

141 FERC ¶ 61,197
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Energy Spectrum, Inc.
Riverbay Corporation

Docket No. EL12-56-000

v.

New York Independent System Operator Inc.

ORDER ON COMPLAINT AND DIRECTING COMPLIANCE

(Issued December 10, 2012)

1. On April 12, 2012, Energy Spectrum, Inc. and Riverbay Corporation (collectively Complainants) filed a complaint (Complaint) against the New York Independent System Operator Inc. (NYISO) alleging that NYISO violated the Federal Power Act (FPA) and the NYISO Market Administration and Control Area Services Tariff (Services Tariff) by issuing a technical bulletin that prohibits certain behind-the-meter generation from participating in NYISO's Installed Capacity (ICAP) Special Case Resources (SCRs) program. In this order, as discussed below, the Commission grants the Complaint and directs a compliance filing.

I. Background

2. The NYISO ICAP market design includes a provision for SCRs to sell capacity in NYISO's capacity auctions.¹ According to NYISO's currently effective tariff, SCRs are defined in relevant part as:

Demand Side Resources capable of being interrupted upon demand, and
Local Generators, rated 100 kW or higher, that are not visible to the ISO's
Market Information System and that are subject to special rules, set forth in

¹ See *New York Indep. Sys. Operator, Inc.*, 90 FERC ¶ 61,319 (2000).

Section 5.12.11.1 of this ISO Services Tariff and related ISO Procedures, in order to facilitate their participation in the Installed Capacity market as Installed Capacity Suppliers.²

The terms “Local Generator”³ and “Demand Side Resources”⁴ are also defined in the Services Tariff. SCRs are represented in the market by Responsible Interface Parties.⁵ Section 5.12.11.1 of the Services Tariff outlines the conditions under which a Responsible Interface Party may qualify as an ICAP supplier using SCRs. NYISO’s Installed Capacity Manual (ICAP Manual) provides additional detail.⁶

² Services Tariff, § 2.19.

³ Local Generator is defined as:

[a] resource operated by or on behalf of a Load that is either: (i) not synchronized to a local distribution system; or (ii) synchronized to a local distribution system solely in order to support a Load that is equal to or in excess of the resource’s Capacity. Local Generators supply Energy only to the Load they are being operated to serve and do not supply Energy to the distribution system. Services Tariff, § 2.12.

The term distributed generator is not defined in the tariff. When we use the term Local Generator herein, we refer to the term as defined in the Services Tariff.

⁴ Demand Side Resource is defined as:

[a] Resource located in the NYCA that is capable of controlling demand in a responsive, measurable and verifiable manner within time limits, and that is qualified to participate in competitive Energy, Capacity, Operating Reserves or Regulation Service markets, or in the Emergency Demand Response Program pursuant to this ISO Services Tariff and the ISO Procedures. Services Tariff, § 2.4.

⁵ A Responsible Interface Party is “[a] Customer that is authorized by NYISO to be the Installed Capacity Supplier for one or more Special Case Resources and that agrees to certain notification and other requirements in this Services Tariff and in the ISO Procedures.” Services Tariff § 2.18.

⁶ New York Indep. Sys. Operator, Inc., Installed Capacity Manual (January, 2012), *available at* http://www.nyiso.com/public/webdocs/products/icap/icap_manual/icap_mnl.pdf.

3. On April 6, 2012, NYISO issued Technical Bulletin 217, entitled “Procedures for Use of Behind the Meter Generation in the Special Case Resource Program to Prevent Double-Counting of Base Load Generation,” and subtitled “*Energy consumed from behind the meter generation is not eligible to participate in the Special Case Resources program.*”⁷ NYISO technical bulletins serve an advisory or explanatory function and are not legally enforceable by the Commission. Technical Bulletin 217 states:

Responsible Interface Parties may enroll the available capacity from a Special Case Resource’s behind the meter generation, which qualifies as a Local Generator, up to the level of the SCR’s Average Coincident Load (ACL)⁸ or Provisional ACL. The NYISO’s tariff defines Capacity as “the capability to generate or transmit electrical power, or the ability to control demand at the direction of the ISO, measured in megawatts (‘MW’).”

Only load consumed by the SCR that is supplied from the distribution system may be included in the metered load values submitted for calculation of the ACL or verification of the Provisional ACL. Any output from behind the meter generation must be netted out of the metering that measures the load used to compute the ACL. Output from behind the meter generation

⁷ http://www.nyiso.com/public/webdocs/documents/tech_bulletins/TB_217.pdf. On March 16, 2012, NYISO issued a draft of Technical Bulletin 217, presented it to stakeholders, and solicited comments prior to issuance.

⁸ ACL is defined as: “The value in each Capability Period for each Special Case Resource that is equal to the average of the Special Case Resource hourly Load taken from the SCR Load Zone Peak Hours applicable to such Special Case Resource, and computed and reported in accordance with Section 5.12.11.1.1 of this Services Tariff and ISO Procedures [i.e., ICAP Manual].” Services Tariff § 2.1. The ACL methodology was adopted in 2011 to replace the previous Average Peak Monthly Demand methodology. *See New York Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,020 (2011) (“NYISO proposes to amend the Services Tariff to apply new SCR baseline load methodology and new performance factor calculations and performance deficiency penalties that apply to Responsible Interface Parties. NYISO states that these revisions will allow NYISO to better align the participation and performance of demand response with the operational expectations of NYISO during an ICAP/SCR event called for reliability purposes by obtaining better estimates of the demand reduction capabilities of Special Case Resources.” *Id.* P 2).

consumed by the load during any SCR Load Zone Peak Hour may not be included in the metered data submitted to the NYISO for calculation of an SCR's ACL or verification of the Provisional ACL.

II. Complaint

4. Complainants state that they participate in the NYISO SCR program. Energy Spectrum, Inc. is a member of the NYISO market as a Responsible Interface Party and Riverbay, also a member of the NYISO market, operates a 40 MW behind-the-meter cogeneration plant that produces electricity and heat for an affordable housing complex in Bronx, New York. Complainants state that Riverbay received \$741,000 and \$755,000 for participation in the NYISO SCR program for fiscal years 2010/2011 and 2011/2012, respectively, but that it will receive no money if Technical Bulletin 217 remains in effect.

