UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. ER12-360-001

REQUEST FOR LEAVE TO ANSWER AND ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Pursuant to Rules 212, and 213,[1] the New York Independent System Operator, Inc. submits this request for leave to answer and answer to the protests filed on July 20, 2012, in the above-captioned proceeding, by: (i) Entergy Nuclear Power Marketing, LLC and the GenOn Parties ("Entergy/GenOn"); (ii) the New York Transmission Owners ("NYTOs")[2]; and (iii) the New York State Public Service Commission ("NYPSC") (collectively the "Protests"). Empire Generating Co. LLC ("Empire") also submitted a protest that supports Entergy/GenOn's protest but makes no substantive arguments of its own. The NYISO is therefore not addressing Empire's protest other than to note that it should be rejected for the same reasons Entergy/GenOn's protest should be. Finally, this answer agrees with the answer that Entergy/GenOn submitted on July 31[3] on certain points where it opposes the NYTOs' protest and disagrees with it on others. The NYISO is not, however, seeking leave to answer, or answering, Entergy/GenOn's answer at this time.

The Protests address the NYISO's June 29, 2012 filing proposing compliance tariff modifications regarding the market mitigation measures that would be applied to any future New

[1] 18 C.F.R. §§ 385.212, 213 (2011).

[2] The NYTOs are Central Hudson & Gas Electric Corporation, Consolidated Edison 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 Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

[3] *Motion for Leave to Answer and Answer of the New York Suppliers*, Docket No. ER12-360-001 (filed July 31, 2012) ("Entergy/GenOn Answer").

Capacity Zones ("NCZs") created in the New York Control Area[4] ("NCZ Mitigation Compliance Filing"), as directed by the Commission's September 8, 2011 order ("September Order").[5] The proposed compliance revisions are comprised of supplier-side and buyer-side market power mitigation measures using the conceptual framework of the existing mitigation measures applicable to the New York City Locality.

The Protests ask the Commission to reject aspects of the NYISO's NCZ Mitigation Compliance Filing based on erroneous claims that the proposed compliance tariff revisions will either serve as a barrier to economic new entry or allow for uneconomic new entry. As explained below, the NYISO's NCZ Mitigation Compliance Filing should be accepted by the Commission as it represents a reasonable proposal to apply appropriate mitigation measures to any NCZs that may be created. Therefore, the NYISO submits that the Commission should accept the NYISO's proposed tariff modifications and reject the Protests, as further explained below.[6]

I. REQUEST FOR LEAVE TO ANSWER

The Commission has discretion to accept answers to protests when they help to clarify complex issues, provide additional information, or are otherwise helpful in the development of the record in a proceeding.[7] The NYISO's answer satisfies those standards and should be

[4] Terms with initial capitalization that are not otherwise defined herein shall have the meaning set forth in the NYISO Market Administration and Control Area Services Tariff ("Services Tariff"), and if not defined therein, in the NYISO Open Access Transmission Tariff ("OATT"), or the meaning set forth in the NYISO's November 7, 2011 ("November 2011 Filing") and June 29, 2012 filings in this proceeding.

[5] *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,165 (2011) ("September Order").

[6] The NYISO has limited its response to those issues on which it believes that providing additional information will best assist the Commission to reach its decision. The NYISO's silence with respect to any particular argument or assertion should not be construed as acceptance or agreement.

[7] *See, e.g., Southern California Edison Co.*, 135 FERC ¶ 61,093 at P 16 (2011) (accepting answers to protests "because those answers provided information that assisted [the Commission] in [its]

accepted because it addresses inaccurate or incomplete statements, clarifies complex issues, and provides additional information that the Commission needs to fairly evaluate the arguments in this proceeding.

II. ANSWER

A. It is Necessary to Implement Supplier-Side and Buyer-Side Market Mitigation Measures in All Future NCZs

1. Supplier-Side and Buyer-Side Market Mitigation Measures Applicable to All Future NCZs Need to Be in Place Now

The NCZ Mitigation Compliance Filing proposed that supplier-side and buyer-side market mitigation measures based on the "conceptual framework" of the established New York City capacity market mitigation rules apply to all future NCZs. It explained that Dr. David B. Patton, the President of the NYISO's independent Market Monitoring Unit ("MMU"), Potomac Economics, Ltd., advised that implementing supplier-side and buyer-side mitigation measures in future NCZs would be necessary "to ensure that prices within NCZs remain just and reasonable."[8]

Dr. Patton also stated that "as the NYCA market is further divided to add NCZs, potential market power increases because the size of the effective market area becomes narrower."[9] He added further that "most NCZs" would be "much more sensitive to withholding or uneconomic

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decision-making process"); *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,058 at P 24 (2011) (accepting the answers to protests and answers because they provided information that aided the Commission in better understanding the matters at issue in the proceeding); *PJM Interconnection, LLC*, 132 FERC ¶ 61,217 at P 9 (2010) (accepting answers to answers and protests because they assisted in the Commission's decision-making process).

[8] NCZ Mitigation Compliance Filing at Affidavit of David Patton at P 11 ("Patton Affidavit").

