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September 27, 2010

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Hon. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: *New York Independent System Operator, Inc.*, Docket No. ER10-____ Proposed Enhancements to In-City Buyer-Side Capacity Mitigation Measures, Request for Expedited Commission Action, and Contingent Request for Waiver of Prior Notice Requirement

Dear Secretary Bose:

In accordance with Section 205 of the Federal Power Act and Part 35 of the Commission's regulations, the New York Independent System Operator, Inc. ("NYISO") respectfully submits proposed revisions to Attachment H of its Market Administration and Control Area Services Tariff ("Services Tariff"). For the reasons set forth in Section V, below, the NYISO requests that the Commission issue an order no later than **October 27, 2010** and, to the extent that it deems necessary, **establish an abbreviated comment period**. If the Commission grants this request then the NYISO would also ask that it waive the standard sixty day prior notice period and make this filing effective the day after the Order is issued, *i.e.*, **no later than October 27, 2010**, with the exception of certain provisions noted below, for which the NYISO is seeking a **September 28, 2010** effective date, *i.e.*, one day after this filing. If the Commission does not issue an order by October 27, however, the NYISO would not, for the reasons set forth below, seek a waiver. It would instead request that the proposed enhancements become effective after the usual sixty day notice period.

Attachment H establishes, among other things, the market power mitigation measures that are applicable to the NYISO-administered Installed Capacity ("ICAP")¹ market in New

¹Defined terms that are not otherwise specified herein shall have the meanings specified in Article 2 of the Services Tariff, in Section 23.2.1 of Attachment H, or in Section 25.1.2 of Attachment S to the Open Access Transmission Tariff ("OATT") as applicable.

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York City (“In-City”). The proposed tariff revisions would refine and enhance several previously approved mitigation rules that guard against the exercise of buyer-side market power in the In-City ICAP markets (“In-City Buyer-Side Mitigation Measures.”). They would also more closely coordinate the implementation of the In-City Buyer-Side Mitigation Measures with tariff provisions that govern the allocation of the costs of new interconnection facilities. Finally, the proposed tariff revisions would increase transparency to all Market Participants, provide potential new entrants with greater certainty at the time that they must make critical investment decisions, and prevent new entrants from facing either under- or over-mitigation while protecting the market from the consequences of both.

As is often the case with proposed changes to rules governing organized capacity markets, certain stakeholders oppose components of the proposed tariff revisions. Many other components, however, are not controversial and every single component has substantial stakeholder support. Taken together, the proposed tariff enhancements are a package that: (i) reasonably balances the interest of suppliers in preventing uneconomic entry, with the interests of customers in ensuring that economic entry is not unreasonably discouraged; and (ii) provides a greater degree of certainty and transparency for all stakeholders. The proposed enhancements are thus just, reasonable, and not unduly discriminatory.

The proposed revisions were developed through the NYISO’s shared governance process with active participation by, and extensive input from, stakeholders. The proposed revisions were supported by more than 64% of stakeholders in a formal Management Committee vote. They were also developed in close consultation with the NYISO’s independent Market Monitoring Unit (“MMU”)² which has expressed support for the proposed package as a whole. As noted below, the MMU has indicated that there is one specific element of the proposed amendments that, although acceptable, it believes might be better addressed differently.³ The MMU’s observation should not delay the Commission’s timely acceptance of the proposed revisions as filed.

I. Documents Submitted

1. This filing letter
2. A clean version of the proposed revisions to Attachment H;

²Potomac Economics, Ltd. is the NYISO’s MMU.

³ See *infra.*, n. 24.

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3. A blacklined version of the proposed revisions to Attachment H; and
4. The NYISO Board of Directors' *Decision on Appeal of the Management Committee's August 25, 2010 Decision to Revise In-City ICAP Buyer-Side Mitigation Measures* (September 24, 2010).

II. Background

The NYISO's Capacity markets are currently organized around a series of NYISO-administered ICAP auctions. Because the In-City Capacity market has historically been highly concentrated, it has been subject to market power mitigation measures since the NYISO's inception in 1999.⁴ The current mitigation regime was developed starting in 2007 through multiple rounds of proceedings before the Commission⁵ and went into effect in 2008. The mitigation measures include a Spot Market Auction offer cap and a must-offer provision to mitigate withholding by large Pivotal Suppliers, and an Offer Floor for uneconomic new entry to implement In-City buyer-side mitigation.⁶

Unless exempt from the In-City Buyer-Side Mitigation Measures, In-City Installed Capacity ("ICAP") Suppliers (other than Special Case Resources ("SCRs"))⁷ that enter the Capacity market are required to offer UCAP into the ICAP Spot Market Auctions and must do so at a price no lower than the Offer Floor. The Offer Floor is set at the lower of Unit Net CONE or 75% of Mitigation Net CONE.⁸ To prevent circumvention of the Offer Floor, new Capacity subject to an Offer Floor can only be offered into the ICAP Spot Market Auctions⁹ and may not be certified towards bilateral Capacity transactions or sales in the Capability Period or monthly ICAP auctions. The Offer Floor is thus a powerful deterrent to uneconomic entry because any

⁴See *Consol. Edison Co. of New York, Inc.*, 84 FERC ¶ 61,287 (1998) (accepting a \$105/kW-year offer and revenue cap on ICAP sales by New York City generators divested by the Consolidated Edison Company of New York, Inc).

