

131 FERC ¶ 61,169
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket Nos. ER09-1682-000
ER09-1682-004
ER09-1682-005

ORDER ON PROPOSED APPLICATION OF MITIGATION MEASURES AND
COMPLIANCE FILINGS

(Issued May 20, 2010)

1. On September 4, 2009, the New York Independent System Operator, Inc. (NYISO) submitted, pursuant to section 205 of the Federal Power Act (FPA),¹ the Commission's *Guidance Order on Expedited Tariff Revisions for Regional Transmission Organizations and Independent System Operators*,² and sections 1(b) and 3.2.3 of Attachment H (ISO Market Power Mitigation Measures) to NYISO's Market Services and Control Area Administration Tariff (Services Tariff),³ a proposed stand-alone Rate Schedule Market Mitigation No. 1 (Rate Schedule M-1) to become effective September 8, 2009. Rate Schedule M-1 implements a new market mitigation measure in response to conduct by three generators that NYISO identifies as an abuse of market power. In its November 3, 2009 order⁴ the Commission conditionally accepted Rate Schedule M-1, subject to further orders. In this order, the Commission finds the proposed rate schedule, as modified, just and reasonable as it applies to the identified

¹ 16 U.S.C. § 824d (2006).

² *Guidance Order on Expedited Tariff Revisions for Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,009 (2005).

³ New York Independent System Operator, Inc., FERC Electric Tariff, Original Vol. No. 2, (Services Tariff) Attachment H, Fourth Revised Sheet No. 466, Seventh Revised Sheet No. 472.

⁴ *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,103 (2009) (November 3, 2009 Order).

generators. The Commission directs NYISO to make a compliance filing within 30 days of the date of this order. In addition, the Commission encourages NYISO's efforts in its ongoing stakeholder process to develop a generally applicable market mitigation measure to address the circumstances at issue here and directs NYISO to submit a progress report within 90 days of the date of this order, if such a measure is not filed with the Commission by that date.

I. Background

A. Relevant Tariff Provisions

2. Guarantee payments are the payments that generators receive as revenue from NYISO when they are dispatched out of economic merit order for reliability purposes. In order for NYISO to maintain system reliability, it may be necessary to commit resources out of economic merit order, i.e., above the Location-Based Marginal Price (LBMP). A resource may be committed for reliability in this manner at the request of a local transmission owner or by NYISO as a Day-Ahead Reliability Unit (DARU) to meet local or system-wide reliability needs or through the Supplemental Resource Evaluation (SRE) as system conditions change. When a generator is committed in this manner, it receives an uplift payment equal to the difference between its bid and the LBMP. This payment is referred to as the Bid Production Cost Guarantee (BPCG) payment, or guarantee payment. At issue in this filing is the ability of market participants to materially affect their guarantee payments through their bids when their generators are the known solution to a specific chronic reliability issue.

3. As a part of its administration of the market, NYISO employs market power mitigation measures that are set forth in Attachment H to the Services Tariff, to mitigate the market effects of any conduct that would substantially distort competitive outcomes in the NYISO markets. Sections 3.1 and 3.2 of Attachment H, respectively, identify the conduct and market impact thresholds used by NYISO to determine whether bids by market participants should be mitigated.

4. Section 1(b) of Attachment H provides that NYISO shall monitor its markets not only for conduct that exceeds the thresholds identified in section 3 of Attachment H, but also for conduct that it determines to be an abuse of market power but that does not trigger the specified conduct and impact thresholds of section 3 for the imposition of mitigation measures. Should such behavior be identified, section 1(b) requires that NYISO make a filing with the Commission under section 205 requesting authorization to apply appropriate mitigation measures; further, the filing must identify the particular

conduct, propose a specific mitigation measure, and present NYISO's justification for imposing that mitigation measure.⁵

5. Section 3.2.3 of Attachment H states that NYISO:

shall make a filing under § 205 with the Commission seeking authorization to apply an appropriate mitigation measure to conduct that departs significantly from the conduct that would be expected under competitive market conditions but does not rise to the thresholds specified in sections 3.1.1 through 3.1.3 above if that conduct has a significant effect on market prices or guarantee payments . . . unless the ISO determines from information provided by the Market Party or Parties . . . that would be subject to mitigation or other information available to the ISO that the conduct and associated price or guarantee payments are attributable to legitimate competitive market forces or incentives. For purposes of this section, conduct shall be deemed to have an effect on market prices or guarantee payments that is significant if it exceeds one of the following thresholds:

- (1) an increase of 100 percent in the hourly day-ahead or real-time energy [Locational Based Marginal Price (LBMP)] at any location, or of any other price in an ISO Administered Market; or
- (2) an increase of 100 percent in guarantee payments to a Market Party for a day.⁶

6. Section 3.3 of Attachment H contains specific procedures by which NYISO is to consult with a market participant that is subject to mitigation in order to develop reference levels for the market participant's bids and through which the market participant may explain its behavior. In accordance with section 3.1.4, reference levels are determined by NYISO based on previous accepted bids and estimates of unit specific costs and designed to reflect the marginal cost to serve as a default bid.⁷

B. NYISO's September 4, 2009 Filing

7. NYISO proposes Rate Schedule M-1, a new stand-alone rate schedule that is to apply mitigation measures only to three specifically identified generators, Saranac Power

⁵ Services Tariff, Attachment H, Fourth Revised Sheet No. 466.

⁶ *Id.* at Seventh Revised Sheet No. 472.

⁷ *Id.* at Sixth Revised Sheet Nos. 470B-471.

Partners, L.P.⁸ (Saranac), Seneca Power Partners L.P (Seneca), and Sterling Power Partners L.P. (Sterling) (collectively, Specified Generators). NYISO states that it has identified bidding behavior of the Specified Generators that, when the generators are committed for reliability as Day-Ahead Reliability Units or through Supplemental Resource Evaluation(s), departs from conduct that would be expected under competitive market conditions. NYISO states that the behavior it has identified has resulted in excessive guarantee payments to these generators in the form of BPCG payments when the generators are committed out-of-merit. As such, NYISO states that it is obligated to make this filing pursuant to Attachment H.

8. NYISO states that the bids received from each of the Specified Generators significantly exceeded the respective facility's marginal operating cost during the August 2, 2009 to August 22, 2009 period, that each market party's behavior has increased its guarantee payments by more than the 100 percent threshold specified in section 3.2.3 of Attachment H, and that these increases are not attributable to legitimate competitive market forces or incentives. NYISO states that its Independent Market Advisor (Dr. David Patton) and its Market Monitoring Department, upon consultations with each of the entities, rejected the position and arguments advanced by each entity including the arguments for inclusion of a fixed cost component in their bids and the claim that the units committed for reliability should be permitted to set the market clearing price. NYISO also states that each of the Specified Generators is the only alternative for resolving specific reliability concerns and, as such, has the ability to cause its guarantee payment to exceed the thresholds.⁹

9. NYISO states that the purpose of sections 1(b) and 3.2.3 of Attachment H is to require NYISO to look for conduct that constitutes an abuse of power but that does not trigger the mitigation thresholds specified in sections 3.1.2 and 3.2.1 of the Market Mitigation Measures in order to identify vulnerabilities in the mitigation scheme and to propose targeted fixes.¹⁰ NYISO states that the Specified Generators were not selected to operate based on the economics of their bids, but were committed by NYISO to operate for reliability, out-of-merit. NYISO contends that generators selected to operate in this manner are entitled to recover their startup and minimum generation costs through a guarantee payment in addition to real-time energy sales based on their bids. NYISO

⁸ Saranac is the owner and operator of the facility and Shell Energy North America, (US) L.P. is the bidding agent.

⁹ NYISO September 4, 2009 Filing at 9.

¹⁰ NYISO September 4, 2009 Filing at 6 (citing *New York Indep. Sys. Operator, Inc.*, 90 FERC ¶ 61,317, at 62,053 (2000); *New York Indep. Sys. Operator, Inc.*, 99 FERC ¶ 61,246 at, 62,038 (2002)).

states however, that there is nothing in its tariffs that entitles generators that are committed for reliability the opportunity to recover fixed costs as a component of their guarantee payment. The Independent Market Advisor explains that incorporating a fixed cost component into bids is not consistent with conduct under competitive market conditions; rather, generators would be expected to offer at their marginal cost.¹¹

10. NYISO states that one of the Specified Generators has suggested that the offers it submitted should be allowed to set price in response to the reliability constraints that they are being committed for, resulting in additional LBMP compensation that would reduce the associated guarantee payments. NYISO states that this would do nothing to reduce the market power problem. Further, according to NYISO, whether the exercise of market power results in additional revenues from LBMP compensation or additional guarantee payments, the result is not consistent with competitive behavior and would result in non-competitive market clearing prices and consequent costs for other ISO Market Participants. NYISO provides support for its actions regarding each of the Specified Generators in confidential Attachments C, D, and E which each provide bids, reference levels, compensation amounts, and correspondence between NYISO and the Specified Generators about their claims.

11. According to NYISO the events occurred during August 2009. NYISO states that Sterling received guarantee payments \$522,992 above what it would have received if it had bid its reference level for five days. Seneca received payments that totaled \$1,096,149 above what it would have received if it had bid at its reference level for a total of 11 days during the month, and Saranac received payments that totaled \$1,096,907 above what it would have received if it had bid at its reference level for a total of 21 days during August 2009.¹²

12. NYISO states that Proposed Rate Schedule M-1 will apply only to the Specified Generators and only when the particular generator is the only alternative available to NYISO to solve a particular reliability constraint. NYISO states that when the generator is committed out-of-merit, mitigation is appropriate because the unit does not face the discipline of competing alternatives when making its offers.¹³ NYISO states that proposed Rate Schedule M-1 would be triggered by bidding conduct that exceeds the applicable reference level by specified amounts that have been determined to be significant by the Market Monitoring Department and the Independent Market Advisor.

¹¹ *Id.* at 8–9.

¹² NYISO January 21, 2010 Filing at 2-3.

¹³ NYISO September 4, 2009 Filing at 9 (citing Attachment B, Patton affidavit at P 31–32).

Specifically, under proposed Rate Schedule M-1, if one of the Specified Generators has been committed for reliability purposes as the only supplier designated to solve the reliability need, mitigation of the applicable Specified Generator would be triggered if the generator's accepted bid or bid components:

- (a) exceeded the minimum generation bid reference level by the greater of 10 percent or \$10/MWh; or
- (b) exceeded the incremental energy bid by the greater of 10 percent or \$10/MWh; or
- (c) exceeded the start-up bid reference level by 10 percent; or
- (d) exceeded the minimum run time reference level by more than 1 hour; or
- (e) exceeded the minimum generation megawatt reference level by more than 10 percent.¹⁴

NYISO states that if one of these thresholds is met, it will substitute a default bid at the generator's reference level for the submitted offer when determining the generator's guarantee payment. NYISO adds that proposed Schedule M-1 also provides that NYISO will notify the generator if NYISO determines mitigation is required and the generator will have an opportunity to challenge the Market Monitoring Department's determination.¹⁵

13. NYISO states that it is appropriate in the circumstances of Rate Schedule M-1 to apply default bid mitigation once the foregoing conduct thresholds have been exceeded because each of the Specified Generators has a demonstrated ability to cause its guarantee payments to increase to non-competitive levels when the generator is committed for reliability. According to NYISO, absent mitigation, the generator's own offers, which are not disciplined by competition, would cause its own guarantee payments to increase to non-competitive levels. NYISO states that imposing mitigation when the above conduct thresholds are exceeded will, effectively, recognize that conduct at or exceeding the threshold will always have a material impact.¹⁶ NYISO also states

¹⁴ Proposed Rate Schedule Market Mitigation No. 1, Original Sheet No. 3.

