

131 FERC ¶ 61,170
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket Nos. EL07-39-004
EL07-39-005
ER08-695-002
ER08-695-003

ORDER ON CLARIFICATION, REHEARING AND COMPLIANCE FILING

(Issued May 20, 2010)

1. On March 7, 2008, the Commission accepted the New York Independent System Operator, Inc.'s (NYISO's) proposals to strengthen the mitigation of market power in the New York City (in-City) Installed Capacity (ICAP) market.¹ On September 30, 2008, the Commission granted, in part, and denied, in part, rehearing of the March 7, 2008 order and accepted two NYISO filings to comply with the March 7, 2008 Order, subject to conditions.² In this order the Commission grants, in part, and denies, in part, clarification and rehearing of the September 30, 2008 Order and also accepts NYISO's October 30, 2008 filing to comply with the September 30, 2008 Order, to be generally effective November 1, 2008, subject to conditions.³

¹ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 (2008) (March 7, 2008 Order).

² *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 (2008) (September 30, 2008 Order).

³ Affiliated Entity provisions of the October 30, 2008 compliance filing are accepted to become effective January 1, 2009.

I. Background

2. Prior orders in this proceeding explain the case in detail and thus we will provide only an abbreviated summary here. In 1998, Consolidated Edison of New York, Inc. (ConEd) divested most of its generators in three bundles, and in doing so, created a high degree of market concentration for generation in New York City. To mitigate the market power of the owners of this divested generation, ConEd proposed - and the Commission accepted - a \$105/kW-year offer and revenue cap on sales of ICAP from these units.⁴ The three companies that purchased ConEd's units were KeySpan-Ravenswood, LLC, NRG,⁵ and Astoria Generating Company, L.P. (collectively, the Divested Generation Owners, or DGOs). Subsequently, NYISO filed to reduce the DGOs' mitigation reference price, but in an order issued March 6, 2007, the Commission rejected NYISO's proposed revisions and established an investigation into the in-City market.⁶ On July 6, 2007, the Commission directed NYISO to file an in-City mitigation proposal, which NYISO filed in narrative form on October 4, 2007, following unsuccessful efforts at settlement.⁷ NYISO's proposal refined in-City buyer and seller market power mitigation measures using offer caps and floors while retaining the existing ICAP market structure, including the current set of ICAP auctions and the use of ICAP Demand Curves. Briefly, NYISO proposed an *ex ante* offer cap and a must-offer provision to implement mitigation for withholding by large, Pivotal ICAP Suppliers, and an *ex ante* offer floor for uneconomic new entry to implement in-City buyer mitigation. Of relevance here, NYISO also proposed to exempt demand response resources from the in-City mitigation rules. In the March 7, 2008 Order, the Commission conditionally approved NYISO's in-City mitigation proposal, including its proposal to exempt demand response, and directed NYISO to file tariff sheets containing the revised in-City market mitigation rules within 60 days of the issuance of the order. On March 20, 2008, NYISO made its filing in partial compliance with the March 7, 2008 Order by filing provisions regarding in-City seller market power⁸ and, on May 6, 2008, filed to comply with the

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

⁵ NRG consists of NRG Power Marketing Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

⁶ *New York Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,182 (2007).

⁷ *New York Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,024 (2007).

⁸ On March 26, 2008, the Commission accepted and suspended the March 20, 2008 filing, and permitted it to become effective March 26, 2008, subject to
(continued)

remaining directives of the March 7, 2008 Order regarding in-City buyer market power, including application of mitigation to exports of capacity.

A. Summary of the September 30, 2008 Order

3. In its September 30, 2008 Order the Commission granted, in part, and denied, in part, rehearing of its March 7, 2008 Order, and accepted certain of the revised tariff provisions (those filed on March 20, 2008) effective March 26, 2008, and others (those filed on May 6, 2008) effective November 1, 2008. With regard to the mitigation of in-City uneconomic entry, the Commission upheld its acceptance of NYISO's proposed generator reference offer floor⁹ but granted rehearing of the March 7, 2008 Order's requirement to apply the in-City offer floor only to Net Buyers and directed NYISO to eliminate that provision. The Commission agreed with the parties requesting rehearing that defining net buyers raises significant complications and provides undesirable incentives to evade mitigation measures.¹⁰

4. The Commission denied rehearing regarding its decision to exclude from in-City mitigation two previously-constructed generation facilities and affirmed that buyer market power mitigation applies to "new" uneconomic entrants as of March 27, 2008, not existing capacity, in order to mitigate future conduct. The Commission also granted rehearing of the March 7, 2008 Order's acceptance of NYISO's initial proposal to exempt from mitigation Special Case Resources (SCRs), including demand response resources, finding it "appropriate for NYISO's in-City market mitigation rules to apply to SCRs in the same manner as all other in-City market participants," and directed NYISO to file tariff sheets reflecting its ruling requiring "SCRs to comply with NYISO's in-City mitigation rules as approved herein."¹¹

5. With regard to the mitigation of in-City seller market power, the Commission granted rehearing on the issue of what costs may be included as net going-forward costs, which are used to determine an individual generator's offer floor which the generator can propose in lieu of the reference offer floor. The Commission directed that all non-discretionary capital expenditures such as those necessary to comply with federal or state regulations for environmental, safety, or reliability reasons be included as going-forward

refund and to the issuance of further orders. *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,282 (2008) (March 26, 2008 Order).

⁹ See P 30 *infra*.

¹⁰ September 30, 2008 Order, 124 FERC ¶ 61,301, at P 29 (2008).

¹¹ *Id.* P 41.

costs, with the caveat that such costs must not only be necessary to comply with federal or state regulations, but also must be necessary to make the unit available in the ICAP market.

6. The September 30, 2008 Order also accepted, subject to conditions, effective March 27, 2008, NYISO's proposed seller mitigation provisions filed March 20, 2008. Among other things, the Commission rejected NYISO's proposed inclusion of the retention of revenue or other financial benefits from UCAP in the definition of Control, which is used in defining "Pivotal Supplier" for purposes of NYISO's proposed seller mitigation provisions.

7. In the September 30, 2008 Order, the Commission also accepted, subject to conditions, effective November 1, 2008, NYISO's May 6, 2008 compliance filing containing tariff language to implement in-City buyer mitigation provisions, including physical withholding provisions, and to apply mitigation measures to exports of capacity. The Commission agreed with NYISO on the importance of establishing a reasonable mechanism to deter uneconomic exports but did not find NYISO's proposal to be reasonable. The Commission rejected NYISO's proposal to compare the price in the external market most proximate in time to the New York City market auction, since it would result in a comparison between an annual product in PJM or ISO-New England with a monthly product in New York City. The Commission also found that, given the uncertainty in forecasting comparable prices in neighboring markets, a 5 percent threshold for determining withholding was unreasonable. The Commission directed NYISO to revise its penalty threshold to the greater of \$2/kW-month and 15 percent and to revise its tariff to avoid comparing the price for an annual product with the price of the New York monthly product. The Commission stated that one way to make the comparison reasonable would be to compare (i) the net revenue that could have been received from the New York City market over the comparable period for which the supplier's capacity was committed in the export market with (ii) the net revenue that was actually received in the export market during that period.

8. The Commission found NYISO's proposed penalty for physical withholding via exports to be excessive and directed NYISO to revise the penalty so that it is 1.5 times the smaller of (i) the difference between the clearing prices in the New York City Spot Market Auction with and without the export and (ii) the difference between the New York City Spot Market Auction clearing price and the external region clearing price.

9. Finally the Commission directed NYISO to institute an *ex ante* approval process for exports, that would allow a generator to submit a request to NYISO for a determination of whether its export will be uneconomic, and therefore, physical withholding subject to the penalty provisions.

B. Rehearing and Compliance

10. On October 30, 2008, the New York State Public Service Commission (NYPSC), NYISO, NRG, New York Transmission Owners (NY Transmission Owners),¹² and TC Ravenswood, LLC (Ravenswood)¹³ filed requests for rehearing of the September 30, 2008 Order.

11. On November 11, 2008, Independent Power Producers of New York (IPPNY) filed an answer to the requests for rehearing filed by the NYPSC, NYISO, and NY Transmission Owners. On November 17, 2008, NY Transmission Owners filed a response to IPPNY's answer.

12. On October 30, 2008, NYISO submitted its compliance filing as required by the September 30, 2008 Order and a request for waiver of the previously requested effective date of November 1, 2008 for the implementation of the "Affiliated Entity" provisions included in the May 6, 2008 compliance filing, with these provisions to become effective on January 1, 2009. Protests and comments were filed, as discussed later below.

II. Requests for Clarification or Rehearing**A. Procedural Matters**

13. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2008), prohibits an answer to a request for rehearing. Accordingly, IPPNY's answer to the requests for rehearing is rejected and NY Transmission Owners' response is dismissed.

B. Substantive Matters**1. Definition of Control**

14. In the March 7, 2008 Order, the Commission generally accepted NYISO's proposal to mitigate seller market power by establishing bid caps and a must-offer

¹² New York Transmission Owners consists of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, Niagara Mohawk Power Corporation, and Orange and Rockland Utilities, Inc.

¹³ TC Ravenswood, LLC is a successor to KeySpan-Ravenswood, LLC, an intervenor in this proceeding.

requirements to ensure that in-City pivotal suppliers¹⁴ that control greater than 500 MW of NYC capacity may not profitably withhold capacity. However, the Commission rejected NYISO's proposed two-part pivotal supplier control test to apply mitigation to NYC capacity that is either owned or controlled by any entity that possesses market power. The Commission directed NYISO to file a pivotal supplier test based solely on control of resources. The Commission, quoting Order No. 697, stated:

our guiding principle is that an entity controls the facilities when it controls the decision-making over sales of electric energy including discretion as to how and when power generated by the facilities will be sold. We also note that the determination of control is appropriately based on a review of the totality of circumstances on a fact-specific basis.¹⁵

The Commission also stated that NYISO may presume that an owner of a capacity resource retains control over that resource for the purposes of applying the pivotal supplier test until the owner is able to demonstrate that it has conveyed control of the capacity resource to a non-affiliated third-party.¹⁶

15. NYISO's March 20, 2008 compliance filing proposed to define a pivotal supplier in section 2.1 of Attachment H to its tariff as a market party that (a) controls 500 MW or more of unforced capacity (UCAP), and (b) controls UCAP some portion of which is necessary to meet in-City locational minimum ICAP requirement in the ICAP Spot Market Auction.¹⁷ In its March 20, 2008 compliance filing, NYISO also proposed the following definition of "Control" in section 2.1:

¹⁴ Generally, a generator is considered "pivotal" when demand cannot be met without some contribution of supply by the seller or its affiliates. March 7, 2008 Order, 122 FERC ¶ 61,211 at n.18. NYISO proposed a special definition of "Pivotal Supplier" for purposes of in-City market mitigation under section 4.5 to include the requirement that, apart from controlling capacity some portion of which is needed to meet installed capacity requirements, the supplier and its affiliates must control 500 MW of unforced capacity (UCAP). In section 2.1 of its March 20, 2008 compliance filing, NYISO's proposal defined the capacity controlled by such pivotal suppliers as "Mitigated UCAP."

¹⁵ March 7, 2008 Order, 122 FERC ¶ 61,211 at P 66.

¹⁶ *Id.* P 66.

¹⁷ New York Independent System Operator, Inc., FERC Electric Tariff, Proposed Original Vol. No. 2, Attachment H, Original Sheet No. 467.01.

For purposes of §4.5 of this Attachment H, “Control” with respect to Unforced Capacity shall mean either (a) the ability to determine the quantity or price of offers to supply Unforced Capacity from an In-City Installed Capacity Supplier submitted into an ICAP Spot Market Auction, or (b) a right to revenue or other financial benefits from such Unforced Capacity.

NYISO explained that its proposed definition of “Control” includes the retention of revenue or other financial benefits from UCAP, the offering rights of which have been conveyed to a third party. NYISO also proposed a market rule in section 4.5(e) providing that the presumption of control from ownership can be rebutted, *inter alia*, by conveying the ability to determine price or quantity of offers to supply ICAP if the conveyance is “without any right to revenues or other financial benefits from such Unforced Capacity that would enable the seller to benefit from an increase in the Market-Clearing Price in the New York City Locality.”

16. In the September 30, 2008 Order, the Commission found that NYISO’s proposed definition of “Control” in section 2.1 and its proposed rebuttable presumption rule in section 4.5(e) went beyond the scope of the Commission’s directive in the March 7, 2008 Order to the extent they broadened the definition of control to include the retention of revenue or other financial benefits from UCAP. The Commission accepted proposed section 2.1 (a) of Attachment H but rejected proposed section 2.1(b) of Attachment H and the corresponding language in section 4.5(e) indicating that, in order to rebut a presumption of control, a person or entity must show that it is “without any right to revenues or other financial benefits from such Unforced Capacity that would enable the seller to benefit from an increase in the Market-Clearing Price in the New York City Locality.”

17. The NYPSC and NYISO request rehearing of the September 30, 2008 Order arguing that the Commission erred in excluding the retention of rights to revenue or other financial benefits from UCAP and that this exclusion allows pivotal suppliers to circumvent otherwise applicable bid caps by transferring ICAP bidding rights to separate entities, while retaining financial interests in the ICAP.

18. The NYPSC states that absent effective mitigation measures, pivotal suppliers may inappropriately profit by raising their bids, thereby foregoing sales on a portion of their ICAP, in order to increase the market clearing price received on their remaining supply (i.e., economic withholding). The NYPSC adds that by narrowly defining a pivotal supplier’s “Control” of capacity resources as the ability to determine the quantity or price of UCAP bids, the Commission has created a regulatory gap by which a pivotal supplier may easily evade the bid caps. The NYPSC states that an otherwise pivotal supplier could merely transfer “control” over bidding a sufficient portion of its UCAP to another entity, so that it maintains less than 500 MW (i.e. the threshold for imposing

mitigation), while economically withholding the UCAP it does retain by bidding far above its going-forward costs and reaping a windfall on the transferred megawatts due to its retained financial interests. The NYPSC contends that the Commission should recognize that financial swaps, which have already been employed by two pivotal suppliers (Reliant and KeySpan), have the same potential to exacerbate market power as if actual ownership were transferred. Thus, according to The NYPSC, financial contracts, such as swaps, must be considered along with ownership and bidding rights as part of any comprehensive market power analysis. The NYPSC argues that the Commission should reconsider its September 30, 2008 Order and find that NYISO's definition of "Control" to include the rights to revenue or other financial benefits from UCAP is both reasonable and necessary to address the problem of economic withholding of ICAP in New York City.

19. NYISO states that deletion of a revenues or financial benefits test for determining whether facilities providing ICAP are subject to the "control" of a pivotal supplier would be arbitrary and capricious, and not based on substantial evidence, and would permit rates that are unjust and unreasonable. NYISO argues that the Commission's rejection of the "revenues or financial benefits" portion of the definition of "Control" as well as the related language in section 4.5(e) goes beyond the rule that "compliance filings must be limited to the specific directives ordered by the Commission."¹⁸ NYISO states that the Commission in the September 30, 2008 Order ¹⁹ recognizes NYISO's assertion that a pivotal supplier could enter into a contract to transfer control over enough megawatts to fall below the relevant threshold, retain a right to revenues from those megawatts, evade mitigation, withhold all the retained megawatts, and realize the benefits of withholding from its rights in the other "transferred" megawatts. But, according to NYISO, the Commission fails to show that this concern is not well-founded, or to explain how this concern does not address a legitimate basis for an effective exercise of "Control" by a pivotal supplier under the "totality of the circumstances." NYISO states that, for example, a transferring entity could retain a right to revenues from the transferred capacity above a nominal level at or about the competitive pricing level, but then use its retained capacity to engage in withholding that would drive up the clearing price on the transferred capacity to levels well above the nominal price. NYISO adds that the transferring entity would not care that the entity exercising nominal control over offers from the transferred capacity would submit relative low, infra-marginal offers for the capacity, since it would get paid the clearing price. NYISO contends that the net effect for both the transferring entity and the market would be substantially the same as if the transferring entity had retained the more obvious type of "control." According to

¹⁸ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 101.