⁵The existing mitigation structure was most recently addressed by the Commission in its May 2010 Order, *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,170 (2010)

⁶*Id.* at P 2.

⁷The proposed revisions do not modify existing, or propose new, provisions applicable to SCRs. Accordingly, references herein to Installed Capacity Suppliers do not, and should not be construed to, refer to SCRs.

⁸The NYISO proposed to add the defined term "Mitigation Net CONE" to Attachment H in its August 2010 compliance filing in Docket Nos. ER10-2210-000, *et al.* That proposed tariff change is currently pending before the Commission.

⁹See Attachment H, Section 23.4.5.7.1.

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Installed Capacity Supplier subject to it would only receive Capacity revenue in months when its Offer Floor was above the ICAP Spot Market Auction clearing price. New Installed Capacity Suppliers are, however, exempt from the Offer Floor if they can pass one of two exemption tests.

Prompted by its experience implementing the In-City Buyer-Side Mitigation Measures, and by stakeholder comments, the NYISO has been exploring possible improvements to the measures for at least a year. The effort became more focused after the MMU issued its *2009 State of the Market Report*¹⁰ in April 2010. That report concluded that the supply-side In-City mitigation measures appeared to be working well but that it was too early to evaluate whether the Offer Floor had been effective. The MMU noted that it had reviewed the “detailed thresholds and testing procedures used to implement the offer floor” and recommended that the NYISO review “the thresholds and procedures used to implement the offer floor, and identify those that may: cause uneconomic entry to be exempted from the floor; or erect an inefficient barrier to economic entry.”¹¹

Subsequently, in May 2010, the NYISO proposed a number of improvements to the InCity Buyer-Side Mitigation Measures for stakeholders to consider. Over the course of several months, and six stakeholder meetings, the NYISO’s preliminary suggestions evolved into the package of proposed tariff enhancements that is included in this filing. Action on additional potential improvements is being deferred to allow more time for further stakeholder consideration, in some cases as a result of stakeholder votes¹² expressly asking the NYISO to do so.¹³ The fact that other potential enhancements will be addressed in the stakeholder process, and may be submitted in a future filing, in no way detracts from the justness and reasonableness of the package that is currently before the Commission.

¹⁰See Potomac Economics, LLC, 2009 State of the Market Report (April 2010), available at http://www.nyiso.com/public/webdocs/documents/market_advisor_reports/2009/2009_NYISO_SOM_Final_4-30-2010.pdf.

¹¹*Id.* at 180.

¹²The NYISO’s stakeholder Business Issues Committee voted to hold additional discussions regarding the appropriate treatment of facilities that are “repowered” or that uprate their Capacity. See http://www.nyiso.com/public/webdocs/committees/bic/meeting_materials/2010-08-04/Final_Motions_revised.pdf (Motions 4 and 4A). The stakeholder Management Committee likewise voted for additional discussions regarding the timing and manner of Offer Floor determinations for a facility initially found to be only partially deliverable (and therefore initially permitted to sell only the deliverable portion of its Capacity) that subsequently seeks permission to sell additional Capacity. See http://www.nyiso.com/public/webdocs/committees/mc/meeting_materials/2010-08-25/082510_final_Motions.pdf (Motion 5).

¹³ In addition, the Board has instructed the NYISO to explore several further possible enhancements to the In-City Buyer-Side Mitigation Measures with stakeholders. See Section IV, below.

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Taken together, the proposed tariff revisions improve the existing In-City Buyer-Side Mitigation Measures while reasonably balancing the divergent economic interests of Capacity suppliers and purchasers.¹⁴ The Commission should afford the proposed revisions the same weight that stakeholder-approved provisions are normally granted,¹⁵ and, for the reasons set forth below, accept them as just, reasonable, and not unduly discriminatory.

