UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Astoria Generating Company, L.P., NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, Oswego Harbor Power LLC and TC Ravenswood, LLC	)	
Complainants,	)	**Docket No. EL11-50-000**
vs.	)	
New York Independent System Operator, Inc.	)	
Respondent.	)	

ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC. TO COMMENTS AND PROTESTS

In accordance with Rule 213 of the Commission's Rules of Practice and Procedure[1] the New York Independent System Operator, Inc. ("NYISO") respectfully answers the: (i) *Motion to Intervene and Comments of the NRG Companies in Support of Complaint and Request for Immediate Commission Action* ("NRG Comments")*;* (ii) *Comments in Support of Complaint of GenOn Energy Management, LLC* ("GenOn Comments")*;* (iii) *Comments in Support of Complaint of Calpine Corporation;* (iv) *Motion to Intervene and Comments of the Brookfield Energy Marketing LP in Support of Complaint* ("Brookfield Comments"); (v) *Comments of the Electric Power Supply Association in Support of Complaint and Request for Emergency Relief (*"EPSA Comments"); and (vi) *Motion to Intervene and Comments in Support of Independent*

[1] 18 C.F.R. § 385.213 (2011).

Power Producers of New York, Inc. ("IPPNY Comments") (collectively, the "Comments"). In addition, the NYISO respectfully requests leave to answer, and answers certain limited elements of the: (i) the *Protest of Bayonne Energy Center, LLC* ("Bayonne Protest"); and (ii) the *Motion to Intervene and Protest of the American Public Power Association* ("APPA Protest") (collectively the "Protests").[2]

As the NYISO explains below, there is nothing in the Comments that should prevent the Commission from promptly taking the actions that the NYISO recommended in its *Answer and Request for Expedited Action* ("August 3 Answer"). Specifically, the Commission should expeditiously issue an order rejecting the Complaint[3] based on the pleadings. The Complainants,[4] even after accounting for the "support" offered by the Comments, have not met the burden of proof under Rule 206. Complainants and the Comments failed to substantiate their allegations that the NYISO's determinations to exempt the Astoria Energy Project II ("AEII") and the Bayonne Energy Center ("BEC") from Offer Floor[5] mitigation could not have been consistent with the tariff and just and reasonable. The independent Market Monitoring Unit ("MMU")[6] confirmed that it had reviewed the NYISO's analysis, detected no potential tariff violations, and found "no issues . . . that would cause the NYISO's determination that [AEII and

[2] The NYISO's silence with respect to any statement in any of the filings should not be construed as agreement with, or an admission to such statement.

[3] *Complaint Requesting Fast Track Processing, Emergency Interim Relief, and Shortened Comment Period*, Docket No. EL11-50-000 (July 11, 2011) ("Complaint").

[4] The Complainants are Astoria Generating Company, L.P. and TC Ravenswood, LLC. Both of these entities are also Complainants in Docket No. EL11-42-000.

[5] Capitalized terms that are not otherwise defined herein shall have the meaning specified in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") or its Open Access Transmission Tariff ("OATT").

[6] Potomac Economics, Ltd. is the independent MMU for the NYISO.

BEC] are exempt from buyer-side mitigation to be incorrect."[7] The MMU's conclusion further demonstrates that the Complainant's conclusions are incorrect. Consequently, there is no need for the Commission to grant "emergency" interim or permanent relief. There is likewise no need for the Commission to consider the other "remedies' proposed in the Complaint or the Comments.[8] Nor should the Commission consider issues here that are already pending in Docket No. EL11-42-000 or that are wholly beyond the scope of both dockets.

To the extent that the Commission concludes that it cannot resolve the issues in this proceeding without first reviewing the NYISO's exemption determinations, it should follow the procedural approach outlined in the August 3 Answer; *i.e.*, it should initiate a confidential expedited review of its own. The Commission need not, and should not, take the same approach that it did in *West Deptford*.[9] Whatever approach the Commission takes, however, the NYISO is confident that the AEII and BEC exemption determinations will ultimately be upheld by the Commission.[10]

I. REQUEST FOR LEAVE TO ANSWER PROTESTS

Under Commission Rule 213(a)(3) the NYISO has a right to answer pleadings styled as "comments." In addition, the Commission has discretion to accept answers to protests when they

[7] *See Motion to Intervene Out of Time and Request for Leave to Answer and Answer of the New York ISO's Market Monitoring Unit*, Docket No. EL11-50-000 at 3 (August 9, 2011) ("MMU Answer"). *See also* August 3 Answer at 7-8 (noting the MMU's involvement in the AEII and BEC determinations and that the NYISO was authorized to state that the MMU had identified no tariff violations).