5. Complainants argue that the issuance of Technical Bulletin 217 is improper because it results in a substantial change in the Services Tariff; and therefore, should have been voted on and approved by the NYISO stakeholder process and filed under section 205 of the FPA. For relief, Complainants request that the Commission declare Technical Bulletin 217 null and void; that SCR program participants using behind-the-meter generation be permitted to continue participation in the NYISO SCR program as if Technical Bulletin 217 had not been issued, and late registration of resources be permitted for the May 2012 ICAP spot market auction such that these resources are able to participate in that auction.

6. Complainants state that distributed generation⁹ has participated in the SCR program associated with the ICAP market within NYISO since 2004, and such participation is permitted under the program rules. Complainants also state that distributed generation has been aggregated by Responsible Interface Parties and offered to the NYISO market as capacity available to the SCR program.

7. Complainants argue that the definitions in the Services Tariff of SCR, Local Generator, and ACL do not support the second paragraph of Technical Bulletin 217. Complainants allege that nothing in these definitions indicates that either Local Generation or distributed generation cannot be included in the calculation of the ACL of an SCR asset or that selling capacity through the SCR program results in double counting or how double counting is determined.

⁹ The term distributed generator appeared in a prior version of the Services Tariff definition of SCR; however, NYISO replaced that term with the term "Local Generators" in a filing implementing the new ACL procedures in 2011. *New York Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,020 (2011).

8. Complainants argue that NYISO truncates the definition in the Services Tariff of capacity (i.e., “the capability to generate or transmit electrical power, or the ability to control demand at the direction of the ISO, measured in megawatts”) to merely “the ability to control demand at the direction of the ISO.” Complainants maintain that the definition of SCR in the Services Tariff is a demand-side resource that is capable of being interrupted on demand *or* a Local Generator. Complainants add that the definition of Local Generator in the Services Tariff includes Local Generation which is not synchronized to a local distribution system. Complainants assert that while NYISO states that distributed generation is not capacity, since NYISO does not have the ability to control demand, in fact, distributed generation meets the definition of capacity, as it has the “capability to generate. . . electrical power,” even if it cannot be controlled by NYISO.

9. Complainants further argue that the application of the revised definition of Special Case Resources in section 2 of the Services Tariff to the SCR program is not just and reasonable. Complainants allege that the 2008 revision of the Services Tariff to the definition of SCR to include Local Generation is, according to NYISO, inadvertent and unintended,¹⁰ and, to the extent Technical Bulletin 217 is based upon this definition, then the applicable definition should be that found in the Services Tariff prior to the 2008 revision of the definition of SCR. Complainants contend that Technical Bulletin 217 is not supported by the pre-2008 definition of capacity, and therefore the revisions to the definition of SCR in 2008 relating to changes to the Demand Side Ancillary Services program has resulted in changes to the SCR program not contemplated at the time, but that are not just and reasonable. Accordingly, Complainants request that the Commission find that the definition of SCR is not just and reasonable as to the changes to the SCR program that flow from the revised definition of SCR, to the extent that the tariff change did not consider the impact on the SCR Program.

¹⁰ Complainants assert that the definition of SCR was revised in 2008 in connection with the implementation of changes to the demand-side ancillary services program to include Local Generation and the revision was approved by the Commission. However, Complainants allege that NYISO disclosed to market participants in July 2010 that a 2008 revision to the definition of SCRs inadvertently limited the participation of distributed generation resources in the SCR program to no more than the baseline value of the host load associated with the resource. According to Complainants, NYISO stated that this “unintended consequence” would be corrected. Complainants April 12, 2012 Complaint at 6.

III. Notice of Filings and Responsive Pleadings

10. Notice of the Complaint was published in the *Federal Register*, 77 Fed. Reg. 24,192 (2012), with interventions and protests due on or before April 19, 2012.

11. Exelon Corporation; Electric Power Supply Association; NRB Companies; New York City; TC Ravenswood, LLC; PowerHouse Energy, LLC; and SourceOne Inc. filed timely motions to intervene. EnergyConnect, Inc. and the New York Transmission Owners (NYTOs)¹¹ each filed a motion to intervene out of time.

12. Consumer Power Advocates (CPA); Congressman Eliot L. Engel; Real Estate Board of New York; Paradise Plastics LLC; U. S. Clean Heat & Power Association; The Durst Organization Inc.; Montefiore Medical Center; The Bronx Chamber of Commerce; and Digital Energy Corp. submitted motions to intervene and comments in support of the Complaint. Edison Mission Energy and Independent Power Producers of New York, Inc. (IPPNY) each filed comments protesting the Complaint. On April 19, 2012, NYISO submitted an answer to the Complaint.

13. On April 20, 2012, Complainants filed an answer to NYISO's April 19, 2012 answer. On April 24, 2012, NYISO filed an answer to Complainants' answer. On April 27, 2012, the NYTOs filed an answer to NYISO's April 19, 2012 answer. On April 30, 2012, Complainants filed an answer to NYISO's April 19, 2012 answer. On May 1, 2012, NYISO filed an answer to the NYTOs and Complainants.

A. NYISO's April 19, 2012 Answer

14. NYISO responds that the issuance of Technical Bulletin 217 was fully consistent with the FPA because it in no way alters the filed Services Tariff and simply clarifies existing rules in light of the recent ACL tariff modifications. As such, NYISO contends that the issuance of Technical Bulletin 217 was consistent with all NYISO governance requirements in that the ISO Agreement does not require Management Committee and Board approval of technical bulletins; nor does it require a vote of the Business Issues Committee.

15. NYISO states that the purpose of its SCR Program is to give resources an incentive to reduce system load during reliability events as evidenced by, *inter alia*, the

¹¹ New York Transmission Owners for purposes of this filing consists of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, and Orange and Rockland Utilities, Inc.

definition of “capacity”¹² and Special Case Resource.¹³ NYISO states that these definitions, as well as the Services Tariff provisions implementing the SCR program¹⁴ clearly require that SCRs be capable of interrupting load upon demand and provide that SCRs may supply capacity only to the extent that they have the ability to reduce demand when NYISO directs. NYISO adds that all SCRs are demand-side resources and as such, SCR generators are not exempted from this requirement to reduce load in response to a NYISO directive. NYISO further states that Complainants’ reliance on the definitions of Local Generator and ACL fail to support their contentions, as nothing in those definitions exempts SCRs from this requirement.