¹⁵ Proposed Rate Schedule Market Mitigation No. 1, Original Sheet No. 4.

¹⁶ NYISO September 4, 2009 Filing at 10 (citing Attachment B Patton Affidavit at P 25-30).

that the mitigation it proposes for the Specified Generators is consistent with procedures used in the constrained area of New York City.¹⁷

14. NYISO proposes to apply these measures prospectively from September 8, 2009, whenever the Specified Generators are required for reliability. NYISO states that, should the Commission direct otherwise, it will be able to retroactively undo any mitigation that it has imposed since the mitigation will not change market clearing prices. NYISO requests a waiver of the requirement in section 4.7 of Attachment H that mitigation be imposed for no longer than six months because it does not foresee any changes in the conditions that require this filing.¹⁸ Additionally, NYISO states that it will commence stakeholder processes to develop and file with the Commission comprehensive mitigation measures to replace Rate Schedule M-1 to apply to generators generally.

C. Procedural Background

1. November 3, 2009 Order

15. In its November 3, 2009 Order,¹⁹ the Commission accepted and suspended NYISO's proposed Rate Schedule M-1, subject to refunds, conditions, and further orders, and acted on the associated requests for confidentiality.²⁰ The Commission denied the requests for confidential treatment of the identities of the three specifically identified generators and granted the requests for privileged and confidential treatment of generator or equipment specific data and transmission system information which is commercially valuable, necessary to participation in the marketplace, and not yet public, including bidding strategies, generator reference levels, generator costs, guarantee payments and the associated relevant time periods.²¹

16. The Commission denied requests for confidentiality of arguments and testimony that (1) did not reveal specific bid data or pricing, (2) concerned previously publicly released bidding strategies, or (3) consisted of information that is general or hypothetical

¹⁷ *Id.* at 10 (citing section 5.2 of Attachment H).

¹⁸ *Id.* at 11.

¹⁹ *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,103 (2009) (November 3, 2009 Order).

²⁰ In an order issued March 18, 2010, the Commission granted NYISO's request for waiver of the requirement in section 4.7 of Attachment H that mitigation be imposed for no longer than six months.

²¹ November 3, 2009 Order, 129 FERC ¶ 61,103 at P 30.

in nature as disclosure of such arguments and testimony would not cause harm to the commercial position of the generators or to the NYISO market. The Commission directed the parties to submit revised, redacted versions of their respective filings and pleadings by December 3, 2009.

2. January 15, 2010 Order

17. In an order issued January 15, 2010²² the Commission denied a motion for stay of the confidentiality ruling in the November 3, 2009 Order and accepted, in part, and denied, in part, requests for rehearing of the November 3, 2009 Order. The Commission denied rehearing of its directive to release the identities of the three subject generators.²³ The Commission granted, in part, rehearing with regard to the disclosure of certain additional data and information.²⁴ The Commission directed the public release of an aggregation of the Bid Production Cost Guarantee payment data and the public release of the beginning and ending dates of the period in which the alleged conduct occurred and the total number of days within that period when the alleged conduct occurred. NYISO and the Specified Generators were directed to file a compliance filing within five days of the issuance date of the order.

3. March 8, 2010 Order

18. On March 8, 2010, the Commission issued an order granting waiver, to the extent necessary, of section 4.7 of Attachment H such that NYISO is able to continue to apply Rate Schedule M-1 as proposed in the September 4, 2009 Filing beyond the initial six-month period.²⁵

II. Notice of Filing and Responsive Pleadings

19. Notice of NYISO's September 4, 2009 filing was published in the *Federal Register*, 74 Fed. Reg. 48,254 (2009) with comments, interventions, and protests due on or before September 25, 2009. Notice of NYISO's September 30, 2009 correction to its confidential filing was published in the *Federal Register*, 74 Fed. Reg. 51,843 (2009)

²² *New York Indep. Sys. Operator, Inc.*, 130 FERC ¶ 61,029 (2010) (January 15, 2010 Order).

²³ *Id.* P 16–17.

²⁴ *Id.* P 24–25.

²⁵ *New York Indep. Sys. Operator, Inc.*, 130 FERC ¶ 61,166 (2010) (March 8, 2010 Order).

with comments due on or before October 21, 2009. Multiple Intervenors,²⁶ JP Morgan Ventures Energy Corporation, New York Association of Public Power (NYAPP), American Public Power Association, Shell Energy North America (US), L.P., Mirant Parties, NRG Companies, Falcon Power Operating Company, and NextEra Energy Resources, LLC filed timely motions to intervene.

20. Independent Power Producers of New York, Inc. (IPPNY); AES Eastern Energy, L.P. (AES); Electric Power Supply Association (EPSA); PSEG Energy Resources & Trade LLC and PSEG Power New York LLC (collectively PSEG); TransCanada Power Marketing Ltd. and TC Ravenswood, LLC (collectively, TransCanada); and the New York Municipal Power Agency and the Municipal Electric Utilities Association of New York State (MEUA) filed motions to intervene and comments. The New York State Public Service Commission (NYPSC) filed a notice of intervention and comments.

21. The New York State Consumer Protection Board, The New York Transmission Owners (NYTOs);²⁷ Seneca and Sterling; and Saranac²⁸ filed motions to intervene and protests.

22. American Public Power Association filed a response to Seneca and Sterling's Request for Confidential Treatment and IPPNY's Comments. NYAPP filed an answer to Seneca and Sterling's and Saranac's requests for confidential treatment. NYISO filed a response to protests and comments from TransCanada, PSEG, Saranac, EPSA, AES, and IPPNY. NYISO also filed a request for confidential treatment and exemption from Freedom of Information Act disclosure with regard to certain attachments to its response. The NYTOs filed comments on the December 3, 2009 refiled responses of the Specified Generators.

23. The NYTOs filed a protest to the January 21, 2010 compliance filings of the Specified Generators.

²⁶ Multiple Intervenors is an unincorporated association of approximately 45 large industrial, commercial and institutional energy consumers with manufacturing and other facilities that are located throughout New York State.

²⁷ The New York Transmission Owners consist of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., 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.

²⁸ As noted above, Seneca and Sterling and Saranac initially requested that their identities be held confidential.

24. On February 16, 2010, Seneca and Sterling filed a supplemental protest. On March 2, 2010, NYISO filed an answer to the supplemental protest.

A. Seneca and Sterling's Protest

25. Seneca and Sterling argue that NYISO's proposed market power mitigation measures, while affecting no other generators in the market, would have an unjust, unreasonable, and confiscatory impact on Seneca and Sterling. They contend that NYISO has no obligation to propose mitigation measures because Seneca and Sterling never actually violated the conduct or impact thresholds in the NYISO tariff. Further, according to Seneca and Sterling, even if NYISO chose to propose such measures in the absence of an obligation to do so, the proposed mitigation measures would not address the actual circumstances which have given rise to NYISO's concerns.

26. Seneca and Sterling state that the generating units have been bidding consistently for years at the only level that permits them to justify their economic existence and, prior to NYISO's filing, had never been informed of the claim that they were the only solution to certain local reliability issues. They state that reference levels were established three years ago in a consultative process with NYISO, with one price used for bids into the day-ahead market and another slightly higher bid applicable for reliability support. Seneca and Sterling state that because of the age and characteristics of their equipment, they have relatively high reference levels that are well above the market-clearing price. Further they state that they have routinely submitted bids above their reference level, but below the Attachment H thresholds, in order to recoup their costs, because, even combined with capacity payments, the level of compensation at reference levels does not justify continued operation. They state that when NYISO determines that these bids are uneconomic in the Day-Ahead Market, unless there is further intervention in the marketplace via a request for reliability support to the system, they are not selected to run, do not generate power, and receive no revenue from the energy market. Seneca and Sterling state that prior to the August period at issue here, Seneca's facility had not been selected to operate since December 2008 and Sterling's facility had not been selected since January 2009. Seneca and Sterling state that the bids submitted in August, when they were requested to run for reliability reasons, were consistent with their past practices and the Service Tariff guidelines.²⁹

27. Seneca and Sterling also state that NYISO has not met its burden of proof that the proposed rules are just and reasonable as applied to the two generators. Further, Seneca and Sterling assert that NYISO has not submitted any evidence as to the Sterling facility. They argue that the Boles affidavit in NYISO's filing, which purports to discuss Sterling is merely a copy of the Boles affidavit which discusses Seneca's facility and the two

²⁹ Seneca and Sterling September 26, 2009 Protest at 8.

facilities were not operating for the same number of days as would appear to be the case if paragraph 20 in both affidavits is compared.³⁰ Thus, according to Seneca and Sterling, that proposed application of mitigation should be dismissed.

28. Seneca and Sterling note that, by NYISO's own admission, they did not break the conduct threshold of 300 percent or \$100 over the generator's reference level or the impact threshold of \$100/MW increase in market clearing price, or 200 percent increase in guarantee payments, as per sections 3.1.1, 3.1.2, and 3.1.3 of Attachment H.³¹ Seneca and Sterling also state that NYISO improperly interprets section 3.2.3(2) of Attachment H as to "an increase of 100 percent in guarantee payments to a Market Party for a day" and was therefore not under the obligation to submit a section 205 filing. Seneca and Sterling assert that the section 3.2.3(2) threshold has not been crossed in their bidding. Seneca and Sterling do not agree with the starting point from which the increase in guarantee payments is to be measured and state that it is not specified in the tariff. According to Seneca and Sterling, NYISO compares the guarantee payment received at the generator's actual bid versus the guarantee payment the generator would have received if it had bid at its reference level. Seneca and Sterling state that the comparison can only be made after-the-fact when the LBMP is known, and the smaller the LBMP, the larger the guarantee payment for bids of the same amount. Seneca and Sterling assert that the intention of section 3.2.3 is to identify problematic conduct; but, under NYISO's interpretation, a generator would have no way of knowing whether its conduct could be determined to be problematic. According to Seneca and Sterling, the only basis a market party may use to determine if its offering behavior exceeds a conduct threshold is to compare its bids with the conduct thresholds identified in section 3.1.2, i.e., with the generator's reference levels.³²

29. Seneca and Sterling propose that the increase of 100 percent in guarantee payments should compare the generator's bid (the element of conduct that is within the generator's control) with its reference level. Seneca and Sterling state, as an example, that under NYISO's interpretation of section 3.2.3(2), a mandatory section 205 filing would be triggered if the generator bid at its reference level and were required to operate for reliability during low load overnight hours when LBMPs are very low, and yet surely, a bidder submitting a bid at its reference level is a situation that should not be of concern.