[8] *See, e.g.*, Brookfield Comments at 10 (calling for the introduction of an administrative price floor). As the NYISO has previously stated, if the Commission were to reach the question of remedies it should seek comments on how best to proceed given the fact-intensive complexities that would be likely to arise. *See* August 3 Answer at n. 59.

[9] *West Deptford Energy, LLC*, 134 FERC ¶ 61,189 (2011) ("*West Deptford*").

[10] As discussed below in response to NRG, even if the Commission were to opt for an adjudicatory approach, there would be no need for "in-person" hearings given the nature of the issues in this case. Instead, Commission identification of issues for a paper hearing or technical conference procedures would better accommodate expedited Commission action.

are helpful to its decision-making process.[11] The NYISO's proposed answer to the Protests is limited to only those points for which the NYISO believes a response is warranted to clarify the record and facilitate Commission review. The NYISO therefore respectfully requests that the Commission accept the answer to the Protests set forth in Section III, below.

II. ANSWER TO COMMENTS

A. The Comments Lack Merit Because they Are Based upon Invalid and Unsupported Assumptions

In general, the Comments, like the ECS Comments[12] which are addressed in the August 3 Answer, are devoid of substantive merit. The Comments offer no evidence and, with the limited exception of the portions of the NRG and Brookfield Comments that are discussed below they do not even attempt to offer new arguments. Instead, they simply assume that the Complaint's assertions, and the assumptions utilized by Mr. Younger in his analysis, are correct. Based on that faulty premise they conclude that: (i) the recent decline in In-City ICAP Spot Market Auction prices must have necessarily been the result of "artificial price suppression"; (ii) that those prices are therefore harmful to individual suppliers and to the market as a whole; and (iii) that the relief, including the extraordinary "emergency" relief, sought by the Complaint is justified.

The NRG Comments went so far as to presume, a week before answers and protests were due, that many of Complainants' claims, including their legal conclusion that AEII was

[11] *See e.g., New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 at P 7 (2004) (accepting the NYISO's answer to protests because it provided information that aided the Commission in better understanding the matters at issue in the proceeding); *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 at 61,036 (2000) (accepting an answer that was "helpful in the development of the record…").

[12] *Motion to Intervene and Comments of Energy Curtailment Specialists, Inc. in Support of Request for Emergency, Interim Relief* ("ECS Comments").

uneconomic and should be mitigated, were "undisputed."[13] Other Comments appear to assume that there is no way that AEII could have legitimately qualified for an exemption because: (i) AEII is known to have a long-term contract with the New York Power Authority ("NYPA"); (ii) they did not expect AEII to qualify for an exemption, and (iii) they believe that NYPA's goal is to artificially suppress prices.[14]

As the August 3 Answer noted in response to the ECS Comments, these kinds of unsupported assumptions and assertions have no evidentiary value. The MMU has confirmed the reasonableness of the assumptions the NYISO actually used. There has been no showing, and it is not the case, that the NYISO's exemption determinations for AEII or BEC were improper. There has likewise been no showing, and it is not the case, that individual suppliers, or the market as a whole have suffered or would suffer legally cognizable harms as a result of AEII's or BEC's entry without an Offer Floor. The Comments, like the ECS Comments, are little more than thinly-veiled expressions of the Commenters' desire for higher capacity prices. The Commission should afford no weight to any attempt to reverse price shifts that are contrary to any market participant's financial interests. To do otherwise would contradict the "whole purpose" of buyer-side mitigation rules which "is to deter uneconomic entry, not economic entry."[15]

[13] NRG Comments at 3.

[14] *See, e.g.*, EPSA Comments at 5.

