert that the OATT Attachment X interconnection facilities cost allocation provisions establish the Interconnection Facilities Study “process” within which the OATT Attachment S Project Cost Allocations and Revised Project Cost Allocations occur. On this basis they claim that the OATT Attachment S Project Cost Allocations and Revised Project Cost Allocations “are prepared (i.e., completed) and provided to class year members during the [Attachment X] allocation process.”⁶⁴ We disagree that the Attachment X process somehow negates the language of Attachment H of the Services Tariff that the Commission applied. The Commission properly interpreted the Attachment H mitigation provision as referring to the completion of the Attachment S cost allocation process. As we noted, section 25.8.4 of the Attachment S cost allocation provisions is entitled “Completion of Decision Process” and states “[t]he process set forth in Sections 25.8.2 through 25.8.3 shall be repeated until (a) none of the remaining eligible Developers in the Class Year provides a Non-Acceptance Notice or

⁶² See section 25.8.6 of Attachment S.

⁶³ Services Tariff, § 25.10.2.1.-25.10.2.2 explain that, for Class Years 2009 and 2010, special provisions for the Assessments, Annual Transmission Baseline and Annual Transmission Reliability, were in place. These provisions had to do with the combined evaluation of Class Year 2009 and 2010.

⁶⁴ Governmental Customers Request for Rehearing at 27-28.

commits a Security Posting Default, or (b) all Developers have dropped out of the Class Year.” The Interconnection Facilities Study of Attachment X determines what facilities must be constructed for all potential developers in a Class Year to offer capacity (i.e., CRIS) to the NYISO system⁶⁵ and incorporates the Attachment S cost allocation process.⁶⁶ Each developer in the particular Class Year(s) must agree to pay its share of the allocated costs of such facilities (i.e., system deliverability upgrade costs) before it can participate in NYISO’s capacity market.⁶⁷ Each developer’s share is determined in the Project Cost Allocation or Revised Project Cost Allocation(s) of Attachment S, as we stated in the September 10, 2012 Order, which are expressly referred to in the Attachment H mitigation provision. Indeed, while arguing about the Commission’s use of the word “process,” Governmental Customers nonetheless concede that “Section 23.4.5.7.2 . . . provides for the determination to be made at the completion of the Project Cost Allocation (or Revised Project Cost Allocation)”⁶⁸ – exactly as the Commission described. The only issue was at what point is the Attachment S cost allocation process “completed” to permit the exemption determination to be made. We reaffirm our

⁶⁵ NYISO OATT, § 30 (Attachment X, Appendix 6 Standard Large Generator Interconnection Agreement. Article 1. Definitions). (“Interconnection Facilities Study shall mean a study conducted by NYISO or a third party consultant for the Developer to determine a list of facilities. . . , the cost of those facilities, and the time required to interconnect the Large Generating Facility with the New York State Transmission System or with the Distribution System.”).

⁶⁶ Attachment S is cross-referenced throughout Attachment X. In particular, *see* OATT, Attachment X section 30.11.1 (“Simultaneously with the completion of the Developer decision process described in Section VIII of OATT Attachment S and acceptance by the Developer of its Attachment S cost allocation, the NYISO and Connecting Transmission Owner shall tender to the Developer a draft Standard Large Generator Interconnection Agreement together with draft appendices completed to the extent practicable.”).

⁶⁷ NYISO OATT, § 25.1.1 (Attachment S, Purpose of the Rules) (“Every Developer is responsible for the cost of the new interconnection facilities required for the reliable interconnection of its generation or merchant transmission project in compliance with the NYISO Minimum Interconnection Standard, as that responsibility is determined by these rules. In addition, every Developer electing CRIS is also responsible for the cost of the interconnection facilities required for the reliable interconnection of its generation or merchant transmission project in compliance with the NYISO Deliverability Interconnection Standard, as that responsibility is determined by these rules.”).

⁶⁸ Governmental Customers Request for Rehearing at 28.

interpretation of NYISO's Services Tariff and OATT that the Project Cost Allocation referred to in section 23.4.5.7.2⁶⁹ is the completion of the Attachment S interconnection facilities cost allocation process with the acceptance of the final cost allocation with no non-acceptances by any of the remaining eligible project developers. We reject Governmental Customers' assertion to the contrary.

50. Governmental Customers argue that the September 10, 2012 Order presents a new interpretation of section 23.4.5.7.2 and in support they point to language at P 27 of the Commission's August 2, 2011 Order stating that "the initial exemption determination or redetermination occurs prior to when the project accepts its cost allocation and enters the capacity market."⁷⁰ As explained above, although NYISO's original intent may have been to provide for a final mitigation exemption determination prior to when a project accepts its cost allocation, NYISO's Services Tariff does not so provide. Indeed, it would not be possible for NYISO to provide a final binding mitigation determination applicable to a project without knowing the final Unit CONE or which projects should be included in determining the expected capacity prices used in the mitigation determination. These essential elements of the mitigation determination are only known after the final Project Cost Allocation.

51. With respect to the statement in the August 2, 2011 Order in Docket No. ER10-3043 that the initial exemption determination or redetermination "occurs prior to when the project accepts its cost allocation and enters the capacity market" that was quoted by Governmental Customers, the Commission was not addressing the precise issue raised here and the cited statement was simply part of its explanation for its rejection of the claim that the Pre-Amendment Rules required that the exemption determination be made before the ambiguous date of the "investment decision" or the "commencement of construction." Thus, as in past orders, the Commission did not specify when, exactly, the determination must be made as it noted that redeterminations were allowed under the rules, which would occur after completion of the cost allocation process and initial determinations. Rather, the Commission intended simply to clarify that, under the new, Post-Amendment Rules, the determination or redetermination should ultimately be made before the project "enters the market," as NYISO originally intended.⁷¹ However, to the

⁶⁹ This section was initially numbered section 4.5(g)(ii).

⁷⁰ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 65 (citing August 2, 2011 Order, 136 FERC ¶ 61,077 at P 27).

⁷¹ *See also* August 2, 2011 Order, 136 FERC ¶ 61,077 at P 28 ("[T]he project can't enter the market without first accepting its cost allocation, exactly as NYISO, and the Commission, originally intended.").

extent that the cited statement in the August 2, 2011 Order suggests that, under the Pre-Amendment Rules as well, the determination had to be made before the project developer had to accept or reject its cost allocation and post security, we find that the statement was not consistent with what the language of the Services Tariff required, as defined by the relevant language in the OATT, and, therefore, was not accurate. However, we find that the Commission did not intend to rule on an issue not raised in the Docket No. ER10-3043 proceeding. As a result, and because that statement was made without the benefit of the litigated record here where the issue has been raised and addressed in detail, the August 2, 2011 Order should not be read to contradict the Commission's ruling here expressly directly addressing the interpretation of the language of the Services Tariff and OATT that existed prior to the revisions accepted in the Docket No. ER10-3043 proceeding.