[9] *Id*. at P 8.

entry than NYCA as a whole" that "even the largest NCZs that may emerge" are not expected to have significant amounts of surplus capacity in equilibrium.[10]

The NYCA has eight large distribution companies that are Load Serving Entities and that are large wholesale purchasers of electricity in their mostly geographically contiguous service territories. There are other large Load Serving Entities whose load may be geographically concentrated. It is thus highly likely that any NCZ will be dominated by one or two large buyers. The Commission has stated that "all uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address."[11] It is therefore reasonable for the NYISO, and the Commission, to expect that structural local market power will exist within NCZs and that effective mitigation measures, including buyer-side mitigation, are appropriate. Acting to address these concerns in advance is reasonable in light of more than a decade of experience with locational market power in Commission-jurisdictional electricity markets. It is also consistent with Commission precedents and policy requiring that market power be effectively mitigated.[12]

The NYTOs and the NYPSC both attempt to challenge the scope of the NCZ Mitigation Compliance Filing. In general, they argue that it is "premature" to adopt mitigation measures now instead of waiting until they are shown to be necessary for an individual NCZ at the time that it is established. They also try to call into question the rationale that justifies the NYISO's

[10] *Id*. at P 11.

[11] *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 at P 101 (2008) ("March 2008 Order").

[12] *See e.g., PJM Interconnection, LLC*, 137 FERC ¶ 61,145 at P 24 (2011) (accepting PJM's MOPR finding that both seller and buyer measures may be necessary in RTO capacity markets to address the potential to exercise market power"); *Midwest Independent Transmission System Operator, Inc.*, 120 FERC ¶ 61,250 (2007) (eliminating sunset date for Broad Constrained Area mitigation measures upon finding that these mitigation measures address locational market power).

proposal and warn that the proposal is likely to result in excessive litigation and to unreasonably discourage new entry. All of these arguments should be rejected by the Commission.

It is not "premature" to establish mitigation rules for all NCZs in advance. In fact, doing so is essential if the NYISO is to implement NCZs in a timely manner after determining that their creation is appropriate. Waiting to establish specific mitigation rules for each NCZ at the time the NCZ is created would create litigation, risk, and uncertainty regarding the timing of implementation. The risk of delay would be compounded if the NYISO were expected to justify a "customized" mitigation regime for each NCZ. Unnecessarily delaying the establishment of NCZs would be contrary to Commission policy as articulated in the September Order.[13] By contrast, making the conceptual framework and basic parameters of future NCZ mitigation rules clear in advance will provide the market with greater certainty.

Further, assertions that the NYISO should be required to conduct a competitive market structure study before adopting mitigation measures in new "ICAP markets"[14] are misplaced. Establishing an NCZ is not the creation of a new "market," which is the situation in which the Commission has required studies to be conducted.[15] Instead it is the creation of a new locational zone within the conceptual framework of an existing capacity market and established market design.

[13] *September Order* at P 70.

[14] *See* NYPSC at 4.

[15] *See e.g., Midwest Independent Transmission System Operator, Inc.*, 119 FERC 61,311 (2007) (market power analysis required when proposing market design for a new market predicated on sales being made at market-based rates).

2. The Remote Possibility that a Hypothetical Very Large NCZ Might Be Created Is Not a Reasonable Basis for Rejecting the NYISO's Proposed NCZ Mitigation Measures

The main thrust in the NYTOs' attempted attack on applying mitigation to all NCZs is an example offered by their witness, Michael Cadwalader. He creates a hypothetical NCZ within which theoretically there would not be significant market power concerns.[16] This hypothetical NCZ is unlikely, as shown by analyses performed in the NYISO Class Year Facilities Study Process[17] to date. Specifically, the Highway tests conducted for the NYISO Class Year 2010 Deliverability Study (the most recent completed Class Year study) showed bottled generation capacity (*i.e.*, negative deliverability headroom) for the UPNY-SENY Highway, which is the Highway between Load Zones A-B-C-D-E-F and Load Zones G-H-I. The tests also showed significant positive deliverability headroom (in the range of about 800 MW to 2,600 MW) for the other Highways in the Rest-of-State Capacity Region (*i.e.*, Load Zones A through I). Thus, the results of the tests conducted to date have not identified any deliverability constraints from a single Load Zone to a group of Load Zones. Even ignoring the actual results of the most recent Highway tests, Mr. Cadwalader's hypothetical NCZ is also unlikely to be created because it would encompass the entire NYCA except for Load Zone D, *i.e.*, it would include more than 98 percent of the NYCA Load.

It is not surprising that a hypothetical NCZ that covered 98 percent of the NYCA's total Load would not have the structural characteristics or raise the market power concerns that the Patton Affidavit reasoned would exist in narrower market areas arising from the subdivision of

[16] NYTOs at 23-26 and Affidavit of Michael D. Cadwalader at PP 17-35 ("Cadwalader Affidavit").

[17] The NCZ Study set forth in the NYISO's proposed tariff revisions uses the same deliverability test methodology as the OATT Attachment S highway deliverability study. The November 2011 Filing identifies the inputs, which include references to specific inputs and assumptions in the test. *See* November 2011 Filing at pp. 4-5, Section C.

the NYCA. The very fact that the NYTOs had to rely on such an extreme example to "refute" Dr. Patton's reasoning reinforces, rather than undermines, the NYISO's position. There is nothing about the NYTOs' hypothetical example that undermines Dr. Patton's testimony that local market power concerns are likely to exist, and will need to be mitigated, in all NCZs that might realistically be created.