16. NYISO states that the Services Tariff does not, however, preclude all behind-the-meter generation from participation in that emergency generators that can be turned on during an SCR event can enroll and participate as SCRs in accordance with the Services Tariff and Technical Bulletin 217 because they can effectuate a system load reduction when NYISO calls upon them. NYISO states that Technical Bulletin 217 explains how that requirement is to be applied to behind-the-meter generation, in the framework of the ACL and Provisional ACL methodologies.

17. NYISO also contends that because Technical Bulletin 217 does not make any change, let alone any significant change, to any NYISO tariff provision, it did not have to be filed under FPA section 205. NYISO argues that Commission policy and precedent is clear that filed tariffs do not have to include all the rules, standards, and practices relating

¹² “The capability to generate or transmit electrical power, *or the ability to control demand at the direction of the ISO*, measured in megawatts.” NYISO Services Tariff, § 2.3 (emphasis added).

¹³ “Demand Side Resources capable of being interrupted upon demand.....” NYISO Services Tariff, § 2.19.

¹⁴ NYISO quotes § 5.12.11.1 that:

Responsible Interface Parties may qualify as Installed Capacity Suppliers, without having to comply with the daily bidding, scheduling, and notification requirements set forth in 5.12.7 of this Tariff, if their Special Case Resources: (i) *are available to operate for a minimum [number] of consecutive hours each day, at the direction of the ISO* (emphasis added).

NYISO adds that § 5.12.11.1 further states that NYISO “shall pay Responsible Interface Parties that, through their Special Case Resources *caused a verified load reduction in response to*” those identified reliability events (emphasis added).

to transmission or other Commission-jurisdictional services, because “such a practice would be impractical and potentially administratively burdensome.”¹⁵ NYISO states that, instead, the Commission applies the “rule of reason” test which requires only those rules, practices, and standards that “significantly affect” such services to be included in a tariff.¹⁶ NYISO argues that Technical Bulletin 217 was issued to clarify an apparent misunderstanding by certain Responsible Interface Parties regarding the eligibility of certain behind-the-meter generation and the recently implemented ACL enrollment requirement applicable to these resources.

18. NYISO states that Technical Bulletin 217 is fully consistent with NYISO’s ICAP Manual. NYISO adds that section 4.12.2 of the ICAP Manual states that an SCR generator “may specify generation in excess of its facility load, provided that it has installed metering capability satisfactory to the NYISO in order to quantify the net load change during a curtailment.” NYISO notes that section 4.12.2 has been in place, without revision, since before the implementation of the Demand-Side Auxiliary Services Program (DSASP) tariff changes. Thus, according to NYISO, section 4.12.2 clearly contradicts Complainants’ assertion that the tariff revisions in the 2008 DSASP tariff filing that prevent SCR generation from being enrolled in excess of the host load, somehow “inadvertently” prevented the enrollment of behind-the-meter generation for the first time. NYISO adds that section 4.12.2 clearly confirms that the requirement that performance of all SCRs must be measured and quantified as the net system load reduction effected during a curtailment event was in effect prior to the DSASP Filing.

19. Further, according to NYISO, sections 4.12.2.1 through 4.12.2.4 of the ICAP Manual, which govern the calculation of Unforced Capacity (UCAP), provide that an SCR achieves the ability to sell capacity solely through its ability to control demand at the direction of NYISO during certain reliability events. NYISO adds that section 4.12.2.1.3 of the ICAP Manual, which provides the formula for determining UCAP for a Generator that is an SCR, defines the “Number of Load Reduction Hours” variable as “as

¹⁵ NYISO April 19, 2012 Answer at 8-9 (citing *Southwest Power Pool, Inc.*, 136 FERC ¶ 61,050, at P 33 (2011)).

¹⁶ NYISO April 19, 2012 Answer at 9 (citing, *inter alia*, *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at PP 1650-1651 (2007), *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, 129 FERC ¶ 61,126 (2009)).

the number of hours (during the reliability event) in which the resource was required to operate in order to offset system load.”

20. NYISO contends that the issuance of Technical Bulletin 217 was consistent with all NYISO governance requirements in that the ISO Agreement does not require Management Committee and Board approval of technical bulletins; nor does it require a vote of the Business Issues Committee.

21. NYISO also argues that Technical Bulletin 217 ensures system reliability by preventing the enrollment as ICAP suppliers, through double-counting behind-the-meter generation as both system load when determining the ACL baseline and again when reported as performance, of SCRs that do not reduce demand at the direction of NYISO. NYISO states that, under Complainants’ conception of the Services Tariff, similarly-situated SCRs would be treated unequally, potentially giving rise to undue discrimination concerns in that some SCRs would be required to respond to NYISO’s directive with a discrete action to reduce load while regularly operating, behind-the-meter generators would not need to take any discrete action in response to NYISO to have been deemed to have performed a load reduction. More importantly, according to NYISO, reinterpreting the Services Tariff as Complainants propose would undercut the system reliability benefits of the SCR program in that NYISO would be left to rely on some SCRs that are not actually capable of providing MWs of demand reduction on request. NYISO states that if behind-the-meter generation is included in the ACL values, the behind-the meter-generation is counted twice - once as system load when determining the ACL baseline and again when it is reported as performance in the measurement and verification step. NYISO contends that such a “phantom” load reduction would not meet the requirements of the SCR program.

B. Comments

22. CPA states that it is a membership organization of universities and health care institutions in New York City, that its members participate in competitive energy markets, and that some members operate or plan to develop distributed generation plants to serve their electric requirements. CPA further states that the total ICAP requirement for the NYCA is determined by forecasting the peak day load and adding a reserve margin. According to CPA this load includes all the coincident peak loads served by distributed generators and, because it is otherwise not visible to NYISO, the ICAP manual, at section 4.12.4.4, provides the following procedures to account for this load:

The normal production level of the distributed generator does not qualify as Special Case Resource capacity except as provided below.