[15] *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,077 at P 28 (2011) ("August 2 Order"). In addition, NRG's corporate parent has contended, as a member of the PJM Power Providers group that buyer-side mitigation rules, like the antitrust laws, should operate for the "protection of *competition*, not *competitors*.' *See Request for Rehearing and Clarification*, PJM Power Providers Group, Docket Nos. EL11-20 and ER11-2875 at 13 (May 13, 2011) *citing*. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) [emphasis in original].

The Comments do not appear to endorse the Complaint's conspiracy theories questioning its independence. The NYISO emphasizes however, that contrary to what some Comments imply, its buyer-side mitigation measures have never included a rule or a presumption that new entrants with long-term contracts should automatically be subject to mitigation. Nor have the measures required the NYISO to attempt to divine the subjective intent of proposed new entrants when it conducts buyer-side mitigation analyses.

B. The Commission Should Reject Attempts to Inject Irrelevant Issues into this Proceeding

The NYISO and the Complainants have both stated that this case concerns the past implementation of the Pre-Amendment Rules,[16] and that Docket No. EL11-42-000 concerns the ongoing administration of the In-City Buyer-Side Capacity Market Mitigation Measures. The Commission should therefore not act on the EPSA Comments' suggestion[17] that this proceeding be consolidated with Docket No. EL11-42-000. The legal and factual issues in the two cases are not sufficiently similar to justify consolidation and consolidation would not promote administrative efficiency.[18]

[16] The "Pre-Amendment Rules" are the buyer-side capacity market power mitigation rules that existed in the Attachment H prior to the November 27, 2010 effective date of the currently-effective buyer-side capacity market mitigation provisions in Attachment H of the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") (such currently-effective rules the "In-City Buyer-Side Capacity Mitigation Measures" (*see* Commission orders in Docket No. EL10-3043).

[17] EPSA Comments at 3.

[18] *See, e.g., Trans-Elect Path 15, LLC*, 115 FERC ¶ 61,179 at P 12 (2006) (denying a request to consolidate proceedings, because (1) "[t]he Commission typically consolidates proceedings only for purposes of hearing and decision" so where the Commission is "summarily deciding [issues raised], without an evidentiary hearing … there is no reason to consolidate", and (2) "while these two proceedings involve the same parties, they raise separate and distinct issues of fact"); *ISO New England, Inc., et al.*, 124 FERC ¶ 61,013 at P 36 (2008) (explaining that a motion to consolidate proceedings should be granted only "when there are common questions of law or fact and consolidation will result in 'greater administrative efficiency'" (internal citation omitted)).

Similarly, the Commission should reject attempts to raise issues here that are either only relevant to Docket No. EL11-42-000,[19] or that are beyond the scope of both this docket and that one.[20] Taking up such issues in this proceeding would only serve to blur the line between the two cases and to hinder the efficient resolution of both.

A. Answer to the NRG Comments

1. The Pre-Amendment Rules Did Not Prevent the NYISO from Making Mitigation Exemption Determinations Until the End of the Relevant Class Year Allocation Process

The NRG Comments advance the novel theory that the Pre-Amendment Rules did not allow the NYISO to make exemption determinations for AEII or BEC until the NYISO's interconnection cost allocation process for their respective Class Year was complete.[21] According to NRG's theory, neither AEII nor BEC could have lawfully been exempted from Offer Floor mitigation because the relevant Class Year Facilities Study cost allocation processes are not yet finished.

NRG's interpretation is inconsistent with the plain language of the Services Tariff, with the rationale underlying the development of the In-City Buyer-Side Mitigation Measures, with the widespread understanding of the tariff prior to NRG's filing, and with the Commission's August 2, 2011 order in Docket No. ER10-3043-002 and -004.[22] Moreover, if NRG's interpretation were adopted it would be contrary to expectations.

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[19] *See, e.g.,* IPPNY Comments at 13-14 (calling on the Commission to direct the NYISO to file tariff revisions and to complete a "benchmarking analysis" that could only possibly be relevant to the transparency issues raised in Docket No. EL11-42-000).

[20] *See, e.g.,* IPPNY Comments at 3 (calling on the Commission to take sweeping action to "fix" the mitigation rules over the longer term); Brookfield Comments, Niemenn Affidavit at P 8 (raising issues regarding historic prices results in the NYISO's ICAP Spot Market Auctions.); EPSA Comments at 10 (suggesting that reliaiblity must run contract mechanisms might need to be considered in New York).