3. The NYISO's Proposed NCZ Mitigation Measures Would Not Result in "Over-Mitigation"

The NYTOs wrongly challenge Dr. Patton's statement that "applying these measures," based on the conceptual framework of the NYC buyer-side mitigation rules, "to all NCZs does not raise significant concerns regarding 'over-mitigation' [because] neither the supplier-side nor the buyer-side mitigation measures are intended to be punitive or to create substantial risk for suppliers that do not have market power."[18] The NYTOs claim that this rationale is somehow inconsistent with reasoning that the NYISO and Dr. Patton have advanced in the past. They cite language from a 2002 affidavit as their "proof." Just as it was revealing that the NYTOs had to create an unrealistic example to try to dispel the NYISO's (and Dr. Patton's) underlying market power concerns, it is telling that they only offer a single, decade-old statement that relates to an entirely different "conceptual framework" to attempt to challenge the NYISO's rationale.

There is no inconsistency between the NYISO's and Dr. Patton's more numerous and more recent statements in support of the New York City buyer-side mitigation measures ("BSM Rules"), on which the NCZ mitigation measures are conceptually built. The underlying rationale for buyer-side mitigation is the same for NCZs as it is for New York City, namely, that structural local market power issues should be addressed by rules that neither over- nor under-mitigate and

[18] NYTOs at 6-7.

thus balance, as best as possible, the need to guard against uneconomic entry and the need to not unreasonably discourage economic entrants.

4. Concerns that Potential Litigation Over Buyer-Side Exemption Determinations in NCZs Might Deter Economic Entry Are Misplaced and Cannot Justify Rejecting the NYISO's Proposed NCZ Mitigation Measures

Arguments that rules based on the New York City BSM Rules should not be applied to NCZs because they are likely to result in excessive litigation that will deter economic entry[19] should be rejected. The NYISO and the MMU have previously expressed, and continue to have, similar concerns regarding the potential for excessive litigation brought by other market parties over individual project determinations.[20] The remedy for these dangers, however, is not abandoning buyer-side mitigation rules when they are needed. Instead, the solution is for the Commission to discourage unjustified and purely strategic challenges to exemption (or non-exemption) determinations under buyer-side mitigation rules that are made by the NYISO and "confirmed" by the MMU.

The recent order in Docket No. EL11-42-000,[21] which emphasized reliance on independent MMU review of independently-made NYISO determinations, is an important step in this direction. To the extent that litigation over new entry decisions nevertheless proliferates, the Commission could take additional steps to restore a reasonable balance, such as establishing an explicit presumption that challenges to MMU-confirmed determinations will be disfavored. Moreover, the notion that deferring action on the question of whether, and how, market power in

[19] *See* NYTOs at 14 and NYPSC at 8.

[20] *See, e.g.*, Docket No. EL11-50-000, *Answer and Request for Expedited Action of the New York Independent System Operator, Inc.*, at 10, 26, and n. 6 (August 3, 2011); Docket No. EL11-50-000, *Motion to Intervene Out of Time and Request for Leave to Answer and Answer of the New York ISO's Market Monitoring Unit* at 6-7 (August 9, 2011).

[21] *See New York Independent System Operator Inc.*, 139 FERC ¶ 61,244 at P 130 (2012).

NCZs should be mitigated will reduce litigation is dubious. It seems far more likely that litigation would only be delayed, not avoided. In addition, assuming that multiple NCZs are established, it can be expected that litigation over proposed mitigation rules would begin anew each time an NCZ was proposed.

B. The Commission Should Not Mandate the Creation of Additional Exemptions from Offer Floor Mitigation at this Time

The NYTOs argue that the NYISO should create new Offer Floor exemptions for "small suppliers," "renewables," and "demand response" that seek to enter the market in NCZs.[22] The NYTOs look, in part, for justification to supposed "instructions" from Commission orders involving other ISO/RTO capacity markets. It is clear, however, that the Commission has not imposed, and has not articulated a desire to impose, a standard market design on all ISO/RTO capacity markets.[23] The only Commission rulings that are directly applicable to the NYTOs' request are the orders requiring that Special Case Resources ("SCRs") in New York City be reviewed and potentially subject to Offer Floor mitigation. Those orders are at odds with the NYTOs' request that "demand response" be exempted in NCZs. As noted below, the NYISO believes that it is essential for the buyer-side mitigation rules, including exemption provisions, to be consistent between New York City and any future NCZ unless there is a valid reason to make a distinction. The NYTOs have not offered any such rationale. Given the Commission's clear precedent for the application of buyer-side mitigation rules to demand response in New York City, the NYISO does not believe that creating, or exploring the possible creation, of a new exemption for demand response in NCZs would be appropriate at this time.

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[22] NYTOs at 11-26.

[23] *See, e.g., New York Independent System Operator, Inc.*, 135 FERC ¶ 61,170 at P 89 (2011) (agreeing that the "Commission has never required that [PJM, ISO-NE, and NYISO] adopt identical capacity market structures. Each uses different demand curves that are based on different sets of complex and interrelated assumptions").

Rulings from PJM, where the "Minimum Offer Price Rule" encompasses the entire PJM market, cannot always be directly "translated" to the NYISO. Among other differences, in New York, the BSM Rules only apply to New York City, and the proposed NCZ mitigation measures would apply to a single Load Zone or group of Load Zones, which would be small relative to the PJM market. The NYISO is not questioning the Commission's recent determination[24] that renewable resources are not likely to be an effective tool for exercising buyer-side market power in PJM. The NYISO has not formulated a view on, and the Commission has not yet addressed, the question of whether the same would be true in potential NCZs established in the NYCA.