¹⁹ *Id.* P 97.

NYISO, the result would be unduly high market prices and the garnering of monopoly profits by the transferring entity on all the transferred megawatts of capacity, notwithstanding the ostensible transfer of “control.”

20. NYISO argues that such a loophole in the determination of the “Control” of ICAP, can give rise to capacity charges that are not just and reasonable, and that would significantly over-compensate generators. NYISO states that the significant disparity in the potential harm to loads and generators makes this result particularly unwarranted. NYISO further states that any supplier that has marginal costs of providing ICAP that are very low, which is generally the case for most suppliers, should be offering capacity as a price taker well below the default bid cap and would not be affected by the mitigation measures if it does so. NYISO adds that if its marginal costs of supply capacity are above the default bid cap, then the mitigation measures provide procedures for setting that supplier’s bid cap at appropriately higher levels, even if it is a pivotal supplier. Thus, according to NYISO, the proposed mitigation measures would not deter legitimate supplier conduct, but, on the other hand, the unwarranted costs to loads could be substantial if the mitigation measures permit suppliers to use contractual mechanisms to evade the definition of “Control” and thereby raise capacity prices to supra-competitive levels.

Commission Determination

21. In the September 30, 2008 Order, the Commission did not address the merits of NYISO’s proposal to define “Control” to include “a right to revenue or other financial benefits” but, rather, rejected the proposal on procedural grounds by finding that NYISO’s proposal was not in compliance with the directive in the March 7, 2008 Order. The March 7, 2008 Order, as noted above, directed NYISO to file a pivotal supplier test based solely on control of resources and described what it meant by “control” by referring to the following excerpts from No. 697: “[A]n entity controls the facilities when it controls the decision-making over sales of electric energy including discretion as to how and when power generated by the facilities will be sold.”²⁰ As stated in the September 30, 2008 Order, “in broadening the definition of control to include the retention of revenue or other financial benefits from UCAP, NYISO [went] beyond the scope of the March 7, 2008 Order.”²¹

22. The rehearing petitioners claim that NYISO’s proposal did, in fact, comply with the March 7, 2008 Order because they assert that the proposal fits within a review of the “totality of circumstances.” The rehearing petitioners rely on the Commission’s

²⁰ March 7, 2008 Order, 122 FERC ¶ 61,211 at P 66.

²¹ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 101.

statement in Order No. 697, which immediately followed the Commission's definition of control: "We also noted that 'the determination of control is appropriately based a review of the totality of circumstances on a fact-specific basis.'" However, the obligation to review the "totality of circumstances" is only with respect to the determination of whether an entity has decision-making power over price and volume. Consideration of the "totality of circumstances" is not a separate, open-ended definition of "control" which permits consideration of other factors that do not necessarily show control "over the decision-making over sales of electric energy including discretion as to how and when power generated by the facilities will be sold." Permitting a showing of "a right to revenue or other financial benefits" is so broad as to encompass entities that do not have the required decision-making power over price and volume of ICAP sales and, therefore, goes beyond compliance with the Commission's directive in the March 7, 2008 Order.

23. If the NYPSC and NYISO objected to or were unclear as to the limits the Commission placed on the definition of control by quoting from Order No. 697, then they should have sought rehearing or clarification of the March 7, 2008 Order. But, no party sought rehearing of the March 7, 2008 Order on this issue. Instead NYISO sought to revise the definition of control in its compliance filing and, in so doing, went beyond the scope of the Commission's directive. When control is defined consistent with Order No. 697 as we have required, NYISO, in effect, points out that it can no longer conclude that sellers with less than 500 megawatts of UCAP will lack the incentive and ability to exercise market power, calling into question the benefits of the mitigation exemption. NYISO asserts that some contract terms could be structured to give a seller a continuing financial interest in the sales of other market participants, as the NYPSC alleges was the case with the financial swaps involving Reliant and KeySpan. NYISO contends that even though a seller might retain control of less than 500 megawatts of UCAP, it could nevertheless profit from withholding, not necessarily on the capacity it retains and directly bids into the market, but on the capacity it has transferred to a third party. While we deny the requests for rehearing on NYISO's proposed revision to the definition of control on procedural grounds, we recognize that NYISO's proposal to exempt small sellers from market power mitigation, which we previously accepted, may create a loophole that could give an entity an incentive and ability to exercise market power by economically withholding capacity even if it controls less than 500 megawatts of UCAP. We will, therefore, require that NYISO review the merits of the existing mitigation exemption and submit a filing within 30 days informing the Commission as to whether the exemption should remain. If NYISO chooses to retain an exemption for small sellers, it must also explain how its mitigation proposal will address the market power issues it has raised without broadening the definition of control. If NYISO believes that changes to its mitigation exemption or other tariff changes are necessary to address the market power issues it has raised, without broadening the existing definition of control, NYISO may propose such changes under section 205 of the Federal Power Act for the Commission to review.

2. Definition of Generator Offer Floor

24. In the September 30, 2008 Order, the Commission accepted, subject to condition, NYISO's May 6, 2008 compliance filing which included provisions to implement uneconomic new entry ICAP mitigation measures applicable to generator suppliers to comply with the March 7, 2008 Order. The Commission accepted, *inter alia*, NYISO's proposed *ex ante* offer floor applicable to new entry of in-City generator ICAP.

25. NY Transmission Owners state that they seek rehearing on the single issue of the provisions for an offer floor for mitigation of uneconomic entry into the in-City ICAP market which were included in NYISO's May 6, 2008 compliance filing. They assert that the Commission in the September 30, 2008 Order failed to address the substance of NY Transmission Owners' May 27, 2008 Comments filed in response to NYISO's May 6, 2008 compliance filing and that NYISO's proposed offer floor is not consistent with the directives contained in the March 7, 2008 Order.

26. NY Transmission Owners state that, in the March 7, 2008 Order, the Commission accepted NYISO's proposal to set the offer floor, which would apply to all new generation entrants in the in-City ICAP market for the first three years of their operation, at 75 percent of the net "cost of new entry" (CONE).²² The NY Transmission Owners note that the March 7, 2008 Order defined "CONE" as the cost of adding a LMS 100 peaking unit to the in-City market and "net CONE" as "CONE less energy and ancillary services revenues (seasonally adjusted)."²³ Consequently, according to NY Transmission Owners, in order to comply with the March 7, 2008 Order, NYISO was required to define the offer floor as 75 percent of the cost of adding an LMS 100 peaking unit to the in-City market after accounting for energy and ancillary services revenues. NY Transmission Owners state that although, in the May 6, 2008 Compliance Filing, NYISO defined the offer floor as "a numerical value equal to 75 percent of the net CONE" in compliance with the March 7, 2008 Order, NYISO's proposed definition of net CONE in that filing is not the same as the definition ordered by the Commission in that it defines net CONE as the price on the in-City ICAP Demand Curve that corresponds to 100 percent of the in-City ICAP Requirement. NY Transmission Owners assert that, for the following reasons, this amount considerably exceeds the estimated cost of adding an LMS 100 peaking unit to the in-City market after accounting for energy and ancillary services revenues.

²² March 7, 2008 Order, 122 FERC ¶ 61,211 at P 107. As noted earlier, the Commission accepted NYISO's proposal to exempt SCRs from the mitigation rules.

²³ *Id.* at n.24 (citing *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,064, at P 23 (2008)).

27. NY Transmission Owners assert that the difference between the two definitions stems from an adjustment that NYISO applied when it was calculating net CONE during its triennial Demand Curve reset process. NY Transmission Owners cite to the following statement in the affidavit of Eugene Meehan, the consultant who NY Transmission Owners state led the development of the Demand Curves, which was appended to NYISO's compliance filing: "[G]iven the bias toward excess capacity, the new peaking unit could not be expected to receive the revenue implied by the net CONE figure over time. Hence the ICAP Demand Curve would not incent sufficient new entry without an adjustment to the net CONE." This adjustment, according to NY Transmission Owners, increased NYISO's measure of net CONE and means that the price on the in-City ICAP Demand Curve that corresponds to 100 percent of the in-City ICAP requirement no longer represented the net cost of developing in-City generation. NY Transmission Owners state that, as the likelihood of the in-City ICAP requirement not being met is very small, this adjustment increased the price on the in-City ICAP Demand Curve that corresponds to 100 percent of the in-City ICAP requirement to a level that was designed to ensure that 104 percent of the in-City ICAP requirement would be provided, on average. NY Transmission Owners contend that if 104 percent of the in-City ICAP requirement is provided on average, then the average price of in-City ICAP must be the price on that Demand Curve that corresponds to 104 percent of the in-City ICAP requirement, not the price which corresponds to 100 percent of that requirement.

28. NY Transmission Owners state that it follows that the anticipated cost of adding new in-City capacity cannot exceed the price on the in-City Demand Curve that corresponds to 104 percent of the in-City ICAP requirement. Consequently, according to NY Transmission Owners, in order to comply with the March 7, 2008 Order, which directed NYISO to set the offer floor at 75 percent of the net CONE, the offer floor must be set at 75 percent of the price on the in-City Demand Curve that corresponds to 104 percent, not 100 percent, of the in-City ICAP requirement.

29. NY Transmission Owners add that it is important to recognize that using NYISO's definition for net CONE would cause the offer floor to be significantly overstated, which will discourage economic entry because it will prevent developers of economically justified new generation from selling all of the capacity those generators can provide. NY Transmission Owners assert that the price that corresponds to 100 percent of the in-City ICAP requirement is 128.6 percent of the price that corresponds to 104 percent of in-City minimum ICAP requirement - meaning that it is 128.6 percent of the net cost of developing new in-City ICAP. Therefore, it asserts, setting an offer floor at 75 percent of net CONE, using NYISO's definition for net CONE, would mean that the offer floor was actually set at $75 \text{ percent} \times 128.6 \text{ percent} = 96.5 \text{ percent}$ of the anticipated cost of new in-City ICAP. Accordingly, NY Transmission Owners assert that the Commission should grant rehearing and direct NYISO to set the offer floor at 75 percent of what it asserts is the cost of adding a LMS 100 peaking unit to the in-City market after taking energy and ancillary services revenues into account, which, according to NY Transmission Owners,

is the price on the in-City ICAP Demand Curve corresponding to 104 percent of the inCity ICAP requirement, based on its assertion that these were the average conditions assumed when developing that Demand Curve.

Commission Determination

30. We grant the NY Transmission Owners' request for rehearing regarding this issue and find that NYISO has not complied with our March 7, 2008 Order in which we accepted an offer floor for new entry by generators equal to 75 percent of net CONE.²⁴

31. There was some confusion regarding NYISO's use of the term "net CONE." However, we specifically defined net CONE in footnote 24 of the March 7, 2008 Order as the cost of adding a LMS 100 peaking unit to the in-City market, less energy and ancillary services revenues (seasonally adjusted) and NYISO's proposed tariff definition of net CONE appeared to be consistent with our definition.²⁵ Accordingly, the offer floor was to be 75 percent of that net cost.²⁶ In contrast, NYISO explained that its proposed offer floor is to be calculated as 75 percent of the price on the ICAP Demand Curve corresponding to 100 percent of the ICAP requirement.²⁷ Although that price at 100 percent of the ICAP requirement on the ICAP Demand Curve had been described as being equal to net CONE, that price actually is higher than net CONE as the Commission defined that term, i.e., the net cost of a LMS 100 peaking unit, because NYISO adjusted

²⁴ March 7, 2008 Order, 122 FERC ¶ 61,211 at P 107.

²⁵ *Id.* P 29 n.24. In its May 6, 2008 compliance filing, NYISO proposed the following definition of net CONE:

For purposes of § 4.5 of this Attachment H, "Net CONE" shall mean the localized levelized embedded costs of a peaking unit in the New York City Locality, net of the likely projected annual Energy and Ancillary Services revenues of such unit, as determined in connection with establishing the Demand Curve for the New York City Locality pursuant to § 5.14.1(b) of the Services Tariff, or as escalated as specified in § 4.5(g) of Attachment H.

New York Indep. Sys. Operator, Inc., FERC Electric Tariff, Original Vol. No. 2, Attachment H Original Sheet No. 467.00A.

²⁶ March 7, 2008 Order, 122 FERC ¶ 61,211 at P 107.

²⁷ New York Indep. Sys. Operator, Inc., June 11, 2008 Response at 12 (citing New York Indep. Sys. Operator, Inc., December 12, 2007 Reply Comments, Docket No. EL07-39-000, at n.44).

the ICAP Demand Curve upward to account for the likely surplus of capacity and an associated lower ICAP revenue attributable to that surplus.²⁸ As the NY Transmission Owners correctly point out, using the figures in their example, net CONE as so defined actually equates to the price on the adjusted ICAP Demand Curve corresponding to 104 percent of the ICAP requirement, which is lower than the price corresponding to 100 percent of ICAP that NYISO included in its compliance filing. As a result, the offer floor included in NYISO's October 30, 2008 compliance filing exceeds the offer floor that we approved in the March 7, 2008 Order. We direct NYISO to make a compliance filing within 30 days of this order that corrects the calculation of the generator offer floor consistent with the above discussion.

3. Proposed Penalty Provisions for Pivotal Supplier Physical Withholding

32. In the September 30, 2008 Order, the Commission accepted NYISO's proposed process for evaluating whether a Pivotal Supplier's plans to retire, mothball, or de-rate generator units constitute an exercise of market power and therefore the supplier is subject to NYISO's corresponding proposed physical withholding penalties.²⁹ The Commission also accepted NYISO's proposed penalty for the failure to offer "Mitigated UCAP"³⁰ into the spot market auction of 1.5 times the market clearing price times the

²⁸ The Commission accepted NYISO's adjustment to the ICAP Demand Curve in an order issued December 18, 2008, in Docket No. ER08-283, finding that

[i]t would be reasonable to establish Demand Curve parameters that raise the height of the Demand Curves to account for the effects over time of surplus capacity on capacity revenues. Such a method would establish a capacity price on the Demand Curve at the minimum capacity requirement that reflects a levelized portion of the revenue deficiency that would otherwise occur due to expected capacity surpluses over time. The result would be a capacity price that is slightly higher than the price that would be calculated if such revenue deficiencies are not accounted for.

New York Indep. Sys. Operator, Inc., 125 FERC ¶ 61,299, at P 39 (2008).

²⁹ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 130.

³⁰ NYISO's March 20, 2008 filing's proposed tariff provisions defined "Mitigated UCAP" as one or more MW of capacity controlled by a Pivotal Supplier.

total of (1) the amount of mitigated UCAP not offered or sold, and (2) all other megawatts of unforced capacity under common control with such mitigated UCAP.³¹

33. The Commission found, however, that NYISO's proposed penalty for physical withholding through uneconomic exports was excessive.³² The Commission stated that the profit from withholding through uneconomic exports can be measured based on the difference in the clearing prices of the New York City spot market auction with and without the export and it directed NYISO to revise its penalty for physical withholding related to uneconomic exports so that it is 1.5 times the smaller of (i) the difference between the clearing prices in the New York City Spot Market Auction with and without the export and (ii) the difference between the New York City Spot Market Auction clearing price and the external region clearing price.³³ The Commission also rejected supplier proposals aimed at avoiding penalties for human or computer error stating that given the historical low record of mistakes, an automated system was not warranted and that mitigated suppliers that claim to have been penalized for human or computer error can request relief in the dispute resolution process or before the Commission.