III. Proposed Improvements to the In-City Buyer-Side Mitigation Measures

A. Improvements to the NYISO's Methodology for Calculating Offer Floor Durations

Section 23.4.5.7 of Attachment H provides that when an Installed Capacity Supplier is subject to an Offer Floor it will remain in effect for the longer of: (i) six Capability Periods starting at the time that the Installed Capacity Supplier first offers to supply UCAP (*i.e.*, approximately three years);¹⁶ or (ii) a “period of years” equal to: (a) the initial DMNC value of the Installed Capacity Supplier plus the amount of Surplus Capacity at the time that the Installed Capacity Supplier first offers to supply UCAP, divided by (b) the average annual growth in MW of the Locational Minimum Installed Capacity Requirement for the New York City Locality over the six Capability Periods preceding the Installed Capacity Supplier's first offer of UCAP.

The existing tariff provisions have the unintended potential to impose Offer Floors on Installed Capacity Suppliers for excessively long periods. If a new Installed Capacity Supplier were to enter the In-City market during a period of limited, or zero, load growth then the “period of years” calculated under formula “(ii)” above could extend for decades and might reach well beyond the life of a new entrant's facility. That outcome would be inconsistent with the economic purpose of the Offer Floor provisions which is to deter uneconomic new entry.¹⁷

¹⁴The fact that neither suppliers nor buyers are fully satisfied with the proposed package, as evidenced by each side appealing certain issues to the NYISO's independent Board of Directors, is a further indication of the balanced nature of the proposed package.

¹⁵*See, e.g., Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1062-65 (D.C. Cir. 2008) (noting that “the Commission may give weight to a negotiated stakeholder process “ while acknowledging that the Commission must ultimately make its own independent determination that a proposed tariff change is just and reasonable”).

¹⁶Each NYISO Capability Period is six months long. Six complete Capability Periods would therefore equate to three years. The proposed minimum mitigation period would, however, count the first Capability Period in which a new entrant first offers to sell UCAP as one of the six Capability Periods. Consequently, the actual minimum mitigation period would be somewhere between two and a half and three years in duration, depending on the exact date that the unit first offers UCAP.

¹⁷*See New York Independent System Operator, Inc., Reply Comments at 17-19, Docket Nos. EL07-39, et*

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Imposing decades of mitigation goes far beyond what is needed to discourage any realistic uneconomic entry strategy. Commission precedent likewise disfavors mitigation measures that are broader in scope, or last longer, than necessary.¹⁸ In addition, the current mitigation duration rules make no allowance for the possibility that a project which is expected to be uneconomic at the time of entry might actually prove to be economic.

The NYISO is therefore proposing to revise its approach to determining Offer Floor durations. Under the proposed new tariff language, an Installed Capacity Supplier would be subject to an Offer Floor for a number of years equal to the shorter time period calculated using two alternative methodologies. To avoid the possibility that the methodologies might produce unreasonably long mitigation periods the maximum Offer Floor duration under both would be thirty Capability Periods (*i.e.*, approximately fifteen years).¹⁹ Thirty Capability Periods of mitigation should be sufficient to deter uneconomic entry by even the largest new entrants. It is implausible that a rational potential entrant would be willing to accept mitigation for such a long period in the hope of thereafter reaping the benefits of uneconomic entry, especially given the difficulty of accurately predicting market conditions so far in advance.²⁰ A thirty Capability

al. and ER08-695, *et al.* (filed December 12, 2007); *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 at PP 107, 118, *New York Independent System Operator, Inc.*, 124 FERC ¶ 61,301 at P 44.

¹⁸*See, e.g., Midwest Independent Transmission System Operator, Inc.*, 122 FERC ¶ 61,172 at P 121 (accepting a proposal that “both protects consumers from market power, while also avoiding over-mitigation that can cause reliability problems to the extent that it keeps capacity out of the market over the longer term”); *Midwest Independent Transmission System Operator, Inc.*, 123 FERC ¶61,297 at P 63 (2008) (finding that the conduct threshold proposed “strikes an appropriate balance between the need to protect consumers from the exercise of market power and the goal of avoiding over-mitigation that may keep capacity out of the market”); *Southwest Power Pool, Inc.*, 117 FERC ¶61,110 at P 21 (2006) (affirming the prior order’s interpretation of the mitigation proposal because “it strikes the appropriate balance between over-mitigation (mitigation of competitive market results) and under-mitigation (some exercise of market power that is not mitigated)”).

¹⁹Thirty Capability Periods would be exactly fifteen years. For the same reasons set forth in footnote 14, above, the actual length of the maximum mitigation period would be somewhere between fourteen and a half and fifteen years.

