

151 FERC ¶ 61, 043  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Astoria Generating Company L.P.; 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 Nos. EL11-42-001

v.

New York Independent System Operator, Inc.

New York Independent System Operator, Inc.

ER12-2414-000  
ER12-2414-001  
ER12-2414-002

ORDER ON CLARIFICATION, REHEARING, AND COMPLIANCE FILING

(Issued April 16, 2015)

1. In a June 22, 2012 order,<sup>1</sup> the Commission granted, in part, and denied, in part, a complaint filed by 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) against the New York Independent System Operator, Inc. (NYISO). Complainants alleged that NYISO improperly implemented its buyer-side market power mitigation provisions in the New York City (NYC) installed capacity (ICAP) market and violated its Market Administration and Control Area Services Tariff (Services Tariff), and Complainants requested relief that included tariff revisions and refunds (Complaint). As discussed below, the Commission grants clarification, in part, and denies rehearing of the June 22, 2012 Order.

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<sup>1</sup> *Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 (2012) (June 22, 2012 Order).

2. The June 22, 2012 Order directed NYISO to file, within 45 days, a compliance filing making certain revisions to its Services Tariff and to post numerical examples on its website to clarify, in general, how the mitigation exemption test and Offer Floor calculations are implemented. As discussed below, the Commission accepts NYISO's tariff record filing, as corrected, to be effective June 22, 2012, subject to a further compliance filing.

### **I. Background**

3. NYISO administers market power mitigation rules in the NYC ICAP market to guard against the exercise of market power. In the case of existing resources, market power mitigation entails applying bid caps to prevent higher prices attributable to economic withholding. Competitive capacity offers from existing resources are expected to be quite low since most existing resources recover their operating costs through participation in energy and ancillary services markets. In the case of new resources, market power mitigation entails applying bid floors to prevent lower prices attributable to below-cost bids from uneconomic entry.<sup>2</sup> Competitive capacity offers from new entrants are expected to be higher than those of existing resources because they should reflect the net cost of new entry. In this way, market power mitigation protects the NYC ICAP market from both seller-side and buyer-side market power. Market power mitigation ensures that market clearing prices are a reliable competitive indication of the value of capacity to guide efficient decisions to build new capacity and retire existing capacity. Unless exempt from this mitigation, NYC ICAP suppliers that enter the capacity market must do so at a price no lower than the applicable Offer Floor.<sup>3</sup> As initially approved, the Offer Floor<sup>4</sup> of section 23.4.5.7 of the Services Tariff is defined as the lower of: (i) 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, which NYISO refers to as Mitigation Net CONE<sup>5</sup> or (ii) the new entrant's actual net cost of new entry for the specific unit, which

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<sup>2</sup> As pertains to new entry, the Commission recently directed, pursuant to section 206 of the Federal Power Act (FPA), modifications to NYISO's buyer-side mitigation rules to allow for private investors that certify they are a purely merchant investment, with no out-of-market subsidy, and relying solely on market revenues to enter the ICAP market unmitigated. *Consolidated Edison Company of New York, Inc.*, 150 FERC ¶ 61,139, at PP 4, 45 (2015).

<sup>3</sup> Services Tariff, § 23.4.5.7.

<sup>4</sup> Services Tariff, § 23.2.1.

<sup>5</sup> In an order issued March 19, 2015, the Commission accepted NYISO's proposal of a defined term "Mitigation Net CONE," which replaces what the Commission previously referred to as "Default Net CONE." *New York Indep. Sys. Operator*,

we refer to in this proceeding as the Unit Net CONE.<sup>6</sup> We refer here to the first Offer Floor as the Default Offer Floor, and to the second as the Unit Offer Floor.

4. NYISO determines whether a supplier is exempt from Offer Floor mitigation using mitigation exemption tests that are described in its tariff.<sup>7</sup> 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 Mitigation 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 (Mitigation Study Period), it is exempt from Offer Floor mitigation.

5. On June 23, 2011, Complainants filed the Complaint alleging that: (i) NYISO's implementation of its buyer-side mitigation rules lacked transparency and objectivity; (ii) NYISO erred in the use of inflation in mitigation exemption testing and Offer Floor determinations; (iii) NYISO incorrectly projected future capacity prices, (iv) NYISO did an inadequate review of bilateral, arms-length contracts; and (v) NYISO used a method of natural gas pricing in determining Unit Net CONE that is inconsistent with the natural gas pricing methodology used in determining the ICAP Demand Curve.

6. In the June 22, 2012 Order, the Commission found, *inter alia*: (i) some merit in Complainants' allegation that NYISO's implementation of the buyer-side mitigation rules lacked transparency and directed certain tariff changes to enhance future disclosure of non-confidential information, as well as posting of hypothetical examples on the NYISO website; (ii) that any inflation adjustment should be consistently applied to all parts of the mitigation exemption test and Offer Floors, should be consistent with that used in the determination of the ICAP Demand Curve, and that any Offer Floor, once set, should be adjusted annually for inflation; (iii) that NYISO should use projected price values from the same Demand Curve that is effective at the time it makes an exemption determination in comparing Mitigation Net CONE with spot market auction prices; (iv) that NYISO has adequately reviewed bilateral, arms-length contracts in the determination of a project's Unit Net CONE; and (v) 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. The Commission required NYISO, to the extent that it provided initial mitigation exemption determinations prior to the conclusion of the Class Year 2009 and 2010 processes, to revise its determinations in light of the rulings in the June 22, 2012 Order. Further, to the extent that, as a result of such revisions, a unit previously exempt from mitigation was now found to be subject to mitigation, the Commission held that the unit's 150 FERC ¶ 61,208, at P 47 (2015). We use that defined term in this order.

<sup>6</sup> Services Tariff, § 23.4.5.7.3.6.

<sup>7</sup> Services Tariff, § 23.4.5.7.2.

Offer Floor should be applied prospectively for the duration specified in NYISO's tariff. The Commission directed NYISO to file tariff revisions and post its numerical example with narrative explanation within 45 days of the June 22, 2012 Order.

7. On July 20, 2012, Complainants filed a request for clarification and rehearing of the June 22, 2012 Order. On July 23, 2012, NYISO and Exelon each filed a request for clarification or, in the alternative, rehearing of the June 22, 2012 Order.

8. On August 6, 2012, in Docket No. ER12-2414-000, as corrected in errata filings in Docket Nos. ER12-2414-001 and ER12-2414-002, NYISO submitted its filing to comply with the Commission's June 22, 2012 Order. On August 7, 2012, NYISO submitted a notice of posting of example to comply with the June 22, 2012 Order.<sup>8</sup> The filings contain both further support for certain proposals as well as revisions to section 23 (Attachment H) of the Services Tariff to reflect changes to buyer-side mitigation rules and tariff provisions to comply with the Commission directives in this proceeding.

## **II. Summary of Requests for Clarification and Rehearing**

9. NYISO requests clarification or, in the alternative, rehearing of the June 20, 2012 Order with respect to the comparison made between the Default Offer Floor and Unit Net CONE in determining a unit's Offer Floor. NYISO also requests clarification or, in the alternative, rehearing of how it is to account for inflation when conducting prong (b) of the mitigation exemption determination and when escalating established Offer Floors. In addition, NYISO requests clarification or rehearing of the June 22, 2012 Order regarding the ability of examined facilities to be retested.

10. Complainants request clarification, or in the alternative, rehearing (i) to make clear that NYISO is required to evaluate out-of-market revenues to ensure the validity of new entrants' costs and to prevent uneconomic entry from artificially suppressing prices; (ii) to clarify when clearing past auctions will count toward the required number of auctions needed for termination of Offer Floor mitigation for a new entrant that was improperly exempted from mitigation; (iii) to address Complainants' concerns that the Offer Floor applicable to a non-exempt unit must be adjusted to track changes to the NYC ICAP Demand Curves; and (iv) because, they assert, the Commission failed to articulate a rational basis for permitting NYISO to use natural gas futures prices in the calculation of the net energy revenue offset used to determine the Unit Net CONE. Similar to Complainants, Exelon requests rehearing of the Commission's determination that out-of-market or subsidized contracts are not relevant to the determination of whether a new entrant to the market has artificially lowered its Unit Net CONE.

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<sup>8</sup> NYISO's example is *available at* [http://www.nyiso.com/public/webdocs/products/icap/incity\\_mitigation/BSM\\_Narrative\\_and\\_Numerical\\_Example.pdf](http://www.nyiso.com/public/webdocs/products/icap/incity_mitigation/BSM_Narrative_and_Numerical_Example.pdf).

### **III. Discussion**

#### **A. Procedural Matters**

11. On July 31, 2012, the City of New York filed an answer to Complainants' request for clarification and rehearing. On August 6, 2012, NYISO filed an answer to Complainants' and Exelon's requests for rehearing. On August 7, 2012, Complainants filed an answer in support of NYISO's request for expedited action and the New York Transmission Owners (NYTOs)<sup>9</sup> filed an answer in support of NYISO's request for clarification.

12. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2014), prohibits an answer to a request for rehearing. Accordingly, we reject the answers from the City of New York, NYISO, Complainants, and the NYTOs filed in response to requests for rehearing.

#### **B. Substantive Matters**

##### **1. Requests for Clarification or Rehearing**

##### **a. Comparison Between Mitigation Net CONE and Unit Net CONE for Determination of the Offer Floor**

13. NYISO asserts that the Commission's June 22, 2012 Order is unclear with respect to the comparison made between the Default Offer Floor and Unit Net CONE in determining the Offer Floor.<sup>10</sup> NYISO requests clarification that in determining the Offer Floor (i.e., the lower value of 75 percent of Mitigation Net CONE, or Unit Net CONE), the value for Unit Net CONE to be used should be only the first year value of the three-year average of annual Unit Net CONE.

14. In the alternative, NYISO seeks expedited clarification regarding the approach that it should use. NYISO contends that further guidance would be necessary because

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<sup>9</sup> For purposes of this filing, the New York Transmission Owners are Orange and Rockland Utilities, Inc., the New York Power Authority, Central Hudson Gas & Electric Corporation, Rochester Gas and Electric Corporation, Long Island Power Authority, Niagara Mohawk Power Corporation, Consolidated Edison Company of New York, Inc., and New York State Electric & Gas Corporation.

<sup>10</sup> NYISO July 23, 2012 Request for Clarification and Rehearing at 8 (citing June 22, 2012 Order, 139 FERC ¶ 61,244 at PP 72-74). We note that section 23.4.5.7 of NYISO's Tariff defines Offer Floor as the lower of: (1) 75 percent of Mitigation Net CONE (i.e., the Default Offer Floor), or (2) the new entrant's Unit Net CONE.

requiring it to compare an annual Default Offer Floor value to a three-year average Unit Net CONE value would be an “apples to oranges” comparison.

### **Commission Determination**

15. We confirm that NYISO’s description of how the Offer Floor should be determined is correct. Because the Offer Floor should reflect the cost of new entry in the first year of entry, i.e., the first year of the Mitigation Study Period, the comparison should be between the “first year” Mitigation Net CONE and the first year value of the Unit Net CONE. Therefore, we agree with NYISO that section 23.4.5.7 of its Tariff should be interpreted to compare the first year value of Unit Net CONE to the first year value of Mitigation Net CONE in determining which is the lower value to be used as the Offer Floor.

16. We note that the need for this clarification arises because NYISO used the term “Unit Net CONE” in performing its mitigation tests differently than how that term is defined in section 23.2.1 of its Tariff. Section 23.2.1 of its Tariff defines “Unit Net CONE” as a single-year value, while NYISO used a three-year average of the defined “Unit Net CONE” value in determining what it terms “Unit Net CONE” for purposes of its mitigation test. To avoid confusion and ambiguity in the future, we direct NYISO to revise its Tariff within 45 days of the date of this order to clearly provide for the use of the first-year Unit Net CONE value as defined in its Tariff for its prong (b) Unit mitigation exemption test and Unit Offer Floor.

#### **b. Inflation Adjustments**

17. For the prong (b) Unit mitigation test, the June 22, 2012 Order held that the inflation component of the latest effective Demand Curve escalation factor should be used for both the three-year average of the Unit Net CONE and the projected Demand Curve prices during the Mitigation Study Period.<sup>11</sup> Likewise, the Commission held that the inflation component of the Demand Curve should be used for inflating the Unit Offer Floor when mitigation is required. The difference between the escalation factor and the inflation rate is that the escalation factor includes, in addition to general inflation, an amount to reflect the increase in power plant construction costs.<sup>12</sup>

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<sup>11</sup> June 22, 2012 Order, 139 FERC ¶ 61,244 at P 62.

<sup>12</sup> June 22, 2012 Order, 139 FERC ¶ 61,244 at n.87. The power plant cost increase rate can be drawn from various indices such as the Handy-Whitman Index’ historical data for power plant construction costs.

**i. Use of the Escalation Factor or Inflation Factor for the Unit Exemption Test**

18. NYISO requests that the Commission confirm that its understanding of how to account for inflation under the prong (b) Unit exemption test is consistent with the June 22, 2012 Order. NYISO states that it will use the escalation factor from the relevant ICAP Demand Curve to escalate the Unit Net CONE and projected ICAP Demand Curve for any year covered by the prong (b) test for which there are accepted ICAP Demand Curves. For years encompassed by the prong (b) Unit test for which the accepted ICAP Demand Curves do not apply (i.e., because the prong (b) Unit test looks further into the future than the three-year duration of the accepted ICAP Demand Curves), it will use the inflation rate component of the currently effective ICAP Demand Curve escalation factor. NYISO states that if it took a different approach, and if the escalation factor included components other than an inflation component, it could create a discrepancy between the known ICAP Demand Curves (and therefore the ICAP price forecast used in the prong (b) Unit test) and the inflation rate used for Unit Net CONE used in that test.

19. With respect to the Demand Curve capacity prices used in the prong (b) Unit test comparison, NYISO states that it believes that it should only escalate or inflate the ICAP Demand Curve reference point, of which prices are a function, and not the actual price forecasts themselves.

**Commission Determination**

20. We confirm, in part, NYISO's understanding of how to account for inflation under the prong (b) Unit test. The prong (b) Unit test is designed to compare a specific unit's cost, i.e., the Unit Net CONE value as of the date of market entry, with capacity prices. NYISO proposes to use the escalation factor from the relevant ICAP Demand Curve to escalate the first year Unit Net CONE for any year for which there are accepted ICAP Demand Curves. This is not consistent with the direction in paragraph 62 of our June 22, 2012 Order that found "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." As noted, the escalation factor has two components: a power plant cost increase rate and an inflation rate. Therefore, rather than adjust the first year value of Unit Net CONE by the escalation rate for the prong (b) test, NYISO should adjust the Unit Net CONE by only the inflation component of the escalation rate. This will ensure that the unit-specific CONE is adjusted only in real terms to arrive at a comparable value as of the beginning of the Mitigation Study Period. Unlike the Mitigation Net CONE used for the prong (a) Default Mitigation Exemption test and for purposes of projecting ICAP prices during the Mitigation Study Period, the Unit Net CONE used in the prong (b) Unit test should not reflect generic changes in power plant costs because cost increases that are specific to a

particular project are already included in the determination of that project's cost at its date of market entry, i.e., its first year's Unit Net CONE.<sup>13</sup>

21. NYISO correctly maintains that the ICAP capacity prices used for the prong (b) Unit test comparisons should be the prices on the accepted (effective) ICAP Demand Curve for any year for which there are effective ICAP Demand Curves. However, it should apply the full escalation factor (including the power plant cost increase rate and inflation rate) to the last year's effective ICAP Demand Curve for later years in which there are no accepted ICAP Demand Curves. Section 23.4.5.7.4 expressly provides that "[Default] Net CONE for 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." In this way, both Mitigation Net CONE and Unit Net CONE will be compared to the same projected ICAP Demand Curve prices when such prices are known, and to the same projected prices based on the last accepted ICAP Demand Curve, as escalated, when such prices are not known.<sup>14</sup>

22. We also agree with NYISO's understanding that it should only escalate or inflate the underlying ICAP Demand Curve reference point, of which prices are a function, and not the prices themselves. Consequently, during the duration of the effective three-year ICAP Demand Curves, NYISO should use the Demand Curve reference points listed in section 5.14.1.2 of its Services Tariff for both the prong (a) and prong (b) mitigation exemption tests. For subsequent years of a Mitigation Study Period for which there are no effective ICAP Demand Curve reference points, NYISO should escalate the reference point of the third year of the effective Demand Curve Mitigation Net CONE by the approved escalation factor.

**ii. Adjustment of Established Offer Floors for Inflation**

23. NYISO also seeks clarification about how an Offer Floor, once established for a non-exempt entrant, should be adjusted for inflation. NYISO states that it is its understanding that if an entrant initially offers unforced capacity (UCAP)<sup>15</sup> after the

<sup>13</sup> Thus, with respect to Attachment A to NYISO's Request for Clarification, the factor to be used to adjust the "Annual Net CONE of Examined Facility" for 2012 and 2013 in Tables 2 and 3 should be "Inflation," rather than "Escalation." Likewise, the "Annual Net CONE of Examined Facility" for 2014 – 2016 in Table 5 should be "Inflation," rather than "Escalation."

<sup>14</sup> Thus, NYISO correctly used the "Escalation" rate for the Default "Part A Test" for 2014 in Table 1 of Attachment A of its July 23, 2012 Request for Clarification and Rehearing.