34. NRG asserts that the Commission's acceptance of NYISO's proposed penalty provisions represents an unjustified departure from well-established precedent, which requires that mitigation, including penalties to prevent inappropriate conduct, be narrowly tailored to address the problem identified.³⁴ NRG states that Commission policy requires a reasoned approach for imposing penalties that considers all of the relevant circumstances, including the harm caused by the violation, the benefit gained by the alleged wrongdoer, and whether the conduct was willful or the result of an innocent mistake.³⁵ NRG contends that the Commission erred in accepting NYISO's penalty provisions, thereby authorizing the imposition of severe penalties on mitigated suppliers that fail to offer all uncommitted capacity in the in-City ICAP market without taking into consideration the intent of the supplier, the harm to the market, or the benefit to the supplier. NRG further contends that the Commission compounded its error in failing to require NYISO to implement measures to prevent the imposition of excessive penalties

³¹ *Id.* P 142.

³² *Id.* P 163.

³³ *Id.*

³⁴ *Citing New England Power Pool*, 101 FERC ¶ 61,344, at P 28 (2002); *Midwest Indep. Transmission Sys. Operator, Inc.*, 105 FERC ¶ 61,147, at P 43, 46 (2003);

³⁵ *Citing Policy Statement on Enforcement, Enforcement of Statutes, Rules, Orders, and Regulations*, 113 FERC ¶ 61,068, at P 18 (2005).

where a mitigated supplier inadvertently fails to offer its uncommitted capacity into the in-City ICAP spot market. NRG compares the Commission's acceptance of the penalty with regard to suppliers that fail to offer all uncommitted capacity with the Commission's rejection of the proposed penalty scheme related to withholding through uneconomic exports. In the latter instance the Commission explained

a reasonable and effective penalty would both remove the entirety of the financial benefit from withholding and apply a significant additional charge to deter future withholding, as Mr. Younger suggests. The profit from withholding can be measured based on the *difference* in the clearing prices of the New York City spot market auction with and without the export. But NYISO's proposed penalty appears to go far beyond this amount. It is based on a percentage above the *full* clearing price in the New York City spot market auction. Thus, NYISO's proposed penalty would be substantially higher than the entire capacity revenue that the supplier received from the New York City and external capacity markets. Such a penalty appears to be far more than is necessary to discourage withholding.³⁶

35. NRG states that instead of applying this reasoning to suppliers that fail to offer all uncommitted ICAP into the NYISO markets, the Commission has accepted a proposal that applies penalties to the megawatts not offered and any other megawatts controlled by the supplier. According to NRG, this could result in penalties that are "substantially higher than the entire capacity revenue that the supplier received from the New York City" and are "far more than is necessary to discourage withholding."³⁷ NRG further states that this could lead to excessive penalties imposed on a mitigated generator even when the failure to offer all unmitigated capacity was inadvertent, the harm to the market was negligible, and the resulting benefit to the mitigated supplier was *de minimus* (or non-existent). NRG contends that the Commission should direct NYISO to develop a penalty regime for physical withholding in-City that appropriately accounts for inadvertent failures to offer capacity, the harm to the market, and the benefit to the supplier. NRG states that one way to accomplish this objective is to establish a penalty in the amount of 1.5 times the difference between the clearing prices in the New York City Spot Market Auction with and without the amount (MWs) deemed to be physically withheld from the in-City market. NRG asserts that applying this comparable approach would (i) strip the supplier of any gains from increases in in-City capacity prices resulting

³⁶ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 163.

³⁷ NRG October 30, 2008 Filing at 8 (quoting September 30, 2008 Order, 124 FERC ¶ 61,301 at P 163).

from the withholding, and (ii) result in a 50 percent penalty. NRG asserts that this penalty would be consistent with the Commission's well-established policies and its treatment of uneconomic exports in the September 30, 2008 Order.

36. NRG adds that the Commission should also require NYISO to (1) automatically include inadvertently uncommitted "must offer" megawatts into the NYISO spot market at \$0, i.e., as a price taker; or alternatively (2) consult with the supplier to give the market participant the opportunity to explain or correct the deficiency before levying penalties. NRG states that such protections are necessary to avoid the imposition of penalties in cases of inadvertent mistakes and that this approach is consistent with the Commission's policy of factoring in supplier intent before levying penalties. NRG further states that the fact that penalized suppliers "can request relief in the dispute resolution process or before the Commission"³⁸ does little prevent the problem from arising and does not address the problem in an efficient and cost-effective manner and attempting to reconstruct or resettle the market after the fact is inconsistent with the Commission's goal of ensuring market certainty.

37. Finally, NRG argues that its proposal is consistent with (1) sections 4.1 and 4.2 of Attachment H to NYISO's Tariff, pursuant to which default bids are applied in response to physical withholding in the energy and ancillary services markets before resorting to penalties under section 4.3; and (2) NYISO's treatment of Load Serving Entities (LSEs), where in lieu of a penalty, NYISO submits bids on behalf of an LSE at a level per MW determined by the ICAP Demand Curves in order to ensure that they purchase the balance of their Unforced Capacity obligation.

Commission Determination

38. We agree with NRG that the penalty for pivotal supplier physical withholding through a failure to offer all uncommitted ICAP into the NYISO markets should be equivalent to the penalty for physical withholding through uneconomic exports. Our reasoning in the September 30, 2008 Order with regard to physical withholding through uneconomic exports³⁹ applies equally to other types of physical withholding. Thus, we find that NYISO's penalty for economic withholding through a failure to offer all uncommitted capacity is excessive and should be the same as the penalty for physical withholding through uneconomic exports. Therefore, we grant rehearing on this issue. We direct NYISO to file revised tariff sheets within 30 days of this order to reflect a penalty for physical withholding through a failure to offer all uncommitted ICAP into the NYISO markets in the amount of 1.5 times the difference between the clearing prices in

³⁸ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 133.

³⁹ *Id.* P 163.

the New York City Spot Market Auction with and without the amount (in MWs) deemed to be physically withheld from the in-City market.

39. We deny rehearing with regard to the issue of the mitigated pivotal supplier who inadvertently fails to offer its uncommitted capacity into the in-City ICAP spot market. In the September 30, 2008 Order, we rejected KeySpan's proposal to automatically offer all of a supplier's capacity in the spot auction to avoid penalties for human or computer error, given the historical low record of mistakes, and stated that "in any event, mitigated suppliers that claim to have been penalized for human or computer error can request relief in the dispute resolution process or before the Commission."⁴⁰ NRG argues that this solution is neither cost-effective, nor does it align with the Commission's goal of ensuring market certainty, and we should adopt its proposal to avoid the imposition of penalties in cases of inadvertent mistakes. We disagree. Given the historical low rate of error, we find NRG's suggested remedies are neither cost-effective, nor practical. They place on NYISO the burden of determining which bids were in error. Each Supplier rightfully should bear the responsibility for its own errors, even if those errors are inadvertent. In addition, a supplier is better positioned than NYISO to judge the validity of its own offers. Further, contrary to NRG's claim, allowing tariff penalties in the case of inadvertent errors without regard to intent would not conflict with Commission policy. In fact, Commission policies on the imposition of civil penalties in enforcing violations of statutes or Commission rules, orders, and regulations under section 316A of the Federal Power Act (FPA)⁴¹ have no direct bearing on the separate issue of whether tariff penalties are just and reasonable. Finally, granting relief from improperly assessed penalties, either through the dispute resolution process or through appeal to the Commission, does not require resettling the markets and is appropriate in that the burden rests with those who made the error, even if inadvertent.

4. Definition of "New" Entry for Generation

40. In the March 7, 2008 Order, the Commission rejected arguments by the divested generation owners and agreed with NYISO that both the NYPA and ConEd generation units, which came online in 2006, should be exempted from net buyer mitigation. The Commission stated that to apply this new market rule to units that already exist in the market misses the point of this prospective rule, which is to affect future actions. Deterrence of their entry, by definition, is no longer possible. In the September 30, 2008

⁴⁰ *Id.* P 133.

⁴¹ 16 U.S.C. § 825o-1 (2006) (providing the Commission with civil penalty authority for violations of any provision of part II of the FPA or any provision of any rule or order thereunder).

Order, the Commission confirmed this finding and rejected requests for transition mechanisms, such as that proposed by Ravenswood in its initial comments preceding the March 7, 2008 Order,⁴² as essentially requests to increase prices, from those which would otherwise result, by imposing modified bidding restrictions on the 1000 megawatts of capacity added by ConEd and NYPA in 2006.⁴³

41. On rehearing, Ravenswood states that, for the reasons stated in its original protest, NYISO's proposed tariff language intended to exempt existing capacity from net buyer market power mitigation should not apply to existing facilities that are transferred or sold, or become attributed to another Net Buyer through new long-term contractual or financial arrangements after March 7, 2008, if the transaction is entered into in a discriminatory process. Ravenswood contended that in such circumstances, significant future actions will be taken that may be motivated by another Net Buyer's efforts to depress prices in the ICAP market. Ravenswood added that each Net Buyer may have different incentives and wherewithal to use uneconomic capacity, whether existing or new capacity, to suppress prices and any Net Buyer that acquires, directly, or indirectly, uneconomic capacity, would have been on notice of the applicability of the offer floor mitigation, even to previously grandfathered facilities. Therefore, according to Ravenswood, the Commission's rationale for exemption of the facilities would no longer apply. Accordingly, Ravenswood proposed to modify the exemption for existing facilities in section 4.5(g)(vii) of Attachment H to read:

(vii) An In-City Installed Capacity Generator shall be exempt from an offer floor if it was an existing facility on or before March 7, 2008 and such facility was neither acquired through any form of transfer or sale nor did it become Attributable ICAP through any new transaction or contractual or financial arrangement that occurs or is entered into after March 7, 2008 in a discriminatory process.

42. Ravenswood requests rehearing of the September 30, 2008 Order for accepting NYISO's May 6, 2008 compliance filing without addressing Ravenswood's protest of the filing's prescription of an exemption of existing resources from buyer market power mitigation rules. Ravenswood reiterates the arguments and proposals made in its protest as described above. Ravenswood states that the Commission's rationale for approving buyer market power mitigation rules is to "affect future [uneconomic] actions" that could suppress in-City capacity prices, a rationale plainly applicable to uneconomic,

⁴² Ravenswood Initial Comments, Docket No. EL07-39-000 (filed November 19, 2007).

⁴³ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 44.

discriminatory, new long-term contractual or financial arrangements for existing generation resources.⁴⁴

Commission Determination

43. We deny Ravenswood's request for rehearing on this issue. We reject Ravenswood's claim that a change in contractual or financial arrangements pertaining to an existing generation facility should transform that facility into a unit subject to new entry mitigation rules. As we concluded earlier, new entry mitigation is intended to deter the construction of uneconomic capacity and such deterrence would not apply in this case. We understand that Ravenswood remains concerned that entities with buyer market power may have an incentive to suppress market clearing prices below the competitive level by retaining uneconomic capacity that should be mothballed or retired, and that they might attempt to exercise this market power through contractual means, i.e., that *new* uneconomic entry is not the only mechanism available for generators to exercise such market power. However, we find the possibility for such action too speculative at this point to require an immediate remedy. We conclude that the evidence to date supports only the offer floor mitigation for uneconomic new entry by generators and SCRs (see discussion below) that this order addresses. Ravenswood's concerns should be addressed in the annual report prepared by the independent market monitor to the extent the monitor finds evidence to support their concerns.

5. Definition of "New Entry" for Special Case Resources

44. In the March 7, 2008 Order, the Commission adopted NYISO's proposal to exempt SCRs⁴⁵ from the mitigation of uneconomic investment.⁴⁶ The Commission stated that demand response is a valuable tool for the maintenance of reliability and fulfills this role in an environmentally benign way, and subjecting demand response to the offer floor, which is based on the cost of new generation entry, could erect a barrier to entry of demand response into the markets. Moreover, the Commission concluded that

⁴⁴ March 7, 2008 Order, 122 FERC ¶ 61,211 at P 118.

⁴⁵ NYISO's Services Tariff defines a "Special Case Resource" 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(a) of this ISO Services Tariff and related ISO Procedures, in order to facilitate their participation in the Installed Capacity markets as Installed Capacity Suppliers." See NYISO Services Tariff, Original Volume No. 2., Attachment H, Sixth Revised Sheet No. 67A.

⁴⁶ March 7, 2008 Order, 122 FERC ¶ 61,211 at P 120.

there is no basis to establish an offer floor for demand response resources based on the cost of new generation entry because there is not necessarily any connection between net CONE by generation and net CONE by demand response resources. Finally, the Commission stated that it is unclear how NYISO would determine the cost of SCR entry or if that entry was uneconomical.⁴⁷ However, in the September 30, 2008 Order, upon further review and based on its action in another proceeding applying certain market mitigation rules to SCRs,⁴⁸ the Commission found that it is appropriate for NYISO's in-City market mitigation rules to apply to SCRs in the same manner as all other in-City market participants.⁴⁹ Accordingly, the Commission stated that it would require SCRs to comply with NYISO's in-City mitigation rules as approved in the September 30, 2008 Order.

45. Ravenswood requests clarification, or, in the alternative, rehearing that, under the September 30, 2008 Order, SCRs are "new" and not exempt from the buyer market power mitigation rules, if a buyer enters into or renews a contract for, or otherwise acquires, an SCR such that it receives revenues in excess of the spot market clearing price. Ravenswood states that because SCRs are transient and often only exist if they receive out-of-market contractual subsidies, market power mitigation rules should apply to any new or extended contracts for SCRs. Ravenswood asserts that new uneconomic contracts or arrangements for SCRs should not be allowed to subsidize and perpetuate the continued use of those resources to suppress market-clearing capacity prices and that absent such new contracts or arrangements SCRs would otherwise exit the market.

46. Ravenswood states that, in the September 30, 2008 Order, the Commission recognized the need to "impose appropriate market power mitigation measures when conduct departs significantly from what would be expected under competitive market conditions."⁵⁰ Ravenswood adds that in a well-functioning competitive market, SCRs would freely enter and exit the market, through execution of new contracts or upon expiration of existing contracts, in response to market clearing prices, not subsidies, and that, if buyers are able to enter into new or renewed uneconomic contracts that subsidize SCRs, when those resources would otherwise exit the market, buyers will be able to suppress capacity prices. Ravenswood states that the requested clarification will deter "conduct [that] departs significantly from what would be expected under competitive market conditions."

⁴⁷ *Id.*

⁴⁸ *Id.* (citing *New York Indep. Sys. Operator, Inc.*, 123 FERC ¶ 61,203 (2008)).

⁴⁹ September 30, 2008 Order, 124 FERC ¶ 61,201 at P 41.

⁵⁰ *Id.*

Commission Determination

47. We will deny Ravenswood's request for clarification or rehearing. In the September 30, 2008 Order, we did not intend that NYISO submit tariff revisions as proposed by Ravenswood; nor was it error not to require NYISO to do so. In the September 30, 2008 Order, we directed NYISO to file revised tariff sheets applying market mitigation rules to SCRs "in the same manner" as all other in-City market participants. As discussed further below in the section of this order dealing with NYISO's October 30, 2008 compliance filing, we did not intend that they be subject to identical mitigation offer caps, must-offer requirements or offer floors. Consistent with the findings in the March 7, 2008 Order, we recognize that there are differences between SCRs and such generation resources. For example, while NYISO's tariff defines "New Capacity" in physical terms of being a new generator or substantial additions to an existing generator,⁵¹ and NYISO's original buyer mitigation proposal's "new entry" requirement clearly contemplated such physical construction of new generation facilities, construction of a physical facility is not an appropriate indicator of new entry for SCRs since the facility in which the SCR equipment is located is engaged in some primary business other than demand response. Finally, we affirm our concern expressed in the March 8, 2008 Order that it is unclear how NYISO would determine the net cost of new SCR entry.

