

150 FERC ¶ 61,208
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc. Docket Nos. EL07-39-006
ER08-695-004
ER10-2371-000

ORDER ON CLARIFICATION, REHEARING, AND COMPLIANCE FILING

(Issued March 19, 2015)

1. In this order the Commission grants, in part, and denies, in part, the requests for rehearing of its May 20, 2010 order¹ and directs a further filing by NYISO. The Commission also accepts, in part, and rejects, in part, the New York Independent System Operator, Inc.'s (NYISO) filing to comply with the May 20, 2010 Order.² The May 20, 2010 Order granted, in part, and denied, in part, rehearing of the Commission's September 30, 2008 order,³ which conditionally accepted NYISO's tariff proposals to strengthen the mitigation of market power in the New York City (in-City or NYC) Installed Capacity (ICAP) market. The May 20, 2010 Order also accepted NYISO's filing to comply with the September 30, 2008 Order.⁴

I. Background

2. This proceeding concerns NYISO's proposals to mitigate market power among suppliers in NYISO's in-City ICAP market.⁵ Prior orders discuss the case in detail and,

¹ *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170 (2010) (May 20, 2010 Order).

² NYISO's compliance filing was docketed ER10-2371-000.

³ *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 (2008) (September 30, 2008 Order).

⁴ NYISO filed to comply with the September 30, 2008 Order on October 30, 2008.

⁵ The Commission initially accepted NYISO's proposals on a conceptual basis in its March 7, 2008 order. *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 (2008) (March 7, 2008 Order). The March 7, 2008 Order directed NYISO to file the

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thus, we discuss here only the background and rulings of those Commission orders that are directly relevant at this stage of the proceeding. Of relevance here, in the September 30, 2008 Order, the Commission accepted NYISO's proposed definition of the generator buyer-side Default Offer Floor to be applied to new uneconomic entry of generation in the in-City ICAP market, and required in-City Special Case Resources (SCRs)⁶ to be subject to mitigation. A number of parties sought rehearing of those rulings. The September 30, 2008 Order also rendered a number of other rulings on other features of NYISO's proposed mitigation provisions, with associated compliance filing directives.

3. In the May 20, 2010 Order, the Commission granted rehearing of the September 30, 2008 Order's acceptance of NYISO's definition of the Default Offer Floor, found that the Default Offer Floor should be 75 percent of Net CONE as the Commission defined that term, and directed NYISO to file to correct the calculation of the Default Offer Floor consistent with that discussion. The Commission also accepted, subject to conditions, NYISO's compliance proposal to implement new in-City SCR mitigation rules.⁷ Again, a number of parties sought rehearing of these two rulings. This order addresses the rehearing requests related to these two rulings. Specifically, the Commission directed NYISO to: (1) file tariff sheets explaining with specificity the criteria it proposes to use in evaluating whether to include a specific subsidy or other benefit in its calculation of SCR Offer Floors; (2) to review the merits of the existing mitigation exemption for small sellers of capacity, report as to whether the exemption should remain, and if so, explain how the mitigation measures would address certain market power issues NYISO has raised; (3) equalize the conduct and impact thresholds

actual tariff provisions that were conditionally accepted by the September 30, 2008 Order. 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).

⁶ A Special Case Resource is a demand side resource that participates in NYISO's installed capacity market as an installed capacity supplier. *See* Section 2.19 of NYISO's Services Tariff.

⁷ Following a grant of an extension of time to file, NYISO filed to comply with the September 30, 2008 Order on August 12, 2010, but this filing was rejected due to an incorrect filing type code. NYISO then withdrew the August 12, 2010 filing and resubmitted it on August 23, 2010. NYISO subsequently withdrew the August 23, 2010 filing as it had omitted an attachment and resubmitted the August 12, 2010 filing in its entirety on August 24, 2010. Protests and comments were filed, as discussed later below.

for Pivotal Supplier physical withholding through exports; (4) revise the penalty for physical withholding through a failure to offer so that it is the same as the penalty for physical withholding through uneconomic exports; and (5) revise the tariff to state that deadlines for requesting and receiving determinations of whether exports would be uneconomic shall be made in accordance with the deadlines specified in ISO Procedures.

II. Requests for Clarification or Rehearing

4. On June 21, 2010, NYISO filed a request for clarification of the May 20, 2010 Order and Independent Power Producers of New York, Inc. (IPPNY), NRG Companies⁸ (NRG), and TC Ravenswood, LLC (Ravenswood) each filed a request for rehearing of the May 20, 2010 Order. On July 6, 2010, New York Transmission Owners (NY Transmission Owners)⁹ filed an answer to IPPNY's request for rehearing. On July 21, 2010, as corrected on July 22, 2010, and July 23, 2010, NYISO filed an answer to IPPNY's request for rehearing¹⁰ and to the NY Transmission Owners' answer. On August 5, 2010, IPPNY filed an answer to NYISO's answer.

A. Procedural Matters

5. 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.

B. Substantive Matters

1. Generator Default Offer Floor

a. Background

6. Section 23.4.5 of Attachment H, Market Power Mitigation Measures, of NYISO's Market Administration and Control Area Services Tariff (Services Tariff) defines the

⁸ 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.

⁹ NY Transmission Owners consist of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc. (ConEd), Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

¹⁰ NYISO states that its answer also addresses the similar arguments advanced by NRG and Ravenswood in their requests for rehearing.

NYC generator mitigation “Offer Floor” for a non-exempt new generation entrant into the NYC ICAP market as the lower of what we refer to as the Default Offer Floor or the Unit Offer Floor. The Default Offer Floor equals 75 percent of the “Net CONE” of the proxy peaking unit used to design the Demand Curve for NYC. “Net CONE” is defined in section 23.2.1 as follows:

For purposes of Section 23.4.5 of this Attachment H, “Net CONE” shall mean the localized levelized embedded costs of a peaking unit in the New York City Locality, net of the likely projected annual Energy and Ancillary Services revenues of such unit, as determined in connection with establishing the Demand Curve for the New York City Locality pursuant to Section 5.14.1.2 of the Services Tariff, or as escalated as specified in Section 23.4.5.7 of Attachment H.

7. The Demand Curve referenced in the definition of “Net CONE” specifies capacity prices per kW-month corresponding to different levels of capacity supply. If capacity supply equals 100 percent of the ICAP requirement, the corresponding market clearing capacity price is the “Reference Price.” As capacity supply increases beyond the ICAP requirement, the market clearing capacity price declines linearly until it reaches zero at 118 percent of the ICAP requirement. In determining the Reference Price, section 5.14.1.2 of the Services Tariff requires NYISO to assess:

(i) the current localized levelized embedded cost of a peaking unit in each NYCA locality and the Rest of State to meet minimum capacity requirements [and] (ii) the likely projected annual Energy and Ancillary Services revenues of the peaking unit over the period covered by the adjusted ICAP Demand Curves, net of the costs of producing such Energy and Ancillary Services, under conditions in which the available capacity would equal or slightly exceed the minimum Installed Capacity requirement.¹¹

¹¹ Section 5.14.1.2 was revised, effective January 9, 2012, to specify that “[t]he cost and revenues of the peaking plant used to set the reference point and maximum value for each Demand Curve shall be determined under conditions in which the available capacity is equal to the sum of (a) the minimum Installed Capacity requirement and (b) the peaking plant’s capacity equal to the number of MW specified in the periodic review and used to determine all costs and revenues.” *New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,160 (2012). We note that excess capacity in the ICAP market lowers expected energy and ancillary services revenues and, thus, increases Net CONE which raises ICAP prices by raising the Demand Curve.

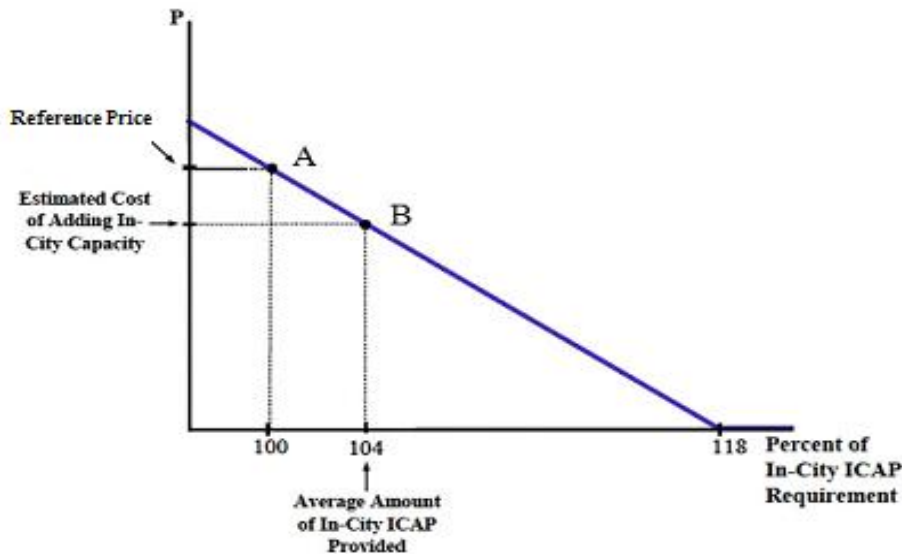
8. NYISO described the Reference Price calculated in accordance with section 5.14.1.2 as equal to “Net CONE”¹² and therefore proposed that the Default Offer Floor would equal 75 percent of the Reference Price.