³⁰ On September 30, 2009, NYISO filed corrections to paragraph 20 of the Boles affidavit, Attachment E to the September 4, 2009 filing, that presents information and data specific to Sterling.

³¹ Sections 3.1.1, 3.1.2, and 3.1.3 of Attachment H specify criteria for identifying physical withholding, economic withholding, and uneconomic production respectively.

³² Seneca and Sterling September 26, 2009 Protest at 14.

Seneca and Sterling state that a better interpretation of the phrase “an increase of 100 percent in guarantee payments” would be to compare the amount of the guarantee payment the generator would have received had its bids been accepted under out-of-merit conditions and the market prices during the period cleared at a level equivalent to the generator’s reference level.

30. Seneca and Sterling also state that the Commission cannot approve the proposed rule because of its unjust, unreasonable, and confiscatory impact. Seneca and Sterling assert that NYISO has the initial burden of showing that its tariff proposal is just and reasonable, and NYISO has not met this burden in that the proposed filing impairs the ability of the facilities to recover revenues that provide compensation for investment and expenses. Seneca and Sterling argue that the proposed cap is arbitrary and makes recovery of sufficient revenues at best extremely unlikely. Seneca and Sterling argue that because of their high fixed costs and the risks inherent in being a high cost unit that is rarely called on to operate, they do not have the opportunity to recover fixed costs by running infra-marginal. They contend that without the ability to recoup going-forward fixed costs or their investment in the few hours when they are called upon to operate, they may be forced to close. They further contend that, while ISO New England, Inc. (ISO-NE) has attempted to provide a market mechanism for high cost, seldom run units to recover their fixed costs,³³ NYISO has addressed this situation through the conduct and impact thresholds contained in sections 3.1.2 and 3.2.1 of Attachment H.

31. Seneca and Sterling state that PJM Interconnection, LLC (PJM) has a more extensive bid cap rule in place, which builds in recognition that the imposition of such caps needs to be tailored to the impact they will have on the subject generators. Seneca and Sterling state that NYISO’s Independent Market Advisor fails to mention that PJM escalates a generator’s offer cap based on the percentage of time a generator is subject to the cap and that for generators offer-capped for 80 percent or more of their operating hours, the cap is determined by agreement between PJM and the seller with the seller permitted to submit the proposed rate to the Commission if they are unable to reach agreement.³⁴ Seneca and Sterling state that unlike PJM, the NYISO proposal is unjust, unreasonable, and confiscatory.

32. Seneca and Sterling assert that NYISO failed to provide adequate support and justification for the proposed new rules in at least four ways: (1) it failed to justify the new limit of \$10 per MWh or 10 percent above threshold with economic analysis or with information as to the competitive frequency of the targeted units being offered in support

³³ *Citing Devon Power LLC*, 103 FERC ¶ 61,082 at P 34 (2003).

³⁴ Response at 20 (citing Patton Affidavit at ¶ 17, and PJM FERC Electric Tariff Sixth Revised Volume No. 1, at section 6.4.2 (third revised sheet No. 402A *et seq.*)).

of system reliability; (2) it failed to describe the local reliability requirement, or alternative solutions to the local reliability problems,³⁵ or how it concluded that the generators have market power; (3) NYISO failed to demonstrate how the generators' bids are inconsistent with results expected under competitive market conditions, i.e., how the inclusion of a fixed cost component is improper, and NYISO's marginal cost bidding position ignores the fact that default bids are designed to allow recovery of marginal costs at a minimum³⁶ and therefore, marginal cost bidding serves as a floor rather than a ceiling; and (4) NYISO is wrong to imply that Seneca and Sterling increase their bids for reliability situations given the fact that Seneca and Sterling have bid the generators at a consistent level for years and regardless of market conditions.

33. Seneca and Sterling further contend that NYISO has not demonstrated that the impact on the market warrants imposition of the temporary mitigation measures prior to conducting the stakeholder process. Seneca and Sterling assert that none of their bids have set the LBMP and they have not impacted the market because they would have been mitigated under the current rules if they had. Moreover, Seneca and Sterling argue that under the proposed rule, NYISO abandons its historic practice of requiring both conduct and market impact prior to mitigation in that new mitigation levels would be applicable without any inquiry into market impact.

34. Seneca and Sterling state that, if the Commission believes that a stakeholder process is necessary to address NYISO's concerns, then it should not focus on mitigation but should instead focus on a goal of cost effective resolutions to local reliability issues and the affected transmission owners should be required to provide an economic analysis of alternatives for addressing the reliability concerns as part of this process.

35. Seneca and Sterling also protest NYISO's request for waiver of the six-month limit on mitigation measures stating that there is no evidence that the reliability events will occur again prior to next summer and that the six-month limit adds urgency to the stakeholder process and incentivizes speedy resolution of the issues.

B. Saranac's Protest

36. Saranac states that prior to June 20, 2009, it was operated as a PURPA facility under the terms of a fifteen year contract by and between New York State Electric & Gas

³⁵ Seneca and Sterling state that it is possible that they are the most cost effective solution for reliability support even at their consistent bid levels, and the fact that no alternatives to solving the reliability problem have emerged supports this conclusion.

³⁶ *Citing New York Indep Sys. Operator, Inc.*, 99 FERC ¶ 61,246, at 62,038 (2002).

Corporation (NYSEG) and Saranac. Saranac further states that in anticipation of the end of that contract and the transition of the facility to being a merchant generator, it entered into a contract with Shell Energy pursuant to which Shell Energy now serves as the bidding agent for the Saranac facility. Saranac states that beginning on June 28, 2009, and subsequently, Supplemental Resource Evaluation requests were issued to operate the facility on the next day in a minimum generation configuration. Saranac adds that these calls to operate on the next day were received at different times during the day and varied in terms of when operation of the facility was to commence and for how long. Saranac states that neither Shell Energy nor Saranac was given information concerning the scope or duration of any claimed reliability need. Saranac asserts that it had a series of discussions with NYISO staff concerning the operation of the Saranac Facility on a 1 by 1 basis,³⁷ and it indicated to NYISO that Saranac intended to include an adder above the reference level to its bids for operating the Saranac Facility in a 1 by 1 mode and sought guidance as to how NYISO would apply its market monitoring and mitigation plan. Saranac states that NYISO advised it that sections 3.1.2 and 3.2.3 of Attachment H, which establish mitigation thresholds, were the pertinent sections. Saranac asserts that NYISO never intimated that including an adder above the reference level to recover Saranac Facility costs through its bid would be inappropriate.

37. Saranac states that before NYISO may invoke sections 1(b) and 3.2.3 of Attachment H and submit an FPA section 205 filing to propose new, generator-specific, mitigation measures, two conditions must exist: (1) conduct has occurred that departs significantly from the conduct expected under competitive market conditions but does not breach the existing thresholds set forth in sections 3.1.2 and 3.2.1 of Attachment H; and (2) such conduct has caused at least a 100 percent increase in guarantee payments to a Market Party for a day.

38. Saranac asserts that the first condition is not met. Saranac asserts that its bids fall well within the relevant thresholds. Saranac states that it did not exceed the 100 percent threshold and that NYISO's interpretation of how this threshold should be applied and the associated calculation of impact produce results that are arbitrary. Saranac contends that NYISO measures impact under section 3.2.3(2) by comparing the degree to which the revenues based on the reference level and the entity's bid are above the revenues based on the market clearing price. Under this interpretation, according to Saranac, the determination of whether the entity is deemed to have exercised market power will ride solely on the level of the market price – a factor the entity cannot know in advance and

³⁷ Saranac states that during the term of the NYSEG Contract it operated in a 2 by 1 configuration (i.e., two combustion turbines and one steam turbine) but upon NYISO's request changed to a 1 by 1 minimum generation configuration (one combustion turbine and the steam turbine).

cannot control.³⁸ Saranac further contends that an entity has the most extreme impact when the market clearing price comes closest to equaling the reference level. Saranac explains that if an entity's bid and its reference level remain static at \$60/MWh and \$50/MWh, respectively, such bid will be deemed to have an increasingly larger impact as the market clearing price comes closer to the reference level and the overall make-whole payment associated with the bid actually declines. Saranac argues that the exact opposite should result, i.e., the closer to the market clearing price, the less impact the entity's behavior should be deemed to have on the market.

39. In contrast, Saranac contends that a reasonable interpretation of this provision would be to measure impact by multiplying the threshold against the entity's entire bid and then the entity would no longer be subject to the vagaries of changes to market clearing prices. Saranac states that by applying this reasonable interpretation of section 3.2.3(2) to the bids that were submitted, the end result is that none of these bids identified by NYISO exceeds this threshold.

40. Saranac also asserts that NYISO's proposed interpretation of section 3.2.3(2) violates the Commission's policy that generators must have complete information on exactly what actions may trigger default bids. According to Saranac, the Commission rejected NYISO's original proposal to keep threshold levels confidential stating that due process requires that generators subject to mitigation have complete information on what actions may trigger default bids.³⁹ However, Saranac states that, while this requirement is achieved in the energy market clearing price mitigation context, it is not met in the guarantee payment context. Under NYISO's interpretation of its impact test, the market party has no information as to the actions that will trigger mitigation because it does not know what the LBMP will be.⁴⁰

41. In addition, Saranac asserts that its bidding conduct did not depart significantly from conduct expected under competitive market conditions. Saranac states that NYISO fails to address the fact that resources that are needed to provide a reliability service have no way to be inframarginal, and thus, to recover a necessary contribution to their fixed

³⁸ Saranac describes a scenario in which an entity could submit the exact same bid (\$120/MWh) on two consecutive days and the facility itself could have the exact same reference level (\$40/MWh). Under this scenario a change in market price from \$30/MWh to \$39/MWh over the two days would result in an 800 percent impact on the first day and an 8,000 percent impact on the following day. Saranac September 25, 2009 Protest at 13-14.

³⁹ *Citing New York Indep. Sys. Operator, Inc.*, 90 FERC ¶ 61,317, at P 8 (2000).

⁴⁰ Saranac September 25, 2009 Protest at 16-17.

costs. According to Saranac, it was reasonable to seek the opportunity to recover its fixed costs within the permissible threshold levels that are established in sections 3.1.2 and 3.2.3 when it received requests from NYISO to meet a reliability need. Thus, according to Saranac, NYISO had no basis and thus, no authority, to make its section 205 filing with respect to Saranac.

42. Saranac further contends that even if, arguendo, NYISO could have submitted its filing with respect to Saranac's facility, the facility at issue is not the only supplier that can solve the identified reliability need. Saranac contends that this new rule can only be applied to a generator located outside New York City when the requirements set forth in provisions (1) through (3) of the rule are all met and provision (3) expressly requires that "the Supplier that owns or offers the Generator is the only Supplier that can . . . solve the reliability need for which the Generator was committed or dispatched."⁴¹ Saranac asserts that NYISO has chosen to ignore both wind generation and Special Case Resources.

