

139 FERC ¶ 61,244
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Astoria Generating Company L.P.; NRG Power Marketing LLC; Arthur Kill Power, LLC; Astoria Gas Turbine Power LLC; Dunkirk Power LLC; Huntley Power LLC; Oswego Harbor Power LLC and TC Ravenswood, LLC

Docket No. EL11-42-000

v.

New York Independent System Operator, Inc.

ORDER ON COMPLAINT

(Issued June 22, 2012)

1. On June 3, 2011, as amended on June 15, 2011, Astoria Generating Company, L.P., (Astoria) NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, Oswego Harbor Power LLC (NRG Companies) and TC Ravenswood (Ravenswood) (collectively, Complainants)¹ filed a complaint (June 3, 2011 Complaint) against the New York

¹ Complainants describe themselves as market-based rate sellers of energy, capacity, and ancillary services in New York City or traders of these commodities. Astoria owns three existing facilities: (1) the 1,273 MW Astoria Generating Facility in Astoria Queens, New York, (2) the 556 MW Gowanus Generating Station in Brooklyn, New York, and (3) the 291 MW Narrows Gas Turbine Station in Brooklyn, New York. In addition, US Power Generating, a corporate parent of Astoria, is developing the 100 MW South Pier Improvement Project (SPIP) at the Gowanus Station site. The NYISO has included the SPIP in the Class Year 2010. The five NRG Companies are wholly-owned generator subsidiaries of NRG Energy, Inc. (NRG) that represent over 4,000 MWs in the New York City or in-City market. NRG is developing the Berrians GT III project, a 789 MW combined-cycle facility located at the site of Astoria Gas Turbine's existing generation facilities in Queens, New York; this project is also in

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Independent System Operator, Inc. (NYISO) alleging that NYISO improperly implements its buyer-side market power mitigation provisions² in the New York City (NYC) installed capacity (ICAP) market as set forth in its Market Administration and Control Area Services Tariff (Services Tariff). Complainants are requesting relief that includes tariff revisions and refunds. For the reasons discussed below, the Commission grants in part and denies in part the June 3, 2011 Complaint.

2. As discussed more fully below, the Complainants allege: (i) NYISO's implementation of buyer-side mitigation rules lacks transparency and objectivity, (ii) NYISO errs in the use of inflation in mitigation exemption testing and offer floor determinations, (iii) NYISO incorrectly projects future prices, (iv) NYISO does an inadequate review of bilateral, arms-length contracts, and (v) NYISO uses a method of natural gas pricing that is inconsistent with the natural gas pricing methodology used in determining the ICAP Demand Curve.

3. First, with the tariff changes required in this order, the additional disclosure of non-confidential information notifying the market that mitigation has occurred, and the provision of an example of its mitigation methodology, we find NYISO's implementation of the buyer-side mitigation rules to be sufficiently transparent and objective. Second, we find that any inflation adjustment should be consistently applied to all parts of the mitigation exemption test and offer floors. In addition, we find that the inflation adjustment should be consistent with that used in the determination of the ICAP Demand Curve. Third, we require NYISO to use values from the same demand curve that is effective at the time it makes an exemption determination in comparing Default net Cost of New Entry (CONE) with spot market auction prices. Fourth, we deny the Complaint that NYISO has not adequately reviewed bilateral, arms-length contracts in the determination of a project's Unit net CONE. Finally, we find that NYISO has justified the use of natural gas futures prices in the calculation of the net energy revenue offset used to determine the Unit net CONE and we do not find it necessary to require NYISO to explain this result further or quantify its impact on Unit net CONE. With respect to specific relief requested, we find the requested "benchmarking analysis" and stakeholder

NYISO's 2010 Class Year. NRG Power Marketing L.L.C. is a NRG-affiliated power marketer that participates in NYISO markets and engages in bilateral transactions in the New York Region. The Ravenswood Facility, a wholly-owned subsidiary of TransCanada, is an approximately 2,480 MW plant that serves approximately 21 percent of New York City's peak load.

² See *infra* PP 7-9 for information explaining the ICAP demand curve, buyer-side mitigation rules, mitigation exemption testing, and offer floor determinations.

process to be unnecessary at this time. We direct Potomac Economics, Ltd., NYISO's external Market Monitoring Unit (MMU), to prepare a public report discussing its assessment of NYISO's buyer-side mitigation determinations.

I. Background

A. Divestiture and Market Power Mitigation

4. In 1998, Consolidated Edison Company of New York, Inc. (Consolidated Edison) divested most of its generators in three bundles³ creating a high degree of market concentration for generation in NYC. To mitigate the market power of the owners of this divested generation, the Commission accepted a Consolidated Edison proposal for a \$105/kW-year offer and revenue cap on sales of ICAP from these units.⁴ In early 2006, approximately 1000 MW of new capacity entered the NYC market, but this did little to change the spot market price.

5. Following both the rejection by the Commission of a NYISO proposal to reduce the Divested Generation Owners' mitigation reference price and unsuccessful attempts at settlement, the Commission directed NYISO to submit a proposal revising the NYC ICAP market in July 2007.⁵ Later that same year, NYISO proposed revising the NYC market rules by refining mitigation measures in order to prevent the exercise of market power by both capacity suppliers and net capacity buyers; the existing ICAP market structure would be maintained. In addition to proposals to mitigate economic and physical withholding, NYISO proposed a bid floor of 75 percent of the net CONE in order to prevent uneconomic entry. On March 7, 2008, the Commission conditionally

³ The three companies that purchased ConEd's units were KeySpan-Ravenswood, LLC (this unit was subsequently sold to TransCanada), the NRG Companies (excluding NRG Power Marketing), and Astoria (collectively, the Divested Generation Owners).

⁴ *Consol. Edison Co. of N.Y., Inc.*, 84 FERC ¶ 61,287 (1998) (1998 Divestiture Order).

⁵ *New York Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,024 (2007) (July 6, 2007 Order). The Commission also set for investigation by the Commission's Office of Enforcement the issue of whether any entity had engaged in manipulation of the in-City ICAP market. The Commission noted in its March 7, 2008 order that the results of the separate investigation were placed in the record in that proceeding. The investigation found no manipulation, and the Commission stated that it would take no further action on the parties' allegations of market manipulation. *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 149 (2008) (March 7, 2008 Order).

approved NYISO's mitigation proposal subject to compliance, including the buyer offer floor, but modified certain calculations for the period of mitigation.⁶

6. On September 27, 2010, NYISO proposed revisions to its buyer-side mitigation rules for the duration of offer floors and the exemption process for offer floors. In the November 26, 2010 Order,⁷ the Commission accepted, in part, and rejected, in part, NYISO's proposed revisions to the mitigation exemption test, subject to additional support for an aspect of the offer floor exemption process. The instant complaint seeks Commission intervention to prevent price suppression, alleging NYISO's implementation of buyer-side mitigation rules could allow uneconomic entry in the NYC capacity market.

B. The ICAP Market and Buyer-Side Mitigation Rules for New York City

7. NYISO administers New York's ICAP market which utilizes NYISO-determined annual demand curves to set prices for each of three zones: the New York Control Area (Rest of State), New York City (NYC) and Long Island. Of relevance here, one of the key parameters NYISO uses to design the demand curves is the cost of a new peaking unit net of likely projected energy and ancillary services revenues (Net CONE).⁸ Within the NYC ICAP market, NYISO administers market power mitigation rules pursuant to section 23 of its Services Tariff (also referred to as Attachment H). One of the purposes of the mitigation rules is to guard against the exercise of market power by those who buy capacity and who thus benefit from a low price. This is commonly referred to as "buyer-side mitigation," and refers to a set of rules for the NYC or in-City ICAP Market. Unless exempt from this mitigation, in-City ICAP suppliers that enter the capacity market must do so at a price no lower than the applicable offer floor.⁹ As initially approved, the offer floor¹⁰ of section 23.4.5.7 is defined as the lower of: (1) 75 percent of the net cost of new entry of the peaking unit in NYC that is used to establish the NYC ICAP Demand Curve,

⁶ March 7, 2008 Order, 122 FERC ¶ 61,211 at Ordering Paragraphs (A) and (B).

⁷ *New York Indep. Sys. Operator*, 133 FERC ¶ 61,178 (2010) (November 26, 2010 Order), *order on compliance*, 134 FERC ¶ 61,083 (2011), *reh'g denied*, 136 FERC ¶ 61,077 (2011).

⁸ Services Tariff, § 23.2.1 (Definitions).

⁹ Services Tariff, § 23.4.5.7.

¹⁰ Services Tariff, § 23.2.1.

which we refer to here as Default net CONE¹¹ or (2) the new entrant's actual net cost of new entry for the specific unit, which we refer to here as the Unit net CONE.¹² We refer here to the first offer floor as the Default Offer Floor, and to the second as the Unit Offer Floor.

8. NYISO determines whether a supplier is exempt from offer floor mitigation pursuant to the process provided in the tariff.¹³ Under revised mitigation provisions NYISO filed on September 27, 2010, which were accepted in part and rejected in part in an order issued November 26, 2010,¹⁴ the exemption test is aligned with the cost allocation process;¹⁵ the exemption test assumes that the new unit enters the market three

¹¹ *Id.* This section provides that what we refer to here as the Default Offer Floor is 75 percent of "Mitigation Net CONE," a new term NYISO proposed in a proceeding that initially established the buyer-side mitigation rules of Attachment H (*See* August 24, 2010 compliance filing in Docket No. ER10-2371-000). NYISO proposed to define that term as "the capacity price on the currently effective In-City Demand Curve corresponding to the average amount of excess capacity above the In-City Installed Capacity requirement, expressed as a percentage of that requirement, that formed the basis for the Demand Curve approved by the Commission." Stated another way, what NYISO refers to as "Mitigation Net CONE" is the price equal to what the Commission defined as the "net CONE" used to design the NYC demand curves. *See New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 31 (2010) (May 20, 2010 Order). NYISO's proposed "Mitigation Net Cone" definition was incorrectly included in a compliance tariff record filing in another proceeding (Docket No. ER10-3043) and was inadvertently accepted for filing purposes by delegated letter order in that docket. The proposal still is pending Commission review in Docket No. ER10-2371-000. For clarity purposes in this order, we will use the term "Default net CONE."

¹² Services Tariff, § 23.4.5.7.3.6.

¹³ Services Tariff, § 23.4.5.7.2.

¹⁴ November 26, 2010 Order, 133 FERC ¶ 61,178 (2010).

¹⁵ In NYISO, costs for interconnection are studied and allocated according to NYISO Open Access Transmission Tariff (OATT) Attachment S. Under Attachment S, the generator petitions to enter a given Class Year by March 1. Thereupon, NYISO commences to evaluate the project along with all others in that Class Year to determine any necessary generator interconnection costs. A generator seeking Capacity Resource Interconnection Service (CRIS) rights has 30 days to decide whether to accept its interconnection cost allocation (Initial Decision Period) and, if it does, receives authority

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years later. This is referred to here as the mitigation exemption test and reads, in pertinent part, as follows:

An Installed Capacity Supplier shall be exempt from an Offer Floor if: (a) the price that is equal to the (x) average of the ICAP spot market auction price for each month in the two Capability Periods, beginning with the Summer Capability Period commencing three years from the start of the year of the Class Year (the “Starting Capability Period”) is projected by the ISO to be higher, with the inclusion of the Installed Capacity Supplier, than (y) the highest Offer Floor based on the Mitigation Net CONE that would be applicable to such supplier in the same two (2) Capability Periods (utilized to compute (x)), or (b) the price that is equal to the average of the ICAP spot market auction prices in the six Capability Periods beginning with the Starting Capability Period is projected by the ISO to be higher, with the inclusion of the Installed Capacity Supplier, than the reasonably anticipated Unit Net CONE of the Installed Capacity Supplier.

9. Thus, similar to the offer floor, there is a Default exemption prong in (a) and a Unit exemption prong in (b). If the generator meets either of the two prongs by showing that either the projected Default net CONE or the Unit net CONE is less than the projected ICAP prices with the inclusion of the ICAP supplier’s capacity for the relevant periods, it is exempt from offer floor mitigation.

II. Summary of the Complaint

10. The Complainants are generators or power marketers that sell energy, capacity and ancillary services in NYISO markets. NYISO is the entity responsible for providing open-access transmission service, maintaining reliability, and administering non-discriminatory competitive wholesale markets for these services in New York State. In the instant proceeding, Complainants request Commission intervention to prevent NYISO from what they assert is improper implementation of its NYC buyer-side mitigation rules. The improper implementation of these rules, Complainants contend, could artificially suppress prices and permit uneconomic entry into the NYC capacity market, a zone within the NYISO capacity market.

to sell its capacity in the capacity market, i.e., it receives CRIS authority. That “Initial” cost allocation may change depending on whether other developers reject their allocation and choose to drop out of that Class Year.

11. Complainants assert that NYISO is violating the requirements of its Services Tariff and prior Commission orders in its implementation of the buyer-side market power rules. Complainants contend that NYISO's implementation is inexcusably opaque and NYISO must implement buyer-side market rules in a transparent and consistent manner that comports with market participant's reasonable expectations.¹⁶ In addition, Complainants assert that they have identified errors associated with (1) the calculation of Unit net CONE; (2) the projection of future ICAP prices; (3) the calculation of Default net CONE; and (4) NYISO's failure to review wholesale power and capacity contracts for purposes of calculating Unit net CONE. Complainants further assert that these errors will taint both the mitigation exemption test determinations and the offer floor calculations. They add that there are a number of other elements of NYISO's approach where NYISO has provided so little information that it is simply not possible to ascertain how NYISO will apply these provisions of the Services Tariff.

12. Complainants state that NYISO intends to make its mitigation exemption test determinations and offer floor calculations following Operating Committee review and approval of the Class Year 2009 and 2010 cost allocation studies, possibly as early as July 10, 2011, if all projects in the class years accept their project cost allocation in the initial decision period stage and there is no appeal of the Operating Committee action. Complainants state that if NYISO is permitted to proceed in this fashion, it will undercut the efficacy of the buyer-side mitigation rules and allow for artificial suppression of capacity prices in the NYC capacity zone. Complainants request urgent Commission action, including holding NYISO's cost allocation process for projects in class years 2009 and 2010 and exemption and mitigation determinations in abeyance in order to prevent damage to the market. Complainants state that if such exemption determinations are allowed to potentially become final, parties will argue that they cannot be disturbed and the NYC capacity market could potentially see an influx of unmitigated, and under-mitigated, uneconomic entry for several years.

13. Complainants submit the affidavits of Craig Hart (Hart affidavit), Mark D. Younger (Younger affidavit), and the affidavit of William H. Hieronymus (Hieronymus affidavit) in support of the Complaint.

III. Notice of Filing and Responsive Pleadings

14. Notice of the June 3, 2011 Complaint was published in the *Federal Register*, 76 Fed. Reg. 34,692 (2011), with interventions and protests due on or before June 23, 2011. An amendment to the June 3, 2011 Complaint was filed on June 15, 2011. Notice of the

¹⁶ June 3, 2011 Complaint at 22 (citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 190 (2009)).

amendment to the Complaint was issued on June 17, 2011, providing for a comment date of July 5, 2011, for that filing. Notice was published in the *Federal Register*, 76 Fed. Reg. 36,914 (2011) changing the comment date applicable to both the Complaint and the amendment to the Complaint to June 30, 2011.

