UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. ER11-2224-000

REQUEST FOR REHEARING, ALTERNATIVE REQUEST FOR CLARIFICATION, AND PARTIAL REQUEST FOR EXPEDITED ACTION OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

In accordance with Rules 212 and 713 of the Commission's Rules of Practice and Procedure,[1] the New York Independent System Operator, Inc. ("NYISO") hereby submits this request for rehearing of four aspects of the Commission's January 28, 2011 order regarding its proposed updates to the Installed Capacity[2] ("ICAP") Demand Curves for Capability Years 2011/2012, 2012/2013, and 2013/2014 ("January Order").[3] It also seeks clarification, or in the alternative, rehearing of two additional issues (in one case on an expedited basis.) On rehearing, the Commission should reverse the January Order's determinations that the NYISO must: (1) assume that there will be no property tax abatements when establishing the New York City ("NYC") ICAP Demand Curve;[4] (2) provide additional support for its proposed excess Capacity levels or continue to use the excess Capacity levels that are incorporated in the currently effective ICAP Demand Curve;[5] (3) include the cost of System Deliverability Upgrades

[1] 18 C.F.R. §§ 385.212 and 713 (2010).

[2] Terms with initial capitalization that are not otherwise defined herein shall have the meaning set forth in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff"), and if not defined therein, in the NYISO's Open Access Transmission Tariff ("OATT").

[3] *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,058 (2011) ("January Order").

[4] *Id.* at PP 88-90.

[5] *Id.* at P 114. References herein to currently effective ICAP Demand Curves and similar terms mean the ICAP Demand Curves for Capability Year 2010/2011.

("SDUs") in the ICAP Demand Curves;[6] and (4) provide additional support for its estimates of NYC System Upgrade Facility ("SUF") costs.[7] None of these determinations was based on reasoned decision-making. All contained legal errors including misinterpreting the requirements of the Services Tariff and holding the NYISO to an unlawfully stringent evidentiary standard. All should, therefore, be overturned.

In addition, the NYISO also requests expedited clarification of Paragraphs 122 and 129 of the January Order which directed the NYISO to use a "consistent level" of excess Capacity for all purposes. Specifically, the Commission should clarify that the NYISO need not alter the level of excess used to determine Energy and Ancillary Services revenue offsets to the net cost of new entry ("CONE"). The Commission should confirm the determination clearly stated in the January Order that the level of excess used for years one through three to determine those offsets is just and reasonable. In the alternative, if the Commission meant to require a change to the Energy and Ancillary Services revenue offsets, then the NYISO respectfully requests rehearing of that determination.

The NYISO also requests clarification of Paragraph 161 of the January Order, which addresses its proposed winter/summer adjustment. Specifically, the Commission should clarify that the NYISO need not modify the winter/summer adjustment methodology which was accepted by the January Order. Instead the NYISO should apply the accepted winter/summer adjustment methodology to the ICAP Demand Curves that are established in compliance with the January Order's other directives, to the extent that they are not overturned on rehearing. In the alternative, if the Commission meant to require a change to the winter/summer adjustment methodology, then the NYISO respectfully requests rehearing of that determination.

[6] *Id.* at P 53.

[7] *Id.* at P 140.

None of these determinations was based on reasoned decision-making and all should be overturned for the reasons specified in Sections III and IV below. In all, it appears that the Commission may not have fully considered that the January Order will substantially raise prices in a market that is functioning well, that is already experiencing a "significant capacity surplus . . .."[8], and that is continuing to attract new Capacity. The Commission has previously directed the NYISO to design Capacity market rules that "provide a level of compensation that will attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators."[9] They will increase Capacity prices substantially beyond those proposed in the November Filing.[10] They also will raise prices substantially beyond the current levels which have attracted and are continuing to attract and retain needed Capacity. As discussed in Section VI below, the January Order will disrupt this balance, particularly in New York City, by raising clearing prices well above levels required to meet the basic goals of the NYISO's Capacity markets. On rehearing, the Commission should carefully consider the risk that the cumulative impact of its decisions will be to inefficiently perpetuate the current Capacity surplus, and thus distort the Capacity markets and unnecessarily increase prices for consumers.

I. COMMUNICATIONS

Communications regarding this pleading should be addressed to:

[8] January Order at P 117.

[9] *New York Independent. System Operator, Inc.,* 118 FERC ¶ 61,182 at P 17 (2007).

[10] *See New York Independent System Operator, Inc.*, Request for Leave to Answer and Answer at Affidavit of David Lawrence ("Lawrence Affidavit"), Docket No. ER11-2224-000 (filed January 6, 2011) ("January Answer").

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II. BACKGROUND

On November 30, 2010 the NYISO submitted a filing (the "November Filing") to revise the ICAP Demand Curves for Capability Years 2011/2012, 2012/2013, and 2013/2014.[11] Among other things, the November Filing proposed ICAP Demand Curve values that: (1) for the NYC Demand Curve, reflected full abatement of NYC property taxes; (2) used a level of excess Capacity based on the NYISO's independent assessment and evaluation, consistent with the Services Tariff; (3) used a different excess Capacity assumption to estimate Energy and Ancillary Services revenue offsets for years one through three; (4) did not include SDU costs in the cost of new entry ("CONE") for the peaking units ("peaking plant"); and (5) included the Consultant's[12] best estimate of NYC SUF costs, with which the NYISO concurred.

The January Order accepted the NYISO's proposed tariff changes subject to modification, suspended them for five months, and directed the NYISO to make a compliance filing. The Commission rejected the NYISO's proposals to recognize full property tax

[11] *New York Independent System Operator, Inc.*, Tariff Revisions to Implement ICAP Demand Curves for Capability Years 2011/2012, 2012/2013, and 2013/2014, Docket No. ER11-2224-000 (filed November 30, 2010) ("November Filing").

[12] National Economic Research Associates, Inc. ("NERA"), with Sargent and Lundy as subcontractor to NERA (collectively, "the Consultant").

abatement in NYC and to exclude Deliverability costs. The Commission also found that the NYISO had not fully supported its level of excess Capacity assumption. The January Order further: (1) directed the NYISO to address a protestor's arguments regarding the SUF costs incorporated in the ICAP Demand Curves proposed in the November Filing;[13] (2) directed the NYISO to use a consistent level of excess Capacity for all purposes, which was incongruous because it also determined that the NYISO's proposed Energy and Ancillary Services revenue offsets were just and reasonable,[14] and (3) found the NYISO's proposed winter/summer adjustment was just and reasonable but also, again incongruously, directed the NYISO to revise it to reflect any adjustments to the assumed level of excess Capacity.[15]

III. REQUEST FOR REHEARING

A. It Was Arbitrary and Capricious for the Commission to Require the NYISO to Include NYC Property Taxes in the Cost of New Entry for the NYC Peaking Plant

The January Order concluded that "it is not just and reasonable to assume full, or in fact, any tax abatement for the NYC LMS 100 peaking unit when granting the tax abatement is discretionary under the UTEP and not a matter of right . . . ."[16] The Commission stated that the NYISO "had not shown" that property taxes "will not be incurred by peaking units that will be constructed in New York City."[17] It also said that it was convinced by the "debate" between the

[13] January Order at P 140.

[14] *Id.* at PP 122-129.

[15] *Id.* at P 161.

[16] *Id.* at P 88. The UTEP is the NYCIDA's *Third Amended and Restated Uniform Tax Exemption Policy*.

[17] *Id.*

NYISO and New York City Suppliers[18] that it was "unclear whether an LMS100, the peaking unit used by the NYISO in determining the CONE for the NYC demand curve, would qualify under the program criteria."[19] Accordingly, because of the supposedly "questionable eligibility of a peaking unit and the fact that such abatement was discretionary . . . ." the NYISO was "directed to exclude tax abatement from the calculation of net CONE for NYC."[20]

The Commission held that the NYISO may not assume any level of property tax abatement in formulating the NYC Demand Curve because there is a chance that the actual abatement level might be lower than 100 percent. The Commission appears to have reached this conclusion without giving any weight to the affidavits submitted by the government agency responsible for administering NYC's property tax abatement program, and without considering the potential alternative, *i.e.,* the adoption of a partial abatement assumption, as was proposed by the protestors.[21] The only evidence that would have supported the Commission's determination that no abatement should be assumed is evidence that there is *no* chance that a developer would receive the abatement (or that it is highly unlikely). No such evidence exists in the record. In fact, the Commission did not even find that the abatement is unlikely, only that it is unclear a developer would receive the abatement because it is discretionary. Hence, assuming a developer will not receive an abatement is unreasonable based on the evidence in the record.

[18] The New York City Suppliers are: (1) Astoria Generating Company, L.P.; NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC (collectively "the NRG Companies"); and (3) and TC Ravenswood, LLC.

[19] January Order at P 88.

[20] *Id.* at 90.

[21] *New York Independent System Operator, Inc.*, Protest of the New York City Suppliers at 50-53, Docket No. ER11-2224-000 (filed December 21, 2010) ("New York City Suppliers Protest").

It also appears that the Commission did not adequately consider the significant negative financial impact on NYC consumers of the zero abatement assumption as it is legally required to do. The extent of that impact is clearly illustrated by Table 1, which was included in the November Filing[22] but not addressed by the January Order.

TABLE 1 – Sensitivity Analysis, NYC Tax Abatement

	Summer Reference Point ($/kW-mo)			2011 Est. Capacity Revenue ($/kW-yr)		
	NYCA	NYC	LI	NYCA	NYC	LI
Current Demand Curve (2011$)		$ 17.24			$ 117.23	
with 100% tax abatement		$ 20.35			$ 138.38	
with 80% tax abatement		$ 21.89			$ 148.85	
with 70% tax abatement		$ 22.66			$ 154.09	
with 50% tax abatement		$ 24.20			$ 164.56	
no tax abatement		$ 28.85			$ 196.18	

Additionally, because the granting of the full tax abatement is likely (although not an absolute certainty), establishing an ICAP Demand Curve that assumes no abatement will substantially overcompensate NYC suppliers and contravene the Commission's own principles for establishing a just and reasonable ICAP Demand Curve.

The Commission also contravened its own policy of giving deference to state and local governmental bodies on matters that fall within the expertise or jurisdictional prerogatives of the respective body. In sum, the Commission has not met its obligation to offer a "reasoned explanation" for its tax abatement decision and has not engaged in reasoned decision-making.[23]

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[22] *See* November Filing at "Proposed NYISO Installed Capacity Demand Curves for Capability Years 2011/2012, 2012/2013 and 2013/2014 Final" at 12 (as revised October 30, 2010) ("NYISO Final Report"). Note that the table demonstrates the magnitude of impacts. It is based on the Consultant's proposed NYC Demand Curve, with the current (2010/2011) Demand Curve used for reference.