²⁰The NYISO recognizes that the Commission has previously held that “a longer period of mitigation may be necessary for larger units and that the length of time a unit should be mitigated by a price floor should vary depending on the size of the unit in question.” *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 at P 114 (2008). This principle will continue to be reflected in the NYISO’s rules for calculating Offer Floor durations. The NYISO’s first duration calculation methodology has already been found to satisfy this requirement. *See Id.* The second methodology will also establish a longer mitigation period for larger units to the extent that a larger quantity of uneconomic Capacity will take longer to clear the market under the Cleared UCAP test. A thirty Capability Period maximum duration is also consistent with precedent because it will allow larger units to be mitigated longer (when appropriate) without subjecting any unit to mitigation for excessively long durations that would serve no valid economic purpose.

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Period maximum was also acceptable to a super-majority of NYISO stakeholders. The maximum would apply to either of the following methodologies for establishing the duration of the Offer Floor. The mitigation measure would also be subject to a proposed minimum duration of six Capability Periods (as described below).

The first methodology would be based on the previously approved “period of years” formula described in “(ii)” above; however, it would be based on a forecast of future load growth rather than the prior three years of actual load growth. Specifically, the Offer Floor duration would be equal to: (a) the initial DMNC value of the Installed Capacity Supplier plus the amount of Surplus Capacity at the time that the Installed Capacity Supplier first offers to supply UCAP, divided by (b) the forecasted average annual growth in MW for the New York City Locality over the six Capability Periods following the Installed Capacity Supplier’s first offer of UCAP using the forecast values identified in the NYISO’s Load and Capacity Data (commonly referred to as the “Gold Book.”)²¹ Incorporating “Gold Book” data that are familiar and available to stakeholders will make the implementation of this rule more transparent and provide greater certainty. In addition, the change from reliance on historic load growth data to forecasts is an improvement because potential new entrants make their entry decisions, and would evaluate the costs and benefits of any uneconomic entry strategy, on a forward-looking basis.

Under the second methodology, mitigation would end when the Installed Capacity Supplier’s “Total Cleared UCAP” was greater than its “Total Nominal UCAP.” “Cleared UCAP” would be defined as the Installed Capacity Supplier’s UCAP offers (in whole MW, rounded down) that were accepted in the In-City ICAP Spot Market Auction so long as that amount was equal to at least fifty percent of the ICAP Supplier’s initial DMNC value. “Total Cleared UCAP” would be the cumulative amount of an Installed Capacity Supplier’s “Cleared UCAP.” “Nominal UCAP” would be calculated using the MW value that was identified in the Interconnection Facilities Study (“IFS”) for the Installed Capacity Supplier’s facility, or, if an IFS was not required, the MW value that the Installed Capacity Supplier presented to the proposed interconnecting Transmission Owner, multiplied by one minus the applicable Equivalent Demand Forced Outage Rate. “Total Nominal UCAP” would equal the product of Nominal UCAP and twelve.

²¹The Load and Capacity Data is a report released each year which presents New York Control Area system, transmission and generation data and NYISO load forecasts for a ten-year period. The most recent Gold Book is available at: http://www.nyiso.com/public/webdocs/services/planning/planning_data_reference_documents/2010_GoldBook_Public_Final_033110.pdf

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In short, under the second methodology, an Installed Capacity Supplier's Offer Floor would be eliminated when the total number of its MW that cleared in the In-City ICAP Spot Market Auction, during months when at least fifty percent of its Capacity cleared, exceeds its Nominal UCAP. Thus, in principle, an Installed Capacity Supplier could satisfy the Cleared UCAP test in twelve months if all of its Capacity cleared in the auctions for twelve consecutive months (which equates to twenty-four months if fifty percent cleared). Note, however, even if a unit subject to an Offer Floor satisfied the Cleared UCAP test in twelve months after entry, it would still be mitigated for the minimum period of six Capability Periods.

The NYISO is proposing this second methodology because it understands that no forecasting model will ever be perfect. If a new resource proves to be economic, as evidenced by having a significant portion of its Capacity clear in the market over time, then it is appropriate to relieve it from mitigation -- subject to the need to preserve the Offer Floor's overall deterrent impact, which is discussed below. Developers that choose to rely on their own forecasts to make investment decisions will not be locked into an excessive mitigation period if actual market conditions prove to be consistent with their own forecasts. The second methodology is informed by the Commission's recent directives on In-City SCR mitigation. In the SCR context, the Commission has required "mitigation to apply until the new SCR's capacity has been accepted in the market at a price at or above its offer floor for a total of 12, not necessarily consecutive, months."²² The Commission's reasoning was that if an SCR met this requirement it would have shown that its "capacity is economic over several different seasons even though the capacity might not be accepted in all months of a calendar year when offered at that price level."²³ The NYISO is proposing to a similar market-based approach, with modifications appropriate for the non-SCR context, in the Cleared UCAP test and thus to lift the Offer Floor for capacity that proves to be economic.