43. Lastly Saranac contends that NYISO has failed to satisfy its burden under FPA section 205 to demonstrate that its proposed new Rate Schedule Market Mitigation No. 1 is just and reasonable. Saranac asserts that the proposed rule would substantially reduce its bidding thresholds without proposing a corollary rule change to provide a mechanism for this facility to recover its fixed costs within its tariffs. Thus, according to Saranac, NYISO's proposed rule unjustly and unreasonably will strip Saranac's facility of a reasonable opportunity to recover its costs in violation of the FPA. Saranac further asserts that NYISO's filing lacks any analysis to support its arbitrarily chosen new thresholds, and its filing runs contrary to Commission precedent.⁴² Saranac states that Dr. Patton's affidavit points to the PJM market as precedent for the proposed rule but fails to note that the PJM market marries these much lower thresholds with the ability to secure a Reliability Must Run (RMR) contract under its tariffs which is designed to ensure fixed cost recovery. Saranac asserts that likewise, ISO-New England proposed to develop pre-specified congestion thresholds when generators were needed to serve load reliably and these included a fixed cost component.⁴³ Saranac states that NYISO must be directed to submit a compliance filing with a corresponding rule change that allows NYISO to enter into RMR type contracts to address these types of circumstances.

⁴¹ *Citing NYISO Services Tariff, Rate Schedule Market Mitigation No. 1, Original Sheet No. 3.*

⁴² *Citing New York Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,182, at P 13–14 (2007) (rejecting NYISO's filing because it offered no cost support and lacked sufficient economic justification for the proposed reference level).

⁴³ *Citing New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287 at P 16 (2002).

Saranac adds that Dr. Patton concedes that “it is possible that a unit needed for reliability will not receive adequate revenues to remain in operation.”⁴⁴

C. Other Intervenors

44. The New York Transmission Owners, NYMPA, MEUA, the NYPSC, and the New York Consumer Protection Board support the filing and state that the Commission should apply the proposed mitigation retroactively. The NYPSC, NYMPA, and MEUA also request that the Commission conduct an investigation to determine whether market manipulation has occurred. NYMPA and MEUA assert that NYISO should assume the responsibility to recommend that the Commission commence enforcement investigations whenever NYISO concludes there has been an exercise of market power or manipulation.⁴⁵ NYMPA and MEUA also request that the Commission conduct a technical conference to examine whether a new approach to market manipulation and correction in New York is warranted.⁴⁶

45. IPPNY states that if it approves the instant filing, the Commission should not predetermine the outcome of the stakeholder process that will address whether and, if so, how, new mitigation rules should be applied to all generators located outside of New York City when they are the sole units available to be committed for reliability purposes. IPPNY requests that, if the Commission approves the new mitigation rules, it specify that such approval does not restrict stakeholders from developing market rules that may obviate the need for new mitigation rules on generators committed for reliability outside of New York City or that are different from those approved by the Commission. IPPNY, noting that NYISO does not have procedures or mechanisms in place for contractual arrangements to ensure that resources needed for reliability remain in service, disagrees with the Independent Market Advisor regarding the ability of generators to recover fixed costs in order to remain in operation and states that this issue should be resolved in the stakeholder process.⁴⁷ IPPNY also questions why Rate Schedule M-1 does not use the existing notification timelines in Attachment H and instead proposes different time frames such as the proposed five days for the generator to request consultation with NYISO compared with 15 days in Attachment H. IPPNY states that the Attachment H

⁴⁴ NYISO September 4, 2009 Filing, Patton Affidavit at P 38.

⁴⁵ NYMPA/MEUA September 28, 2009 Comments at 7-8 (citing market manipulation issues of the Western power markets of 2000-2001 and Order No. 670).

⁴⁶ *Id.* at 10 (citing, among other issues, the Lake Erie loop flow investigation, *New York Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61, 049 (2009)).

⁴⁷ IPPNY September 25, 2009 Comments at 6.

time frames were developed through the stakeholder process and NYISO has not demonstrated why it cannot use the existing timelines. IPPNY requests that the Commission order NYISO to make the time frames in Rate Schedule M-1 consistent with those in Attachment H.

46. IPPNY requests that the Commission direct NYISO to develop measures with its stakeholders that apply to all generators needed for reliability located outside of the New York City constrained zone. IPPNY states that otherwise, there will be no pressure to effect a long-term solution.⁴⁸ TransCanada, EPSA, PSEG, and AES support IPPNY's comments. AES also states that the Commission should direct NYISO to conduct a study of the underlying causes of reliability needs on its system and submit a report within 180 days.

47. On October 28, 2009, IPPNY submitted an answer to NYISO's October 13, 2009 response. IPPNY asserts that the "Gap Solution" in Attachment Y of NYISO's OATT, coupled with NYISO's proposed Rate Schedule M-1 changes, do not ensure just and reasonable rates under the FPA for generators that are identified as the sole source to address specific reliability needs that are identified on the system.⁴⁹ Nor is it clear, states IPPNY, that NYISO has provided sufficient information to establish the general rule that fixed costs must never be recoverable as part of energy bids.⁵⁰ Thus, IPPNY urges the Commission to direct NYISO to address these issues with its market participants as part of its generic rule change and file a comprehensive proposal that ensures that the rates, terms and conditions for cost recovery for generators needed for reliability are just and reasonable under the FPA.⁵¹

48. TransCanada asserts that sections 1(b) and 3.2.3 of Attachment H and the evidentiary record currently before the Commission provide support for a section 205 filing to implement the new mitigation rules to the Specified Generators only and that the same authority does not exist for the NYISO to seek implementation of broad based market rule revisions pursuant to section 205.⁵² TransCanada states that, any such tariff revisions that are not subject to the NYISO governance process need to be made pursuant

⁴⁸ *Id.* at 10 (citing *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163, at P 347 (2004)).

⁴⁹ IPPNY October 28, 2009 Answer at 1.

⁵⁰ *Id.* at 1-2.

⁵¹ *Id.* at 2.

⁵² TransCanada October 28, 2009 Answer at 3.

to section 206 along with evidentiary support. TransCanada states that, accordingly, the only issue NYISO requested the Commission to decide was whether the rules related to the three generators are just and reasonable given the specific confidential facts and circumstances identified by the NYISO in its filing.⁵³

49. In its October 13, 2009 answer, American Public Power Association states that IPPNY's proposal to incorporate fixed costs into energy bids where a generator is called upon for reliability reasons is contrary to fundamental principles governing competitive markets, including the basic idea that bids should not result in excessive rates, as well as specific provisions in NYISO's market mitigation measures.⁵⁴ American Public Power Association asserts that IPPNY's solution is inconsistent with the Commission's determination that "default bids, designed to cause a market participant to bid as if faced by a competitive market. . . are by design at a level that allows participants to recover marginal costs at a minimum."⁵⁵ American Public Power Association states that IPPNY's call for a stakeholder process is a distraction from the specific market mitigation measures proposed in this case.⁵⁶

50. American Public Power Association asserts that the Commission should reaffirm that it is appropriate for the RTO to employ effective mitigation measures when generators requested to run for reliability reasons have the opportunity to exercise market power.⁵⁷ American Public Power Association further asserts that the Commission should provide for restitution of the amount of fixed costs included in guarantee payments to the Specified Generators.⁵⁸

51. The NYTOs disagree with Seneca and Sterling's assertion that while the guarantee payments are considered to be the difference between the generator's accepted bid and the revenues received through the applicable market, their bids, for market mitigation purposes, should be compared to the reference level.⁵⁹ The NYTOs state that Seneca and

⁵³ *Id.*

⁵⁴ American Public Power Association October 13, 2009 Answer at 3, 8.

⁵⁵ *Id.* at 8 (citing *New York Independent System Operator, Inc.*, 99 FERC ¶ 61,246 at, 62,038 (2002)).

⁵⁶ *Id.*

⁵⁷ *Id.* at 3.

⁵⁸ *Id.* at 3, 8.

⁵⁹ New York Transmission Owners December 28, 2009 Comments at 6.

Sterling offer no tariff language in support for their assertion and it is a collateral attack on the Commission's orders approving the language.⁶⁰ The NYTOs also state that it appears that Saranac is proposing an impact test based on total payments rather than just guarantee payments, which is not consistent with the plain wording of the tariff. The NYTOs further state that the admissions by the Specified Generators that they used their market power status to submit non-competitive bids that include fixed costs is justification for the actions taken by NYISO.⁶¹

D. NYISO's Answer

52. NYISO responds to the claims made by the Specified Generators that their bids when called on for reliability were consistent with bids made under competitive conditions because the increment over variable operating costs was intended to recover fixed costs. NYISO states that these assertions are not consistent with the Commission's recognition that competitive bids should reflect only the generator's variable operating costs, i.e., short run marginal cost.⁶² NYISO states that from NYISO's inception, the Commission has recognized that its markets use a pricing methodology under which the price of energy at each location in the system is equivalent to the cost to supply the next increment of load at that location, i.e. the short run marginal cost. Therefore, according to NYISO, it follows that competitive bids should reflect each generator's marginal cost so that the clearing price is set at the marginal cost of the marginal unit. NYISO also references prior Commission findings that, similar to here, generators committed for reliability that were mitigated to their reference levels were appropriately and adequately compensated in accordance with the Services Tariff and that generators committed for reliability should not include a fixed-cost component.⁶³

53. NYISO asserts that generators are not guaranteed fixed cost recovery in either the energy market or in the capacity market where competitive bids are based on going-forward costs, not fixed costs as the Specified Generators suggest. NYISO cites to the section 4.5 of Attachment H mitigation thresholds as applied to generators in the capacity

⁶⁰ *Id.* at 6-7 (citing *New York Indep. Sys. Operator, Inc.*, 90 FERC ¶ 61,317 (2000)).

⁶¹ New York Transmission Owners December 28, 2009 Comments at 8 (citing Saranac Protest at 18).

⁶² NYISO October 13, 2009 Answer at 6 (citing *NRG Power Marketing, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 91 FERC ¶ 61,346 at 61,165 (2000)).

⁶³ NYISO October 13, 2009 Answer at 7 (citing *N.Y. Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,021 at P 22 (2006)).

market with market power in the constrained New York City capacity zone where generators are mitigated to going-forward costs as an approximation of competitive bids.⁶⁴ NYISO further states that the Specified Generators have not provided a demonstration or analysis of their ability to recover going-forward costs in either the energy, ancillary services, or capacity markets and have provided no basis to conclude that any of the three generators is not recovering costs it should expect to recover in a competitive market. Further, according to NYISO, the Specified Generators do not put their cost recovery issues in the context of the current economic climate with its low demand and low LBMPs. NYISO states that to the extent some generators are not achieving their hoped-for levels of profitability, that is not a basis for changing the design of the New York markets or for rejecting Rate Schedule M-1.