[23] *See, e.g.*, *Panhandle Eastern Pipe Line Co. v. FERC*, 881 F.2d 1101, 1118 (D.C. Cir. 1989) ("The agency's determination must reflect reasoned decision making that has adequate support in the record and must include an 'understandable' agency analysis and rationale."). *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992) (finding that "[i]t most emphatically remains the duty of this Court to ensure that an agency engage the arguments raised before it-that it conduct a process of *reasoned* decisionmaking," *citing*, *American Mining Congress v. U.S. EPA*, 907 F.2d 1179, 1187 (D.C. Cir. 1990) (emphasizing that deference to an agency's judgment does not relieve a reviewing court of its

1. The Record in this Proceeding Clearly Supports the Conclusion that the NYC Peaking Plant Would Be Eligible for, and Would Receive, a Full Property Tax Abatement Under the New York City Industrial Development Agency's Established Criteria

The record in this proceeding clearly supports a finding that the NYC peaking plant that is the basis for the NYC Demand Curve would receive a property tax abatement under the New York City Industrial Development Agency's ("NYCIDA's") UTEP. As the Commission and the courts repeatedly recognized, the Commission's principal responsibility under the Federal Power Act ("FPA") is to protect consumers against unjust and unreasonable rates.[24] The January Order acknowledges as much, observing that "[i]n choosing a general methodology and inputs into the demand curve model, judgments must be made, and it is the Commission's responsibility to determine whether these judgments and the resultant outcomes fall within a zone of reasonableness."[25] The January Order, however, did not address, and appears to have not even

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responsibility to ensure that the agency has articulated a satisfactory explanation for its action) (emphasis in original)); *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 358 (D.C. Cir. 1985) (finding that the Commission failed to offer a "reasoned basis" for its decision); *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1499 (1984) (finding that "[u]nder the 'arbitrary and capricious' standard, a reviewing court must conduct a 'searching and careful' inquiry into the record in order to assure itself that the agency has examined relevant data and articulated a reasoned explanation for its action including a "rational connection between the facts found and the choice made" and that "[m]ost fundamentally our task is 'to ensure that the [agency] engaged in reasoned decision-making," *citing, Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 815 (D.C. Cir. 1983); *American Gas Association v. FPC*, 567 F.2d 1016, 1029-30 (D.C. Cir. 1977)).

[24] *See, e.g., Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) (stating that "[a] major purpose of the . . . [FPA] is to protect power consumers against excessive prices"); *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (finding that the "principal purpose [behind passage of the Federal Power Act] was to encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices"); *Williams Pipeline Co.,* 21 FERC ¶61,260 at p. 61,583 (1982) (explaining that the Commission's "essential mission" is "to protect consumers against exploitation" and that "[c]onsumer protection is what we are here for. Of course, that function must be performed with scrupulous regard for the legitimate claims of those we regulate. Nevertheless, it is the consumer's interest that is paramount. The statutes on which we spend most of our time and energy were carefully designed to close gaps in the protective fabric that the states had previously fashioned for the consumer's benefit. That is so clear that even lawyers have been unable to dispute it. Thus history gives us a good light by which to steer when we deal with electric power and with the transportation of natural gas").

[25] January Order at P 119 (internal citations omitted).

considered, the "resultant outcomes" that would follow its conclusion, which has no basis in the record, that property tax abatements will not be granted.

It is unjust and unreasonable to require consumers to pay rates predicated on an assumption that the NYC Demand Curve peaking plant would receive zero property tax abatements. The record adequately demonstrates that such abatements would be granted. The record is also clear that incorporating NYC property taxes at a level of 100 percent into the peaking unit's CONE would substantially inflate the NYC Demand Curves. Yet the January Order does not address this "resultant outcome" in any way. Instead, the Commission leapt from its finding that a full abatement *might not be granted* to its conclusion that zero abatement *must be assumed* without adequately considering consumer impacts. Even if there were legitimate doubts about the application of the UTEP, it is arbitrary, capricious, and inconsistent with reasoned decision-making for the Commission to resolve those doubts entirely against consumers. Although it is not a certainty that 100 percent abatement will be granted to each peaking plant, there is no evidence in the record suggesting that a developer would not receive an abatement or even that the abatement would be unlikely. The Commission's determination could only be deemed unreasonable in light of such evidence. Moreover, the Commission did not venture to provide a reasoned explanation.

a. The NYCIDA's Rules and Economic Motivation Support the Conclusion That It Will Grant Property Tax Abatements

The January Order's analysis disregarded, without explanation, the rationales offered by the NYISO and others[26] that it would be irrational to assume that the NYCIDA, as an economic development agency, would exercise its discretion in a way that would inflate NYC Capacity

[26] *See New York Independent System Operator, Inc.*, Request for Leave to Answer and Answer of the New York Transmission Owners at 12-17, Docket No. ER11-2224-000 (filed January 10, 2011) ("NYTOs Answer").

prices. It is readily foreseeable that doing so would harm economic development and contravene both the stated public policy goals of the UTEP and NYC, and the NYCIDA's statutory purpose. The City of New York's ("City") Comments, noted that "the role of the NYCIDA is to actively foster and facilitate economic development and job growth retention in New York City" and that it achieves this objective by granting property tax abatements and providing other incentives.[27] The City stated that the NYCIDA's "core purpose" is economic development, particularly through job creation and retention, and "there can be no question that the construction and operation of a new generating facility will accomplish this important purpose."[28] Further, the City has no incentive to unreasonably deny property tax abatement, as "the impact on NYC Locality electricity consumers related to the exclusion of the tax abatement benefits is massive, equating to potentially hundreds of millions of dollars annually."[29]

Even the New York City Suppliers, who objected to full abatement, acknowledged a likelihood that the NYC peaking plant would receive a significant abatement of property taxes.[30] Two affidavits submitted by the City in this proceeding establish that the NYCIDA has a statutory mandate to promote economic development and job retention and creation, and that granting tax abatements to new generators would serve these objectives.[31] The January Order acknowledged that the UTEP was recently revised for the express purpose of "induc[ing] the

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[27] *New York Independent System Operator Inc.*, Motion to Intervene Protest and Comments of the City of New York at 16 (filed December 21, 2010) ("City of New York Comments").

[28] *Id.* at 17.

[29] *Id.* at 18, n. 34.

[30] New York City Suppliers' Protest at 46-47, 51-52; *New York Independent System Operator, Inc.*, Answer to Motion, Motion for Leave to Answer and Limited Answer of the New York City Suppliers at 7-8 (filed January 14, 2011) ("New York City Suppliers Answer").

[31] City of New York Comments at Affidavit of Maureen Babis ("Babis Affidavit") filed December 21, 2010); *New York Independent System Operator, Inc.*, Request for Leave to Answer and Answer of the City of New York at Response Affidavit of Maureen Babis ("Basis Response") filed January 5, 2011 ("City of New York Answer").

installation of peaking units in NYC."[32] The City noted that "inasmuch as the NYCIDA Board adopted a tax abatement program specifically designed for new peaking generating units, it is reasonable to presume that the NYCIDA Board will consider applications for assistance under that program in a manner that is consistent with its statutory mission . . . ."[33]

The City further explained that given the plain language of the UTEP, it was reasonable to expect that the peaking plant would most likely be granted full tax abatement.[34] While new LMS100 peaking units are not entitled to tax abatements as a matter of right, the NYCIDA testified that its discretion was constrained by the UTEP and that it was reasonable to assume that denials would be unusual.[35] The City also described that New York State law applicable to all Industrial Development Agencies, including the NYCIDA, requires that it have a policy that delineates how and when it could deviate from its policy.[36] The UTEP provides those guidelines and prevents the NYCIDA from arbitrarily denying a request for abatement.[37]

b. The NYC Peaking Plant Will Meet the UTEP's Criteria to Qualify for Property Tax Abatement

The City demonstrated that there was no merit to the New York City Suppliers' claims that the peaking plant would not be eligible for an abatement under the UTEP and submitted

[32] January Order at P 65.

[33] Babis Affidavit at P 12.

[34] Babis Response at PP 8, 14.

[35] City of New York Answer at 17-18.

[36] *See* Babis Affidavit at 11 ("Section 874(a) of the New York General Municipal Law requires each industrial development agency to establish a uniform tax exemption policy, and Section 874(b) requires each agency to '. . . establish a procedure for deviation from the uniform tax exemption policy required pursuant to this subdivision. The agency shall set forth in writing the reasons for deviation from such policy, and shall further notify the affected local taxing jurisdictions of the proposed deviation from such policy and the reasons therefor.' In accordance with this statutory requirement, Section III of the UTEP lays out the NYCIDA's deviation policy.)

[37] *See id.*

evidence that discredited the New York City Suppliers' witness, Mr. David Perri on this issue.[38] The City stated that it developed the UTEP criteria after consulting with Mr. Perri regarding the expected operating characteristics of an LMS100 unit in NYC and that Mr. Perri provided the City with information that provided the basis for the criteria in the UTEP.[39] Inexplicably, the information on the LMS100's heat rates and parasitic load information provided to the City by Mr. Perri was different from the heat rate and parasitic load information that was later included in Mr. Perri's affidavit on behalf of the New York City Suppliers.[40] That affidavit was intended to cast doubt on whether an LMS100 unit would qualify under the UTEP criteria.

The NYISO also submitted an affidavit by its Demand Curve Consultant which explained that the LMS100 unit would satisfy the second of the UTEP's two objective criteria, and thus be eligible for abatement.[41] As explained in the Ungate Affidavit, the UTEP criteria require that "the proposed Peaking Unit will have a full-load heat rate not exceeding either (aa) 7,850 btuLHV/kwh … as measured at generator terminals, or (bb) 8,250 btuLHV/kwh (9,150 btuHHV/kwh) as measured net of parasitic load."[42] If the parasitic losses for the LMS100 unit are properly estimated, as provided in the Ungate Affidavit, the heat rate for the peaking plant meets the (bb) requirement, and the auxiliary power would have to increase "to approximately 4,240 kW before the section (bb) heat rate requirement cannot be met."[43]

[38] City of New York Answer at 12-14 and Exhibit A.

[39] *Id.* at 12-13.

[40] *Id.* at 13.

[41] January Answer at Affidavit of Christopher D. Ungate at PP 7-11 ("Ungate Affidavit").

[42] UTEP Art 1(e)(ii).

[43] *See also* January Answer at Ungate Affidavit at P 10.