48. Nonetheless, we believe a "new" versus "existing" distinction, albeit not identical to that applied to new, large, generation that supplies the grid, is appropriate in rules designed to deter future uneconomic entry by SCRs. Accordingly, to that extent, we agree with Ravenswood that it is appropriate that an offer floor for SCRs differ from that applied to new large generation. We do not, however, agree with Ravenswood that we intended to direct NYISO to submit Ravenswood's specific proposed measure or that it is error not to so order. Indeed, we did not specify any particular definition of "new entry" or form of offer floor applicable to SCRs that NYISO was required to submit in its compliance filing, and we find that our action was not in error. Consistent with all other mitigation provisions considered in this proceeding, we intended that NYISO initially formulate and submit its own proposal tailored to the unique characteristics of SCRs. In the compliance section of this order we address NYISO's proposal, which is a variant of Ravenswood's insofar as it is based on when SCRs enter into contracts to provide service, but does not subject SCRs to mitigation every time the SCR enters into a new contract. We do not agree with Ravenswood that subjecting SCRs to mitigation every time a new contract is signed is reasonable. SCRs, in most cases, enter into annual contracts. Thus, under Ravenswood's proposal most, if not all, SCRs would be

⁵¹ See section 2.1 to Attachment H of NYISO's Services Tariff, First Revised Sheet No. 467.00A.

continuously subject to mitigation. As discussed in more detail in the compliance section of this order below,⁵² with certain modifications and conditions directed there, we believe that NYISO's proposed SCR in-City mitigation provisions, including its proposed provisions establishing the new entry qualification and offer floor for such SCRs, is reasonable. Accordingly, we deny Ravenswood's request for clarification or, alternatively, rehearing on this issue.

III. October 30, 2008 Compliance Filing

A. Notice of Filing and Responsive Pleadings

49. Notice of NYISO's October 30, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 69,630 (2008), with interventions and protests due on or before November 20, 2008. On November 13, 2008, this deadline was extended to December 2, 2008.

50. On December 2, 2008 CPower, Inc., Energy Curtailment Specialists, Inc., Energy Spectrum, Inc., EnerNOC, Inc., and Innoventive Power, LLC (collectively, the Responsible Interface Parties, or RIP Coalition); Ravenswood; IPPNY; and the NYPSC filed requests for rehearing. On December 2, 2008, ConEd filed comments. On December 15, 2008, Ravenswood filed an answer to ConEd's comments and to the NYPSC's protest. On December 16, 2008, IPPNY filed an answer to the protests and comments of the NYPSC, ConEd and the RIP Coalition. On December 17, 2008, NYISO filed an answer to protests and comments.

B. Compliance Procedural Matters

51. Rule 213(a)(2) of the Commissions Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

C. Substantive Compliance Matters

1. Net Buyers

52. In its October 4, 2007 compliance filing, NYISO proposed in-City buyer mitigation rules to address uneconomic new entry of generation capacity by entities that offer such capacity with the purpose of driving down the price of capacity they buy. In the March 7, 2008 Order, the Commission directed NYISO to revise its proposal to apply

⁵² *Infra* section III.C.7.

only to “Net Buyers,” i.e., in-City market parties that buy more ICAP than they sell. NYISO and others sought rehearing of that directive. NYISO complied with that directive in its May 6, 2008 filing, but posed a number of problems with implementing such a provision. In its September 30, 2008 Order, the Commission granted rehearing on the issue of limiting generator new entry buyer mitigation to “Net Buyers” only and ruled that NYISO was not required to modify its proposed buyer market power mitigation rules for uneconomic entry to apply only to net buyers. Thus, the Commission rejected the “Net Buyer” provisions contained in NYISO’s compliance filing and directed NYISO to reflect this ruling in a further compliance filing.

53. In its October 30, 2008 compliance filing, NYISO states that it has deleted the definition of “Net Buyer” in § 2.1 of Attachment H and has also deleted the definition of “attributable ICAP” since that definition was only used to implement the “Net Buyer” definition. NYISO also states that it has deleted the substantive provisions implementing the Net Buyer limitation that appeared in § 4.5(g)(vi) of Attachment H. Accordingly, NYISO’s proposed section 4.5(g) applies the generator new entry offer floor to all new in-City Installed Capacity Suppliers without reference to capacity buyers.

54. We find that NYISO has complied with the September 30, 2008 Order in regard to Net Buyers. Although this provision is designed to implement buyer mitigation, it need not expressly require that the mitigated entity be a buyer since only a capacity buyer could profit from procuring new, uneconomic generation capacity in order to drive down the price of capacity it buys.

2. Control of UCAP

55. In the March 7, 2008 Order, the Commission rejected NYISO’s proposed definition of “Control” in determining whether a supplier is “Pivotal” for purposes of the Pivotal Supplier test and directed NYISO to implement a revised definition consistent with the Commission’s current definition, principally, that an entity controls the facilities when it controls the decision-making over sales of electric energy. The Commission also recognized a rebuttable presumption of control from ownership. Despite this directive, in its March 20, 2008 compliance filing, NYISO proposed a broader definition, including the retention of revenue or other financial benefits from unforced capacity (UCAP) to close what it believed was a loophole in the definition. In its September 30, 2008 Order, the Commission found that in broadening the definition of Control to include the retention of revenue or other financial benefits from UCAP, NYISO went beyond the scope of the Commission’s directive in the March 7, 2008 Order.⁵³ The Commission rejected proposed section 2.1(b) of Attachment H and the corresponding language in

⁵³ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 101.

section 4.5(e) which had provided that, in order to rebut a presumption of control, a person or entity must show that it is “without any right to revenues or other financial benefits from such Unforced Capacity that would enable the seller to benefit from an increase in the Market-Clearing Price in the New York City Locality.” As discussed earlier herein, we have denied rehearing of that ruling.

a. NYISO’s Filing

56. NYISO states that it continues to believe that not including this requirement will potentially create a significant loophole that would allow a supplier to avoid the Pivotal Supplier test while retaining an interest in capacity that would provide incentives for withholding. NYISO notes that it has requested rehearing on this aspect of the September 30, 2008 Order, which we reject earlier herein. However, NYISO states that it has submitted the revised definition of “Control” in Attachment H and has made the conforming change in § 4.5(e) of Attachment H, which reflect the deletion of the subject language referring to a right to revenues or other financial benefits.

b. Protests

57. IPPNY asserts NYISO correctly deleted the specific clause which was identified by the Commission, but protests that the remaining language in section 4.5(e) that states

and if two or more Market Parties each have rights or obligations with respect to Unforced Capacity from an Installed Capacity Supplier that could reasonably be anticipated to affect the quantity or price of Unforced Capacity transactions in an ICAP Spot Market Auction, the ISO may attribute control of the affected MW of Unforced Capacity from the Installed Capacity Supplier to each such Market Party

might also improperly be interpreted to impart “control” on counterparties to arms-length bilateral contracts and, thus, should be deleted. IPPNY asserts that this section of the tariff should be revised to make the ability and right to engage in such arms-length bilateral contracts explicit to avoid misunderstandings in the future.

c. NYISO’s Answer

58. NYISO responds that the language identified by IPPNY should not be deleted because it is consistent with the concept of “control” set forth in the September 30, 2008 Order, which focuses on decision-making over sales from the facility in the relevant market. NYISO states that the language at issue here specified “control” based on rights or obligations that can be used to affect the quantity or price of UCAP transactions and thus it is consistent with the concept of “control” in the September 30, 2008 Order. NYISO states that the language should be retained to address circumstances in which more than one entity may have such rights. NYISO asserts that IPPNY merely offers

unfounded conjecture that NYISO might improperly attribute control to counterparties to arms-length bilateral contracts, without any specification of the types or terms of legitimate contracts that might be adversely affected.

Commission Determination

59. We find that NYISO has fully complied with the September 30, 2008 Order with respect to the issue of control. In the September 30, 2008 Order we accepted NYISO's proposed section 2.1(a) of NYISO's Attachment H, which defined control as "the ability to determine the quantity or price of offers to supply Unforced Capacity from an In-City Installed Capacity Supplier submitted into an ICAP Spot Market Auction." We rejected NYISO's proposed section 2.1(b) of Attachment H and corresponding language in section 4.5(e), which would have broadened the definition of Control to include the retention of revenue or other financial benefits from UCAP. In its October 30, 2008 compliance filing, NYISO has removed that language as we directed. The September 30, 2008 Order did not direct any additional language regarding control be deleted or modified, including the other language in section 4.5(f) that IPPNY protests. Accordingly, IPPNY's protest goes beyond the scope of the September 30, 2008 Order's compliance requirements. Further, we find that the language protested by IPPNY is consistent with the language that the Commission accepted in its September 30, 2008 Order and NYISO's proposed definition of Pivotal Supplier as it recognizes that control of specific installed capacity may be shared by two or more parties.⁵⁴ If IPPNY, in a specific situation, believes that NYISO has improperly imputed "control," then IPPNY can challenge NYISO's decision through NYISO's dispute resolution process or through filing a complaint with the Commission under section 206 of the Federal Power Act (FPA).

3. Generator Going-Forward Costs

60. NYISO's proposed seller mitigation provisions included an offer cap for generators who are Pivotal Suppliers, which is set at the higher of a reference level on the in-City Demand Curve or the net going-forward costs of the individual generator. In its March 20, 2008 compliance filing, NYISO proposed to define going-forward costs as costs that could be avoided if the generation unit were mothballed. In its September 30, 2008 Order, the Commission found that generator going-forward costs should include all non-discretionary capital expenditures, such as those necessary to comply with federal or state regulations for environmental, safety, or reliability reasons. However, the Commission added that to be included as a going-forward cost, such a cost

⁵⁴ For example, section 2.1 defines a Pivotal Supplier as a Market Party "together with any of its affiliates" that controls UCAP subject to mitigation.

must not only be necessary to comply with federal or state regulations but also must be necessary to make the unit available in the ICAP market. The Commission directed NYISO to file revised tariff sheets to reflect the change in the definition of going-forward costs.

61. NYISO states that it believes that the inclusion of costs both necessary to comply with federal or state regulations *and* necessary to make the unit available in the ICAP market is consistent with the definition of “Going-Forward Costs” that it previously submitted. In the instant filing, NYISO has added language to the definition of generator “Going-Forward Costs” to make clear that those costs include, but are not limited to, “mandatory capital expenditures necessary to comply with federal or state environmental, safety or reliability requirements that must be met in order to supply capacity” as specified in the September Order.

Commission Determination

62. We find that NYISO has complied with the September 30, 2008 Order in this regard. Generator going-forward costs may include any cost incurred to be eligible for the ICAP market and can include costs necessary to comply with federal and state regulations.

4. Generation Capacity Retirements

63. In the September 30, 2008 Order, the Commission required NYISO to include language that would permit inclusion of the costs avoided as a result of retiring in the calculation of going-forward costs for purposes of determining the offer cap for an individual Pivotal Supplier generator only if the resource actually plans to retire if the ICAP revenues it receives are not sufficient to cover those costs.⁵⁵

64. NYISO states that the clarifying language required by P 134 of the September 30, 2008 Order has been added to section 4.5(c), and also a reference to mothballing a unit has been added to avoid any negative inference that the concept of avoided going-forward costs applies only to unit retirements.

Commission Determination

65. We find that NYISO has complied with the September 30, 2008 Order in this regard.

⁵⁵ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 129, 134.

5. Pivotal Supplier Physical Withholding and Exports

66. In the March 7, 2008 Order, the Commission directed NYISO to propose mitigation rules with respect to physical withholding by Pivotal Suppliers. In its March 20, 2008 compliance filing implementing seller mitigation provisions, NYISO proposed a penalty to Pivotal Suppliers that fail to offer their Mitigated UCAP in each in-City ICAP Spot Auction or that export such capacity, unless the NYC Locational Capacity requirement has been met. NYISO proposed that in such case the Responsible Market Party would pay a penalty of 1.5 times the Market-Clearing Price times the total of un-offered capacity plus all other capacity under common control of the Responsible Market Party. NYISO indicated that it would commit to evaluate and offer in its forthcoming buyer mitigation compliance filing to include a different set of export rules. In its May 6, 2008 compliance filing, NYISO proposed ex post audit procedures to assess export conduct and proposed price impact thresholds of an increase in prices of in NYC of 5 percent or more, provided that such increase is at least \$.50/kW-month for physical withholding.⁵⁶ In the September 30, 2008 Order, the Commission required NYISO (1) to revise its penalty threshold for physical withholding to the greater of \$2/kW-month and 15 percent; (2) to revise the penalty for physical withholding so that it is 1.5 times the smaller of (i) the difference between the clearing prices in the New York City Spot Market Auction with and without the export and (ii) the difference between the New York City Spot Market Auction clearing price and the external region clearing price; (3) to eliminate from the determination of withholding through exporting, the comparison of the price for an annual product with the price of the New York monthly product; and (4) to create an *ex ante* approval process.

a. Pivotal Supplier Export Withholding Conduct and Impact Thresholds

67. In its May 6, 2008 Compliance Filing, NYISO stated that, while exports should be permitted, exports can be a means for a Pivotal Supplier to withhold capacity from New York City and should be subject to a penalty if an audit shows that the export fails a specified price test. In section 4.5(d)(i) of Attachment H to NYISO's Services Tariff, NYISO proposed to define the conduct of a Pivotal Supplier exporter which would constitute physical withholding as an export to an External control Area or sale of UCAP to meet an Installed Capacity requirement outside the New York City Locality that would be at a net price 5 percent or more below what the exporter could have gotten for that capacity in the New York City market. This is referred to as the export conduct

⁵⁶ NYISO's proposal would also apply the proposed price impact threshold to determine whether a Pivotal Supplier who does not offer Mitigated UCAP in each in-City ICAP Spot Market Auction would be subject to the physical withholding penalty.

threshold. However, in section 4.5(d)(ii), NYISO further proposed that withholding, as defined in subsection 4.5(d)(i), would only subject the exporter to a penalty if that failure to offer its capacity in the New York City Locality caused an increase in price in the New York City Locality of 5 percent or more, provided such increase is at least \$.50/kW-month. This is referred to as the impact threshold.

68. Astoria and IPPNY protested that NYISO's proposed thresholds were too low in light of the difficulty of estimating prices in the future due, in part, to the wide fluctuations in the NYC clearing price that result from small changes in the total supply. Consistent with the affidavit of its consultant, Mr. Younger, Astoria proposed to expand the thresholds to "the greater of \$2/kW-month or 15 percent"⁵⁷ and to require the implementation of an "*ex ante*" process under which the exporter could consult with NYISO and get an advance determination that the proposed export would meet or fail the foregoing conduct threshold, as revised.⁵⁸

69. In the September 30, 2008 Order, the Commission agreed with NYISO that uneconomic exports (i.e., exports into markets with lower prices than the in-City capacity market price) are one means for Pivotal Suppliers to withhold capacity from the in-City capacity market. However, the Commission stated that it did not agree that NYISO's proposal for deterring uneconomic exports was reasonable. Among other things, the Commission agreed with Astoria regarding the difficulty of forecasting prices. The Commission stated that under the NYISO proposal, the in-City supplier would need to forecast New York City prices for the entire period corresponding to the PJM delivery year, and if the supplier's forecast were inaccurate by as little as 5 percent, it would result in a conclusion of physical withholding. The Commission also stated: "Forecasting is inherently fraught with uncertainty. NYISO has not established that a 5 percent threshold is reasonable, given the variability of capacity prices over time."⁵⁹ Accordingly, the Commission stated: "We conclude that Mr. Younger's proposal to apply a higher threshold - the greater of \$2/kW-month and 15 percent - is reasonable."⁶⁰ The Commission also directed NYISO to implement the proposed *ex ante* procedure.