An exception to the immediately preceding paragraph is made when the Special Case Resource, LSE, Transmission District and NYCA

peak Load upon which Installed Capacity requirements were based are grossed up to account for the Special Case Resource's operation. Under these circumstances the Special Case Resource would be treated as a back-up generator that was not operating during the prior year NYCA peak. Special Case Resources that use a distributed generator for demand reduction during the NYCA peak Load period and that desire to qualify this demand reduction as Installed Capacity must authorize the [Responsible Interface Party] to request such treatment of the NYISO. The [Responsible Interface Party] must, in turn, notify the NYISO of the Special Case Resource's authorization to treat the Special Case Resource generator's production as Installed Capacity The NYISO will then assume responsibility for notifying the Transmission Owner in whose Transmission District the Special Case Resource generator exists and ensure that the generator demand reduction is properly accounted for in the relevant customer's Load, the LSE's Load, the Transmission District's Load forecast and the NYCA peak Load forecast.

23. According to CPA, Complainants offered evidence that NYISO added 118.7 MW of distributed generation to the 2011 peak load used to determine the 2012 summer ICAP requirement. CPA adds that ICAP requirements are set for each Load Serving Entity and are equal to the sum of the ICAP "tags" for all of its customers. CPA states that in the case of a distributed generator, the ICAP tag includes the load added back according to the above procedure. CPA states that, for example, if a building had a load of 10 MW at the time of the NYCA peak and a distributed generator providing 6 MW, only 4 MW would be included in the peak day, but an additional 6 MW would be added back to the ICAP tag account for the distributed generator output, if the owner wished to register as an SCR resource. According to CPA, this ensures that there is no double count of either the load or the ICAP related to the distributed generator and preserves the balance between supply and demand in the ICAP market.

24. CPA also argues that eliminating distributed generators will cause ICAP prices to increase because, in effect, NYISO has reduced the amount of ICAP in the market without making the corresponding reduction in the ICAP requirement. CPA requests that, if the Commission determines that the tariff language as it exists now requires NYISO's action, it should still recognize that the abrupt manner in which Technical Bulletin 217 was issued will cause harm to ratepayers and mitigate that harm by allowing the past practice to continue at least one more year.

25. The Real Estate Board of New York; U.S. Clean Heat and Power Association; Montefiore Medical Center; The Durst Organization; PowerHouse Energy, LLC; and Joint Supporters support the Complaint. They argue that Technical Bulletin 217 is an obvious change of NYISO policy and is in direct contradiction to the eligibility practices

of NYISO to date. They also argue that the reliability that is inherent in baseload cogeneration systems is crucial to the grid, and imposition of this change without the associated voting process would cause irrevocable financial damages to these compliant resources. Paradise Plastics and The Bronx Chamber of Commerce also support the Complaint and comment that the policy in Technical Bulletin 217 is in direct contradiction to the current eligibility practices and will penalize clean, baseload cogeneration systems that have invested millions of dollars in critical infrastructure. Both the Bronx Chamber of Commerce and Congressman Eliot L. Engel note that Montefiore Medical Center, with over 18,000 employees, has operated their 10 MW clean baseload cogeneration system since 1995 and has invested millions of dollars to develop clean baseload cogeneration systems, and Technical Bulletin 217 will cause such entities significant financial damage.

26. Digital Energy Corp also supports the Complaint and argues that removing baseload behind-the-meter generation from the New York City ICAP spot market auction could increase the price of ICAP in the summer 2012 capability period by \$1.52 per kW. Digital Energy Corp states that using the average numbers from the summer 2011 capability period as an example, this would increase the cost of all transactions in the New York City Zone J by over \$30,000,000 during the six month summer capability period.¹⁷ It adds that the effect on prices in the 2012 summer and winter capability periods could be twice as large, because the utilities' capacity requirements have already been grossed up to account for baseload behind-the-meter generation.

27. Digital Energy Corp argues that Technical Bulletin 217 changes the Services Tariff. It contends that double counting is already addressed in the Services Tariff section 5.12.11.1 and the ICAP Manual section 4.12.4.4. Digital Energy Corp further contends that NYISO has misinterpreted the definition of Load and ACL in Technical Bulletin 217 and attempts to redefine these terms. Digital Energy Corp understands load to be the full electrical demand of the facility to include capacity supplied by behind-the-meter generation, but Technical Bulletin 217 limits load to the facilities' utility-metered value. According to Digital Energy Corp, this is not supported by ICAP Manual section 4.12.4.4. In response to NYISO's argument regarding the inability of behind-the-meter generators to respond to NYISO's direction, Digital Energy Corp states that Responsible Interface Parties have the ability to control their baseload behind-the-meter generation manually, and thus, have "the ability to control demand at the direction of the ISO."

¹⁷ Digital Energy Corp calculates the maximum increase of removing baseload distributed generation on the value of transactions in the New York City ICAP spot auction as \$5,170,460 per month.

28. Edison Mission Energy and IPPNY protest the Complaint. They argue that the language of Technical Bulletin 217 clarifies the Services Tariff with respect to the eligibility requirements of the SCR program. They also argue that behind-the-meter generators should not be eligible for the SCR program as they are not operating at the direction of NYISO, and cannot provide a response when a call is made, as they have already transferred the load.

C. Answers to Answers

29. The NYTOs respond that they take no position on the merits of the SCR issue, but believe that Technical Bulletin 217 seeks to address a substantive issue with respect to the Services Tariff without adhering to the applicable governance procedural requirements. Similar to CPA's comments above, the NYTOs state that Technical Bulletin 217 appears to conflict with section 4.12.4.4 of the ICAP manual. The NYTOs argue that to the extent Technical Bulletin 217 conflicts with the ICAP manual, it must also conflict with the Services Tariff since the two must be consistent. The NYTOs assert that the tariff cannot be changed through technical bulletins that are not even subject to stakeholder approval.

30. In their April 20, 2012 response to NYISO's answer, Complainants state that NYISO did not successfully demonstrate that any of Complainants' arguments are incorrect. Complainants assert that NYISO previously included baseload cogenerators in the SCR program as recently as 2011. Complainants include correspondence which they assert evidences the fact that baseload cogenerators were included in the NYISO SCR program as recently as 2011. Thus, according to Complainants, Technical Bulletin 217 represents a substantial change in the program from prior practice, a change that was not communicated to stakeholders except with respect to Technical Bulletin 217.