The January Order did not accord appropriate weight to this evidence[44] and instead reached the erroneous conclusion that NYCIDA's discretion to deny tax abatements meant that the NYISO should assume that zero abatement would be granted. It did so despite the fact that the New York City Suppliers conceded that significant levels of partial abatements – in the range of an abatement of 89 to 94 percent of property taxes -- were likely.[45]

2. The Commission Failed to Afford Proper Deference to the Expertise and Jurisdictional Prerogatives of Local Government Agencies by Disregarding the NYCIDA's Testimony

The January Order directly contravenes the Commission's normal policy of deference to the expertise and jurisdictional prerogatives of State and local government bodies.[46] The Commission has previously noted that it is not its "intent to interfere with state programs that

[44] The January Order only acknowledged the City's pleadings in passing and only with respect to the question of whether the ICAP Demand Curve CONE Plant would meet the UTEP criteria. *See* January Order at P 70.

[45] See New York City Suppliers' Protest at 46-47, 51-52, New York City Suppliers' Answer at 7-8.

[46] *See, e.g., City of Vernon, California,* 111 FERC ¶61,092 at P 39 (2005) ("Of course, the Commission respects state and local regulatory authorities and makes every effort not to intrude on their jurisdiction."); *Entergy Services, Inc.,* 120 FERC ¶61,020 at P 29 (2007) ("the Commission has found that where there is a strong local interest it may give deference to a state commission on a matter subject to the Commission's jurisdiction.") S*ee also New York Independent System Operator, Inc.*, 109 FERC ¶ 61,372 at PP 18-19 (2004) (stating that the Commission's "goal" in transmission planning is to "appropriately recognize the respective state-federal authorities over transmission matters" and accepting a NYISO proposal that afforded the New York Public Service Commission a large role in the transmission planning process for New York state); *Consolidated Edison Co. of New York, Inc.*, 15 FERC ¶ 61,174 at p. 61,405 (1981) (deferring to the New York Public Service Commission with respect to certain rates for Consolidated Edison Company's delivery services to the New York Power Authority which the Commission found presented "unusual circumstances which create strong local interest"); *Consolidated Edison Co. of New York, Inc.*, Letter Order, Docket No. ER11-1961-000 (continuing the practice of deferring to the New York Public Service Commission with respect to certain rates). Deference in this context does not mean that the Commission should cede responsibility for the justness and reasonableness of Capacity prices to the NYCIDA but certainly means, at a minimum, that it should attach significant weight to the NYCIDA's sworn statements.

further specific legitimate policy goals."[47] Rather than showing an appropriate level of regard for the NYCIDA's testimony that an LMS100 unit would be eligible for, and would be granted, full abatement, the Commission arbitrarily determined that the NYCIDA would grant zero abatements merely because it was possible that it might deny them. Further, the Commission should not have given Mr. Perri's or the New York City Suppliers' speculation the same weight as the NYCIDA's and the City's statements supporting full abatements.

It also is not reasoned decision-making for the Commission to base a conclusion of zero abatement on a party's disagreement with the NYISO and the NYCIDA, which the Commission characterizes as a "debate" regarding the eligibility of the LMS100 unit under the UTEP.[48] The Consultant's Report,[49] the Consultant's Affidavit, and the City's pleadings including affidavits, fully support a finding that the peaking plant would qualify for full tax abatement under the UTEP. The New York City Suppliers relied on Mr. Perri's affidavit to argue that it would not be eligible but it was unreasonable for the Commission to rely on it after the City demonstrated that Mr. Perri had recently contradicted himself on the very point at issue.

The New York City Suppliers did not argue that every LMS100 unit would fail to qualify. The Perri Affidavit only provided an example of how one particular unit, USPG's South

[47] *New York Independent System Operator, Inc.*, 131 FERC ¶61,170 at P 137 (2010).

[48] January Order at P 88.

[49] *See* November Filing at Independent Study to Establish Parameters of the ICAP Demand Curve for the New York Independent System Operator at 73 (September 3, 2010, as revised September 7, 2010 and November 15, 2010) (stating that "[t]he EDC policy statement appears to indicate an inclination to provide the above-described abatement to the peaking unit that will be used in the Demand Curve reset") ("NERA/S&L Report"); *see also* January Answer at Ungate Affidavit at PP 7-11.

Pier Project, and perhaps other projects with the same characteristics as the USPG project, *might not* qualify.[50]

As noted above, Mr. Perri apparently provided inconsistent information on heat rates and parasitic load information for an LMS100 unit. In an email sent to the City in response to the City's request for information regarding the LMS100, Mr. Perri provided heat rates and parasitic load information that were lower than the information submitted in his affidavit.[51] The discrepancies in the information provided by Mr. Perri demonstrate that it is not reasonable to rely on his statements. Further, even if the information provided by Mr. Perri in this proceeding were accurate, the Commission should not rely on his data because they were introduced after the completion of the Consultant's Report and stakeholder process, and after the submittal of the November Filing. The only reasonable conclusion, based on the evidence provided in the Consultant's Report, the Consultant's affidavit (the Ungate Affidavit), and the City's pleadings including the NYCIDA's affidavits, is that new peaking plants in NYC would generally be expected to qualify for full property tax abatement.

Even if there was room for doubt as to the treatment of the USPG's South Pier Project unique characteristics and configuration, such doubts would be irrelevant because the ICAP Demand Curves are to be established based on the treatment to be afforded the Demand Curve peaking plant. The New York City Suppliers' focus on the particular circumstances of an individual unit, instead of the characteristics of the hypothetical peaking plant is contrary to the Services Tariff. It amounts to a collateral attack on earlier Commission rulings approving the use of the peaking plant to set the ICAP Demand Curves. To the extent that the Commission

[50] *See New York City Suppliers Protest* at Perri Affidavit at P 9 (stating that he "reviewed the UTEP to determine whether the *SPIP* would meet the objective criteria") and P 10 (stating that "the *SPIP* will not meet either of these UTEP expressly designated 'objective' heat rate criteria) (emphasis added).

[51] City of New York Answer at 13, Affidavit of Thomas Simpson at PP 7-8 and Exhibit A.

relied on such evidence, it impermissibly departed without a reasoned explanation from its own precedent and from its own finding in the January Order that the hypothetical LMS100 plant should be used to set the NYC Demand Curve.

3. Even if There Were A Reasoned Basis for Finding That the Record Was Unclear, the January Order Should Have Explored Other Options for Resolving any Uncertainties

Even if there were a basis to conclude that the record was unclear as to whether the NYC Demand Curve peaking plant would be eligible under the UTEP for property tax abatement, the Commission should not have simply rejected the November Filing's proposal and taken an opposite position, *i.e.*, compelling the NYISO to assume zero abatement. The January Order does not, and given the record, could not reasonably, hold that the protestors had established that the peaking plant would not be eligible for abatement. If the Commission had a view that the record was not clear, the most that it could have reasonably concluded was that neither the NYISO's nor the protestors' position had been established. When facing similar circumstances with respect to excess Capacity levels,[52] the Commission directed the NYISO to make a compliance filing providing support for a reasonable level of excess Capacity. The Commission should have made a similar ruling regarding the peaking plant's eligibility.

Even if there was a reasoned basis to conclude that the peaking plant would receive an abatement lower than 100 percent, and that the reasonably anticipated percentage could not be discerned from the record, the January Order's resolution of the issue was unreasonable. At a minimum, the Commission should have provided an opportunity for the NYISO to further justify the November Filing's full tax abatement assumption for the reasons specified above. If the

[52] The NYISO is seeking rehearing of the Commission's determinations concerning the November Filing's excess Capacity level proposals for the reasons specified in Section IV.A below.

evidence proffered in the record left questions unanswered, it was unreasonable for the Commission not to seek additional input on tax abatement questions. To the extent that the Commission believed that a genuine dispute over an issue of material fact existed, it should have[53] set the matter for a paper hearing, convened a technical conference, or taken some other step to resolve the factual dispute. None of these potential alternative approaches would have delayed establishing new Demand Curves beyond the period contemplated by the January Order.

Finally, by requiring the NYISO to simply assume zero abatements, based on *doubts* over eligibility and a purportedly unclear record, the Commission will impose disproportionate financial impacts on consumers and unreasonably disrupt the balance between Capacity sellers and consumers that the ICAP Demand Curves should reflect. Moreover, the desired balance between "under compensating" and "overcompensating" suppliers will be skewed in a manner that is likely to perpetuate a NYC Capacity market with an inefficient level of excess supply.

4. A Finding of Zero Abatement Is Not Supported by the Record, and Will Result in Rates That Are Not Just and Reasonable

Contrary to the Commission's conclusion, even the New York City Suppliers acknowledged[54] that it would be reasonable for the ICAP Demand Curves to assume that at least some percentage of abatements would be granted. It is significant that even they do not view the abatement issue as an "all-or-nothing" proposition. Indeed, the New York City Suppliers'

[53] *See, e.g., Cajun Electric Power Co-op v. FERC*, 28 F.3d 173, 180 (D.C. Cir. 1994) (remanding a decision because the Commission failed to conduct an evidentiary hearing where a genuine issue of material fact existed); *Louisiana Public Service Commission v. FERC*, 184 F.3d 892, 895 (D.C. Cir 1999) (stating that "[i]n general, the Commission must hold an evidentiary hearing whenever a complainant raises a genuine issue of fact that is material to the justness and reasonableness of a rate and cannot be resolved upon the written record"); *El Paso Electric Co. v. FERC*, 201 F.3d 667, 672 (5th Cir. 2000) (finding that where evidence was raised that could "create a genuine issue of material fact" the Commission should engage in more than "summary proceedings").

[54] New York City Suppliers Protest at 50-53; New York City Suppliers Answer at 7-8.

demonstrated that the record of industrial development agencies in other parts of New York State provided an evidentiary basis to "include a percentage of [property tax] costs reflective of the likelihood that abatement will be granted."[55] They stated that the information they provided "equates to an assumed property tax abatement approximately 89-94 percent."[56] Accordingly, if the Commission is uncertain regarding what would be an appropriate level of abatement and is unable to determine an appropriate percentage, the evidentiary record supports a range of abatement of 89 to 100 percent.

As with the myriad of other uncertainties that can affect the profitability of investments, one must determine an "expected value" associated with the uncertain factor that takes into account the probabilities of the different outcomes. Because the evidence in this case supports a high probability of abatement, the abatement assumption can only be reasonable if it likewise assumes a high probability of abatement as there is no credible information in the record supporting a zero probability of abatement. Even utilizing the NYC Suppliers' proposed level of abatement[57] would be more reasonable and fairer to consumers than assuming zero abatement.

5. The January Order Unlawfully Required the NYISO to Prove With Absolute Certainty That Abatements Would Be Granted When the Federal Power Act Only Requires a Showing That it Was Just and Reasonable to Expect They Would Be Granted

Finally, the January Order effectively imposed an unlawfully high burden of proof on the NYISO. Commission and judicial precedents are clear that proposed rates need only be "just and

[55] *Id.* At 51-52.