52. NYISO contends on rehearing that the September 10, 2012 Order fails to substantially address its key arguments demonstrating that section 23.4.5.7.2 gave it discretion to issue final determinations before the completion of the class year interconnection cost allocation process. NYISO argues that our interpretation of section 23.4.5.7.2 was inconsistent with the plain meaning of the provision.

53. In support of its argument regarding its discretion with respect to when it may issue a mitigation determination, NYISO pointed to section 23.4.5.7.2 which stated

[t]he ISO. . . shall provide the requesting entity with the relevant price projections, the Offer Floors. . . and the reasonably anticipated Unit Net CONE less the costs to be determined in the Project Cost Allocation or Revised Project cost Allocation, as applicable, not later than the commencement of the Initial Decision Period for the Interconnection Facilities Study. . . .

NYISO argued that the "not later than" language did not restrict an entity's right to receive an exemption determination before the class year facilities study cost allocation process is complete. Our discussion in Paragraph 61 of the September 10, 2012 Order addressed this argument. We stated, in essence, that the tariff requires NYISO to provide the project developer a number of inputs and calculations, including the Unit Net CONE, not later than the commencement of the Initial Decision Period, but the only time provided in the tariff for NYISO to inform the developer of its exemption determination and whether the Unit exemption is applicable is "as soon as practicable" after "completion" of the relevant project cost allocation. The language cited by NYISO merely provides that NYISO may provide certain data to the requesting entity; it does not provide that NYISO shall provide the mitigation exemption determination. Thus, we reject NYISO's argument.

54. NYISO also argues that the Commission failed to acknowledge that its own interpretation of section 23.4.5.7.2 is what necessitated a waiver of that provision to allow NYISO to make the mitigation exemption determination for the Astoria II project. NYISO argues that its interpretation would not have required a waiver and would also have enabled a determination prior to market entry. Whether NYISO's interpretation avoids the need for a waiver, or would provide for a different result, is inapposite. The issue is the meaning of the tariff language with respect to when the exemption determination is to be provided to the Developer or Interconnection Customer and we find that the tariff language is sufficiently clear that the determination must follow the completion of the cost allocation process.

55. And as explained earlier, we also find that a literal reading of the tariff language is reasonable because NYISO is required to include both cost and capacity price information in conducting a mitigation exemption determination. Because both of these factors change with each iteration of the Project Cost Allocation process, it is reasonable that NYISO must wait to issue its final exemption determination until after the Final Decision Round of the Project Cost Allocation process.

56. NYISO also contends that its interpretation is consistent with the Commission's February 2, 2011 and the August 2, 2011 Orders that modified the Pre-Amendment Rules. NYISO refers to the Commission discussion of the new Three-Year Rule (entry date is assumed to be three years after the start of the project's Class Year) approved by those orders as a method for approximating when a developer can reasonably be expected to begin selling Unforced Capacity (UCAP) and suggests that this change was needed "to more closely align the mitigation exemption and the Class Year cost allocation processes and to establish that exemption determinations would be made in tandem with the latter."⁷² NYISO offers the proposed changes as evidence of the fact that the Pre-Amendment Rules were not as closely tied to the Class Year cost allocation timetable as the September 10, 2012 Order assumes, and allowed NYISO the flexibility to make final mitigation determinations before the Class Year process was complete. We do not find NYISO's argument convincing. The new Three-Year Rule, effective November 27, 2011, only provided an assumption about the entry date to be used in the mitigation exemption analysis; it did not alter the timing requirement of the mitigation exemption determination provisions of the Services Tariff to be something other than after the Final Decision Round when the cost allocations are final or at some other point in the Project Cost Allocation Process. Further, there is nothing in the Pre-Amendment tariff language that affords NYISO the flexibility it asserts that it had to make final mitigation determinations. We reaffirm that the Pre-Amendment tariff only provided for a final mitigation determination after the completion of the Project Cost Allocation process.

⁷² NYISO Request for Rehearing at n. 10.

57. Finally, we turn to NYISO's alternative argument that, if the Commission does determine that its interpretation is more reasonable than NYISO's, it should not find NYISO in violation of its own tariff. NYISO contends that its interpretation was reasonable and was consistent with Commission precedent, the principles underlying buyer-side mitigation and the view of the MMU. We have found above that NYISO's tariff is sufficiently clear with respect to the timing of the mitigation exemption determination. NYISO does not have the discretion to step outside the provisions of its Services Tariff. We find that NYISO violated its tariff in so doing, and on that basis, we deny NYISO's request for rehearing with respect to the finding of a tariff violation.

4. Analysis Reference Date

58. In the September 10, 2012 Order, the Commission found that because the Unit exemption determination must include the final cost allocation accepted by the project developer, the Pre-Amendment mitigation rules must be interpreted to require that all cost, price, and revenue projections used in the Unit exemption determination must be based on the most up-to-date information as of the same time frame as the final cost allocation accepted by the project developer from the Attachment S interconnection cost allocation process.⁷³ As explained above, however, because it took an inordinately long time for NYISO to complete the final Project Cost Allocation for the 2009 and 2010 Class Years, the Commission waived both of these requirements for NYISO's Astoria II and Bayonne determinations to allow NYISO, in this instance only, to provide exemption determinations prior to when the projects accepted their final cost allocation. The Commission concluded that NYISO's approach, which used data and information from an earlier so-called "going-forward date," was not consistent with the Pre-Amendment NYISO tariff and that NYISO must use the most recent up-to-date data and information as of October 2010 when the ISO made its exemption determinations. The date from which such data and information used in the mitigation determination is referred to as the "Analysis Reference Date."

59. Governmental Customers, NYISO, and the NYTOs request rehearing with respect to this issue. Governmental Customers assert that the Commission ignored information they provided in their protest to the underlying Complaint regarding the need and rationale for entering into a power purchase agreement with Astoria II, including evidence that, at the time Astoria II was selected, the future looked very different than it does today, and there was a need for new capacity in New York City. Governmental Customers also assert that the Commission's finding on this point reverses Commission

⁷³ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 79.

precedent that a developer “should not be penalized after-the-fact for a decision to build that was economically rational at the time the decision was made.”⁷⁴

60. Governmental Customers also state that the Commission incorrectly held that there was no tariff basis for NYISO’s decision to base the mitigation exemption determination for Astoria II on the project’s going-forward date. They contend that the basis is Attachment H to the Services Tariff, the same basis used for the Commission’s 2008 and 2010 holdings. Further, Governmental Customers assert that the Commission erred in finding that “[i]t is entirely feasible that a developer would construct a generating unit primarily for the purposes of providing energy. . . rather than capacity”⁷⁵ as there is nothing in the record to support this finding and, in fact, Astoria II was developed and financed around a long-term power purchase agreement with NYPA.