<sup>15</sup> UCAP is installed capacity adjusted for the historic availability of the supplier.



first year of the Mitigation Study Period, the June 22, 2012 Order directs NYISO to adjust the Offer Floor for inflation in the capability year that the entrant first offers UCAP. If, however, an entrant initially offers UCAP prior to the first year of the Mitigation Study Period, NYISO contends that it is required to adjust for early entry and deflate the Offer Floor for inflation. NYISO asserts that this approach is consistent with the finding in the June 22, 2012 Order that adjusting for inflation should maintain “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.”<sup>16</sup>

24. In the alternative, to the extent the Commission finds that the approach outlined above is not consistent with the June 22, 2012 Order, NYISO seeks expedited clarification regarding the approach that it should use. NYISO maintains that not allowing it to make upward and downward inflation adjustments to the Offer Floor to account for situations in which a new entrant does not enter the market in the first year of the Mitigation Study Period would result in a value that is inconsistent with the June 22, 2012 Order’s determination that Offer Floors should reflect inflation.

### **Commission Determination**

25. We agree with NYISO that it should adjust the Offer Floor for inflation if the entrant enters the market either before or after the first year of the Mitigation Study Period. If an entrant initially offers UCAP after the assumed first year of entry of the Mitigation Study Period, NYISO must adjust the Offer Floor for inflation. Likewise, if an entrant initially offers UCAP prior to the first year of the Mitigation Study Period, it should also adjust for early entry and adjust the Offer Floor for inflation. In both cases, this will appropriately result in the determination of the Offer Floor in “real” terms.

#### **c. Adjustment of Offer Floors for Changes in the NYC Demand Curve**

26. In the June 22, 2012 Order, the Commission disagreed with Complainants’ assertion that the Default Offer Floor should be based on the NYC ICAP Demand Curve that is currently effective each month that the Offer Floor is applied for a mitigated unit.<sup>17</sup> Instead the Commission found that the Services Tariff was silent on this point and held that the Offer Floor (whether the Default Offer Floor or the Unit Offer Floor) should be adjusted annually for inflation using the inflation component of the ICAP Demand Curves. The Commission found that this was necessary to properly state the Offer Floor in “real” terms and to make the Offer Floor comparable to capacity prices in the year in which the mitigation occurs. The Commission also found that the administrative burden

<sup>16</sup> *Id.* at 9 (citing June 22, 2012 Order, 139 FERC ¶ 61,244 at P 73).

<sup>17</sup> June 22, 2012 Order, 139 FERC ¶ 61,244 at P 65 (quoting Complainants June 3, 2011 Complaint at 36).

of adjusting Default Offer Floors in conjunction with the changes in the NYC ICAP Demand Curve would be high, and would introduce a new element of uncertainty.

27. In their request for rehearing, Complainants contend that the Commission's decision is arbitrary and capricious and fails to reflect reasoned decision-making for several reasons. First, Complainants maintain that the Commission's claim that the Services Tariff is "silent" cannot be reconciled with the express tariff language<sup>18</sup> that sets the Default Offer Floor at 75 percent of the Mitigation Net CONE.<sup>19</sup> Complainants state that the Commission does not dispute that, if the Default Offer Floor is fixed but ICAP Demand Curves are adjusted, the Default Offer Floor, over time, would no longer be equal to 75 percent of the Mitigation Net CONE. Complainants assert that the Commission made no effort to explain how a static Default Offer Floor would comply with the express definition of "Offer Floor" in the Services Tariff, or to address concerns regarding over- or under-mitigation.<sup>20</sup> Complainants argue that the Commission's determination runs counter to the rule that tariffs "should be interpreted in such a way as to avoid unfair, unusual, absurd, or improbable results,"<sup>21</sup> because it will create a situation in which offers from a mitigated unit that have become economic over time stand no chance of clearing in some cases and will lead to the premature termination of mitigation in others.

28. Complainants contend that, having failed to address their legitimate concerns, the June 22, 2012 Order instead improperly attempted to justify the Commission's decision "with a non sequitur,"<sup>22</sup> claiming that adjustment of the Default Offer Floor would impose an "administrative burden [that] would be too high and would introduce a new element of uncertainty."<sup>23</sup> Neither of these reasons withstands scrutiny, according to Complainants.<sup>24</sup>

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<sup>18</sup> Complainants July 20, 2012 Request for Clarification and Rehearing at 12 (citing Services Tariff, § 23.2.1 (definition of "Offer Floor")).

<sup>19</sup> *Id.* (citing June 22, 2012 Order, 139 FERC ¶ 61,244 at P 7).

<sup>20</sup> *Id.* at 13.

<sup>21</sup> *Id.* (citing *Columbia Gas Transmission Corp.*, 27 FERC ¶ 61,089, at 61,166 (1984)).

<sup>22</sup> *Id.* (citing *City of Vernon, Cal. v. FERC*, 845 F.2d 1042, 1048 (D.C. Cir. 1988)).

<sup>23</sup> *Id.* (citing June 22, 2012 Order, 139 FERC ¶ 61,244 at P 72).

### **Commission Determination**

29. We deny rehearing. While we agree that the Services Tariff defines the Offer Floor as the lesser of a numerical value equal to 75 percent of the Mitigation Net CONE<sup>25</sup> or Unit Net CONE, there is nothing in the Services Tariff that links an Offer Floor, once determined, to changes in the ICAP Demand Curve, as Complainants advocate. We found in the June 22, 2012 Order that, once the project enters the ICAP market, its Offer Floor should only be adjusted for inflation to maintain the originally-determined Offer Floor in “real” terms to make it comparable to the prices in the year in which the mitigation occurs. This inflation adjustment will ensure that a mitigated uneconomic new entrant will not improperly suppress capacity prices by bidding its capacity at a price lower than its original Offer Floor. In this way, the Offer Floor will neither under- nor over- mitigate the new entrant; instead it will reasonably mitigate uneconomic new entry by requiring a new entrant to offer at a competitive level. Since the Offer Floor is determined before the project enters the ICAP market, it does not change with subsequent changes in the ICAP Demand Curves and, therefore, its numerical value is independent of such subsequent changes. We find that it is not necessary or appropriate to restate the Offer Floor to reflect changes in the ICAP Demand Curve. Accordingly, we reaffirm our reading of NYISO’s tariff and deny rehearing.

#### **d. NYISO’s Treatment of Out-of-Market Revenues**

30. In the June 22, 2012 Order, the Commission disagreed with Complainants’ argument that NYISO should consider out-of-market revenues to determine if the supplier has an incentive to understate costs. The Commission stated that “[t]he 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.”<sup>26</sup> The Commission further explained that “[o]ut-of-market revenues . . . do not enter into the determination of either the gross cost of new entry. . . or the projected energy and ancillary service revenues that are used in deriving the new entrant’s Unit Net CONE.”<sup>27</sup> The Commission concluded that it would “not require NYISO to extend its

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<sup>24</sup> *Id.* (citing *e.g.*, *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious where it fails to “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choices made.’”)).

<sup>25</sup> Services Tariff § 23.2. In relevant part, the NYISO Services Tariff reads, “For purposes of Section 23.4.5 of this Attachment H [Mitigation Measures], “Offer Floor” for an In-City Installed Capacity Supplier that is not a Special Case Resource shall mean the lesser of a numerical value equal to 75 [percent] of the Mitigation Net CONE....”

<sup>26</sup> June 22, 2012 Order, 139 FERC ¶ 61,244 at P 93.

review of a new entrant's Unit Net CONE determination to consider out-of-market revenues.”<sup>28</sup>

31. Complainants request that the Commission clarify that, in stating that NYISO is not “to consider out-of-market revenues,” the Commission was not suggesting that NYISO would be entitled to entirely disregard contracts, including power purchase agreements and other contracts providing out-of-market revenues, when those out-of-market revenues skew the new entrant's cost and economic analysis associated with buyer-side mitigation. Complainants also assert that the Commission should confirm that NYISO is, in fact, required to continue to evaluate contracts as necessary to determine whether a cost is appropriate to use in a project's Unit Net CONE.

32. According to Complainants, NYISO must consider whether contracts provide subsidies and other benefits unavailable to other market participants that must solely rely on revenues from the NYISO markets. Complainants offer the following examples of such benefits: (1) the buyer under a long-term contract could subsidize a new entrant's costs by agreeing to pay for the turbines for its generating facility or by providing other equipment or materials at below market costs; (2) a new entrant may have obtained lower financing costs because it has a long-term power purchase agreement resulting from a discriminatory solicitation process that provides a guaranteed revenue stream; and (3) a new entrant's claimed Unit Net CONE may be substantially lower than the cost assumptions underlying the contract price, requiring NYISO to closely examine the cost information provided by the new entrant to ensure its accuracy.