[56] New York City Suppliers Answer at 7-8.

[57] *See* New York City Suppliers at Protest at 46-47, 51-52; New York City Suppliers Answer at 7-8 .

reasonable."[58] The November Filing made a reasonable assumption that the NYCIDA would grant tax abatements in accordance with the NYCIDA's own representations and its statutory mandate, which was consistent with the City's stated larger economic interests. The Commission rejected the NYISO's assumption because it did not prove with absolute certainty that 100 percent of the abatements would always be granted. That standard is more than the "just and reasonable" showing required under the FPA and thus does not reflect reasoned decision-making.

B. The November Filing's Proposed Levels of Excess Capacity Were Fully Supported, Would Have Resulted in Just and Reasonable Rates, and Should Have Been Accepted by the Commission

In setting the ICAP Demand Curves, the NYISO must avoid the extremes of under-compensating or over-compensating suppliers. Finding the balance between over- and under-compensation will send appropriate economic price signals. It also will strike a balance between Capacity suppliers and consumers. ICAP revenues must be adequate to attract and retain sufficient Capacity to satisfy statewide and local reliability requirements, while imposing a just and reasonable cost on consumers. Both the NYISO's and the MMU's proposed levels of excess Capacity reasonably avoided these extremes and are thus consistent with Commission precedent. Much higher levels of excess Capacity would impose an undue financial burden on buyers and perpetuate a Capacity market with an inefficient level of excess supply. Alternatively, the MMU's proposal provides a reasonable middle ground.

[58] *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (finding that "[t]he Federal Power Act requires that all rates charged by public utilities be 'just and reasonable.' In the past FERC has interpreted is authority to review rates under this provision of the Act as limited to an inquiry into whether the rates proposed by a utility are reasonable - and not to extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs").

Continuing the assumption of 400 MW excess in the current NYC Demand Curve would perpetuate a market that is already long and also would not strike a balance between suppliers and consumer because it would impose excessive costs on consumers. Moreover, it would constrain the NYISO to continue its prior assumptions despite changed economic conditions.

The January Order mistakenly found that the NYISO's "proposed excess capacity adjustments are unsupported, and therefore cannot be found to be just and reasonable."[59] At the same time, it rejected as unsupported variations on the November Filing's proposal that were proffered by the MMU. The Commission directed the NYISO to either adopt the levels of excess Capacity that were used in the last reset proceeding or "propose to use a new level of excess capacity" in its compliance filing based on what the Commission deems to be adequate support.

The NYISO welcomes the opportunity to provide additional support for excess Capacity levels that avoid the extremes of under- and over-compensation. The NYISO will include that support in its compliance filing. Nevertheless, the Commission should have accepted the November Filing's proposal on this issue as filed. Alternatively, the MMU's proposal provides a reasonable middle ground and should be adopted.

1. The NYISO's and the MMU's Proposed Excess Capacity Levels Were Based on Reasoned Judgments and Were Consistent with the Services Tariff

To establish the ICAP Demand Curves, the peaking plant's cost of new entry is offset by Energy and Ancillary Services revenues.[60] A component in determining those revenues is the

[59] January Order at P 114.

[60] As discussed in Section IV.A. below, for the three-year period covered by this Demand Curve update, the NYISO used as it has in previous resets, a Capacity level of 100.5 percent of the target

assumed level of average excess Capacity. The assumed level of excess Capacity reflects the expectation that Capacity levels in the NYCA will not be allowed to fall below the minimum required amount and thus that there will always be some level of excess.[61] The excess Capacity level affects both projected Energy and Ancillary Services revenues and the projected Capacity revenues realizable in the ICAP Spot market. Assuming a higher level of average excess Capacity will result in a higher net CONE, since it will decrease the revenues that offset the cost of entry. Conversely, assuming a lower level of excess Capacity would result in a lower net CONE. Setting the excess Capacity level at an unreasonably low or unreasonably high level would therefore contravene the Commission's policy that Capacity markets should neither under- nor over-compensate suppliers.

As the Commission stated, the Services Tariff instructs that the NYISO's periodic review of the ICAP Demand Curves include an assessment of its excess Capacity assumption, so that the CONE is adjusted "in recognition that likely actual capacity revenues will be below those modeled at equilibrium due to expected excess capacity in the New York market."[62] The Commission has previously affirmed that the Services Tariff dictates that the excess Capacity level should be calculated as if Capacity were at, or slightly above, equilibrium (*i.e.,* the Installed Reserve Margin). The Services Tariff specifies that the Capacity level should "equal or slightly exceed the minimum Installed Capacity requirement."[63] The relevant language of the Services

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Installed Capacity level for computing Energy and Ancillary Services revenues. That level comports with the Services Tariff, which states that Energy and Ancillary Services are to be determined "under conditions in which the available Capacity would equal or slightly exceed the minimum Installed Capacity requirement." Services Tariff Section 5.14.1.2.

[61] *See* November Filing at Affidavit of Dr. David B. Patton at PP 25-26 ("Patton Affidavit").

[62] January Order at P 115.

[63] Services Tariff Section 5.14.1.2.

Tariff has not changed since the Commission made that ruling. The NYISO has satisfied that requirement.[64]

By requiring a review of the level of excess as part of the Demand Curve reset, the Services Tariff expressly contemplates that the NYISO's excess Capacity assumptions may be revised from one triennial review to another. Therefore, the assertion by some parties[65] that revising the level of excess is a "regulatory surprise" is, quite simply, a canard.

The January Order recognized that setting a reasonable excess Capacity level necessarily involves judgment.[66] The reasoned judgment of the NYISO and the MMU was that excess Capacity levels should be determined based on the size of the respective peaking plants. The NYISO's best judgment was that the levels for this triennial reset should equal one-half the size of the peaking plant: 98 MW for NYC and Long Island and 207 MW for the NYCA.[67]

2. The NYISO's Proposed Excess Capacity Levels Were Fully Supported

The January Order held that the NYISO had "not adequately supported the use of a hypothetical peaking unit, rather than the use of a combined cycle unit, or the use of forecasted actual capacity additions, in computing the average excess capacity adjustment in this reset."[68]

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[64] *See* Second DCR Order at P 31 ("The Commission agrees that some small level of expected capacity over the minimum requirement is appropriate.") and n. 21 ("In an April 21, 2005 order accepting NYISO's previous ICAP Demand Curve parameters, the Commission accepted NYISO's proposal to determine the parameters based on energy and ancillary service revenue estimates that would arise when supply conditions are near, but slightly higher than, the minimum capacity requirement. The reason was to create incentives for capacity investment not to fall below the minimum requirement").

[65] *See New York Independent System Operator, Inc.*, Motion to Intervene and Protest of Independent Power Producers of New York, Inc. at 25, Docket No. ER11-2224-000 (filed December 21, 2010) ("IPPNY Protest")

[66] January Order at P 119.

[67] November Filing, at NYISO Final Report at 13.

[68] *Id.* at P 121.

The Commission allowed that "it may be true that a peaking unit would be the efficient addition to maintain reliability, and that the use of a peaking unit to compute average excess capacity would appear consistent with the proxy unit specified in the tariff for determining the net CONE . . . ."[69] Nevertheless, the Commission declined to accept the proposed use of the peaking plant. Among other things, the Commission expressed concern that "[i]nstead of accounting for the consistent reliability signals in New York State and the lumpy nature of capacity additions, as NYISO did in the previous reset, NYISO assumes that the timing of entry could reasonably coincide with the time at which excess capacity is anticipated to fall to zero."[70] The January Order acknowledged that the NYISO offered a coherent rationale for proposing to use the peaking plant to determine excess Capacity levels; namely, that it would be more consistent with other parameters used to establish the ICAP Demand Curves.[71] This reasoning was supported by a number of parties, including the New York Transmission Owners ("NYTOs").[72]

The NYISO fully justified using the peaking plant rather than a larger combined cycle unit. The NYISO proposed using the respective peaking plants based on its judgment that they appropriately reflected the size of an efficient addition to maintain reliability. This judgment was consistent with the MMU's reasoning. The Commission's concern that the NYISO did not properly account for the consistency of reliability signals or the "lumpiness" of Capacity additions is misplaced. Using a combined cycle unit would have introduced more lumpiness

[69] *Id.*

[70] January Order at P 120 (internal citations omitted).

[71] January Answer at 26.

[72] The New York Transmission Owners are Central Hudson Gas & Electric Corporation, Consolidated Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Gird, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation; *see* NYTOs Answer at 9-12; City of New York Answer at 22-27.

than was warranted because such a unit would be larger than the most efficient addition. Using the peaking plant instead of a combined cycle plant was also consistent with the reality that there is now and is expected to continue to be a significant Capacity surplus in New York State. It was reasonable for the NYISO to consider that the higher excess Capacity levels used in the previous ICAP Demand Curve[73] reset may have contributed to that excess.

The Commission cannot reasonably ignore that correlation in its own analysis and erred when it characterized the NYISO's consideration of that possibility as an unjustified "abandonment" of prior assumptions. A higher excess capacity assumption will increase the incentive to invest in new resources and can move the market away from a long-run equilibrium that is slightly in excess of the minimum requirement. The fact is that the ICAP Demand Curves may violate the Commission's principles if they produce revenues that over-compensate suppliers, and also a substantial capacity surplus will be created or exacerbated by excess investment. Accordingly, it is very important to determine whether the excess Capacity assumption is too high and may, therefore, perpetuate a Capacity surplus that generates unnecessary costs for consumers. It seems from the January Order that the Commission ignored that possibility which is not reasoned decision-making.

Even if the potential rationale for basing excess Capacity levels in this ICAP Demand Curve reset on a combined cycle unit had been as strong (which it was not) as the NYISO's rationale for basing it on the peaking plants, the NYISO's approach was more consistent with the Commission's mandate that the ICAP Demand Curves not inefficiently over-compensate suppliers. In contrast, the Commission's proposal to continue using the current level of excess

[73] *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,064 at PP 31-34 (2008)) ("Second DCR Order").

may cause new Capacity to enter solely because the ICAP Demand Curves are set too high, rather than based upon a need for new Capacity.

Parties may argue, and have asserted during the reset process, that a combined cycle unit may enter because it might have lower costs than other technologies, or that an LMS100 peaking unit may enter because it can be sited more quickly. The NYISO's Interconnection Queue demonstrates that diverse technologies have entered, and are proposed to enter the market during a period of downward pressure on load forecasts and continued high levels of excess Capacity.