61. NYISO, while acknowledging that the Pre-Amendment Rules did not specify an analysis reference date, argues that Commission precedents and earlier NYISO filings clearly established the principle that the analyses should be conducted using information available as of the time that developers decided to proceed with an investment. NYISO argues that the intent of the mitigation measures is to mitigate only conduct where a developer enters the market uneconomically in order to depress capacity prices, and therefore, it is essential to utilize the information the developer would have had available when it decided to enter. NYISO contends that the July 2008 date should be considered both reasonable and fully supported by the record and the September 10, 2012 Order’s ruling that NYISO must use an October 2010 analysis reference date for Astoria II is wholly inconsistent with the principle of using information from the time that an investment decision was made. NYISO further contends that neither Complainants, nor the other parties that challenged the July 2008 date made any showing that would justify, nor does the record support, an October 2010 analysis reference date for Astoria II. In fact, according to NYISO, the Commission ignored potential alternate reference dates that are far more reasonable than October 2010.⁷⁶ Moreover, NYISO asserts that the fact that the Commission accepted tariff revisions to incorporate clearer and more objective requirements in the buyer-side mitigation rules does not mean that the use of a going-forward date was impermissible under the Pre-Amendment Rules.

⁷⁴ Governmental Customers Request for Rehearing at 30-31 (citing *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178, at P 71 (2010); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 117 (2008)).

⁷⁵ Governmental Customers Request for Rehearing at 33 (citing September 10, 2012 Order, 140 FERC ¶ 61,189 at P 81).

⁷⁶ NYISO states that, for example, Astoria closed on financing in July 2009.

62. Similar to NYISO, the NYTOs argue that the September 10, 2012 Order is inconsistent with the Commission's prior findings that "new entry mitigation is intended to deter the construction of uneconomic capacity."⁷⁷ They state that there would be no point in applying the mitigation exemption tests to units that were nearly completed or already built and in the market, as is the case with Astoria II, and they note that the Commission previously excluded from application of these mitigation rules any generator that was already built when the rules were first implemented. They argue that the Commission ignored its own prior approvals of the Services Tariff and findings that, for purposes of mitigation exemption analysis, require NYISO to apply the mitigation exemption test prior to the supplier's beginning construction of a new resource. Thus, the NYTOs argue, making Astoria II wait until 2010, when construction of the plant was nearly complete, in order to find out whether it would be mitigated is inconsistent with the rationale given in these previous Commission orders.

63. The NYTOs also contend that the Commission misinterpreted the applicable provisions of the Services Tariff in finding that it prohibited NYISO from beginning the analysis reference period as of July 2008, as the Services Tariff is not specific on the date to be used.⁷⁸ The NYTOs add that the September 10, 2012 Order found that the default exemption test is made in contemplation of a potential ICAP supplier entering the capacity market and not just in contemplation of the construction of its generating or other facilities. However, according to the NYTOs, the Commission failed to recognize that Astoria II clearly indicated its intent to be an ICAP resource by responding to NYPA's RFP, which specifically sought resources to provide long-term supply of in-City unforced capacity and optional energy. The NYTOs add that NYISO understood that, as of the date of its contract with NYPA, Astoria II indicated its intent to enter the in-City ICAP market. Thus, they state, the Commission's premise is incorrect in this instance. Moreover, according to the NYTOs, in indicating that Astoria II could have entered on an energy-only basis, the Commission did not adequately consider the cost structure for new generation in New York City and whether a new unit would reasonably participate in the in-City markets on an energy-only basis.

64. The NYTOs also argue that July 11, 2008, was a proper going-forward date because it was the date upon which Astoria II began incurring significant costs related to its project, including execution of its power purchase agreement with NYPA and

⁷⁷ NYTOs Request for Rehearing at 5 (citing *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 43 (2010)).

⁷⁸ The NYTOs state that the Commission even admitted that the Services Tariff does not contain a provision that defines the going-forward date. NYTOs Request for Rehearing at 6 (citing September 10, 2012 Order, 140 FERC ¶ 61,189 at P 81).

execution in July 2008 of agreements for major equipment and supplies necessary for project construction. The NYTOs add that in December 2008, Astoria II received approval from the NYPSC of its transfer and financing of certain of its assets, indicating its clear intent to proceed.

Commission Determination

65. We deny rehearing of the Commission's finding that there was no support in the tariff for basing the mitigation determination on a project's so-called "going-forward" date. NYISO acknowledges that the Pre-Amendment Rules did not specify an "Analysis Reference Date." We disagree with NYISO that Commission precedent and earlier NYISO filings clearly established the principle that the analyses should be conducted using information available as of the time that developers decided to proceed with an investment. In the August 2, 2011 Order, the Commission rejected arguments that the exemption determination must be made prior to the "decision to invest," which the parties also referred to as the "decision to go forward with the project," on the basis that such dates are ambiguous.⁷⁹ Therefore, in the absence of an express requirement in the Services Tariff to use data as of such an ambiguous earlier date, the Commission was reasonable in finding that the exemption determination must be based on the most up-to-date data and information as of the time period when NYISO makes the determination. As we stated in the September 10, 2012 Order, Attachment H has no provision for basing the mitigation determination on a project's going-forward date or that even defines the term. And, as we also said in the September 10, 2012 Order, if such a provision was intended to be in the Tariff, its omission was very significant because the date by which data is used in the determination can be crucial to whether a developer passes or fails the mitigation test. Therefore, we affirm our rejection of NYISO's use of data and information as of a going-forward date in applying the exemption determination required by the Pre-Amendment NYISO tariff.

66. Because we have found that the use of a going-forward date as the Analysis Reference Date was not authorized by NYISO's Services Tariff, arguments as to what the going-forward date should have been are not relevant. The relevant period is when the exemption determination is made and according to NYISO's tariff, that determination is made after a potential ICAP supplier requests an exemption determination and after NYISO completes the relevant Project Cost Allocation or Revised Project Cost Allocation. It is during that time that the potential ICAP supplier must provide NYISO with the information NYISO needs to evaluate the exemption request, including all data available to the requesting entity relating to the reasonably anticipated Unit Net CONE. Therefore, the use of the most up-to-date cost, price, and revenue information available as

⁷⁹ August 2, 2011 Order, 136 FERC ¶ 61,077 at P 27.

of the date NYISO makes the exemption determination is eminently reasonable. We therefore affirm our finding in the September 10, 2012 Order that the Pre-Amendment mitigation rules must be interpreted to require that all cost, price, and revenue projections used in the Unit exemption determination be based on the most up-to-date data and information as of the same time frame as the final cost allocation.