15. Brookfield Energy Marketing LP; New York Association of Public Power;¹⁷ Calpine Corporation; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (Constellation); American Public Power Association;¹⁸ Dynegy Power Marketing Inc., Dynegy Northeast Generation, Inc. and Sithe/Independence Power Partners, L.P.; GenOn Energy and GenOn Bowline, LLC; Entergy Nuclear Power Marketing, LLC; Consolidated Edison Solutions, Inc.; Hudson Transmission Partners (Hudson); PSEG Energy Resources & Trade LLC and PSEG Power New York LLC; Astoria Energy LLC and Astoria Energy II LLC; Central Hudson Gas & Electric Corporation, New York State Electric & Gas Corporation; and the MMU filed motions to intervene.

16. On July 6, 2011, Hudson filed a motion to file out of time and comments. On July 29, 2011, Hudson filed a motion to withdraw its comments. On August 18, 2011, Complainants filed an answer in opposition to the withdrawal of Hudson's comments. The New York State Public Service Commission (New York Commission) filed a notice of intervention and comments. Electric Power Supply Association (EPSA) and Independent Power Producers of New York (IPPNY) filed motions to intervene and comments in support of the Complaint. Energy Curtailment Specialists filed a motion to intervene out of time and comments in support of the Complaint.

17. Bayonne Energy Center, LLC filed a motion to intervene and conditional protest. Consolidated Edison, Orange and Rockland Utilities, Inc., Long Island Power Authority, the New York Power Authority, the City of New York, and the New York Association of Public Power (collectively Downstate Load Serving Entities or Downstate LSEs) filed motions to intervene and collectively filed a protest.

18. On July 6, 2011, as corrected on July 7, 2011, NYISO submitted an answer to the Complaint. On July 21, 2011, the MMU submitted an answer to the Complaint and on

¹⁷ The New York Association of Public Power is an unincorporated association of nine municipal electric utilities and four rural electric cooperatives located throughout New York State, serving approximately 500 MW of load.

¹⁸ The American Public Power Association is the national service organization representing the interests of the approximately 2,000 not-for-profit, publicly-owned electric utilities throughout the United States.

August 16, 2011, Complainants submitted an answer to NYISO's answer. On July 22, 2011, NYISO filed an answer out-of-time to the comments of IPPNY, EPSA, Hudson, and Energy Curtailment Specialists. On August 8, 2011, NYISO filed a supplemental answer.

NYISO's General Answer to the Complaint

19. NYISO asserts that Complainants have not met their burden of proof; they have failed to show that NYISO has violated, or will in the future violate, its tariff or Commission policy. NYISO states that it has satisfied the Commission's requirement that buyer-side mitigation rules be conducted pursuant to objective tariff-based criteria and in a transparent manner. NYISO argues that the Complaint offers nothing but speculation, mischaracterization, and inaccurate assertions to support its claim. NYISO states that the Hieronymus affidavit submitted by the Complainants does not demonstrate that the buyer-side mitigation rules are not just and reasonable; rather it consists of generalized criticisms of the NYC ICAP market, which is incorrectly described as being "systematically revenue inadequate as a result of exempting buyer-side sponsored units built before 2008 from mitigation."¹⁹ NYISO states that this is belied by the fact that there are five capacity projects that are proposed or that have begun construction in NYC, while retirements in the City have been rare. NYISO asserts that Hieronymus' claims of inadequate revenue are contradicted by Complainants' statement that two of them are seeking to invest in new in-City projects. NYISO also states the market manipulation precedent that Complainants cite is irrelevant because Complainants have not claimed that NYISO's administration of its tariff amounts to market manipulation.²⁰

¹⁹ NYISO July 7, 2011 Answer at 21 (citing Complaint, Hieronymus Aff. ¶ 5).

²⁰ *Id.* at 24 (citing Complaint at 19 and n.51). Complainants cite *Amaranth Advisors, L.L.C.*, 120 FERC ¶ 61,085 at P 51 (explaining that "whenever manipulation results in markets that function other than on the basics of supply and demand, harm to the market participants results"), *order on reh'g*, 121 FERC ¶ 61,224 (2007), *reh'g denied*, 124 FERC ¶ 61,050 (2008); *Amaranth*, 120 FERC ¶ 61,085 at P 123 (stating that "[c]onsumers are harmed when prices are set by manipulation," even if the "[h]arm from downward manipulation is more long term"); *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 at P 15 (explaining that "[w]hen producers receive less than the market price for their [product], price signals that would otherwise tend to stimulate production, and thereby benefit customers nationwide, are frustrated"), *order on reh'g*, 121 FERC ¶ 61,282 (2007).

20. NYISO also responds that Complainants are attempting a collateral attack on previous Commission orders that establish buyer-side mitigation rules²¹ and on the 2011 ICAP demand curve reset orders.²² NYISO asserts that Complainants raise the same issues they raised in protests and in their rehearing request regarding the tariff's rules for performing exemption and offer floor determinations.²³ NYISO also asserts that Complainants attack the Commission's acceptance of tariff provisions that specify the inputs NYISO is to use when performing mitigation exemption tests and offer floor analyses.

21. Further, NYISO argues the Complainants' request for abeyance is an attempt to delay two separate processes so that changes occur to a third, the demand curve, likely resulting in higher offer floors for new entrants. NYISO states that Complainants' request to hold the NYISO's Class Year Facilities Study process,²⁴ as well as the concurrent mitigation exemption tests and offer floor calculations, a separate process, in abeyance pending Commission action on the NYISO's implementation of the final demand curves is an attempt to use the instant proceeding as an additional forum to have NYISO adopt revised ICAP demand curves. NYISO explains that implementing revised ICAP demand curves would also increase the escalation factor that would be applied to the curves and, in turn, impact mitigation exemption test determinations and offer floor calculations. However, according to NYISO, Complainants' request for revisions to the currently effective demand curves was already rejected.

IV. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), timely, unopposed motions to intervene serve to make the

²¹ *Id.* at 25-26 (citing November 26, 2010 Order, 133 FERC ¶ 61,178 at PP 47-51; *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,083 (2011)).

²² *Id.* at 26-27 (citing *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,058 (January 28, 2011 Order), *order on reh'g*, 134 FERC ¶ 61,178 (March 9, 2011 Order), *order on reh'g*, 135 FERC ¶ 61,170 (2011) (May 19, 2011 Order)).

²³ *Id.* at 25-27 (citing Request for Clarification or, in the Alternative, Rehearing of the New York City Suppliers, Docket No. ER10-3043-004, filed March 4, 2011).

²⁴ November 26, 2010 Order, 133 FERC ¶ 61,178 at 71.

entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept all of the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

1. Withdrawal of Hudson's Comments

23. We deny the withdrawal of Hudson's July 6, 2011 Comments.²⁵ Hudson states that it requests withdrawal of its comments primarily because NYISO has communicated with it and agreed to provide Hudson the methodology, data, and calculations for Hudson's ongoing mitigation exemption test. Hudson also states it is concerned that its prior comments might be misinterpreted as more general support for the Complaint. Hudson states that NYISO filed an answer to several of the points it made in its July 6, 2011 comments. Hudson does not agree with several of the points in NYISO's answer but chooses not to respond to the substantive issues and chooses instead to withdraw its substantive comments in the present matter, pending the outcome of its discussions with NYISO. Hudson states, however, that this withdrawal does not foreclose future action on Hudson's part should NYISO not adequately share the methodology, data, or calculations being used in Hudson's mitigation exemption decision, or if Hudson disagrees with NYISO's approach.

24. In their August 15, 2011 answer, Complainants argue that there is good cause to deny Hudson's motion to withdraw its comments because those comments contain relevant information regarding what Complainants assert is NYISO's opaque and improper implementation of the buyer-side mitigation rules and Hudson has not claimed that any statement made therein is untrue or inaccurate. In addition, according to Complainants, both Complainants and NYISO have cited, quoted, and otherwise relied on Hudson's comments. Complainants argue that contested motions to withdraw have been denied where the withdrawing party has provided, or is uniquely positioned to provide relevant information related to the subject matter of the proceeding and/or where the prejudice to the opposing party would outweigh the harm of permitting withdrawal. Complainants argue that both of these circumstances are present in this proceeding. Complainants state that Hudson's comments provide crucial information, which Hudson is uniquely positioned to provide, that corroborates Complainants' claims that NYISO has (at least until recently) refused to provide the most basic information regarding the methodology, data and calculations it has used. Further, according to Complainants,

²⁵ Hudson July 29, 2011 Motion to Withdraw.

Hudson does not identify any benefits that would result from permitting withdrawal of its comments.

25. NYISO argues that Hudson sought leave to withdraw its comments in large part because it found that its desire for more information regarding its mitigation determination had been satisfied over the course of ongoing communications with NYISO. NYISO notes that Hudson makes it clear that its arguments in this proceeding were “in support of open access and more market competition, so that ratepayers would get the most reliable energy and capacity at more competitive prices” and not general support for Complainants’ claims.²⁶ NYISO also states that, as evidenced by the Hudson filing to withdraw its comments, challenges to the extent of NYISO’s communications with developers under the buyer-side mitigation rules are premature. These communications concerning projects under review are not complete.

26. Under Rule 216(b) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.216(b) (2011), the Commission has discretion to disallow a contested withdrawal of a pleading in whole or in part for a good cause.²⁷ As described above, we find that Hudson’s comments are relevant to the issue of transparency, parties have relied on those comments in their pleadings²⁸ and withdrawal of Hudson’s comments would prejudice Complainants because they use Hudson’s experience to support their argument that communications with NYISO about the mitigation exemption test processes are deficient. Thus, for these reasons we find good cause to disallow the withdrawal of Hudson’s comments.

2. Ripeness Issue

27. Downstate LSEs claim that the Complaint is not ripe and should therefore be dismissed. Downstate LSEs argue that Complainants’ case is speculative in that it relates

²⁶ NYISO August 8, 2011 Answer at 13 (*quoting* Hudson July 29, 2011 Filing at 3).

²⁷ *See, e.g., Columbia Gas Transmission Corp.*, 31 FERC ¶ 61,307, at 61,677 (1985).

²⁸ *See* Complainants July 21, 2011 Answer at 6; NYISO July 21, 2011 Answer at 2-9.

to potential future NYISO actions and thus, does not demonstrate that Complainants have a present controversy that has caused them harm.²⁹

28. Complainants respond that NYISO's lack of transparency and failure to provide the information requested are responsible for any "speculative" nature of its filing.

29. Complainants have raised issues about the manner in which NYISO, on an on-going basis, implements the offer floor mitigation provisions of its services tariff. Accordingly, we decline to dismiss the June 3, 2011 Complaint on the ground of ripeness and instead, we proceed to the merits.

B. Substantive Matters

30. In general, Complainants argue that NYISO in its implementation of the buyer-side mitigation rules is violating its tariff both in its calculation of specific factors used in the mitigation exemption test, which we address individually below, and in its lack of transparency. NYISO and Downstate LSEs argue that the Complaint should be dismissed in that Complainants fail to meet their burden of proof, and fail to demonstrate that they have been harmed by any NYISO action.

1. Transparency of NYISO's Implementation of Buyer-Side Mitigation Rules

a. Complaint

31. Complainants argue that NYISO must implement buyer-side mitigation rules in a transparent and consistent manner that comports with market participant's reasonable expectations.³⁰ Complainants contend that throughout the process NYISO has stated it will not inform market participants when mitigation rules have been applied. Complainants assert that NYISO makes adjustments to the model used in the demand curve reset process for the calculation of energy and ancillary services offsets while not providing a complete list of those adjustments. Thus, a developer cannot confirm that the model is adequate, being structured properly, or operating correctly. For greater

²⁹ Downstate LSEs July 6, 2011 Protest (citing, *inter alia*, *California Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,072, at P 11 (2009); *American National Power*, 98 FERC ¶ 61,154, at P 5 (2002); *American Transmission System v. PJM*, 129 FERC ¶ 61,249 (2009)).

³⁰ June 3, 2011 Complaint at 22 (citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 190 (2009)).

transparency, Complainants request that the Commission direct NYISO to file tariff language that details the review process for the mitigation exemption test, in particular, “where it deviates from what market participants would reasonable expect in light of the existing tariff.”³¹

b. Comments

32. On July 6, 2011, Hudson filed comments arguing NYISO’s mitigation exemption test process lacks transparency and that the cost amortization for a high-voltage transmission facility is completely different from a gas-fired peaking generating facility. Further, Hudson maintains that the cost structure and revenue models for its project do not comport with the fundamental assumptions that appear to be the basis for NYISO’s calculation of Unit net CONE. Hudson explains that this is because its transmission line can be used to provide energy and capacity in New York City, but it will bring that energy and capacity from existing generating facilities outside of New York City, in a lower cost area. Hudson seeks from NYISO the mitigation exemption test and Unit net CONE methodology used for its project, along with the data and calculations NYISO used for the Hudson project. Hudson argues that transparency of this information is essential to providing the proper market signals to new entrants and fair treatment for ratepayers. Hudson states that it does not endorse all of the positions taken in the Complaint, but is in full agreement that NYISO’s lack of transparency is such that all mitigation exemption testing should be held in abeyance pending resolution of outstanding issues because Unit net CONE is the “linchpin of the buyer-side market power rules.”

33. EPSA also supports Complainants’ assertion that NYISO’s implementation of its buyer-side mitigation rules is not transparent and it supports Complainants’ proposed remedy.³² EPSA notes that market participants have attempted for months to obtain specific information on how NYISO intends to implement the buyer-side mitigation rules. EPSA states that NYISO’s responses have been inexcusably opaque and market participants cannot be expected to make long-term financial commitments in a vacuum without a basic understanding how the rules will be applied.³³ EPSA, citing to the US Power Generating testimony in the Complaint,³⁴ recommends that the Commission

³¹ *Id.* at 25.

³² EPSA July 6, 2011 Comments at 7 (citing *ISO New England Inc.*, 135 FERC ¶ 61,029, at PP 156, 218, (2011)).

³³ *Id.* at 8.

³⁴ June 3, 2011 Complaint, Hart Aff. ¶ 14.

require NYISO to provide, in a timely manner, the assumptions, specific study parameters, and price forecasts used to evaluate project economics. According to EPSA this would allow existing generators to forecast future market conditions and/or a project developer planning to enter the market to assess whether its own project is structured properly.

34. IPPNY argues that NYISO's application of the new mitigation exemption determination rules highlights the lack of clarity in the tariff and is demonstrated by NYISO's refusal to provide market participants with adequate information about how the determinations are being made. Consequently, IPPNY requests the Commission direct NYISO to file tariff revisions to clarify how the mitigation exemption test will be performed and order NYISO to allow market participants sufficient access to the process.³⁵ IPPNY states that NYISO clearly granted an exemption under a veil of secrecy prior to the end of the class year process in which the Astoria Energy II Facility was a member. IPPNY avers that the July spot monthly ICAP auction price of \$5.76 per KW/month is far too low to realistically support the entry of the \$1.3 billion, 500 MW Astoria Energy II facility. IPPNY requests that the Commission conduct an investigation of NYISO's implementation of the mitigation exemption test to avoid further depressing capacity prices which could force economic generators out of the market.³⁶

35. The MMU states that it agrees with NYISO that transparency must be limited by requirements to hold participants' information confidential.³⁷ The MMU asserts that the NYISO tariff does not require additional information to be provided, and yet, transparency is important because it promotes confidence among participants in the markets allowing better investment and forward contracting decisions.³⁸ The MMU agrees with Complainants that, in order to improve transparency, NYISO should produce an analysis or example that illustrates how the buyer-side mitigation exemption test is performed and NYISO should publicly disclose the final determination of whether a resource is subject to, or exempt from, an offer floor.

36. The MMU disagrees with NYISO's competitive concerns with this disclosure and states that ultimately, participants can discern these results, but learning about the entry

³⁵ IPPNY July 6, 2011 Comments at 10.