The ISO New England precedent invoked by the NYTOs also does not support the establishment of a new category of Offer Floor exemptions at this time. The order relied on by the NYTOs states that the Commission would decide on a case-by-case basis whether to accept proposals by states and state agencies "that certain resources that receive payments pursuant to state programs, which would otherwise trigger the offer floor should nevertheless be exempt."[25] The Commission did not actually establish any such exceptions, however. It determined that the parties in that proceeding had not "provided sufficient specificity to allow us to approve an appropriately narrow exception and we cannot establish an exemption in a vacuum or without facts supporting a specific exemption."[26] At a minimum, the order cited by the NYTOs indicates that new mitigation exemptions should not be established unless "states or state agencies" offer specific justification for them.[27] The NYISO believes further that any such proposals should be carefully reviewed before being adopted.

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[24] *PJM Interconnection, LLC*, 135 FERC ¶ 61,022 at P 153 (2011).

[25] *ISO New England*, 135 FERC ¶ 61,029 at P20 (2011).

[26] *Id*. at P 171.

[27] The NYPSC separately requests that the Commission recognize that it would have the right to "seek an exemption from the mitigation measures with respect to projects pursued for legitimate state

The proposed new exemptions for "small suppliers" and "renewables" are thus not mandated by any precedent; however, they are also not contrary to any Commission rulings specific to the NYISO. The NYISO has not fully assessed such exemptions, and they have not been considered in the NYISO stakeholder process. Therefore, it would be premature to establish small supplier or renewable exemptions at this time. Depending on how "small suppliers" are defined (*e.g.*, the MW limit), there might be substantial overlap with "renewables." Accordingly, any consideration of possible exemptions for "small suppliers" and renewable resources should be undertaken concurrently. In addition, because it is important, both as a matter of market design principle and for reasonable administration, to have parallel exemption rules in New York City and NCZs, the NYISO believes that any proposed exemptions should be consistent for all Mitigated Capacity Zones unless there are valid reasons for differences.

C. The Differences Between the Proposed NCZ BSM Rules and the NYC BSM Rules are Appropriate and Fully Justified

Entergy/Gen On, and their witness, Mr. Mark Younger, appear to take the view that any "deviations" from the NYC mitigation rules, no matter how small, are inherently problematic.[28] The NCZ Mitigation Compliance Filing reasonably proposes to utilize the conceptual framework of the New York City mitigation rules but, appropriately, did not propose to adopt them in their entirety. It can be appropriate to have different, but conceptually consistent, rules in New York City and in NCZs when there is a valid reason for the variation. The New York City rules were created for the known circumstances and conditions of New York City in the 2007-2008

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objectives." *See* NYPSC at n. 9. The NYISO has no objection to the NYPSC's right to propose such exceptions, but believes that proposals must be fully developed and carefully considered before being accepted by the Commission.

[28] Entergy/GenOn at 24-26 and Younger Affidavit at PP 54-57.

timeframe, with an eye towards future conditions that were expected at that time. By contrast, the NCZ mitigation rules will potentially apply to multiple NCZs that have not yet been defined and whose exact conditions cannot yet be known. NCZs are likely to have market power issues that are similar, but not identical, to those that exist in New York City. It is therefore appropriate for the NCZ mitigation measures to accommodate the anticipated differences among NCZs. The NYISO's proposal appropriately accommodates this kind of variability on the supplier-side by providing for each NCZ to have a different Pivotal Supplier threshold. It is appropriate for there to be a similar accommodation on the buyer-side with a variation of the grandfathering rule that was specific to New York City.

1. There Are Valid Reasons for the Differences Between the NCZ Compliance Filing's Proposed Grandfathering Exemption and the Existing Grandfathering Rule for New York City

Entergy/GenOn argue at length that the NCZ Mitigation Compliance Filing's proposed "grandfathering" provisions are unjustifiably broader than the grandfathering provision in the BSM Rules for New York City.[29] Under the New York City rule applicable to generating units (but not to SCRs,) only units that were "existing facilities" on or before March 7, 2008 are grandfathered.[30] Entergy/GenOn note the fact that a single project that had taken significant steps in the development process, but was not yet "existing" by that date, was not eligible for the grandfathering exemption established for New York City.[31] They also disagree with Dr. Patton's conclusion that the NYISO's proposal to allow entrants that had "Commenced Construction" in NCZs to qualify for grandfathering is "reasonably balanced."[32] Entergy/GenOn depict the

[29] Entergy/GenOn at 13-16 and Affidavit of Mark Younger at PP 27-32 ("Younger Affidavit").

[30] *See* Services Tariff Attachment H § 23.4.5.7.6.

[31] Entergy/GenOn at 15.

[32] *Id*. at 17-18.

NYISO's proposal as if it were such a departure from the New York City rule as to constitute a "wholly different test for buyer side mitigation in NCZs."[33]

The NCZ Mitigation Compliance Filing's grandfathering proposal is consistent with the conceptual framework of the New York City BSM Rules but has been modified to accommodate reasonably anticipated circumstances in future NCZs. It is also consistent with the principle behind the Commission's acceptance of the grandfathering provisions in the New York City BSM Rules which was to "affect future actions" by deterring uneconomic new entry.[34] The NCZ Mitigation Compliance Filing's grandfathering proposal will exempt only those units that have taken significant steps and made substantial investments to enter the market, as evidenced by either completion of specified construction milestones, or comparable actions or commitments. It would thereby avoid unfairly mitigating and thereby punishing an entrant that has not acted strategically and that incurs significant development costs before it is clear that its project would be located in a newly created NCZ where it would be at risk of being subjected to an Offer Floor. Such entrants would be too far along to be deterred from entering by the existence of buyer-side mitigation measures.