67. NYISO and the NYTOs argue that the September 10, 2012 Order is inconsistent with the Commission's prior findings that the point of new entry mitigation is to deter development of uneconomic entry of capacity resources.⁸⁰ The NYTOs maintain that there would be no point in applying the mitigation exemption test to units that were nearly complete or already built and in the market.

68. Although the Services Tariff does not expressly so provide, the Commission concurs that mitigation exemption testing should be done prior to entry into the capacity market and, as the Commission held in the August 2, 2011 Order discussed above, not necessarily prior to when the investment decision is made. And NYISO's Pre-Amendment tariff allowed sufficient time for the exemption testing to occur prior to entry -- provided that the developer sought such determination sufficiently far in advance of the expected commercial operation date of its project to allow NYISO to complete the cost allocation process and make the mitigation determination. In the instant case, it turned out that Astoria II did not seek a mitigation determination far enough in advance of its expected commercial operation date while Bayonne did.⁸¹ Absent waiver, pursuant to its Pre-Amendment Tariff, NYISO's final mitigation determination could have been made in October 2011 after the remaining eligible developers accepted their final Revised Project Cost Allocations.⁸² Under NYISO's tariff, because Astoria II went into service in July 2011 it did not have a mitigation determination prior to its entry into the capacity market, while Bayonne, which went into commercial operation in the summer of 2012, would have. In light of the extraordinary circumstances relating to the duration of the interconnection cost allocation process in this case, however, we granted a waiver of the tariff to permit NYISO to make the exemption determinations in October of 2010, prior to the time required by the tariff. We conclude therefore that the September 10, 2012

⁸⁰ *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 43 (2010).

⁸¹ Both Astoria II and Bayonne entered the 2010 Class Year in March 2010, which was the earliest that they could have requested a mitigation determination. We know that Bayonne requested a mitigation determination in October 2010 (September 10, 2012 Order, 140 FERC ¶ 61,189 at P 37).

⁸² As previously noted, it took NYISO an inordinately long time to complete the 2009/2010 Class Year Project Cost Allocation.

Order was consistent with the Commission's prior findings that the purpose of new entry mitigation is to deter development of uneconomic entry of new capacity resources.

69. The NYTOs contend that, by indicating Astoria II could have entered on an energy-only basis, the Commission ignores the intent of Astoria II to be a capacity resource by way of its RFP. Moreover, the NYTOs argue that the Commission did not adequately consider the cost structure for new generation in the New York City market. Although we do not dispute that Astoria II could have indicated its intent to enter NYISO's capacity market by way of its RFP, the only definitive objective evidence of such intent was its acceptance of its final Project Cost Allocation. This is the only time under NYISO's tariff that the definitive decision to enter the capacity market is made. It is not necessary therefore to attempt to determine when a developer first intended to enter the capacity market, as the NYTO's would have us do. With respect to our comment on the possibility of constructing a generator for purpose of providing energy rather than capacity, we were not making a specific finding as to what options Astoria II may have contemplated but, rather, were referring to the alternative under the NYISO tariff that provides for such possibility. This tariff-provided alternative exemplifies why the investment going-forward date of a project is not necessarily the same as the going-forward date for participation in the capacity market. In any event, our discussion in no way should be read as supporting the use of the ambiguous "going forward" date in any context.

70. Based on the above discussion we deny rehearing and reiterate that price projection data and other inputs used in the mitigation exemption determination must be the most up-to-date data and inputs derived from the time when mitigation exemption determinations are made.

5. Exclusion of Astoria II's Sunk Costs

71. In the September 10, 2012 Order, the Commission concluded that it was improper for NYISO to exclude from its calculation of Astoria II's Unit Net CONE certain sunk costs associated with the facilities it shared with Astoria I.⁸³ NYISO and others argued that as these were sunk costs, that is, costs incurred in the past for an asset that no longer has any opportunity cost or market value, they should not be included in Unit Net CONE. The Commission held that the Pre-Amendment Rules define Unit Net CONE as the "localized levelized embedded costs of a specified Installed Capacity supplier, including interconnection costs . . . net of likely projected annual Energy and Ancillary Services

⁸³ The developers of Astoria II paid the developers of Astoria I for a portion of the costs of the shared facilities pursuant to an agreement between the parties dated July 11, 2008.

revenues” and that “embedded costs” includes all costs that have been incurred in the past whether or not the associated assets have opportunity costs or market value.

72. Governmental Customers and NYISO request rehearing. Governmental Customers contend that the September 10, 2012 Order errs by adopting arbitrary and out-of-context internet-based definitions of tariff terms, i.e., embedded costs, as sufficient controlling authority to negate the independent expert analyses of NYISO, the MMU, and the National Economic Research Associates’ (NERA). Governmental Customers argue that the term “embedded costs” is not defined in NYISO’s tariffs. They state that the Commission did not dispute that the shared facilities costs were sunk costs and as such are generally excluded from suppliers’ going-forward decision-making, but rather determined that the only relevant question was whether these costs were appropriately considered “embedded” costs. According to Governmental Customers, the basis of the Commission’s interpretation of the “common meaning” of embedded costs was apparently an internet search of the term. They further contend that the Commission did not explain how such search results were more appropriate than the determinations of NYISO and the MMU, and that it provided no support for its conclusion that generic internet definitions constitute controlling authority for either a “common meaning” of the term embedded costs or its meaning as used in the electric industry and in this particular application. Governmental Customers argue that including sunk costs in the Unit Net CONE calculation is inappropriate because no reasonable investor would have considered them when making a going-forward decision.