The November Filing and the supporting Lawrence Affidavit provide a reasoned basis for the NYISO's proposal regarding the timing of entry. The resulting proposed levels comport with the requirements of the Services Tariff: the levels equal or slightly exceeds the minimum Installed Capacity requirement.[74] At a minimum, the Commission should recognize that it was just and reasonable to use the peaking units to determine the level of excess, for the reasons offered by the NYISO and the MMU.

The NYISO also explained that its proposal was feasible and not "unrealistic". The NYISO assumed that signals for new entry would be provided before the level of excess dropped to the equilibrium point; but that the timing of that entry could coincide with the time at which the excess was anticipated to fall to zero.[75] The addition of the new entry peaking unit would bring the level of excess equal to the MW of the peaking plant; *i.e.*, 195 MW for NYC and Long Island. The NYISO also used the peaking plant to establish the proposed level of excess for the NYCA. The NYCA peaking plant, a 7FA is 413 MW; and applying the same rationale would result in 207 MW or a level of excess of 0.6 percent.

[74] *See* November Filing at 17-19 and Affidavit of David Lawrence at PP 8-11.

[75] *Id.* at Initial Lawrence Affidavit at PP 3-4 and NYISO Final Report at 13.

The NYISO explained that it "was unrealistic to assume that, over time, an average level of excess below 1% is reasonable. Therefore, the NYISO recommend[ed] that the level of excess in NYCA be modeled at 1%."[76] As the excess is absorbed by load growth, the cycle would repeat, resulting in an average level of excess of 0.5 multiplied by the size of the relevant peaking plant. The possibility that these conditions might not occur in the market is not pertinent because the Services Tariff requires only that the ICAP Demand Curves incorporate a level of excess Capacity that would "equal or slightly exceed" the minimum Installed Capacity requirement. Objections on the ground that the NYISO erroneously assumed "that the timing of entry could reasonably coincide with the time at which excess capacity is anticipated to fall to zero" thus misapprehend the nature of the excess Capacity level setting exercise.

The Commission unreasonably gave short shrift to the NYISO's reasoning and simply declared that "adequate support" had not been provided. The Commission did not offer a reasoned explanation of why the level of support provided in the November Filing was deficient. Yet the support provided in the November Filing was comparable to what the NYISO provided in the prior reset to support the Commission-approved level of excess Capacity.[77]

As the NYISO explained,[78] its 2007 proposal had also used assumptions that differed from the Consultant's and were justified principally based on sensitivity analyses. The supportive information in the 2007 filing was similar to that included in the November Filing.

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[76] *Id.*

[77] *See New York Independent System Operator, Inc.*, Tariff Revisions to Implement Revised ICAP Demand Curves for Capability Years 2008/2009, 2009/2010 and 2010/2011 at 12-16, Docket No. ER08-283-000 (filed November 30, 2007) and at Affidavit of David Lawrence at PP 6-10.

[78] *See* January Answer at 5 and n. 18 (*citing* Second DCR Order at PP 26, 31, 60-61 (2008) (accepting NYISO modifications to excess Capacity level estimates recommended by NERA based on an analysis by Mr. David Lawrence and accepting the NYISO's judgment not to include an additional risk factor that NERA had recommended).

Specifically, the following table, which was included in the November Filing,[79] illustrates the impact of different excess Capacity assumptions.

Table 2 – Sensitivity Analysis, Levels of Excess Capacity Modeled

	Summer Reference Point ($/kW-mo)			2011 Est. Capacity Revenue ($/kW-yr)		
	NYCA	NYC	LI	NYCA	NYC	LI
Current Demand Curve (2011$)	$ 10.67	$ 17.24	$ 9.37	$ 26.14	$ 117.23	$ 26.14
1.5*MW peaking unit	$ 9.38	$ 20.35	$ 11.08	$ 22.98	$ 138.38	$ 23.19
1.0*MW peaking unit	$ 8.86	$ 18.43	$ 8.36	$ 21.71	$ 125.32	$ 21.71
NYISO recommendation*	$ 8.86	$ 16.91	$ 6.31	$ 21.71	$ 114.99	$ 21.71
@100.5% of equilibrium	$ 8.39	$ 15.99	$ 4.88	$ 20.56	$ 108.73	$ 21.71

*NYISO recommended excess: NYCA: 1%; NYC: 1.1%; Long Island: 2.1%
Current Demand Curve excess: NYCA: 1.5%; NYC: 4%; Long Island: 4%

In addition, the January Order did not explain why it was imposing a higher burden of proof and requiring considerably more support for the expected level of Capacity estimate in this ICAP Demand Curve reset than it did in the 2008 Demand Curve reset order. Despite a sufficient level of support in the record, the Commission erroneously concluded that the NYISO had simply stated its "beliefs."[80] The Commission's decision on this issue simply does not reflect reasoned decision-making. On rehearing, the Commission should accept the NYISO's proposed level of excess.

3. The January Order Applied an Impermissibly Stringent Burden of Proof to the NYISO's Excess Capacity Level Proposals

Commission precedent is clear that multiple alternative proposals can simultaneously be just and reasonable without diminishing the justness and reasonableness of others.[81] The January

[79] November Filing at NYISO Final Report at 14.

[80] January Order at P 122.

[81] *PJM Interconnection, LLC*, 119 FERC ¶ 61,063 at P 41 (2007) (stating that "on the same set of facts there can be 'multiple just and reasonable rate designs'"); *California Independent System Operator Corporation,* 119 FERC ¶ 61,076 at P 14 (2007) (stating that "there can be more than just and reasonable proposal, and the proposal under consideration will be selected unless it is found unjust and

Order, however, stated that "[i]n the instant reset, NYISO abandons positions it held in the previous reset without support for its new positions." It also held that the NYISO had not shown why the peaking unit "would more likely cause excess capacity conditions than either a combined cycle unit or a combination of generation that is expected to enter the market."[82]

Such showings are not required by the terms of the tariff. The NYISO must only demonstrate that its proposal is just and reasonable. The January Order thus impermissibly holds the NYISO to a higher standard than that in the Federal Power Act ("FPA"). The NYISO need only show that its proposed excess Capacity level is just and reasonable. The Commission, however, required the NYISO to prove that its proposal was superior to what was accepted in earlier orders.

Nothing in the Services Tariff supports this departure from the burden of proof required under the FPA. The Services Tariff does not require a special showing to justify changing the assumptions used in prior ICAP Demand Curve resets. To the contrary, the periodic review requirement, along with multiple Commission holdings (including in the January Order itself) allowing the NYISO to adjust Demand Curve parameters, belie the notion that assumptions should not be altered in the triennial review process.

The Commission's suggestion that the NYISO's proposed level of excess for each Demand Curve is unsupported because the NYISO "abandoned" past positions without a special

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unreasonable"); *Midwest Independent Transmission System Operator, Inc.*, 117 FERC ¶ 61,241 at P 62 (2006) (stating that "[u]nder the FPA, if we find that the Midwest ISO has successfully supported the justness and reasonableness of its proposal, we must approve it even if there are other just and reasonable ways…"); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (finding that "[t]he Federal Power Act requires that all rates charged by public utilities be 'just and reasonable.' In the past FERC has interpreted is authority to review rates under this provision of the Act as limited to an inquiry into whether the rates proposed by a utility are reasonable - and not to extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs").

[82] January Order at P 121.

explanation is thus both unreasonable and unlawful. The Commission's inquiry should be limited to whether the NYISO's current proposal is "just and reasonable."

4. If the Commission Refuses to Accept the NYISO's Proposal on Rehearing, it Should Accept the MMU's Proposal as it is Adequately Supported

The January Order attempts to distinguish the NYISO's 2007 ICAP Demand Curve reset proposal from the November Filing on the ground that in the 2007 filing, the NYISO and MMU both supported the same excess Capacity level proposals.[83] In this proceeding, however, the NYISO and the MMU were in complete agreement with respect to the NYCA excess Capacity assumption. The NYISO and the MMU also were in conceptual agreement regarding the use of the peaking plant to establish the level of excess. The sole difference between the NYISO's proposal and the MMU's variation of it was that the MMU favored setting the level of excess Capacity for the NYC and Long Island Localities equal to the size of the peaking plant rather than at 0.5 times its size.

To the extent that the January Order's determination was influenced by the disagreement between the NYISO and the MMU on that point, the NYISO wishes to clarify that it does not believe that the MMU's recommendations for NYC or Long Island were unjust, unreasonable, or inadequately supported. It has argued that the MMU was overly focused on actual market conditions and that the November Filing's proposed levels of excess for NYC and Long Island were feasible. Nevertheless, if the Commission does not adopt the November Filing's proposals on rehearing, the Commission should instead approve the MMU's variation.

[83] *Id.* at P 122.

The MMU's proposals for NYC and Long Island are adequately supported by the NYISO's and MMU's evidence in the record. Insofar as the January Order's decision on those excess Capacity levels was based on a concern regarding the NYISO's assumptions on the timing of entry, the MMU's variation was developed to address that very issue. Like the November Filing's proposal, the MMU's more closely conforms the calculation of excess Capacity levels to other ICAP Demand Curve parameters. It is also more consistent with the Services Tariff's requirements than the alternatives favored by supply-side protestors.[84] Finally, setting the excess Capacity assumption for the NYC and Long Island Demand Curves based on 195 MW, instead of 400 MW as under the currently effective ICAP Demand Curves, would be less likely to result in over-compensating or under-compensating suppliers. It would thus send more accurate price signals for the amount of Capacity needed to maintain reliability. The MMU's proposal is thus superior to the proposed supply-side alternatives.

5. The January Order Misinterpreted the Services Tariff's Provisions Governing the Determination of Excess Capacity Levels

The January Order wrongly suggests, that excess Capacity levels should reflect "current conditions,"[85] "historical experience," "future projections," the "lumpiness" of actual Capacity additions,[86] or "forecasted actual capacity additions."[87] It does not appear that the Commission is requiring the NYISO to consider these factors but it would be a fundamental legal error if it were to do so. As explained above, the Services Tariff does not provide for the level of excess to be based on "observed" levels of Capacity. It instead requires that the NYISO make a reasoned

[84] *See* IPPNY Protest at P 16; New York City Suppliers Protest at 16, 26.

[85] *Id.* at P 117.

[86] *Id.* at 120.

[87] *Id.* at P 121.

judgment that sets excess Capacity levels at or slightly above, equilibrium (*i.e.*, the Installed Reserve Margin).