[21] *See* NRG Comments at 2, 13-16.

[22] *New York Independent System Operator, Inc.,* 136 FERC ¶ 61,077 (2011) ("August 2 Order").

The Pre-Amendment Rules were clear: an entity could request that the NYISO "make exemption determinations upon execution of all necessary Interconnection Facilities Study Agreements for the Installed Capacity Supplier."[23] The Pre-Amendment Rules also contained other language pursuant to which the NYISO would provide a "requesting entity" with certain information "not later than" certain milestones in the Class Year Facilities Study process. That "not later than" language by its very nature did not nullify or restrict an entity's right under the tariff to receive an exemption determination before the Class Year Facilities Study cost allocation process was complete. To the extent that an entity wished to seek a determination it was free to do so anytime after it executed an Interconnection Facilities Study Agreement. The "not later than" language only imposed a requirement on the NYISO to issue a determination in a set amount of time so that, if the entity desired, it could have the information before it was required to accept or reject the NYISO's project cost allocations. Even in that case, the rules only applied if the developer provided all the data necessary for the NYISO to make a determination. The Pre-Amendment Rules likewise did not restrict the NYISO from making a determination later than the close of the Class Year process or from making multiple determinations.[24]

New entrants do not have that freedom of action under the In-City Buyer-Side Mitigation Measures. Indeed, a principal objective of the changes to the Pre-Amendment Rules was to more closely align the mitigation exemption and the Class Year cost allocation processes and to

[23] This rule originally appeared at section 4.5g(ii) of Attachment H to the Services Tariff. Section 4.5g(ii) was re-numbered as part of the e-tariff conversion and became section 23.4.5.7.2.

[24] August 2 Order at PP 25-27 (2011).

establish that exemption determinations would be made in tandem with the latter.[25] Contrary to NRG's claim, final mitigation determinations were not "tied" to Class Year process milestones under the Pre-Amendment Rules.[26] The NYISO's September 27, 2010 Filing, which resulted in the replacement of the Pre-Amendment Rules with the In-City Buyer-Side Mitigation Measures, made this distinction clear. It stated that the tariff's new "directive" that the NYISO must make exemption and Offer Floor determinations for all Examined Facilities 'prior to the commencement of the Initial Decision Period for the Class Year . . . .' should not be construed as requiring the NYISO to re-evaluate a project for which it has previously made an exemption or Offer Floor determination under the currently effective (pre-amendment) version of Attachment H." The filing went on to clarify that "any exemption or Offer Floor determinations that the NYISO made under the currently effective version of Attachment H would not be altered or affected by the amendments proposed in this filing."[27] Implicit in those statements is recognition that the requirement that exemption determinations must be made at the time of the commencement of the relevant Initial Decision Period was a truly new one.

Furthermore, NRG's interpretation is inconsistent with the change from the "Reasonably Anticipated Entry Date Rule" to the "Three Year Rule" under the In-City Buyer-Side Mitigation Measures.[28] The entire debate overt hat change centered on the problems that existed under the

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[25] *See Proposed Enhancements to In-City Buyer-Side Capacity Mitigation Measures, Request for Expedited Commission Action, and Contingent Request for Waiver of Prior Notice Requirement* at 9-10-13-14, Docket No. ER10-3043-000 (filed September 27, 2010) ("September 27, 2010 Filing").

[26] NRG Comments at 14.

[27] *See* September 27, 2010 Filing at 14. *See also, Request for Leave to Answer and Answer of the New York Independent System Operator, Inc.*, filed November 1, 2010 ("November Answer") at 14, n. 39, Docket No. ER10-3043-000)).

[28] *Initial Compliance Filing and Request for Expedited Action No Later than December 14, 2010* at 2, Docket No. ER10-3043-001 (filed December 7, 2011) (explaining that under the "Reasonably Anticipated Entry Date Rule" the exemption analysis used price data starting with the Capability Period in which an ICAP Supplier "is reasonably anticipated to offer to supply UCAP" and that under the

former rule because of new entrants' ability to decide when it would request a determination. This in turn allowed them to influence their anticipated entry date.[29] NRG's interpretation that determinations must be tied to the Class Year process is also inconsistent with the fact that the In-City Mitigation Measures explicitly required that the NYISO perform an exemption test for all proposed new projects "in a Class Year [that was closed by the effective date of the amendments], and has not commenced commercial operation or been canceled, and for which the ISO has not made an exemption or Unit Net CONE determination."[30] From that new provision, it is clear that a buyer-side mitigation determination was not made for all projects at the time their Class Year was closed.