73. NYISO contends that it properly excluded the shared facilities costs from the Astoria II determination, notwithstanding the reference to “embedded costs” in the definition of Unit Net CONE. NYISO maintains that the definitions of “embedded costs” cited by the Commission and the definition from an energy industry textbook⁸⁴ all indicate that the term “embedded costs” sometimes includes and sometimes excludes a variety of costs. Moreover, NYISO argues, even if “embedded costs” has a “common meaning” in the traditional cost-of-service ratemaking context, that does not dictate that the same meaning must apply in a competitive energy market. According to NYISO, the September 10, 2012 Order excluded aspects of the definition that more reasonably relate to use of the term in a buyer-side mitigation analysis. NYISO concludes that the term is ambiguous when used outside the context of traditional cost-of-service ratemaking and in the context of buyer-side mitigation rules, which involve a prospective analysis focused on evaluating the economic decisions of private investors. Further, according to NYISO, where a tariff is ambiguous, such ambiguity must be resolved by reference to the tariff as

⁸⁴ NYISO October 10, 2010 Request for Rehearing at 11-12 (citing H. Lee Willis, Power Distribution Planning Reference Book, 138-139 (2nd Ed. 2004)).

a whole and extrinsic evidence may be considered,⁸⁵ and therefore the fundamental purpose of the buyer-side mitigation rules, i.e., to determine whether an investment is uneconomic, cannot be ignored. NYISO contends that there is no extrinsic evidence suggesting that the traditional utility definition of embedded costs was meant to be applied in the market-based analyses that are part of buyer-side mitigation determinations; and NYISO's understanding is that no other ISO/RTO incorporates the traditional utility ratemaking definition of embedded costs into its buyer-side mitigation analyses. In particular, NYISO points to PJM's exclusion of sunk costs⁸⁶ and states that there is no valid economic reason why legitimate sunk costs should be excluded from PJM's buyer-side mitigation but automatically included in NYISO's.

Commission Determination

74. We deny rehearing as to both Governmental Customers' and NYISO's requests for rehearing with respect to sunk costs. The Pre-Amendment Rules define Unit Net CONE as the "localized levelized embedded costs of a specified Installed Capacity supplier, including interconnection costs . . . net of likely projected annual Energy and Ancillary Services revenues." Complainants argued that the definition of Unit Net CONE does not authorize NYISO to designate and exclude certain legitimate and verifiable costs simply because NYISO or the MMU views them as sunk. In evaluating the validity of the Complainants' claim, the Commission looked to NYISO's tariff definition of Unit Net CONE, and noted that the costs to be included in Unit Net CONE were required to be the "embedded costs" of the ICAP supplier. Since NYISO's tariff did not define "embedded costs," the Commission reasonably looked to the common industry meaning of that term, and cited to three sources of common industry definitions

⁸⁵ NYISO Request for Rehearing at 12-13 (citing, *inter alia*, *Duquesne Light Co.*, 122 FERC ¶ 61,039, at P 85, *clarified*, 123 FERC ¶ 61,060 (2008)).

⁸⁶ *Id.* at 14 (citing PJM, Intra-PJM Tariffs, OATT, Attachment DD at § 5.14(h)(5)(ii)). NYISO states

[PJM's] Minimum Offer Price Rule . . . allows sell offers below the normal minimum offer level when a supplier can demonstrate that its "competitive, cost-based, fixed, net cost of new entry" falls under it. To qualify for this exception to the MOPR, the supplier must provide documentation to support the "fixed development, construction, operation, and maintenance costs of the planned generation resource, as well as estimates of offsetting net revenues." Notably, "[s]uch documentation also shall identify and support any sunk costs that the Capacity Market Seller has reflected as a reduction to its Sell Offer."

which defined “embedded costs” as “historical,” “already been incurred,” “total costs of all assets,” or the “accounting” costs,⁸⁷ which are also commonly referred to as “sunk” costs. We found nothing in NYISO’s tariff, or in the common industry meaning of the term that would define “embedded costs” to exclude such “sunk” costs, as NYISO and Governmental Customers advocate.

75. NYISO suggests that the opinion of its MMU, Dr. Patton, that the September 10, 2012 Order’s definition for “embedded costs” may lead to erroneous mitigation determinations should control the Commission on rehearing. We disagree. Despite NYISO’s contention that the fundamental purpose of the buyer-side mitigation rules – to determine whether an investment is economic – should inform the interpretation of “embedded costs” in NYISO’s Tariff, NYISO fails to suggest how such a fundamental purpose impacts the definition of “embedded costs,” or why it should lead to an alternative definition from that used in the September 10, 2012 Order. The purpose of NYISO’s mitigation exemption test is to determine whether a project will be economic at the time the project enters into NYISO’s capacity market. One way it does this is by comparing the specific cost of the new unit with expected capacity market prices. Although there may be alternative ways to measure whether an investment is “economic,” NYISO’s tariff makes such determination based on the new entrant’s embedded cost, not on the basis of some other type of costs that exclude sunk costs. If NYISO intended to use some other type of costs, it could have included the relevant term in the tariff provision. Instead, the tariff language it proposed, and that we accepted, used the term “embedded cost.”

76. Lastly, we reject NYISO’s contention that the fact that the PJM Minimum Offer Price Rule (MOPR) tariff provisions allow sunk costs to be excluded from the calculation of Unit Net CONE supports the same exclusion from Unit Net CONE for purposes of NYISO’s mitigation exemption determinations.⁸⁸ We note that PJM’s tariff does not expressly require the use of “embedded cost” in defining Unit Net CONE, unlike NYISO’s tariff. In any event, the Commission does not require exact uniformity among the ISOs as to how they implement such matters as market mitigation. Therefore, we find that this comparison fails to support NYISO’s contention.

77. Therefore, the Commission denies rehearing and re-affirms its finding that the Unit Net CONE of the Astoria II project must include the “sunk” costs associated with the facilities it shared with Astoria I.

⁸⁷ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 121, n.152.

⁸⁸ NYISO Request for Rehearing at 14-15.

6. Cost of Capital

78. The September 10, 2012 Order found that NYISO's use of the actual cost of capital was not consistent with the rationale the Commission used in *PJM* (*PJM Rationale*), wherein the Commission found that PJM and its Internal Market Monitor must exercise discretion in assessing whether "competitive cost advantages" are legitimate and whether there are "irregular or anomalous" cost advantages or sources of revenue that "do not reflect arm's-length transactions, or that are not in the ordinary course of [business]." ⁸⁹ We refer to this reasoning as the *PJM Rationale*.

79. The Commission found that the *PJM Rationale* was applicable in the instant proceeding in that the power purchase agreement lowered the project's risk, enabling it to attract debt and equity capital investors on more favorable terms inconsistent with a competitive offer, and the contracting process that awarded that agreement was discriminatory. The Commission held that because the contracting process was discriminatory (i.e., limited to new resources), the lower financing costs associated with the power purchase agreement fall into the category, discussed in *PJM*, of "irregular or anomalous" cost advantages that are "not in the ordinary course of business." Thus, the Commission directed NYISO to use the proxy unit's cost of capital as of the date the analysis was performed for Astoria II in 2010.

80. Governmental Customers, Public Power Entities, and NYISO request rehearing. They argue that (1) the Commission's decision to impose proxy costs for the Astoria II exemption determination was an error in that it defeats the purpose of the new entrant mitigation rules; (2) the Commission misapplied the *PJM Rationale*; (3) the Commission applied the wrong standard for discrimination; (4) the Commission failed to establish a causal link between the NYPA RFP and Astoria II's financing costs; and (5) the Commission has changed, without justification, its long-standing policy of encouraging long-term contracts.