⁵⁷ Astoria May 27, 2008 Protest at 12.

⁵⁸ *Id.* at 11-12.

⁵⁹ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 161.

⁶⁰ *Id.*

i. NYISO's Filing

70. In its October 30, 2008 Compliance Filing, NYISO states that this change in threshold is included in revised language of section 4.5(d)(ii), the impact threshold, which provides that the penalty for physical withholding will apply only if mitigated UCAP not offered or sold causes or contributes to an increase in UCAP prices in the New York City Locality of 15 percent or more, provided such increase is at least \$2.00/kW-month. However, NYISO did not propose to change its originally-proposed 5 percent conduct threshold for a finding of physical withholding in section 4.5(d)(i).

ii. Protests

71. IPPNY, supported by Ravenswood, contends that the Commission should reject NYISO's proposed conduct threshold in that it does not comply with the Commission's directive in the September 30, 2008 Order. IPPNY argues that it and other parties demonstrated that both the proposed conduct and the proposed impact thresholds were too stringent and, as a result, would impede efficient exports. According to IPPNY, the Commission in its September 30, 2008 Order agreed with IPPNY and other protestors in this regard. IPPNY argues that NYISO did not comply with the Commission's directive in that it retains the 5 percent conduct threshold and changes only the impact threshold. IPPNY includes in its protest an affidavit from Mr. Younger who states that his prior affidavit demonstrated that NYISO's thresholds were too tight and both the conduct and impact thresholds should be revised to be the greater of \$2.00/kW-month or 15 percent.⁶¹ He asserts that NYISO has not complied with the Commission's directive insofar as NYISO has retained the 5 percent conduct threshold.⁶²

iii. NYISO's Answer

72. NYISO argues that paragraph 161 of the September 30, 2008 Order only directs NYISO to make a filing that "revises its penalty threshold," in the singular and thus, NYISO's compliance filing only revised the impact threshold for exports. NYISO states that this is the threshold for determining if a penalty should be applied depending on its effect on New York City capacity prices.

73. NYISO adds that IPPNY fails to acknowledge the inclusion in the October 30, 2008 Compliance Filing of an *ex ante* safe harbor for offers into external capacity markets, an addition that it asserts substantially relieves the exporter of any uncertainty in projected New York City ICAP Spot Auction clearing prices when

⁶¹ IPPNY December 2, 2008 Protest, Younger Affidavit at P 37.

⁶² *Id.* P 35-36.

formulating its offering conduct in an external capacity reconfiguration auction. According to NYISO, this removes the ostensible rationale advanced for raising the conduct threshold.

Commission Determination

74. We find that NYISO has not complied with the September 30, 2008 Order with respect to the Pivotal Supplier withholding conduct threshold. We intended to adopt Mr. Younger's proposal and direct NYISO to file to change both the conduct threshold and the impact threshold to be the greater of \$2/kW-month and 15 percent. Unfortunately, our language in the September 30, 2008 Order was imprecise in that we referred to Mr. Younger's proposal as increasing a "threshold" in the singular. To be more precise, we should have used the plural term "thresholds" because we intended NYISO to file to adopt Mr. Younger's proposal to increase the conduct threshold, as well as the impact threshold, to be the greater of \$2/kW-month and 15 percent. Because the exporter must estimate prices to determine if a proposed export will exceed the conduct threshold, increasing the conduct threshold is consistent with our agreement with Astoria that NYISO's proposed 5 percent conduct threshold was too narrow because estimating prices is "fraught with uncertainty." Accordingly we accept NYISO's impact threshold, but we direct NYISO to file a compliance filing within thirty days of this order, revising section 4.5(d)(i) of Attachment H to reflect a Pivotal Supplier withholding conduct threshold of 15 percent or more, provided such increase is at least \$2.00/kW-month.

b. Determination of Pivotal Supplier Withholding through Exporting

75. With regard to the determination of Pivotal Supplier withholding through exporting using a conduct threshold, the Commission concluded that it is not reasonable to compare the price for an annual product with the price of the New York monthly product, and stated that

[o]ne way to make the comparison reasonable would be to compare (i) the net revenue that could have been received from the New York City market over the comparable period for which the supplier's capacity was committed in the export market with (ii) the net revenue that was actually received in the export market during that period.⁶³

The Commission directed NYISO to make changes consistent with this discussion.

⁶³ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 162.

i. NYISO's Filing

76. NYISO states that it has made tariff revisions in section 4.5(d)(i) of Attachment H in compliance with the directive in paragraph 162 of the September 30, 2008 Order, discussed above. NYISO states that these revisions are necessarily informed by NYISO's position, noted with apparent approval in the September 30, 2008 Order, that

mitigation turns on a supplier's conduct in the shortest term, organized external market that is closest in time to an in-City auction in which exported capacity was not offered, and correspondingly, a supplier would not be subject to mitigation because of a decision to sell capacity into a three-year forward external market.⁶⁴

NYISO states that the revisions are also informed by the statement from the September 30, 2008 Order that

if capacity is available in a short term external market at a price below the in-City spot auction price, there is no economic justification for a Pivotal Supplier not to take advantage of the lower-priced capacity to satisfy its external obligations, unless the Pivotal Supplier were seeking to use its market power to raise capacity prices in New York City.⁶⁵

77. NYISO states that the proposed tariff revisions specify that an export can be deemed to constitute physical withholding if (a) the Responsible Market party could have bought out of its export obligation through participation in an external reconfiguration auction, and (b) the net revenues that could have been earned in New York over the period covered by the commitment period for reconfiguration auction purchases would have been greater, subject to an appropriate bandwidth, than the revenues the exporter did earn over the period covered by the reconfiguration auction.

ii. Protests

78. IPPNY argues that NYISO's filing violates the Commission's September 30, 2008 Order by comparing the net revenues associated with buying out of a capacity position in the shortest term External Reconfiguration Market and selling that capacity into the New York City Locality to determine whether mitigation is appropriate. IPPNY states that in its September 30, 2008 Order, the Commission found that whether an export was potentially inappropriate could be determined by comparing the New York City market

⁶⁴ *Id.* P 154.

⁶⁵ *Id.*

revenues to the market revenues that were actually received by a capacity exporter. IPPNY argues that NYISO has ignored this aspect of the Commission's order and instead proposes that the comparison be based upon the shortest term External Reconfiguration Auction. IPPNY claims that Mr. Younger, in an affidavit in support of the limited protest of NYISO's May 6, 2008 compliance filing submitted by Astoria Generating, demonstrated that the Reconfiguration Auctions tend to be very thinly traded, as compared to the Base Residual Auctions. An additional complication, according to IPPNY, is that even the shortest term auction is held several months before the first New York spot market auction takes place. According to Mr. Younger's affidavit attached to IPPNY's protest, this "forces the exporter to take a gamble on whether it should reverse its sale by buying out in a thinly traded market even in cases where its original sale was appropriate."⁶⁶ IPPNY asserts that it is unreasonable to place this risk on the exporting generator when its initial decision to export the capacity was economic.

79. IPPNY states that, in any event, if the Commission accepts NYISO's proposed conduct comparison it should direct NYISO to revise its Tariff to clarify that in cases where an exporter's option is to buy out of its external position, the calculation of net revenues will include both the price in the External Reconfiguration Markets and any additional costs that the exporter will face to buy out of its position. IPPNY asserts that such additional costs include any export charges that the external area would impose on the capacity export and any contractual charges that the exporter would face to relieve itself of a previous obligation.

iii. NYISO's Answer

80. NYISO responds that under the revisions in the Compliance Filing, NYISO would only impose mitigation for physical withholding if an exporter could have satisfied its external obligation through the purchase at favorable prices of capacity in an external reconfiguration auction rather than exporting capacity from New York City. NYISO asserts that the fact that a given auction may be thinly traded may mean that such an opportunity may not exist in that auction, in which case, the export would not be subject to mitigation. NYISO adds that if capacity could be purchased in the reconfiguration auction at a price below the net New York City price, then the exporter should take advantage of that opportunity, whether or not the auction could be characterized as "thinly traded."

81. NYISO also responds to the additional costs that IPPNY claims the mitigation measure needs to consider. NYISO states that if New York City capacity can be exported, then New York City and external capacity are fungible. NYISO further states

⁶⁶ IPPNY December 2, 2008 Protest, Younger Affidavit at P 39.

that the mitigation measures presuppose only that the exporter's external position could be satisfied with external capacity purchases in the reconfiguration auction, thus freeing the exporter's New York City capacity for use in New York City. In that case, according to NYISO, there should be no "buy out" costs, since the exporter would be satisfying its external obligation, using the external capacity purchased in the reconfiguration auction; nor would the exporter incur external export charges, since any New York City capacity sales would be from New York City capacity. NYISO states that, in any event, the compliance filing specifies a comparison of external and New York City capacity sales on a "net revenue" basis, which should account for the costs hypothesized by Mr. Younger, if any.

Commission Determination

82. We agree with NYISO that its revisions to section 4.5(d)(i) are in compliance with our directive in the September 30, 2008 Order. IPPNY argues that NYISO's revisions continue to place unreasonable risk on an exporting generator in that they do not account for the fact that buying out of a position may be difficult or expensive because Reconfiguration Auctions are often thinly traded and there are timing issues that may limit trading opportunities. We agree with NYISO that IPPNY's concerns are overstated. NYISO's revisions target only those export transactions that could have been profitably reconfigured. We also agree with NYISO that there is no need to account for any additional costs that might be incurred from buying out of a position since the tariff specifies a comparison on a net revenue basis and would include any transaction costs that concern IPPNY.

c. Pivotal Supplier Export *Ex Ante* Approval Process

83. In the September 30, 2008 Order, the Commission directed NYISO to institute an *ex ante* approval process for Pivotal Supplier exports. The Commission stated that similar provisions are allowed for sellers who wish to retire as well as for new entrants who wish to enter the market with a guarantee of not being considered uneconomic. It directed NYISO to develop a process, similar to the one for retirement, that will allow a generator to submit a request to NYISO for a determination of whether its export is uneconomic, and therefore physical withholding.⁶⁷

i. NYISO's Filing

84. NYISO states that the Pivotal Supplier export *ex ante* approval process, which is specified in new subparagraph section 4.5(d)(iii), is informed by similar considerations as those discussed above with respect to the determination of withholding through

⁶⁷ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 164.

exporting. NYISO states that the *ex ante* process will allow the Responsible Market Party to request NYISO, in consultation with its independent Market Advisor, to provide a projection of in-City ICAP Spot Auction prices over the commitment period covered by the external reconfiguration auction. NYISO states that the Responsible Market Party would be exempt from a withholding penalty if it made offers in the external reconfiguration auction that would reasonably be expected to produce net revenues from exports that would exceed the net revenues that would have been realized from in-City sales of the same capacity at the spot auction prices projected by the NYISO over the period corresponding to the commitment period specified in the external reconfiguration auction. In effect, according to NYISO, the Responsible Market Party would be able to require NYISO to specify an offer floor for the external reconfiguration auction that, when viewed on a net revenue basis, would provide a safe harbor for participating in the external market. Further, according to NYISO, the price projections would be binding on NYISO in that if the export decision was an economically rational response at the time to higher external revenues when compared to NYISO's price projections, NYISO would be precluded from imposing a physical withholding penalty.

ii. Protests

85. IPPNY states that to provide a comparable process to that of new entrants who wish to enter the market with a guarantee of not being considered uneconomic, the language should include a deadline by which NYISO will make its *ex ante* determination upon receipt of a request from a supplier. IPPNY proposes the following language: "The NYISO will respond to a request with a determination of whether a proposed export is uneconomic within 30 days of the submittal of such a request by an In City Installed Capacity Supplier." IPPNY states this will appropriately put the responsibility on the supplier to ensure that it submits requests sufficiently in advance of the external auction in which it seeks to participate and will allow the supplier to time its submission so as to have NYISO's determination by a date certain ahead of the auction.

iii. NYISO's Response

86. NYISO objects to the language proposed by IPPNY because it refers to "a determination of whether a proposed export is uneconomic." NYISO states that its response would provide capacity price projections for the New York City ICAP market, from which an exporter could determine a safe harbor bidding strategy in an external reconfiguration auction. NYISO states that it would not object to striking the phrase "and in accordance with the deadlines specified in ISO Procedures" from the second line of section 4.5(d)(iii) and replacing it with "Such requests, and the NYISO's response, shall be made in accordance with the deadlines specified in ISO Procedures." NYISO argues that the use of ISO Procedures is appropriate for this level of administrative detail, since the deadlines will have to be tailored to auction procedures in several external markets, and those procedures may be subject to change.

Commission Determination

87. We accept NYISO's compliance filing, as modified to include the language changes that NYISO proposes. We direct NYISO to file the tariff sheets reflecting the new language within 30 days of the date of this order. We agree with NYISO that it is appropriate to specify this level of administrative detail in the ISO procedures. NYISO's provision of price projections would allow the exporter to calculate its own profit position based on the projected prices to determine its safe harbor.

6. Miscellaneous Other Generator Mitigation Provisions

88. IPPNY argues that there is a possibility of internal conflict between subsections 4.5(c) and (f). IPPNY asserts that, under paragraph (c), an ICAP supplier who bids its MMU approved Going Forward Costs inclusive of retirement costs and is not accepted at auction is expected to retire. However, according to IPPNY, under paragraph (f), that decision by the market participant to retire may be subject to audit, review, and penalties. IPPNY argues that section (f) must be revised to include a proviso relating to subsection (c) authorizing mothballing or retirement, and indicating that in these circumstances the retirement should not be deemed to be physical withholding.

89. IPPNY also argues that the term "existing facility," used in subsection 4.5(g)(vi), needs to be made a defined term in section 2.1 of Attachment H to specify that a unit shall be deemed to be an existing facility if it commenced commercial operation on or before March 7, 2008, and shall not include facilities currently under construction or to be constructed at some point after March 7, 2008.

90. Finally IPPNY contends that subsection 4.5(h), which confirms that the offer floor applies to new generation brought on line by Pivotal Suppliers that is subject to the offer cap, needs to be revised to reflect the Commission's determination to revise the definition of net buyer in its September 30, 2008 Order. IPPNY proposes the following language: "Mitigated UCAP shall be subject to the requirements of Section 4.5(g). If the offer floor is higher than the applicable offer cap as determined in accordance with section 4.5(b), the bid for the Mitigated UCAP shall not be lower than the applicable offer floor."

91. NYISO responds that no conflict exists between subsections 4.5(c) and (f). NYISO states that subsection 4.5(c) specifies that avoided costs from mothballing or retiring a unit should only be claimed as part of a unit's going-forward costs if the owner or operator of the unit actually intends to mothball or retire the unit if capacity revenues are not sufficient to cover those costs. NYISO also states that subsection 4.5(f) specifies procedures to determine whether a decision to retire or otherwise remove a unit from service constitutes physical withholding. According to NYISO these two paragraphs each contemplate objective evaluations of the relevant costs and other circumstances and the determination posited by IPPNY would not withstand Commission scrutiny.

92. NYISO responds that IPPNY's proposed addition of a definition of "existing facility" to section 2.1 goes beyond the scope of the matters that the Commission directed NYISO to address in the October 30, 2008 Compliance Filing.

93. With respect to IPPNY's proposed revisions to subsection 4.5(h), NYISO responds that any substantive effects of the proposed revisions or why they are necessary to comply with the September 30, 2008 Order are not apparent.

Commission Determination

94. We agree with NYISO that there is no internal conflict between subsections 4.5(c) and (f). Subsection 4.5(c) explains how going-forward costs would be established for an ICAP supplier that makes a request for a unit-specific calculation. Subsection 4.5(f) establishes audit and review procedures for suppliers that intend to retire or remove a unit from the market. Although both sections may deal with retiring units, there is no apparent conflict requiring additional clarification.