33. Complainants state that the Commission failed to explain how NYISO reasonably could ignore contract terms that may affect a new entrant's Unit Net CONE and the Commission failed to provide a reasoned explanation for finding that out-of-market contract revenues cannot affect the Unit Net CONE analysis in ways that will prevent NYISO from accurately determining whether “a project's entrance decision is economic if it were only to receive revenues through the NYISO's ICAP spot market auction.”<sup>29</sup>

34. Exelon states that it agrees with Complainants that out-of-market contracts are relevant to the question of whether or not a project is uneconomic. Exelon contends that the costs of the project may be lowered simply by virtue of the existence of the out-of-market contract. Exelon asserts that even if the Services Tariff does not explicitly require consideration of out-of-market revenues in determining a new entrant's Unit Net CONE, it does require that NYISO “determine the reasonably anticipated Unit Net CONE” and

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Complainants' July 20, 2012 Complaint at 8 (citing June 22, 2012 Order, 139 FERC ¶ 61,244 at P 93).

that it “seek comment from the Market Monitoring Unit [MMU] on matters related to the determination of price projections and cost calculations.”<sup>30</sup> Exelon submits that the presence of out-of-market or subsidized contracts could affect the reasonably anticipated Unit Net CONE determination. Exelon requests that the Commission clarify or grant limited rehearing and require that NYISO review contracts to ensure the accuracy of the Unit Net CONE calculation.

### **Commission Determination**

35. We grant clarification and deny rehearing regarding the review of contracts when determining an entrant’s Unit Net CONE. While we agree with Exelon that NYISO should seek to identify any arrangements that would inappropriately understate a new entrant’s proposed Unit Net CONE, we affirm our conclusion in the June 22, 2012 Order that NYISO’s Services Tariff requires it to estimate energy and ancillary services revenues based only on what may be earned from the NYISO administered markets. Thus, NYISO should not consider any out-of-market revenues that may be received by a new entrant. Such revenues are not part of the calculation of the gross cost of new entry; nor are they part of the calculation of projected energy and ancillary services revenues.

36. However, we stated in the June 22, 2012 Order that NYISO evaluates contracts as necessary to determine whether a cost is appropriate to use in a project’s Unit Net CONE. To the extent the June 22, 2012 Order was unclear, we clarify here that NYISO is required to assess whether “competitive cost advantages” associated with contracts are the result of a competitive process or whether they are “irregular or anomalous” cost advantages or sources of revenue that “do not reflect arm’s-length transactions, or that are not in the ordinary course of [business].”<sup>31</sup> This is consistent with the finding on rehearing of our September 10, 2012 order in Docket No. EL11-50, that NYISO’s use of the actual cost of capital in determining Unit Net CONE was appropriate because the request for proposal process was not unduly discriminatory in its effect.<sup>32</sup> Therefore, we clarify that, in its evaluation of an entrant’s claimed Unit Net CONE, NYISO should ensure that irregular or anomalous cost advantages associated with out-of-market contracts are not included in determining a project’s Unit Net CONE.

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<sup>30</sup> Exelon July 23, 2012 Request for Clarification or Rehearing at 5 (quoting Services Tariff, Attachment H, § 23.4.5.7.3.3).

<sup>31</sup> *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 245 (2011).

<sup>32</sup> *Astoria Generating Company L.P. and TC Ravenswood, LLC. v. New York Independent System Operator, Inc.*, 151 FERC ¶ 61,044 (2015).

**e. Use of Natural Gas Futures Prices**

37. In the June 22, 2012 Order, the Commission found that NYISO had justified the use of natural gas futures prices in the calculation of the net energy revenue offset used to determine the Unit Net CONE.<sup>33</sup> The Commission disagreed with Complainants' argument that because historic natural gas prices were used to calculate Mitigation Net CONE in determining the ICAP Demand Curve, they should also be used in the prong (b) Unit mitigation test to maintain comparability.<sup>34</sup> The Commission found that the objective underlying the Demand Curves, i.e. to provide an opportunity for an efficient new entrant to recover its costs over its lifetime, differs from the objective of the mitigation test, which is to determine whether the project will be economic at the time it enters the capacity market, i.e., the first three years of a resource's operation. The Commission stated 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.<sup>35</sup>

38. The Commission also rejected Complainants' argument that natural gas futures prices should not be used because the NERA model used to estimate net energy and ancillary services revenues does not accurately analyze the effect of gas prices on net energy and ancillary services revenues and did not produce sensible results when natural gas futures prices were used. The Commission responded that if the NERA model were flawed, the remedy would be to fix the model, and that Complainants' argument did not shed light on the question of whether historical or futures prices should be used.<sup>36</sup>

39. In their rehearing request, Complainants contend that the Commission's determination that NYISO "may use different methodologies to calculate the Mitigation Net CONE and Unit Net CONE because the objectives underlying the calculation of Mitigation and Unit Net CONE differ"<sup>37</sup> is not a satisfactory explanation for its decision given the structure of the mitigation exemption test. Complainants argue that "a comparison of [Unit Net CONE] to Net CONE must be based, whenever possible, on materially similar methods of calculation."<sup>38</sup>

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<sup>33</sup> June 22, 2012 Order, 139 FERC ¶ 61,244 at P 105.

<sup>34</sup> *Id.* P 108.

<sup>35</sup> *Id.* PP 108-109.

<sup>36</sup> *Id.* P 112.

<sup>37</sup> Complainants July 20, 2012 Request for Clarification and Rehearing at 15 (citing June 22, 2012 Order, 139 FERC ¶ 61,244 at PP 108-109).

40. Complainants also assert that the June 22, 2012 Order failed to address two evidentiary matters raised in this proceeding that are contrary to our finding and that were previously raised in the 2011-2014 Demand Curve reset proceeding in the unrelated Docket No. ER11-2224-000. First, they assert that the June 22, 2012 Order did not address NERA's recommendation that historic gas prices should be used without adjustment in order to recognize that the use of gas futures prices threatens to inject error into the analysis.<sup>39</sup> Second, Complainants contend that the June 22, 2012 Order did not address the counter-intuitive result of increased net energy revenues when lower gas futures pricing was used in the modeling.<sup>40</sup>

### **Commission Determination**

41. We affirm our finding that NYISO has justified its use of natural gas futures prices in calculating Unit Net CONE and historical prices to determine Mitigation Net CONE. The two prongs to the mitigation exemption test offer alternative methods of evaluating whether new entry is economic. The prong (a) Default mitigation exemption test, which uses Mitigation Net CONE, is an option that does not require submission of unit-specific data. However, a generator may opt for the prong (b) mitigation exemption test, which uses the more precise measurement of the specific unit's net CONE. The Commission rejects the idea that differences in methods of calculation produce a resulting "apples to oranges" comparison problem because there is no comparison being made. An entrant is exempt from buyer-side mitigation upon determination that it passes either of two tests, the prong (a) Default mitigation exemption test *or* the prong (b) Unit mitigation exemption test. If the project fails both of the tests, the Offer Floor is then set in the entrant's favor -- at the lower of the two Offer Floors. The goal of both tests is to evaluate whether new entry is likely to be economic over the long-term.

42. As we explained in the June 22, 2012 Order, when looking only three years forward in determining natural gas prices for Unit Net CONE, the use of natural gas futures prices provides a reasonable, market-based forecast of future natural gas prices in the near term than the use of historical natural gas prices.<sup>41</sup> It is therefore preferable and

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<sup>38</sup> *Id.* at 16 (citing Complaint, Attachment C, Affidavit of William H. Hieronymus at 7).

<sup>39</sup> *Id.* at 17 (citing Complainants' Motion for Leave to Answer and Answer at 19-20, Docket No. EL11-42-000 (filed July 21, 2011); *id.*, Attachment A, Second Supplemental Affidavit of Mark D. Younger at ¶¶ 14-15 (Younger Second Supplemental Affidavit)).

<sup>40</sup> *Id.* (citing Younger Second Supplemental Affidavit at ¶ 13).

reasonable to use natural gas futures prices in determining a specific unit's Unit Net CONE metric. We also noted that natural gas futures prices are not available over a generating unit's life-time, and therefore cannot be used in determining the life-time natural gas prices used for Mitigation Net CONE. There is no reason why the Unit Net CONE must be derived using a less accurate historical method, as advocated by Complainants, when a more accurate method of estimating natural gas prices is available.

43. Complainants also assert that the Commission failed to address NERA's statement that the use of historic natural gas prices was preferable to the use of natural gas futures prices because the latter threatens to inject error into the NERA model. In the June 22, 2012 Order, the Commission noted that Complainants' focus on alleged shortcomings of the NERA model were not relevant here,<sup>42</sup> where the issue is whether the natural gas futures prices provide a reasonably accurate measure for purposes of calculating Unit Net CONE. We concluded that natural gas future prices do provide a reasonably accurate measure. Accordingly, we reiterate our finding in the June 22, 2012 Order that the use of natural gas futures prices, while not the only possible method, is reasonable in that it will produce the most accurate results based on the goals of the buyer-side mitigation rules.