81. Governmental Customers state that the Commission erred in finding that the NYPA RFP was discriminatory because, under the tariff rules in place at the time, the Divested Generation Owners (DGOs) in the in-City market were prohibited from entering into bilateral transactions for capacity, and thus, from participating in the RFP. ⁹⁰ They assert that the record in this case demonstrates that the RFP was issued pursuant to an

⁸⁹ *PJM*, 137 FERC ¶ 61,145 at P 245.

⁹⁰ Government Customers observe that the ban on DGOs entering bilateral transactions for capacity was lifted by the Commission in the year following the RFP, pursuant to *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211, at P 60 (2008). See *Governmental Customers Request for Rehearing*, at 39-40.

open, transparent, and competitive procurement process in that NYPA received nine proposals from prospective suppliers and did not discriminate among fuel sources. They add that NYPA did not exclude any single market participant from the RFP; it only limited the ability of certain resources to bid because they could not solve the problem. They argue that discrimination against resources (i.e. the plant itself) cannot be undue discrimination when the owners of those resources are included in the solicitation.

82. Moreover, according to Governmental Customers, contrary to the Commission's finding at paragraph 135 of the September 10, 2012 Order, the NYPA RFP was not limited to new resources in that existing resources outside New York City could bid if they could secure delivery to Zone J. Governmental Customers add that the only limitation in the RFP was that the winning bidder must be new to Zone J, i.e., existing in-City capacity resources could not qualify, unless they were repowered. Governmental Customers add that this limitation was not discriminatory, but rather, it was a deliberate and justified attempt to bring new capacity into New York City, due to a clearly-identified need for additional generation in New York City.

83. Public Power Entities assert that, other than the Complainants' unsupported claims, there was no basis in the record to make a determination that the NYPA RFP process was discriminatory or unduly discriminatory.⁹¹ Public Power Entities state that the Commission ignored the fact that "[n]o claim or complaint of discriminatory practices was ever filed against NYPA with respect to its RFP process,"⁹² and that one of the Complainants "actively participated in the RFP process."⁹³ Public Power Entities argue that the Commission thus erred in ignoring substantial evidence that was contrary to its findings.⁹⁴ Public Power Entities also argue that the Commission departed without explanation from precedent in which it has found that NYPA's RFP process was non-discriminatory and also ignored evidence which demonstrated that the RFP was not discriminatory.⁹⁵ Moreover, Public Power Entities assert that the Commission's decision

⁹¹ Public Power Entities Request for Rehearing at 15. Public Power Entities maintain that if anyone were to have timely challenged NYPA's RFP as having discriminated against it under the Equal Protection Clause of the Fourteenth Amendment, that entity would have to demonstrate that NYPA treated the entity "disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Id.*

⁹² *Id.* (citing NYPA October 10, 2011 Answer at 27).

⁹³ *Id.* (citing NYPA October 10, 2011 Answer at 27, n.55).

⁹⁴ *Id.*

⁹⁵ *Id.* at 13 (citing September 10, 2012 Order, 140 FERC ¶ 61,189 at PP 135, 137).

was arbitrary because it did not articulate any basis or standard for making a determination that because there were certain qualification requirements in the RFP, it was “discriminatory.”⁹⁶

84. Public Power Entities state that while the Commission may analyze and consider the rates of non-jurisdictional utilities to the extent that those rates affect jurisdictional transactions,⁹⁷ the Commission has also recognized that it must respect the rights of non-jurisdictional entities to pursue legitimate policy interests.⁹⁸ Public Power Entities state that the Complainants themselves recognized that “the State of New York and its agencies are free to ‘pursue policy interests within their jurisdiction.’”⁹⁹ Public Power Entities maintain that NYPA’s rationale for fashioning its RFP as it did requires deference given NYPA’s legitimate policy interests of ensuring needed additional capacity in the most cost-effective manner.¹⁰⁰ Public Power Entities argue that the Commission did not even address if NYPA had a rational basis to limit its RFP to “new or repowered facilities.”¹⁰¹

85. Public Power Entities state that in *Conjunction, LLC*,¹⁰² the Commission found that NYPA’s RFP “seeking 500 MW of in-city generation capacity or a combination of generation and transmission capacity,” which solicited a “wide variety of proposals from power plants, new sources of energy, renewable sources and/or new transmission lines,” was a “broad-based solicitation designed to increase power options in New York City,” and that “this RFP process by a government entity has no potential for affiliate abuse and is designed to be non-discriminatory, fair and transparent.”¹⁰³ Public Power Entities

⁹⁶ *Id.*

⁹⁷ *Id.* at 16.

⁹⁸ *Id.*

⁹⁹ *Id.* (citing Complaint at 20).

¹⁰⁰ *Id.* (citing NYPA Answer, Docket No. EL11-50 at 13 (filed Oct. 11, 2011)).

¹⁰¹ *Id.* (citing NYPA Protest, Docket No. EL11-50 at 13 (filed Aug. 3, 2011)).

¹⁰² 108 FERC ¶ 61,090 (2004) (*Conjunction*).

¹⁰³ Public Power Entities Comments at 15 (citing *Conjunction*, 108 FERC ¶ 61,090, at PP 5, 13). Public Power Entities note that the Commission also cited this finding in *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104, at PP 22, 28 (2011).

maintain that here, however, the Commission failed to afford NYPA's open and transparent RFP process the same respect it has previously afforded to governmental entities' open and transparent RFP processes and departed from the legal standard of review it would have applied to a jurisdictional entity's RFP process.

86. Public Power Entities further argue that the Commission's finding that NYPA's RFP was discriminatory because it did not include existing generation runs counter to Order No. 1000 wherein the Commission is requiring that "transmission needs driven by Public Policy Requirements be considered in transmission planning processes."¹⁰⁴ Public Power Entities assert that NYPA tailored its RFP to meet specific public policy needs in the NYC market, i.e., the need for additional generation to ensure reliability under a broad spectrum of conditions, and the desire to replace older, less efficient generation with newer, more efficient and environmentally desirable generation. Yet, according to Public Power Entities, what the Commission finds it must mandate in the transmission arena, it has labeled discriminatory in the generation realm. Public Power Entities contend this inconsistency is glaring, and should be remedied on rehearing.