Relying on "observed levels" of Capacity to set estimated excess Capacity levels is circular and could inadvertently perpetuate Capacity surpluses or deficiencies that happen to exist at the time when ICAP Demand Curves are reset. For example, the January Order stated that there is a "current state of significant capacity surplus in the NYCA . . . ."[88] Incorporating the current surplus into the excess Capacity calculation would tend to maintain the existing significant surplus without recognizing the economic inefficiency and the negative consequences to the market and consumers of doing so. An "observed level" approach also could have the opposite effect of keeping Capacity levels too low if it were applied at a time when no surplus existed. Both alternatives are undesirable because each would be contrary to the purpose of the ICAP Demand Curves, *i.e.,* to "improve system and resource reliability and incent new entry."[89]

6. There Is No Evidentiary Support for Using the Currently Effective Excess Capacity Levels for the Next Three Capability Years

The Commission erred when it ruled, without any evidentiary support, that the level of excess incorporated in the NYISO's currently effective ICAP Demand Curves would result in an acceptable level of excess for Capability Years 2011/2012 and beyond.[90] Although the Commission properly determined that those levels were appropriate when it set the current ICAP Demand Curves, they were never considered for use after May 1, 2011. The NYISO is not challenging their use for a brief additional period, such as the portion of the suspension period

[88] *Id.* at P 117.

[89] Second DCR Order at P 2 (stating that the ICAP Demand Curves "are intended to improve system and resource reliability by valuing the ICAP resources available above the system's required levels, and providing more effective economic signals for new investment.").

[90] January Order at P 114.

that falls after May 1, 2011. However, extending the excess Capacity levels used in the May 2008 through April 2011 Demand Curves for the three Capability Years of this reset, based on the record in this proceeding, would be inconsistent with reasoned decision-making. If the Commission does not accept the November Filing's proposal on rehearing or alternatively, the MMU's proposal, it should accept the proposal that will be included in the NYISO's compliance filing and not consider using the level of excess Capacity used in the May 2008 through April 2011 Demand Curves. To use the level in the current curves constitutes error as it is not supported by the evidence in the case.[91]

C. The Commission Erred When it Found That the NYISO Must Include System Deliverability Upgrade Costs in the ICAP Demand Curves

The January Order found that System Deliverability Upgrade ("SDU") costs "are a *required cost* of investment for interconnection customers in order to participate in the New York capacity market and be 'economically viable'" and such costs "are among the 'current localized levelized embedded cost of a peaking unit" that must be included in the ICAP Demand Curves pursuant to the Services Tariff.[92] The January Order also found that including SDU costs in the ICAP Demand Curves does not reduce the incentive for developers to locate their projects in areas where they would be deliverable[93] and rejected arguments that including such costs will create a situation in which Capacity buyers are subsidizing developers.[94] The Commission held

[91] The current Demand Curves have a level of excess of 4 NYC, 4 Long Island, and 1 NYCA. For the reasons stated in the record and described herein, utilizing the level of excess in the current demand curves risks perpetuating significant levels of surplus Capacity. It also would not result in just and reasonable rates.

[92] January Order at P 53.

[93] *Id.* at P 59.

[94] *Id.* at P 60.

that excluding SDU costs would "not accurately reflect developer's costs and thus, may discourage investment."[95] The Commission erred in several respects.

The January Order failed to consider the impacts to consumers that will result from including SDU costs in the peaking unit's cost of new entry, in contravention of its consumer protection responsibility under the FPA.[96] It is unjust and unreasonable for consumers to pay Capacity prices that include the costs of SDUs, especially when the Commission[97] and other parties, including the NYISO's independent MMU, acknowledged that SDU costs are more appropriately addressed by developing criteria for and, where appropriate, creating new Capacity zones. The Commission's ongoing proceeding examining such criteria and potential new Capacity zones[98] provides the appropriate forum for the parties and the Commission, to evaluate the economically efficient price signals to locate needed Capacity. By contrast, including SDU costs in the CONE will only serve to mute efficient price signals by increasing the probability that developers who locate in areas where they incur significant SDU costs will be significantly insulated from the true economic consequences of their location decision. Other than concluding that the inclusion of SDU costs will not create a subsidy and that no windfall exists because

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[95] *Id.*

[96] *See, e.g., Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) (stating that "[a] major purpose of the . . . [FPA] is to protect power consumers against excessive prices"); *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (finding that the "principal purpose [behind passage of the Federal Power Act] was to encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices"); *Williams Pipeline Co.,* 21 FERC ¶61,260 at p. 61,583 (1982) (explaining that the Commission's "essential mission" is "to protect consumers against exploitation" and that "[c]onsumer protection is what we are here for. Of course, that function must be performed with scrupulous regard for the legitimate claims of those we regulate. Nevertheless, it is the consumer's interest that is paramount. The statutes on which we spend most of our time and energy were carefully designed to close gaps in the protective fabric that the states had previously fashioned for the consumer's benefit. That is so clear that even lawyers have been unable to dispute it. Thus history gives us a good light by which to steer when we deal with electric power and with the transportation of natural gas").

[97] January Order at P 64 (stating that "we agree with NYISO and the MMU that the creation of a new capacity zone could provide better locational signals").

[98] *New York Independent System Operator, Inc.*, Docket No. ER04-449-023.

including such costs would simply reflect the "actual costs of new entry,"[99] the January Order did not address the "resultant outcomes"[100] of including SDU costs in the CONE. The January Order should have (i) considered the financial impact on consumers and (ii) provided a reasoned explanation of why the price signals and investment signals intended for developers would not be muted by including SDUs in the cost of new entry.

The NYISO's proposal reasonably excluded SDU costs from the peaking unit's CONE. Inclusion of SDU costs will result in unjust and unreasonable rates because it will either discourage development in areas where units would be deliverable or eliminate the financial disincentives for locating in areas that require significant system upgrades.

The November Filing explained that prior to the instant ICAP Demand Curve reset, SDU costs were not a factor to be considered in a peaking plant's cost of new entry, as they did not yet exist in the NYISO market.[101] The NYISO showed that, contrary to protestors' assertions, SDUs were not previously identified, and past determinations of SUF costs were irrelevant to the issue of whether SDU costs are properly included in the ICAP Demand Curves.[102] The January Order is incorrect in its finding that "the same rationale used to include System Upgrade Facilities in CONE also leads to the conclusion that System Deliverability Upgrades should not be excluded."[103]

The January Order does not refute the NYISO's statement that the Deliverability tariff provisions were "designed to give interconnection customers an economic incentive to locate in

[99] *Id.* at P 60.

[100] *Id.* at P 119.

[101] *Id.* at P 56 (acknowledging that "System Upgrade Facilities were the only type of identified interconnection upgrade required previously because, prior to the current demand curve reset, NYISO offered only one type of interconnection service—Minimum Interconnection Standard.").

[102] January Answer at 18.

[103] January Order at P 57.

areas where their capacity would be deliverable."[104] Including SDU costs in the peaking plant's cost of new entry clearly contravenes the purpose of the Deliverability tariff provisions. In its orders accepting the Deliverability tariff provisions, the Commission rejected arguments that the cost allocation provisions unfairly allocated certain costs entirely to developers, finding that the approach was "consistent with Commission policy and recognize[d] the competing interests of those involved."[105] In those orders, the Commission found that it was reasonable and consistent with a "beneficiary-pays" approach to require developers to be primarily responsible for paying for those transmission system upgrades necessary to achieve deliverability.[106] Further, as noted in the Affidavit of Dr. David B. Patton, "including SDU costs in the Demand Curves is not an efficient means of providing long-term economic signals to prospective investors in new resource."[107]

Similarly, the January Order incorrectly found that "excluding these costs results in net CONE that does not accurately reflect the developer's costs and thus, may discourage investment."[108] The NYISO and the NYTOs presented evidence that projects can be sited in regions where deliverability constraints exist, such as NYC, without incurring SDU costs, so such costs are not necessarily a required cost of new entry. As shown in the January Answer, two projects located in NYC, the Hudson Transmission Partner project in Class Year 2008 and the Bayonne Energy Center project in Class Year 2009, did not incur SDU costs.[109] Further, the

[104] *Id.* at P 59.

[105] Deliverability Order at P 46.

[106] *Id.* at P 45.

[107] November Filing at Affidavit of Dr. David B. Patton at P 18.

[108] January Order at P 60.

[109] January Answer at 19-20.

Affidavit of John Beck,[110] shows that incurring SDU costs in NYC is determined by "specific local characteristics all under the control and selection of the developer," including the project's interconnection point, voltage level and size.[111] The fact that certain projects are locating in a manner that allows them to avoid SDU costs supports the view that the Deliverability process is intended to send locational signals for economically efficient siting, and that those tariff provisions are actually achieving their intended result.[112] It also demonstrates that SDU costs are not a required cost of entry and, therefore, it was appropriate to not include them in of the estimate of the net CONE. Suggestions that SDU costs may be allocated to a project are not evidence of a cost of entry but merely indicate that a supplier made a conscious business decision to forego locations with zero SDU costs in favor of a location that does have SDU costs.

Reflecting SDU costs in the peaking plant's cost of new entry will mute the signals that those provisions are currently sending, likely leading to inefficient investment. Therefore, rehearing must be granted because the January Order erred when it found that inclusion of such costs in the peaking plant's net cost of new entry "does nothing to decrease this incentive because the developer will still evaluate profitability over the life of the project in determining where to locate"[113]

SDU costs are directly related to the issues being addressed in Docket No. ER04-449-023. The November Filing explained that the proceeding examining new Capacity zones in the NYCA is the appropriate venue to consider the SDU costs, as it would address those costs

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[110] *See New York Independent System Operator, Inc.*, Request for Leave to Answer and Answer of the New York Transmission Owners at Affidavit of John Beck of Consolidated Edison Company of New York Inc. at P 24, Docket No. ER11-2224 ("Beck Affidavit"), (filed January 10, 2011) ("NYTO Answer").

[111] NYTO Answer at Beck Affidavit P 24.

[112] *Id.* at P 22.

[113] January Order at P 59.

without increasing Capacity payments to all resources.[114] Thus, the January Order should have accepted the NYISO's proposal to not include SDU costs.

D. The January Order Should Not Have Directed the NYISO to Consider Additional Data Regarding NYC System Upgrade Facility Costs That Was Introduced After the NYISO's Submitted its November Filing

The January Order found that "there is merit to IPPNY's concerns with the level of interconnection costs used by the NYISO in determining CONE for the NYC locality" and directed the NYISO "to address IPPNY's arguments that the costs for System Upgrade Facilities that NYISO has used for NYC are unrealistic and provide support for the estimate it has used."[115] It was not reasoned decision-making for the January Order to direct the NYISO to reexamine the interconnection costs, including SUF costs, of the NYC peaking plant based on data finalized after the Consultant's Report and the stakeholder process had been completed.[116] Further, the NYISO's November Filing and January Answer provided sufficient support for the estimate used in the proposed ICAP Demand Curves. The Commission did not provide a reasoned basis for its rejection of the NYISO's estimate beyond the assertion that there may be "merit" to the concerns raised by IPPNY.