54. NYISO asserts that permitting generators to exercise market power is not an appropriate method of providing generators that are needed for reliability an opportunity to recover going-forward costs. NYISO states that attempting to include a fixed cost component into the reference levels would be an impractical and imprecise cost-recovery method in that it would always lead to over- or under-recovery since it would be dependent on assumptions of unit operation which is independent of competitive bidding.⁶⁵

55. Further, according to NYISO, its tariff provides a remedy if there is an imminent threat to reliability because a generator intends to cease operations absent additional legitimate cost recovery. NYISO states that Attachment Y to the NYISO OATT provides that resources that are unable to recover their costs and are needed for reliability may rely on customized contractual solutions. NYISO adds that Attachment Y authorizes the NYISO Board, in consultation with the NYPSC, to identify an imminent threat to the reliability and to require the appropriate transmission owner or owners to propose an appropriate Gap Solution outside the normal reliability planning cycle. Further, according to NYISO, other entities, including the Specified Generators, could propose Gap Solutions and Attachment Y includes a provision for the recovery of the costs of Gap Solutions that are not transmission projects. Hence, NYISO concludes that there is no need to permit generators to exercise market power in the energy, ancillary services, or capacity markets in order to make necessary cost recovery payments to generators that are genuinely needed for reliability of the bulk-power system.

⁶⁴ Going-forward costs for providing capacity may include costs to keep the generators in service and available including expected profits from alternative uses, but do not include sunk costs that would not be avoided by taking the generator out-of-service.

⁶⁵ NYISO October 13, 2009 Answer at 11(citing *ISO New England, Inc.*, 129 FERC ¶ 61,008, at P 18 (2009)).

56. NYISO also states that modeling a new constraint that can only be solved by one supplier would expand the potential market impact of that supplier's exercise of market power and that, contrary to the Specified Generators' assertions, NYISO has provided appropriate support for the mitigation thresholds proposed in Rate Schedule M-1. NYISO states that the proposed "greater of 10 percent or \$10/MWh" mitigation threshold is not intended as a vehicle to permit generators to recover their fixed or going-forward costs, but rather, is intended to prevent over mitigation by providing flexibility in bidding to account for uncertainties that are inherent in determining reference levels (e.g., fuel price fluctuation). NYISO also states that, while the Specified Generators argue the thresholds should be looser, they do not show that the proposed thresholds are not appropriate for the intended purpose.⁶⁶ NYISO also responds to Saranac's assertion that NYISO has not provided adequate cost support or economic justification for its proposed rate schedule. NYISO states that reference levels are determined on a case-by case basis and, at any rate, the setting of reference levels is not at issue here; rather, the issue is the mitigation thresholds and NYISO has provided both an economic justification and cost support for them.

57. In response to allegations that its calculation pursuant to section 3.2.3(2) of Attachment H was not appropriate, NYISO states that this is the same method it uses on a daily basis for real-time guarantee payment impact under section 3.2.1(2) of Attachment H which is also consistent with the method previously accepted by the Commission, i.e., by comparing the original Bid Production Cost Guarantee Payment based on the generator's bid with the guarantee payment based on the applicable reference level.⁶⁷ NYISO also states that 72 percent of its stakeholders voted in favor of the NYISO proposal for this particular calculation method, and the particular pricing scenarios presented by the Specified Generators did not occur during the period in question. Had they occurred, NYISO would have exercised its authority under section 3.2.3 of Attachment H to determine that the guarantee payments received were due to legitimate competitive forces or incentives, which would have obviated the need for NYISO's September 4, 2009 Filing.

58. NYISO further states that the test that the Specified Generators actually propose is not a guarantee payment impact test but rather a conduct or revenue impact test. NYISO states that Saranac argues that the guarantee payment impact should instead be calculated by comparing the accepted portions of a generator's bid to the corresponding reference

⁶⁶ NYISO October 13, 2009 Answer at 14 -15 (citing *New York Indep. Sys. Operator, Inc.*, 99 FERC ¶ 61,246 at 62,047-48 (2002)).

⁶⁷ NYISO October 13, 2009 Answer at 17 (citing NYISO Filing, Docket No. ER07-1334-000, at Page 4 (filed August 31, 2007); *New York Indep. Sys. Operator, Inc.*, 121 FERC ¶ 61,112 (2007)).

levels to determine if it had an impact on the guarantee payment. NYISO states that this method ignores the LBMP revenues that the generator receives, so it would not accurately test the impact that a Market Party's bidding behavior had on the guarantee payment that its generator receives. NYISO states that it is required to determine the extent to which a Market Party's bidding behavior increased its guarantee payment or the extent to which its total revenues were enhanced.

59. NYISO also states that, contrary to the Specified Generators' assertions, the guarantee payment impact test is not deficient simply because Generators assert that they may not know in advance if their bids will result in a determination of impact. NYISO states that, as stated above, it is required to perform a guarantee payment impact test and in addition, suppliers that bid a generator into NYISO's markets can know with certainty that they will not be mitigated by bidding the generator's marginal cost. NYISO adds that the purpose of the mitigation thresholds is not to permit a supplier to receive compensation in excess of the compensation it would receive if it bid competitively. Rather, suppliers that want certainty should submit bids at competitive levels and use the consultation process, as necessary, to ensure their generators' reference levels are accurate.

60. In response to the Specified Generators' assertion that NYISO is obligated to inform them of the reason(s) their generators are being committed for reliability, NYISO responds that Specified Generators are not entitled to any more information than NYISO provides to the rest of the market. In response to Saranac's assertion that it should not be subject to Rate Schedule M-1 because it is not the only supplier that can, or that has been designated, to solve a reliability need for which generator(s) were committed, NYISO states that there are circumstances under which Saranac's generators are the only resources that are able to address an identified reliability need and that this is the only time they would be mitigated.⁶⁸

61. NYISO also responds to other protesters' suggestions that NYISO model in the energy market the reliability concerns that required the commitment of the Specified Generators. NYISO states that this will not solve the market power issue and will only shift the effect from guarantee payments to energy prices. In addition, according to NYISO, adding new constraints to NYISO's market model that can only be solved by a single supplier expands the potential market impact of that supplier's ability to exercise market power.

⁶⁸ *Id.* at 24 (citing Gonzales Affidavit at P 3).

E. Seneca and Sterling's Supplemental Protest

62. Seneca and Sterling state that NYISO has changed its compensation incentive system to provide incentives based on reducing uplift costs. Seneca and Sterling assert that the incentive plan not only detracts from the goal of system reliability but creates an inherent conflict of interest, which is contrary to NYISO's Code of Conduct requirement to avoid even the appearance of a conflict of interest. Seneca and Sterling contend that the proposed uplift incentive goals directly tie NYISO employees' compensation to a reduction in the uplift payments to market participants, which necessarily requires some degree of subjectivity and could affect system reliability. According to Seneca and Sterling, these conflicts call into question the ability of NYISO employees to render independent evaluations. Generation Owners state that they provide this information to the Commission to assist the Commission with analyzing the appropriateness of NYISO's filing.

F. NYISO's Answer to the Supplemental Protest

63. NYISO states that any asserted conflict of interest raises separate issues that turn on facts and policies not under consideration in this docket. In response to Seneca and Sterling's assertions, NYISO states that its Rate Schedule M-1 mitigation measure was submitted to the Commission several months before NYISO's new incentive goals were put in place, and thus the new incentive goals could not have played a role in the development of the new mitigation measure. NYISO further states that its market mitigation and analysis department has been removed from the incentive compensation goal based on statewide uplift costs. The incentive goal, according to NYISO, is fully consistent with the requirements of its Code of Conduct. NYISO states that Seneca and Sterling fail to acknowledge that the reliability commitments of their generators are always, or almost always, for local reliability at the request of the local transmission owner, and the proposed incentive goal only applies to uplift for statewide reliability, not to uplift that is assigned to a locality. NYISO states that its Market Monitoring Unit is an external monitoring unit and, as such, its employees do not participate in NYISO's incentive goals. NYISO further states that the mitigation measure in Rate Schedule M-1 is formulaic with discretion limited to determination of the relevant reference levels for each generator. NYISO adds that the method and procedures for determining reference levels are well-established and have been subject to extensive safeguards.

III. Commission Determination**A. Procedural Matters**

64. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

65. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

66. For reasons discussed below, the Commission finds that NYISO has demonstrated that the three Specified Generators' bidding conduct during the summer of 2009 warrants mitigation pursuant to the conduct and impact tests of section 3.2.3 of Attachment H of the Services Tariff. We also find that NYISO's proposed mitigation measures as set forth in its proposed Rate Schedule M-1, as modified below, are just and reasonable and appropriately applicable to the three Specified Generators. The Commission, therefore, accepts NYISO's proposed Rate Schedule M-1, subject to modifications to be included in a compliance filing as discussed below, to be effective September 8, 2009, with respect to the three Specified Generators. For the reasons discussed below, we encourage NYISO's efforts to develop a generally applicable version of Rate Schedule M-1 which would be applied to all market participants located outside of New York City and we direct NYISO to file a report on the progress of those efforts within 90 days of the date of this order, if the generally applicable measure has not yet been filed with the Commission.

1. Introduction

67. Before we address the specific issues raised, a general overview of NYISO's market power mitigation framework will provide context for our decisions. Every generator in NYISO has a reference level that is an estimate of what the unit would be expected to offer in a competitive market. Reference levels are determined in various ways in accordance with Attachment H (as cited earlier), but all are intended to estimate a unit's marginal operating cost. Reference levels, which are known in advance to all generators, make no allowance for the inclusion of fixed costs in bids.

68. NYISO's approach to market power mitigation—the conduct and market impact approach—aims to mitigate only non-competitive bids that would “significantly” increase a market price or bid production guarantee payment above that which would have prevailed had the generator bid competitively. NYISO's mitigation of market power thus balances the need to assure competitive outcomes with the cost of potential over-mitigation; NYISO's tariff establishes threshold values for conduct and market impact that account for this trade-off. Section 3.2.3 of Attachment H covers conduct and impacts that do not arise to the level of section 3.1 thresholds, but nonetheless warrant mitigation.

69. Market power mitigation is a market design mechanism to ensure competitive offers even when competitive conditions are not present; it is not intended to function as “punishment” for a tariff violation, but instead to protect and promote competition. In

NYISO's in-City market, where market power is an ever-present concern, strict conduct and market impact thresholds apply and market power mitigation is implemented with automatic mitigation procedures. Outside of the in-City market, where competition is viewed as sufficient to discipline bids to competitive levels during most hours of the year, NYISO has tariff authority to implement market power mitigation only when certain conduct and impact thresholds are exceeded. Its authority is limited in this way in order to promote competition without unduly interfering with market operations.

70. However, the conduct thresholds that apply outside of the in-City market in NYISO's tariff are not "safe-harbor" bids either. Under NYISO's tariff, bidding below the conduct thresholds does not guarantee a generator that it will not be subject to mitigation. It merely gives a generator assurance that market power mitigation will not apply to it absent the Commission's acceptance of a section 205 proposal filed by NYISO pursuant to section 3.2.3 to apply mitigation in appropriate circumstances.