**f. Duration of Offer Floor Mitigation**

44. In the June 22, 2012 Order, the Commission clarified that if NYISO previously made an initial determination that a unit passed the exemption test, but now determines that the unit fails the test, that unit would be subject to an Offer Floor only on a prospective basis. However, the Commission further clarified that:

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.<sup>43</sup>

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<sup>41</sup> June 22, 2012 Order, 139 FERC ¶ 61,244 at P 108.

<sup>42</sup> *Id.* P 111.

<sup>43</sup> June 22, 2012 Order, 139 FERC ¶ 61,244 at P 132.



45. Complainants state that they do not disagree that, if a unit would have cleared in an earlier auction in which all participants had received properly-determined exemptions, that auction should count towards the 12 auctions needed for the termination of mitigation. Complainants, however, argue that if a particular unit was improperly exempted for a sustained period, the artificial price suppression that would result from the improper exemption may affect decisions by other market participants in ways that would offset the artificial price suppression to some degree. Complainants posit an example involving a comparison between an improperly exempted unit and the clearing price in an auction where market participants have chosen to sit out due to ongoing price suppression. In this example, Complainants argue that the test is no longer valid because of actions secondary to the mitigated units, i.e., because of the bidding strategies of these “other market participants.” Complainants state that, under such circumstances, comparing the Offer Floor for the improperly exempted unit to the clearing price does not provide a reliable test of whether the unit would have cleared if it had been properly mitigated in the first instance.

46. Complainants further state that the issue is moot in the instant case because the only facility whose mitigation would be affected by the June 22, 2012 Order has not yet entered the market, so there will be no need to assess whether or not it would have cleared in any past auctions. Complainants, however, state that “the Commission should clarify that past auctions are an appropriate indicator of whether a new entrant should no longer be subject to mitigation only in circumstances where there is no indication that auction clearing prices and market participant behavior were not affected by the erroneous mitigation determination.”<sup>44</sup> Complainants urge the Commission, at a minimum, to state that its statements with respect to the calculation of past auctions required for termination of Offer Floor mitigation only apply to this case. In the alternative, Complainants request rehearing, asserting that the Commission made its decision without any consideration of the impact of erroneous mitigation determinations on clearing prices in the ICAP spot market auctions, and without any evidence that would show that it would be just and reasonable to use clearing prices affected by erroneous mitigation determinations in determining whether a new entrant should no longer be subject to Offer Floor mitigation.<sup>45</sup>

### **Commission Determination**

47. We deny clarification and rehearing. While we acknowledge the possibility that suppressed clearing prices could be offset if other market participants responded to the lower prices resulting from erroneous mitigation by not participating in auctions, we

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<sup>44</sup> Complainants July 20, 2012 Request for Clarification and Rehearing at 10.

<sup>45</sup> *Id.*

conclude that it is impractical and speculative to ascertain whether market participants changed their behavior in reaction to perceived price suppression.

48. Instead, our decision in the June 22, 2012 Order to take into account only the observable facts (i.e., the actual market clearing prices) in ascertaining the period during which an entrant will be mitigated, reasonably balances the interests of all market participants in achieving appropriate mitigation. Had the new entrant been mitigated from the date of its original market entry, such mitigation would have continued for 12, not necessarily consecutive, months during which its mitigated bid would clear. Reductions in the number of months of mitigation to reflect months in which the entrant would have cleared, based on actual market clearing prices is a readily determinable, independently verifiable, and reasonably accurate way to make this determination. Accordingly, we deny clarification and rehearing.

**g. Retesting of Examined Facilities**

49. In footnote 115 of the June 22, 2012 Order, the Commission stated that 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.<sup>46</sup>

50. NYISO requests clarification of this statement. NYISO contends the statement should not be read as requiring it to allow retesting in situations where it would not be allowed by the currently effective version of the Services Tariff.<sup>47</sup> NYISO asserts that the language of section 23.4.5.7.3.5 of its Services Tariff clearly provides that the only situation in which NYISO would reevaluate an exemption or Offer Floor determination is where an examined facility "intends to receive transferred Capacity Resource Interconnection Service (CRIS) Rights at the same location" (and does not have to go through the class year process) or "it enters a new Class Year for CRIS."<sup>48</sup> NYISO argues that the current tariff is clear that projects will not be retested under any other circumstances.

51. NYISO maintains that reading footnote 115 to require that any non-exempt project may be retested prior to its entry would clearly contravene the plain meaning of section 23.4.5.7.3.5. NYISO asserts that this provision was not in dispute in this proceeding and no party has suggested, let alone supported a claim, that it should be

<sup>46</sup> June 22, 2012 Order, 139 FERC ¶ 61,244 at n.115.

<sup>47</sup> NYISO July 23, 2012 Request for Clarification and Rehearing at 10 (citing Services Tariff § 23.4.5.7.3).

<sup>48</sup> NYISO Open Access Transmission Tariff (OATT), § 25.7.4 ("A Developer, in order to be eligible to become an Installed Capacity Supplier or receive Unforced Capacity Deliverability Rights, must elect CRIS.").

revised. Thus, NYISO argues that the Commission should grant clarification that its statements in the June 22, 2012 Order were not intended to expand the categories of examined facilities eligible for retesting under the Services Tariff.

52. NYISO states that, in the alternative, if the Commission did intend for footnote 115 to expand the categories of examined facilities that would be eligible for retesting to encompass any “non-exempt unit at any time prior the unit’s entry into the ICAP Market,” it requests rehearing.

### **Commission Determination**

53. The Commission grants clarification. NYISO is correct that the Commission’s statements in the June 22, 2012 Order were not intended to expand the categories of examined facilities eligible for retesting or to allow for retesting in situations where it would not be allowed under section 23.4.5.7.3.5 of NYISO’s Services Tariff. The footnote was only intended to note that there are certain specified situations in which this section of the Services Tariff would allow retesting prior to the unit’s entry into the NYISO ICAP market; not that a redetermination is permitted in all situations. The Services Tariff provides for retesting only in the case of a facility that either “(a) enters a new class year for CRIS or (b) intends to receive transferred CRIS rights at the same location.”<sup>49</sup> We find that the Services Tariff is clear that projects will not be retested under any other circumstances. Retesting may only occur as permitted by section 23.4.5.7.3.5 of NYISO’s Services Tariff.

#### **h. Reissuance of Mitigation Exemption Determinations for Examined Facilities**

54. In the June 22, 2012 Order, at paragraph 132, the Commission stated “to the extent NYISO provided initial mitigation exemption determinations prior to [the Class Year 2009 and 2010] processes, we will require NYISO to revise its determinations with respect to our findings herein.”

55. NYISO asks the Commission to clarify that paragraph 132 only requires it to reevaluate final mitigation exemption determinations for facilities that accepted CRIS.<sup>50</sup> NYISO asserts that the Services Tariff does not authorize it to reissue determinations to examined facilities that had been in a class year and that did not accept CRIS. NYISO informs the Commission that it has made a final mitigation exemption determination with respect to only one project that accepted CRIS in class years 2009 and 2010 under the buyer-side mitigation rules. NYISO states that consistent with the buyer-side mitigation rules, NYISO only intends to reexamine that one project.

<sup>49</sup> Services Tariff, § 23.4.5.7.3.5.

<sup>50</sup> NYISO OATT, § 25.7.4.

56. In the alternative, NYISO requests rehearing of paragraph 132 of the June 22, 2012 Order to the extent that the paragraph directs NYISO to revise any mitigation exemption determinations made for examined facilities in class years 2009 and 2010 that did not accept CRIS. Additionally, NYISO asserts that if the Commission intended to direct NYISO to modify those currently effective tariff provisions without explanation, record support, or the necessary findings under section 206 of the FPA, it would be inconsistent with reasoned decision-making. Therefore, NYISO contends that, to the extent the June 22, 2012 Order would require reevaluation of projects ineligible for retesting under section 23.4.5.7.3.5, it must be reversed on rehearing.

### **Commission Determination**

57. We grant clarification and clarify that, in the June 22, 2012 Order, we intended to require NYISO to reevaluate only final mitigation exemption determinations made under the buyer-side mitigation rules and only for those facilities that accepted CRIS.

## **IV. Compliance Filing in Docket No. ER12-2414**

### **A. Procedural Matters**

#### **1. Notice and Responsive Pleadings**

58. Notice of NYISO's August 6, 2012 compliance filing was published in the *Federal Register*, 77 Fed. Reg. 48,511 (2012), with interventions and protests due on or before August 27, 2012. Notice of NYISO's August 7, 2012 errata was published in the *Federal Register*, 77 Fed. Reg. 48,510 (2012), with interventions or protests due on or before August 28, 2012. On October 12, 2012, NYISO refiled its base tariff section to correct a ministerial error. Notice of the October 12, 2012 filing was published in the *Federal Register*, 77 Fed. Reg. 64,501 (2012), with interventions or protests due on or before November 2, 2012.