9. However, the NY Transmission Owners pointed out that the Reference Price determined in accordance with section 5.14.1.2 of the Services Tariff did not equal Net CONE as defined in section 23.2.1. In accordance with section 5.14.1.2, the Reference Price is to be adjusted to reflect the expectation that capacity levels in NYC will generally exceed 100 percent of the ICAP requirement. For the 2008-2011 Demand Curves, the assumed average capacity level was 104 percent of the minimum ICAP requirement.¹³ In contrast, the NY Transmission Owners pointed out that Net CONE as defined in section 23.2.1 for purposes of in-City mitigation does not include such an adjustment. Thus, the NY Transmission Owners argued that the Default Offer Floor should equal 75 percent of Net CONE as defined in section 23.2.1, which on a per kW-month basis is the Demand Curve price corresponding to 104 percent of the ICAP requirement, and not 75 percent of the Reference Price corresponding to 100 percent of the ICAP requirement. The following graph shows the different price points on the Demand Curve that NYISO and the NY Transmission Owners defined as “Net CONE” for purposes of establishing the mitigation Offer Floor.¹⁴

¹² See NYISO Reply Comments, Docket No. EL07-39-000, at 16, n. 44 (filed December 12, 2007) (Regarding “Dr. Patton’s proposal for a 75% of net CONE threshold” for buyer mitigation, NYISO stated, “In this context, ‘net CONE’ refers to the reference level at 100% of the minimum capacity requirement that is determined in setting the NYC demand curve.”). NYISO again referred to this definition of “net CONE” for purposes of Offer Floor mitigation in its June 11, 2008 answer to protests to its May 6, 2008 compliance filing. NYISO Response to Comments, Docket No. ER08-695-001, at 12 (filed June 11, 2008).

¹³ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,064, at P 27 (2008) (January 29, 2008 Order). The assumed level of excess capacity above the minimum capacity requirement may change in each Demand Curve reset proceeding. However, for ease of discussion in this order, we will refer to the 104 percent capacity level applied in the 2008-2011 Demand Curve reset proceeding.

¹⁴ NY Transmission Owners May 27, 2008 Comments, Docket No. ER08-695-001, at 5.



Thus, referring to the graph above, NY Transmission Owners proposed that the Default Offer Floor be set at 75 percent of price B, whereas NYISO proposed that it be set at 75 percent of Price A.

10. In the May 20, 2010 Order, the Commission agreed with NY Transmission Owners and rejected NYISO's proposed Default Offer Floor and directed NYISO to make a compliance filing to correct the calculation of the Default Offer Floor.¹⁵

b. Rehearing Arguments of the Parties

11. IPPNY, Ravenswood, and NRG seek rehearing of the May 20, 2010 Order and request that the Commission reinstate the Default Offer Floor calculated as 75 percent of the Reference Price. IPPNY agrees with the NY Transmission Owners that the 2008-2011 Demand Curves reflect an assumed capacity level equal to 104 percent of the in-City ICAP requirement, but asserts that the Default Offer Floor should be based on the Reference Price. In IPPNY's view, supported by an affidavit by Mark D. Younger attached to its request for rehearing, a Default Offer Floor based on a lower capacity price corresponding to 104 percent of the ICAP requirement would be inconsistent with the

¹⁵ May 20, 2010 Order, 131 FERC ¶ 61,170 at P 31.

Demand Curve and undercut the ability of the mitigation to prevent price suppression.¹⁶ Moreover, Mr. Younger's affidavit concludes that at the lower price, a hypothetical new entrant would require an unreasonable 40-year amortization period to recover its costs.¹⁷ According to IPPNY, a Default Offer Floor based on the lower price level recommended by the NY Transmission Owners would ignore important risk factors used to develop the Demand Curve and artificially suppress capacity prices.

12. Both Ravenswood and NRG support IPPNY's rehearing request and both assert that the Reference Price reflects the minimum price needed for a new hypothetical unit to recover its costs over time. NRG also argues that the Default Offer Floor is designed to ensure that uneconomic entry does not compromise the ability of the market to provide for just and reasonable rates. According to NRG, the lower Default Offer Floor advocated by the NY Transmission Owners creates the potential for buyers to engage in a greater amount of uneconomic entry and perpetuates reliance on subsidized entry. Finally, NRG claims that the Commission provided no record support for the lower Offer Floor and whether it would permit Commission jurisdictional capacity markets to support new entry.

c. Commission Determination

13. We deny rehearing. The issue on rehearing is which Demand Curve price should be the basis for calculating the Default Offer Floor: (1) the Reference Price corresponding to 100 percent of the ICAP requirement (Price A on the graph above); or (2) a lower price corresponding to the percentage of the capacity requirement incorporated into the Demand Curve, which was 104 percent in the 2008-2011 Demand Curve reset proceeding (price B on the graph above).¹⁸

14. We find that the lower price (price B on the graph above) is supported by the record as a just and reasonable level for determining the Default Offer Floor.¹⁹ Picking

¹⁶ IPPNY June 21, 2010 Request for Rehearing at 8. *See also* NYISO November 30, 2007 Filing in Docket No. ER08-283-000 at Attachment 6, Exhibit A (2008 – 2011 ICAP Demand Curve reset proceeding filing).

¹⁷ *Id.* Younger Aff. at ¶ 48.

¹⁸ We note that, in NYISO's July 21, 2010 Answer, which we reject above on procedural grounds, NYISO now agrees with the NY Transmission Owners that price B on the graph above is the proper basis for calculating the Default Offer Floor.

¹⁹ What may have caused confusion regarding this higher "Reference Price" Demand Curve parameter figure was that NYISO's consultant Meehan achieved it by reducing the amortization period used to calculate Net CONE (as defined by the Commission) by a factor derived from solving for the effect of the assumed 104 percent

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point B “is not a matter for the slide-rule,” but, rather, involves judgment. While experts may differ on the appropriate point, we find that price B fulfills the purpose of the mitigation Offer Floor, for the reasons discussed below and meets the requirements of Attachment H of the NYISO Services Tariff as it is equal to “Net CONE” of the proxy generator that is to be used for the Default Offer Floor as defined in Attachment H of the Services Tariff using a 30 year amortization as approved in the January 29, 2008 Order. That distinguishes price B from price A insofar as the net cost calculation underlying the Reference Price at price A was based on an “adjustment” to the Net CONE calculation to reflect a lower, 17.5 year, amortization. In the 2008-2011 Demand Curve reset proceeding, the Demand Curve included an adjustment to reflect an average capacity surplus that is four percent greater than the ICAP requirement. Thus, at the lower price level corresponding to price B on the graph above, a hypothetical new LMS-100 generator would be expected to recover its costs net of energy and ancillary services revenues over an approximate 30-year period.²⁰ Consistent with the original affidavit filed by Mr. Meehan of NERA Economic Consulting (NERA), who developed the Demand Curves in NYISO’s 2008-2011 Demand Curve reset proceeding, we also agree that, because of the same four percent adjustment, at the Reference Price, the LMS-100 unit used in the calculation of the NYC Demand Curve would be expected to recover its costs over a 17.5-year period.²¹

15. Accordingly, the Commission in the May 20, 2010 Order agreed with and adopted the analysis of the NY Transmission Owners in their request for rehearing, which showed that the Reference Price was calculated to provide that, at the clearing price

excess capacity (i.e., the capacity of the proxy unit) on ICAP market prices. Thus, both NYISO and the NY Transmission Owners have referred to the Reference Price point at 100 percent of the minimum requirement as being equal to “adjusted” Net CONE and to the lower price at 104 percent of the minimum requirement simply as “Net CONE.” However, the resulting higher figure Mr. Meehan used as the Reference Price parameter in designing the Demand Curves for NYC as the result of that “adjustment,” nonetheless, was not “Net CONE” *as defined in section 23 of the Services Tariff* and as approved by the Commission and, therefore, the Reference Price is not to be used to establish the NYC generator mitigation Default Offer Floor.

²⁰ See NYISO November 30, 2007 Filing Transmittal in the 2008 – 2011 ICAP Demand Curve reset proceeding in Docket No. ER08-283-000 at 12, 18. The Commission approved NYISO’s use of a 30-year recovery period in developing the Demand Curves in NYISO’s 2008-2011 Demand Curve filing. January 29, 2008 Order, 122 FERC ¶ 61,064, at P 44.

²¹ See NYISO, Filing of Tariff Revisions to Implement Revised Demand Curves for Capability Years 2008/2009, 2009/2010, 2010/2011, Docket No. ER08-283-000, Transmittal Letter at 9 (filed November 30, 2007).

expected in the market (i.e., at the price of the 104 percent excess capacity level incorporated into the 2008-2011 Demand Curves), the proxy peaking unit would recover its costs over the 30-year period, consistent with the January 29, 2008 Order.²²

16. IPPNY offers testimony from Mr. Younger that price B cannot be the correct price on which to base the Offer Floor because, at that price, a new entrant would require an unreasonable 40-year amortization period to recover its costs. We generally do not permit new evidence to be introduced on rehearing,²³ and thus, we will not accept Mr. Younger's affidavit and analysis. But, even if we were to consider this evidence, we would reject Mr. Younger's analysis, which relied on lower energy and ancillary services revenues for the first three years of the analysis of Net CONE compared to the revenues assumed for the remaining 27 years of the analysis. In the January 29, 2008 Order, the Commission rejected a proposal to base the energy and ancillary services revenues on the three-year period covered by the Demand Curves and approved NYISO's proposed use of an estimate of such revenues over a 30-year period.²⁴ Mr. Younger's analysis does essentially what the Commission rejected in that order.