95. IPPNY's argument that the term "existing facility," used in subsection 4.5(g)(vi), be made a defined term in section 2.1 of Attachment H in the form it proposes goes beyond the scope of changes required to be made by this compliance filing. We did not direct NYISO in the September 30, 2008 Order to make such a change and the proposed change is unnecessary.

96. Likewise, IPPNY's proposed revision to subsection 4.5(h) is outside the scope of changes required to be made by this compliance filing and are unsupported.

7. Special Case Resources

97. In the March 7, 2008 Order, the Commission accepted NYISO's proposal to exempt SCRs from in-City mitigation. However, in the September 30, 2008 Order, the Commission found that it was appropriate for NYISO's in-City market mitigation rules to apply to SCRs in the same manner as all other in-City market participants and, thus, granted rehearing on this issue, required SCRs to comply with NYISO's in-City mitigation rules as approved in that order, and directed NYISO to file revised tariff sheets to reflect this ruling within 30 days. As clarified earlier herein,⁶⁸ the Commission did not intend that SCRs be subject to the identical in-City mitigation provisions as apply to traditional large generators. In its October 30, 2008 compliance filing, NYISO submits that, in complying with the Commission's directive in the September 30, 2008 Order, certain distinctions between SCRs and what it refers to as "traditional generator sources of Installed Capacity" must be recognized. It asserts that, first, SCR ICAP comes from

⁶⁸ *Supra* P 46-47.

numerous small sources, which in many instances may be aggregated at a single ICAP injection and tracking point; and second, SCRs are usually industrial or commercial companies that, in exchange for an advanced payment, agree to curtail power usage, usually by shutting down, when requested to do so by NYISO. Thus, according to NYISO, the Commission has concluded that there is no basis to establish an offer floor for demand response resources based on the cost of new generation entry because there is not necessarily any connection between net CONE by generation and net CONE by demand response resources.⁶⁹

98. Accordingly, in its October 30, 2008 compliance filing, NYISO proposes to revise section 4.5(g) to provide that the in-City seller mitigation offer floor (based on 75 percent of net CONE) does not apply to SCR and to revise section 4.5(g)(v) to delete the earlier exemption from mitigation for SCR and replace it with in-City SCR mitigation rules that are tailored to SCRs.⁷⁰ Specifically, NYISO proposes that a mitigation offer floor for SCRs be equal to the minimum monthly payment the SCR receives from the Responsible Interface Party plus other benefits the SCR receives from third-parties. NYISO also proposes that SCR mitigation apply both to initial offers to supply SCR capacity (referred to simply as “Installed Capacity”) and to subsequent offers following a period of one year or more in which the SCR did not offer such capacity, and that such mitigation last for 12 months. Further, under NYISO’s proposal, Responsible Interface Parties that aggregate SCR offers would be subject to penalties for failure to offer SCR capacity at or above the highest SCR offer floor at a point identifier if certain market price impacts result.

99. In its protest to the October 30, 2008 compliance filing, IPPNY asserts that the filing fails to comply with the Commission’s directive in the September 30, 2008 Order because it does not propose mitigation rules that apply to SCRs in the same manner as all other in-City market participants.

100. We will address NYISO’s proposed SCR provisions below. At the outset, however, we will accept NYISO’s proposal to tailor the mitigation ordered for SCRs in our September 30, 2008 Order to recognize differences between SCRs and traditional generator sources of Installed Capacity.

⁶⁹ Citing September 30, 2008 Order, 124 FERC ¶ 61,301 at P 37, n.27.

⁷⁰ Because SCRs are not pivotal suppliers, the seller mitigation provisions that apply to pivotal suppliers, e.g., sections 4.5(b)-(f) are not applicable to SCRs.

a. Definition of SCR New Entry and Duration of SCR Mitigation

i. NYISO's Filing

101. NYISO proposes new provisions in section 4.5(g)(v) of Attachment H that would establish offer floor provisions applicable to SCRs that are new entrants into the capacity market or SCRs that re-enter the market after an absence of at least one year. NYISO states that proposed section 4.5(g)(v) recognizes that since capacity is not the primary business of an SCR, a given SCR may leave and later reenter the capacity market. NYISO adds that offers from an SCR that were subject to mitigation would be subject to mitigation for a 12-month period commencing with the month in which offers subject to an offer floor were first made. NYISO asserts that this is a reasonable period for the application of offer floors, given the facility with which SCRs can enter and leave a capacity market, and it corresponds to the 12-month period for determining whether an SCR should be considered a new entrant.

ii. Protests

102. IPPNY states that in the March 7, 2008 Order, the Commission ruled that the duration of the mitigation must be based upon the size of the new entrant plus the previous surplus capacity and the annual growth rate in the capacity requirement. IPPNY argues that NYISO's proposed one-year duration on mitigation for SCRs would provide an improper incentive to invest in uneconomic entry of larger amounts of new SCRs. IPPNY states that if the time period is too short, uneconomic entry will result in the later years, a dynamic the Commission addressed in its March 7, 2008 Order when it rejected NYISO's original proposal in this regard. IPPNY adds that its consultant, Mr. Mark Younger, demonstrates that, based on recent surpluses in the market and average growth in the New York City Locality Minimum Requirement, the buy-side mitigation rules would impose an offer floor on a new 100 MW generator for eight years while a new SCR would only be subject to the offer floor for one year.

103. The NYPSC argues that the Commission should eliminate the proposed tariff provision that would impose mitigation measures upon SCRs that have not participated in the in-City ICAP market for more than one year. The NYPSC argues that these SCRs would have already entered the market, and the rationale for mitigating in the first instance (i.e., to deter uneconomic entry) would no longer apply; thus, there is no basis to treat them as new entrants.

iii. Answers to Protests

104. With regard to the one-year duration of SCR mitigation, NYISO argues that both Mr. Younger and IPPNY ignore the necessity of applying the SCR offer floor on the basis of after-the-fact audits and penalties. NYISO states that IPPNY does not show that

the proposed penalty would not be sufficient to deter unwarranted SCR entry, without over-deterrence of warranted entry. According to NYISO, such over-deterrence could result from the lengthy mitigation periods advocated by IPPNY. NYISO argues that the considerations applicable to mitigation of SCRs are very different from those relevant to the *ex ante* mitigation of new entry by generators, NYISO adds that a generator would not face the *ex post* penalty applicable to SCRs, but only a requirement to sell at competitive levels.

105. With regard to the NYPSC's claim that there is no basis for treating entities that have not participated in NYISO capacity markets for more than one year as new entrants, NYISO states that deletion of this test would perpetually exempt an SCR from an offer floor if it had ever participated in a NYISO capacity market. Also, according to NYISO, this position ignores the fact that SCRs are in a range of businesses, but not the electric business, and that the opportunity costs of being capacity suppliers for such entities relative to capacity prices undoubtedly will vary significantly over time. NYISO states that a one-year period for denominating reentry as new entry provides a reasonable means for assessing the economics of such reentry on a then-current basis.

Commission Determination

106. In the September 30, 2008 Order, the Commission found it appropriate for NYISO's in-City market mitigation rules to apply to SCRs in the same manner as all other in-City market participants, but, as clarified earlier herein, not necessarily identically to traditional large generators. Consistent with that finding, we find reasonable NYISO's proposal to mitigate uneconomic "new entry" by SCRs. As we explained in the September 30, 2008 Order, the objective is to deter uneconomic new entry⁷¹ - entry that is not needed by the market or whose full costs are higher than the market value for such capacity. Such entry can inefficiently depress the market price paid for other capacity. Applying an offer floor related to a new entrant's full entry costs is likely to deter uneconomic entry, because the new resource will not be accepted in the capacity market and will not receive capacity revenues until the market needs the resource's capacity or is willing to pay a price at or above the resource's full entry cost. While NYISO proposes different offer floors for new generation versus new SCRs, the different floors are reasonable because the costs and characteristics of new generation and new SCRs are different. Therefore, we find reasonable NYISO's proposal to define such "new entry" by reference to an SCR's initial offer of its capacity, rather than to use the definition of "new entry" by traditional large generation (i.e., the construction of new generation facilities after November 1, 2008, the date of effect of the in-City buyer

⁷¹ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 44. *See also* March 7, 2008 Order, 122 FERC ¶ 61,211 at P 118.

mitigation rules).⁷² That is because SCRs are not constructed primarily to provide capacity and often do not involve the construction of new generation.⁷³ Further we find that the definition of “new entry” should be limited to the initial participation of an SCR in the marketplace. That is because the objective is to deter uneconomic new entry, not to inefficiently deter the use of existing capacity. Once a new resource has entered the market and demonstrated that its capacity is needed by the market, its up-front costs can no longer be avoided.⁷⁴ So if an SCR provider that has demonstrated that its capacity is needed by the market subsequently leaves the market and then returns later, it is not appropriate to inefficiently discourage the use of these existing resources. Accordingly, we reject NYISO’s proposal in section 4.5(g)(v)(B) to consider SCR as “new entry” that is subject again to mitigation when it reenters the market after a year’s absence. NYISO’s claim that exempting an SCR from mitigation upon reentry would permit an SCR to be used to suppress market clearing prices perpetually is unpersuasive and inconsistent with mitigation of new generation. Uneconomic new generation is generally subject to mitigation for a single, initial period of three years,⁷⁵ and terminates once load growth has absorbed the additional capacity. Therefore, SCRs also should be subject to mitigation for a single, initial period.

107. However, the approach to determining the duration of mitigation for a new traditional large generator based on its size in relation to load growth does not readily translate to determining an appropriate duration of mitigation for SCRs. SCRs tend to

⁷² March 7, 2008 Order, 122 FERC ¶ 61,211 at P 118 (NYPA and ConEd generation units installed in 2006 were considered exempt “existing” capacity). *See also* proposed section 4.5(g)(vi) which states: “An In-City Installed Capacity Supplier that is not a Special Case Resource shall be exempt from an Offer Floor if it was an existing facility on or before March 7, 2008.”

⁷³ The exception is an SCR whose demand response is supported with behind-the-meter generation.

⁷⁴ See September 30, 2008 Order, 124 FERC ¶ 61,301 at P 44. “[B]uyer market power mitigation clearly applies to ‘new’ uneconomic entrants, not existing capacity. To apply this new market rule to units that already exist in the market misses the point of this prospective rule, which is to affect future actions. Deterrence of the entry of existing units, by definition, is no longer possible.”

⁷⁵ Pursuant to section 4(g)(ii) of NYISO’s mitigation provisions, new generation will be exempt from the offer floor if NYISO projects that the ICAP Spot Market Auction price for the first two capability periods (one year) in which it is reasonably anticipated it will offer capacity will exceed the new generation offer floor.

provide much smaller amounts of capacity than traditional large generation, are located at facilities of net consumers of power whose primary business is not the provision of capacity, are used to reduce demand, and are generally subject to one-year contracts. Recognizing some of these differences from traditional large generators, NYISO has proposed to apply mitigation to new SCRs for 12 calendar months starting with the month the SCR initially offers its capacity in the market. We find that this proposal does not provide any assurance that the SCR capacity actually is economic and warrants a termination of mitigation. For example, consider an SCR that enters the market during a period of substantial capacity surplus that is forecasted to exist for several years and that would produce capacity prices well below the full entry costs of the SCR for several years. Such an SCR would not be needed in the market for several years, and yet under NYISO's proposal, the SCR's offer floor mitigation would terminate after only one year. As a result, the SCR's capacity could inefficiently be used to depress capacity prices after its first year. Accordingly, NYISO's proposal to automatically terminate mitigation simply because 12 calendar months have passed is unsupported. However, the market's acceptance of the SCR's bid at or above its offer floor, i.e., at its cost, would show that the new capacity is economic. For that reason, we reject NYISO's proposal and require mitigation to apply until the new SCR's capacity has been accepted in the market at a price at or above its offer floor for a total of 12, not necessarily consecutive, months. Meeting this requirement will show that the SCR's capacity is economic over several different seasons even though the capacity might not be accepted in all months of a calendar year when offered at that price level. If an SCR's offer at its offer floor is accepted in each of its first twelve monthly capacity auctions, this would indicate that the SCR is economically needed as soon as it enters the market. In this case, mitigation would terminate after only one year. But if the SCR is not economically needed initially, its offer at the floor would not be accepted during the initial monthly auctions. In this case, mitigation would extend beyond a year. It would continue until the SCR was economically needed, and thus, accepted in 12 monthly auctions. Thus, although this may result in a period of mitigation that could exceed one year, when ICAP offered by a new SCR at or above its offer floor has been accepted in the market for a total of 12 monthly auctions, the mitigation provisions of section 4.5(g)(v) will no longer apply to that SCR.

108. Finally, we note that two further revisions to Attachment H are necessary. First, consistent with the exemption provided for new generation in section 4(g)(ii), we direct NYISO to provide a similar exemption for new SCRs if, for the first year after entry into the market, the market price is expected to exceed the SCR offer floor. Specifically, NYISO shall revise section 4(g)(v) to provide that new SCRs shall be exempt from mitigation if NYISO projects that for the first two capability periods (one year) after the SCR resource first bids into the market, the ICAP Spot Market Auction price will exceed the SCR's offer floor. Second, section 4.7 of Attachment H requires that "Any mitigation measure imposed as specified above shall expire not later than six months after the occurrence of the conduct giving rise to the measure..." This six-month limit on

mitigation is inconsistent with in-City generator and SCR mitigation which last longer than 6 months. Therefore, the Commission directs NYISO to revise section 4.7 of Attachment H so that the six-month limit does not apply to in-City mitigation. Therefore, the Commission directs NYISO to revise section 4.7 of Attachment H to add “Except as otherwise provided above,” at the beginning of that provision.

b. SCR Offer Floor

i. NYISO’s Filing

109. In its October 30, 2008 compliance filing, NYISO proposes in new section 4.5(g)(v) of Attachment H to provide that the offer floor for a SCR shall be equal to the minimum monthly payment for providing ICAP by its Responsible Interface Party, plus the monthly value of any payments or other benefits the SCR receives from a third party for the provision of ICAP by the SCR, or that is received by the Responsible Interface Party for the provision of ICAP by the SCR. The section further provides that offers by a Responsible Interface Party at a point identifier shall not be lower than the highest offer floor applicable to a SCR providing ICAP at that point identifier.

110. NYISO states that certain distinctions between SCRs and traditional, large generator sources of ICAP must be recognized. NYISO explains that SCRs are usually industrial or commercial companies that, in exchange for an advanced payment, agree to curtail power usage, usually by shutting down, when requested to do so by the NYISO and that SCR ICAP comes from numerous small sources, which in many instances may be aggregated at a single ICAP injection and tracking point or point identifier. Thus, according to NYISO, in a finding not overturned by the September 30, 2008 Order, the Commission has “concluded that there is no basis to establish an offer floor for demand response resources based on the cost of new generation entry because there is not necessarily any connection between net CONE by generation and net CONE by demand response resources.”⁷⁶ NYISO states that its revisions to implement the inclusion of SCRs in the mitigation measures for uneconomic entry recognize that the net CONE test for determining offer floors, for the reasons articulated by the Commission, does not apply to SCRs, and the revisions instead set forth offer floor rules specific to SCRs in section 4.5(g)(v) of Attachment H.

111. NYISO states that the offer floor for an SCR would be based on the amount of the per month minimum payment that is payable to the SCR by its Responsible Interface Party, as the best available proxy for the SCRs’ costs of providing capacity. NYISO adds that, as unrelated parties presumably dealing at arm’s length, a Responsible Interface

⁷⁶ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 39 (citing March 7, 2008 Order, 122 FERC ¶ 61,211 at P 120).