59. The NRG Companies,<sup>51</sup> Astoria Generating Company, L.P., Exelon Corporation, TC Ravenswood, LLC, and Bayonne Energy Center, LLC filed timely motions to intervene.

60. On August 27, 2012, the New York City Suppliers (NYC Suppliers)<sup>52</sup> filed comments and a limited protest to NYISO's compliance filing. On August 28, 2012, the

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<sup>51</sup> For purposes of this filing, the NRG Companies are NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

<sup>52</sup> For purposes of this proceeding, the New York City Suppliers are: Astoria Generating Company, L.P.; NRG Power Marketing, LLC; TC Ravenswood, LLC; Arthur

NYTOs filed a motion to intervene and a protest. On September 11, 2012, NYISO filed an answer to the NYC Suppliers protest.

61. Pursuant to Rule 214 of the Commission's Rules of Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

62. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014) prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in Docket No. ER12-2414-000 because they have provided information that assisted us in our decision-making process.

## **B. Substantive Matters**

### **1. Transparency**

63. The June 22, 2012 Order found some merit in Complainants' allegation that NYISO's implementation of the buyer-side mitigation rules lacks transparency. The June 22, 2012 Order directed NYISO in its future implementation of the buyer-side mitigation rules to revise the tariff to require the disclosure of the identity of the project and the final exempt/non-exempt determination as soon as they are final, and it required NYISO to post examples on its website to clarify how the mitigation exemption test and Offer Floor calculations are implemented. The June 22, 2012 Order also directed NYISO to submit tariff sheets outlining the responsibility of the MMU to prepare a public report (MMU report) that would confirm whether the mitigation exemption test determinations and calculations were conducted in accordance with the terms of the Services Tariff, and, if not, would identify the flaws inherent in NYISO's approach and to present this report concurrently with NYISO's announcement of the mitigation test results.<sup>53</sup>

#### **a. NYISO's Filing**

64. With respect to the June 22, 2012 Order's directive requiring disclosures, NYISO proposes to insert the following language as section 23.4.5.7.8: "The ISO shall post on its website the identity of the project in a Mitigated Capacity Zone and the determination of either exempt or non-exempt as soon as the determination is final." In addition, on August 7, 2012, NYISO provided notice that it was posting an example on its website that clarifies how the mitigation exemption test and Offer Floor calculations are

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Kill Power LLC; Astoria Gas Turbine Power LLC; Dunkirk Power LLC; Huntley Power LLC and; Oswego Harbor Power LLC.

<sup>53</sup> June 22, 2012 Order, 139 FERC ¶ 61,244 at P 130.

implemented, and provides a link to the examples. NYISO also requested leave of the Commission to make that posting one day later than required.

65. With respect to the MMU report, NYISO proposes to modify section 23.4.5.7.8 to require the MMU, concurrent with NYISO's posting of exempt or non-exempt determinations, to publish a report on NYISO's determinations, as further specified in sections 30.4.6.2.11 and 30.10.4 of Attachment O of NYISO's Services Tariff.<sup>54</sup> As proposed, both sections 30.4.6.2.11 and 30.10.4 require the MMU to prepare a written report confirming whether NYISO's Offer Floor and exemption determinations and calculations were conducted in accordance with the terms of the Services Tariff. Section 30.4.6.2.11 specifies that the report will assess whether the determinations were made in accordance with section 23.4.5.7.2 of the Market Mitigation Measures, while section 30.10.4 states that the report will assess whether the determinations were made in accordance with both sections 23.4.5.7.2 and 23.4.5.7.7 of the Market Mitigation Measures. NYISO notes that section 23.4.5.7.7 was included in section 30.10.4 to address the grandfathering of a proposed generator or Unforced Capacity Deliverability Rights project associated with a new capacity zone.<sup>55</sup>

**b. Comments**

66. The NYC Suppliers are concerned that the proposed language of new section 23.4.5.7.8 is insufficiently clear as to when the disclosure is to be made.<sup>56</sup> The NYC Suppliers contend that the revised language could be misconstrued as meaning that a mitigation exemption determination is final when posted, even if the cost allocation process under Attachment S of the OATT for the applicable class year has not yet concluded. The NYC Suppliers assert that they would support NYISO posting mitigation exemption determinations following each round of the cost allocation process prior to the conclusion of the process, even though these mitigation exemption determination postings would necessarily not be of "final" determinations.

67. To avoid confusion, the NYC Suppliers request that NYISO be directed to make clear that, irrespective of when they are posted, mitigation exemption determinations will not be considered final until the cost allocation process has been completed.<sup>57</sup> The NYC Suppliers assert that this is consistent with section 23.4.5.7.3.3 of the Services Tariff,

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<sup>54</sup> Attachment O of NYISO's Services Tariff contains provisions relating to NYISO's Market Monitoring Plan.

<sup>55</sup> NYISO August 7, 2012 Filing at 4.

<sup>56</sup> NYC Suppliers August 27, 2012 Protest at 3.

<sup>57</sup> *Id.* (citing June 22, 2012 Order, 139 FERC ¶ 61,244 at P 132).

which states that NYISO shall “inform the project whether the Offer Floor exemption . . . is applicable as soon as practicable after completion of the relevant Project Cost Allocation or Revised Project Cost Allocation.”<sup>58</sup>

68. The NYC Suppliers also assert that it is unclear why NYISO references sections 23.4.5.7.2 and 23.4.5.7.7 in the proposed section 30.10.4, but only section 23.4.5.7.2 in the proposed section 30.4.6.2.11.<sup>59</sup> The NYC Suppliers contend other provisions of the Services Tariff not referenced in the revisions to either section 30.10.4 or section 30.4.6.1.1 also govern NYISO’s mitigation exemption determinations, including, but not necessarily limited to, section 23.4.5.7.3, which describes the facilities and anticipated clearing prices NYISO should include in its analysis, and section 23.4.5.7.4, which addresses inflation adjustments. In order to avoid confusion, the NYC Suppliers assert that the Commission should direct NYISO to make clear that the MMU is required to examine, and report on, whether NYISO properly applied all of the buyer-side mitigation rules.

**c. NYISO’s Answer**

69. NYISO asserts that section 23.4.5.7.3.3 of the Services Tariff is clear that the exemption determinations made following each round of the class year process are not final. NYISO maintains final determinations for examined facilities in a class year and those being examined concurrent with the class year do not exist until after the completion of class year project cost allocation.<sup>60</sup>

70. NYISO further contends that the June 22, 2012 Order is clear that NYISO is only required to post “final” exemption determinations; it does not believe that there is any reason to go beyond its compliance obligations.<sup>61</sup> NYISO states that that it would not be appropriate to post non-final determinations and it does not intend to make such postings. NYISO asserts that there is no danger that its proposed compliance revision<sup>62</sup> would be “misconstrued” as transforming non-final determinations into final determinations.

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<sup>58</sup> *Id.* at 4 (citing Services Tariff, § 23.4.5.7.3.3).

<sup>59</sup> *Id.* (citing NYISO August 6, 2012 Compliance Filing at 5).

<sup>60</sup> NYISO September 11 Answer at 3 (explaining that examined facilities that may not be in a class year but would be examined concurrent with a class year are described in section 23.4.5.7.3 (II) and (III)).

<sup>61</sup> *Id.* (citing June 22, 2012 Order, 139 FERC ¶ 61,244 at P 51).

<sup>62</sup> NYISO intends to revise section 23.4.5.7.8.

Therefore, NYISO argues that no clarification, or additional revisions, to its proposed language is necessary.

71. With respect to the scope of the MMU report, NYISO maintains that the Commission should reject NYC Suppliers' request to require it to reference additional market mitigation provisions in Attachment O. According to NYISO, its proposed revisions make it clear that the MMU is responsible for evaluating the entirety of an exemption and Offer Floor determination. NYISO argues that the MMU must consider the elements of an exemption analysis before it can reasonably "confirm" that it was correctly made or identify the flaws. NYISO contends that no purpose would be served by revising its compliance tariff revisions to expressly reference every provision that has to do with exemption and Offer Floor determinations and that all relevant tariff provisions are already encompassed within the scope of the language that it proposed. In addition, NYISO maintains that the NYC Suppliers' proposal to specifically require the MMU to address NYISO's application of all of the buyer-side mitigation rules would unnecessarily dictate how the MMU must write its report. NYISO argues that the Commission should leave it to the MMU to determine what specific issues warrant discussion in its report instead of requiring a detailed treatment of every possible issue.

72. NYISO argues that it is not correct that section 30.10.4 contains additional references while section 30.4.6.2.11 "omits" a reference to another section because the MMU's obligation to report on determinations made pursuant to section 23.4.5.7.7 is already included in the base language in section 30.4.6.2.11.<sup>63</sup> NYISO cites the proposed language of section 30.4.6.2.11 as showing that there is no omission. NYISO further argues that it has already proposed language requiring the MMU to evaluate any NYISO determination that an existing or proposed project in a mitigated capacity zone be grandfathered from an Offer Floor pursuant to section 23.4.5.7.7 and thus, there is no need to further revise proposed section 30.4.6.2.11.