The NYISO is not aware of any market participant, other than NRG, that has taken the position that the Pre-Amendment Rules prohibited exemption and Offer Floor determinations from being made out of sequence with the Class Year Facilities Study cost allocation process. Neither the Complaint nor the other Comments appear to make any mention of such an interpretation.

The Commission's August 2 Order recently confirmed that the conventional understanding of the Pre-Amendment Rules is correct. It affirmed that "Commission precedent and the November 26, 2010 Order intended to allow a mitigation exemption determination

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"Three-Year Rule" the exemption analysis used ICAP Spot Market Auction prices for future Capability Periods beginning with the Summer Capability Period that begins three years from the start of the proposed facility's Class Year).

[29] *Id.* at 4.

[30] *See* Services Tariff Attachment H §23.4.5.7.3. No party in Docket No. EL10-3043 ever questioned that the NYISO was required to issue a determination for projects tied to the close of the Class Year Facilities Study process. If that were the case, then, for example, the NYISO would have been required to issue a determination for Class Year 2008 projects that received Capacity Resource Interconnect Service ("CRIS") tied to the Class Year Facilities Study cost allocation process. The Commission's Orders in that docket, and the NRG Companies (along with the Complainants in this docket) own pleadings, by explicitly addressing that provision, recognized that determinations under the Pre-Amendment Rules were not required to be "tied" to the Class Year Facilities Study process.

before the developer decided whether to move forward with a project, but also to allow an exemption determination after the project was constructed."[31] The "Commission precedent" that the August 2 Order refers to are the decisions accepting the Pre-Amendment Rules. NRG's interpretation that the Pre-Amendment Rules only permit exemption determinations to be made at the end of the relevant Class Year Facilities Study process is thus contradicted by the August 2 Order.

The only support that NRG offers for its novel position is three references to past statements by the MMU and NYISO. The oldest is from an October 2007 MMU affidavit which observed that exemption determinations should be made "before the developer commits to go forward with the project and accepts its cost allocation from the facilities study and makes a security deposit in the interconnection process."[32] Even on its face, however, this statement in no way suggests that entities could only request exemptions at (or near) the time that they accepted their Class Year Facilities Study cost allocations. Furthermore, the August 2 Order stated that NRG and the Complainants had read too much into this very language. The Commission was clear that it cannot be used to argue that exemption determinations could only be made at a single point in time.[33]

NRG goes on to cite a more recent MMU statement from Docket No. EL11-42-000, which had to do with the ongoing and prospective administration of the In-City Buyer-Side Mitigation Measures, not the application of the Pre-Amendment Rules.[34] Moreover, any attempt

[31] August 2 Order at P 20.

[32] NRG Comments at 14; *citing Affidavit of Dr. David B. Patton,* filed October 4, 2007 in Docket No. EL07-39 at p. 21, P 70.

[33] *See* August 2 Order at P 27.

[34] NRG Comments at 2, n.4. NRG's quote on page 14 appears to be incorrect. Page 9 of the MMU Answer does not state that "final mitigation determinations should only be made in relation to the on-going Class Year Facilities Study process." Instead, it explains the MMU's understanding that if the

to invoke the MMU's statements on a different tariff, to support a claim that the NYISO's exemption determinations for AEII and BEC were invalid is contradicted by the MMU Answer's statement that those exemption determinations were correct.[35]

NRG's last reference is to a NYISO compliance filing from 2008 which stated that exemption determinations would be made "in an Initial Decision Period."[36] That language is from a summary description in the NYISO's filing letter, not the tariff itself, and cannot be used to read the tariff language that created a right to request an exemption determination upon the execution of an IFSA out of existence. Under the Pre-Amendment Rules the decision on a project was to be made before making significant financial commitments. In AEII's and BEC's case this point was reached well before the Initial Decision Period in their respective Class Year analyses.