87. Finally, Governmental Customers, Public Power Entities, and the NYTOs argue that the Commission employed the wrong legal standard in that the only legal framework relevant here that justifies remedial action by the Commission is *undue* discrimination and NYPA's RFP was not *unduly* discriminatory. They maintain that for discrimination to be undue, and thus unlawful under the FPA, a regulated entity must engage in disparate treatment of similarly-situated entities;¹⁰⁵ and, on the contrary, when the utility can justify the disparate effect, its actions are not unduly discriminatory.¹⁰⁶ The NYTOs argue that the NYPA RFP sought new generation resources to replace NYPA's retirement of its Poletti unit, which provided a major portion of energy and capacity supplies for the New York City market, and they contend that the NYPA RFP was open and competitive to any and all new resources, without discriminating against any one resource type, owner, or proposal. The NYTOs and Governmental Customers argue that resources that were already providing Zone J capacity could not, by definition, replace the capacity of a soon-to-be retired Poletti plant, and thereby alleviate constraints in New York City and satisfy expected future shortfalls. Further, Governmental Customers assert that, even if NYPA engaged in a selective bilateral procurement, there is no federal law or regulation

¹⁰⁴ Public Power Entities Request for Rehearing at 17 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000-A, 139 FERC ¶ 61,132, at P 209 (2012)).

¹⁰⁵ Governmental Customers Request for Rehearing at 41.

¹⁰⁶ *Id.*

that requires NYPA to open its bilateral procurement to existing resources, or one that vests in this Commission the ability to pass judgment on NYPA's procurement or dictate market outcomes that flow from that judgment.¹⁰⁷

Commission Determination

88. Although we continue to believe that, in the circumstances where an RFP has been shown to be unduly discriminatory resulting in a non-competitive cost of capital, NYISO may substitute a proxy cost of capital for the new entrant's actual cost of capital, in this instance, we grant rehearing and find that the RFP in this case was not unduly discriminatory.

As Governmental Customers observe, existing capacity owned by the DGOs in New York City was prohibited under the terms of the NYISO Tariff from participating in the RFP when the RFP was held in late 2007.¹⁰⁸ Because the DGOs were barred from participating in any RFP, no capacity that could participate in the RFP and which might otherwise have won the contract was excluded from participation in the RFP. Thus, we would not expect the results of the RFP to have been different had it not limited the resources that could participate to new resources. So, although the RFP design limited participation in that respect, the design did not have a discriminatory effect. Since Astoria II could have been awarded a contract as a result of the RFP even if the RFP was not so limited, we conclude that it is reasonable to use Astoria II's actual cost of capital in the mitigation exemption determination. Accordingly, we direct NYISO to redo the exemption determination using Astoria II's actual cost of capital.

¹⁰⁷ Governmental Customers note that, as a general matter, the Commission's authority under the FPA does not extend to purchases. *Id.* n.116.

¹⁰⁸ As a part of the formation of the wholesale electricity market in New York City, the New York PSC required Con Edison to divest at least 50 percent of its in-city generating capacity to unaffiliated third parties. Con Edison elected, with the approval of the New York PSC, to auction off the majority of its in-city generation in three bundles of assets, which would be sold to three individual entities, known collectively as the Divested Generation Owners. In 1998, the Commission accepted market power mitigation measures for the DGOs. Among those measures was a prohibition of DGOs entering into bilateral contracts for ICAP. *See Keyspan-Ravenswood, Inc.*, 99 FERC ¶ 61,252, at 62,098 (2002); *see also Consolidated Edison Company of New York, Inc.*, 84 FERC ¶ 61,287 (1998).

7. Adjustment for Seasonal Differences in Capacity Ratings

89. Complainants argue on rehearing that the Commission did not address their arguments and evidence that NYISO failed to correctly adjust for seasonal differences in generating facility capacity levels to produce correctly weighted Offer Floors for the winter and summer capability periods. Complainants state that due to differences in ambient summer and winter temperatures, generating facilities generally have higher capacity ratings in the winter than in the summer and that it is essential that the Offer Floors correctly account for this factor in order to ensure that they are not too low in one capability period and too high in the other. Complainants assert that they demonstrated in the Complaint proceeding that NYISO failed to do so when it performed the mitigation exemption tests for the Astoria II and Bayonne Projects.¹⁰⁹ Complainants state that their witness, Mark D. Younger, using NYISO-forecasted winter and summer capacity levels (10,917.9 MW and 9,972.4 MW, respectively), demonstrated that the winter UCAP clearing price should have been “\$10.60/kW-month lower than the summer UCAP clearing price.” Complainants note that NYISO’s posted examples of how the buyer-side market rules will be implemented confirm that NYISO’s methodology for calculating summer and winter Offer Floors erroneously compresses the spread between summer and winter market clearing prices resulting in summer Offer Floors being set too low and uneconomic capacity clearing the market prematurely and artificially suppressing market clearing prices. Complainants also state that the Commission has emphasized that “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.”¹¹⁰ Complainants add that, while the September 10, 2012 Order was not focused on the calculation of Offer Floors for projects that failed the mitigation exemption test, nonetheless, in not addressing this issue, the September 10, 2012 Order is “intolerably mute” and rehearing is required in order to address it.

Commission Determination

90. Complainants have not shown that NYISO’s methodology for determining seasonal offer floors is inappropriate. NYISO’s Tariff defines Offer Floor as “lesser of a numerical value equal to 75 % of the Mitigation Net CONE translated into a seasonally

¹⁰⁹ Complainants Request for Rehearing at 4 (citing Complainants, Answer, Docket No. EL11-50-000, at 29 (filed September 23, 2011); *id.*, Attachment A, Second Supplemental Affidavit of Mark D. Younger at ¶¶ 17-18, 111-116 (Younger Second Supplemental Affidavit)).

¹¹⁰ *Id.* at 5 (citing *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178, at P 51 (2010), *order on reh’g*, 136 FERC ¶ 61,077 (2011)).

adjusted monthly UCAP value, or a numerical value determined as specified in Section 23.4.5.7.3 (Unit net CONE), translated into a seasonally adjusted monthly UCAP value using an appropriate class outage rate.”¹¹¹ However, NYISO’s Services Tariff does not prescribe a method for translating the Offer Floor into a seasonally adjusted value. Complainants assert that NYISO’s method failed to properly account for “the higher ratings that units have in the winter” in calculating seasonal Offer Floors for the Astoria II and Bayonne Projects, and therefore that the Offer Floors were “inconsistent with expected market clearing prices. However, the NYISO website sets forth NYISO’s formuli, which we find, contrary to Complainants’ claim, does reflect seasonal differences in capacity. Moreover, Complainants have not shown that NYISO’s formuli are unreasonable or that NYISO failed to follow these formuli in calculating the Offer Floor. While another methodology may also be reasonable, there is nothing in the record that shows that the methodology chosen by NYISO is unreasonable. We therefore reject Complainants’ contentions on this issue. If Complainants believe that their method will achieve more accurate winter and summer Offer Floors, they can pursue their use through the NYISO stakeholder process.