17. The Default Offer Floor is intended to approximate a competitive offer from a new entrant, or a capacity price an economic new entrant would require to enter the market. NYISO proposed and we have accepted that a Default Offer Floor equal to 75 percent of Net CONE,²⁵ specifically 75 percent of the cost of an LMS-100 unit less net

²² May 20, 2010 Order, 131 FERC ¶ 61,170 at P 31; *see* NY Transmission Owners October 30, 2008 Request for Rehearing, Docket No. EL07-39-004, *et al.*; *see also* October 4, 2007 Compliance Filing, Docket No. EL07-39-000, Attachment 2, Aff. of Mr. Eugene T. Meehan, at ¶ 27 (“[I]n the NERA/S&L study, we solved for an amortization period for New York City of 15.5 years. Essentially, we found that levelizing investment costs for 15.5 years to determine the net CONE, considering that over time the price would clear below the net CONE, would enable the peaking unit to earn its cost of capital over a 30-year life.”). Later in its 2008-2011 Demand Curve Filing in Docket No. ER08-695-000, NYISO used a 17.5-year amortization period to determine the Reference Price. *See* NYISO, Filing of Tariff Revisions to Implement Revised Demand Curves for Capability Years 2008/2009, 2009/2010, 2010/2011, Docket No. ER08-283-000, Transmittal Letter at 9 (filed November 30, 2007).

²³ *Commonwealth Edison Co. and Commonwealth Edison Co. of Indiana*, 127 FERC ¶ 61,301, at P 14 (2009); *PPL Electric Utilities Corp.*, 124 FERC ¶ 61,229, at P 7 (2008); *TransCanada Power Marketing Ltd. v. ISO New England Inc.*, 123 FERC ¶ 61,149, at P 22 (2008); *New York Independent System Operator, Inc.*, 112 FERC ¶ 61,283, at P 35, n.20 (2005).

²⁴ January 29, 2008 Order, 122 FERC ¶ 61,064 at P 44.

²⁵ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 32.

energy and ancillary services revenues used to develop the NYC Demand Curve, is reasonable. This value is based on the default Net CONE as defined in Attachment H of NYISO's Services Tariff²⁶ and is based on a 30-year amortization period.²⁷ To develop the Demand Curve, section 5.14.1.2 requires an adjustment to account for a capacity level that exceeds the ICAP requirement.²⁸ This adjustment, based on the 2008-2011 Demand Curves, assumed an average capacity supply equal to 104 percent of the ICAP requirement, and shifted the Demand Curve so that the estimated levelized net cost of the proxy LMS-100 unit would correspond to a capacity level equal to 104 percent of the ICAP requirement. In this way, all prices on the Demand Curve reflect the risk of a small, but persistent, supply exceeding the ICAP requirement. As a result, the adjustment produces a Reference Price that exceeds the Net CONE value defined in section 23.2.1. Thus, in our view, a Default Offer Floor based on the lower price level reasonably reflects the important risk factor that an expected average surplus capacity level creates. Market clearing is expected to fluctuate around this level, not around the capacity level corresponding to the Reference Price (where supply equals the ICAP requirement). This Demand Curve adjustment needed to account for the risk of surplus capacity is not an element used to determine the levelized net cost of the proxy LMS-100 unit which is defined as Net CONE in section 23.2.1.

18. Further, mitigation under the Default Offer Floor is intended to require a competitive offer from a new entrant that may otherwise have the incentive and ability to exercise market power by suppressing prices. Our ruling may produce lower capacity offers than would result under a higher Default Offer Floor. This outcome would be just and reasonable because it would reflect the competitive cost of new entry.²⁹ The goal of

²⁶ NYISO, Services Tariff, § 23.2.1.

²⁷ January 29, 2008 Order, 122 FERC ¶ 61,064 at P 44.

²⁸ May 20, 2010 Order, 131 FERC ¶ 61,170, at P 27 (“[G]iven the bias toward excess capacity, the new peaking unit could not be expected to receive the revenue implied by the net CONE figure over time. Hence, the ICAP Demand Curve could not incent sufficient new entry without an adjustment to net CONE.”). This adjustment is required because the New York planning process is based on an objective of ensuring that capacity does not fall below the minimum requirement. The Commission found that it is reasonable to assume that the NYCA will experience some level of capacity above the minimum requirement and accepted NYISO's assumed excess levels. *See* January 29, 2008 Order, 122 FERC ¶ 61,064 at PP 31-34.

²⁹ Higher or lower market clearing prices than the Default Offer Floor are possible depending on other accepted capacity offers. In the NYC capacity auctions, the last bid accepted in the auction establishes the market clearing price applicable to all accepted bids.

mitigation is to ensure competitive offers from all participants, not to target a higher or lower price. For these reasons, we deny rehearing.

19. Finally, we clarify that the Commission's ruling does not affect the Demand Curve reset process. In particular, our decision in no way affects the need to factor in a surplus assumption to determine the Reference Price, which is a key element in the determination of the ICAP Demand Curve. Our decision only reiterates that the point on the Demand Curve that corresponds to Net CONE, as defined in section 23.2.1, is the localized levelized embedded cost of a peaking unit in NYC net of the likely projected annual Energy and Ancillary Services revenues. The Reference Price used in setting the Demand Curve continues to be based on a level of assumed excess above the ICAP requirement that may vary with each Demand Curve reset, but will always result in a Reference Price that exceeds Net CONE, as defined in section 23.2.1.

2. Offer Floor for SCRs

20. NYISO proposed an Offer Floor for SCRs equal to the minimum monthly ICAP payment that the SCR receives from its Responsible Interface Party, plus the monthly value of any third party payments or other benefits the SCR or Responsible Interface Party receives for providing ICAP. In accepting NYISO's proposal, the Commission stated

where the SCR has agreed to accept a percentage of the market clearing price with a guarantee of a minimum monthly payment in return for a capacity obligation, that minimum payment, coupled with other benefits or subsidies, is a reasonable proxy for the SCR's net cost of providing that capacity, which would be difficult to determine, and thus is a reasonable Offer Floor.³⁰

21. The Commission concluded that subsidies or other benefits designed to encourage SCRs should be included in the calculation of the Offer Floor, stating that "the best representation of the opportunity cost of that curtailment is the value that will induce the SCR to abstain."³¹ However the Commission also stated that

[n]onetheless, it is not our intent to interfere with state programs that further specific legitimate policy goals. We agree that it is appropriate to exempt payments an SCR receives from such programs from the calculation of the price floor proposed by NYISO. Based on the information provided in this proceeding, the Commission believes it is

³⁰ May 20, 2010 Order, 131 FERC ¶ 61,170 at P 133.

³¹ *Id.* P 136.

reasonable to allow an exemption for the two programs discussed in the filings in this proceeding, [New York State Energy Research and Development Authority (NYSERDA)] rebates and ConEd's Distribution Load Relief Program, and exclude the payments received by SCRs under these programs from the calculation of the offer floor.³²

22. The Commission also directed NYISO to file tariff sheets listing the criteria it proposes to use in evaluating whether to include a specific subsidy or other benefit in its calculation of Offer Floors for future SCR programs. The Commission also directed NYISO to publish on its website a complete list of SCR programs whose subsidies and other benefits are to be included or excluded in the Offer Floor.³³

a. NYISO's Request for Clarification

23. NYISO seeks confirmation that the May 20, 2010 Order did not intend for NYISO to evaluate the "legitimacy" of individual state programs that provide for benefits or payments to SCRs when calculating SCR Offer Floors. NYISO states that such a requirement would be inconsistent with both Commission policy and NYISO's role as a market administrator. NYISO states that it reads the Commission's single reference to "specific legitimate policy goals" as a non-dispositive expression of the Commission's desire that state programs not be disrupted, rather than a mandate that NYISO undertake a "legitimacy analysis" of each program. NYISO adds that because of stakeholder controversy over how SCR payments should be considered in Offer Floor calculations, it requests clarification that the May 20, 2010 Order does not require NYISO to distinguish "legitimate" state programs from others in calculating SCR Offer Floors.

24. NYISO states that the requested clarification is consistent with Order No. 719's determinations that Independent System Operators and Regional Transmission Organizations (ISOs/RTOs) must not interpret potentially ambiguous state laws and regulations.³⁴ NYISO contends that requiring an ISO/RTO to discern the intent of state policies, and evaluate their "legitimacy," would be problematic and contrary to Commission policy encouraging ISO/RTO responsiveness to states that is articulated in

³² *Id.* P 137.

³³ *Id.* P 138.

³⁴ NYISO June 21, 2010 Filing at 4 (citing *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 at nn. 78 & 212 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009); *See also* Order No. 719-A, FERC stats. & Regs. ¶ 31,292 at P 50).

Order No. 719 and Order No. 2000.³⁵ NYISO states that it interprets the Commission's instructions as a mandate to identify criteria that may cause uneconomic SCR entry harmful to capacity markets, and not to evaluate the legitimacy or goals of SCR programs, themselves.

b. NRG's Request for Rehearing

25. NRG argues that the decision to exempt NYSERDA and Consolidated Edison's (ConEd) Distribution Load Relief Program payments from the Offer Floor lacks record support and was internally inconsistent. NRG states that the Commission rejected requests for a blanket exemption from the Offer Floor for any subsidies or other benefits designed to encourage SCRs to enter the market and correctly recognized that the Offer Floor should reflect the costs that induce SCRs to abstain from using power. But then, NRG asserts, the Commission inconsistently exempted the two main programs that induce SCRs to enter the market. NRG states that the NYSERDA program offers incentives to offset the cost of equipment, and asserts that such incentives are directly tied to participation as an SCR ICAP provider in the NYISO market. NRG adds that the Distribution Load Relief Program pays customers an additional capacity payment for actually reducing at least 50 kW of load for a period of not less than four hours and that demand response providers look to both NYISO and ConEd payments to incent them to enter the market.