The proposed requirement that an Installed Capacity Supplier must clear at least fifty percent of its Capacity in a given month for that Capacity to be counted as "Cleared UCAP" is the product of extensive stakeholder negotiations. It is also a significant change from the NYISO's proposal at the outset of the stakeholder process, which would have counted any cleared Capacity. The NYISO has come to believe, along with a sizable majority of its stakeholders, that the "fifty percent rule" represents a reasonable balance between the dual goals of preventing uneconomic entry and not discouraging economic investments.²⁴

²² *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,170 at P 107 (2010).

²³ *Id.*

²⁴ The MMU has expressed concern that the fifty percent rule might allow mitigation to end prematurely for some projects because it does not require that Capacity clear in both the Winter and Summer Capability Periods.

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Under both proposed Offer Floor duration calculation methodologies, the minimum mitigation period would be six Capability Periods. A minimum period is warranted even when an Offer Floor might otherwise be eliminated more quickly under the ordinary workings of the methodologies. The shorter the potential duration of the Offer Floor, the greater the risk that a market participant might conclude that uneconomic entry would ultimately be a profitable strategy. The MMU has advised the NYISO that in its judgment, with the current and proposed duration calculation methodologies, a six Capability Period minimum mitigation period is important to maintaining the deterrent value of the Offer Floor provisions. Moreover, adopting a six Capability Period minimum Offer Floor period will act as a reasonable check against the possibility that the provisions might allow some projects to escape mitigation prematurely under circumstances that are not currently foreseen. Also, three years has previously been accepted by the Commission as a suitable “default” mitigation period,²⁵ which reinforces the appropriateness of using six Capability Periods as a minimum period in the future.

B. Improvements to the Offer Floor Exemption Process

The currently-effective version of Section 23.4.5.7.2 of Attachment H states that a “Developer or Interconnection Customer may request” that the NYISO determine whether it would be exempt from the Offer Floor “upon execution of all necessary Interconnection Facilities Study Agreements for the Installed Capacity Supplier.” It also requires the NYISO to provide the requesting entity with information on its Offer Floor and exemption determinations “not later than” the “commencement of the Initial Decision Period for the Interconnection Facilities Study to which the Interconnection Facilities Study Agreement applies “

Among other things, this language does not expressly address the NYISO’s responsibilities if it does not receive a request for an exemption, does not expressly encompass certain types of potential new entrants that might qualify for an exemption, and is not as precise as it could be regarding the deadline for requesting exemptions, the information that must be provided to the NYISO, and the inputs that would be used in the exemption analysis. It also gives potential entrants substantial influence over which in-service dates would be used in that analysis.

The NYISO believes that the six Capability Period minimum Offer Floor period, and the fact that the Demand Curves which are an input into the Offer Floor determination, do include a Winter and Summer shaping, addresses this concern and that the proposed fifty percent rule should therefore be accepted.

²⁵See *New York Independent System Operator, Inc.*, 122 FERC ¶61,211 at PP 113-116 (2008).

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Importantly, the existing language is imperfectly aligned with the “Class Year” processes that the NYISO follows under Attachment S of its OATT to determine and allocate the interconnection costs of new projects.²⁶ In addition, the existing Attachment H language was drafted before, and thus does not contemplate, recent changes to OATT Attachment S. These include revisions associated with the creation of a new Capacity Resource Interconnection Service (“CRIS”) and related Deliverability requirements.

The NYISO therefore concluded that the In-City Buyer-Side Mitigation Measures should be clarified to more clearly address these points and to specify the NYISO’s responsibilities and authority. The goal is to provide increased transparency and certainty for the benefit of all stakeholders, including potential new entrants evaluating the applicability of the Offer Floor to a project. Better aligning the Attachment H and OATT Attachment S procedures and timetables will provide potential new entrants with the results of the NYISO’s exemption and Offer Floor analyses before they must make the critical decision of whether to accept a Class Year allocation of interconnection project costs (specifically, System Deliverability Upgrade costs).

1. Clarifying Which Entities May Receive Offer Floor Exemptions

Proposed new Section 23.4.5.7.3 specifies that the NYISO will make exemption determinations regardless of whether (or when) one is requested. The new section also clarifies that the NYISO would make the determination for all “Examined Facilities,” which, unlike the existing tariff, would expressly encompass all potential new entrants. Distinguishing the three categories is necessary because the differences among them necessitate the application of different rules in order to timely capture the projects. The three categories of Examined Facilities would be:²⁷

- **Category One:** Each proposed new Generator or UDR project, and each existing Generator or UDR project that does not have CRIS rights, and that: (i) is a member of the Class Year that requested CRIS Rights; or (ii) requested an evaluation of the transfer of CRIS Rights from another location, in the Class Year Facilities Study commencing in the calendar year in which the Class Year Facility Study determination is being made.