³⁶ *Id.* at 11.

³⁷ MMU July 21, 2011 Answer at 2.

³⁸ *Id.* at 2.

of unmitigated supply only after the market has cleared can significantly affect the participant's ability to form accurate expectations regarding market outcomes. In addition, the MMU states that when the final exempt/non-exempt determinations are not public, suppliers that receive the determinations have a substantial advantage over other participants. The MMU argues that making the exemption determinations available to all participants as soon as possible would improve the performance of forward markets by providing more information to participants for the purpose of forward contracting.³⁹

c. NYISO's Answer

37. NYISO states that its tariffs: (1) describe the information it is required to disclose, (2) require it to protect confidential information, and (3) specify the timing of that disclosure.⁴⁰ NYISO disputes the allegation by the Complainants' regarding the role of market participants. NYISO states that the timing of the examination and issuance of determinations is explicit in the Services Tariff; it is in relation to the Class Year Facilities Study process and the Revised Cost Allocations pursuant to that process. NYISO maintains that it satisfied these requirements by posting a spreadsheet of the required information in November 2010,⁴¹ which was updated June 8, 2011,⁴² before the anticipated Initial Decision Period of 2009 and 2010 Class Years. NYISO asserts that it also provided narrative descriptions, in writing and orally at two May 2011 ICAP Working Group meetings.⁴³ NYISO adds that it could not answer certain questions until the Commission resolved issues concerning the application of the "Three Year Look Ahead Rule" of the mitigation exemption test and had to respect the nature of commercially sensitive material, but that it was committed to responding "in a timely manner."⁴⁴

38. NYISO argues maintaining confidentiality in aspects of the buyer-side mitigation rules is consistent with Commission precedent on confidential energy reference level

³⁹ *Id.* at 3.

⁴⁰ NYISO July 7, 2011 Answer at 30 (citing Services Tariff, § 23.4.5.7.3.2).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 31 (citing Boles Aff. ¶¶ 40-42).

⁴⁴ *Id.* at 34-35.

determinations that protects against market participant collusion. Further, NYISO asserts Commission precedent confirms that market power monitoring and mitigation processes should not provide a level of “complete transparency” that would disclose confidential information.⁴⁵ NYISO states that Commission precedent is clear that market power mitigation must strike “an appropriate balance between the need to protect consumers from the exercise of market power and the goal of avoiding over-mitigation that may keep capacity out of the market.”⁴⁶ NYISO also responds to EPSA’s argument that, in PJM’s capacity procurement minimum offer price mechanism (MOPR)⁴⁷ proceeding, the Commission directed PJM to make a filing to clarify what information market participants must submit before mitigation determinations are made and the objective standards under which such submissions will be evaluated. NYISO states that, in that proceeding, one of the Complainants’ corporate parents invoked the axiom that the antitrust laws are supposed to work for the benefit of competition, not competitors, suggesting that the same principle should apply to Commission-jurisdictional market power mitigation rules.⁴⁸ NYISO agrees with the principle, but is concerned it would be violated if Complainants are permitted to have a *de facto* role in the administration of the mitigation rules, or are allowed to make the rules more burdensome and unpredictable to their potential competitors.

⁴⁵ *Id.* at 32 (citing *New England Power Pool and ISO New England, Inc.*, 103 FERC ¶ 61,304, at P 48 (2003) (specifying that in the context of regular reporting on mitigation, instances of mitigation should be noted subject to the acceptable treatment to protect sensitive and confidential information)).

⁴⁶ *Id.* at 33 (citing *Midwest Independent Transmission System Operator, Inc.*, 123 FERC ¶ 61,297 at P 63, (2008)).

⁴⁷ *See* PJM OATT at Attachment DD, § 5.14(h).

⁴⁸ NYISO July 7, 2011 Answer at 65 (“Specifically, the NRG Companies’ corporate parent, NRG Energy, is a member of the ‘PJM Power Providers Group’ which has contended in the PJM MOPR proceeding that ‘the purpose of the law is the protection of competition, not competitors.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *see also* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14 (1984); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *NYMEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (a Sherman Act claim “must allege and prove harm, not just to a single competitor, but ... to competition itself”). *See* Request for Rehearing and Clarification, PJM Power Providers Group, Docket Nos. EL11-20 and ER11-2875 at 13 (May 13, 2011).

39. NYISO contends that Complainants have inappropriately attempted to twist the Commission's policy favoring transparency into a requirement that market participants play an active role in mitigation decisions involving potential customers. NYISO adds that if Complainants are empowered to "confirm the accuracy" of NYISO determinations under mitigation rules, there is a great risk that the balance between protecting consumers and avoiding over-mitigation⁴⁹ will be disrupted resulting in unreasonable barriers to entry. NYISO further asserts that if an ICAP supplier knew, or could derive, the costs or offer floor of its competitors, it could modify its offer behavior in a way that would raise prices above competitive levels. Also, according to NYISO, confidential treatment of this information is consistent with NYISO's approach to treat as confidential going-forward costs, which comprise data similar to those used to determine a project's Unit net CONE.⁵⁰ Similarly, NYISO explains that it has kept confidential information at the request of incumbent generators regarding withholding behaviors and data from which confidential information could be derived in its annual capacity withholding report.⁵¹

40. NYISO asserts that the information submission requirements in the buyer-side mitigation rules have already been found to include objective standards and to be sufficiently clear.⁵² NYISO maintains that the mitigation rules accepted in the November 26, 2010 Order add considerably more transparency and objectivity than the NYISO tariff rules previously in place. NYISO asserts that during the extensive vetting of the current tariff provisions, stakeholders discussed objectivity and transparency and substantially improved the then-existing tariff in this regard.⁵³ NYISO asserts that Complainants were actively involved in the stakeholder process vetting the proposed tariff revisions and could have, but did not, request rejection or modification of the proposed rules to increase transparency or objectivity after the issuance of the November 26, 2010 Order.

⁴⁹ NYISO July 7, 2011 Answer at 33 (citing *Midwest Independent Transmission System Operator, Inc.*, 123 FERC ¶ 61,297, at P 63 (2008)).

⁵⁰ *Id.* at 31 (citing Services Tariff, section 23.4.5.2).

⁵¹ *Id.* at 32.

⁵² NYISO July 22, 2011 Answer at 13 (citing November 26, 2010 Order, 133 FERC ¶ 61,178, at P 74 (2010)).

⁵³ NYISO July 7, 2011 Answer at 34.

41. NYISO asserts that the mitigation tariff provisions do not require it to inform stakeholders of exemption and offer floor determinations made for other entities. However, NYISO states that it would have no objection to the MMU's proposal if the Commission required NYISO to disclose the identity of the project and the final exempt/non-exempt determination.

42. NYISO asserts that it does not appear that IPPNY is actually requesting an investigation under section 1b.8 of the Commission's regulations, but rather that the instant Complaint be granted. NYISO maintains that IPPNY has not satisfied the Commission's requirements for initiating an investigation given that the request lacks merit.⁵⁴

d. Complainants' Answer

43. Complainants contend that NYISO's defense of its failure to administer the rules with transparency and objectivity should not be a defense against improper administration of those rules.⁵⁵ Complainants assert that NYISO's attempts to rebut the Hart testimony fail because the experience of several developers has been characterized by the same lack of communication and transparency.⁵⁶

Commission Determination

44. We find some merit in Complainants' allegation that NYISO's implementation of the buyer-side mitigation rules lacks transparency. Although the buyer-side mitigation rules, including the mitigation exemption determination tests and offer floors, establish a framework for the process NYISO uses, in this order, we provide additional clarity to the implementation of those rules. However, we are not requiring that NYISO put all these details in its tariff because, as we have previously found, not all of the details of a methodology must be delineated in a tariff.⁵⁷ We direct NYISO in its future implementation of the buyer-side mitigation rules to follow the directives set forth in this order, make the tariff changes directed below, and to post examples on its website that reflect these rulings. In addition, we conclude that prompt disclosure of final exemption

⁵⁴ NYISO July 22, 2011 Answer at 15.

⁵⁵ Complainants July 21, 2011 Answer at 5.

⁵⁶ *Id.* at 5-7.

⁵⁷ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,064, at P 47 (2008).

determinations would be beneficial; thus, we will require certain tariff revisions to enhance future disclosure of non-confidential information.

45. Complainants argue that Commission precedent is based on long held principles that competitive markets benefit from greater transparency wherever possible, and that market participants have a right to understand how an ISO will apply its tariffs. They contend that NYISO's administration of its market mitigation rules is unacceptably opaque and should be based on objective tariff provisions. Complainants cite two Commission orders addressing PJM market mitigation and the role of the market monitoring unit in the implementation of market power mitigation rules. In the first, the Commission reaffirmed its earlier decision that PJM's market mitigation should not rely on the market monitor's discretion but rather, objective criteria should be developed so that predictable results will emerge.⁵⁸ In the second, the Commission gave responsibility to the PJM independent market monitor to determine whether a seller's new generation resource offer constitutes an exercise of market power. However, the Commission required PJM to provide objective tariff provisions that will determine when mitigation rules will be applied.⁵⁹ More recently, the PJM Power Providers Group filed a complaint asserting certain state-sponsored initiatives would promote price suppression and the exercise of buyer market power, absent any revision. Shortly thereafter, PJM submitted proposed MOPR changes adopting, in part, PJM Power Providers Group's requests to update and increase objective criteria while eliminating provisions that did not increase transparency.⁶⁰ The Commission accepted PJM's proposal to update its existing MOPR reference values as used to calculate the Net CONE.⁶¹ The Commission also found that Net CONE is a reasonable approximation of the cost of new entry, less the energy and ancillary services revenues that resources are likely to receive, on average, over the resource's life and that, as such, Net CONE serves as a reasonable estimate for a competitive offer price.

⁵⁸ June 3, 2011 Complaint at 22-23 (citing *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at PP 180-181 (2007)).

⁵⁹ *Id.* at 22 (citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 190 (2009)).

⁶⁰ *See, e.g., PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at PP 43, 66, 86, 101 (2011).

⁶¹ *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at PP 43, 47, 49-50.

46. In the instant case, however, NYISO has already provided objective rules of how mitigation will be conducted and set forth criteria in Attachment H of its Services Tariff.⁶² The Commission has accepted NYISO's buyer-side mitigation tariff including a number of revisions to the mitigation exemption test rules designed to increase transparency and provide potential new entrants with greater certainty. The Commission found that NYISO's proposals to revise its mitigation exemption tests generally were reasonable improvements "because they distinguish between categories of facilities that it will examine for exemptions and clarify the information submission requirements for examined facilities."⁶³ On August 2, 2011, the Commission denied Complainants' request for rehearing of the November 26, 2010 Order.⁶⁴ To the extent that Complainants now raise additional challenges to the buyer-side mitigation rules approved in that proceeding, they collaterally attack the November 26, 2010 and August 2, 2011 Orders, and such arguments are, therefore, rejected.

47. With respect to IPPNY's request for an investigation of NYISO's implementation of the mitigation exemption test, we agree with NYISO that IPPNY is not requesting an official investigation pursuant to section 1b.8 of the Commission's regulations. To the extent IPPNY's request is directed to NYISO's implementation following the November 26, 2010 Order, the Commission has met that request in this proceeding. To the extent IPPNY refers to NYISO's implementation of the mitigation exemption test prior to November 27, 2010, the Commission addresses that timeframe in the proceeding in Docket No. EL11-50-000.

48. Complainants allege that NYISO lacked sufficient transparency about how it was making mitigation exemption test determinations during the data submission process and prior to NYISO's initial calculation of the new entrants' Unit net CONE in June 2011. However, we find that NYISO provided, within a reasonable timeframe, the information that the tariff requires it to provide. The tariff specifies that, "before the commencement of the Initial Decision Period for the Class Year, the ISO shall post on its website the inputs of the reasonably anticipated ICAP spot market auction forecast prices determined in accordance with 23.4.5.7.3.2, the Expected Retirements, and the Examined Facilities, before the Initial Project Cost Allocation."⁶⁵ Based on our review of the record, NYISO

⁶² Services Tariff, §§ 23.4.5.7, 23.4.5.7.2.

⁶³ November 26, 2010 Order, 133 FERC ¶ 61,178 at P 71.

⁶⁴ *New York Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,077 (2011).

⁶⁵ Services Tariff, § 23.4.5.7.3.2.

did so. NYISO posted a spreadsheet containing the relevant inputs for the mitigation exemption test and offer floor calculations using the most recently available information in November 2010,⁶⁶ with an update in June 2011, shortly before the beginning of the class year determination process.⁶⁷ In addition, NYISO updated this spreadsheet in October 2011 to reflect the Commission's directives in its September 15, 2011 order⁶⁸ in Docket No. ER11-2224.⁶⁹ We also note that toward the end of the determination process NYISO provided some clarification of the mitigation determination process in response to market participant questions at the May 2, 2011 and May 16, 2011 Installed Capacity Working Group meetings. Based on the above, the Commission finds that NYISO's actions were adequate to meet the requirements of the tariff.

49. Further, the Commission, in a number of contexts, has recognized that the goal of transparency must be balanced against other goals, such as the protection of commercially sensitive information and administrative efficiency.⁷⁰ For example, the Commission stated in Order Nos. 719⁷¹ and 719-A⁷² that it will retain the policy in use

⁶⁶ November 12, 2010 Posting on NYISO website, ICAP Data & Information §, at: http://www.nyiso.com/public/webdocs/products/icap/incity_mitigation/In-City_ICAP.pdf.

⁶⁷ Complainants' June 15, 2011 Amendment to the Complaint, Exhibit MDY-S-1. Also, June 8, 2011 Posting on NYISO website at: http://www.nyiso.com/public/markets_operations/market_data/icap/index.jsp.

⁶⁸ *New York Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,192 (2011) (September 15, 2011 Order).

⁶⁹ October 4, 2011 updated posting on NYISO website at: http://www.nyiso.com/public/webdocs/products/icap/incity_mitigation/In-City_ICAP_Buyer-side_Mitigation_Test_Data_100411.pdf.

⁷⁰ See e.g., *West Deptford Energy, LLC*, 134 FERC ¶ 61,189, at PP 25-29 (2011); See also *Wholesale Competition in Regions with Organized Electric Markets*, FERC Stats. & Regs. ¶ 31,281, at PP 465-469 (2008) (Order No. 719); *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,247 (2009), *reh'g denied*, 134 FERC ¶ 61,054 (2011).

⁷¹ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 423.

⁷² Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 157.

by ISOs to mask bid data from the identities of the bidders. Additionally, the Commission's regulations contain provisions that prevent public disclosure and maintain confidentiality of commercially sensitive information.⁷³ We find that NYISO has properly treated information it is required to keep confidential, i.e., commercially sensitive and proprietary data, as the improper release of this information could cause harm to the individual ICAP suppliers and to a competitive market.

50. However, we agree with Complainants that developers would benefit from examples of how the mitigation and offer floor rules will be applied because increased clarity and a better understanding of how the rules will be applied benefit both new entrants and existing market participants. Therefore we direct NYISO to provide examples on its website to clarify, in general, how the mitigation exemption test and offer floor calculations are implemented. The examples should use hypothetical data coupled with detailed narratives explaining how NYISO performs each of the required mitigation tests as well as how it determines and applies the offer floors for non-exempt projects. We direct NYISO to post these examples and explanations for each type of potential capacity market participant on its website as soon as practicable prior to making further exemption and offer floor determinations. While we are requiring hypothetical examples, we will not require the disclosure of actual mitigation and offer floor determinations because we recognize that it is necessary to balance transparency with the confidentiality needed for the competitive operation of the market. In this instance, independent monitoring by the MMU must be relied upon in the place of complete disclosure to achieve this balance. Therefore, we will not require NYISO to disclose the details of its actual individual exemption determinations.