The mere fact that the East Coast Power project was not grandfathered from the New York City BSM Rules is not a valid reason for adopting an overly restrictive rule for NCZs. Among other considerations, the Commission has never ruled that it would be unjust and unreasonable to grandfather entrants in New York City that had taken the steps required to satisfy the proposed "Commenced Construction" test. Based on the facts before it at the time, the Commission's order established a "bright line" grandfathering rule for New York City. The litigated dispute over East Coast Power principally had to do with whether BSM Rules should

[33] *Id*. at 15.

[34] March 2008 Order at P 118.

apply to all new entrants, including controllable transmission lines, rather than be confined to new resources owned or controlled by "dominant buyers."[35] Different issues are involved in this proceeding. Moreover, New York City has been universally recognized as an area with structural local market power issues, and has been subject to some form of capacity market mitigation since the NYISO's inception more than a decade ago. That fact alone distinguishes East Coast Power's circumstances from those that might arise in future NCZs.

As Dr. Patton has explained, exposing entrants to the risk of lost capacity revenues when they develop projects in areas that are identified as NCZs after they have made substantial development efforts "could create an inefficient economic barrier to new investment."[36] It is realistic to anticipate that some entrants would be subject to this risk, and thus that potentially economic entry could be deterred, if the NYISO were compelled to adopt an absolutely inflexible "bright line" rule. The NYISO has instead reasonably addressed the risk by defining "Commenced Construction" to encompass entrants that have met certain "physical construction" milestones or that have made financial commitments "comparable to" achieving those milestones. Dr. Patton stated that the proposed language "constitutes a reasonable balance" between guarding against this risk without allowing for "strategic uneconomic investment."[37]

Entergy/GenOn focus exclusively on the potential harm of strategic entry without any serious regard for preserving the balance between the competing interests recognized by Dr. Patton. Their principal target is the "comparable financial commitment" prong of the "Commenced Construction" definition. Entergy/GenOn contend that this part of the test is too

[35] Docket No. EL07-39-000, *Initial Comments of East Coast Power, L.L.C. to Compliance Filing of the New York Independent System Operator, Inc. Regarding the New York City ICAP Market Structure* at 5 (filed November 19, 2007); *see also* March 2008 Order at P 120.

[36] Patton Affidavit at P 16.

[37] *Id*. at P 17.

permissive and will allow uneconomic entrants to unjustifiably avoid mitigation by entering into sham contracts.

Such concerns are overstated, based on nothing but speculation that the NYISO, and the MMU and the Commission, would tolerate abuses of an express tariff requirement. They are insufficient to justify the risk of subjecting all NCZ entrants to an overly strict grandfathering rule.

The NYISO's proposed compliance tariff language requires that an entrant seeking a grandfathering exemption based on its financial commitments must have made commitments "comparable to" those associated with extensive physical development of a project. The ability to demonstrate that a project fulfills the requirements through either physical or financial commitments allows the flexibility necessary to account for the fact that different types of resources may have different construction processes. That flexibility is not intended to create an opportunity for uneconomic entrants to avoid mitigation. The rule is not "loose" and the NYISO will not implement it in a permissive manner.[38] As with all other facets of BSM Rule implementation, the NYISO will consider the MMU's input when it applies the "Commenced Construction" rule to specific entrants. The MMU will act as a check against the NYISO and will presumably raise any concerns in the public reports that it will prepare in relation to the June 22 Order.[39] Relying on this mechanism to guard against strategic uneconomic entry would

[38] The Commission's comparability principle requires that all similarly situated customers be treated comparably. *See Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,214 at P 435, *order on reh'g*, Order No. 890-A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g and clarification*, Order No. 890-B, 73 FR 39092 (July 8, 2008), 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 74 FR 12540 (Mar. 25, 2009), 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 74 FR 61511 (Nov. 25, 2009), 129 FERC ¶ 61,126 (2009).

[39] *See* Docket No. EL11-42, Compliance Filing at 3-5 (filed August 6, 2012 (explaining that the NYISO has proposed compliance tariff revisions to Services Tariff Attachment H Section 23.4.7.8, and

be more reasonable than applying an absolute "bright line" rule that risks discouraging economic entry by subjecting non-strategic, substantially developed, projects to unexpected mitigation. The NYISO's proposal would also have none of the disadvantages of Entergy/GenOn's overly prescriptive and impractical suggested "alternative" version of the "Commenced Construction" definition, which is addressed below.

The public reports, in tandem with the other enhancements endorsed by the June 22 Order, should also ensure that the NYISO's administration of the BSM Rules for NCZs will fully satisfy the Commission's transparency requirements. There is no basis for Entergy/GenOn's vague claims that the NCZ Mitigation Compliance Filing proposal somehow lacks transparency.[40]

2. Entergy/GenOn's "Gaming" Arguments Are Speculative, Overstated, and Do Not Justify Over-Mitigation

Entergy/GenOn's warnings regarding the danger that strategic entrants will "game" the NYISO's proposed grandfathering rule are not a sufficient basis for upsetting its balance.[41] As explained above, Entergy/GenOn focus exclusively on potential harm presented by uneconomic new entry and wholly disregard the necessity of ensuring that barriers to economic new entry are not erected. Further, Entergy/GenOn appear to believe that gaming is likely, despite the fact that the proposed tariff provisions establish an appropriately high threshold for satisfying the grandfathering rule.