31. Complainants also assert that NYISO's answer implies that the only tariff revision that made substantive changes in the SCR program is the change in how the SCR baseline is calculated, i.e., the introduction of the ACL. Complainants state that this change relates to the number of data points used in the calculation and there no change to the definition of Local Generation; thus, it did not result in a change to the SCR program with respect to whether or not baseload Local Generators were permitted to participate in the SCR program. Had that been the case, according to Complainants, Riverbay would not have been permitted to so participate in 2011.

32. Complainants argue that by claiming that a baseload generator must provide load reduction, NYISO is redefining SCR Local Generation. According to Complainants, neither the tariff definition of SCR Local Generation, nor section 5.12.11.1 specifies that SCR Local Generators must demonstrate a reduction in load. Complainants assert that the definition of Special Case Resource in the Services Tariff refers to demand side resources being capable of interruption on demand, and does not refer to Local

Generators in the same way. Complainants contend that Responsible Interface Parties comply with section 5.12.11.1 of the Services Tariff with respect to baseload generators by measuring their output for a minimum of four consecutive hours, rather than measuring for reduction in load. Complainants also note that Responsible Interface Parties that participate in the SCR program with Local Generators do not provide data regarding a change in the amount of power imported from the NYISO grid. Complainants assert that although the definition of SCR was revised, section 5.12.11.1 was not similarly revised and does not reference Local Generators at all. Complainants assert that there is no definition of distributed generation in the Services Tariff and section 5.12.11.1 does not outline how distributed generator resources participate in the SCR Program, despite NYISO's claim that they must demonstrate verified load reduction.

33. Complainants reiterate that, contrary to NYISO's assertion, the definition of capacity does not provide that capacity is required to generate *and* to control demand at the direction of NYISO. Complainants assert that as per the definition of capacity in the Services Tariff, generation is capacity separate from the ability to control demand. Complainants add that, even though control by NYISO is not required, if a generator fails to generate for at least a four hour period as required upon a call from NYISO for demand response, the generator will not be able to demonstrate compliance and will be penalized.

34. In their April 30, 2012 Answer, Complainants assert that the actual results of the May spot market ICAP auctions, held after the implementation of Technical Bulletin 217 demonstrate that there has been an impact on the spot market for capacity in New York City. They further assert that the price posted for New York City, \$17.16 per kW month, is the highest price posted for ICAP in New York City in the over 10 years that NYISO has been in existence and it compares with the corresponding May 2011 price of \$11.97. Complainants thus forecast a monthly impact far greater than the average monthly amount anticipated based on the \$5.1 million increase computed for this summer's ICAP market by Digital Energy Corp.

35. In its April 24, 2012 answer, NYISO responds that Technical Bulletin 217 does not prevent behind-the-meter generation from participating in the SCR program provided that it can satisfy the Services Tariff's core, reliability-based, eligibility requirement. Specifically, according to NYISO, behind-the-meter generation must be able to reduce demand at the direction of NYISO in order to enroll as an SCR. NYISO adds that there is behind-the-meter generation in New York that meets this requirement and that will continue to be eligible to participate in the SCR program. In response to Complainants' argument that the requirement that demand side resources must be capable of interruption does not apply to Local Generators, NYISO states that Complainants fail to acknowledge that behind-the-meter generation enrolled as an SCR does not provide capacity as a "generator" under the Services Tariff. NYISO states that, like any other SCR, behind-

the-meter generation is eligible to receive capacity payments based on its ability to reduce demand, not its ability to “generate electrical power” for the grid. NYISO asserts that the tariff recognizes this distinction by identifying “Responsible Interface Parties” and “Generators” as separate classes of “Installed Capacity Supplier” and in numerous other ways.¹⁸

36. NYISO also asserts that Complainants’ reading of section 5.12.11.1 of the Services Tariff is wrong in that an SCR cannot ignore the requirements of subsection: (i), which unambiguously applies to all potential SCRs, simply because it has reported behind-the-meter generation in accordance with subsection (ii). NYISO states that both requirements apply to an SCR that seeks to participate with behind-the-meter generation. NYISO reiterates that resources that cannot reduce their demand may not participate as SCRs under the Services Tariff and adds that Commission precedent is clear that “informal communications between the parties, such as phone calls and emails, do not take precedence over the language of the filed tariffs.”¹⁹

37. In its May 1, 2012 answer, NYISO states that the NYTOs appear to agree that allowing resources that cannot reduce load at the direction of NYISO to participate in the SCR program would create a reliability issue, but they mistakenly argue that this reliability issue can only be addressed through a tariff revision or by obtaining a tariff waiver. According to NYISO, they fail to explain how Technical Bulletin 217 is inconsistent with any provision of the Services Tariff, or to address NYISO’s arguments that it is consistent with the Services Tariff. Instead, NYISO states, they assert that Technical Bulletin 217 conflicts with the ICAP manual, which NYISO argues is not the case. NYISO quotes section 4.12.4 of the ICAP manual, which states in relevant part:

a Special Case Resource must make Energy available. . . by reducing Load or by transferring load to a distributed generator. The obligation to reduce Load or to transfer Load to a distributed generator shall commence at the top of the hour after the NYISO has provided the following notices:

¹⁸ NYISO April 24, 2012 Answer at 3 (citing *e.g.*, section 2.0 of the Services Tariff (establishing the definition of “Installed Capacity Supplier,”) section 5.12 (differentiating between Responsible Interface Parties and generators with respect to various ICAP supplier requirements)).

¹⁹NYISO April 24, 2012 Answer at 5 (citing *New York Indep. Sys. Operator v. Astoria Energy LLC*, 118 FERC ¶ 61,216 at P 36 (2007)).

- b. [t]he Special Case Resource shall reduce its Load or to transfer Load to a distributed generator . . . commencing at the top of the hour immediately after the two-hour notice period has expired NYISO may specify the hour at which the Special Case Resource shall commence performance of its obligation by reducing Its Load or to [sic] transferring Load to a distributed generator.

NYISO contends that section 4.12.4.4 and section 4.12.4 must be read in tandem and cannot be read as authorizing any and all behind-the-meter generation to participate in the SCR program; but rather refers to participation as SCRs by the kinds of emergency and incremental generators that were referenced above and that are capable of reducing demand when instructed to do so.

38. NYISO further argues that, even assuming that section 4.12.4.4, cited by the NYTOs, were in conflict with Technical Bulletin 217, that would not invalidate Technical Bulletin 217 because extrinsic evidence is only relevant to the extent that a tariff is ambiguous. Here, according to NYISO, the Service Tariff clearly requires that an SCR must be able to reduce system load at NYISO's request during certain specified reliability events in order to participate in the SCR program.