51. In response to the complaint that market participants are not informed if exemptions have been granted and the MMU's concern that this creates an information asymmetry between tested participants and incumbents, NYISO states that it has no objection to disclosure of this information. Although these disclosures are not required under NYISO's current tariff, we agree with the MMU that the information asymmetry that results would favor certain market participants. Therefore, we will direct NYISO to file tariff revisions within 45 days of the date of this order to require the disclosure of the identity of the project and the final exempt/non-exempt determination, as soon as they are final.

⁷³ 18 C.F.R. § 388.107(d) (2011).

2. Inflation Adjustments

52. Generally speaking, inflation adjustments are used when evaluating costs or revenues in different time periods. Money (the dollar) has a “time value” because, as a result of general increases in the cost of goods and services (i.e., general inflation) over time, a dollar has less purchasing power, and therefore less value, a year from today than it has today, and vice versa. A general inflation rate measures that difference in the value of the dollar over time. Thus, for example, in order to measure what the “real” cost of an item would be in next year’s lower value dollars, the “nominal” cost of that item in units of currency (i.e., dollars) is adjusted (increased) for inflation to put that cost in “real” terms, i.e., valued in that future year’s lower value dollars.⁷⁴ As explained in more detail below, the Commission agrees with Complainants and finds that the values used in the mitigation and offer floor determinations must be inflated to make them comparable.

a. Adjustment of Unit net CONE for Inflation in the Mitigation Exemption and Offer Floor Determinations

i. Complaint

53. Complainants argue that NYISO should adjust various elements of its mitigation and offer floor determinations for inflation. Specifically, Complainants assert that NYISO should adjust for inflation in determining whether an ICAP supplier is exempt from mitigation based on its Unit net CONE, and in determining the offer floor for non-exempt suppliers. An inflation adjustment is necessary, according to Complainants, in order to have a valid “apples to apples” comparison of costs stated in current year’s dollars with capacity prices in future years.

54. As noted above, the Services Tariff outlines both the mitigation exemption tests and the offer floor determinations. The mitigation exemption test has two prongs.⁷⁵ If the ICAP supplier meets either prong, it will be exempt from the offer floor when it

⁷⁴ For example, assume that the short-term annual general inflation rate is projected to be 4 percent and the nominal cost of an item in dollars today is \$100. In order to evaluate that nominal \$100 cost in “real” terms of next year’s lower valued dollars, the \$100 cost would be increased by the general inflation rate, 4 percent, to \$104. Conversely, to determine the present day “real” value, i.e., in today’s higher value dollars, of an item with a projected nominal cost next year of \$100, that \$100 would be discounted by 4 percent to \$96.15

⁷⁵ Services Tariff, § 23.4.5.7.2.

commences to offer its capacity in the ICAP market. Under prong (a), the Default Exemption, to be exempt, the average of the spot market auction prices over the two capability periods (i.e., a one-year total period) beginning with the summer capability period commencing three years from the start of the supplier's class year, with the inclusion of the ICAP supplier, must be projected to exceed the highest offer floor based on the Default net CONE (i.e., 75 percent of the net cost of the proxy peaking unit used to derive the NYC demand curve) that would be applicable to the supplier during those two periods. Under prong (b), the Unit exemption, to be exempt, the average of the ICAP spot market auction prices over the six capability periods (i.e., a three-year total period) starting on the same date as in prong (a) must be projected to exceed, with the inclusion of the ICAP supplier, the reasonably anticipated Unit net CONE of the ICAP supplier. If the ICAP supplier is found to not be exempt, it will be subject to an offer floor when it enters the ICAP market which, like the two-pronged exemption process, entails determination of a Default Offer Floor and a Unit Offer Floor. The ICAP supplier's offer floor is the lower of the two offer floors. The Unit Offer Floor is the Unit net CONE, the new entrant's actual cost of new entry for the specific unit.⁷⁶ The Default Offer Floor is 75 percent of net CONE, which we refer to here as Default net CONE.⁷⁷

55. Complainants allege that NYISO erroneously proposes to set a new entrant's Unit net CONE for both the exemption and the offer floor based on the new entrant's "real" levelized costs using the first year values for each subsequent year without adjustment, an approach that they assert fails to account for inflation costs. This, according to Complainants, would result in the Unit net CONE for both the mitigation exemption test and the Unit Offer Floor being too low. Complainants assert that levelized costs can be addressed either on a nominal cost basis that includes the impacts of inflation in the base (first year) calculation and produces a levelized project cost that is the same for all future years; or on a real cost basis, that removes inflation from the initial calculation of future costs, revenues and the cost of capital in order to produce a project cost value that subsequently must be increased each year to incorporate inflation. Complainants argue that it is a well-settled principle of economics that inflation is a core project cost and one that NYISO has correctly incorporated into the proxy unit Default net CONE calculation

⁷⁶ Services Tariff, § 23.2.1 provides that the ICAP supplier's Unit Offer Floor is a value equal to the localized embedded costs of the ICAP supplier net of likely projected energy and ancillary services revenues translated into a seasonally adjusted monthly UCAP value using an appropriate class outage rate.

⁷⁷ Services Tariff, § 23.2.1. Default net CONE is what NYISO proposes to define as Mitigation Net CONE.

in each capacity demand curve reset process, but one that NYISO fails to address in a new entrant's Unit net CONE.

56. Complainants explain that the mitigation exemption test is designed to compare the Unit net CONE of a new resource with the default bid (i.e., the capacity price on the demand curve), which is based on the Default net CONE. According to Complainants' witness, Dr. Hieronymus, because the test is comparative, the Unit net CONE calculation needs, whenever possible, to utilize similar methodologies to those used in the demand curve's Default net CONE process.⁷⁸

57. With respect to the offer floor, Complainants argue that, given the dynamics of the New York market, even if a small amount of capacity is able to bid at an improperly low offer floor, it could push the market price substantially below the competitive level.⁷⁹ According to Complainants, failing to inflate the real-levelized Unit net CONE results in an understatement of the new entrant's actual Unit net CONE by 25 percent over the unit's 30 year life.⁸⁰ This, they assert, will markedly skew the results both in favor of unjustified exemptions and ineffectively low bid floors for those not exempted with the result being unmitigated buyer market power and an invitation for uneconomic entry.

ii. NYISO's Answers

58. In its July 6, 2011 Answer, NYISO contends that Complainants have failed to show that NYISO has violated, or will violate, its tariff's requirements concerning the use of inflation. As described by NYISO's witness Boles in his attached affidavit, for purposes of both the exemption analysis and determination of Unit Offer Floor, NYISO accounts for inflation when computing the Unit net CONE by applying a long-term inflation rate of 2.15 percent. It clarifies that this is the long term inflation rate of 2.4 percent net of 0.25 percent for technical progress, which was recommended by its consultant, National Economic Research Associates, Inc. (NERA).⁸¹ NYISO states that, in order to perform the Unit net CONE analysis, it first expresses the project's costs in the year's dollars of the first year of the Unit Mitigation Study Period (i.e., the three year period starting in the summer capability period three years in the future after the start of

⁷⁸ June 3, 2011 Complaint at 28 (citing Hieronymus Aff. at 19 - 20).

⁷⁹ *Id.* at 30 (citing Hieronymus Aff. at 5).

⁸⁰ *Id.* at 28 (citing Younger Aff. ¶ 70).

⁸¹ NYISO July 7, 2011 Answer at 44, Boles Aff. at ¶ 21, Meehan Aff. at ¶ 24. *See infra* note 83.

the project's Class Year). It states that it then inflates the Unit net CONE's first year's base value for years two and three of the Unit Mitigation Study Period, and then computes a straight average of those three values, which it refers to as "the Unit net CONE." It states that it then compares this "Unit net CONE" figure to the straight average of the ICAP spot market auction prices for the six capability periods (i.e., the same three-year Mitigation Study Period) in making exemption determinations.⁸² NYISO's witness Boles explained that the "Unit net CONE" used in the exemption test is the same "Unit net CONE" utilized to establish a project's Unit Offer Floor.⁸³

iii. Comments

59. Downstate LSEs agree with NYISO and argue that NYISO's calculation of Unit net CONE is consistent with the Services Tariff. In their July 21, 2011 Answer, Complainants state they are relieved by NYISO's representation that it will account for inflation when computing the offer floor for a new entrant,⁸⁴ but maintain that this statement stands in stark contrast to what NYISO previously told stakeholders. In its August 8, 2011 answer, NYISO replies that it has not contradicted what it stated earlier with respect to the values used in the offer floor and that Complainants have conflated two distinct concepts that require separate consideration: use of inflation in establishing the offer floor (i.e., the three-year Unit net CONE average) as opposed to escalation of established offer floors. It clarifies that it will not escalate the established offer floors.⁸⁵

Commission Determination

60. NYISO's tariff is silent on whether and how inflation should be included in the calculation of Unit net CONE for purposes of the prong (b) Unit exemption test and Unit Offer Floor. The Unit net CONE figure serves two purposes: (1) as a point of comparison in prong (b) of the mitigation exemption test and (2) as the Unit Offer Floor. In prong (b), a comparison is made between the Unit net CONE and demand curve prices projected for a three-year period (Unit Mitigation Study Period) commencing in the summer capability period three years after the start of the unit's Class Year. Thus, because the intent is to compare the Unit net CONE amount stated in one year's dollars to demand curve prices stated in dollars of three to six years in the future, it is necessary to

⁸² Services Tariff, § 23.4.5.7.2.

⁸³ NYISO July 7, 2011 Answer, Boles Aff. ¶ 13.

⁸⁴ Complainants July 21, 2011 Answer at 10.

⁸⁵ NYISO August 8, 2011 Answer at 15.

restate, i.e., inflate the Unit net CONE value in order to render a valid comparison in constant “real” dollar terms. Therefore, we find that an inflation factor should be applied to Unit net CONE as part of the exemption analysis to have a valid comparison of Unit net CONE to each year of the Unit Mitigation Study Period projected demand curve prices. This will state both the Unit net CONE and demand curve prices in “nominal” dollars of the future years of the Unit Mitigation Study Period. That way, an “apples to apples” comparison of Unit net CONE and projected demand curve prices can be made.

61. Further, an inflation adjustment to the prong (b) Unit exemption test is consistent with the prong (a) Default exemption test. Specifically, under section 23.4.5.7.3.6 of the Services Tariff, because the Default Mitigation Study Period commences after the currently effective demand curves are scheduled to expire,⁸⁶ Default net CONE underlying the current demand curves must be escalated by the approved “escalation factor” used in designing the demand curves. That escalation factor reflects an inflation rate.⁸⁷ To provide an “apples to apples” comparison of the projected Default Offer Floor

⁸⁶ The Default Mitigation Study Period under prong (a) commences in the Summer Capability Period three years after the project’s Class Year, but demand curves are effective only for three one-year intervals beginning May 1 of each year and ending April 30 of the next year. Therefore, for a project whose Class Year is the first year of updated demand curves, the Default Mitigation Study Period commences in the summer after those currently effective demand curves will have terminated. Accordingly, demand curve prices for that future study period must be projected in the initial exemption determination. To account for this, the prong (a) Default exemption test provisions require NYISO to make a reasonable projection of what the demand curve prices will be during the future Default Mitigation Study Period. Specifically, § 23.4.5.7.4 of the Services Tariff provides that the “[Default net CONE] for the first two years after the last year covered by the most recent demand curves approved by the Commission shall be increased by the escalation factor approved by the Commission for that demand curve.”

⁸⁷ In each triennial demand curve reset proceeding, the first year’s demand curve has been based on a levelized net CONE analysis incorporating a long-term inflation rate over a 30-year amortization period. However, in determining the demand curves for years two and three of the three-year demand curve reset, rather than re-calculating the levelized net CONE for the Default proxy peaking unit entering the ICAP market in each such year, an “escalation factor” simply was applied to the first year’s demand curves to arrive at the second year’s demand curves. The same escalation factor was then applied to the second year’s demand curves to arrive at the third year’s demand curves. In the 2008 demand curve reset proceeding, the approved escalation factor was 7.8 percent, consisting of a 5.1 percent annual cost increase rate drawn from Handy-Whitman Index

(continued...)

to projected demand curve prices during the Default Mitigation Study Period, the demand curve prices projected for the one-year Default Mitigation Study Period, likewise, should reflect the same adjustment for inflation. This makes the comparison required by each prong of the mitigation exemption test an “apples to apples” comparison. The Commission concludes, therefore, that in making the Unit exemption determination NYISO should “inflate” or restate Unit net CONE and demand curve price values projected for the three-year future Unit Mitigation Study Period to reflect inflation. The average of each year’s inflated Unit net CONE values for that three-year period should be compared to the average of the forecasted demand curve prices for that period. Whether that value should change, in the future after the unit actually enters the ICAP market, is addressed in the next section below.

62. The next question is what the inflation rate should be for Unit net CONE when used in the exemption test and offer floor. NYISO states that in recent exemption determinations it used a long-term inflation rate of 2.15 percent derived from the 2.4 percent long-term rate,⁸⁸ net of a .25 percent “technical progress” factor. We reject the use of the 2.15 percent inflation rate in the application of the Unit exemption test and Unit Offer Floor. Consistent with our finding above, we find that Unit net CONE and projected demand curve prices used in applying the prong (b) Unit exemption test should be inflated by the same inflation rate that is included in the latest effective demand curve escalation factor. At the current time, as approved in the most recent demand curve reset proceeding in Docket No. ER11-2224, effective September 15, 2011, the inflation rate component of the approved escalation factor is the average short-term annual general inflation rate of 1.7 percent.⁸⁹ Thus, at this time, to compare on a similar basis the

historical data for power plant construction costs and an annual short-term general inflation rate of 2.7 percent. *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,064, at PP 48, 54 (2008). The escalation factor incorporated into the calculation of the currently effective demand curves for the 2011/2012, 2012/2013, and 2013/2014 Capability Years was designed differently as it reflects only a 1.7 percent short-term annual inflation rate from the average of three general inflation indices and no separate power plant cost increase component given that the “forecast of power capital costs showed no near term inflation.” January 28, 2011 Order, 134 FERC ¶ 61,058 at PP 142, 150.

⁸⁸ NYISO used 2.4 percent as the long-term inflation rate in its calculation of the real levelized Default net CONE underlying the currently effective demand curves. *See* NYISO November 30, 2010 Filing, Docket No. ER11-2224-000, Attachment 1, at 39.

⁸⁹ January 28, 2011 Order, 134 FERC ¶ 61,058 at PP 142, 150.

average “real” Unit net CONE in the future Unit Mitigation Period to average “real” projected demand curve prices over that period, Unit net CONE, likewise, should reflect the same currently effective 1.7 percent annual inflation rate. In future years, after further demand curve resets, that rate would change to reflect the then effective inflation component of the escalation factor.⁹⁰ Accordingly, we direct NYISO to use the inflation rate component of whatever the then currently approved escalation factor from the demand curve process (currently 1.7 percent) is at the time the exemption test is performed to inflate the calculated value of Unit net CONE for each year of the future three-year Unit Mitigation Study Period in its Unit mitigation exemption test determinations.