Party and its SCR should negotiate payments to the SCR that reflect at least the minimum amount at which the SCR would expect to recover its costs of providing capacity, and there is no legitimate economic reason why a Responsible Interface Party should be willing to offer capacity for less than what it is paying an SCR to provide the capacity. NYISO asserts that there is no equivalent to the proxy generating unit that is used as the basis for the net CONE determination for generators, and thus no ready basis for determining a broadly applicable bid floor threshold for all SCRs.

112. NYISO further states that, to be comprehensive, any such offer floor would have to be inclusive of any subsidies or other benefits, meant to encourage SCRs to provide capacity. In addition, NYISO states, the offer floor is set at the minimum monthly amount payable to the SCR, in order to accommodate arrangements in which the SCR is paid a percentage of the monthly market-clearing price. NYISO states that, while it understands that SCR payments based on a percentage of the market-clearing price are common, it believes that few if any would obligate an SCR to provide capacity in a given month without a minimum payment protection, and the minimum payment at which the SCR is willing to provide capacity would provide the appropriate proxy for a cost-based offer floor. NYISO adds that if an SCR were willing to undertake a capacity obligation on a percentage basis without minimum payment protection, then presumably its costs of providing capacity are very low and its offer floor would and should be permitted to sink to that level.

113. NYISO also states that the offers submitted for SCRs by the Responsible Interface Party may aggregate a number of SCRs behind a single injection and tracking point, or point identifier. NYISO explains that in order to avoid having an offer floor attributable to one SCR being nullified by offers from other SCRs with which it is aggregated, thus allowing an uneconomic offer to escape mitigation, the revisions in section 4.5(g)(v) specify that offers by a Responsible Interface Party at a given point identifier may not be lower than the highest offer floor applicable to an SCR providing ICAP at that point identifier.

ii. Protests

114. ConEd asserts that NYISO's definition of the offer floor for an SCR would have an adverse impact on customer participation in Con Ed's retail Distribution Load Relief Program. ConEd states that pursuant to this program, the criteria for designating a load relief period and therefore requesting load relief from customers is if the next contingency would result in a Condition Yellow, or if a voltage reduction of five percent or greater has been ordered. ConEd also states that it uses this program to deal with distribution feeder outages (contingencies), which do not necessarily occur on the hottest days of the year; and thus, the program and the payments associated with it are purely distribution and retail in nature. ConEd is concerned that the cost-based payments that it would make to SCRs participating in its retail load relief program for its distribution

system could be considered an “other benefit” and added to the SCR’s Floor Price. ConEd asserts that this could raise the Floor Price such that many of these SCRs would no longer be willing to provide this distribution load relief service to ConEd. ConEd argues that a cost-based payment made to a retail customer pursuant to a retail tariff to provide retail load relief on distribution feeders should not count as an “other benefit.” ConEd contends that the intent of the NYISO compliance filing is to prevent subsidization of SCR providers, but, *a priori*, that cannot be true for an SCR provider that is receiving a cost-based payment for providing distribution load relief. ConEd proposes that NYISO modify its tariff language to exclude any payments made by a local utility pursuant to that local utility’s cost-based distribution load relief program from its calculation of the offer floor.

115. The NYPSC argues that the Commission should not impose a bid floor for SCRs based on the incentives such resources may receive and asks that the Commission direct NYISO to eliminate proposed tariff language that would include, as part of the SCR bid floor, any payments or other benefits received from a third party in connection with providing ICAP. The NYPSC states that the mandatory bid floors on SCRs could be interpreted to include various State initiatives that are designed to achieve important policy objectives of bolstering reliability and reducing peak demand by increasing the availability of demand response resources. According to the NYPSC, NYISO’s proposed language may undermine the NYPSC’s efforts to encourage and promote the use of demand response resources.

116. The NYPSC states that it has instituted programs, primarily administered by the New York State Energy Research and Development Authority (NYSRDA) and funded by retail customers, such as rebates to cover the costs of meters and equipment upgrades for SCRs. Requiring SCRs to include the value of these rebates as part of a mandatory minimum bid will threaten the availability of SCRs. According to the NYPSC, imposing a bid floor that includes any incentives SCRs may receive will make it less likely that SCRs will either be selected by NYISO as an ICAP provider or be willing to participate in the New York City ICAP market.

117. In addition, the NYPSC is concerned that NYISO’s Compliance Filing may be interpreted to include, as part of the Bid Floor, the compensation for load reductions made during local relief periods designated by ConEd. The NYPSC adds that this compensation is not made in connection with providing ICAP, but, rather, is designed to provide load relief on the local distribution system, to avoid, or at least defer, the need for costly distribution system upgrades and thus, the arguments to include these payments in the calculation of the offer floor should be rejected. The NYPSC asks that in the event the Commission rejects its request to eliminate proposed tariff language, it clarify that ConEd’s Distribution Load Relief Program and the NYSRDA rebates are not the types of compensation that are subject to the bid floor.

118. The RIP Coalition also argues that NYISO's proposed offer floor for new SCRs should be modified to eliminate other monthly benefits from third parties. The RIP Coalition states that without participation in the NYISO SCR program, customers would be disqualified from participation in the applicable rebate from NYSRDA, a rebate which customers fund through the System Benefits Charge.⁷⁷ The RIP Coalition states that requiring SCRs to include rebates into their offer floors would both inflict harm on the customer and require NYSRDA to reshape its funding opportunities and programs. With regard to ConEd's District Load Relief Program, The RIP Coalition states that it is not linked to the provision of capacity or to the NYISO capacity markets and that the ConEd curtailment events have been more frequent than just NYISO curtailment events, thus justifying the additional revenue stream outside the NYISO payment.

119. The RIP Coalition states that NYISO incorrectly assumes that all responsible interface parties enter into fixed contract pricing and therefore should be able to determine what the minimum offer floor for each SCR will be, when, in most instances, responsible interface parties enter into contracts that pay SCRs a percentage of auction clearing prices, based on strip, monthly, and/or spot market clearing prices. The RIP Coalition states that responsible interface parties have no forward knowledge of what auction pricing might be, nor should they be forced to project pricing ahead of time and then suffer the consequences of poor projection after the fact. The RIP Coalition recommends that in the case of "percentage of market" contracts, the Commission clarify that since the price paid to such customers could go to zero, the appropriate offer floor is zero.

120. The RIP Coalition states that under the NYISO proposal, where a new SCR is aggregated with existing SCRs at an existing point identifier, the responsible interface party will be required to offer the entire point identifier at a price not lower than the highest offer floor applicable to any new SCRs contained within the point identifier. The RIP Coalition states that this methodology is flawed. It explains that responsible interface parties have modeled their SCRs into groups (point identifiers) and that NYISO's proposal would reclassify existing SCRs as new SCRs by subjecting these resources to the same offer floor as the highest new SCR within the point identifier. According to the RIP Coalition, this proposal will harm both existing SCRs and new SCRs with a lower cost of entry, it restricts the advantages of asset aggregation pools, and it defeats the purpose of aggregation, i.e., hedging of risk for the responsible interface party.

⁷⁷ The RIP Coalition states that retail customers are the primary funders of the System Benefits Charge, a fund that makes rebates available from NYSRDA.

121. The RIP Coalition contends that NYISO has the ability to track new assets as they are registered within a point identifier and it can easily identify new SCRs and apply the offer floor test to each new SCR based on each individual SCR's offer floor. The RIP Coalition further contends that the NYISO's *ex post* audit and penalty procedure would allow NYISO to evaluate and review new SCRs within the point identifier and assure itself that the new SCR was not escaping the new entry mitigation rules.

122. IPPNY argues that NYISO's proposal to calculate the offer floor based on the Responsible Interface Party's contractual minimum monthly payment to the SCR and other benefits the SCR receives may fail to capture the full amount of the payments an SCR receives. According to IPPNY consultant, Mr. Younger, a Responsible Interface Party can effectively guarantee a minimum payment close in value to the other benefits the SCR receives without actually memorializing the guarantee in a contract. IPPNY also argues that SCR representatives recently advocated in a NYPSC proceeding that the payments they require to accept the obligation to curtail load are substantially greater than the summer capability period offer floor that would be applied to generators under NYISO's proposed mitigation. Thus, according to IPPNY, there should be no concerns that the 75 percent of net CONE offer floor is unreasonable for SCRs, particularly when, like other new entrants, SCRs will have the right to demonstrate to NYISO that their offer floors should be lower because their respective costs are less than 75 percent of net CONE.

iii. Answer to Protests

123. NYISO responds that applying mitigation measures without regard for difference between SCRs and other market participants would result in undue discrimination. In particular, NYISO states, that IPPNY does not show that the costs considered in determining net CONE for generators have any relevance to SCRs, and it is evident that they do not. NYISO adds that the cost structure for an SCR is driven by its opportunity costs of not operating its primary business in order to provide capacity while the net CONE for a generator would be determined by its construction and other capital costs, net of energy and ancillary services revenues. NYISO states that the two types of ICAP suppliers are not similarly situated and IPPNY has shown no reason in principle for applying an offer floor based on the 75 percent of net CONE test to SCRs. According to NYISO, applying such a test can only have unintended consequences for the New York capacity markets. NYISO states that none of the December 2, 2008 filings propose an alternative in principle to the NYISO's proposal to use the minimum payment to an SCR as the measure of the appropriate offer floor. NYISO states that if the costs of being called on to provide capacity would be greater than the payments an SCR would receive to be an ICAP supplier, then its participation in the capacity market would be uneconomic, and thus, these are the costs that should be reflected in an offer floor. Moreover, according to NYISO, because NYISO's proposal is based on minimum

payment levels, it would not force Responsible Interface Parties to make price projections and suffer after-the-fact consequences if their projections are wrong.

124. With regard to the inclusion of other benefits in the offer floor, NYISO notes that it is appropriate to keep in mind that an SCR would not itself have an interest in the potential economic benefits of uneconomic entry; those benefits would only accrue to load serving entities in a position to realize lower overall costs from suppressed capacity prices. Thus, according to NYISO, it is necessary to ensure that any third-party payments or other benefits for SCRs are included in determining offer floors, to the extent those payments would serve to offset the costs of participating in NYISO's ICAP markets. Also, according to NYISO, similar consideration should govern the Commission's response to the argument of the NYPSC that NYISO should be directed not to consider any third-party payments or other benefits to SCRs.

125. NYISO states that the assertion that certain payments received by an entity participating in demand response programs may not be related to its role as an ICAP supplier raise questions of fact that are best resolved in the audit and penalty procedure. NYISO states that under the October 30, 2008 Compliance Filing, payments or other benefits that are not related to the provision of ICAP would not be considered in determining if uneconomic entry by an SCR had occurred. NYISO adds that if it can be determined that a program only provides payments or other benefits that do not offset the costs of providing ICAP, then such programs could be excluded from the determination of offer floors, but a tariff compliance filing is not an appropriate vehicle for such fact-specific determinations, particularly since the terms and conditions of such programs could change over time.

126. In response to the RIP Coalition's complaint that NYISO's proposal will prevent Responsible Interface Parties from engaging in legitimate risk management strategies by aggregating SCRs at a given point identifier, NYISO states that a separate point identifier can be established for a new SCR, thus leaving opportunities for aggregating all other SCRs at an existing point identifier as may be appropriate. In addition, according to NYISO, the offers at a point identifier can comprise a specified set of points at which prices can vary with the quantity offered (an offer curve). NYISO adds that if the offer curve includes MW from an SCR subject to mitigation, at least that number of MW must be offered at the offer floor applicable to that SCR, while other points on the offer curve reflecting capacity from SCRs not subject to mitigation, would not be so constrained. NYISO argues that averaging unmitigated offers with mitigating offers in an aggregation of SCRs has the mathematical effect of lowering the offer floor for the mitigated SCR, creating a loophole in the mitigation measures.

127. Ravenswood responds to the NYPSC's request that certain state subsidies of SCRs be ignored in the determination of offer floors for purposes of participating in the in-City ICAP market. Ravenswood argues that the NYPSC improperly raises an argument that it

could have raised in a request for rehearing of the September 30, 2008 Order. Ravenswood states that the question of whether demand resources should be accorded special treatment was resolved by the Commission when it held that “it is appropriate for NYISO’s in-City market manipulation rules to apply to SCRs in the same manner as all other in-City market participants.”⁷⁸ The NYPSC had 30 days in which to request rehearing of that holding. While it did file a request for rehearing, it did not claim that the Commission erred in holding that the SCRs should be subject to mitigation in the same manner as all other market participants. Thus, according to Ravenswood, the NYPSC’s proposal constitutes an impermissible collateral attack on the September 30, 2008 Order; it cannot litigate an issue here that it could have raised in a request for rehearing of the September 30, 2008 Order.

128. Ravenswood states that to the extent that the Commission might be inclined to consider the NYPSC’s proposal, it should not because the NYPSC raised this argument on rehearing of the Commission’s March 7, 2008 Order. The Commission responded that the NYPSC had not provided sufficient specificity to allow the Commission to mandate an appropriately narrow exemption, and that the NYPSC could make a filing under section 206 of the FPA to justify a mitigation exemption for entry of new capacity that is required by a state-mandated requirement that furthers a specific legitimate state objective. Ravenswood argues that the same response is appropriate here in that the NYPSC has not shown that its policies to promote demand response cannot be implemented without the exemption and without associated negative impacts on the competitive wholesale market. Ravenswood argues that if the NYPSC wants to pursue an exemption for SCRs, it should be required to file a complaint under FPA section 206 that contains sufficient specificity to allow the Commission to evaluate it. Only in this way, according to Ravenswood, will all parties be afforded adequate opportunity to present evidence and arguments, and only in this way, will the Commission have an adequate record upon which to make a decision.

129. Finally, Ravenswood argues that a government-created out-of-market source of revenue provided to SCRs is a subsidy that, if ignored, will distort the wholesale market price of capacity, sending inaccurate price signals to the entire market. According to Ravenswood, while SCRs will receive revenues over and above those they would receive based upon the price set by the market, the rest of the market will receive diminished revenues based upon an artificially suppressed price. Ravenswood adds that the subsidy will enable SCRs to participate in the market even when it is uneconomic for them to do so based upon competitive wholesale market prices and the SCRs’ actual cost structure. Ravenswood states that this has an unduly discriminatory and detrimental impact on existing generators, as well as on potential new generators that desire to enter the market.

⁷⁸ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 41.

Ravenswood argues that SCRs already have special rules to accommodate participation in NYISO's competitive wholesale markets, developed through collaboration instead of litigation and now that SCRs have grown to more than 1700 MW of UCAP during a period in which there are significant amounts of excess capacity and significantly suppressed competitive market prices, additional subsidies and accommodations are not justified or reasonable. Ravenswood argues that although current market prices may be uneconomic for SCRs, unmitigated subsidies are not the solution and that continued unchecked growth of SCRs in the NYISO market due to subsidies could lead to payments to resources that are unable to provide the necessary reliability needs or even worse, threaten reliability if there is an over-reliance on SCRs by the market.

130. With regard to ConEd's protest, Ravenswood argues that ConEd has misstated the impact of the mitigation measures proposed by NYISO on ConEd's program. Ravenswood contends that ConEd's request to ignore payments it makes to its customers/resources suffers from the same procedural shortcomings as the similar request raised by the NYPSC, i.e., ConEd seeks to raise in the context of a compliance filing an issue that it could have raised on rehearing of the September 30, 2008 Order. Ravenswood asserts that if ConEd wants to pursue an exemption for the subsidies it provides to its customers, it should file a complaint under FPA section 206. Moreover, according to Ravenswood, ConEd's payments are subsidies that distort wholesale capacity markets, and as such are the payments that mitigation is designed to prevent. Ravenswood states that mitigation would not prevent any of these resources from participating in ConEd's program because ConEd's program pays these resources 100 percent of their costs directly and separate from the competitive wholesale market.