Finally, the results of adopting NRG's interpretation of the Pre-Amendment Rules would be absurd and contrary to the August 2 Order. Mitigating all new entrants until the completion of their Class Year allocation process would punish them for reasons beyond their control but subject them to the influence of competitors who would have some ability to prolong the Class Year process. Subjecting operational economic entrants to indefinite mitigation on such grounds, regardless of their economic merit, or the fact that they had obviously long since made the commitment to invest, would accomplish nothing except to discourage competitive entry.

Commission issued an order on pending ICAP Demand Curves "prior to the NYISO's issuance of final mitigation determinations in relation to the on-going Class Year Facilities Study process," the NYISO would be able to use those values in its exemption determinations. In any event, as noted above, the MMU was addressing the application of the In-City Buyer-Side Mitigation Measures, not the Pre-Amendment Rules.

[35] *See* MMU Answer at 3.

[36] NRG Comments at 13-14.

2. NRG's Procedural Suggestions Should be Rejected

NRG argues that the Commission should follow the same procedural approach that it adopted in *West Deptford,* contending that there are no differences between that proceeding in this one.[37] In reality, this case differs substantially from *West Deptford* for all of the reasons specified in the August 3 Answer and in the MMU Answer.[38] As the MMU Answer explained, new entrants' perception that protective agreements cannot safeguard their competitively sensitive information could have significant adverse consequences. Applying *West Deptford* in the context of this proceeding would be likely to result in unnecessary litigation and less investment. The Commission should reject NRG's suggestion to use that approach and instead follow the procedural path outlined by the NYISO and the MMU.

NRG also urges the Commission to move forward in this proceeding on an "accelerated schedule" and to use "emergency measures" such as "in-person hearings" in order to bring it to a conclusion in one or two months.[39] As previously noted, the NYISO is also calling for prompt action within that timeframe, albeit for different reasons than NRG.[40] The NYISO is unsure exactly what NRG has in mind when it proposes "in-person hearings." Presumably it is referring to a traditional hearing presided over by an Administrative Law Judge. If the Commission decides not to proceed through an investigation, the NYISO reiterates that a paper hearing would be the superior procedural option. There are neither issues that could not be addressed based on a written record in this proceeding, nor issues of witness motive, intent, or credibility.

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[37] *See* NRG Comments at 17-18.

[38] *See* August 3 Answer at 32-34; MMU Answer at 5-7.

[39] *See* NRG Comments at 19-20.

[40] *See* August 3 Answer at 3.

B. Answer to the Brookfield Comments

At a quick glance, the Brookfield Comments might appear to offer new evidence in the form of Mr. Niemann's affidavit. That testimony, however, provides no new analysis and instead largely recites Mr. Younger's claims. Like the Younger Affidavit, the Niemann Affidavit therefore reaches conclusions that are based on a carefully-selected set of assumptions and thus falls short of showing that the NYISO violated its tariff or that artificial price suppression has occurred in New York. Mr. Niemann's "new" information and exhibits amount to nothing more than forecasted clearing prices and an allusion to the NYISO's "Gold Book."

Mr. Niemann also makes an assertion that is both mistaken and outside the scope of this proceeding. He claims that "NYC capacity prices to date have not been reflective of a fully competitive market outcome - as prices over the last 6 years have never exceeded 77 percent of the prevailing demand curve, despite the fact that new capacity had been needed." This is belied by the fact that since 2006, approximately 1600 MW of new capacity, including roughly 300 MW of new Special Case Resource demand response participants, have been added to the capacity supply in NYC.[41]

In addition, it appears that an underlying premise of Brookfield's Comments is incorrect. Brookfield states that "[t]he recent entry of an unmitigated new unit at a time when it is not economic has caused capacity prices to fall dramatically" and that "[e]ntering the market at this time would not be rational unless the new entrant also receives out of market revenues . . . ."[42]

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[41] See 2011 Load and Capacity Data (the NYISO "Gold Book") available at <http://www.nyiso.com/public/webdocs/services/planning/planning_data_reference_documents/2011_GoldBook_Public_Final.pdf>; NYISO Gold Books for 2006 – 2011; and Special Case Resource Data available at http://www.nyiso.com/public/markets_operations/market_data/icap/index.jsp monthly SCR reports, and in the NYISO's annual capacity reports, and Supplement and Errata to Annual Report in Docket No. ER01-3001-000 at Table 3, and same table in each of the NYISO's prior ICAP Annual Reports on Installed Capacity and New Generation Projects in the New York Control Area.