63. We direct NYISO to file tariff changes to reflect the foregoing rulings within 45 days of the date of this order. To ensure consistency across the buyer-side mitigation rules and clarity to market participants, tariff revisions should state that inflation will be applied in accordance with the inflation rate component of the escalation factor determined in the demand curve process.

b. Ongoing Adjustment of the Offer Floor after the Unit Enters the ICAP Market

i. Complaint

64. Complainants also challenge NYISO’s refusal to adjust the offer floor, once determined, for inflation. Specifically, the issue is whether the offer floor applicable to a non-exempt unit should be adjusted annually for inflation and/or changes in demand curves after the non-exempt unit enters the ICAP market. NYISO clarifies that it does

⁹⁰ As noted earlier, *supra* note 83, the escalation factor approved in the 2008 demand curve reset proceeding reflected two components: a 5.1 percent rate specifically derived from indices of historical power plant cost increases and a 2.7 component derived from a general inflation index. The escalation factor underlying the current demand curves (1.7 percent) consists of only a general inflation rate. Thus, the nominal cost of a proxy LMS 100 unit was expected to increase by 5.1 percent each year. Each year’s increased cost would then be inflated by the 2.7 percent rate to value that increased cost in future dollars. If the escalation factor in future demand curves contains two components like the 2008 demand curves’ escalation factor, only the general inflation rate component which measures the loss in purchasing power of the dollar should be used in inflating Unit Offer Floor after the unit enters the market. Any such other power plant related cost inflation factor only would be relevant to projection of Default net CONE under § 23.4.5.7.4 of the Services Tariff.

not intend to make adjustments to the offer floor once it is set. The mitigation offer floor is essentially the lesser of (a) the Default net CONE or (b) the Unit net CONE. Complainants assert that, regardless of whether the offer floor is based on Default net CONE, i.e., the Default Offer Floor, or Unit net CONE, i.e., the Unit Offer Floor, it should be adjusted for inflation.

65. With respect to the Default Offer Floor, Complainants argue that because NYISO intends to “freeze” the Default Offer Floor based on the 2011/2012 demand curve, the Default Offer Floor will not track Commission-approved changes to the net CONE value set in the ICAP demand curve reset process in violation of section 23.2.1 of NYISO’s Tariff.⁹¹ Complainants assert that the definition of “Mitigation Net CONE” makes clear that this value, which is used to calculate the Default Offer Floor, is to be based on “the currently effective demand curve.”⁹² Therefore, according to Complainants, NYISO must look to the NYC ICAP demand curve that is currently effective each month that the offer floor is applied for a mitigated unit.⁹³ Complainants contend that any other interpretation would violate the fundamental canon of construction that tariffs “should be interpreted in such a way as to avoid unfair, unusual, absurd, or improbable results.”⁹⁴ Complainants state that if the Default Offer Floor remains fixed and the ICAP demand curves are increased after the first year, the new entrant’s offer floor would become progressively lower than the Default net CONE for the corresponding capability year. Over time, this would allow a resource that may not be economic to clear the market and suppress market clearing prices below the just and reasonable levels authorized by the Commission. Conversely, according to Complainants, if the ICAP demand curves were to decrease over time, but the new entrant’s offer floor were to remain fixed, the new entrant’s offer floor would become higher than 75 percent of the then-current net CONE, thereby preventing the new entrant from clearing the market at levels authorized by the Commission.

66. With respect to the Unit Offer Floor, Complainants argue that the definition of Unit net CONE as the supplier’s levelized embedded cost, net of energy and ancillary services revenues, requires NYISO, going forward, to escalate Unit net CONE to account

⁹¹ June 3, 2011 Complaint at 35.

⁹² *Id.* at 36 (citing NYISO August 10, 2010 Compliance Filings in Docket Nos. EL07-39 and ER10-2371).

⁹³ *Id.*

⁹⁴ *Id.* (citing *Columbia Gas Transmission Corp.*, 27 FERC ¶ 61,089 at 61,166 (1984)).

for inflation and, likewise escalate the offer floor that is based on that same figure.⁹⁵ Mr. Younger argues that failing to properly escalate the real-levelized Unit net CONE for future years results in the real dollar value of the Unit net CONE decreasing over time and likewise, the offer floor that is based on that Unit net CONE, declines in real terms.⁹⁶ Complainants argue that if the offer floor is to provide effective protection against the exercise of buyer-side market power, it must increase when the underlying Unit net CONE value rises. Complainants add that no new entrant that fails the mitigation exemption test can legitimately expect to be subject to an offer floor that remains frozen based on a calculation made years in advance.⁹⁷

ii. NYISO's Answer

67. NYISO states that, contrary to Complainants' assertions, its tariff does not provide for continuously escalating offer floors and such escalation would conflict with what it asserts is the Commission's clear policy that mitigation determinations are made once in advance of entry. NYISO asserts that this is an attempt to revise the duration rule, i.e., the rule in section 23.4.5.7 under which a new entrant that is not initially exempt from mitigation will cease to be subject to an offer floor if its capacity clears the market at the offer floor price for twelve, not-necessarily consecutive, monthly auctions. NYISO reasons that it would be unjust and unreasonable to punish new entrants if economic conditions change in ways that were not anticipated at the time of entry. NYISO further asserts that allowing offer floors to vary with the demand curves would introduce a new element of uncertainty that would complicate, and perhaps discourage, investment by new entrants that believe their projects are economic at the time of investment.

68. Further, NYISO maintains an escalating offer floor would require that the Services Tariff set forth an escalation rate and describe the mechanics for applying it, which it currently does not do. NYISO asserts that Complainants' proposal would require that each month NYISO update the following inputs to recalculate the Default Offer Floor: (i) the NYC annual revenue requirement; (ii) the NYC excess capacity

⁹⁵ June 3, 2011 Complaint, Younger Aff. ¶¶ 67-72 and Exhibit MDY-6; Complainants July 21, 2011 Answer at 11. *See* Services Tariff § 23.2.1 for Unit net CONE definition.

⁹⁶ Mr. Younger determines that, assuming the 2.4 percent inflation rate used in the most recent demand curve reset process, failing to inflate the real-levelized Unit net CONE understates the new entrant's actual Unit net CONE by 25 percent over the unit's 30-year life. June 3, 2011 Complaint, Younger Aff. ¶ 69.

⁹⁷ Complainants July 21, 2011 Answer at 17.

assumption that was assumed in the latest ICAP demand curve reset (iii) NYC system winter/summer ratio; (iv) unit-specific winter/summer ratio; (v) NYC system Equivalent Demand Forced Outage Rate (EFORD); and (vi) the project-specific EFORD. NYISO states that it would then have to determine for each month whether the Default net CONE or the Unit net CONE was lower, and the mitigated new entry would be subject to that value as the offer floor for the month. NYISO states that it is unclear when Complainants would expect NYISO to give ICAP suppliers their revised offer floors.

69. However, NYISO further responds that it has examined the issue of whether an offer floor, once established, should escalate and its view is that providing for the escalation of established offer floors could be an improvement to the current in-City market mitigation rules. However, NYISO states that Complainants offer no suggestion as to what those rules should be or what escalation factor NYISO should use. NYISO adds that such a change would require that new rules and mechanics be added to Attachment H and existing tariff provisions would have to be amended. In addition, NYISO states, the tariff would have to specify the frequency of escalation. Further, according to NYISO, its stakeholders have not vetted escalating an offer floor and, given the variety of options, issues and implications that the design of escalation rules would have, the Commission should provide an opportunity for stakeholder input.⁹⁸

iii. Comments

70. The MMU states that it believes that escalating established offer floors to account for inflation is essential to account for the changing value of money and that Attachment H could reasonably be read to allow for such escalation. The MMU agrees with NYISO that Attachment H provides that the offer floor shall be computed one time, but disagrees that this implies that the values should not be adjusted over time to account for inflation. The MMU states that Attachment H is silent on whether the offer floor value should be fixed in nominal terms or in real terms and when the tariff is silent, and could reasonably be interpreted in either manner, it should be interpreted in the manner that is most logically consistent with the intent of the provision. The MMU believes the logically consistent interpretation is that the offer floors would be fixed in real terms.

71. While the MMU agrees with Complainants that the offer floor should be adjusted to account for the changing value of money, the MMU states that it does not believe the offer floors should be adjusted for factors such as changes in the value of CONE that result in changes in the ICAP demand curves.⁹⁹ Rather, the MMU asserts that they

⁹⁸ NYISO July 7, 2011 Answer at 54.

⁹⁹ MMU July 21, 2011 Answer at 7.

should be based on what the investor knew or expected at the time it decided to make the investment. The MMU asserts that it would not be reasonable to adjust the offer floor to reflect changes in external factors, such as the costs of equipment or labor that occur after the supplier has made its investment. As noted above, the MMU supports only the escalation in the nominal value of the offer floor that would allow the offer floor to be fixed in real terms. The MMU presents a method for making these inflation adjustments based on the implicit price deflator for the gross domestic product.¹⁰⁰

Commission Determination

72. We find the tariff to be silent on the question of whether, once set, the offer floor applicable to a non-exempt unit should be adjusted annually for inflation and/or changes in effective demand curves after the non-exempt unit enters the ICAP market. We conclude, for the same reason that we are requiring adjustment of the initial values for the Unit net CONE used in mitigation determinations above, that the offer floor for a non-exempt unit should be adjusted annually for inflation. We disagree with the Complainants that NYISO should adjust offer floors on a monthly basis based on changes in the NYC demand curve. The Commission finds the administrative burden of this method would be too high and would introduce a new element of uncertainty. Moreover, the demand curves are shifted annually by an inflation adjustment. Therefore, a similar application in this context is appropriate.

73. We agree with the MMU that this is the most logical interpretation of the tariff and is consistent with the intent of the offer floor mitigation. NYISO argues that this is an attempt to revise the duration rule. We disagree. Under the rule, a mitigated new entrant obtains exemption once its capacity clears the market at the offer floor price for twelve, not-necessarily consecutive, monthly auctions. We find that such inflation adjustment does not revise the duration rule as it maintains the originally determined offer floor in “real” terms while at the same time making such values comparable to the prices in the year in which the mitigation occurs. Without an inflation adjustment, a static offer floor would understate Unit net CONE over time. This could permit a new entrant to be exempt in monthly auctions leading to a suppression of market clearing prices and permit

¹⁰⁰ The MMU contends that to adjust the offer floors for the change in the value of money due to inflation, NYISO should use the implicit price deflator for gross domestic product (GDP), which is equal to the ratio of nominal GDP to real GDP times 100. According to the MMU, to adjust for the change in the value of money, NYISO would simply multiply the offer floor by the GDP deflator for the current year divided by the GDP deflator for the year in which the offer floor is implemented, making the adjustment once a year prior to the summer capability period. *Id.* at 7.

uneconomic entry into a market. Therefore, in this context, in the interest of consistency amongst methodologies, we find that applying an inflation adjustment to offer floors appropriate.

74. Because the currently effective demand curves are adjusted using an average of forecasted values for the GNP deflator (currently 1.7 percent), we conclude that the demand curve inflation adjustment is an appropriate measure for inflating applicable offer floors based on either Default net CONE or Unit net CONE. For future demand curve resets, adjustments to demand curves for years two and three may include elements other than monetary inflation as was the case when the Handy-Whitman index was used to adjust the demand curves. Thus, the currently-applicable inflation adjustment as revised here for offer floors may differ from future demand curve escalation factors to the extent that future demand curve escalation factors reflect more than monetary inflation. If that were to occur, NYISO should use the appropriate inflation adjustment component of the new approved escalation factor.

75. Finally, because the Services Tariff provides that the ICAP Supplier's offer floor shall be reduced to its Unit Offer Floor if it is lower than the Default Offer Floor,¹⁰¹ we also wish to clarify that in order to provide consistency and reduce uncertainty, once an offer floor has been determined to be applicable to the ICAP Supplier, that offer floor should not change (with the exception of the ongoing inflation adjustments discussed above). For example, if NYISO determines that an ICAP Supplier will be mitigated, and the offer floor of the ICAP Supplier is determined to be its Unit Offer Floor rather than the Default Offer Floor, that Unit Offer Floor (as inflated) will be applied for all years during which the ICAP Supplier is subject to an offer floor even if the Default Offer Floor later changes to a lower value. This will provide greater certainty for the ICAP Supplier in determining its minimum offer bid, for NYISO in administering the offer floor, and for the ICAP market in general.

76. We direct NYISO to file tariff changes to reflect this ruling within 45 days of the date of this order. To maintain consistency within the buyer-side mitigation rules, tariff revisions should state that inflation will be applied annually to offer floors of a non-exempt unit entering the market, at the inflation rate component of the escalation factor determined in the demand curve process.

¹⁰¹ Services Tariff, § 23.4.5.7.3.6.

3. Use of the 2010-2011 NYC Demand Curve from the 2008 Demand Curve Reset for Calculation of Default net CONE

a. Complaint

77. This issue primarily concerns what initial value (before considering inflation) should be used for Default net CONE. Complainants assert that NYISO proposes to use outdated 2010/2011 Default net CONE values from the 2008 demand curve reset proceeding to set the Default net CONE for the exemption test and offer floor determinations for entrants in class years 2009 and 2010. Complainants assert that, instead, NYISO should use the updated Default net CONE values for the 2011/2012, 2012/2013, and 2013/2014 capability years that were proposed in NYISO's November 30, 2010 filing in Docket No. ER11-2224, as modified by the Commission's January 28, 2011 and May 19, 2011 Orders in that proceeding. EPSA also states that it objects to the use of outdated New York City demand curve data in the mitigation exemption test.

78. Pursuant to NYISO's mitigation exemption provisions, entry is assumed to occur in the summer capability period three years after start of the applicable Class Year; thus, Complainants state, a Class Year 2010 project would be presumed to enter the market during the 2013 Summer Capability Period. Complainants therefore assert that, given that the mitigation exemption test requires a comparison between the average of ICAP clearing prices during the first year after entry, i.e., the 2013/2014 Capability Year, and the Default net CONE for that year, the 2010/2011 demand curve would not be relevant for the purposes of this analysis. Moreover, according to Complainants, the Commission made it clear that the demand curves for the 2011/2012, 2012/2013, and 2013/2014 capability years must be implemented no later than November 1, 2011.¹⁰² Complainants argue that NYISO should use that updated three-year set of demand curves set forth in the Services Tariff as they represent the currently-effective demand curves that NYISO asserts is to be used for the mitigation exemption test.¹⁰³

¹⁰² June 3, 2011 Complaint at 32 (citing January 28, 2011 Order, 134 FERC ¶ 61,058 at P 168); *see also* March 9, 2011 Order, 134 FERC ¶ 61,178 at P 16 (reaffirming that NYISO is authorized "to defer implementation of the modified rates until as late as November 1, 2011.").

¹⁰³ June 3, 2011 Complaint at n.100. Complainants refer to the March 29, 2011 compliance filing that had been pending before the Commission in the 2011-2014 demand curve reset proceeding in Docket No. ER11-2224. In the order issued September 15, 2011, the Commission accepted, subject to condition, compliance tariff

(continued...)

b. NYISO's Answer

79. NYISO states that the buyer-side mitigation provisions of its tariff¹⁰⁴ require that it use the currently effective ICAP demand curves when determining Default net CONE. At the time of its Answer, the currently effective demand curves were the same as the 2010/2011 demand curves from the 2008 demand curve reset proceeding. NYISO asserts that those demand curves do not include an escalation rate as a result of the Commission's rulings in its orders in the latest demand curve reset proceeding in Docket No. ER11-2224.¹⁰⁵ Accordingly, for purposes of applying the Default exemption test, it states, Default net CONE contains a zero escalation rate.¹⁰⁶ NYISO states that it has no legal basis for using any value other than those currently effective demand curves to establish Default net CONE.¹⁰⁷ Further, NYISO states, the suggestion that the proposed demand curves in Docket No. ER11-2224 should be used to establish Default net CONE ignores the fact that the proposed demand curve values are the subject of protracted litigation in Docket No. ER11-2224. NYISO adds that it will be prepared to implement the revised ICAP demand curves within twelve days of a Commission order accepting them without further modification.

c. Comments

80. Downstate LSEs assert that NYISO is adhering to the relevant provisions of the tariff, but Complainants are unhappy with those tariff provisions. According to Downstate LSEs, the issue of which demand curve should be used was hotly contested by

records NYISO submitted on June 20, 2011, and rejected the March 29, 2011 filing as superseded and moot. September 15, 2011 Order, 136 FERC ¶ 61,192 (2011).