The November Filing used the appropriate data available to calculate the interconnection costs, including SUF costs, in the NYC peaking unit's CONE. The Commission has previously

[114] November Filing at 13 and Patton Affidavit at P 18 (stating that "[s]ince efficient economic signals can be achieved by the completion of this effort and implementation of one or more new zones, it is reasonable to exclude the interzonal SDU costs from the Demand Curves as proposed by the NYISO").

[115] January Order at P 140.

[116] The January Order directs the NYISO to review its interconnection and SUF costs based on issues raised by IPPNY's evaluation of data published by the NYISO on November 30, 2010 and December 2, 2010. NYISO Answer at Ungate Affidavit at P 17.

declined to require updates to inputs to the ICAP Demand Curves based on data available after the fact, stating that

> as in a cost-of-service rate case involving test year data, at a certain point, a decision must be made based on the information on hand, and adjustments based on post test year data can throw off the balance between offsetting factors.[117]

The January Order should have followed prior precedent and not required that the NYISO update interconnection costs to reflect data introduced after completion of the Consultant's Report and after the November Filing because that information was not yet final prior to filing[118] and as of the date of the filing of this request still has not yet been approved by the NYISO's Operating Committee, as required by Section 25.7.7 of Attachment S to the OATT. The interconnection costs used in the Consultant's Report were reasonably estimated based on average SUF costs for historical Zone J Capacity interconnection projects, escalated to 2010 dollars. The January Order did not find that the NYISO's use of such data was unjust and unreasonable.

Further, the reasonableness of the data used in the Consultant's Report is not undermined by the more recent project-specific data used by IPPNY. That data only shows that the interconnection costs of projects in NYC varies widely, depending primarily on specific project characteristics wholly within the control of the developer, such as a project's voltage level and interconnection point location. As noted the January Answer[119] and in the Beck Affidavit, [120] generalization of the costs used in IPPNY's analysis is not possible and those costs do not support the conclusion that the Consultant's interconnection costs are understated. Aside from a

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[117] *New York Independent System Operator, Inc.*, 112 FERC ¶61,283 at P 38 (2005).

[118] *Id.* at P 37.

[119] January Answer at 14.

[120] NYTO Answer at Beck Affidavit P 24.

statement regarding a "belief" that IPPNY's concerns have "merit," the January Order did not provide a reasoned basis to reject the NYISO's proposed interconnection costs estimates. Therefore, rehearing should be granted with respect to the directive that the NYISO reexamine and provide additional support for the estimates utilized in the proposed ICAP Demand Curves.

In addition, the January Order did not address any of the points raised by Mr. Beck on this issue. It thus fails to comport with the legal requirement that Commission decisions be based on substantial record evidence and that the Commission respond to legitimate issues raised by parties to the proceeding. Specifically, whether the Commission engaged in reasoned decision making under the arbitrary and capricious standard, depends on whether it "respond[s] meaningfully to the evidence."[121] Thus "unless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned."[122] As such, directing the NYISO to consider additional data regarding NYC SUFs, as opposed to approving the NYISO's proposal, was arbitrary and capricious and should be reversed.

IV. REQUEST FOR CLARIFICATION OR IN THE ALTERNATIVE REHEARING

A. The Commission Should Clarify its Ruling Regarding the Consistent Application of the Level of Excess Capacity or, in the Alternative, Grant Rehearing Before the NYISO's Compliance Filing Deadline

The NYISO also requests clarification of Paragraph 129 and Paragraph 122 of the January Order in which the Commission, respectively, directed that the "NYISO revise the demand curves to use the level of excess capacity that is reflected in the curves currently in use and to use this level of capacity consistently throughout the analyses used to develop the demand

[121] *KeySpan-Ravenswood v. FERC,* 348 F.3d 1053, 1056 (D.C. Cir. 2003), *citing Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000).

[122] *Id.*

curves" and found that the NYISO "does not support its proposal to use a different adjustment for the first three years as compared to the remainder of the nominal life of the hypothetical peaking unit." The Commission should clarify that it is not directing the NYISO to change the ICAP Demand Curves to apply that consistent level of excess in its determination of Energy and Ancillary Services revenue offsets to the net CONE and confirm that the level of excess used for years one through three to determine those offsets is just and reasonable. The NYISO also requests that the Commission grant this clarification expeditiously, and if necessary, issue an order on this point before it acts on other rehearing issues. Providing guidance on this discrete issue prior to the NYISO's compliance filing deadline would eliminate any possible uncertainty regarding the assumptions to be included in that filing.

Paragraph 136 of the January Order accepted the NYISO's proposed Energy and Ancillary Services revenue offsets, noting that though changes to estimation methods or data choices could have been made to produce lower or higher results, the estimated values were produced using "objective and reasonable statistical methods." Those proposed revenue offsets were calculated using a different level of excess for years one through three, as consistent with the NYISO's approach in the prior Demand Curve reset. In the 2007 Demand Curve reset, the Consultants used 100.5 percent as the excess level of Capacity for computing Energy and Ancillary Services revenues for the first three years[123] and the NYISO did not alter its approach for this Demand Curve reset.[124] Additionally, Paragraph 136 accepted the NYISO's proposed

[123] *See, New York Independent System Operator, Inc.*, Tariff Revisions to Implement Revised ICAP Demand Curves for Capability Years 2008/2009, 2009/2010 and 2010/2011 at 12, Docket No. ER08-283-000 (filed November 30, 2007) (stating that "[t]he Consultant's modeled 100.5% as the excess for these three years…") and at Affidavit of David Lawrence at Exhibit A at 9 (stating that "[f]or the three year period covered by this demand curve update, the NYISO recommends using a capacity level of 100.5 percent of the target installed capacity level for computing energy and ancillary services revenue").

[124] November Filing at 17.

Energy and Ancillary Services revenue offsets calculated using the different years one to three excess Capacity level assumption. Thus, the NYISO requests clarification that the Commission did not intend for the directives in Paragraph 122 or Paragraph 129 to require the NYISO to modify the accepted Energy and Ancillary Services revenue offsets.

In the alternative, to the extent that the Commission intended to require the NYISO to change the Energy and Ancillary Services revenues offsets, by requiring a consistent application of the level of excess to those calculations, the January Order did not engage in reasoned decision-making and rehearing should be granted expeditiously. The Energy and Ancillary Services revenue offsets that the Commission accepted in Paragraph 136 were calculated "[b]ased upon the Consultant's energy model and the NYISO's recommended levels of excess,"[125] and assumed a 100.5 percent level of excess Capacity for years one through three.[126] No party protested the use of 100.5 percent in the Energy and Ancillary Services revenue offset calculation. Nor did any party protest the Consultant's or the NYISO's application of a level of excess Capacity in years one through three that differed from the level applied in years four through thirty. Paragraph 136 of the January Order accepted the Energy and Ancillary Services revenue offsets calculated using those different assumptions for the two periods. The Commission accepted the Energy and Ancillary Services offset assumptions, finding them to be produced using "objective and reasonable statistical methods."[127] Thus, should the Commission not grant the NYISO's request for clarification on this issue, the Paragraph 122 and Paragraph 129 requirement that the NYISO apply a consistent level of excess Capacity does not reflect reasoned decision-making, as it contradicts the Commission's finding in Paragraph 136.

[125] *Id.* at Consultant's Report at 73.

[126] *Id.* at 17 and Consultant's Report at 73.

[127] *Id.*

As explained above, the NYISO's approach did not deviate from its proposal in the 2007 Demand Curve reset,[128] which the Commission previously found to be just and reasonable in that proceeding.[129] Nothing has changed in the time since the last ICAP Demand Curve reset proceeding that would affect or alter the rationale for the NYISO's approach and the January Order did not identify any changed circumstances that would make the approach unjust and unreasonable.

Also alternatively, instead of rejecting the NYISO's proposal, if the Commission concluded that the record was unclear regarding the NYISO's application of a different level of excess for years one through three, the January Order should have, consistent with the other directives on the level of excess Capacity, provided the NYISO with an opportunity to submit further justification of its proposal. Therefore rehearing should be granted, because the Commission failed to articulate any changed circumstances which would form a basis for denying what had been previously found to be just and reasonable, requiring the NYISO to change the Energy and Ancillary Services revenue offsets would make the January Order internally inconsistent, and, to the extent the record was unclear, the Commission should have provided the NYISO an opportunity to supplement the record consistent with the other directives on the level of excess Capacity.

B. The Commission Should Clarify its Ruling Regarding the NYISO's Accepted Winter/Summer Adjustment Methodology or, In the Alternative, Grant Rehearing

[128] *See New York Independent System Operator, Inc.*, Tariff Revisions to Implement Revised ICAP Demand Curves for Capability Years 2008/2009, 2009/2010 and 2010/2011 at NERA/S&L report at 61, Docket No. ER08-283-000 (filed November 30, 2007).

[129] Second DCR Order at PP 43-47 (accepting the NYISO's proposed revenue offsets for energy and ancillary services).

The NYISO respectfully requests clarification regarding the January Order's directive that it "revise the winter/summer adjustment to reflect the assumption for the level of excess capacity" in order "to be consistent with other aspects of the demand curve reset analysis."[130] The January Order accepted the NYISO's proposed winter/summer adjustment methodology as "just and reasonable and consistent with the requirements of the Services Tariff with respect to the issue of quantities of capacity available versus quantities sold."[131]

It does not appear that the January Order could reasonably be construed as requiring the NYISO to modify its methodology to include the revised level of excess Capacity in its calculation of the winter/summer adjustment. The Commission appears to have accepted the NYISO's proposed winter/summer adjustment methodology which is based on the amount of Capacity available (*i.e.*, the amount of Capacity that could be offered into the ICAP Spot Market Auctions). Excess Capacity levels should therefore not be a factor in the calculation of the winter/summer adjustment because the amount of available Capacity is determined using historical levels obtained from data published by the NYISO in its annual Load and Capacity Reports.[132]

Nevertheless, because the winter/summer adjustment was challenged by a party[133] and because the Commission's intent is not entirely clear, the NYISO respectfully requests clarification that it is not required to change its winter/summer adjustment methodology. The Commission should instead clarify that Paragraph 161 only requires that the NYISO apply its accepted winter/summer adjustment methodology when establishing revised ICAP Demand

[130] January Order at P 161.

[131] *Id.*

[132] November Filing at Consultant's Report at 18.

[133] *New York Independent System Operator, Inc.*, Motion to Intervene and Protest of the New York Transmission Owners at 15-17 (filed December 21, 2010).

Curves that reflect the January Order's directives regarding excess Capacity levels. Those revised ICAP Demand Curves will incorporate a Commission-approved level of excess, but the level of excess should not be an input into the winter/summer adjustment methodology.