²⁶See OATT Attachment S Sections 25.5, 25.6, 25.7, and 25.8.

²⁷Consistent with the discussion in proposed Section B.4, below, “Examined Facilities” would not include any facility that was originally found to be deliverable for a portion of its requested MW of CRIS rights and later requested CRIS rights for its remaining MW in a subsequent Class Year.

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- **Category Two:** Each existing Generator that does not have CRIS Rights and each proposed new Generator and UDR project, that is an expected recipient of transferred CRIS Rights at the same location for which the ISO has been notified by the transferor or the transferee of a transfer pursuant to Section 23.9.4 of Attachment S that will be effective on a date within the “Mitigation Study Period.”
- **Category Three:** Each proposed new Generator that (a) is either (i) in the NYISO Interconnection Queue, in a Class Year prior to 2009/2010, and has not commenced commercial operation or been canceled, and for which the NYISO has not made an exemption or Unit Net CONE determination, or (ii) not subject to a deliverability requirement (and therefore, not in a Class Year) and (b) provides specific written notification by a NYISO-established deadline that it plans to commence commercial operation and offer UCAP in a month that falls within a Capability Period that is within the “Mitigation Study Period.”

The “Mitigation Study Period” would be the period of time encompassing the Capability Periods of expected entry of the members of the Class Year that included the Examined Facilities. For facilities in “Category Three,” under proposed new Section 23.4.5.7.3.1, the commercial operation date that the NYISO will use to define Examined Facilities would be determined at the time of the relevant Class Year Study and will be the date most-recently (A) identified by the project to the NYISO in the Interconnection Facilities Study process; or (B) reflected in the Interconnection Queue. If neither of the foregoing is applicable, then the date identified by the project to the Transmission Owner to which it has proposed interconnecting would be used.

2. Clarifying Information Submission Requirements and the Consequences of Non-Compliance

Under proposed new Section 23.4.5.7.3, the NYISO is to make a Unit Net CONE determination for developers, Interconnection Customers, and Installed Capacity Suppliers for Examined Facilities. In order for that determination to be made, those entities will need to submit data and information. In addition, proposed new Section 23.4.5.7.3.3 requires that those entities that do not request CRIS Rights must provide data and information required by the NYISO by a deadline that the NYISO will provide to all stakeholders and entities in the Interconnection Queue, and will post under the Market Monitoring section of its website well in advance of the deadline. For any Examined Facility that is in a Class Year, but that will only have ERIS rights after the Project Cost Allocation process is complete, the NYISO will utilize the data first provided in its analysis of the Unit Net CONE in its review of the project in any future Class Year in which the Generator or UDR facility requests CRIS Rights or in relation to a request to approve the transfer of CRIS rights at the same location.

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Pursuant to proposed new Section 23.4.5.7.3.4 if a “Category Two” or “Category Three” Examined Facility fails to timely provide the written notifications required under Section 23.4.5.7.3, or if any Examined Facility does not provide all data requested by the NYISO in the time specified, then that Examined Facility’s Capacity would automatically be subject to the default Offer Floor (*i.e.*, 75% of Mitigation Net CONE).

3. Improving the NYISO’s Offer Floor Exemption Analysis

Under the currently effective version of Section 23.4.5.7.2 of Attachment H, Installed Capacity Suppliers are exempt from the Offer Floor if the NYISO’s forecast for: (i) “any” ICAP Spot Market auction price for the first two Capability Periods that the Installed Capacity Supplier is reasonably anticipated to offer to supply Unforced Capacity (“UCAP”) is greater, with the inclusion of the Installed Capacity Supplier, than the highest Offer Floor based on Net CONE; or (ii) the average of the ICAP Spot Market Auction prices in the six Capability Periods beginning with the first Capability Period for which the Installed Capacity Supplier is reasonably anticipated to offer UCAP is higher, with the inclusion of the Installed Capacity Supplier, than Unit Net CONE.

The NYISO is proposing to revise the first test to provide that the NYISO will use the average of the ICAP Spot Market Auction price during each month of the two starting Capability Periods instead of the price in “any” one month during that timeframe. Using the price from “any” one month has the potential to result in an exemption determination being made based on unrepresentative market conditions that may only exist briefly.

In addition, the NYISO is proposing to add new Section 23.4.5.7.3.2 to provide additional transparency and certainty regarding various aspects of the Offer Floor exemption calculation. Specifically, the new language expressly states that the NYISO will compute the “reasonably anticipated ICAP Spot Market Auction forecast price” after accounting for “Expected Retirements” and each of the three categories of Examined Facilities. “Expected Retirements” would include any Generator that provided written notice to the New York State Public Service Commission that it intends to retire, plus any UDR facility, or Generator smaller than 2 MW, that provided written notice to the NYISO that it intends to retire.²⁸ The tariff would also specify that load forecasts, and information regarding SCR participation, from the most-recently published “Gold Book” would be used in the exemption calculation.