Applying the "bright line" grandfathering rule that Entergy/GenOn advocate in the name of preventing gaming would harm legitimate entrants for the sole purpose of reducing

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Services Tariff Attachment O Sections 30.10.4 and 30.6.2.11 requiring the MMU to publish a report on the NYISO's mitigation exemption/Offer Floor determinations).

[40] Entergy/GenOn at 24.

[41] *Id*. at 19-20.

speculative risks that strategic entrants might use sham contracts to exploit the "Commenced Construction" definition. It would be very difficult to engage in the type of gaming behavior that Entergy/GenOn expresses concern about, in the real world. And it ignores the fact that projects and developers and their actions, are subject to the scrutiny of various New York State, local, and federal regulatory entities from which it was applying for or had received permits and licenses, as well as other governmental and financing entity audit and enforcement actions.

Entergy/GenOn likewise exaggerate the ability of new entrants to foresee that their projects will be located in areas that become NCZs,[42] and act on their speculation. The NYISO's proposed mitigation rules are in the context of the NYISO's November Compliance Filing establishing a triennial process to examine and propose NCZs. The NYISO's March 2012 report to stated that it planned to "reevaluate the feasibility of a more frequent process once the initial NCZ Evaluation Process is concluded."[43] The NYISO also will be examining pre-defining potential deliverability constraints or zones as recommended by the MMU in the 2011 State of the Market Report.[44] As part of those examinations, the NYISO will examine the effectiveness of the grandfathering rule and whether it may inadvertently provide an opportunity to evade mitigation. Even to the extent a developer was strategically looking to qualify for grandfathered status pursuant to the proposed rule because the NYISO's Class Year deliverability tests suggested that an NCZ be created, the boundaries of the NCZ cannot be certain until the formal process steps to identify and propose the NCZ have been completed. For example the NCZ

[42] *Id*. at 19.

[43] *New York Independent System Operator, Inc.*, Compliance Filing at 9, Docket No. ER04-449-023 ("Report of the [NYISO] on the desirably and Feasibility of Creating New Capacity Zones on an Annual Basis Rather Than Triennially") (March 8, 20212).

[44] Potomac Economics, 2011 State of the Market Report New York ISO at 37 (April 2012), available at < http://www.nyiso.com/public/webdocs/documents/market_advisor_reports/ 2011/SOM_Report-Final_41812.pdf>.

boundary may not be known, and various system factors influence the outcome of the deliverability test from year to year. In addition, it takes a developer a significant amount of time to conceive of a project to satisfy the "Commenced Construction" criteria. Further in order to satisfy the grandfathering test, a project would also have to meet the requirements regarding receiving CRIS MW in a completed Class Year or having requested an Interconnection Agreement electing CRIS or reflecting that a transfer of CRIS has been requested.

3. Entergy/GenOn's Proposed Modifications to the Grandfathering Test Are Unreasonable and Impractical

In addition to proposing to directly eliminate the NYISO's proposed grandfathering test, Entergy/GenOn also propose to indirectly nullify it through unreasonable and impractical modifications. Specifically, Entergy/GenOn propose changes to the "Commenced Construction" definition which would require: (1) entrants to fulfill both the site preparation and financial commitment criteria; (2) that the necessary financial commitment in subpart (b) of the definition be at least equal to the value of the investment in subpart (a) of the definition; and (3) that any penalties included in contract cancellation provision be set equal to at least the investment.[45] Further, Entergy/GenOn propose to apply the grandfathering test as of the date the NYISO begins the NCZ Study (September 1), rather than the date of the filing (March 31.)[46] They claim that these revisions must be made to increase transparency and reduce the NYISO's allegedly excessive discretion.[47]

These "alternative" revisions must be rejected. Entergy/GenOn's proposal to require that both prongs of the "Commenced Construction" definition be satisfied would effectively

[45] Entergy/GenOn at 22-23.

[46] *Id*. at 23-24.

[47] *Id*. at 21.

eliminate the "financial commitment" portion of the test by requiring all entrants to satisfy the specified physical construction criteria. Determining whether an entrant that had met the physical criteria had made the necessary financial commitment to satisfy them would be a tautological exercise. Eliminating the financial commitment prong would tip the balance of the NYISO's proposal beyond guarding against uneconomic entry and introduce too much risk that the buyer-side mitigation rule would become an inefficient barrier to entry.

Requiring that financial commitments, or financial penalties included in any cancellation provision, be equal to the investment would be unnecessary and would raise serious practical concerns. It would appear to require the NYISO to make unrealistically exact and elaborate calculations to determine when penalty and investment amounts were equivalent. It would also seem to require counterparties to contracts for project work or equipment that are outside of the Commission's jurisdiction, and the developer to adopt cancellation provisions that have no financial or commercial basis. Such a requirement could disrupt negotiations of other contract terms and have other unintended negative consequences.

Entergy/GenOn's proposal that the grandfathering test be applied when the NYISO begins the triennial study (*i.e.*, September 1 prior to a Demand Curve Reset Year), rather than when the NYISO makes its filing proposing an NCZ (*i.e.*, March 31 in a Demand Curve Reset Year), must also be rejected. The grandfathering test will be conducted based on the information and status on the date of the NYISO's filing because that is when the proposed configuration of the NCZ will be known. It would not be reasonable to utilize an earlier date.