In the alternative, the NYISO respectfully requests rehearing. As explained above, the level of excess is not an input in the NYISO's winter/summer adjustment methodology. If the Commission intended that excess Capacity levels be used as an input, then its ruling would be inconsistent with the January Order's seeming acceptance of the NYISO's proposed calculation methodology. Any such ruling would not constitute reasoned decision-making and should be overturned. At a minimum, if the Commission did intend for the NYISO to revise its winter/summer adjustment methodology it should more clearly explain exactly what it expects the NYISO to do, so that the NYISO may fulfill its compliance obligations.

V. THE COMMISSION SHOULD CONSIDER THE CUMULATIVE IMPACT OF ITS DECISIONS WHEN IT CONSIDERS THE REQUESTS FOR REHEARING AND CLARIFICATION IN THIS PROCEEDING

The NYISO is required to administer Capacity markets that "provide a level of compensation that will attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators."[134] The proposals that were advanced in the November Filing were developed with this requirement in mind. Ultimately, the ICAP Demand Curves must be set at a level that avoids both under- and over-compensation. Otherwise, the efficiency of the Capacity markets, and the balance between consumer and supplier interests could be seriously disrupted.

[134] *New York Independent. System Operator, Inc.,* 118 FERC ¶ 61,182 at P 17 (2007).

The MMU has observed,[135] and the Commission has acknowledged,[136] that there is currently significant surplus Capacity in each of New York's three Capacity zones. It is clear from the NYISO's Interconnection Queue and its 2010 Load and Capacity Data Report, that new Capacity has continued to enter the market, and more is expected in the near future. There is no sign that new entry has been discouraged by the levels of revenue provided under the currently effective ICAP Demand Curves or would be discouraged by the levels proposed in the November Filing.

Thus, at a minimum, there should be little cause for concern that the Capacity price increases proposed by the November Filing would result in Capacity prices that were inefficiently low. The four determinations addressed in Section III of this rehearing request, however, give rise to a genuine danger that Capacity prices, especially in New York City, would be inefficiently high. In each instance, the Commission has adopted unreasonable interpretations, or reached unsupported conclusions, that will increase Capacity prices substantially beyond the levels proposed in the November Filing[137]

Inefficient over-compensation would distort the Capacity market, particularly in New York City, by encouraging inefficient new entry and by perpetuating the current high level of excess Capacity. It would also contravene the Commission' statutory obligation to protect consumers against excessive rates. Given the level of rates approved in the January Order, it appears that the Commission has failed to demonstrate the attention to consumer interests that

[135] See Patton Affidavit at 7, citing Potomac Economics, 2009 State of the Market Report New York ISO at iii, iv, xii, and 19 (September 2010), available at <http://www.nyiso.com/public/webdocs/documents/market_advisor_reports/2009/NYISO_2009_SOM_Final.pdf> (noting that "significant surpluses" exist in the three Capacity zones).

[136] January Order at P 117.

[137] January Answer at Lawrence Affidavit at Exhibit 1.

Order No. 719 requires.[138] It was not reasoned decision-making for the Commission to fail to account for, or seemingly to even consider, these implications. A Commission ruling that substantially increases Capacity prices at a time of significant surplus and significant planned new Capacity entry also has the potential to undermine consumer and public confidence in ISO/RTO-administered markets in general, and the NYISO's ICAP Demand Curve construct in particular.

VI. STATEMENT OF ISSUES

In accordance with Rule 713(c), 18 C.F.R. § 385.713(c), the NYISO submits the following statement of issues:

1. The Commission's decision finding that no property tax abatement should be assumed in the peaking plant's cost of new entry is arbitrary and capricious, is unlawful, does not reflect reasoned decision making, and is not reasonably explained because: (a) the record in this proceeding clearly supports the conclusion that the peaking plant would be eligible for, and would receive, a full property tax abatement under the New York City Industrial Development Agency's *Third Amended and Restated Uniform Tax Exemption Policy* and the Commission failed to consider the price impact of the property tax abatement ruling on NYC consumers, in contravention of its statutory consumer obligation purpose (*see, e.g., Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952); *NAACP v. FPC*, 495 U.S. 662, 669-70 (1976)); (b) the Commission disregarded the arguments showing that it would be irrational to assume that the New York City Industrial Development Agency would exercise its discretion in a way that would harm economic development and contravene its stated public policy goals; ((c) the Commission failed to accord sufficient weight to the evidence showing that the peaking plant would qualify for tax abatements; (d) the Commission should have followed its precedent regarding deference to state and local regulatory agencies (*see, e.g., City of Vernon, California*, 111 FERC ¶ 61,092 (2005); *Entergy Services, Inc.*, 120 FERC ¶ 61,020 (2007)) and found that the statements by New York City Industrial Development Agency regarding its application of the *Third Amendment and Restated Uniform Tax Exemption Policy* indicated that it was reasonably likely, and thus

[138] In Order No. 719, the Commission directed ISOs/RTOs to pursue governance and market reforms to ensure that they were responsive to stakeholders, and, more generally, that ISO/RTO-administered markets work for the benefit of consumers. *See Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 at PP 1-2 (2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009).

reasonable to conclude that the peaking plant would receive full property tax abatement; (e) even if it was reasonable to conclude that an assumption of full tax abatement was not supported, it was not reasoned decision-making to direct that no tax abatement be assumed (*see, e.g., Panhandle Eastern Pipeline Co. v. FERC*, 881 F.2d 1101, 1118 (D.C. Cir. 1989)); instead, the Commission should have directed the NYISO to provide additional support for its proposal, or assume some partial level of property tax abatement, or initiate paper hearing or technical conference proceedings to resolve any remaining factual uncertainties; (f) the Commission's conclusion of zero abatement is not supported by the evidence in the record, which supports a high probability of abatement, and will result in unjust and unreasonable rates; and (g) the January Order imposed an unlawfully high burden of proof on the NYISO, instead of the "just and reasonable" showing required under the Federal Power Act (*see, e.g., Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (1984)).

2. The Commission's rejection of the NYISO's proposed levels of excess Capacity is arbitrary and capricious, is not lawful, does not reflect reasoned decision making, and is not reasonably explained because: (a) the NYISO's proposals were based on reasoned judgments and were consistent with the requirements of the NYISO's Services Tariff (*see* NYISO Services Tariff Section 5.14.1.2); (b) the NYISO's proposal provided full support for its proposed excess Capacity levels, the support provided was comparable to what was provided for the same proposal in the last ICAP Demand Curve reset, the Commission failed to explain why it was requiring a greater level of support than it had in the past, and the evidence showed that the NYISO's proposed excess Capacity levels would have resulted in just and reasonable rates; (c) the Commission erred because it applied to the NYISO an impermissibly stringent burden of proof (*see, e.g., Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (1984)); (d) in the event that the Commission refused to accept the NYISO's proposal on rehearing, it should have found, in the alternative, that the MMU's variation on that proposal was adequately supported and accepted it; (e) the Services Tariff requires that the NYISO calculate excess Capacity as if Capacity was, at or slightly above, the Installed Reserve Margin (*see* NYISO Services Tariff Section 5.14.1.2) and the Commission erred to the extent it incorrectly directed the NYISO to base its proposed level of excess Capacity on "observed levels"; and (f) there is no evidentiary support for using the currently effective level of excess Capacity for the next three Capability Years.

3. The Commission's finding that the NYISO's proposal to exclude SDU costs from the peaking plant's cost of new entry is arbitrary and capricious, does not reflect reasoned decision making, and is not reasonably explained because: (a) the Commission failed to consider the impact that inclusion of SDU costs in the peaking plant's cost of new entry would have on consumers (*see, e.g., Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952); *NAACP v. FPC*, 495 U.S. 662, 669-70 (1976)); (b) the Commission failed to consider the evidence presented that indicated that SDU costs were not a factor to be considered in prior Demand Curve reset proceedings; (c) the Commission erred when it found that including SDU costs in the peaking plant's cost of new entry did not mute the signals that the deliverability tariff provisions were intended to send and are currently sending (s*ee New York Independent System Operator, Inc.*, 126 FERC ¶61,046 at PP 45-46 (2009)); and (d) the Commission failed to consider the evidence presented which showed that

projects can be sited in areas where deliverability constraints exist without incurring SDU costs, so such costs are not necessarily a required cost of new entry.

4. The Commission's directive that the NYISO reexamine interconnection costs, including SUF costs, of the NYC peaking plant, is arbitrary and capricious, does not reflect reasoned decision making, and is not reasonably explained because: (a) it would require the NYISO to reexamine those costs based on data available after the Demand Curve Reset process had been concluded and that to date has not yet been approved by the NYISO's stakeholder Operating Committee as required by the OATT (*see, e.g.*, *New York Independent System Operator, Inc.*, 112 FERC ¶ 61,283 at P 38 (2005)); and (b) the NYISO provided sufficient support for its interconnection costs estimates.

5. If the Commission denies clarification that the NYISO does not need to apply a consistent level of excess in its determination of Energy and Ancillary Services revenue offsets to the net CONE and that the proposed level of excess used for years one through three to determine those offsets was just and reasonable, the Commission's decision is arbitrary and capricious, does not reflect reasoned decision making, and is not reasonably explained because: (a) interpreting the January Order to require the NYISO to change its Energy and Ancillary Services revenue offsets makes the January Order internally inconsistent, and thus does not reflect reasoned decision-making; (b) the January Order did not provide a reasoned basis to reject a proposal previously found to be just and reasonable (s*ee New York Independent System Operator, Inc.,* 122 FERC ¶ 61,064 at PP 43-47 (2008)); and (c) if the record was unclear, the Commission should have provided the NYISO an opportunity to submit further justification of its proposal.

6. If the Commission denies clarification that it did not intend for the NYISO to modify its winter/summer adjustment methodology to include the revised level of excess Capacity, the Commission's decision is arbitrary and capricious, does not reflect reasoned decision making, and is not reasonably explained because the January Order accepted the NYISO's proposed winter/summer adjustment methodology which is based on the amount of available Capacity and is not properly calculated using the excess Capacity level as a factor.

7. The Commission's failure to consider or address the danger that the cumulative impact of the decisions referenced in Paragraphs one through six would be to set Capacity prices inefficiently high, especially in New York City, and thereby distort the Capacity markets by encouraging inefficient new entry, perpetuate the current high level of excess Capacity, and expose consumers to excess rates was is arbitrary and capricious, does not reflect reasoned decision making, and is not reasonably explained.

VII. CONCLUSION

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc. respectfully requests that the Commission grant rehearing, or in the alternative, clarification, of the January Order for the reasons specified above.

Respectfully Submitted,

/s/Ted J. Murphy
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February 28, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 28th day of February, 2011.

/s/Ted J. Murphy
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