²⁸See proposed Section 23.4.5.7.3.

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In order to further promote transparency, the proposed tariff revisions would direct the NYISO to post on its website inputs to the reasonably anticipated ICAP Spot Market Auction forecast prices, the Expected Retirements, and the Examined Facilities, before the Initial Project Cost Allocation. Furthermore, when the NYISO is evaluating more than one Examined Facility concurrently, the proposed tariff revisions clearly state that the NYISO's computation of the anticipated ICAP Spot Market Auction forecast price would recognize that Generators or UDR facilities will clear from lowest to highest, using for each Examined Facility the lower of (i) its Unit Net CONE or (ii) the numerical value equal to 75% of the Mitigation Net CONE.

The NYISO is also proposing additional minor clarifying edits to the existing exemption test calculation language of Section 23.4.5.7.2. Most notably, it would modify the first of the two exemption tests to consider ICAP Spot Market Auction prices for the two Capability Periods beginning with the Summer Capability Period commencing three years from the start of the year of the Class Year, rather than the first Capability Period in which the Installed Capacity Supplier is expected to offer UCAP. This change is part of the NYISO's overall effort to better coordinate the Attachment H exemption tests with the requirements and timetables established under OATT Attachment S.

4. Clarifying and Updating the Timetable for Conducting Exemption Analyses and Disclosing Results

Proposed new Section 23.4.5.7.3.3 provides that the NYISO shall determine the reasonably anticipated Unit Net CONE, less the costs to be determined in the Project Cost Allocation or Revised Project Cost Allocation, as applicable, for each Examined Facility and provide it with its exemption determination or its calculation of the Offer Floor prior to the commencement of the "Initial Decision Period"²⁹ for deciding whether to accept a Project Cost Allocation for a given Class Year. If the Commission is able to expeditiously accept the tariff revisions included in this filing, as is proposed in Section V, below, it will be in time for the next Initial Decision Period, which is likely to begin in early November, 2010.

The existing tariff language, currently set forth in Section 23.4.5.7.2, says that the NYISO will provide that information (on request) "not later than" the commencement of the Initial Decision Period for the IFS to which the IFS Agreement applies " The change is

²⁹Section 25.1.2 of OATT Attachment S defines the "Initial Decision Period" as "the 30 calendar day period within which a Developer must provide an Acceptance Notice or Non-Acceptance Notice to the NYISO in response to the first Project Cost Allocation issued by the NYISO to the Developer."

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intended to more clearly establish that potential entrants will receive exemption and Offer Floor information that may be critical to their project development decisions in advance of the deadline for deciding whether to accept Project Cost Allocations, or Revised Project Cost Allocations, under OATT Attachment S. It would also ensure that the NYISO would perform the exemption analysis for all proposed Capacity projects in a particular interconnection Class Year at a time calculated to give them the best possible information to use when deciding whether to move forward with a project. Section 23.4.5.7.3.3 goes on to say that the NYISO shall revise its forecast of ICAP Spot Market Auction prices for the Capability Periods in the Mitigation Study Period based on the Examined Facilities that remain in the Class Year for CRIS and on “Category Two” and “Category Three” Examined Facilities no later than three days prior to the NYISO’s issuance of the Revised Project Cost Allocation. Additional minor revisions update existing tariff provisions to clearly establish that the NYISO shall: (i) provide each project with its revised price forecast for a Subsequent Decision Period no later than its issuance of a Revised Project Cost Allocation; and (ii) inform each project whether an Offer Floor exemption is applicable as soon as practicable after completion of the relevant Project Cost Allocation or Revised Project Cost Allocation. The NYISO anticipates that performing the exemption analysis concurrent with the OATT Attachment S cost allocation process will increase the precision of the former since it will be conducted iteratively as projects accept or reject their System Deliverability Upgrade costs in each round of the Attachment S process

Finally, proposed new Section 23.4.7.3.5 specifies that a “Category One” Examined Facility for which an exemption or Offer Floor determination has been rendered may be reevaluated for an exemption or Offer Floor determination provided that it either (a) enters a new Class Year for CRIS or (b) intends to receive transferred CRIS Rights at the same location. Category Two and Category Three Examined Facilities would not be re-evaluated under any circumstances.

Section 23.4.5.7.3.5 specifies the only situations in which the NYISO would re-evaluate an exemption or Offer Floor determination under the tariff amendments proposed in this filing. Therefore, Section 23.4.5.7.3.3’s directive that the NYISO 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. To be clear, 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.