### **Commission Determination**

73. The Commission accepts NYISO's language in section 23.4.5.7.8 as compliant with its directive. The Commission is satisfied that the new section 23.4.5.7.8 makes clear that the exemption status of a project is to be posted only once that determination is final. Revised section 23.4.5.7.8 states "The ISO shall post on its website the identity of the project in a Mitigated Capacity Zone and the determination of either exempt or non-exempt as soon as the determination is final." We do not find that this language could be construed as meaning that the exemption determination is finalized by the posting of that determination on NYISO's website. We find that the Services Tariff is clear that exemption determinations are not final until the cost allocation process under Attachment S of the OATT has concluded for the applicable class year. As soon as that

<sup>63</sup> NYISO September 11, 2012 Answer at 6.



process is complete, NYISO is required to disclose the identity of the projects and their exemption status pursuant to the new language in section 23.4.5.7.8. Additionally the Commission did not intend to require NYISO to give progress reports during the class year process as the NYC Suppliers suggest. Accordingly, we accept the tariff revisions to section 23.4.5.7.8.

74. We also agree with NYISO that there is no omission in section 30.4.6.2.11 of Attachment O, as the MMU's obligation to report on determinations made with respect to proposed generators or Unforced Capacity Deliverability Rights projects pursuant to section 23.4.5.7.7 is already included in the portion of section 30.4.6.2.11 that is not being revised in this proceeding.<sup>64</sup>

75. However, we find that the new language directing the preparation of a written report by the MMU confirming that NYISO's mitigation and exemption determinations were conducted in accordance with the terms of the Services Tariff should not be restricted to only the Offer Floor and exemption determination sections of Attachment H (i.e., sections 23.4.5.7.2 and 23.4.5.7.7), but should be sufficiently open-ended so as not to limit the review performed by the MMU to those sections. As we stated in our June 22, 2012 Order, the MMU report is intended to increase participant confidence in the results of the tests. To do this we believe that the MMU must have the ability to consider any and all factors that affect NYISO's mitigation exemption and Offer Floor determinations. Although NYISO asserts that all relevant tariff provisions are encompassed within the scope of the proposed revisions, we disagree. There are a number of exemption and Offer Floor elements that are not referenced, such as those raised by the protest and those addressing the determination of energy and ancillary service revenue offsets, the determination of the Offer Floor, the computation of the ICAP spot market auction forecast price, et al., as well as related methods and procedures specified in the NYISO's manuals (e.g. "ISO Procedures"). Therefore, we direct NYISO to incorporate language that allows the MMU to consider all factors relevant to mitigation exemption and Offer Floor determinations. NYISO should submit such revised language within 45 days of the issuance of this order.

76. The Commission concludes that NYISO's posting of the "Buyer Side Mitigation Narrative and Numerical Example" on its website complies with our directive to post a numerical example with a narrative explanation to increase clarity and provide a better understanding of how the mitigation exemption test and Offer Floor calculations are implemented. NYISO must ensure that the website posting is an up-to-date reflection of rulings and orders of the Commission regarding its mitigation exemption methodology.

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<sup>64</sup> Revisions to section 30.4.6.2.11 were accepted subject to a compliance filing. *New York Independent Sys. Operator, Inc.*, 143 FERC ¶ 61,217 (2013).

## **2. Adjustment for Inflation**

77. In the June 22, 2012 Order, the Commission agreed with Complainants that the values used in the mitigation and Offer Floor determinations must be adjusted for inflation to make them comparable. The June 22, 2012 Order directed NYISO to apply an inflation factor to the Unit Net Cone as part of prong (b) of the mitigation exemption test that would be equivalent to the inflation rate component of the escalation factor determined in the Demand Curve process.<sup>65</sup> The June 22, 2012 Order also required NYISO to adjust Offer Floors, once established, for inflation on an annual basis after the non-exempt unit enters the ICAP market. The Commission reasoned that this would maintain 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. The Commission found the Demand Curve inflation adjustment to be an appropriate measure for inflating applicable Offer Floors based on either Mitigation Net CONE or Unit Net CONE and directed NYISO to file tariff changes to reflect this ruling.

### **a. NYISO’s Filing**

78. With respect to the prong (b) Unit mitigation exemption test, NYISO proposes revisions to section 23.4.5.7.4 to specify that it will identify the Unit Net CONE and price on the ICAP Demand Curve projected for a future Mitigation Study Period using the escalation factor of the relevant ICAP Demand Curve for any year for which there are accepted ICAP Demand Curves or the inflation rate component of the escalation factor of the relevant ICAP Demand Curve for any year for which the accepted ICAP Demand Curves do not apply. For purposes of the prong (a) mitigation exemption test, NYISO shall use the escalation factor of the relevant ICAP Demand Curves.

79. With respect to the Offer Floor to be applied to a non-exempt unit after entry, NYISO proposes to revise section 23.4.5.7 to specify that Offer Floors be adjusted annually using the inflation rate component of the escalation factor of the relevant effective ICAP Demand Curves that have been accepted by the Commission. Further, NYISO proposes to modify sections 23.4.5.7.2.4 and 23.4.5.7.3.2 to specify that the Offer Floor would be based on the first of the three-year values that comprise a facility’s Unit Net CONE. In addition, NYISO proposes to revise section 23.4.5.7.3.6 to address early or delayed entry by inflating or deflating the Offer Floor in accordance with its

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<sup>65</sup> June 22, 2012 Order, 139 FERC ¶ 61,244 at P 60.

understanding that it should compare the Default Offer Floor to the annual net CONE value for the first year of the Mitigation Study Period.<sup>66</sup>

80. With respect to the periodic review of the ICAP Demand Curves and the corresponding consultant's report, NYISO proposes modification to clarify that these studies will assess and identify an escalation factor and inflation rate component for the escalation factor. NYISO proposes to add an additional item, the escalation factor and inflation rate component, to the list of items that it will assess during its periodic review of the ICAP Demand Curves.

**b. Comments**

81. The NYTOs argue that the June 22, 2012 Order directed NYISO to use the forecasted inflation rate during the period when the ICAP Demand Curves are effective, not the ICAP Demand Curve escalation rate, as NYISO's proposed tariff revisions provide.<sup>67</sup> According to the NYTOs, the Commission's Order makes sense, because the Unit Net CONE of a new entrant will not continue to increase in real terms once the entrant has completed construction. The NYTOs state that, by contrast, the cost of new entry for other prospective suppliers, which is reflected in the ICAP Demand Curves, could potentially continue to increase in real terms. The NYTOs argue that the following revisions to NYISO's proposed language for section 23.4.5.7.4 of the Services Tariff will bring it into compliance with the Order:

23.4.5.7.4 For purposes of Section 23.4.5.7.2(b), the ISO shall identify the Unit [n]et CONE and price on the ICAP Demand Curve projected for a future Mitigation Study Period using: (i) the escalation factor of the relevant ICAP Demand Curves (in the case of the projected price on the ICAP Demand Curve) and the inflation rate component included in that escalation factor (in the case of Unit [n]et CONE) for any year for which there are accepted ICAP Demand Curves; or (ii) the inflation rate component of the escalation factor of the relevant ICAP Demand Curve for any year for which the accepted ICAP Demand Curves do not apply. For purposes of Section 23.4.5.7.2(a), the ISO shall use the escalation factor of the relevant ICAP Demand Curves.

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<sup>66</sup> NYISO August 6, 2012 Filing at 8 (citing NYISO July 23, 2012 Request for Clarification at 6, Docket No. EL11-42-001).

<sup>67</sup> NYTOs August 28, 2012 Comments at 4 (citing June 22, 2012 Order, 139 FERC ¶ 61,244 at P 62).

82. The NYTOs maintain that they believe this is what the Commission intended. With these proposed changes, the NYTOs assert both the Unit Net CONE and projected ICAP prices for each year are measured using the dollars for that year. But these changes would permit the Unit Net CONE to increase at the forecasted general inflation rate, while ICAP revenues increase or decrease at a different rate when the ICAP Demand Curves are based on an escalation rate that differs from the forecasted general inflation rate. In contrast, according to the NYTOs, the language proposed by NYISO does not permit this to occur; it requires projected capacity revenues and Unit Net CONE to increase at the same rate. As a result, the NYTOs maintain it could subject economic capacity to an Offer Floor in some cases, or exempt uneconomic capacity from Offer Floors in other cases.<sup>68</sup> Therefore, the NYTOs request the Commission to direct NYISO to revise section 23.4.5.7.4 of the Services Tariff.