26. NRG further argues that the Commission did not adequately explain its statement about not "interfere[ing] with state programs that further specific legitimate policy goals." According to NRG, properly framed, the issue in this proceeding is not whether the Commission should interfere with state policy objectives of encouraging demand resources, but rather whether the Commission should allow SCRs to participate in Commission-jurisdictional wholesale markets without mitigation, despite an economic interest and opportunity to suppress capacity market prices. NRG claims that the May 20, 2010 Order provides no reasoned basis for why applying buyer-side mitigation to new SCR entrants is inconsistent with state policies or undermines New York's provision of incentives to demand response. NRG adds that mitigation of buyer-side market power from SCRs is not inconsistent with state goals, in that nothing prevents the state from pursuing legitimate public policy objectives; it simply cannot do so at the expense of maintaining the pricing integrity of the Commission-jurisdictional capacity market.

³⁵ *Id.* at 5 (citing *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,074-075 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)).

27. In addition, NRG asserts that the Commission failed to identify in any way the specific information upon which it relied for its decision, did not provide the specific information, and did not provide the criteria it used in determining that the information provided supported exempting these two programs from the Offer Floor. Moreover, according to NRG, the Commission compounded the error by establishing a further proceeding to determine the criteria for exempting additional state programs aimed at SCRs from the Offer Floor.³⁶ NRG states that reasoned decision making requires that the Commission determine and explain the criteria for exempting these two programs.

28. NRG states that, in any event, the information provided in this proceeding did not support exempting these two programs. NRG contends that, to be an effective tool, the Offer Floor must prevail when state initiatives adversely impact the just and reasonable capacity rate. Thus, according to NRG, the Commission should not have reduced the Offer Floor for SCRs by exempting the two programs that induce SCRs to enter the market.

29. Finally, NRG argues that, at a minimum, the Commission should defer exempting these two programs from the Offer Floor pending a decision on the NYISO filing to specify the criteria for exemption of state programs from the Offer Floor. Further, the Commission should clarify that any decision on that filing will be based on the facts and circumstances of the New York programs.

Commission Determination

30. We clarify that our May 20, 2010 Order did not intend for NYISO to rule on the legitimacy of particular state programs. However, neither did we intend to grant a blanket exemption for all state programs that subsidize demand response.³⁷ Upon further consideration, we conclude that it is not necessary for NYISO to provide a list of criteria to govern the determination of whether payments under specific programs should be excluded from the SCR Offer Floor determination. Consistent with the Commission's order in *PJM*, the state may seek an exemption from the Commission pursuant to section 206 of the FPA if it believes that the inclusion in the SCR Offer Floor of rebates and other benefits under a state program interferes with a legitimate state objective.³⁸ An

³⁶ NRG June 21, 2010 Request for Rehearing at 18 (citing *ANR Pipeline Co. v. FERC*, 931 F.2d 88, 92093 (D.C. Cir. 1991) (finding the Commission "lack[ed] the clarity and consistency necessary" in granting summary disposition while at the same time expressly leaving open the same issue at hearing)).

³⁷ We have rejected the blanket exemption from mitigation of state sponsored projects. See *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 89 (2011) (*PJM*).

³⁸ *Id.* P 91.

exemption determination will then be made by the Commission based on the specific request, which will be given public notice and be subject to comments and protests so that the Commission's determination can be based on a full record. Accordingly, we direct NYISO to file to revise its Services Tariff to provide that, unless ruled exempt by Commission order on a request for exemption filed by the state, all rebates and other benefits from state programs must be included in the SCR Offer Floor.³⁹

31. In the May 20, 2010 Order, the Commission determined that payments under ConEd's Distribution Load Relief Program and the NYSERDA rebate program should not be included in the calculation of the SCR Offer Floor. However, upon further consideration, we grant NRG's request for rehearing with regard to these two programs, reverse the Commission's findings with respect to these two programs, and direct that any determination regarding the treatment of rebates and benefits under these two programs going forward be made in accordance with the procedure we establish above. We agree with NRG that the current record in this proceeding does not adequately support the exemption of payments under these two programs from the SCR's offer floor, and accordingly, we grant rehearing. We believe that allowing exemptions under such programs requires the kind of fully developed record that is best made in the give and take of a Commission proceeding focused on the specific requested exemption. We emphasize that our determination regarding payments under these two programs rests wholly on our concern over the insufficient record in this proceeding.

32. The reversal of our prior decision to exclude such payments raises the question of remedy for past rates that may have been unjust and unreasonable. In fashioning such remedy, we weigh the complication and cost of resettling the market and the uncertainty such action could create for market participants against the benefit, if any, to be gained by such endeavor.⁴⁰ In this case, we find that the expense, and complexity associated with attempting to re-create putative market outcomes – as well as the uncertainty for market participants – outweighs whatever benefit might accrue to the market through this exercise. Accordingly, our ruling here is effective prospectively from the date of this order, and thus will not affect the formerly exempt status of the payments associated with these two programs prior to the date of the order.

³⁹ In the later part of this order dealing with NYISO's compliance filing, we reject its proposed tariff provision that would establish a blanket exemption for all state programs. *See infra* P 79.

⁴⁰ *California Indep. Sys. Operator Corp.*, 120 FERC ¶ 61,271, at P 24 (2007).

III. NYISO's August 24, 2010 Compliance Filing in Docket No. ER10-2371-000

A. Notice of Filing and Responsive Pleadings

33. NYISO's August 24, 2010 filing to comply with the May 20, 2010 Order was docketed in Docket No. ER10-2371-000 and notice of the filing was published in the *Federal Register*, 75 Fed. Reg. 54,615 (2010), with interventions and protests due on or before September 14, 2010.⁴¹

34. Hess Corporation, NRG Companies, Bayonne Energy Center, LLC, and Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (collectively, Constellation) filed motions to intervene. On September 2, 2010, NY Transmission Owners filed a motion to intervene and comments. On September 2, 2010, as corrected on September 3, 2010, In-City Suppliers⁴² filed a motion to intervene and protest.

35. On September 17, 2010, In-City Suppliers filed an answer to NY Transmission Owners and NYISO filed an answer to In-City Suppliers and NY Transmission Owners.

B. Compliance Procedural Matters

36. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

⁴¹ NYISO initially submitted its filing on August 12, 2010, but used an incorrect filing code and was requested by FERC Staff to withdraw and resubmit the filing. NYISO states that it resubmitted its filing on August 23, 2012, but inadvertently omitted an attachment. Problems with NYISO's eTariff software required NYISO to resubmit the entire filing on August 24, 2014.

⁴² In-City Suppliers consists of Astoria Generating Company, L.P., GDF Suez Energy North America, Inc., TransCanada Power Marketing Ltd., and TC Ravenswood, LLC.

C. Substantive Compliance Matters

1. Definition of Control

a. Background and NYISO's Filing

37. In the May 20, 2010 Order, the Commission recognized that when control is defined consistent with Order No. 697⁴³ as we have required, NYISO's proposal to exempt small sellers from market power mitigation, which the Commission had previously accepted, may create a loophole that could give an entity an incentive and ability to exercise market power by withholding capacity even if it controls less than 500 megawatts of UCAP.⁴⁴ The Commission, therefore, directed NYISO to review the merits of the existing mitigation exemption and report as to whether the exemption should remain. If NYISO chose to retain the exemption for small sellers, NYISO was directed to explain how its mitigation proposal would address the market power issues it has raised without broadening the definition of control.⁴⁵

38. In its August 24, 2010 Filing, NYISO states that it re-examined the merits of the existing 500 MW exemption using the updated Demand Curve parameters and prices from May 2008 through June 2010, and determined that the existing 500 MW exemption should be retained even with the current, narrower definition of control.⁴⁶ NYISO adds that its Independent Market Monitoring Unit (MMU) supports this determination.⁴⁷

⁴³ In Order No. 697 the Commission said “[A]n entity controls the facilities when it controls the decision-making over sales of electric energy including discretion as to how and when power generated by the facilities will be sold.” *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007) FERC Stats. & Regs. ¶ 31,252 (2007). NYISO's proposed definition broadened the definition of control to include the retention of revenue or other financial benefits from UCAP, which the Commission rejected in the September 30, 2008 Order on the basis that it went beyond the scope of the March 7, 2008 Order.

⁴⁴ NYISO asserted that some contract terms could be structured to give a seller a continuing financial interest in the sales of other market participants so that even though a seller might retain control (as defined under Order No. 697) of less than 500 megawatts of UCAP, it could nevertheless profit from withholding on the capacity it has transferred to a third party. May 20, 2010 Order, 131 FERC ¶ 61,170 at P 23.

⁴⁵ *Id.*

⁴⁶ August 24, 2010 Re-Filing of August 10, 2010 Filing Letter, at 15-16.

⁴⁷ *Id.* at 16.

NYISO states that, over the 26-month period examined, the average required size for profitable withholding was 575.8 MW and the median size was 676.5 MW. NYISO notes that although the size for profitable withholding was above 500 MW in summer months and below 500 MW in winter months, winter withholding is not as much of a concern because in-City capacity prices are frequently significantly lower and usually set by the overall NYCA price, which makes the potential opportunity to benefit from withholding much lower and less predictable than in the Summer.⁴⁸ NYISO asserts that this analysis confirms that the 500 MW level is an appropriate level at which to identify ICAP Suppliers that could benefit from withholding as Pivotal Suppliers.