39. In response to Complainants' claim regarding the impact of excluding behind-the-meter generation for the SCR program, NYISO states that the claims are not plausible. NYISO states that Zone J SCR capacity available for the ICAP auction in May 2012 was only 17.4 MW less than the SCR capacity that participated in May 2011.²⁰ NYISO states that this reduction represents less than five percent of the available SCR capacity that participated in last May's ICAP market and well below .2 percent of the total NYC capacity.²¹ NYISO argues that a number of other factors affected the change in ICAP auctions from May 2011 to May 2012, including the implementation of the summer 2012 ICAP demand curve for Zone J, the application of the new Installed Reserve Margin and Locational Capacity Requirements for the summer capability period, and several hundred megawatts of publicly announced generator mothballing decisions.

²⁰ NYISO May 1, 2012 Answer at 6 (citing http://icap.nyiso.com/ucap/public/auc_view_default_reference_price_detail.do; and http://www.nyiso.com/public/webdocs/products/icap/monthly_scr_reports/2011/SCR_May_2011_Summary.pdf).

²¹ *Id.*

IV. Discussion

A. Procedural Matters

40. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

41. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2012), the Commission will grant the late-filed motions to intervene filed by the NYTOs given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

42. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers to answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

43. The issue before us is whether NYISO's treatment, in accordance with NYISO's Technical Bulletin 217, of Complainants' behind-the-meter Local Generation complies with or is inconsistent with the SCR provisions in the Services Tariff and ICAP Manual.

44. We find the Services Tariff and ICAP Manual to be ambiguous with respect to whether, and if so, how Local Generator capacity is eligible to participate in NYISO's SCR program. Our review of the relevant tariff and ICAP Manual provisions shows that certain provisions could be interpreted to support Complainants' position that such generation qualifies as SCR capacity, and other provisions could be interpreted to support NYISO's position that Complainants' Local Generation does not qualify as SCR capacity.

45. For example, the Services tariff definition of "Special Case Resource" appears to support Complainants' position by referring to "Local Generation" as a separate category of "Special Case Resources" in addition to "Demand Side Resources" rather than as a mere subcategory of demand side resources. Section 2.19 defines an SCR, in pertinent part, as:

Demand Side Resources capable of being interrupted upon demand, and Local Generators, rated 100 kW or higher, that are not visible to the ISO's Market Information System and that are subject to special rules, set forth in Section 5.12.11.1 of this ISO Services Tariff and related ISO Procedures, in

order to facilitate their participation in the ICAP market as Installed Capacity Suppliers. (emphasis added)

46. As a separate category of SCR, an SCR using a Local Generator to supply its own power arguably would not be required to use that generator to perform demand response, i.e., provide load reduction at the direction of NYISO. Similarly, section 5.12.11.1 of the Services Tariff contains a provision governing Responsible Interface Parties and SCRs that appears to support Complainants' view that the production from their behind-the-meter Local Generator can qualify as SCR capacity even though run without being used to perform demand response. The initial paragraph of section 5.12.11.1 reads, in relevant part:

Responsible Interface Parties may qualify as Installed Capacity Suppliers...if their Special Case Resources: (ii) were not operated as a Load modifier coincident with the peak upon which the LSE Unforced Capacity Obligation of the LSE that serves that customer is based, unless that LSE's LSE Unforced Capacity Obligation is adjusted upwards to prevent double-counting.

47. In addition, language in section 4.12.4.4 of the ICAP Manual, entitled "Use of Generation by a Special Case Resource," states that, although a back-up generator "for demand reduction"²² could qualify its production as SCR capacity, "the normal production level of the distributed generator [Local Generator] does not qualify as Special Case Resource capacity except as provided below." The section continues by providing an exception under which the normal, i.e., baseload, output of the SCR's Local Generator will qualify as SCR capacity if the LSE included the output of the SCR's Local Generator in determining its ICAP requirements. The section states: "Under these circumstances the Special Case Resource would be treated as a back-up generator that was not operating during the prior year peak." Thus, based on the foregoing excerpts of section 4.12.4.4 of the ICAP Manual, if the Complainants' Local Generation output is included in the LSE's minimum ICAP requirement, the Complainants could qualify that output as SCR capacity.

²² By referring to "demand reduction" and not to "demand response," this section can be interpreted as not requiring load reduction at the direction of NYISO (demand response) and, therefore, could include permanent load reduction through the baseload use of Local Generation to supply the SCR's energy needs in lieu of obtaining the energy from NYISO.

48. In contrast, and potentially supporting NYISO's position, other language in section 5.12.11.1 of the Services Tariff suggests the output of a Local Generator that does not reduce its consumption of NYISO-supplied power at the direction of NYISO would not qualify as SCR capacity. For example, section 5.12.11.1 reads, in relevant part:

Responsible Interface Parties may qualify as Installed Capacity Suppliers...if their Special Case Resources: (i) are available to operate for a minimum of four (4) consecutive hours each day, *at the direction of the ISO* . . . following notice of the potential need to operate twenty one (21) hours in advance . . . (emphasis added)

49. Under that language a Local Generator operating on a continuous basis would not alter its output "at the direction of the ISO" and therefore, would not need notice of the "potential need to operate" at that direction, such generation arguably would not qualify as SCR capacity. Further, the ICAP Manual's provisions setting forth formulae for determining SCR unforced capacity (UCAP) all require load reduction.²³ Of particular relevance, section 4.12.2.1.3 of the ICAP Manual, entitled "Determining the Amount of UCAP for a Generator Based Special Case Resource," provides a formula for determining SCR capacity that specifically only applies to "all generators used to reduce load at Resource g."

50. Moreover, this proceeding lacks a sufficient record upon which to understand how the SCR program currently operates. As discussed above, the record in this proceeding, including evidence with respect to NYISO's differing practices prior to and following issuance of the technical bulletin, demonstrates differing understandings of the contribution of Local Generation towards resource adequacy on the NYISO system for which NYISO has provided compensation through the SCR program. The record in this proceeding also does not demonstrate that the participation in the SCR program at issue here has not contributed to the resource adequacy of the NYISO system; nor is it clear that these generators received unwarranted compensation as NYISO contends. Further, it is not clear that the NYISO SCR program as it pertains to Local Generators is purely a demand response program like ISO New England's program.²⁴

²³ See also ICAP Manual, section 4.3.3 "Special Case Resources (Section 4.12 of this ICAP Manual)" ("[E]ach Special Case Resource must be capable of being interrupted on demand as specified in this ICAP Manual.").