Entergy/GenOn's assertions that the NCZ Mitigation Compliance Filing would give the NYISO too much discretion should also be rejected. The NYISO's current proposal is reasonable and consistent with the NYISO's administration of other mitigation provisions in its

Services Tariff. The tariffs include a number of mitigation rules that provide a comparable level of detail but leave some room for the NYISO to exercise independent judgment, subject to review by the MMU, and the MMU's report on the grandfathering determinations.[48] Eliminating any application of reasoned judgment in the name of restricting "discretion" would necessitate the adoption of hyper-detailed, overly prescriptive tariff rules in an unrealistic, and perhaps impossible, effort to make the market mitigation power mitigation a purely mechanical process. Even if it were possible to create such rules, they would be susceptible to gaming and could quickly become obsolete as circumstances changed.

4. The Other Supposed "Deviations" from the NYC BSM Rules Identified by Entergy/GenOn are Reasonable Variations that the NYISO Proposed for Valid Reasons

Entergy/GenOn identify certain other supposedly unjustified "deviations" from the BSM Rules in the NCZ Mitigation Compliance Filing. In each case, however, there are either valid reasons for the NYISO's proposed variations or what Entergy/GenOn label a deviation is actually an immaterial and inconsequential difference.

Specifically, the rules in proposed Sections 23.4.5.7.2.1 and 23.4.5.7.2.2 are intended to apply only to NCZ Examined Projects.[49] Those provisions address specific issues that arise with respect to making mitigation exemption and Offer Floor determinations for NCZ entrants and are thus properly applied only to such entrants the first time that an NCZ is established for the location of the project.

The timing of the posting of inputs into the NYISO's ICAP Spot Market Auction price forecasts are different in the BSM rules and the proposed NCZ buyer-side mitigation rules that

[48] *See* NCZ Mitigation Compliance Filing at 8 (explaining that Section 23.4.5.7.7 of the tariff provides that the MMU will publish a report on any determinations made by the NYISO regarding grandfathering of NCZ Examined Facilities).

[49] *See* Entergy/GenOn at 26.

apply only to the time the NCZ is being established.[50] The difference is necessary because it is not possible to post NCZ forecast inputs concurrent with the NYC forecast inputs. That timing is necessary because some of the NCZ forecast inputs, including the ICAP Demand Curve for the NCZ and the Load forecast for the NCZ will not be known at the time that the NYISO establishes the New York City inputs when the Initial Decision period for a Class Year occurs prior to the establishment of the NCZ.

Similarly, the Load forecasts that would be used under the NCZ buyer-side mitigation rules must necessarily be different than those that would be used for New York City because they would use inputs such as the Indicative Locational Minimum Installed Capacity Requirement and until those are developed, there will be no data that can be used for purposes of developing an NCZ Load forecast. The Load forecast needed for purposes of the NCZ mitigation exemption determination cannot simply be taken from the zonal Load forecasts that are found in the Gold Book.

With respect to differences between the provisions on the timing of the posting of exemption determinations,[51] the NYISO will inform Market Participants of a determination once it is final.

Finally, regarding the assertion that the provisions do not indicate what happens if a project rejects its initial Project Cost Allocation, the rules proposed in the NCZ Mitigation Compliance Filing clearly provide that determinations will be made for projects that are in a completed Class Year. Thus, a project would only receive a final determination under these provisions if it was an NCZ Examined Project that accepted its Project Cost Allocation. Once a

[50] *See id*. at 25-26.

[51] *See id*. at 25.

Mitigated Capacity Zone ("MCZ") has been established, new entry in that MCZ will be examined under the standard provisions.

D. The Commission Should Reject the NYTOs' Argument Regarding the Calculation of Default Offer Floors for Entrants in "Nested" Mitigated Capacity Zones

The NYTOs assert that under the NYISO's filing "capacity in the smaller MCZ [*e.g.*, Load Zone J] that is subject to an offer floor may not be permitted to sell capacity in the larger MCZ [*e.g.,* a hypothetical "super zone" encompassing Load Zones G-H-I-J] even in cases where this prevents the larger MCZ from meeting its minimum capacity requirement."[52] The NYTOs argue that this is inconsistent with the "rationale for establishing default offer floors in the first place."[53]

The NCZ Mitigation Compliance Filing did not propose to change the current manner in which the NYISO-administered capacity auctions clear. The NYTOs' proposal is therefore misplaced. Moreover, the NYTO's proposal would be a substantial departure from the current rule. If it is determined that adjustments to existing rules and systems are warranted, the NYISO would propose to identify any necessary modifications to its stakeholders and would need to identify tariff revisions on or before it proposes an NCZ.

[52] NYTOs at 24.

[53] *Id., see also* Cadwalader Affidavit at P 30.

E. The NYISO's Proposed Definition of "Expected Retirements" Does Not Include Mothballed Units But the NYISO Would Support Expanding the Tariff Definition to Include Mothballed Units in All Mitigated Capacity Zones

The BSM Rules include two separate tests: the Part A test and the Part B test.[54] Both require the NYISO to "compute the reasonably anticipated ICAP Spot Market Auction forecast price based on Expected Retirements."[55] The BSM Rules also state that "Expected Retirements shall be determined based on any Generator that provided written notice to the New York State Public Service Commission that it intends to retire . . . ."[56] The NCZ Mitigation Compliance Filing proposes to apply the same exemption tests, the same requirement to account for "Expected Retirements" when developing the ICAP Spot Market Auction forecast, and the same definition of "Expected Retirements."[57]

The NYTOs ask the Commission to establish that the NCZ Mitigation Compliance Filing's proposed definition of "Expected Retirements" should be interpreted "to mean that NYISO must assume, when conducting the Part (a) exemption test that all mothballed generators will not return to service during the two capability periods that will be evaluated."[58] That is, they ask the Commission to confirm that all units that have mothballed should be treated as "Expected

[54] Services Tariff Attachment H § 23.4.5.7.2 sets forth the mitigation exemption determination which has two parts (*i.e.*, the Part A and Part B tests). An Installed Capacity Supplier will be found to be exempt from an Offer Floor where it passes either the Part A or Part B test. The Part A test does not use Unit Net CONE values and assumes that the project offers into the ICAP Spot Market Auction at a price equal to zero. The Part B test evaluates whether a project is projected to be economic over the first three years after entry.