¹⁰⁴ As noted earlier, NYISO proposed to re-name "Net CONE" (what we refer to here as "Default net CONE" to avoid confusion with net CONE of a unit) as "Mitigation Net CONE" in Attachment H of NYISO's Services Tariff.

¹⁰⁵ NYISO July 6, 2011 Answer at 44.

¹⁰⁶ *Id.* at 45.

¹⁰⁷ The Commission found in its January 28, 2011 Order in Docket No. ER11-2224, and reiterated in the March 9, 2011 Order, the April 4, 2011 Order, and the May 19, 2011 Order on Rehearing in that docket, that the then currently effective ICAP demand curves, i.e., the 2010/2011 demand curves established in the 2008 demand curve reset proceeding, were to remain in effect until superseded. Such demand curves were superseded effective September 15, 2011.

Complainants in Docket No. ER11-2224 and now is being framed as an allegation that NYISO is improperly implementing its Services Tariff.

81. The MMU states that while it does not dispute the legal basis on which NYISO has determined that the Default net CONE should be based on the currently effective demand curves, it is concerned that using those curves in this context could have undesirable consequences that were not anticipated by the Commission. The MMU adds that, in general, it is preferable for mitigation to be imposed based on the most accurate information possible. In this context, this means it would be preferable for NYISO to make the exemption determinations using the proposed ICAP demand curve values in Docket No. ER11-2224. The MMU recommends that the Commission approve the use of the updated demand curves prior to their final approval for the limited purposes of performing the buyer-side mitigation exemption tests.

d. Complainants' Answer

82. First, Complainants reiterate that using the existing 2010/2011 Demand Curve to calculate the Default net CONE for Class Year 2009 and 2010 projects is not correct because the starting capability period for such projects will be 2012/2013.

83. Second, Complainants contend that NYISO's contention that it must use the "currently effective" ICAP demand curve in calculating the Default net CONE is based on the inclusion of this term in a definition that has not yet been accepted by the Commission.¹⁰⁸ Specifically, Complainants assert that the term "currently effective" appears only in the proposed, but yet unaccepted, definition of "Mitigation net CONE."¹⁰⁹ Further, Complainants argue that the May 19, 2010 Order in Docket No. ER11-2224 did not direct that the Default net CONE be defined or calculated using the "currently effective" ICAP demand curve. Therefore, according to Complainants, nothing supports NYISO's approach of using the 2010/2011 ICAP demand curves.¹¹⁰

¹⁰⁸ Complainants July 21, 2011 Answer at 13. *See also New York Indep. Sys. Operator*, 131 FERC ¶ 61,170 (2010) (May 20, 2010 Order).

¹⁰⁹ Services Tariff, § 23.2.1 (Definitions). *See supra* note 8.

¹¹⁰ Complainants July 21, 2011 Answer at 14. *See New York Independent System Operator, Inc., Compliance Filing and Continued Request for Flexible Effective and Implementation Dates*, Docket No. ER11-2224-009 (filed June 20, 2011).

84. Third, Complainants state that the Services Tariff makes it clear that the clearing prices and Default net CONE used in the mitigation exemption test are to be for “the same two (2) capability periods.”¹¹¹ Complainants state that NYISO does not refute Complainants’ argument that using one demand curve (i.e., the demand curve for the 2010/2011 Capability Year) to calculate the Default net CONE while calculating projected clearing prices using the substantially higher 2011/2012, 2102/2013, and 2013/2014 demand curves, will invalidate the comparison and artificially skew the results of the mitigation exemption test. According to Complainants, NYISO cannot point to any language in the mitigation exemption test that contemplates performing the test using two different sets of demand curves. Complainants state that, to the contrary, NYISO is required to “compute the reasonably anticipated ICAP spot market auction forecast price” and it would be unreasonable for NYISO to use a different demand curve to project clearing prices than the demand curve used to derive Default net CONE.¹¹² Complainants add that if the Services Tariff could be said to require this comparison, either now or in the future, it is clearly unjust and unreasonable and thus must be modified pursuant to section 206 of the Federal Power Act.

Commission Determination

85. We agree with Complainants that it would be unreasonable to compare the Default net CONE value associated with demand curves from one year with the projected ICAP prices based on demand curves of a different year in determining whether a supplier should be exempted from mitigation. Complainants correctly point out that the mitigation exemption test provisions of NYISO’s tariff¹¹³ in fact require a comparison between the average of ICAP spot market auction prices projected for the first year after entry and the Default net CONE projected for that same year.¹¹⁴ As explained further below, we will require NYISO to use values from the same demand curve that is effective at the time it makes an exemption determination in comparing Default net CONE with spot market auction prices.

86. Thus, if the Commission has accepted and made effective updated demand curves at the time of the mitigation determination, then we agree that NYISO should use such demand curve values in making the mitigation exemption and offer floor

¹¹¹ *Id.* (citing Services Tariff, § 23.4.5.7.2).

¹¹² *Id.* (citing Services Tariff, § 23.4.5.7.3.2).

¹¹³ Services Tariff, § 23.4.5.7.2.

¹¹⁴ Services Tariff, § 23.4.5.7.2.

determinations.¹¹⁵ However, if the Commission has not accepted proposed updated demand curves applicable to the periods used in the mitigation test at the time of such mitigation exemption determination, then, consistent with section 23.4.5.7.4 of NYISO's Services Tariff, the most recently approved demand curves must be used.¹¹⁶ This is true for both Default net CONE and in calculating projected clearing prices. Therefore we reject NYISO's initial use of clearing prices from the proposed 2013/2014 demand curves for this comparison.

87. The concerns raised by Complainants arose as a result of the circumstances of 2011 in which the demand curve prices from the last year of the previous (2008) demand curve reset proceeding continued in effect for several months after April 30, 2011, when they were to expire pursuant to the terms of the Services Tariff, to be replaced by updated demand curve prices effective May 1, 2011.¹¹⁷ Here, we clarify how NYISO should have performed NYC mitigation exemption determinations in 2011. Until new demand curves were approved effective September 15, 2011, in making mitigation exemption determinations during the Spring and Summer of 2011, NYISO was required by its tariff to use the then currently effective NYC demand curve, i.e., the 2010/2011 NYC demand curve, to project future demand curve prices and Default net CONE for purposes of the Default exemption test. Contrary to NYISO's claim, that demand curve already did include an escalation factor (7.8 percent). The Commission's order in Docket No. ER11-2224 simply rejected a proposal by one of the parties to further escalate those existing demand curves during the period the new proposed demand curves in ER11-2224 were suspended. Accordingly, in this unusual situation, in the Spring and Summer of 2011

¹¹⁵ The mitigation provisions permit a re-assessment of the mitigation exemption determination for a non-exempt unit any time prior to the unit's entry into the ICAP market. *See* Services Tariff, § 23.4.5.7.3.5; *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,077, at PP 25, 27 (2011).

¹¹⁶ Pending § 23.4.5.7.4 of the Services Tariff states: "Mitigation Net CONE for the (sic) each year after the last year covered by the most recent Demand Curves approved by the Commission shall be increased by the escalation factor approved by the Commission for such Demand Curves."

¹¹⁷ The existing 2010/2011 demand curves from the 2008 demand curve reset proceeding would have continued in effect, by the terms of the tariff, through April 30, 2011, but were replaced by identical demand curves NYISO filed on March 28, 2011, which the Commission accepted, subject to conditions, effective April 22, 2011, by its order issued April 4, 2011. *New York Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,002 (2011).

prior to September 15, 2011, NYISO should have incorporated the then currently approved existing 7.8 percent escalation factor to escalate the 2010/2011 demand curve values in applying the Default exemption test at that time. However, in making mitigation exemption determinations on or after September 15, 2011, NYISO should have used the new effective demand curve prices which reflected the new approved 1.7 percent escalation factor.

4. Review of Bilateral, Arms-Length Contracts

a. Complaint

88. Complainants assert that a new entrant will seek to propose the lowest possible Unit net CONE offer floor because it will have a vested interest in securing an exemption or the lowest possible offer floor to ensure that it can sell its capacity into the market once it is constructed. Complainants add that to prevent improper attempts to artificially understate Unit net CONE, the Services Tariff requires a new entrant that wants to rely on its Unit net CONE to provide all required cost information to NYISO.¹¹⁸ Complainants also state that the Services Tariff makes it clear that NYISO is required to determine the reasonably anticipated Unit net CONE and seek comment from the MMU on matters relating to the determination of price projections and cost calculations.¹¹⁹ Complainants contend that despite this obligation, NYISO has stated that it will not even require new entrants to submit wholesale power and capacity contracts for review. Complainants assert that this violates sections of the tariff¹²⁰ in at least the following two respects: first, a contract could provide the opportunity for buyers to exercise market power by shifting some project costs into a contract through subsidy payments and out-of-market revenues, thus artificially masking the true costs of the project; and, second, contracts can also reflect the parties' arm's length negotiations and thus, serve as an important tool for verifying the reasonableness of a new entrant's claimed Unit net CONE.

¹¹⁸ June 3, 2011 Complaint at 39 (citing Services Tariff, § 23.4.5.7.3.6 (a new entrant is only permitted to use its Unit net CONE as its offer floor if it can “demonstrate to the reasonable satisfaction of [NYISO] that its Unit Net CONE is less than any Offer Floor that would otherwise be applicable”)).

¹¹⁹ *Id.* (citing Services Tariff, § 23.4.5.7.3.3).

¹²⁰ *Id.* (citing Services Tariff, §§ 23.2.1, 23.4.5.7.3.6).

89. Complainants request that the Commission direct NYISO and the MMU to require new entrants to provide all contracts, including those for wholesale power and capacity, necessary for NYISO to verify their respective estimates of Unit net CONE and to identify any arrangements providing implicit or explicit subsidies or that would otherwise give the entrant an incentive to bid below costs or that would make it indifferent to ICAP clearing prices.

b. NYISO's Answer

90. NYISO responds that Complainants have inaccurately concluded that it does not evaluate contracts as needed to validate costs identified by a developer and determine whether they are appropriate to include in a project's Unit net CONE. NYISO asserts that it evaluates contracts to validate the costs identified by a developer and to determine whether a cost is appropriate to use in a project's Unit Net CONE.¹²¹ NYISO asserts that contrary to Complainants' suggestion, it is not necessary to project an entrant's anticipated revenues from various sources. NYISO adds, and the New York Commission agrees, that it need not examine contracts for out-of-market incentives because it evaluates new entry based on whether a project's entrance decision is economic if it were to only receive revenues through the NYISO's ICAP spot market auction. NYISO states that whether a developer entered into an above market capacity contract does not shed light on whether it is economic because this determination is made based on revenues from an ISO-administered market and buyer-side mitigation measures prevent uneconomic entry.¹²²

c. Comments

91. Downstate LSEs assert that Complainants cannot point to a specific tariff provision requiring NYISO to examine bilateral contracts because no such provision exists and that Complainants had every opportunity to raise this issue in the mitigation reform proceeding. Thus, according to Downstate LSEs, this issue pertains to an alternate request that the Services Tariff be modified, not the claim that NYISO has violated the Services Tariff. Downstate LSEs contend that this request is improper and should be addressed in the NYISO stakeholder process.

92. In their July 21, 2011 Answer, Complainants state that they are encouraged by NYISO's statement that it evaluates contracts when and as necessary to validate costs and

¹²¹ NYISO July 7 Answer at 54 (citing June 3, 2011 Complaint at 38-40).

¹²² NYISO July 7, 2011 Comments at 54-55, Boles Aff. ¶ 60.

determine whether a cost is appropriate to use in a project's Unit net CONE. Complainants maintain, however, that NYISO's response indicates that NYISO's review of contracts is too narrow to effectively protect against economic entry because the insistence that out-of-market revenues are irrelevant to the Unit net CONE calculation demonstrates that NYISO and the Downstate LSEs have missed the point that these are an important check on suppliers' incentive to understate their costs.¹²³ Complainants assert that a review of out-of-market revenues provisions of contracts is, therefore, part and parcel of NYISO's responsibilities under the Services Tariff to "determine the reasonably anticipated Unit Net CONE" for a supplier.¹²⁴

Commission Determination

93. We deny this aspect of the Complaint. NYISO has confirmed that it evaluates contracts as necessary to determine whether a cost is appropriate to use in a project's Unit net CONE. Although encouraged by this response, Complainants continue to argue that NYISO should consider out-of-market revenues to determine if the supplier has an incentive to understate costs. We disagree. NYISO's task is to verify a new entrant's Unit net CONE based on cost information supplied by the new entrant. The Services Tariff is explicit that a new entrant that wants to rely on its Unit net CONE must provide all required cost information to NYISO.¹²⁵ The Services Tariff neither provides, nor is it necessary, for NYISO to consider any out-of-market revenues that may be received by the new entrant in determining the new entrant's Unit net CONE. Out-of-market revenues that may be received by the new entrant simply do not enter into the determination of either the gross cost of new entry, a figure based on a hypothetical unit established in the demand curve proceeding, or the projected energy and ancillary service revenues that are used in deriving the new entrant's Unit net CONE. In the demand curve proceeding, NYISO used capital costs, financing costs, operating and maintenance costs, including property taxes and insurance, based on the Consultant's recommendation to establish the gross cost of new entry.¹²⁶ In the instant proceeding, Meehan explains

¹²³ Complainants July 21, 2011 Answer at 18.

¹²⁴ *Id.* (citing Services Tariff, § 23.4.5.7.3.3).

¹²⁵ June 3, 2011 Complaint at 39 (citing Services Tariff, § 23.4.5.7.3.6 (a new entrant is only permitted to use its Unit Net CONE as its Offer Floor if it can "demonstrate to the reasonable satisfaction of [NYISO] that its Unit Net CONE is less than any Offer Floor that would otherwise be applicable"))).

¹²⁶ January 28, 2011 Order, 134 FERC ¶ 61,058 at PP 13-17 (describing the components NYISO uses in the calculation of the CONE for a peaking unit).

net energy revenue estimates are arrived at through econometric projections made using the model used in the Demand Curve reset proceeding (NERA Model).¹²⁷ For ancillary service revenues, NYISO provides NERA an estimate to be used in calculating Unit net CONE.¹²⁸ Once NYISO is satisfied that the Unit net CONE is properly determined, it compares it to the forecasted ICAP prices in assessing whether the new entrant will be mitigated. NYISO does not and need not consider revenues from any other source in its mitigation determination. Therefore, we will not require NYISO to extend its review of a new entrant's Unit net CONE determination to consider out-of-market revenues.

5. Natural Gas Prices in Unit Net CONE

a. Complainant

94. As noted earlier, prong (b), i.e., the Unit exemption prong, of the mitigation test compares expected average capacity revenues over the resource's first three years of operation with the resource's Unit Net CONE. Unit Net CONE is calculated as Gross CONE (basically, the resource's localized, levelized embedded fixed costs) minus the resource's expected net energy and ancillary service revenues. The Net CONE parameter is also used in developing the Default net CONE for NYISO's ICAP demand curves.