²⁴ *ISO New England, Inc.*, 123 FERC ¶ 61,021 (2008) (*ISO New England*). In *ISO New England*, the Commission was concerned with the compensation of market

(continued...)

51. Importantly, we find that it was inappropriate for NYISO to use a technical bulletin to clarify these ambiguous tariff provisions, and, on this basis, we grant the Complaint. Allowing NYISO to implement a change to a practice that significantly affects the rates, terms, and conditions of a Commission jurisdictional service through a technical bulletin, without Commission approval and without a clear and complete record, would be inconsistent with longstanding Commission policy.²⁵ In addition, overlooking NYISO's procedural error here could encourage others to seek to change practices that significantly affect the rates, terms, and conditions of a Commission jurisdictional service without Commission approval. Until NYISO revises its tariff as necessary to clarify the role of Local Generation in its SCR program as directed below, NYISO is to treat good faith Local Generation participation as it did before it issued Technical Bulletin 217.²⁶

52. To address both the ambiguity that leads us to grant the Complaint and NYISO's practical concerns regarding the implementation of its SCR program, we direct NYISO to revise its Services Tariff to reflect more clearly the requirements of Technical Bulletin 217. We direct NYISO to submit a filing within 90 days of the date of this order reflecting such revisions.

participants who shift load between peak and off-peak period in the context of what clearly was exclusively a demand response program; it was not concerned with whether the ISO's tariff could be interpreted to not require demand response, as is the case here. *Id.* at PP 58-62.

²⁵ Practices that significantly affect rates, terms and conditions of service must be included in a Commission-approved tariff rather than in other documents. *Quest Energy, L.L.C. v. Detroit Edison Co.*, 106 FERC ¶ 61,227, at P 20 (2004) ("a company's tariffs, not its manuals or handbooks, must define the rates, terms and conditions of jurisdictional services"), *complaint withdrawn*, 109 FERC ¶ 61,334 (2004); *accord Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,147, at P 58 (2009) (finding that consistent with the Commission's policy, as implemented through the rule of reason, a provision "that significantly affects rates, terms and conditions of service ... must be filed for Commission approval and made a part of the ... tariff."); *Wisconsin Power and Light Co.*, 123 FERC ¶ 61,307, at P 6 (2008) (pursuant to 18 C.F.R. §§ 35.1-35.2, rate schedules must set forth in writing, clearly and specifically, all rates, terms, and conditions for sales of electric energy subject to the Commission's jurisdiction.); *see generally Prior Notice and Filing Requirements under Part II of the FPA*, 64 FERC ¶ 61,139, at 61,986-89 (1993), *order on reh'g*, 65 FERC ¶ 61,081 (1993).

²⁶ *See EnerNOC, Inc.*, 134 FERC ¶ 61,158 (2011).

The Commission orders:

(A) The Complaint of Energy Spectrum, Inc. and Riverbay Corporation is hereby granted as discussed above.

(B) NYISO is directed to make a compliance filing within 90 days from the date of this order as discussed in the body of this order.

By the Commission. Commissioners LaFleur and Clark dissenting with a joint statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Energy Spectrum, Inc.
Riverbay Corp.

Docket No. EL12-56-000

v.

New York Independent System Operator, Inc.

(Issued December 10, 2012)

LaFLEUR, Commissioner, and CLARK, Commissioner, *dissenting*:

We agree with the majority that the only question presented by the complaint is whether or not Technical Bulletin 217 is consistent with NYISO's Tariff.¹ But while the order properly identifies the question before it, it does not answer the question. Instead, it merely recites the Complainants' arguments that the Tariff is ambiguous and finds that ambiguity is a valid justification for granting the complaint. The order then directs NYISO to cease enforcing the Technical Bulletin, but to submit a compliance filing revising the Tariff to reflect the Technical Bulletin's requirements.

We disagree with granting the complaint. Further, we believe that answering the question posed in the complaint requires interpretation of the Tariff, and that such interpretation reveals that Technical Bulletin 217 is consistent with the Tariff. Moreover, by granting the complaint and requiring a compliance filing, the Order has the effect of: (1) allowing reliability concerns voiced by NYISO to persist; and (2) requiring customers to pay for demand response the Complainants cannot provide. Therefore, we respectfully dissent.

I. Technical Bulletin 217 is Consistent with the Tariff

Drafted in response to a stakeholder question concerning the eligibility requirement for Special Case Resources, Technical Bulletin 217 clarifies that capacity regularly used to serve load from behind the meter generators cannot be used in calculating the amount of demand response a Special Case Resource is eligible to provide because Special Case Resources must be able to reduce system load at the direction of the NYISO. NYISO explains this limitation exists because it relies on Special Case Resources to reduce load on short notice during specific events. Thus, according to NYISO, behind-the-meter generation that cannot reduce load at its direction (because it is entirely dedicated to serving a local power need) is incapable

¹ Order at P 43 ("The issue before us is whether NYISO's treatment, in accordance with NYISO's Technical Bulletin 217, of Complainants' behind-the-meter Local Generation complies with or is inconsistent with the SCR provisions in the Services Tariff and ICAP Manual.")

of providing emergency demand response.²

Complainants operate or represent behind-the-meter generators. They assert that they participate in the Special Case Resources Program (ICAP/SCR Program) pursuant to section 2.19 of the Tariff, which defines Special Case Resources to include “Local Generators.”³ Their main argument is that Technical Bulletin 217 effectively truncates the Tariff’s definition of capacity (“the capability to generate or transmit electrical power, or the ability to control demand at the direction of the ISO, measured in megawatts”) by reducing it to “the ability to control demand at the direction of the ISO.”

We believe that the question posed in this proceeding requires an examination of the Tariff to determine whether the Technical Bulletin is or is not a substantial change to the Tariff that requires a stakeholder vote as Complainants allege. Upon carrying out this analysis, we have concluded that the Tariff is most reasonably read to already require what is stated more clearly in Technical Bulletin 217 - that Special Case Resources can only participate in the ICAP/SCR Program if they can reduce demand from the system at NYISO’s direction.