39. NYISO states that it continues to believe that the risk of market abuses with the combination of the current definition of control and the 500 MW exemption is greater than with the narrower proposed definition, but it believes that the advantages of retaining the exemption outweigh the disadvantages, even after accounting for the heightened risk. NYISO states that if it were to uncover suspicious conduct, it would refer the matter to the MMU and consider proposing tariff revisions to address any issues. NYISO also states that it intends to include the amounts of unoffered, and offered but unsold, capacity in NYC in its ICAP Demand Curves report that is filed annually with the Commission.⁴⁹

b. Protests and Answers

40. NY Transmission Owners agree with NYISO with respect to summer months but state that their analysis indicates that, in 5 of the 12 winter months that NYISO included in its analysis, entities with NYC ICAP portfolios of less than 500 MW could have benefited from withholding, even after taking into account that winter NYC ICAP prices during this period were sometimes set by the ICAP Demand Curve for the NYCA.⁵⁰ Therefore, they contend that maintaining the 500 MW exemption has not been justified. NY Transmission Owners state NYISO's other tools for deterring withholding may not be sufficient to address economic withholding in these circumstances. For example, according to NY Transmission Owners, NYISO has the power to audit potential withholding that causes certain increases in price for NYC ICAP, however, that provision is limited to *physical* withholding and thus, could permit economic withholding in winter months.⁵¹

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ NY Transmission Owners September 2, 2010 Comments at 3.

⁵¹ *Id.* at 4.

41. In-City Suppliers respond that even if the math underlying these allegations is technically correct, the conclusions that the NY Transmission Owners draw are fundamentally flawed.⁵² They assert that the NY Transmission Owners do not allege that any supplier used its position as a small entity to benefit the price paid for other MWs with which it was associated.⁵³ In-City Suppliers state that the Commission already considered and rejected, in its March 7, 2008 Order, assertions raised by load parties with respect to the size of the exemption; thus this is a collateral attack on past Commission orders finding that the supplier exemption itself was properly structured.⁵⁴

42. In-City Suppliers further state that the alleged benefit is highly speculative and likely to be very difficult for any small NYC supplier to exact with any degree of certainty given the unpredictable nature of factors that affect clearing prices, such as the level of SCRs that will participate in any given monthly spot market auction.⁵⁵ In-City Suppliers contend that none of the five months identified in the NY Transmission Owners' analysis fell within the period following a transition period when the addition of 1,000 MW of new generation was offset by the retirement of generating facilities in New York. Since the retirement, according to In-City Suppliers, prices in both summer and winter periods have cleared against the NYC Demand Curve, not the NYCA curve, with the result that a small supplier will not be able to successfully employ an economic withholding strategy.⁵⁶

Commission Determination

43. We find that NYISO has complied with the May 20, 2010 Order with respect to the exemption for units that control less than 500 MW of capacity. NYISO reviewed the mitigation exemption, as the Commission directed, and found that the average size required for profitable withholding was 575.8 MW. While the figures vary from month to month and the size in the winter months may drop below 500 MW, we agree with NYISO that withholding in the winter months is less of a concern given that the clearing prices in the winter months are frequently set by the NYCA clearing price and are significantly lower than the summer ICAP prices. Further we agree with In-City Suppliers that the unpredictable nature of the factors that affect clearing prices make it

⁵² In-City Suppliers September 17, 2010 Answer at 5.

⁵³ *Id.* at 6.

⁵⁴ *Id.* (citing *New York Indep. Sys. Operator, Inc.*, March 7, 2008 Order, 122 FERC ¶ 61,211, at P 68 (2008)).

⁵⁵ *Id.*

⁵⁶ *Id.* at 6-7.

difficult for any small supplier to predict with accuracy any benefit to be gained from withholding small amounts of supply.

44. We also note that NYISO states that it will be vigilant for signs that suppliers that qualify for the exemption might be engaging in market abuses and that it will refer any suspicious conduct to the MMU and consider tariff revisions to address any issues. Accordingly, we find that NYISO provided reasonable justification for the mitigation exemption.

2. Definition of Default Offer Floor

a. NYISO's Filing

45. As discussed in the rehearing section of this order, the Commission's May 20, 2010 Order granted NY Transmission Owners' request for rehearing with regard to the specification of the generator mitigation Default Offer Floor. The Commission found that NYISO's proposed Default Offer Floor of 75 percent of the Reference Price exceeds Net CONE as defined by section 23 of the NYISO Services Tariff because the Reference Price used to develop the ICAP Demand Curve has been adjusted upward to account for the likely capacity surplus and associated lower ICAP revenue. Thus, the Reference Price used to develop the Demand Curve is not the equivalent of Net CONE. As the Commission found in the May 20, 2010 Order, Net CONE (per kW-month) equates to the price on the ICAP Demand Curve corresponding to 104 percent of the minimum capacity requirement since the ICAP Demand Curves approved in the 2008-2011 Demand Curve reset proceeding reflect a market clearing quantity that exceeds the requirement by an average four percent. The Commission directed NYISO to modify the calculation of the Offer Floor consistent with that discussion.

46. In its August 24, 2010 filing, NYISO proposes to retain the existing definition of "Net CONE" but add a definition of a new term, "Mitigation Net CONE," to section 23.2.1 of Attachment H of its Services Tariff, and to incorporate that new term in the definition of the Default Offer Floor in place of "Net CONE." The Default Offer Floor would be 75 percent of Mitigation Net CONE under NYISO's proposal. Mitigation Net CONE would be defined as "the capacity price on the currently effective in-City Demand Curve corresponding to the average amount of excess capacity above the in-City ICAP requirement, expressed as a percentage of that requirement, that formed the basis of the in-City Demand Curve approved by the Commission."⁵⁷ NYISO states that under its proposal, it would not be necessary to revise the definition of Mitigation Net CONE every time the Demand Curves are re-set. NYISO adds that its proposed distinction between the terms "Mitigation Net CONE" and "Net CONE" will clarify the mitigation measures and avoid any implication that determinations in the in-City mitigation context

⁵⁷ NYISO August 24, 2010 Filing at 4.

regarding the definition of Mitigation Net CONE might have precedential effects on the Demand Curves. There were no protests to or comments on NYISO's proposal.

b. Commission Determination

47. We find that NYISO's proposal to add a new term "Mitigation Net Cone" is consistent with the May 20, 2010 Order and, therefore, it is accepted. NYISO's proposed new term "Mitigation Net CONE" tracks the Commission's clarification that the proxy unit levelized net cost value per kW-month to be used for purposes of applying Default Net CONE in the NYC buyer-side mitigation exemption and Default Offer Floor determinations equates to the price point on the relevant Demand Curve at the level of excess capacity used to design the Demand Curve (104 percent of the ICAP requirement for the 2008-2011 Demand Curves). Thus, Mitigation Net CONE is a per-kW-month equivalent of Net CONE (which, as defined in the NYISO Tariff, is a total net cost parameter). Of course, since Mitigation Net CONE is less than the Reference Price, the Reference Price exceeds the per-kW-month equivalent of Net CONE. Adding the term "Mitigation Net CONE" allows the Tariff to clearly describe how the Default Offer Floor is to be calculated as the Demand Curve is reset over time.

48. However, we clarify that, by accepting NYISO's proposal, we are not agreeing with NYISO that Net CONE as currently defined in Attachment H is a different total net cost amount than the Net CONE on which the per-kW-month Mitigation Net CONE price is based.⁵⁸ There cannot be two "Net CONE" amounts, a higher one for purposes of the Demand Curves and a lower for purposes of mitigation. The May 20, 2010 Order rejected NYISO's interpretation of the existing defined term "Net CONE" as that price at 100 percent of the ICAP requirement on the ICAP Demand Curve. On this basis, we found in the rehearing portion of this order that NYISO was in error in referring to the Demand Curve Reference Price calculated to establish the 2008-2011 Demand Curves as "Net CONE." The Commission has clarified here and in the May 20, 2010 Order that there is only one meaning for the term "Net CONE" as set forth in section 23.2.1 of Attachment H, and that is the levelized net cost of the proxy unit using the appropriate amortization period as discussed above in Paragraph 14 (30 years in the case of the 2008-2011 Demand Curves), which is the price point on the Demand Curve as defined by the new term "Mitigation Net Cone."

3. Penalty for Withholding ICAP

49. Physical withholding of ICAP includes unjustified retirements, a Pivotal Supplier's failure to offer all uncommitted ICAP into the NYISO markets, and a Pivotal Supplier withholding by exporting. Thresholds for identifying physical withholding are specified in section 23 of Attachment H. This section also allows market participants to

⁵⁸ NYISO August 24, 2010 Filing at 5.

take advantage of higher prices in external markets. Thus, a determination of physical withholding by exporting must entail a measurement of whether the export is economic. The amount of the penalty is also at issue.

a. Conduct and Impact Test

i. Background

50. In its May 6, 2008 filing in this proceeding, NYISO proposed a conduct and impact test to make the determination of whether an ICAP export constitutes physical withholding. An ICAP export must fail both the conduct and impact test to be subject to the mitigation penalty.⁵⁹ Section 4.5(d)(i) describes the conduct element of the test. It would conclude an export constituted physical withholding when the export price was at least five percent less than the NYC price, net of costs and measured over the relevant timeframe. Section 4.5(d)(ii) describes the impact element of the test. It would conclude an export constituted physical withholding if it contributes to at least a five percent increase in NYC prices, provided such increase is at least \$.50/kilowatt-month.⁶⁰

51. In the September 30, 2008 Order, the Commission directed NYISO to raise its penalty threshold to \$2/kW-month and 15 percent, but did not specify whether the threshold related to the conduct and/or impact tests. In response to the September 30, 2008 Order, NYISO filed to revise its impact threshold for physical withholding, but not its conduct threshold. In the May 20, 2010 Order, the Commission stated that it intended, in the September 30, 2008 Order, to direct NYISO to file to change both the conduct and impact thresholds to be the greater of \$2/kW-month and 15 percent. Therefore, in the May 20, 2010 Order, the Commission accepted the revised impact threshold but directed NYISO to revise its conduct threshold to 15 percent or more, provided such increase is at least \$2/kW-month.⁶¹

ii. NYISO's August 24, 2010 Filing

52. NYISO proposes to modify section 23.4.5.4.1 to provide that the conduct threshold for exports would be deemed to be withholding if the difference between estimated and actual prices for exports of UCAP and in-City sales was the greater of 15 percent or \$2/kW-month.