Commission Determination

131. We find that NYISO has substantially complied with the September 30, 2008 Order, as clarified earlier herein, with regard to its proposed offer floor for SCRs. Accordingly, we accept NYISO's proposed tariff provisions establishing an offer floor for SCRs, subject to the modifications and conditions discussed below.

132. In the March 7, 2008 Order, the Commission explained that an offer floor applicable to new entry of capacity would help prevent large, net buyers of capacity from exercising buyer market power by acquiring new capacity that is not needed and whose costs exceed the market price, and bidding that capacity into the in-City capacity market at less than a competitive level to depress market clearing prices for the capacity they buy thereby lowering the buyer's net bill but resulting in the LSE's captive customers bearing the risk of such an uneconomic investment.⁷⁹ On rehearing and

⁷⁹ March 7, 2008 Order, 122 FERC ¶ 61,211 at P 101.

compliance in the September 30, 2008 Order, the Commission held that mitigation of uneconomic new entry by generators should apply even if the capacity supplier is not a net buyer. Further, the Commission accepted NYISO's proposal to apply the offer floor to all suppliers of new capacity with no size criteria, unlike seller mitigation which only applies to Pivotal Suppliers. In the September 30, 2008 Order, in response to requests for rehearing of our approval of NYISO's proposal to exempt SCRs from mitigation of uneconomic entry, we found that it is appropriate for NYISO's in-City mitigation rules to apply to SCRs "in the same manner as all other in-City market participants." As discussed earlier herein, we do, however, recognize that SCRs have different characteristics from traditional large generators. In directing that they be treated in the "same manner" we clarify earlier herein that we did not intend that SCRs must be treated identically to large generators that connect to the grid. We stated in the March 7, 2008 Order⁸⁰ and we still conclude, as discussed earlier, that there is no basis to establish an offer floor for demand response resources or other SCRs based on the cost of new large generation entry. There is no connection between the net CONE of a new large generation unit and the net CONE of a demand response resource because the CONE of a demand response SCR includes its lost opportunity costs relative to the SCR's primary business. Nonetheless, some form of an offer floor applicable to new entry by SCRs is appropriate for the same reason that an offer floor for new entry by large generators that connect to the grid is appropriate, i.e., to prevent future uneconomic conduct from depressing market prices. However, in the September 30, 2008 Order, we did not specify what form an offer floor for SCRs should take. Therefore, NYISO was required to propose what it believes would be reasonable mitigation rules for SCRs, including an SCR offer floor.

133. Upon review of its proposal, we find that NYISO's proposed method of establishing an offer floor based on minimum monthly payments applicable only to SCRs is reasonable and will be accepted. Where the SCR has agreed to accept a percentage of the market clearing price with a guarantee of a minimum monthly payment in return for a capacity obligation, that minimum payment, coupled with other benefits or subsidies, is a reasonable proxy for the SCR's net cost of providing that capacity, which would be difficult to determine, and thus is a reasonable offer floor. We note that NYISO points out that the offer floor could be zero.⁸¹ We also find that NYISO's proposal is a reasonable check on the exercise of market power not only by individual SCRs who make uneconomic offers, but also by the Responsible Interface Party itself who may aggregate SCR bids.

⁸⁰ March 7, 2008 Order, 122 FERC ¶ 61,211 at P 120.

⁸¹ NYISO December 17, 2008 Answer at 7.

134. For those SCRs whose offers lack a minimum payment guarantee, IPPNY and its consultant, Mr. Younger, offer a scenario in which a Responsible Interface Party can effectively guarantee a substantial payment under a percentage-based arrangement, generally 90 percent of the clearing price, but without memorializing it in a contract. Under that scenario, in any month the SCR's bid was accepted, it would receive both its percentage-based payment from the Responsible Interface Party and its benefits pursuant to participation in the LSE's demand response program. As a result, the SCR's offer floor arguably would be set unreasonably low thereby allowing uneconomic bids to lower the market price with no deterrence or consequences to the SCR. While it is possible that SCR bid floors under NYISO's proposal may not fully address every price-suppressing opportunity, IPPNY offers no solution to its hypothetical example. Furthermore, we find that NYISO's proposal strikes a reasonable balance between mitigating price-suppressing SCR entry while not unduly discouraging the participation of demand response resources. Thus, IPPNY's concern does not cause us to direct any further changes to NYISO's mitigation plan at this time. However, we direct NYISO to monitor SCR participation in its capacity market to evaluate whether SCRs are being used to suppress market clearing capacity prices below a competitive level despite bidding at or above the offer floor under NYISO's proposal, and, if so, to propose further changes to its mitigation rules to address such issues.

135. The RIP Coalition argues that NYISO's proposal will prevent Responsible Interface Parties from aggregating SCRs at a given point identifier. We agree with NYISO's observation that averaging mitigated and unmitigated offers has the mathematical effect of lowering the offer floor for the mitigated SCR. Assigning a separate point identifier to the mitigated SCR, as suggested by NYISO, permits the appropriate offer floor for the mitigated SCR while allowing aggregation of other SCRs. Using an offer curve at the point identifier is a reasonable alternative means of offering the mitigated SCR at the offer floor, while offering the unmitigated SCRs at other points on the Offer Curve. Either alternative is a practical solution to the RIP Coalition's concerns and we find that NYISO's response adequately addresses the RIP Coalition's concerns. However, NYISO's proposals in its response are not clearly reflected in NYISO's actual proposed tariff revisions, which only state that "[o]ffers by a Responsible Interface Party at a [point identifier] shall not be lower than the highest offer floor applicable to a Special Case Resource providing Installed Capacity at that [point identifier]." The proposed tariff language does not specifically state that offers can comprise a specified set of points at which prices can vary with the quantity offered, and that if this set includes MW from an SCR subject to mitigation, then at least that number of MW must be offered at the offer floor applicable to that SCR. We direct NYISO to file revised tariff sheets including such language as it agreed to in its response within 30 days of the date of this order.

136. ConEd, the NYPSC, and the RIP Coalition argue that subsidies or other benefits designed to encourage SCRs should be eliminated from the calculation of the offer floor.

We disagree. An SCR engaged in demand response agrees to curtail power usage to make capacity available. The best representation of the opportunity cost of that curtailment is the value that will induce the SCR to abstain. Offering this capacity at less than the opportunity cost is an uneconomic offer and will unreasonably drive down the price of capacity. NYISO's proposed offer floor prevents uneconomic SCR entry into the market.

137. Nonetheless, it is not our intent to interfere with state programs that further specific legitimate policy goals. We agree that it is appropriate to exempt payments an SCR receives from such programs from the calculation of the price floor proposed by NYISO. Based on the information provided in this proceeding, the Commission believes it is reasonable to allow an exemption for the two programs discussed in the filings in this proceeding, NYSRDA rebates and ConEd's Distribution Load Relief Program, and exclude the payments received by SCRs under these programs from the calculation of the offer floor. With regard to future programs, we direct NYISO to file tariff sheets within 30 days of this order reflecting provisions explaining, with specificity, the criteria it proposes to use in evaluating whether to include a specific subsidy or other benefit in its calculation of SCR offer floors. In its filing, NYISO should provide full support for the criteria it has chosen. With criteria included in NYISO's tariff, market participants that disagree with NYISO's determination with respect to particular subsidies or other benefits could then challenge that determination before the Commission.

138. Further, we direct NYISO to publish on its website a complete list of programs whose subsidies and other benefits are to be included in the offer floor, as well as all programs whose subsidies or benefits are to be excluded from the calculation of the offer floor, i.e., those subsidies or benefits that an SCR can accept but that will not be added to its guaranteed minimum payment from the Responsible Interface Party in the calculation of its offer floor. The two programs discussed above must be included in the list of excluded programs. Such publication will add a measure of certainty to an SCR's advance calculation of its offer floor.

c. SCR *Ex Post* Audit and Penalty Procedure

i. NYISO's Filing

139. NYISO states that its proposed revisions in section 4.5(g)(v) of Attachment H would enforce the SCR offer floor requirement through an *ex post* audit procedure, similar to that applicable to physical withholding, with price impact thresholds and penalty amounts paralleling those used elsewhere in the ICAP mitigation measures. Specifically, NYISO proposes changes to section 4.5(g)(v) to provide that, if the Responsible Interface Party submits an SCR offer subject to the offer floor that is below the offer floor and that offer causes or contributes to a decrease in in-City UCAP prices of 5 percent or more (provided the decrease is at least \$.50/kW-month), the Responsible

Interface Party shall be required to pay NYISO an amount equal to 1.5 times the difference between the in-City Market-Clearing Price in the ICAP Spot Auction for which the offers exceeding the offer floor were submitted with and without such offers being set to the offer floor, times the total amount of ICAP sold by the Responsible Interface Party and its affiliates in that auction.⁸² NYISO states that the SCR price impact test is set at the lower of the thresholds used elsewhere in the in-City mitigation measures in recognition of the reality that Responsible Interface Parties should be able to determine the applicable offer floors at the time of their bids with relative certainty. NYISO contends that there may be hundreds of SCRs participating in the in-City capacity market at any given time, and NYISO has neither the software nor the other resources necessary to evaluate and apply offer floors across the inventory of SCRs prior to each monthly ICAP Spot Auction.

ii. Protests

140. The NYPSC states that NYISO's proposal of an *ex post* enforcement of the SCR bid floor requirement means that SCRs would not even know what types of rebates or compensation NYISO will determine constitutes "payments or other benefits" for ICAP until after the SCRs have opted to participate in the ICAP market. The NYPSC contends that the risk of being fined would chill participation by the demand response resources that the Commission and the NYPSC are trying to encourage.

141. IPPNY asserts that the *ex post* basis of the audit and penalties allows the SCR to submit bids below its offer floor and thereby artificially suppress the clearing price if it is the marginal unit. IPPNY adds that even though a Responsible Interface Party should be able to calculate an SCR's offer floor precisely, SCRs are not even penalized by bidding below their offer floors if their bids do not cause clearing prices to fall by the greater of five percent of the clearing price or \$.50/kW. Moreover, according to IPPNY, whether or not the SCR faces penalties, the deleterious impact on the market clearing price is the same when the SCR is the marginal unit - the price has been artificially suppressed. IPPNY disagrees with NYISO's argument that it is infeasible to perform the evaluation of the SCR's payments prior to bid submission and argues that an *ex ante* evaluation would, in fact, take less effort than NYISO's proposed *ex post* evaluation. IPPNY states that under NYISO's proposed SCR mitigation measures, it would have to determine each and every new SCR's bid floor after the fact so that it could determine whether the Responsible Interface Party's bid is subject to penalty. In contrast, according to IPPNY, under the buy-side mitigation measures applicable to other new entry, NYISO would only need to determine a bid floor in instances where the new SCR was contending that

⁸² New York Independent System Operator, Inc., FERC Electric Tariff, Proposed Original Vol. No. 2, Attachment H, Original Sheet No. 467.04 A.

its own costs were lower than the 75 percent of net CONE that was used to set the in-City demand curve.

iii. Answers to Protests

142. With regard to the suggestion of an *ex ante* CONE test, NYISO responds that because the ICAP spot auctions are conducted every month, even a very small number of SCR audits would make such a test infeasible. Further, according to NYISO, such a suggestion ignores the large number of SCRs that may participate in New York capacity markets, and the need to develop the software necessary to apply an *ex ante* test.

Commission Determination

143. We find that NYISO's proposed SCR *ex post* audit and penalty procedures, with the modification directed below, are reasonable, as the large number of potential SCR participants makes it infeasible to determine an offer floor for each SCR *ex ante*. IPPNY's observation that a penalty does not remedy the deleterious impact on the market clearing price of an uneconomic bid is true, but in light of the necessity for an *ex post* evaluation of SCR conduct, such an outcome is reasonable in the case of SCRs. The Commission clearly favors *ex ante* mitigation whenever possible, and consistent therewith we have approved NYISO's proposed buyer mitigation offer floor for traditional large generation which operates *ex ante* to set minimum bid levels with no penalties. However, in some instances *ex post* mitigation with either sanctions or penalties is necessary, as here with respect to in-City SCR mitigation, and will be allowed. We have rejected IPPNY's proposal to apply the generator 75 percent of CONE default offer floor to SCR, so its claim that such an offer floor could be implemented on an *ex ante* basis is moot.

144. However, while we will not direct NYISO to determine individual SCR offer floors on an *ex ante* basis, it is important that an SCR be able to reasonably anticipate, in advance of submitting its offer, what its offer floor is likely to be, specifically including what subsidies or other benefits are likely to be included in the offer floor. To that end, in the preceding section we directed NYISO to provide advance guidance on what state programs may qualify for an exemption from inclusion as benefits in the determination of the SCR's offer floor.

145. Turning to the matter of NYISO's proposed SCR price impact threshold and penalty procedures, we find that imposing the SCR mitigation penalty on the Responsible Interface Party appropriately deters the improper exercise of market power by such parties who may also buy installed capacity and who may desire to aggregate SCR offers to make uneconomic offers to artificially lower market prices to their advantage. However, Responsible Interface Parties that are subject to SCR mitigation should be promptly informed of their breach of their offer floor and price impact threshold and of the amount of the penalty to be levied against them and should be given a reasonable

amount of notice before NYISO imposes such penalty. Accordingly, we direct NYISO to file proposed tariff sheets within 30 days of this order containing revisions to section 4.5(g)(v) requiring NYISO to promptly notify the Responsible Interface Party of the breach of the offer floor and price threshold and of the penalty NYISO intends to impose and to provide such notice a reasonable period in advance of imposing such penalty. Further, we find that NYISO erred in stating that the penalty is to be calculated using the difference between the in-City Market-Clearing Price in the ICAP Spot Auction for which the offers *exceeding* the offer floor were submitted. We direct NYISO, in the compliance filing directed above, to change the word “exceeding” to “below.”

146. With these modifications, we find NYISO’s proposed *ex post* audit and penalty procedures, including the proposed price impact threshold and penalty amount which are not specifically protested, reasonable and adequate to deter uneconomic bidding by SCRs and Responsible Interface Parties. With elimination of uncertainty with regard to the payments and benefits to include in the offer floor as required above, we disagree with the NYPSC that the risk of being fined will chill legitimate participation by demand response resources.

IV. Request for Waiver

147. NYISO states that in the May 6, 2008 compliance filing NYISO proposed a new definition of “affiliated entity.” The definition was accepted in the September 30, 2008 Order, effective November 1, 2008.⁸³ NYISO further states that in the time available after the issuance of the September 30, 2008 Order, it was not possible to complete the data compilation and software mapping necessary to implement the new definition any earlier than in time for the ICAP Spot Auction for February, held toward the end of January. Accordingly, NYISO requests a waiver of the November 1, 2008 effective date for the Affiliated Entity provisions, with this portion of the May 6, 2008 compliance filing to become effective on January 1, 2009. NYISO states that this change will not affect the substantive application of the supplier mitigation measures, but only the administrative burden of implementing them.

148. We find good cause to allow the requested effective date. Accordingly, the Affiliated Entity provisions of the May 6, 2008 compliance filing are accepted, effective January 1, 2009.

The Commission orders:

(A) The requests for clarification or rehearing of the September 30, 2008 Order are hereby denied, in part, and granted, in part, as discussed in the body of this order.

⁸³ September 30, 2008 Order, 124 FERC ¶ 61,301 at P 163.

(B) The revised tariff sheets in NYISO's October 30, 2008 compliance filing are hereby accepted, as modified, effective November 1, 2008, with the exception of the tariff sheets containing the Affiliated Entity provisions of the May 6, 2009 compliance filing which are accepted effective January 1, 2009, subject to the conditions of this order, as discussed in the body of this order.

(C) NYISO's requested change in the effective date of the Affiliated Entity provisions of the May 6, 2008 compliance filing to January 1, 2009, is hereby granted, as discussed in the body of this order.

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.