95. Complainants argue that NYISO's method of calculating expected net energy and ancillary service revenues for Unit net CONE in the prong (b) mitigation test is not reasonable because it relies on two features that are inconsistent with those used in calculating the same parameter for Default net CONE in the 2010 demand curve reset process.¹²⁹ Through reference to the demand curve reset process, Complainants raise for

¹²⁷ NYISO July 7, 2011 Comments, Meehan Aff. ¶¶ 15-20, 130. January 28, 2011 Order, 134 FERC ¶ 61,058 at P 130 (describing NERA's econometric price model and a dispatch model that estimates the hypothetical peaking unit's energy and ancillary services revenues based projections of Locational Based Marginal Prices (LBMPs). Each price model is focused on estimating the relationship between LBMP and the reserve margin while controlling for other factors such as gas costs. Lower estimated energy and ancillary services revenues translate into a higher value for net CONE; likewise, higher estimated energy and ancillary services revenues translate into a lower value for net CONE.)

¹²⁸ NYISO July 7, 2011 Comments, Meehan Aff. ¶ 23.

¹²⁹ The Default net CONE value is used in both the Default exemption test and the demand curve reset process.

discussion from that proceeding four issues that were discussed in the stakeholder process and in the Demand Curve Reset Report.¹³⁰ First, net energy and ancillary service revenues in the prong (b) test are based on natural gas futures prices, while the same parameter is calculated based on historical natural gas prices in the demand curve process.¹³¹ Complainants assert that, because the Commission has rejected the use of natural gas futures prices in estimating the energy and ancillary services offset and the associated net CONE calculation in the 2010 demand curve reset process, NYISO should explain the use of New York Mercantile Exchange (NYMEX) natural gas futures prices in the Unit mitigation exemption test and quantify its impact on Unit net CONE.

96. Second, the prong (b) mitigation test is based on the average of net energy and ancillary service revenues over a three-year Mitigation Exemption period, while the Default net CONE of the demand curve is based on average revenues over the entire useful life of the hypothetical reference resource.¹³²

b. Complainants' July 21, 2011 Answer

97. With respect to the first inconsistency, Complainants argue that NYISO should be directed to provide detailed information needed to confirm that the use of natural gas futures prices will not skew its Unit net CONE calculations. Complainants explain that in southeast New York, natural gas is the fuel that most often sets the marginal price, a key determinant in the price of electricity.¹³³ Complainants contend this means that when

¹³⁰ June 3, 2011 Complaint, Younger Aff. ¶ 88 (*see* NYISO November 30, 2010 Filing, Meehan Aff., NERA/S&L Report at 53-54). The data set used to price natural gas in the buyer-side mitigation process became the forum to revisit the discussion of gas futures from the earlier proceeding. The four issues were: (1) adjusting prices hour-by-hour, (2) intra-month price volatility, (3) the elasticity of LBMP changes with respect to gas price changes from regression analysis, and (4) regression results for LBMPs in the month of November.

¹³¹ June 3, 2011 Complaint at 43 (citing Younger Aff. ¶¶ 88-89). Complainants cited this example of one place where NYISO had given stakeholders a perspective on how the ISO was conducting mitigation. Complainants stated this was an inconsistency in the methodology and should have been implemented differently. Complainants requested relief in five ways detailed in Section 6 below.

¹³² Complainants assert that NYISO's use of gas futures prices in the Prong (b) test was first revealed by NYISO's consultant Meehan in NYISO's July 6, 2011 Answer.

¹³³ Complainants July 21, 2011 Answer, Younger Aff. ¶ 11.

natural gas prices rise, net energy revenues should also rise. Complainants argue NERA's model, in the demand curve reset, did not produce reasonable results for net energy revenues when gas futures prices were used and that, because of this, NYISO should not replace historical gas prices with natural gas futures prices in estimating net energy and ancillary services revenues.¹³⁴

98. Regarding the second inconsistency, Mr. Younger disagrees that the demand curve reset process and the mitigation exemption test warrant different time periods for calculating net energy and ancillary services revenues.¹³⁵ Mr. Younger asserts that the economics of a project must be evaluated over the full life of the project for the mitigation exemption test as was the case in the demand curve reset process. In his view, no reason has been given for why a shorter, three-year mitigation time frame is more appropriate for the Unit mitigation exemption test used to evaluate an economic entry decision. Complainants also contend the impacts of using only a three-year period have not been quantified.¹³⁶

c. NYISO's Answers

99. NYISO responds that its approach to gas futures prices is reasonable, consistent with Attachment H, and that there is no need for it to confirm that the Unit net CONE calculation was not skewed. In response to Complainants' comment that the Net CONE calculations in the mitigation test are inconsistent with those in the demand curve reset, NYISO argues that different approaches are reasonable for estimating Default versus Unit net CONE because different objectives underlie estimates of these two parameters. In NYISO's view, the objective in estimating Default net CONE is to develop a set of demand curves over time that encourage efficient entry. According to NYISO, achieving this objective requires a set of demand curves that provides a reasonable opportunity for efficient entrants to recover the net cost of entry in the capacity market on average over time, but not necessarily in each year. This requires the average of estimates of net energy revenues underlying Default net CONE to be accurate over time, but not necessarily in each demand curve reset period. NYISO argues that using historical natural gas prices, rather than gas futures prices, to estimate the Default net CONE of the reference generator results in capacity market revenues that will more likely match the Default net CONE of a new entrant on average over time. That is because, according to

¹³⁴ *Id.* ¶ 13.

¹³⁵ *Id.* ¶ 16.

¹³⁶ *Id.* ¶ 16.

NYISO, forecasting gas prices over the 30-plus-year life of a generator is very difficult, but using recent historical natural gas prices in every demand curve reset process will result in net energy revenues (and thus, Default net CONE), that reflect actual gas prices over time, albeit with a lag.¹³⁷

100. By contrast, NYISO argues, the objective in the mitigation exemption test is to ensure that the entry decision is economic as of a specified time. To achieve this objective, the estimate of net energy revenues for the Mitigation Study Period must be accurate. In NYISO's view, estimating energy prices using a snapshot of natural gas futures prices should reflect the economics of the entry decision over the Mitigation Study Period.¹³⁸

101. NYISO and its consultant, Mr. Meehan, also disagree with Complainants that the NERA model produces nonsensical results because net energy revenues were not positively correlated with gas prices. Mr. Meehan states that net energy revenues may reasonably increase or decrease as natural gas futures prices decline, depending largely on the heat rate of the unit, and provides an illustrative example.¹³⁹

102. In addition, Mr. Meehan refers to the NERA/Sargent & Lundy Demand Curve Report¹⁴⁰ and further explains why the reasons for rejecting the use of natural gas futures prices in the Demand Curve reset process do not apply to the mitigation exemption test. For example, Mr. Meehan asserts that using natural gas futures prices rather than historical natural gas prices raises concerns about introducing an arbitrary effect. This is because a natural gas futures price is a solitary "snapshot" projection of what a price would be in a given month; whereas historical natural gas prices use the average of all the days of that month and reflect all the specific factors that affect energy prices. In the mitigation exemption test this concern is reasonably addressed by averaging the monthly natural gas futures prices over the three-year Mitigation Study Period.¹⁴¹

¹³⁷ NYISO's July 7, 2011 Answer, Meehan Aff. ¶ 16.

¹³⁸ *Id.* ¶ 17.

¹³⁹ NYISO August 8, 2011 Answer, Meehan Aff. ¶ 12.

¹⁴⁰ The Demand Curve Report, written by NERA and Sargent & Lundy, submitted with the NYISO ICAP demand curve filing, provides details on the assumptions and methods used by the consultant to develop ICAP demand curves for New York City, Long Island and the Rest-of-the-State.

¹⁴¹ NYISO August 8, 2011 Answer, Meehan Aff. ¶ 15.

103. Mr. Meehan also notes that the use of natural gas futures price does not account for the volatility of daily natural gas prices which could significantly affect the dispatch of units with greater optionality,¹⁴² but he does not agree that this argues against the use of natural gas futures prices. He explains, “The mean gas price used is correct but the dispatch is not examined over the full range of possible daily gas prices. The complexity of this adjustment and need to expand the analysis is a good example of why the NERA/S&L Demand Curve Report recommended against adjusting for gas price futures. However, I do not believe that this is a significant issue that would render the net energy revenue estimates unreasonable or unfit for use to implement In-City mitigation measures.”¹⁴³ Mr. Meehan emphasizes that any bias from using futures prices in this case would be to understate net energy revenue.¹⁴⁴ That is, in Mr. Meehan’s view, attempts to correct for volatility will likely increase the estimate of net energy revenue and that would translate into a lower Unit net CONE and a greater likelihood that the unit would be exempt from mitigation.

104. With respect to the time frame over which Unit net CONE should be determined, Mr. Meehan agrees that it would be reasonable to justify the development of a generating unit over its expected life. However, in his view, analysis over the Mitigation Study Period is a stricter and more appropriate test in the mitigation context. He explains that, “It is irrelevant if a unit is economic over its full life if it is not economic in the Mitigation Study Period, as it would constitute uneconomic entry to not defer the entry decision.”¹⁴⁵

Commission Determination

105. We find that NYISO has justified the use of natural gas futures prices in the calculation of the net energy revenue offset used to determine the Unit net CONE. We do not find it necessary to require NYISO to explain this result further or quantify its impact on Unit net CONE. Complainants offer two basic reasons why historical natural gas prices should be used to determine the Unit net CONE value.

¹⁴² Optionality refers to a unit whose cost structure results in a dispatch that will vary considerably with market prices and conditions. For example, a base load unit would have no optionality and a peaking unit would have high optionality.

¹⁴³ NYISO August 8, 2011 Answer, Meehan Aff. ¶ 16.

¹⁴⁴ *Id.* ¶ 17.

¹⁴⁵ *Id.* ¶ 21.

106. First, Complainants argue, historical natural gas prices were used to calculate Default net CONE in the demand curve reset process, and therefore should also be used in calculating Unit Net CONE in the prong (b) mitigation test. Otherwise there is an “apples to oranges” comparison problem. Complainants argue that it is not reasonable for NYISO to use different approaches in calculating the same generic parameter, i.e., the net energy revenues of a generator.

107. Second, Complainants argue that NERA’s model used to estimate net energy revenues did not produce sensible results when natural gas futures prices were used, and for that reason NERA recommended using historical natural gas prices in the demand curve reset process. Therefore, historical natural gas prices, and not natural gas futures prices should also be used to develop estimated net energy revenues in the prong (b) Unit exemption test that also are developed using the NERA model, according to Complainants.

108. In response to Complainants’ first point, we agree with NYISO that the objectives underlying the calculation of Default and Unit net CONE differ and that these differing objectives justify using natural gas price forecasts from different sources in calculating net energy and ancillary service revenues in the mitigation test versus in the demand curve reset process. We also agree with NYISO that the objective underlying the demand curves is to provide a reasonable opportunity for an efficient new entrant to recover its costs over its lifetime, and that using historical natural gas prices is likely to provide an accurate estimate of average of net energy and ancillary service revenues on average over time, although not necessarily for any individual year. That is because historical natural gas prices are replaced with updated historical natural gas prices every three years with each demand curve reset process.

109. By contrast, prong (b) of the mitigation test is focused on a shorter time period. That is, prong (b) compares average expected capacity revenues over the resource’s first three years of operation with Unit Net CONE. It is more important in this context to accurately estimate the individual years’ net energy and ancillary service revenues. We agree with NYISO that natural gas futures prices are likely to provide the more accurate forecast of future natural gas prices in the near term individual years than would historical natural gas prices. Natural gas futures prices represent a kind of consensus among market participants about the expected price for gas at the delivery date. That is because a natural gas futures price at any point in time is the price at which market participants are willing to transact at that time for delivery of gas at a specified time in the future.

110. Moreover, natural gas futures prices for delivery dates a few years out into the future are available, including for the three-year Mitigation Study period. But they are not available for the full 30-year life of a typical generation resource. Thus, while futures prices could be used in the mitigation test, they are not available to be used in estimating

the life-time energy revenues of a new generator and the associated Net CONE underlying the ICAP demand curve.

111. Complainants also argue that natural gas futures prices should not be used as input to the NERA model in estimating net energy and ancillary services revenues, because the NERA model does not accurately analyze the effect of gas prices on net energy and ancillary services revenues. But even if Complainants' criticism of the model were correct, their criticism does not shed light on whether historical or futures prices should be used as inputs to the model. If the NERA model were flawed, the remedy would be to fix the model. Complainants do not explain why using historical gas prices in a flawed model would provide a more accurate estimate of net energy and ancillary service revenues than using natural gas futures prices.

112. We are also not persuaded that the NERA model produces nonsensical results, for the following reason. Net energy revenues are calculated as gross energy revenues (mainly, LBMP multiplied by the quantity of energy sold) minus variable costs (which are largely the fuel costs of producing energy). Of course, natural gas prices influence the LBMP to the extent that the marginal, price-setting resource is fired by natural gas, since higher natural gas prices raise the offer price of the marginal resource. And natural gas prices influence the variable costs of a gas-fired resource. If a given change – for example, an increase – in natural gas prices increases LBMPs by the same percentage as the increase in the variable cost of a gas-fired resource, then the result would be an increase in the net energy revenue of the resource.¹⁴⁶ However, as NYISO observes, a natural gas price increase does not always result in a percentage increase in the variable cost of a gas-fired resource that matches the percentage increase in LBMPs. One reason is that the marginal resource that sets the LBMP is not always a gas-fired resource, and in these instances, a natural gas price increase may have little or no effect on the LBMP. And if the resulting increase in variable costs is sufficiently large relative to the increase in LBMPs, then the resource's net energy revenues could decrease as a result of a natural gas price increase. Thus, it is not unreasonable for the NERA model to conclude that net energy revenues may vary inversely with natural gas prices.

113. Finally, we disagree with Complainants and their consultant, Mr. Younger, that it is unreasonable for the prong (b) mitigation test to compare average capacity revenues and Unit Net CONE for only a three-year period. Mr. Younger contends that the test should compare lifetime revenues and costs. We agree in principle that determining

¹⁴⁶ This is because a percentage increase of a larger number, i.e., LBMP results in a greater dollar increase than a percentage increase of a smaller number, i.e., variable costs.

whether a new investment is economic depends on a comparison of lifetime revenues and costs. But as a practical matter, it is very difficult to accurately estimate revenues and costs far into the future. Moreover, the present value of revenues and costs in the later years of a resource's life is small compared to those in the early years, because of the high level of discounting of future revenues and costs. Accordingly, we think that it is reasonable to compare the average of the first three years of revenues and costs, as is done in the current prong (b) mitigation test, since forecasting revenues and costs in a resource's early years can be done more accurately, and these revenues and costs have a comparatively large present value.

6. Requested Relief

a. Complaint

114. Complainants request that the Commission require NYISO to (1) revise the Services Tariff to specify, in greater detail, the methodology for implementing buyer-side mitigation rules; (2) perform the benchmarking analysis described in the Younger Affidavit,¹⁴⁷ (3) conduct a stakeholder process to allow comments on the methodology presented in the Younger Affidavit and to get remaining questions regarding the mitigation methodology answered. In addition, Complainants request that the Commission require the MMU to issue a written report confirming whether NYISO's mitigation and exemption determinations and calculations were conducted in accordance with the terms of the Services Tariff, and, if not, identifying the flaws inherent in NYISO's approach. Complainants also request that the Commission consider whether, consistent with the PJM MOPR order, it would be appropriate to have the MMU, rather than NYISO, calculate and verify new entrants' Unit net CONEs in the future.