2. Application of the Section 3.2.3 Conduct and Impact Thresholds

71. As noted earlier herein, section 3.2.3 of Attachment H of the Services Tariff requires NYISO to file, pursuant to section 205 of the FPA, "an appropriate mitigation measure" if it identifies conduct that departs significantly from "the conduct that would be expected under competitive market conditions" but that does not rise to the thresholds specified in sections 3.1.1 through 3.1.3 if that conduct has a significant effect on market prices or guarantee payments. Section 3.2.3 provides that conduct shall be deemed to have such a significant effect, as relevant here, if it exceeds a threshold of "an increase of 100 percent in guarantee payments to a Market Party for a day." In addition, section 1(b) of Attachment H requires NYISO to, among other things, identify the particular conduct NYISO believes warrants mitigation and to provide NYISO's justification for imposing the mitigation measure.⁶⁹ This is the first occasion that the Commission has been called on to review an interpretation and application of section 3.2.3 and the Specified Generators have raised issues with respect to NYISO's interpretation of the conduct and impact tests of that section.

72. As we discuss further below, we find that NYISO properly interpreted and applied section 3.2.3, and likewise we agree with NYISO that the Specified Generators have market power during periods when they are needed for reliability and are therefore pivotal. Because the Specified Generators' bids exceeded their reference levels, i.e., their marginal costs, and because bid production guarantee payments were thereby increased by more than the allowed threshold, NYISO properly construed section 3.2.3 and properly concluded that the section 3.2.3 conduct and market impact thresholds were met, and that NYISO properly made the instant filing proposing appropriate mitigation.

⁶⁹ Services Tariff, Attachment H, Fourth Revised Sheet No. 466.

a. Conduct Threshold

73. In its September 4, 2009 filing, NYISO explains that it evaluated the Specified Generators' bidding conduct in August of 2009, when they were called on for reliability purposes, by comparing their bids to their reference levels, i.e., their marginal cost.⁷⁰ Specified Generators protest the use of marginal cost, which their respective "reference levels" set by NYISO are intended to represent, as the benchmark for applying the conduct test of section 3.2.3. They argue, instead, that as high-cost generators they need to be allowed to bid more than marginal cost to recover their fixed costs or else they will eventually go out of business. Therefore, they argue, their bidding conduct should not be found to have breached the conduct threshold of section 3.2.3. We disagree, and find that NYISO's proposed use of reference levels as the benchmark for measuring conduct under section 3.2.3 is consistent with the language of section 3.2.3 and is likewise reasonable.⁷¹ First, NYISO has done no more than what section 3.2.3 requires NYISO to do—evaluate the conduct and impact and make a filing in response. Second, in a competitive market, a generator lacking market power would be expected to submit bids into the NYISO spot market at a level that, if accepted at that bid price, would be expected to cover the generator's marginal costs. This is because, as we explain below, under NYISO's uniform market-clearing price auction procedures, a seller's profits are maximized by marginal cost bidding. In contrast, the ability to include and recover costs in excess of marginal cost, including fixed costs, in bids during periods when the generators are required to run for reliability is evidence of market power. In NYISO's auction, the lowest-bid increment of energy is accepted first, and higher-priced increments are accepted next, until the last increment of energy (or portion thereof) is accepted, and the last increment establishes the market-clearing price that all accepted bids receive. Thus, in a competitive market, bidding above one's marginal cost would not necessarily increase the market price, but would risk pricing the generator out of the market such that its bid would not be accepted. We add that NYISO's development and use of reference levels is well defined in the tariff as previously approved by the Commission.⁷²

⁷⁰ NYISO is required by section 3 of Attachment H to consult with market parties and NYISO indicates that, in fact, it reviewed and consulted with Saranac to ensure that the reference levels used accurately reflect the generator's marginal cost and operating configurations. NYISO September 4, 2009 Filing, Attachment C at P 14.

⁷¹ We note that section 3.1 similarly uses reference levels approximating marginal cost as a benchmark when evaluating bidding.

⁷² See *e.g.*, *N.Y. Indep. Sys. Operator, Inc.*, 99 FERC ¶ 61,246, at 62,043 (2002).

Furthermore, Saranac, for one, concedes that it knew of the applicability of not only section 3.1.1, but also of section 3.2.3.⁷³

74. Specified Generators argue, however, that they did not change their bids in response to being committed for reliability and, for that reason, they state their bids should not be found to have breached the section 3.2.3 conduct threshold. Thus, the issue is whether the conduct threshold of section 3.2.3 can only be met by a showing that the generator changed its bid above its reference level or whether it can be met by showing that the generator's bid exceeds the reference level regardless of whether that bid is a change from earlier bids. We find that it is the latter. The section 3.2.3 conduct threshold only requires a showing that the bid departs significantly from conduct that would be expected under competitive market conditions, and what would be expected is bidding at marginal cost.⁷⁴ Whether a submitted bid is a change from a prior bid is irrelevant, because the analysis should properly focus on the bid compared to the reference level, and not on what a generator bids one day compared to another day.

75. In the instant case, NYISO demonstrates that, during August 2009, the Specified Generators were able to bid at prices substantially above their respective marginal costs reflected in their reference levels. Although there is no definition of the term “significantly” as used in section 3.2.3, we agree with NYISO that, based on what the Specified Generators' respective reference levels were at the time of the subject conduct, the bids were substantially above their reference levels. By so bidding, the Specified Generators were able to significantly increase their guarantee payments while still not exceeding the section 3.1 thresholds. We agree with NYISO and find that the Specified Generators' bidding conduct during the period in question “departs significantly from the conduct that would be expected under competitive conditions” and, therefore, meets the conduct threshold of section 3.2.3.⁷⁵

⁷³ See Saranac September 25, 2009 Filing, Affidavit of Matthew J. Picardi, at P 11.

⁷⁴ Section 2.3(b) of Attachment H separately states, in general, the NYISO shall consider conduct to be inconsistent with competitive conduct if the conduct would not be in the economic interest of the Market Party in the absence of market power. Services Tariff, First Revised Sheet No. 467.02.

⁷⁵ The specific amounts for each day that the Specified Generators' conduct is at issue is detailed in each Table 1 of Attachment C, D, and E, respectively, of the September 4, 2009 Filing. Further, additional detailed data and spreadsheets were provided by NYISO in its December 3, 2009 compliance filing from which the Commission was able to verify and replicate the NYISO calculations. This information competitive in nature and is privileged and confidential as the Commission found in the November 3, 2009 Order and the January 15, 2010 Order.

76. Thus, while the conduct described by NYISO in the September 4, 2009 filing did not indicate market manipulation, as defined by section 1c.2 of the Commission's Regulations,⁷⁶ or physical or economic withholding or uneconomic production, as defined in sections 3.1.1 through 3.1.3 of NYISO's mitigation rules, we find that it does meet the sections 3.2.3 and 1(b) definitions of conduct that warrants mitigation; the Specified Generators had to be scheduled regardless of price to meet reliability requirements and, knowing that, bid significantly above their marginal costs.

77. Saranac argues that its generator is not pivotal, and that other wind generators and demand response providers are also available to meet NYISO's reliability needs. Accordingly, it claims that it did not, in fact, have market power when it bid into the market at levels significantly above its marginal cost. We disagree. Two of the reliability needs at issue here involve local voltage support. The third reliability need required a generator at a specific location to cover a possible transmission line outage. It is the Specified Generators' locations on the grid that make them uniquely suited to provide the solutions to three location-specific reliability issues. As NYISO shows, wind generators and demand response resources were not located at the specific network locations required to solve these localized reliability problems.⁷⁷ Additionally, we find that claims by Seneca and Sterling that NYISO failed to describe alternative solutions to the local reliability problem beg the issue as NYISO has shown that the Specified Generators are pivotal and are the sole suppliers who can meet its reliability needs.

78. The Specified Generators also contend that they had no way of knowing prior to submitting their bids whether they would be called upon for reliability purposes, or any way of knowing in advance whether their bids would constitute improper conduct, and thus were unaware that they had the opportunity to exercise market power. Competitive behavior only requires that a generator be able to determine and bid its marginal cost. The record reflects that Specified Generators expected to be committed for reliability needs, albeit infrequently, and consistently bid at levels above their marginal cost with that expectation in mind.⁷⁸ That conduct constitutes an attempt to exercise market power if such circumstances arise even though they might not have known in advance which particular days or hours they would be committed to meet reliability needs. Market power is a consequence of too few or no competitive alternatives, and NYISO has shown that, under the specified conditions, these generators are the only facilities capable of providing reliability services and, thus, have market power in such instances.

⁷⁶ 18 C.F.R. § 1c.2 (2009).

⁷⁷ NYISO October 13, 2009 Answer, Attachment C.

⁷⁸ NYISO October 13, 2009 Answer, Attachment B at P 11. Seneca and Sterling September 26, 2009 Protest at 7-8.

Historically, this may not have been the case and it may not be the case in all hours of the year. However, when a pivotal generator is required out-of-merit for reliability, there is no dispute that it possesses market power, and thus that mitigation may be required. Further, the fact that the calculation of actual guarantee payments necessarily occurs after-the-fact is irrelevant. The Specified Generators, in effect, are advocating that they should be allowed to bid so that they are ensured they will receive a particular level of fixed cost recovery; however, this is not appropriate in this particular situation where they have market power.

79. Generators called out-of-merit for reliability, as in this case, are paid as-bid, i.e., they receive the market clearing price for any energy supplied and then receive a “make whole” payment to cover the difference between the market clearing price and their bid. Because the generators do not know, in advance, the hourly energy market clearing prices and their associated energy market revenues, they cannot know what portion of their as-bid payment will be received in the form of a guarantee payment. However, this is not a reason to exempt the generators from mitigation. We reiterate that submission of a competitive offer only requires that a generator be able to determine and bid its own marginal costs.

80. Saranac also argues that its bidding conduct did not depart significantly from conduct expected under competitive market conditions in that it is not reasonable to require marginal cost bids from a high-cost generator that is frequently needed for reliability. In Saranac’s view, its bid should be allowed to reflect its fixed costs, which it asserts are high, because it would otherwise have no opportunity to recover its fixed costs. Indeed, it asserts, even its marginal costs are so high as to routinely exceed the prevalent market price. Saranac argues that, because it will always be called out-of-merit, its bid will always be higher than the clearing price,⁷⁹ and thus, (unlike most generators) its revenues from the market will never exceed its bid. Along similar lines, Seneca and Sterling argue that their generating units have bid consistently for years at the only level which allows them to justify their economic existence, while bidding at their reference level provides a level of compensation that is too low to justify continued operation.

81. We disagree with Specified Generators’ claim that bids should be allowed to ensure a recovery of fixed costs because this is their only opportunity to recover those fixed costs. Their desire for full cost recovery does not justify the exercise of market power. Generators needed mainly for reliability have other opportunities to receive compensation above their marginal costs. During periods of market-wide scarcity, given the nature of NYISO’s markets, the market clearing price will typically exceed the

⁷⁹ Saranac thus admits that, when bidding, it knows it is likely to be called out-of-merit, as we discuss in prior paragraphs.

marginal costs of virtually all generators by a substantial amount, thereby allowing all such generators to receive revenues that contribute to fixed cost recovery.⁸⁰ In addition, generators can receive revenues to contribute to the recovery of their fixed, i.e., capacity, costs from the capacity market. While generators that are needed for reliability may have fixed cost recovery issues that need to be addressed, these generators remain subject to NYISO's market power mitigation measures, the application of which is the only issue in this proceeding.