[42] Brookfield Comments at 2.

The flaw in this reasoning is clear from the Commission's Order regarding the Pre-Amendment Rules:

> To ensure that the mitigation rules do not deter economic entry, the Commission agrees that units should be exempted when their decision to enter was based on price signals that the market sent indicating that entry was needed. If NYISO predicts in some future year that market prices will be greater than the net CONE then this indicates that building new capacity to begin operation in that year is economically rational. Such new capacity should not be penalized after-the-fact for a decision to build that was economically rational at the time the decision was made.[43]

Accordingly, Brookfield's assertion that new entrants should be mitigated if they are uneconomic at the time of entry, without consideration of expected conditions at the time that they decided to enter, is not tenable.

III. ANSWER TO PROTESTS

A. Answer to the Bayonne Protest

Bayonne opposes the Complaint to the extent that it targets the BEC project. It states that the Younger Affidavit is "full of assumptions and inaccuracies" regarding BEC, is based on "grossly inaccurate speculations," and is a completely inadequate basis to reopen BEC's determination."[44] Bayonne also argues that there are various cost, operating, and financing-related distinctions between BEC and AEII. The NYISO has no objection to Bayonne's arguments regarding BEC except to the extent that they imply that AEII is an "uneconomic new entrant" that should be subject to mitigation.[45] As the NYISO and the MMU have stated, both

[43] *New York Independent. System Operator, Inc*., 122 FERC ¶ 61,211, at P 117 (2008) (March 7, 2008 Order).

[44] Bayonne Protest at 8-9.

[45] *See, e.g.*, Bayonne Protest at 21 ("whereas Astoria II is significantly more expensive than the proxy unit and could be considered an uneconomic new entrant"). Similarly, the NYISO objects to the Bayonne Protest to the extent it is intended, or interpreted, to support claims that the NYISO has

AEII and BEC are properly eligible for exemptions. BEC's Protest also foreshadows the highly contentious, multi-sided disputes that are certain to arise repeatedly if the Commission were to adopt an approach as in *West Deptford*. As the August 3 Answer warned,[46] suppliers will have strong incentives to challenge the unmitigated entry of any non-affiliate, loads will have equivalent incentives to oppose all mitigation, and new entrants can be expected to argue for exemptions for themselves while simultaneously insisting that other entrants be mitigated. For all of the reasons articulated by the NYISO,[47] and the MMU,[48] the Commission should adopt procedures to govern challenges to buyer-side exemption determinations that would reasonably balance competing interests while avoiding the various problems that serial litigation would engender.[49]

B. Answer to the APPA Protest

APPA opposes the Complaint but asks that the Commission "undertake a global review of the operation and outcomes of locational capacity markets, and to replace them . . . ." with alternative constructs that APPA has advocated for several years. The NYISO respectfully submits that such an inquiry would, at a minimum, be far beyond the scope of this proceeding and that taking it up would needlessly impede the Commission's ability to take expedited action here.

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administered its buyer-side mitigation measures with insufficient transparency. *See* Bayonne Protest at 11 ("It would be unfair to penalize BEC for the NYISO's lack of transparency.")

[46] *See* August 3 Answer at 9-10, 25-26.

[47] *Id.* at 24-36.

[48] *See* MMU Answer at 4-7.

[49] Bayonne's request (Bayonne Protest at 4) in this docket regarding a possible NYISO stakeholder process to address transparency in relation to Docket No. EL11-42, is wholly misplaced and clearly beyond the scope of this proceeding. It is also unnecessary on the merits, as explained in the NYISO's Answer in that docket. *See Answer of the New York Independent System Operator, Inc.*, Docket No. EL11-42-000 (July 6, 2011), as modified by the errata filed July 7, 2011 ("July 6 Answer").

IV. CONCLUSION

In conclusion the NYISO respectfully requests that the Commission deny the Comments' requests for relief, decline to initiate the broader inquiry proposed by the APPA Protest, and reject the Complaint for all of the reasons specified above and in the August 3 Answer.

Respectfully submitted,

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August 11, 2011

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 11th day of August, 2011.

/s/ Vanessa A. Colón
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