[55] *See* Services Tariff Attachment H § 23.4.5.7.3.2 and NCZ Mitigation Compliance Filing at Attachment I Services Tariff Attachment H § 23.4.5.7.2.3.1.

[56] *Id*.

[57] *See* Services Tariff Attachment H § 23.4.5.7.3.2 and NCZ Mitigation Compliance Filing at Attachment I Services Tariff Attachment H § 23.4.5.7.2.3.1.

[58] NYTOs at 11.

Retirements." Dr. Patton agrees with the NYTOs' interpretation that a mothballed unit is temporarily (and indefinitely) retired.

The Services Tariff's definition of "Expected Retirements" is expressly limited to units that have given written notice that they "intend to retire." Although the NYISO would agree that it is reasonable to exclude mothballed units from the ICAP forecast, the NYISO does not believe a literal reading of the Services Tariff will support including mothballed units under the definition of "Expected Retirements." However, the NYISO would not oppose a Commission order directing it to modify both its proposed tariff language for NCZs, and its existing tariff language for New York City, to expressly state that mothballed units should be excluded from the ICAP Spot Market Auction forecast in all Mitigated Capacity Zones. Dr. Patton's view is that this is the only reasonable way to treat mothballed units in the buyer-side mitigation tests. If mothballed units are not excluded, Dr. Patton believes that the mitigation measures will likely preclude investment that is efficient and necessary to satisfy the NYISO's resource adequacy requirements.

The NYISO generally does not disagree with Dr. Patton's logic; but believes it is constrained to apply the tariff as literally drafted and believes that the Commission should provide either appropriate interpretive guidance, or direct conforming language changes.

Finally, because "Expected Retirements" is a term utilized in both the Part A and Part B tests, if mothballed units are to be treated the same as "Expected Retirements" for purposes of the Part A Test, they should be treated the same way for purposes of the Part B test. Mothballed units should also be treated the same for purposes of the ICAP Forecast in both NCZs and New York City. There is no reason to utilize different types of data in the forecast for different regions.

F. Other Proposed Revisions to the NCZ Mitigation Compliance Filing

The Commission should reject the NYTOs proposal to revise the definition of "Locality" to remove references to "Transmission Districts."[59] The NYTOs' concerns that the inclusion of such references could affect the future configuration of an NCZ are unfounded, as the modifications would in no way restrict how an NCZ may be configured. The only restriction is that an NCZ can be a Load Zone or multiple Load Zones, but not part of a Load Zone.[60] As explained in the NCZ Mitigation Compliance Filing, the modifications to the definition of Localities are necessary to ensure that "nested zones" are properly accounted for in Load forecasts performed pursuant to Services Tariff Article 5, and in accordance with the Load Forecasting Manual.[61] Thus, revising the definition as suggested by the NYTOs could have undesirable and unintended consequences with respect to the NYISO's ability to accurately account for such zones in its Load forecasts.

By contrast, the NYISO has no objection to certain "minor corrections" proposed in the NYTOs' pleadings. Specifically, it does not oppose: (i) revising 23.4.5.7.7(I)(b)(ii) to refer to an "Interconnection Request" instead of a request for an Interconnection Agreement; or (ii) revising section 23.4.5.7.7(II) to broaden its scope to include an "effective Interconnection Agreement."

G. The NCZ Mitigation Compliance Filing Is Consistent with the September Order

The NYPSC suggests the NCZ Mitigation Compliance Filing is not compliant with the September Order because the order should be interpreted as requiring that buyer-side mitigation

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[59] NYTOs at 26-28.

[60] *See* NCZ Mitigation Compliance Filing at 14-15 (explaining the proposed tariff revisions to the definition of Locality).

[61] *See* NYISO Load Forecast Manual (April 2010) *available at* < http://www.nyiso.com/public/webdocs/documents/manuals/planning/load_fcst_mnl.pdf>

measures be developed only after an NCZ is established.[62] The September Order did not, however, require the NYISO to wait until an NCZ is established to develop market power mitigation measures. The September Order stated that:

> We agree with NYISO that market power concentration studies may be necessary after a new zone is determined to be needed, and that additional market power mitigation measures may be needed for an established new capacity zone. However, we will not prejudge these yet-to-be developed measures…"[63]

The NCZ Mitigation Compliance Filing is therefore consistent with the directives of the September Order.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, the NYISO respectfully requests that the Commission reject the protests as discussed herein, and accept the NCZ Mitigation Compliance Filing.

Respectfully submitted,

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August 6, 2012

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[62] NYPSC at 7-8.

[63] September Order at P 64.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2011).

Dated at Washington, D.C. this 6th day of August, 2012.

/s/ Catherine Karimi
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