82. In cases where a supplier is needed for reliability but is unable to recover its fixed costs from the market, the Commission has previously relied on customized contractual solutions (e.g., so-called reliability must-run agreements), although this is not a solution preferred by the Commission. Protestors argue that such a contractual solution is not currently available, because NYISO (unlike its RTO neighbors) has no authority under its existing tariff to enter into a reliability-must-run contact. However, if NYISO's current market measures that allow for fixed cost recovery are inadequate, those issues may be addressed in other appropriate proceedings but they are not within the scope of the instant proceeding, which, rather, is focused on market power mitigation.

83. NYISO made this filing to initiate market power mitigation measures to address the identified non-competitive behavior. Further, as we discuss below, such mitigation as we are accepting here is designed to assure that the Specified Generators are not able to receive non-competitive bid production guarantee payments when they have market power. There is no basis for any further requirements for notification that the Specified Generators are needed for reliability beyond what we have previously authorized.⁸¹ Competitive offers require only knowledge of a unit's marginal cost, not advance knowledge (i.e., prior to the close of the day-ahead market) of whether the unit may be called for reliability.

84. The Specified Generators argue that NYISO lacks the authority to make the instant filing under its tariff because the bids of the three generators did not exceed the thresholds established in sections 3.1 and 3.2 of Attachment H of the tariff. That argument ignores section 3.2.3 and, therefore, is without merit. In addition, Saranac asserts that it discussed its bid level with NYISO staff and was informed that the relevant parameters were the section 3.1.2 and 3.2.3 thresholds. Specified Generators should have known that section 3.2.3, which expressly applies in situations when the section 3.1 thresholds are not breached, also needed to be considered. To assume that the parameters

⁸⁰ *New York Indep. Sys. Operator, Inc.*, 106 FERC ¶ 61,111 at P 1, 41-45 (2004). See, e.g., scarcity pricing provisions in the Services Tariff, Rate Schedules 3, 4, and 5 and Attachment B.

⁸¹ See *New York Indep. Sys. Operator, Inc.*, 130 FERC ¶ 61,017 (2010).

of section 3.1 are the only relevant parameters is incorrect, and clearly so, since that would read section 3.2.3 out of the tariff. Sections 1(b) and 3.2.3 require NYISO to make a filing under section 205 of the FPA for conduct that does *not* trigger the other Attachment H thresholds if that conduct departs significantly from conduct that would be expected under competitive market conditions. Moreover, whenever NYISO identifies market behavior that it believes is an exercise of market power that is not adequately addressed by its existing market power mitigation authority, we expect it to make a filing to correct the oversight as contemplated by Attachment H.

b. Impact Threshold

85. To apply appropriate mitigation measures pursuant to section 3.2.3 once it has been shown that the section 3.2.3 conduct threshold was violated, as discussed above, NYISO must also demonstrate that the effect of that conduct meets a specific numerical impact threshold. Section 3.2.3 provides that the identified conduct must have “a significant effect on market prices or guarantee payments.” And, as relevant here, conduct shall be deemed to have such an effect if it exceeds “an increase of 100 percent in guarantee payments to a Market Party for a day.” Consistent with its interpretation of the section 3.2.3 conduct test, as discussed above, NYISO applied the section 3.2.3 impact test by comparing the guarantee payment received by the generator at its actual bid price to the guarantee payment the generator would have received if it had bid at its reference level. NYISO interpreted the section 3.2.3 impact test as being met, if the actual guarantee payment exceeded by 100 percent the guarantee payment at the reference level. Based on the Specified Generators’ bids and associated reference levels during the period in question, NYISO found that the impact test numerical threshold was exceeded, warranting appropriate mitigation measures.⁸² We agree with NYISO and find that the Specified Generators’ conduct caused the section 3.2.3 impact threshold to be violated.

86. Saranac argues that the impact threshold has not been crossed, and that NYISO’s conclusion to the contrary is based on an erroneous interpretation of section 3.2.3. Whereas NYISO compares the guarantee payment received at the actual bid price with that which the market party would have received had it bid its reference level, Saranac

⁸² According to NYISO witness Boles, Saranac received guarantee payments in excess of the section 3.2.3 impact threshold for 17 of the 21 days studied during August 2009 (NYISO September 4, 2009 Filing, Attachment C at P 30). According to NYISO, Seneca received guarantee payments in excess of the section 3.2.3 impact threshold for 10 of the 11 days studied in August 2009 (NYISO September 4, 2009 Filing, Attachment D at P 20) and Sterling received guarantee payments in excess of the section 3.2.3 impact threshold for five days during August 2009 (NYISO September 4, 2009 Filing, Attachment E at P 20).

argues that, because these comparisons can only be made after-the-fact, a market party would have no way of knowing in advance if its conduct could be determined to be problematic. Thus, according to Saranac, a better interpretation of the impact threshold language in section 3.2.3 is whether the generator's bid is itself a 100 percent increase over the generator's reference level. Saranac also asserts that the section 3.1.2 impact threshold is based on just such a calculation.

87. We find that Saranac's interpretation of the section 3.2.3 impact threshold is unsupported in that it applies an incorrect comparison. That threshold is stated as "an increase of 100 percent in guarantee payments to a Market Party for a day." What is being compared are guarantee payments, not bids. To determine whether this threshold had been exceeded, NYISO thus correctly compared guarantee payments. The issue is how to define what an "increase" in guarantee payments means. NYISO applied this requirement by dividing the guarantee payment the generator actually received under its bid by the guarantee payments that the generator would have received if the generator had bid at its reference level. In each case, NYISO found that the ratio thus calculated exceeded 100 percent. The purpose of this threshold, within the context of section 3.2.3, is to measure a significant change over a competitive bid as defined by a generator's reference level. We conclude that NYISO's interpretation of the basic methodology underlying the impact test under section 3.2.3 is correct.

88. Further, we reject the Specified Generators' claim that comparing guarantee payments in order to apply the section 3.2.3 impact threshold is unreasonable because it is conducted after-the-fact. Section 3.2.3 requires a comparison of guarantee payments. Necessarily, such a comparison only can be made after-the-fact, because guarantee payments depend, in part, on the actual LBMPs and associated energy revenues that are received during the operating day. In addition, for the same reason, we reject Saranac's claim that longstanding Commission precedent supports requiring that Generators have complete information on exactly what actions may trigger default bids.⁸³ In the order cited by Saranac, the Commission rejected NYISO's argument that conduct and impact thresholds should be confidential, stating that "due process requires that generators subject to ISO mitigation have complete information on exactly what actions may trigger default bids or financial obligations."⁸⁴ However, in describing NYISO's proposal, the Commission noted that "the exercise of market power may warrant mitigation even if the defined thresholds are not triggered,"⁸⁵ and pointed to the predecessor to section 3.2.3.

⁸³ *Citing New York Indep. Sys. Operator Inc.*, 90 FERC ¶ 61,317, at 62,053 (2000).

⁸⁴ *Id.* at 62,055.

⁸⁵ *Id.* at 62,053.

Guarantee payments are uplift payments made to a generator if its energy revenues do not cover its bid-in costs. By definition, these payments can only be calculated after the market clearing prices (LBMPs) are determined; therefore, any generator, including the Specified Generators, will not know the specific magnitude of the guarantee payment it will later receive. The Commission accepted these thresholds currently employed by NYISO in the order cited by Saranac and anything beyond the application of these existing provisions is beyond the scope of this proceeding.⁸⁶

89. Accordingly, we reject the arguments of the Specified Generators and find that on the occasions identified by NYISO they engaged in conduct that departed significantly from that which would be expected under competitive conditions and that such conduct resulted in an increase of over 100 percent in their guarantee payments. Therefore, mitigation is required by section 3.2.3.

3. NYISO's Mitigation Proposal

90. Having found that NYISO appropriately identified conduct breaching the section 3.2.3 conduct threshold and then demonstrated that the conduct had an impact at or above the threshold, as defined above, section 3.2.3 requires NYISO to make a section 205 filing seeking Commission authorization to apply "an appropriate mitigation measure" to the identified conduct. The Commission, thus, reviews the mitigation proposal under the statute's "just and reasonable" standard. In its September 4, 2009 filing, NYISO proposes to apply special mitigation rules as set forth in proposed Rate Schedule M-1 to its Service Tariff to the Specified Generators prospectively effective September 8, 2009. NYISO states that proposed Rate Schedule M-1 will apply only to the Specified Generators and only when the particular generator is the only alternative available to NYISO to solve a particular reliability constraint. NYISO states that mitigation under proposed Rate Schedule M-1 would be triggered by bidding conduct that exceeds the applicable reference level by specified amounts. Specifically, under proposed Rate Schedule M-1, subsection 4, mitigation of the applicable Specified Generator would be triggered if, having been committed for reliability purposes as the only supplier designated to solve the reliability need, the generator's accepted bid or bid components:

- (a) exceeded the minimum generation bid reference level by the greater of 10 percent or \$10/MWh; or

⁸⁶ We note that, under section 3.1.2, the Specified Generators know in advance that any bid substantially in excess of their marginal cost, i.e., reference level, could trigger mitigation, while bidding at marginal cost would ensure that they would not be mitigated. Likewise, we believe that Specified Generators should have had the same knowledge and expectation when considering the possibility of mitigation under section 3.2.3.

- (b) exceeded the incremental energy bid by the greater of 10 percent or \$10/MWh; or
- (c) exceeded the start-up bid reference level by 10 percent; or
- (d) exceeded the minimum run time reference level by more than 1 hour; or
- (e) exceeded the minimum generation megawatt reference level by more than 10 percent.⁸⁷

91. NYISO states that if one of these thresholds is exceeded, it will substitute a default bid at the generator's reference level for the submitted offer when determining the generator's guarantee payment. NYISO adds that proposed Schedule M-1 also provides that NYISO will notify the generator if NYISO determines mitigation is required and the generator will have an opportunity to challenge the Market Monitoring Department's determination.⁸⁸

92. NYISO's proposed Rate Schedule M-1 reflects the principle, described in greater detail above, that a generator lacking market power would submit bids into the NYISO spot market that reflect its marginal costs. As we discussed earlier, this is because a generator that lacks market power would not necessarily increase the market price through its bidding behavior, and bidding significantly above its marginal cost could well risk pricing the generator out of the market.

93. We also agree with NYISO that the mitigation measure should apply when the particular Specified Generator is the only alternative available to solve a particular reliability constraint because that is when the Specified Generators have market power. We agree with NYISO that its proposed tighter mitigation thresholds are reasonable for ensuring competitive bidding even when market conditions are not competitive. NYISO's proposed conduct thresholds allow bids to exceed reference levels by a modest amount—the greater of 10 percent or \$10/MWh. NYISO states that, consistent with NYISO's section 3.1.1 through 3.1.3 mitigation thresholds, a modest margin above marginal cost is reasonable to reflect the uncertainties associated with estimating a unit's actual marginal cost and is intended to avoid excessive mitigation. It states that these uncertainties may include, for example, variations in fuel costs. The tariff does not require NYISO to tolerate the exercise of market power when it concludes that existing thresholds are not adequate.