⁵⁹ NYISO, Compliance Filing, Docket No. ER08-695-001, at 14 (filed May 6, 2008).

⁶⁰ *Id.*

⁶¹ May 20, 2010 Order, 131 FERC ¶ 61,170 at P 74.

iii. Protests and Answers

53. In-City Suppliers state that currently Pivotal Suppliers that physically withhold through uneconomic export are not assessed a penalty unless the threshold levels defined in the Services Tariff are exceeded; however, under NYISO's proposal, no threshold is applied to physical withholding through failure to offer. In-City Suppliers assert that the Commission clearly intended to treat all forms of physical withholding by Pivotal Suppliers in the same manner;⁶² thus, the thresholds defined in the Services Tariff must be applied to both situations. In-City Suppliers argue that NYISO's proposal will undermine the critical balance between load and supplier interests that the Commission sought to achieve in its March 7, 2008 Order, that it over-penalizes Pivotal Suppliers that fail to offer all uncommitted ICAP, and this proposed revision is inconsistent with NYISO's prior submissions wherein NYISO proposed to apply thresholds to both types of physical withholding.⁶³ According to In-City Suppliers, NYISO stated that such rules were intended to be invoked when the withholding in question had a defined impact.⁶⁴ In-City Suppliers contend that NYISO's proposed change makes the treatment of uneconomic sales and failure to offer uncommitted ICAP less similar, rather than equivalent.

54. NYISO responds that In-City Suppliers seek to expand the scope of the Commission's directive by including a requirement that NYISO apply an impact threshold on penalties for a failure to offer, a modification the Commission did not require. NYISO argues that the penalty for a failure to offer has always been triggered solely by a Pivotal Supplier's failure to offer all applicable MWs of capacity, and application of an impact threshold would undermine the effectiveness of the penalty rule. NYISO states that adding an impact test to the existing "must offer" requirement would eviscerate the penalty and undermine the intent of it because any withholding by a Pivotal Supplier can have a significant adverse impact on the capacity market. NYISO also notes that the May 20, 2010 Order specifically discussed the conduct and impact thresholds to be applied in determining whether to assess penalties for physical withholding through uneconomic exports, without directing NYISO to adopt similar provisions for physical withholding through failure to offer.⁶⁵

⁶² In-City Suppliers September 2, 2010 Protest at 20-21 (citing *New York Indep. Operator, Inc.*, 131 FERC ¶ 61,170 at P 38 (2010)).

⁶³ In-City Suppliers September 2, 2010 Protest at 20-21 (citing *New York Indep. Operator, Inc.*, 131 FERC ¶ 61,170 at PP 66-67 (2010)).

⁶⁴ *Id.*

⁶⁵ NYISO September 17, 2010 Answer at n. 12.

Commission Determination

55. We find that NYISO's proposed revisions to section 23.4.5.4.1 to equalize the conduct and impact thresholds for withholding through exports comply with the May 20, 2010 Order. We also agree that NYISO complied with the Commission's directive to equalize the amount of the penalty for withholding by failure to offer. It is reasonable that both types of withholding, i.e., failure to offer and withholding through exporting, be treated the same. That is, all megawatts of ICAP determined to be withheld should be subject to the same mitigation penalty. Accordingly, we accept NYISO's revisions to section 23.4.5.4.1 of its Services Tariff.

56. We reject the In-City Suppliers contention that the Commission intended that a conduct and impact test should also be used to judge whether withholding through failure to offer should be deemed withholding and subject to withholding penalties. A conduct and impact test is necessary to judge whether an export constitutes physical withholding because a decision to export reflects expectations about price differences between markets. It would not be appropriate to mitigate all exports that were uneconomic because price expectations were not realized by the exporter. Economic exports could be unduly discouraged if price uncertainty was not taken into account, and a conduct and impact test is a reasonable way to recognize this uncertainty. However, a conduct and impact test is not needed to make a withholding determination if a supplier fails to offer its available capacity as it is simply the failure to offer available capacity that constitutes withholding.⁶⁶ Thus if a supplier fails to offer its available capacity into the market, it should be subject to withholding penalties.

57. It is reasonable that both types of withholding, i.e., failure to offer and withholding through exporting, should be treated the same. That is, all megawatts of ICAP determined to be withheld should be subject to the same mitigation penalty.

58. Accordingly, we accept NYISO's revisions to section 23.4.5.4.1 of its Services Tariff.

b. Penalty Amount

59. In the May 20, 2010 Order, the Commission found that NYISO's penalty for Pivotal Supplier physical withholding through a failure to offer all uncommitted ICAP into the NYISO markets was excessive and should be the same as the penalty for physical withholding through uneconomic exports.⁶⁷ The Commission stated that its

⁶⁶ Section 23.3.1.1 contains Thresholds for Identifying Physical Withholding. This section specifies, *inter alia*, that physical withholding of a Generator may be determined if 10 percent of its capability is not offered.

⁶⁷ May 20, 2010 Order, 131 FERC ¶ 61,170 at P 38.

reasoning in the September 30, 2008 Order with regard to physical withholding through uneconomic exports applied equally to other types of physical withholding.⁶⁸ The Commission directed NYISO to file revised tariff sheets to reflect a penalty in the amount of 1.5 times the difference between the clearing prices in the New York City Spot Market Auction with and without the amount (in MWs) deemed to be physically withheld from the in-City market.

i. NYISO's Filing

60. NYISO proposes to modify the penalty provisions of section 23.4.5.4.2 of Attachment H to provide that, if mitigated UCAP is not offered or sold as specified,

the Responsible Market Party for such Installed Capacity Supplier shall pay the ISO an amount equal to the product of (A) 1.5 times the difference between the Market-Clearing Price for the New York City Locality in the ICAP Spot Market Auction with and without the inclusion of the Mitigated UCAP and (B) the total of (1) the amount of Mitigated UCAP not offered or sold as specified above, and (2) all other megawatts of Unforced Capacity in the New York City Locality under common Control with such Mitigated UCAP.⁶⁹

NYISO also proposes a conforming modification to the penalty calculation provisions in section 23.4.5.6 to provide that ICAP suppliers that are not Pivotal Suppliers would be subject to the same penalties as ICAP Pivotal Suppliers for similar conduct. NYISO states that absent this modification, Pivotal Suppliers would be subject to lower penalties for similar conduct than would ICAP suppliers that were not Pivotal Suppliers, a result that would be inequitable and presumably, unintended by the Commission.

Commission Determination

61. We find that NYISO's modification of section 23.4.5.4.2, with respect to the amount of the penalty, complies with the Commission directive. Further, we agree with NYISO that Pivotal Suppliers and non-Pivotal Suppliers should be subject to the same penalties for similar conduct. Accordingly, we accept NYISO's modification of section 23.4.5.4.2 and its conforming modification to section 23.4.5.6.

⁶⁸ *Id.*

⁶⁹ NYISO Market Services Tariff, proposed section 23.4.5.4.2.

4. Pivotal Supplier Export *Ex Ante* Approval Process

62. In the May 20, 2010 Order, the Commission accepted as modified NYISO's compliance filing to institute an *ex ante* approval process for Pivotal Supplier capacity exports that would allow exporters to request determinations of whether exports would be uneconomic and would therefore constitute physical withholding. In response to protests that NYISO should be required to include a specific deadline for making the *ex ante* determinations, NYISO proposed and the Commission accepted alternative language that stated in section 23.4.5.4.3 "[s]uch requests, and the NYISO's response shall be made in accordance with the deadlines specified in ISO Procedures." The Commission and NYISO agreed that it is appropriate to specify such level of administrative detail in the ISO procedures.

63. NYISO proposes the language stated above in a modification to section 23.4.5.4.3 of its Services Tariff to clarify that in the *ex ante* approval process for Pivotal Supplier capacity exports, requests for determination of whether exports would be uneconomic and NYISO's response to these requests will be in accordance with the deadlines to be specified in the ISO Procedures.

Commission Determination

64. We find that NYISO's modification to section 23.4.5.4.3 complies with the May 20, 2010 Order. Accordingly, we accept NYISO's proposed revisions.

5. Changes Applicable to SCRs

a. Applicability and Duration of SCR Mitigation Rules

65. In the May 20, 2010 Order, the Commission found NYISO's proposal to mitigate uneconomic "new entry" by SCRs to be reasonable but rejected NYISO's proposals to (1) consider an SCR as "new entry" that is subject to mitigation when it re-enters the market after a year's absence⁷⁰ and (2) terminate SCR mitigation after 12 months.⁷¹ The Commission held that SCRs, like uneconomic new generation, should be subject to mitigation for a single, initial period and that mitigation should apply until the new SCR's capacity has been accepted in the market at a price at or above its Offer Floor for a total of 12, not necessarily consecutive, months. The Commission reasoned that meeting this requirement will show that the SCR's capacity is economic over several different seasons even though the capacity might not be accepted in all months of a calendar year when offered at that price level.

⁷⁰ May 20, 2010 Order, 131 FERC ¶ 61,170 at PP 106-107.

⁷¹ *Id.* P 107.