83. Although NYISO and the NYC Suppliers agree on how the inflation adjustments are supposed to be implemented, the NYC Suppliers maintain that they are concerned that some confusion may result from the proposed tariff references in sections 23.4.5.7 and 23.4.5.7.4 to the “relevant” effective ICAP Demand Curve(s)<sup>69</sup> that will be used in determining the escalation and inflation rate. The NYC Suppliers contend the term “relevant” may precipitate future disputes as to which Demand Curves are “relevant” at a particular time. The NYC Suppliers request that the Commission direct NYISO to modify its proposed tariff revisions to replace the word “relevant” in these phrases with “currently effective” such that the references are to the “currently effective ICAP Demand Curve.” The NYC Suppliers contend this appears to be consistent with the June 22, 2012 Order, as well as NYISO’s request for clarification of the June 22, 2012 Order and its statements in the compliance filing.<sup>70</sup>

84. The NYC Suppliers also assert that application of the escalation factor should be the same for both Unit Net CONE and Mitigation Net CONE. The NYC Suppliers

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<sup>68</sup> NYTO’s August 28, 2012 Comments at 5.

<sup>69</sup> NYC Suppliers August 27, 2012 Protest at 6 (citing NYISO Compliance Filing, Attachment I, § 23.4.5.7).

<sup>70</sup> *Id.*

maintain that in order to avoid confusion, the Commission should make clear that the same escalation factors should be used for both Unit and Mitigation Net CONE.<sup>71</sup>

85. The NYC Suppliers assert that while NYISO states that it understands it should compare the Default Offer Floor to the annual net CONE value for the first year of the Mitigation Study Period, the NYC Suppliers argue the proposed tariff modifications do not reflect this understanding and instead only reference “the first year value of [a project’s] Unit Net CONE.”<sup>72</sup> In order to be as clear as possible, the NYC Suppliers argue NYISO should be directed to revise this language to specify that it will use the value of the project’s inflation adjusted Unit Net CONE for the first year of the Mitigation Study Period, as calculated pursuant to section 23.4.5.7.3.6.

**c. NYISO’s Answer**

86. NYISO argues that the NYC Suppliers’ request to require the use of escalation rather than the inflation component of the escalation rate during the period when the ICAP Demand Curves are effective, should be rejected because, as it explained in its request for clarification, it understands the June 22, 2012 Order’s directive to require it to use the: (1) “escalation factor from the relevant ICAP Demand Curve to escalate the Unit Net CONE and projected ICAP Demand Curve prices for any year covered by the [prong (b)] test for which there are accepted ICAP Demand Curves”; and (2) “inflation rate component of the currently effective ICAP Demand Curve escalation factor” for any year “encompassed by the [prong (b)] test for which the accepted ICAP Demand Curves do not apply.”<sup>73</sup>

87. With respect to the NYC Suppliers’ contention that NYISO should replace the word “relevant” with “currently effective” in the proposed tariff revision that describes how the escalation and inflation rate will be determined, NYISO maintains that it understands the Commission’s directive to require the application of accepted, but not necessarily currently effective, ICAP Demand Curves in certain situations. Specifically, according to NYISO, such ICAP Demand Curves would be used where there is a need to make a determination during a period where the Commission has accepted a new ICAP Demand Curve and made it effective for a future period. NYISO contends that the

<sup>71</sup> *Id.* at 7 (citing June 22, 2012 Order, 139 FERC ¶ 61,244 at P 7 n.11). The Commission accepted NYISO’s proposal of the defined term, “Mitigation Net CONE” on March 19, 2015. *See supra* note 5.

<sup>72</sup> *Id.* (citing Attachment I, §§ 23.4.5.7.2.4, 23.4.5.7.3.2).

<sup>73</sup> NYISO September 11, 2012 Answer at 7-8 (citing NYISO, Request for Expedited Clarification, and Alternative Request for Rehearing, of Docket No. EL11-42-000, at 6 (filed July 23, 2012)).

“currently effective” characterization would not clearly allow it to do this. NYISO argues that the language it proposed in sections 23.4.5.7 and 23.4.5.7.4 was carefully worded to ensure that the tariff allows it to conduct its analyses in a manner that permits the use of either the most recently accepted or currently-effective ICAP Demand Curve, as appropriate. Therefore, NYISO asserts that the Commission should accept its compliance tariff revisions as proposed without further modification

88. NYISO also argues that the NYC Suppliers’ request to modify NYISO’s proposed compliance tariff changes to ensure that the escalation factor used for Unit Net CONE calculations also be applied to “Mitigation Net CONE” determinations should be rejected.<sup>74</sup> NYISO contends that, because its proposed definition of Mitigation Net CONE states that it shall mean the capacity price on the currently effective In-City Demand Curve, or for years where the accepted ICAP Demand Curves do not apply, the inflation rate component of the escalation factor for the relevant ICAP Demand Curves, the revisions already properly establish the escalation or inflation factor to be applied. Therefore, NYISO argues, its proposed language complies with the June 22, 2012 Order and does not need to be modified as requested by the NYC Suppliers.

89. In its answer, NYISO states that it would not object to revising its proposed tariff language to address the NYC Suppliers’ concern that the proposed tariff revisions fail to state that NYISO is to compare the inflation adjusted Unit Net CONE for the first year of the Mitigation Study Period. Although NYISO is willing to make clarifications, it does not propose to adopt the specific modifications proposed by the NYC Suppliers. Instead, NYISO proposes certain revisions to address this concern.<sup>75</sup> Under NYISO’s proposal, section 23.4.5.7.3.6 would read:

If an Installed Capacity Supplier demonstrates to the reasonable satisfaction of the ISO that the value equal to the first of the three year values in the Mitigation Study Period that comprise its Unit Net CONE is less than any Offer Floor that would be applicable to the Installed Capacity Supplier, then its Offer Floor shall be reduced to a numerical value equal to the first year of its Unit Net CONE.

### **Commission Determination**

90. We agree with the NYC Suppliers that NYISO needs to modify its proposed tariff revisions to require the use of the inflation component of the escalation rate for Unit Net

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<sup>74</sup> NYC Suppliers August 27, 2012 Comments at 6.

<sup>75</sup> Specifically, NYISO proposes to include a reference to Mitigation Study Period in section 23.4.5.7.3.6 and a reference to section 23.4.5.7.3.6 in section 23.4.5.72.4(i). NYISO September 11, 2012 Answer at 10-11.

CONE during all years of the Mitigation Study Period, as we stated in our June 22, 2012 Order. In contrast, NYISO's proposed revisions to section 23.4.5.7.4 would require that the escalation rate be used for Unit Net CONE for any year in the Mitigation Study Period for which there are accepted ICAP Demand Curves, which is not consistent with the directive in our June 22, 2012 Order. Therefore, we direct NYISO to amend its proposed tariff provisions within 45 days of the issuance of this order to reflect the use of the inflation component, rather than the escalation rate, for Unit Net CONE for all years of the Mitigation Study Period.

91. With respect to the capacity prices used for comparison during the Mitigation Study Period for both the prong (a) and prong (b) mitigation exemption tests, we agree with NYISO that they should be the prices that are reflected on the ICAP Demand Curves for the periods covered by ICAP Demand Curves that have been accepted by the Commission. For Mitigation Study Periods that extend beyond those included in accepted ICAP Demand Curves, NYISO should use the escalation rate of the last year's accepted ICAP Demand Curves. As we found earlier, the Commission finds that, in this way, both Mitigation and Unit Net CONE will be compared to the same projected prices when such prices are known, and when such prices are not known, the comparison will be based on the last accepted Demand Curve ICAP prices, as escalated.<sup>76</sup> Consistent with our ruling above on rehearing, we direct NYISO to file tariff revisions reflecting this clarification within 45 days of this order.

92. With respect to NYC Suppliers' contention that NYISO should replace the word "relevant" with "currently effective" in its mitigation and Offer Floor determinations, we agree with NYISO that the use of the term "relevant" is more appropriate as it will allow NYISO to use ICAP Demand Curves that have been accepted by the Commission to be effective during the Mitigation Study Period, when such period extends beyond the currently effective Demand Curve period. The Commission accepts this approach as consistent with the June 22, 2012 Order that directed NYISO to use values from the same Demand Curve that is effective at the time it makes an exemption determination in making comparisons with spot market auction prices over the study period.

93. The NYC Suppliers believe that the language does not reflect the understanding that the Default Offer Floor should be compared to the annual net CONE value for the first year of the Mitigation Study Period. We find that NYISO's proposed language in its September 11, 2012 Answer would make this clear, and therefore require NYISO to make such revisions to section 23.4.5.7.3.6. Accordingly, we direct NYISO to submit the revisions described above within 45 days of this order.

The Commission orders:

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<sup>76</sup> For further explanation, *see supra* P 21.

(A) The requests for clarification are hereby granted, in part, and rehearing is hereby denied, as discussed in the body of this order.

(B) NYISO's tariff record filing in Docket No. ER12-2414-000, *et al.*, is hereby accepted, effective June 22, 2012, subject to a further compliance filing, as discussed in the body of this order.

(C) NYISO is hereby directed to file tariff revisions within 45 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.