Section 2.19 of the Tariff defines a Special Case Resource as follows:

Demand Side Resources capable of being interrupted upon demand, *and Local Generators*, rated 100 kW or higher, that are not visible to the ISO’s Market Information System and *that are subject to special rules, set forth in Section 5.12.11.1 of this ISO Services Tariff* and related ISO Procedures, in order to facilitate their participation in the ICAP market as Installed Capacity Suppliers. (emphasis added)

Section 5.12.11.1 allows for the qualification of Special Case Resources that:

- (i) are available to operate for a minimum of four (4) consecutive hours each day, *at the direction of the ISO*...following notice of the potential need to operate twenty-one (21) hours in advance...; **and** (ii) were not operated as a Load modifier coincident with the peak upon which the LSE Unforced Capacity Obligation of the LSE that serves that customer is based, unless that LSE’s LSE Unforced Capacity Obligation is adjusted upwards to prevent double-counting. (emphasis added)

Complainants assert that the term “Local Generators” in section 2.19 supports their argument

² Order at 15; *See also NYISO Demand Response Programs Annual Report* submitted in Docket No. ER01-3001-000 (January 18, 2011) (“Resources are obligated to curtail when called upon to do so with two or more hours notice..... In addition, ICAP/SCR resources are subject to testing each Capability Period to verify they can fulfill their curtailment requirement.”)

³ See Order at n.3 (providing the Tariff definition of “Local Generator.”).

because it represents a separate category of Special Case Resources that is not required to perform emergency demand response at the direction of NYISO. The majority contends that section 5.12.11.1 supports this argument because requirement (ii) can be read to permit Local Generators to qualify as Special Case Resources even if they cannot be used to perform emergency demand response at the direction of NYISO. The majority recites Complainant's arguments and, without analysis, finds that they render the Tariff ambiguous.⁴

We find that Complainant's interpretation of the Tariff is not plausible. In order to entertain Complainants' argument, the majority must read requirement (ii) in section 5.12.11.1 apart from the remainder of the section, which provides that Local Generators must comply with *both* requirements (i) *and* (ii). The relevant section, read as a whole as required by Commission precedent,⁵ provides that Local Generators must comply with *both* requirements (i) *and* (ii). Therefore, a demand response provider enrolled as a Special Case Resource cannot rely on requirement (ii) alone; it must also be able to show that it is able to satisfy requirement (i), which specifies that it must be able to reduce demand at the direction of the ISO.

II. Continued Payment for Demand Response

The order also fails to explain why Complainants should receive payment for demand response they cannot provide until the Commission acts on a future NYISO compliance filing. We find this approach to be of particular concern here since NYISO highlights the reliability concerns that are presented by resources that do not have the ability to reduce load when called upon under the ICAP/SCR Program.

In its answer, NYISO provides the example of a behind-the-meter generator that supplies 2 MW to its own load and never takes power from NYISO's system. NYISO notes that if this resource participates as a Special Case Resource by "adding back" 2 MW to its ICAP/SCR demand response eligibility, then a resource that creates no load on the system would be credited with the ability to provide 2 MW of load reduction when called upon by NYISO; when in actuality, the resource would provide no net load reduction on the system. This scenario permits "a [Special Case Resource] to receive a full capacity payment for generation that it regularly operates to serve base load" behind the meter and "adversely impact[s] system reliability."⁶

⁴ Order at PP 45-46.

⁵ See *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, at 25 (2004) ("Our ruling conforms to the generally accepted canons of contract interpretation which require that . . . a contract should be interpreted as an integrated whole"); *Cruden v. Bank of New York*, 957 F.2d 961, 976 (2nd Cir. 1992) ("[T]he entire contract must be considered, and all parts of it reconciled, if possible, in order to avoid an inconsistency."). See also *Colorado Interstate Gas Co. v. FERC*, 599 F.3d 698, 703 (D.C. Cir. 2010) (upholding FERC's interpretation of a tariff because the interpretation ensured that no provision of the tariff lacks legal effect).

⁶ NYISO April 19 Answer at 20.

The Commission has addressed concerns nearly identical to those raised by NYISO in a proceeding on the New England Day-Ahead Load Response Program (DALRP).⁷ In that proceeding, participants in the DALRP were receiving compensation for demand response during core DALRP hours (non-holiday weekdays from 7 AM to 6 PM) without actually providing any demand response during those hours. Addressing a particular example concerning parties that had shifted their load to off-peak hours (hours that were not eligible for compensation under the DALRP program), the Commission stated that “it is not clear what these participants are being paid for, nor what demand response they could provide when called upon, since they are not operating during these hours.” The Commission further found that “besides raising payment issues (in both the energy and capacity market), this also poses a threat to system reliability.”⁸

While the majority argues that the DALRP proceeding is distinguishable because ISONE’s program was “exclusively a demand response program,” the fundamental concerns in these two proceedings are identical. In the DALRP proceeding, the Commission took direct action⁹ to address the harm to reliability and concerns over inappropriate compensation for resources that were unable to reduce load when called upon by ISO-NE. Both of these issues are present in this proceeding. However, here the majority requires that Complainants receive payments for demand response they cannot provide until a future time when the Commission approves NYISO’s compliance filing.

We cannot support this result, as granting the complaint undercuts the fundamental integrity of the ICAP/SCR program and is inconsistent with a reasonable interpretation of the existing Tariff. This is a program available to interruptible load and emergency backup generation designed to respond in the case of reliability events. Therefore, we see no basis for the continued compensation of resources that purport to provide demand response yet do not and can not reduce system load. If Complainants do not intend or cannot reduce consumption from the grid when directed to do so by NYISO, they cannot provide the reliability service that the ICAP/SCR program is intended to provide and therefore should not be compensated as a demand resource.

Accordingly, we respectfully dissent.

Cheryl A. LaFleur
Commissioner

Tony Clark
Commissioner

⁷ See *ISO New England, Inc.* 123 FERC ¶ 61,021 (2008), *order denying reh’g*, 124 FERC ¶ 61,235 (2008).

⁸ See 123 FERC ¶ 61,021 at PP 58, 61.

⁹ *Id.* at P 25.