66. In addition, the Commission directed NYISO, consistent with the exemption provided for new generation, to provide an exemption for new SCRs if, for the first year after entry into the market, the market price is expected to exceed the SCR Offer Floor. The Commission also directed NYISO to revise section 4.7 so that the six-month limit on mitigation measures does not apply to in-City mitigation.

i. NYISO's Filing

67. NYISO proposes to modify section 23.4.5.7.5 of the Services Tariff to state that an in-City ICAP supplier that is an SCR shall be subject to an Offer Floor beginning with the month of its initial offer to supply ICAP and lasting until its offers of ICAP have been accepted in the ICAP spot market auction at a price at or above its Offer Floor for a total of twelve, not necessarily consecutive, months. NYISO proposes to add that SCRs shall be exempt from the Offer Floor if the ISO projects that the ICAP spot market auction price will exceed the SCR's Offer Floor for the first 12 months that the SCR is reasonably anticipated to offer to supply Unforced Capacity.

68. NYISO states that it must have certain data from Responsible Interface Parties in order to make the SCR Offer Floor exemption determination and that if it receives such data by a certain date prior to the spot market auction, it could provide the Responsible Interface Parties with determinations of whether the SCR was exempt and, if not exempt, the price of the SCR's Offer Floors. NYISO is also proposing to revise section 23.4.5.7.5 to specify that SCRs for which NYISO has not received all of the required SCR information by a deadline to be specified in the ISO procedures will not be eligible to offer or sell capacity until the required information is provided. NYISO also proposes to make conforming changes to section 23.4.8, which would provide an exception for the in-City generator and SCR mitigation periods from the otherwise applicable six-month limit on market power mitigation measures.

Commission Determination

69. We find that NYISO's filing with respect to the applicability and duration of SCR mitigation complies with the May 20, 2010 Order. We find that it is reasonable to treat an SCR as ineligible to offer to sell ICAP if the Responsible Interface Party fails to provide, by the deadline specified in the ISO procedures, the data needed to make the exemption determination or to determine the price of the SCR's Offer Floor.

b. SCR Offer Floor

70. In the May 20, 2010 Order, the Commission accepted NYISO's compliance proposal to add a new section to Attachment H to include in the SCR Offer Floor the monthly value of any payments or other benefits the SCR or Responsible Interface Party

(RIP) receives.⁷² The Commission rejected arguments of protesters that subsidies or other benefits designed to encourage SCRs should be eliminated from the calculation of the SCR Offer Floor, reasoning that the best representation of the opportunity cost to an SCR of curtailing power “is the value that will induce the SCR to abstain.”⁷³ Nonetheless, the Commission stated that it did not intend to interfere with state programs that further specific legitimate policy goals and agreed with the protests that it is appropriate to exempt payments an SCR receives from such programs from the calculation of the Offer Floor.⁷⁴ The Commission further stated that, based on the information provided in this proceeding, it is reasonable to allow an exemption for two programs discussed in the filings in this proceeding: NYSERDA rebates and ConEd’s Distribution Load Relief Program.⁷⁵ With respect to future programs, the Commission directed NYISO to file tariff provisions explaining, with specificity, the criteria it proposes to use in evaluating whether to include a specific subsidy or other benefit in its calculation of SCR Offer Floors and to provide full support for the criteria it has chosen.⁷⁶ Further, the Commission directed NYISO to publish on its website a complete list of programs whose subsidies and other benefits are to be included in the Offer Floor, as well as all programs whose subsidies or benefits are to be excluded from the calculation of the Offer Floor.⁷⁷

i. NYISO’s Filing

71. In its compliance filing, NYISO states that, for the reasons specified in its June 21, 2010 Request for Clarification, it does not believe that the Commission could have intended for NYISO to pass judgment on the “legitimacy” of individual state programs. NYISO states that it assumes that the Commission would agree that state programs should be presumed to be aimed at serving valid public policy goals, and, therefore, it interprets the May 20, 2010 Order as directing it to consider the potential for payments or other benefits received by SCRs to cause uneconomic entry that would harm the capacity markets. NYISO states that it does not believe that any of the programs of which it is aware that are currently administered or approved by New York State, or a governmental authority thereof, are currently causing uneconomic entry that would harm

⁷² May 20, 2010 Order, 131 FERC ¶ 61,170 at PP 109, 131.

⁷³ *Id.* P 136.

⁷⁴ *Id.* P 137.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* P 138.

the capacity markets. Therefore, NYISO proposes to exclude all payments and other benefits to SCRs under state programs from the Offer Floor calculation. NYISO states that its MMU agrees that this represents a reasonable approach at this time. Accordingly, to comply with the May 20, 2010 Order, NYISO proposes to modify section 23.4.5.7.5 to read as follows:

The Offer Floor calculation shall include any payment or the value of other benefits that are awarded for offering or supplying In-City Capacity, except for payments or the value of other benefits provided under programs administered or approved by New York State or a government instrumentality of New York State.

72. NYISO states that it will continue to monitor the impact of other benefits from state programs, and to consider any stakeholder concerns that such programs may individually, or collectively, be promoting uneconomic entry. NYISO adds that should it determine that the exemption from the Offer Floor computation of payments and other benefits from state programs may or has become harmful to the capacity market, it will propose appropriate tariff changes given the circumstances at that time. NYISO adds that since the SCR mitigation provisions were added to Attachment H, the level of new SCRs sold by any one Responsible Interface Party has not exceeded the impact threshold. NYISO concludes that even if every new SCR added by a single Responsible Interface Party were offered in an ICAP auction at a level below the SCR's respective Offer Floors, including payments and other benefits from state programs, the currently-defined SCR uneconomic impact threshold would not be reached. NYISO also states that it will post on its website the names of the two programs identified by the Commission and any other known state programs that would be exempt from the Offer Floor calculation, as well as any other programs providing payments or benefits that would be excluded from or included in the calculation of an SCR's Offer Floor. In addition, NYISO states that it will invite stakeholders to inform it of programs that are not posted on its website that should be included in or excluded from an Offer Floor determination.

ii. Protests and Answers

73. In-City Suppliers argue that NYISO has failed to comply with the Commission's directive to provide criteria, with specificity and full support for evaluating whether subsidy and benefit programs should be included in the SCR Offer Floor calculation. In-City Suppliers state that NYISO's "feigned belief" concerning its inability to pass judgment on the legitimacy of individual state programs is without merit. In-City Suppliers cite two studies introduced in the Forward Capacity Market proceeding that they assert focused on the correlative effect between adding demand response and reducing the capacity market clearing prices.⁷⁸ In-City Suppliers add that these studies

⁷⁸ In-City Suppliers September 2, 2010 Protest at 14 (citing New England Power
(continued...))

included charts explaining how load could use demand reduction to secure “large absolute dollar reductions in capacity prices with relatively small levels of additional demand response participation in the market.”⁷⁹

74. In-City Suppliers also contend that, rather than closely examining the current demand response programs, of which NYISO has knowledge, to extract the common criteria that could be used to judge whether such programs should be included or excluded from the SCR Offer Floor calculation, NYISO eschewed any analysis at all and, instead, proposed to operate under a presumption that any program that is administered, or approved, by the State of New York, or a governmental instrumentality thereof, must clearly be legitimate, and thus, is *per se* exempt. Nor, according to In-City Suppliers, has NYISO provided any support for its proposed blanket approach. In-City Suppliers state that it is critical that clear, objective criteria be established so that all present and future SCR programs can be evaluated by NYISO on their merits. In-City Suppliers add that this will also ensure that the web posting that the Commission also mandated will not simply be a ministerial act of list compilation but will provide a transparent opportunity for market participants to review, and when necessary, challenge NYISO’s determinations before the Commission.

75. In-City Suppliers also argue that expanding the blanket exemption to programs sponsored by “a governmental instrumentality of New York State” further throws open the uneconomic entry flood gates, because this term could be broadly construed to include a substantial number of entities that have the incentive and the ability to depress prices through uneconomic entry. In-City Suppliers state that, for example, ConEd and the New York Power Authority (NYPA) dominate the New York City market and, if left unchecked, could engage in uneconomic new entry, bid such entry into the market at below its actual cost, and reap the benefit of a lower overall market clearing price for the remainder of its load obligation. In-City Suppliers assert that NYPA, which was created by an act of the New York State Legislature, could arguably be considered a “governmental instrumentality,” and thus, under NYISO’s proposal, any subsidy or benefit “administered” or “approved” by NYPA would be *per se* exempt from the SCR Offer Floor calculation. In-City Suppliers state that the Commission’s directive was designed to bring certainty and clarity to the SCR Offer Floor calculation and to facilitate Commission review of any future disputes that arose over inclusion or exclusion of a particular benefit. In-City Suppliers assert that by proposing to adopt an assumption that every program administered or approved by the State or any governmental instrumentality thereof *per se* qualifies for an exemption for all time, NYISO accomplishes neither goal.

Generators Association, Inc., Opening Brief, Docket No. ER10-787-000 (filed July 1, 2010) (NEGPA Brief)).

⁷⁹ *Id.* at 14-15 (citing NEPGA Brief at 34).

76. NYISO responds that In-City Suppliers mischaracterize NYISO's statements and incorrectly state that NYISO did not conduct an analysis to support its conclusion that current programs did not have an effect on the market. NYISO states that the Commission has indicated that its intention was to not "interfere with state programs that further specific legitimate policy goals"⁸⁰ and it does not believe that the May 20, 2010 Order can be read to require NYISO to do so. NYISO states that such a requirement would place it in the legally untenable position of engaging in a quasi-judicial inquiry regarding whether various state initiatives are legitimate or effective. Consequently, according to NYISO, it has proposed compliance language which would include in the Offer Floor calculation any payments under third party programs that are not administered or approved by a state entity and would avoid situations where it would be required to determine whether the intentions and policies of the programs themselves are legitimate. NYISO states that because In-City Suppliers would have NYISO engage in exactly such an evaluation, their protest should be rejected.