8. Projection of Energy and Ancillary Services Revenues

91. Complainants assert that the Commission should grant rehearing of the September 10, 2012 Order to ensure that NERA’s model produces accurate projections of energy and ancillary services revenues. Complainants state that NYISO and NERA use historical gas prices as an input to the NERA model when calculating energy and ancillary services revenues for purposes of resetting the ICAP demand curve, but that NYISO used natural gas futures prices to apply the mitigation exemption test.

92. Complainants also state that when natural gas futures prices were used as an input to the model, the resulting projected energy and ancillary services revenues did not change in tandem with changes in the gas futures prices. According to Complainants, the September 10, 2012 Order stated that “it is not unreasonable for the NERA model to conclude that net energy revenues may vary inversely with natural gas prices,” but at the same time the Commission acknowledged that the NERA model may nonetheless be flawed and stated that, if so, Complainants should seek to fix it, reasoning, according to Complainants, that the model would be equally flawed when applied to both historic natural gas prices and natural gas futures prices.¹¹² Complainants argue that the September 10, 2012 Order’s failure to propose a workable solution to an acknowledged problem was not the product of reasoned decision-making because Complainants are not

¹¹¹ NYISO Services Tariff § 23.2.1.

¹¹² *Id.* at 7.

in a position to “fix” the NERA model, as fixing the model is entirely outside of their control.

93. Complainants request that the Commission grant rehearing and order NYISO, NERA and the MMU to take certain additional steps to ensure that the NERA model does, in fact, produce an accurate projection of energy and ancillary services revenues. Complainants also request that the Commission direct (a) NYISO to provide, for each final mitigation exemption test determination, the model used and data demonstrating its accuracy when natural gas futures prices are used; (b) the MMU to address the accuracy of the net energy revenues projections produced by the NERA model when natural gas futures prices are used as an input, as part of the public report it is to prepare on each mitigation exemption test determination;¹¹³ and (c) NYISO and NERA to work with stakeholders to modify the NERA model to the extent necessary in light of such data and reports.

Commission Determination

94. Complainants misconstrue the September 10, 2012 Order’s assessment of the NERA model. In the September 10, 2012 Order, the Commission stated that it was not persuaded that the NERA model’s results – that find that net energy revenues vary inversely with natural gas prices – are unreasonable or inaccurate. The Commission noted that Complainants could pursue modification to the model *if* the model was flawed.¹¹⁴ In doing so, the Commission made no acknowledgement of any actual flaws. Though Complainants may not be in a position to directly “fix” the NERA model, should Complainants believe they have sufficient evidence that the model is flawed, they may pursue corrections to the model in the NYISO stakeholder process.

95. NYISO provided sufficient support for its use of natural gas futures prices in performing the prong (b) Unit exemption test.¹¹⁵ Conversely, Complainants have not demonstrated that the use of natural gas futures prices exposed flaws in the NERA model. Absent such showing as to why the Commission should find the NERA model to be inaccurate or the use of natural gas futures prices in applying the prong (b) Unit exemption test to be inappropriate, the Commission denies Complainants’ requests.

¹¹³ See *Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 (2012).

¹¹⁴ September 10, 2012 Order, 140 FERC ¶ 61,189 at P 102.

¹¹⁵ NYISO August 31, 2011 Answer at Meehan/Falk Aff. ¶¶ 38-42.

9. NYISO's Request for Clarification

96. NYISO states that certain rulings in the June 22, 2012 Order in Docket No. EL11-42-000 and in the September 10, 2012 Order would logically seem to be universally applicable because there is no apparent reason to restrict them only to the context of either the Pre-Amendment Rules or the currently effective buyer-side mitigation rules. NYISO further states that it believes it should follow this kind of broadly applicable Commission guidance in all of its buyer-side mitigation determinations (and redeterminations) regardless of whether they are conducted under the Pre-Amendment or the current buyer-side mitigation rules. NYISO states that it is in the process of performing buyer-side mitigation analyses consistent with this assumption, including its redetermination of the Hudson Transmission Partners, LLC's merchant transmission project (HTP Project).

97. Specifically, NYISO asks that the Commission confirm that, if NYISO is required to apply the *PJM Rationale* to replace Astoria II's cost of capital with the proxy unit's cost of capital, it should also apply the *PJM Rationale* to determinations under the buyer-side mitigation rules when the facts warrant. In addition, NYISO states that the Commission should confirm that the June 22, 2012 Order's holdings in Docket No. EL11-42 with respect to the use of inflation and escalation factors under the current buyer-side market rules should also be applied to the mitigation and Offer Floor redeterminations for Astoria II and Bayonne under the Pre-Amendment Rules. NYISO argues that it is reasonable to adjust Offer Floors for inflation after an entrant is in the market, regardless of whether that Offer Floor was set using the current buyer-side market rules and the Pre-Amendment Rules. NYISO adds that it would apply inflation to the Offer Floor for these redeterminations: (1) based on annual proxy net CONE rather than Unit Net CONE; and (2) inflated or deflated as applicable based on each specific project's entry date.

Commission Determination

98. Although this proceeding only addresses the mitigation determinations for Astoria II and Bayonne, we agree that it would be reasonable to apply the *PJM Rationale* and our other findings to future mitigation determinations. Thus, for example, we agree that the logic of our rulings in the June 22, 2012 Order in Docket No. EL11-42-000 with regard to inflation and escalation factors would apply to the redeterminations for the Astoria II and Bayonne projects because those rulings apply to the Pre-Amendment mitigation provisions that were not changed by the mitigation tariff changes that took effect November 27, 2011, which are not applicable here.

99. The Offer Floor is meant to ensure that an uneconomic new entrant will not improperly suppress capacity prices by bidding its capacity at a price lower than the Unit cost of new entry in the year the new entrant is expected to be participating in the

capacity market. That cost should not change except to make it comparable in “real” terms to capacity prices in each month that the new entrant is subject to the Offer Floor. And, as we held in the June 22, 2012 Order,¹¹⁶ this result is accomplished by annually applying an inflation factor to the Offer Floor. Finally, we clarify that NYISO may use appropriate proxy data if it shows that a specific actual data input is unreasonable, invalid, or otherwise inappropriate to use.

The Commission orders:

Clarification of the September 20, 2012 Order is hereby granted to the extent set forth above and rehearing is hereby granted, in part and denied, in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹¹⁶ 139 FERC ¶ 61,244 at P 72.