115. Complainants state that they are not seeking to inject themselves into individual exemption or mitigation decisions, or seeking access to confidential information that new entrants provide in the course of the mitigation process. Rather, according to Complainants, they are seeking to understand the parameters that NYISO is applying to its mitigation exemption test and offer floor processes to confirm that NYISO is, in fact, complying with the requirements of the Services Tariff.

116. Complainants also seek to hold NYISO's class year allocation process and the corresponding exemption and mitigation determinations in abeyance pending resolution

¹⁴⁷ According to Complainants, this would apply the exemption and offer floor methodologies to the proxy peaking unit, so that market participants could confirm that adequate, objective and consistent testing processes are being applied, without requiring the disclosure of confidential cost data.

of the Complaint. Complainants argue that the projects currently being examined for mitigation and exemption comprise more than 2,500 MW of capacity; thus, the mitigation determinations are critical to the future functioning of the NYISO markets, and incorrect exemption and mitigation decisions will cause the market to clear at artificially suppressed levels for many years. Further, Complainants assert that the Complaint must be promptly resolved because the Commission has thus far declined to retroactively apply buyer-side mitigation to units that already are commercially operable. Complainants also assert that abeyance would avoid the circumstance in which uneconomic entry decisions may be alleged to have been made in reliance on erroneous NYISO exemption determinations.

117. Complainants argue that even if the Commission declines to hold the class year in abeyance, there is no legitimate reason for giving any weight to determinations made in violation of the Services Tariff or under provisions of the Services Tariff found to be unjust and unreasonable. Complainants state that the Commission has made clear that even a mitigation exemption expressly granted by the Commission remains subject to later rescission and prospective mitigation.¹⁴⁸ Accordingly, Complainants request, in the alternative, that the Commission establish a refund effective date based on the filing of the Complaint, withdraw any exemptions incorrectly granted, and make any necessary adjustments to offer floors on a prospective basis. Complainants emphasize that alternative relief would be prospective only, and that they are not requesting resettlement of any monthly auctions that occur while this Complaint is before the Commission.

118. Complainants argue that, if the Commission finds that the Services tariff allows any of the above-discussed NYISO “approaches,” the Commission should recognize, as it did in the case of PJM MOPR¹⁴⁹ and as it has done on any number of occasions where supplier mitigation was involved,¹⁵⁰ the substantial threat to effective mitigation posed by any loopholes. Therefore, it should act to protect the integrity of the buyer-side mitigation regime by finding that the relevant tariff provisions of the Services Tariff are

¹⁴⁸ June 3, 2011 Complaint at 49 (citing *Maryland Pub. Serv. Comm’n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169, *order on reh’g*, 125 FERC ¶ 61,340 (2008)).

¹⁴⁹ *Id.* at 42 (citing *PJM Interconnection, L.L.C., Inc.*, 135 FERC ¶ 61,022 (2011) (PJM MOPR Order)).

¹⁵⁰ *Id.* at 42 (citing, *inter alia*, *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,145 (2009); *Maryland Pub. Serv. Comm’n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169; *on reh’g*, 125 FERC ¶ 61,340 (2008); *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 (2004), *on reh’g*, 110 FERC ¶ 61,053 (2005)).

unjust and unreasonable. According to Complainants, the PJM MOPR Order makes clear that the Commission can and will reconsider buyer-side mitigation rules in the face of mounting evidence that what was previously only a theoretical risk could now allow for uneconomic entry.¹⁵¹

119. Bayonne Energy Center requests that the Commission make clear that the outcome of this proceeding is only applicable to the current buyer-side mitigation rules that were made effective November 27, 2010 (Post-Amendment Rules), and that the proceeding will not affect exemption determinations issued under rules effective before that date (Pre-Amendment Rules).¹⁵² Bayonne Energy Center states that it has a 512 MW plant and transmission line under development (Project). Bayonne Energy Center states that the Project is Class Year 2009¹⁵³ and is considered in-City capacity.¹⁵⁴ Bayonne Energy Center states that NYISO has already issued it an exemption determination under the Pre-Amendment Rules.¹⁵⁵

120. Bayonne Energy Center states that any attempt to re-test projects that have already received an exemption determination under the Pre-Amendment Rules violates the filed rate doctrine because it retesting retroactively invalidates the lawful rate as it existed at the time the NYISO issued such determinations. Bayonne Energy Center further argues that it would be inappropriate to modify the prior, Commission-approved test under the Pre-Amendment Rule based on the Post-Amendment Rules that did not take effect until after the determinations were issued.¹⁵⁶

b. NYISO's Answer

121. NYISO responds that Complainants must not be allowed to inappropriately inject themselves into market power mitigation functions that must only be performed by independent entities. NYISO states that it is not Complainants' responsibility to "confirm that NYISO is, in fact complying with the requirements of the Services Tariff,"

¹⁵¹ *Id.* at 42 (citing PJM MOPR Order, 135 FERC ¶ 61,022 at P 139).

¹⁵² Bayonne Energy Center July 6, 2011 Protest at 13.

¹⁵³ *Id.* at 4-5.

¹⁵⁴ *Id.* at 2.

¹⁵⁵ *Id.* at 7.

¹⁵⁶ *Id.* at 12.

this usurps the role of the MMU, tips the balance between protecting consumers from the exercise of market power and avoiding over-mitigation, and creates a serious risk of impeding entry into the capacity market. NYISO adds that Commission precedent has been clear that market power monitoring and mitigation are functions that must be performed by independent entities, not by, or even in collaboration with, market participants.

122. With respect to the “benchmarking analysis,” NYISO maintains that its response was limited by considerations of commercially sensitive information, pending Commission decisions, and the requirements approved in the November 26, 2010 Order.¹⁵⁷ Furthermore, NYISO contends it satisfied the disclosure requirements by posting a spreadsheet on November 12, 2010 (November 12, 2010 posting) that was updated June 8, 2011.¹⁵⁸ That spreadsheet was updated on October 4, 2011.

123. In response to Complainants’ suggestion that the Commission should direct the MMU to take on new responsibilities such as calculating and verifying Unit net CONEs, NYISO states that these requests are actually requests for tariff revisions to modify Attachment O of the Services Tariff.¹⁵⁹ NYISO argues that individual market participants should not be allowed to dictate the actions or the monitoring and mitigation priorities of an independent MMU. NYISO states that the MMU is already responsible for detecting potential market power abuse and market manipulation in the NYISO-administered markets for energy, ancillary services, financial transmission rights, and capacity and that the MMU determines what issues warrant its attention consistent with its overall responsibility to detect and report potential market problems to the Commission. NYISO adds that the MMU is monitoring and supporting NYISO’s administration of the buyer-side mitigation rules and it has the discretion to give the issue higher priority, should it deem it warranted.

124. NYISO asserts that the PJM MOPR precedent is not binding on it because NYISO was not a party to the PJM MOPR docket, and NYISO-specific issues were not considered there. Moreover, according to NYISO, the Commission’s order in the PJM MOPR proceeding accepted a voluntary proposal by PJM under section 205 of the FPA that the same assumptions be used in both buyer-side mitigation and capacity demand curve calculations, while there has been no such proposal and no such linkage in the

¹⁵⁷ NYISO July 7, 2011 Answer at 18-19.

¹⁵⁸ *Id.* at 30-31.

¹⁵⁹ NYISO July 7, 2011 Answer at 56.

NYISO context. In addition, NYISO states that no such proposal has been made in NYISO and the Commission has not required ISOs/RTOs to adopt standardized rules.¹⁶⁰

c. Comments

125. In its July 22, 2011 answer, the MMU states that it has reviewed the buyer-side mitigation exemption tests, has identified no compliance concerns with respect to NYISO's implementation of buyer-side mitigation rules, and does not support holding the class year allocation process in abeyance. However, the MMU notes that it provides a report on the Reliability Needs Assessment and Comprehensive Reliability Plans issued by NYISO.¹⁶¹ The MMU states that, if it would increase participant confidence in the results, the MMU would not be opposed to a public report discussing its assessment of the buyer-side mitigation tests.¹⁶²

126. With respect to the request for the MMU to perform the exemption test, the MMU maintains this role is comparable to the role proposed for the market monitors in both PJM and ISO-New England for analogous measures. However, the MMU states that while it is capable and not opposed to performing this, NYISO is correct that the current tariff calls for the MMU to only review and comment on the tests. The MMU asserts that its willingness to perform this role in the future should not be viewed as a criticism of NYISO's ability to perform the role, or its performance thus far.¹⁶³

127. With respect to the MMU's role, the New York Commission states that the proposed approach would be inconsistent with the responsibilities and duties of the MMU, which are specified to include review and comment. The New York Commission maintains that pursuant to the revised Market Monitoring Plan, the calculations for, and implementation of, the mitigation rules are clearly delineated to the internal Market

¹⁶⁰ *Id.* at 46.

¹⁶¹ The Reliability Needs Assessment and Comprehensive Reliability Plan are components of NYISO OATT, Attachment Y. NYISO and market participants use this process to plan for and meet the reliability needs of the New York State Bulk Power Transmission Facilities. The MMU provides comments on these parts of the process to determine whether market rule changes are necessary to address an identified failure, if any, in one of the NYISO's competitive markets.

¹⁶² MMU July 21, 2011 Answer at 4-5.

¹⁶³ *Id.* at 5.

Mitigation and Analysis Department (MMA) and the MMU should not be responsible for administering the Services Tariff.¹⁶⁴ The New York Commission argues that insufficient information was given to support the allegation that NYISO is unwilling to apply effective mitigation, and thus, there is no basis for revising the Market Monitoring Plan. According to the New York Commission, Complainants seek to shift the responsibility to the MMU in hope of a more favorable outcome.

128. Energy Curtailment Specialists state that they strongly support the Complaint and the requested relief. They add that because demand response providers often receive a greater share of their revenues from capacity markets than energy markets, preserving the integrity of capacity markets can be more important to facilitating demand response than getting energy pricing right. Energy Curtailment Specialists aver that if RTOs and ISOs are permitted to disregard the buyer-side mitigation rules in their tariffs and thus artificially suppress capacity prices, it will prevent demand response resources from participating in capacity markets and discourage investment in such resources.¹⁶⁵ Energy Curtailment Specialists refer to the Commission's directive in Order No. 745¹⁶⁶ that demand response providers are to be paid the full locational marginal price for energy in order to allow more demand response resources to cover their investment costs. Energy Curtailment Specialists aver that the same concern about covering investment costs is present here.

Commission Determination

129. We addressed above in greater detail the methodologies used by NYISO and directed compliance to ensure greater transparency in the mitigation exemption test and offer floor determination process. To the extent compliance is directed, it has been described above. We find the "benchmarking analysis" and stakeholder process requested by the Complainants unnecessary. A major component of the "benchmarking" was speculation as to the demand curve inputs of the November 12, 2010 posting; NYISO has fulfilled this data disclosure requirement of Attachment H by updating its

¹⁶⁴ New York Commission July 6, 2011 Answer at 7.

¹⁶⁵ Energy Curtailment Specialists Comments in Support at 6.

¹⁶⁶ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322, at P 18 (2011) (Order No. 745).

November 12, 2010 posting in June and October of 2011.¹⁶⁷ Furthermore, our earlier determination requiring the posting of an example of how the mitigation and offer floor rules will be applied addresses these concerns.

130. With respect to Complainants' request to require the preparation of a written report by NYISO's MMU confirming whether NYISO's mitigation and exemption determinations and calculations were conducted in accordance with the terms of the Services Tariff, and, if not, identifying the flaws inherent in NYISO's approach, we direct the MMU to prepare a public report discussing its assessment of the buyer-side mitigation determinations. We find that this approach will increase participant confidence in the results of the tests. This report should be presented concurrently with NYISO's announcement of the mitigation test results. NYISO is directed to submit tariff sheets outlining this responsibility of the MMU within 45 days.

131. The MMU's role is clearly delineated in the Services Tariff, specifically in Attachment H and Attachment O, and its responsibilities are separate and distinct from those of NYISO's internal Market Mitigation and Analysis department. We concur with NYISO, the MMU, and the New York Commission that the currently effective tariff makes NYISO responsible for calculating and verifying the Unit net CONE of new entrants. Likewise, we find although the MMU does calculate the analogous metrics in PJM and ISO-New England, similar treatment is not required here or appropriate without tariff modification. Complainants would have to show that NYISO's tariff is unjust and unreasonable and they have not done so. NYISO is charged with seeking comment from the MMU on matters relating to the determination of price projections and cost calculations while NYISO administers the effective tariff. We find that Complainants have not demonstrated that this current division of responsibilities is unjust or is being inappropriately exercised.

132. With respect to Complainants' request for abeyance of cost allocation decisions, we find the issue is moot by the fact that the Class Year 2009 and 2010 process concluded in November 2011 with all remaining parties accepting cost allocations, and thus, we deny the request. To the extent NYISO provided initial mitigation exemption determinations prior to those processes, we will require NYISO to revise its determinations with respect to our findings herein. To the extent that, as a result of such revisions, a unit that previously had been determined to have passed the mitigation exemption test is now determined to have failed the test, that unit shall be subject to the

¹⁶⁷ NYISO, *ICAP Data & Information: Reference Documents, In-City Mitigation Documents (June 2012)*, available at http://www.nyiso.com/public/markets_operations/market_data/icap/index.jsp.

applicable offer floor prospectively, for the duration specified in NYISO's tariff. In these latter circumstances, we will not require NYISO to re-run the auctions occurring in the past based on such improperly-determined offer floors. Re-running past auctions would create market uncertainty for market participants and require resolving complex questions. However, in any past auction in which the applicable capacity price was below the properly-determined offer floor (and thus, the unit would not have cleared if the unit's offer was at the offer floor), it would be improper to count such an auction towards the number of auctions that the unit must clear before it is no longer subject to an offer floor. By contrast, in any past auction in which the unit cleared and the applicable capacity price equaled or exceeded the properly-determined offer floor if the offer floor had applied at that time, the unit would have cleared the auction even if its offer price had been equal to the offer floor. As a result, it would be reasonable to count such an auction towards the required number of auctions needed for the unit to clear before terminating its offer floor."

133. Section 206(b) of the FPA provides that upon the filing of a complaint, the Commission must establish a refund effective date that is no earlier than the date of the complaint and no later than five months subsequent to the date of the complaint.¹⁶⁸ In order to provide maximum protection to consumers, and consistent with our precedent, we set the refund effective date at the earliest date possible, the date of the Complaint.¹⁶⁹ Accordingly, we will set the refund effective date as of the date of the Complaint, June 3, 2011,¹⁷⁰

134. Finally, Bayonne Energy Center and NYISO assert that the outcome of this proceeding is only applicable to the currently effective buyer-side mitigation exemption rules made effective November 27, 2010, and will not affect exemption determinations issued under the rules effective before that date, the latter of which are relevant to the complaint in Docket No. EL11-50.¹⁷¹ We agree. The June 3, 2011 Complaint at issue here only concerns the implementation of the mitigation rules effective since November 26, 2010, and not those effective prior to November 27, 2010.

¹⁶⁸ 16 U.S.C. § 824e(b) (2006)

¹⁶⁹ E.g., *Canal Electric Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

¹⁷⁰ Although we set a refund effective date herein, we do not require NYISO to rerun the auctions and thus, do not anticipate a need for refunds.

¹⁷¹ Bayonne Energy Center July 6, 2011 Protest at 6.

The Commission orders:

(A) Except to the limited extent as discussed in the body of this order above, the June 3, 2011 Complaint is hereby denied.

(B) NYISO is hereby directed to file tariff revisions and post its numerical example with narrative explanation within 45 days of the date of this order on its website as discussed in the text above.

By the Commission. Commissioner Clark voting present.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.