77. In response to In-City Suppliers' contention that NYISO contradicts itself by offering to propose tariff changes if state programs prove to actually harm the capacity markets, NYISO states that it has not indicated that it will propose tariff changes to implement generic criteria to judge the legitimacy of state programs, but rather, that in the event a program has a detrimental impact on the market, NYISO will propose necessary modifications consistent with its obligations under the tariff. NYISO reiterates that it conducted an evaluation and found that current programs were not having a harmful impact on the capacity market and that allowing it to wait until a potential issue arises with respect to such a program is reasonable and was endorsed by the MMU.

Commission Determination

78. In the Clarification and Rehearing part of this order above, we granted NYISO's requested clarification to the limited extent that we held that the Commission did not intend for NYISO to evaluate the legitimacy of state programs. Accordingly, we ruled that it is not necessary for NYISO to provide a list of criteria to govern the determination of whether payments under specific programs should be excluded from the SCR Offer Floor determination as directed by the May 20, 2010 Order. We ruled that, instead, the Commission will decide on a case by case basis whether a subsidy or benefit under a state program should be excluded from the Offer Floor calculation in response to a request for exemption of the state.⁸¹ To that end, we directed NYISO to file to revise its Services Tariff to provide that, unless ruled exempt by Commission order on a request for

⁸⁰ NYISO September 17, 2010 Answer at 5 (citing *New York Indep. Operator, Inc.*, 131 FERC ¶ 61,170 at P 137).

⁸¹ *See supra* P 30.

exemption filed by the state, all rebates and other benefits from state programs must be included the SCR Offer Floor. Accordingly, we reject NYISO's proposed modification to section 23.4.5.7.5 in its compliance filing.⁸²

c. Additional Clarifying Tariff Revisions

79. In the May 20, 2010 Order, the Commission found that NYISO's proposal that offers at a point identifier can be comprised of separate points was not clearly reflected in its tariff language and directed NYISO to revise the language accordingly. NYISO proposes to revise section 23.4.5.7.5 to clarify that:

[s]uch offers may comprise a set of points for which prices may vary with the quantity offered. If this set includes megawatts from a Special Case Resource(s) with an Offer Floor, then at least that many megawatts in the offer associated with each Special Case Resource must be offered at or above the Special Case Resource's Offer Floor.

80. In addition the May 20, 2010 Order directed NYISO to promptly inform Responsible Interface Parties of a breach of the Offer Floor and price impact threshold and the penalty to be assessed. NYISO proposes to modify section 23.4.5.7.5 to state that:

If an offer is submitted below the applicable Offer Floor, the ISO will notify the Responsible Market Party and the notification will identify the offer, the Special Case Resource, the price impact, and the penalty amount. The ISO will provide the notice reasonably in advance of imposing such penalty.

81. NYISO also submits typographical corrections, certain corrections of numbering and, in response to the Commission directive, changes the word "exceeding" to "below" in section 23.4.5.7.5 regarding the calculation of the penalty.

Commission Determination

82. We find that the clarifying tariff revisions submitted by NYISO comply with the May 20, 2010 Order and we hereby accept them.

⁸² We note that, because NYISO did not propose to provide criteria as directed by the May 20, 2010 Order and, instead, proposed to add a blanket exclusion from the Offer Floor calculation of any payment or the value of other benefits provided under programs

administered or approved by New York State or a government instrumentality of New York State, NYISO's filing would not have complied with the May 20, 2010 Order.

The Commission orders:

(A) The requests for rehearing of the May 20, 2010 Order are hereby granted, in part, and denied, in part, as discussed in the body of the order.

(B) NYISO's August 24, 2010 Compliance filing is hereby accepted, in part, and rejected, in part, as discussed in the body of this order.

(C) NYISO is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Bay is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket Nos. EL07-39-006
ER08-695-004
ER10-2371-000

(Issued March 19, 2015)

BAY, Commissioner, *concurring in part and dissenting in part*:

While I largely concur with today's decision regarding the market power mitigation rules for the New York City Installed Capacity market, I write separately because I cannot agree with the majority's decision to revoke the previously established exemptions for payments under Consolidated Edison's Distribution Load Relief Program and rebates offered by the New York State Energy Research and Development Authority (NYSERDA).

In 2010, the Commission determined that it was appropriate to exempt payments made in connection with "state programs that further specific legitimate policy goals" from the offer floor applicable Special Case Resources (SCRs).¹ The Commission also found that "the information provided in this proceeding" established that the ConEd and NYSERDA programs furthered such goals and that any related payments should be excluded when calculating the offer floor for SCRs.² Now, five years after creating the exemptions, the majority finds that they are unjust and unreasonable. Neither of the reasons offered by the majority justifies this belated reversal of course.

First, the majority contends that the "current record ... does not adequately support the exemption."³ Notably, the majority makes no effort to identify what additional information it seeks. Nor does it grapple with any of the evidence in the extensive record compiled during the eight years this matter has been pending. The record demonstrates that, under ConEd's program, cost-based payments are made to participating retail customers pursuant to a retail tariff in order to assist the utility in dealing with distribution feeder outages. Payments are not tied to the customers' participation in NYISO's capacity market and are designed to provide load relief on the local distribution

¹ *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,170, P 137 (2010).

² *Id.*

³ Order P 31.

system to avoid or defer costly distribution system upgrades.⁴ Rather than being aimed at capacity prices, ConEd's Distribution Load Relief Program addresses the reliability of the local distribution system. The nexus between this program and the capacity market – not to mention any alleged harm to that market – is so attenuated as to amount to speculation.

Second, the NYSERDA rebates are funded by retail customers and provide one-time payments to enable facilities to participate in demand response programs by offsetting the cost of new equipment, such as load shedding controls, automation equipment, and new generation equipment.⁵ The Commission-approved SCR offer floor is defined to include “the monthly value of any payments or other benefits the SCR receives from a third party for the provision of” installed capacity.⁶ The one-time payments at issue here cannot reasonably be characterized as “payments ... from a third party for the provision of” installed capacity. As a result, it does not appear that they are even subject to mitigation under NYISO's tariff in the first instance.

The majority next contends that any evaluation of these programs must take place “in the give and take of” a section 206 proceeding “focused on the specific requested exemption.”⁷ But that precise contention was presented to, and rejected by, the Commission five years ago.⁸ The majority offers no explanation as to why that prior ruling was erroneous. Moreover, there was extensive discussion of the propriety of exempting these programs from the SCR offer floor before the Commission's May 2010 order.⁹ And parties had another opportunity to debate these exemptions on rehearing of

⁴ See, e.g., Comments of Consolidate Edison Company, Dec. 2, 2008, at 2-3; Protest of New York State Public Service Commission, filed Dec. 2, 2008, at 6-7; Comments and Limited Protest of CPower Inc., *et al.*, filed Dec. 2, 2008, at 5-6; Answer of TC Ravenswood LLC, filed Dec. 15, 2008, at 15-17; Answer of New York State Public Service Commission, filed Jan. 13, 2009, at 4.

⁵ See, e.g., Protest of New York State Public Service Commission, filed Dec. 2, 2008, at 4-5; Comments and Limited Protest of CPower Inc., *et al.*, filed Dec. 2, 2008, at 5; Answer of TC Ravenswood LLC, filed Dec. 15, 2008, at 15-17

⁶ *New York Independent System Operator*, 131 FERC ¶ 61,170 at PP 109, 131.

⁷ Order P 31.

⁸ See *New York Independent System Operator*, 131 FERC ¶ 61,170 at P 128 (“Ravenswood argues that if the NYPSC wants to pursue an exemption for SCRs, it should be required to file a complaint under FPA section 206”).

⁹ See, e.g., *New York Independent System Operator*, 124 FERC ¶ 61,301, PP33-38 (2008) (discussing New York Public Service Commission's request for a state program exemption to buyer-side mitigation rules); *New York Independent System*

that order. Indeed, even NRG's request for rehearing – upon which the majority bases its ruling – acknowledges that “[t]he record in this proceeding reflected much back and forth between the various interested parties on exempting New York state subsidies and benefits from the offer floor.”¹⁰ While NRG believed that more process was necessary because “[t]he Commission would benefit from NYISO's views,” those views are now part of the record.¹¹ “NYISO states that it does not believe that any of the programs of which it is aware that are currently administered or approved by New York State, or a governmental authority thereof, are currently causing uneconomic entry that would harm the capacity markets.”¹² The market monitor concurred. There seems little to be gained – and much to be lost in way of regulatory certainty – by having the parties restate their positions yet again in a section 206 proceeding.

More fundamentally, the Commission announced five years ago that it did not intend “to interfere with state programs that further specific legitimate policy goals.”¹³ Yet that is precisely what the majority does today by declaring the ConEd and NYSERDA programs to be presumptively improper exercises of market power. Certainly, the Commission has the statutory obligation, and should never hesitate, to prevent market power abuse. But there is no evidence that these programs undercut the capacity market or were intended to do so. And, unfortunately, New York must now make a section 206 filing in order to justify programs that further important state policies while posing no demonstrable harm to NYISO's capacity construct.

For all those reasons, I respectfully dissent in part.

Norman C. Bay
Commissioner

Operator, 131 FERC ¶ 61,170 at PP 109-138 (discussing arguments regarding state program exemptions to buyer-side mitigation rules).

¹⁰ See Request for Rehearing of the NRG Companies, filed June 21, 2010, at 20-21.

¹¹ *Id.* at 21.

¹² See Order P 71; New York Independent System Operator filing, dated August 24, 2010, Attachment 1 at 12.

¹³ *New York Independent System Operator*, 131 FERC ¶ 61,170 at P 137.