⁸⁷ Proposed Rate Schedule Market Mitigation No. 1, Original Sheet No. 3.

⁸⁸ Proposed Rate Schedule Market Mitigation No. 1, Original Sheet No. 4.

94. Specified Generators argue that NYISO has provided no support for its proposed margins. However, we find that they are reasonable and consistent with levels that we have accepted for other organized markets,⁸⁹ and they are higher than those that apply to generators located in the New York City constrained area. Rate Schedule M-1 provides bright-line values for bid parameters that trigger mitigation, such as for energy bids, start-up offers, minimum generation, and minimum run time. Therefore, generators committed for reliability know that guarantee payments will be based on reference levels if bids or bid components exceed the specified amounts. As such, the proposed tariff revisions fully satisfy our requirement that a generator know what conditions will trigger mitigation.

95. NYISO has identified the conduct which constitutes an exercise of market power, and the effect of that conduct on guarantee payments, and NYISO is, therefore, required by its tariff to file to mitigate that conduct. Accordingly, we accept NYISO's filing as just and reasonable insofar as it mitigates the Specified Generators' bids at such times that they are the only supplier that is able to solve a reliability need and the unit is called upon for that reliability need. At such times, NYISO will substitute a reference level for each bid if the bid exceeds the specified thresholds. If other revenue sources do not provide adequate revenues, we agree with NYISO's Independent Market Advisor that establishing offer caps significantly above marginal costs for mitigation purposes would be a poor policy. First, there is no one set of thresholds that would be appropriate for all suppliers, since fixed costs vary among generators. In addition, forcing suppliers to recover their fixed costs by raising their bids above marginal cost creates risk for the suppliers. Because of the uncertainty of market conditions, such bids may be above market clearing levels, and thus, the supplier may not be dispatched. Moreover, NYISO will be able to dispatch to meet load at the least cost if the bids of suppliers reflect their marginal costs; when some suppliers bid above their marginal costs, the generators that are dispatched (i.e., those with the lowest bids) may not be those with the lowest costs. Thus, we conclude that market rules should promote marginal cost bidding.

96. NYISO states that it will only apply Rate Schedule M-1 to the three Specified Generators and that, in order for NYISO to apply these measures to other generators,

⁸⁹ For example, under the mitigation rules in PJM, the offer cap is 10 percent above incremental costs. PJM Interconnection, LLC, FERC Electric Tariff, Sixth Revised Volume No. 1, Third Revised Sheet No. 402A. In addition, the Commission recently accepted a proposal by ISO New England to establish a threshold of 10 percent above the reference level for mitigation of guarantee payments (referred to in New England as "Net Commitment Period Compensation") paid to resources committed to meet local reliability needs. *See ISO New England Inc. and New England Power Pool*, 129 FERC ¶ 61,008 (2009).

NYISO would have to submit a separate filing to the Commission justifying the application of proposed Rate Schedule M-1 to each generator.⁹⁰ We note that Rate Schedule M-1 does not specify to whom it will apply except that, as written, subsection 1 on Original Sheet No. 2 states that it will apply to bids or bid components for generators that the Commission has authorized. As proposed in the instant filing, NYISO states that it intends that Rate Schedule M-1 will apply only to Saranac, Sterling, and Seneca. We find that the application of NYISO's mitigation proposal, as modified below, only to the three Specified Generators effective as of September 8, 2009, is appropriate and fully consistent with section 3.2.3. Accordingly, we direct NYISO to indicate within Rate Schedule M-1 that it applies only to Saranac, Sterling, and Seneca.

97. Subsection 1 of proposed Rate Schedule M-1 requires Commission authorization for NYISO to apply the rate schedule mitigation provisions. However, it is not clear whether NYISO intends this mitigation provision to apply with or without it first having to seek Commission approval to apply the mitigation provision of Rate Schedule M-1 for each instance in which Saranac, Sterling, or Seneca has met its conduct threshold of Rate Schedule M-1. We find that it is appropriate to apply the mitigation provisions of proposed Rate Schedule M-1 without NYISO first having to file for authorization to apply its provisions. In the instant filing, NYISO demonstrated the need for mitigation in the narrow circumstances when a generator is the sole solution to a reliability need and is committed and dispatched out-of-merit. We do not see the need for Commission authorization for each individual application of the proposed mitigation provisions as this would cause an unnecessary delay in the implementation of mitigation. Further, it is not consistent with the other mitigation measures contained in section 3.1 of Attachment H, in that a mitigation measure is imposed by NYISO when specified conditions are met without requiring Commission authorization. Likewise, in the case of the proposed mitigation of generators needed for reliability, NYISO should be able to mitigate the bids to the reference level when the specified conduct provisions are met without first obtaining specific Commission authorization. Accordingly, we direct NYISO to remove subsection 1 from Original Sheet No. 2 of proposed Rate Schedule M-1.⁹¹

98. Rate Schedule M-1 does not provide for a time limit on the mitigation and we agree that mitigation to reference levels should not be limited to any fixed period for applicable generators.⁹² This is reasonable as such mitigation provisions should

⁹⁰ NYISO September 4, 2009 Filing at n.9.

⁹¹ We assume NYISO did not intend section 1 of Rate Schedule M-1 to require an Attachment H section 3.2.3 filing.

⁹² The Commission granted waiver, to the extent necessary, of section 4.7 of Attachment H, which provides an expiration of mitigation measures, from applying to the three Specified Generators in its March 8, 2010 Order.

automatically apply whenever any generator (other than in-City) is committed for reliability and dispatched out-of-merit.⁹³

99. Finally, to avoid confusion by market participants, we believe it is important to maintain market mitigation measures and criteria in one place within the Services Tariff, i.e., in Attachment H. Therefore, we direct NYISO to remove its designation as Rate Schedule Market Mitigation No. 1 and place its provisions in Attachment H, modified as discussed above.⁹⁴

100. NYISO is directed to file these revisions with the Commission within 30 days from the date of this order.

101. We understand that simultaneously with the instant filing, NYISO submitted a proposal for review under its stakeholder process to apply Rate Schedule M-1 to all market participants outside of New York City that meet the conduct test of Rate Schedule M-1. We are concerned with the absence of a generally-applicable mitigation measure to address the exercise of market power in those instances where a generator is the only solution to a reliability need. Further, having demonstrated in this proceeding that bidding above marginal cost, particularly in such circumstances, is not what would be expected in a competitive market, we believe that it may be appropriate for NYISO to be authorized to immediately mitigate such conduct rather than having to not only investigate whether the conduct and impact thresholds of section 3.2.3 have been met on a case-by-case basis for specified individual generators but then delay mitigation by having to file a mitigation proposal under section 205.

102. We understand that NYISO and its stakeholders are working towards developing a generally applicable mitigation measure and we encourage these efforts. If NYISO is unable to file such a proposal for Commission review within 90 days of the date of this order, we direct NYISO to file a progress report on these efforts with the Commission within 90 days of the date of this order for informational purposes only. As such, we will not issue public notice of the report, accept comments on it, or issue an order on it.

4. Other Issues

103. We deny the requests for the Commission to conduct an investigation under section 1c.2 of the Commission's regulations.⁹⁵ First, we have found above that NYISO

⁹³ See *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170 (2010)

⁹⁴ This will also facilitate NYISO's use of other related Attachment H provisions such as the consultation timelines. See NYISO October 13, 2009 Answer at 27.

⁹⁵ 18 C.F.R. § 1c.2 (2009).

appropriately identified a situation during which the Specified Generators engaged in “conduct that departs significantly from the conduct that would be expected under competitive market conditions” and properly filed, in accordance with section 3.2.3 of Attachment H, Rate Schedule M-1 to mitigate such conduct, which should eliminate the opportunity for this conduct to occur in the future. We also find that, under the facts and circumstances shown, an investigation under section 1c.2 is not warranted and that the application of mitigation as proposed is sufficient. We also reject the requests to order retroactive adjustment of the guarantee payments the Specified Generators received for the August 2009 period because section 3.2.3 provides for a section 205 filing and NYISO requests only prospectively-effective tariff changes.⁹⁶ Further, as noted previously, the generators complied with the tariff, followed NYISO instructions to support reliability, and were properly compensated according to the tariff provisions in effect at that time.

104. We also reject the arguments raised by Seneca and Sterling in their supplemental protest. No issues with respect to NYISO’s Code of Conduct have any relevance to the implementation of mitigation pursuant to Attachment H of the Services Tariff.

IV. Compliance Filings

A. Background and Procedural Matters

105. On December 3, 2009, NYISO, Saranac, and Seneca and Sterling submitted filings in compliance with the November 3, 2009 Order. On January 20, 2010, NYISO, Saranac, and Seneca and Sterling submitted filings in compliance with the January 15, 2010 Order.

106. Notice of the December 3, 2009 compliance filings was published in the *Federal Register*, 74 Fed. Reg. 68,261 (2009) with comments, interventions, and protests due on or before December 28, 2009. None was filed.

107. Notice of the January 20, 2010 compliance filings was published in the *Federal Register*, 75 Fed. Reg. 5,075 (2010) with comments, interventions, and protests due on or before January 29, 2010. On January 29, 2010, the NYTOs filed a protest. The NYTOs protest Saranac’s assertion in its compliance filing that NYISO cannot simply ignore

⁹⁶ See, e.g., *Portland General Electric Co.*, 98 FERC ¶ 61,050 at 61,133 (2002) (absent agreement of the filing utility, the Commission will not order an effective date earlier than the filing utility’s requested effective date). Cf. *New York Indep. Operator Sys., Inc.*, 90 FERC ¶ 61,317 at 62,055 (2000) (“We require that [NYISO] file a further revised mitigation plan to clarify that mitigation for market power is prospective only. We do not intend for mitigation to entail any retroactive recalculation of market-clearing prices.”).

fixed costs in determining the category of costs that are properly recoverable within the thresholds over a facility's reference level. The NYTOs also protest Saranac's request that the Commission direct NYISO to combine the instant mitigation proposal with implementation of a reliability-must-run type mechanism to ensure that when a supplier located outside New York City is the sole unit that can meet an identified reliability need, it can recover its costs. The NYTOs contend that this request is outside the scope of this proceeding, completely unsupported, and that Saranac seeks to bypass the NYISO stakeholder process.

B. Commission Determination

108. We accept the compliance filings. Saranac and Seneca and Sterling have provided the information required in the November 3, 2009 Order and the January 15, 2010 Order. Likewise NYISO has made public the required information. While the issues raised by the NYTOs in their January 29, 2010 protest should have been raised in response to earlier filings, the Commission addresses them in this order as they were already issues in this proceeding.

The Commission orders:

(A) Rate Schedule M-1, as modified, is hereby accepted effective on September 8, 2009, with respect to the three Specified Generators.

(B) 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.

(C) NYISO is hereby directed to submit a report on its progress in the development of a generally applicable market mitigation measure, within 90 days of the date of this order, if such a mitigation proposal has not been filed with the Commission by that date, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.