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In addition, the Management Committee's recommendation that the Board approve the tariff revisions came with an important caveat.³⁰ At this time, the approved language is not intended to address, and should not be interpreted as currently applicable to, the questions of whether and how to make an exemption or Offer Floor determination for a generator initially found to be deliverable for part of its MW of requested CRIS rights that subsequently requests CRIS rights for the remaining MW. The NYISO respectfully requests that the Commission either confirm that it accepts this interpretation or direct the NYISO to make a compliance filing to explicitly clarify this point in Attachment H.³¹

C. Miscellaneous Clarifications and Corrections

Finally, the proposed tariff revisions include a handful of ministerial clarifications and corrections to Attachment H. These include: (i) adding "and Terms" to the title of existing Section 23.4.1; (ii) adding language to that Section clarifying that capitalized terms not otherwise defined in Attachment H shall have the meaning specified in the NYISO's OATT; and (iii) deleting an unneeded "s" from the first instance of the term "Offer Floor" in section 23.4.5.7.

IV. Stakeholder Approval, Stakeholder Appeals, and NYISO Board Decision

The NYISO's proposed tariff revisions were approved by the requisite super-majority of the stakeholder Management Committee on August 25, 2010.³²

Subsequently, the Independent Power Producers of New York, Inc. ("IPPNY") and the "Indicated NYTOs,"³³ (collectively, the "Indicated NYTOs") exercised their rights under the

³⁰ See *supra*, n. 12.

³¹As indicated, the NYISO believes that no additional revisions would be necessary. However, should the Commission determine that the tariff should be further revised to so specify, because the Management Committee voted to approve Section 23.4.7.3.5 with this condition, but did not vote to approve a specific tariff change to implement it, it is unclear whether the NYISO may unilaterally file clarifying tariff language under Section 205 of the Federal Power Act. The NYISO could, however, clarify the tariff to reflect the Management Committee's directive if ordered to do so by the Commission.

³²Most of the proposed tariff revisions were supported by 64.17% of stakeholders in the August 25 Management Committee vote. The proposed change to Section 23.4.5.7.2 to clarify that the NYISO will use the average of the ICAP Spot Market Auction price during each month of the two starting Capability Periods" instead of the price in "any" one month during that period in its exemption analysis was the subject of a separate Management Committee vote in which there were abstentions but no dissenting votes.

³³The Indicated NYTOs are Consolidated Edison Company of New York, Inc., Orange and Rockland

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NYISO's "shared governance" system to appeal the Management Committee's determination to the Board. Four Motions in Support and/or Opposition to the appeals were also submitted.³⁴

IPPNY objected to the proposed Cleared UCAP formula, and in particular the fifty percent rule discussed above, as well as the thirty Capability Period maximum Offer Floor duration. It claimed that they were too permissive and had not been adequately supported. It also maintained that the proposed tariff enhancements could grant "a generator the ability to retest after it has made an investment decision" and thus to distort the exemption calculation process.

The Indicated NYTOs appealed the Management Committee's rejection of an amendment that would have eliminated the minimum six Capability Period duration of the Offer Floor. They argued that the Cleared UCAP formula was sufficient to deter uneconomic entry because once a new Installed Capacity Supplier satisfies the Cleared UCAP formula, it has demonstrated that it was truly economic.

The Board issued a written decision on September 24 denying both appeals. A copy of that decision is attached to this filing letter.

Changes are needed to address unintentional consequences under the current tariff, *i.e.*, over-mitigation. With respect to the thirty Capability Period maximum duration, IPPNY's appeal failed to address the reality that the existing tariff provisions could, unintentionally, subject new Installed Capacity Suppliers to mitigation for far longer than could conceivably be necessary to serve the deterrent purpose of the Offer Floor. The Board emphasized that the fifty percent rule, in tandem with the six Capability Period minimum Offer Floor duration, was part of a mitigation package that balanced the dual objectives of preventing uneconomic entry and encouraging economic investments. In brief, the Board explained that IPPNY's challenge to the fifty percent rule overlooked the fact that fifty percent was a negotiated value that was adopted in the interest of achieving the broadest possible stakeholder consensus. Finally, the Board reaffirmed that the proposed tariff enhancements did not include a re-testing provisions as is

Utilities, Inc., the Long Island Power Authority, the New York Power Authority, and Niagara Mohawk Power Corporation d/b/a National Grid.

³⁴Specifically: (i) TC Ravenswood, LLC submitted a *Motion in Support of IPPNY Appeal and In Opposition of the Indicated TOs Appeal*; (ii) U.S. Power Generating Company submitted a *Motion in Support of IPPNY Appeal and In Opposition of the Indicated NYTOs Appeal*; (iii) the City of New York filed a *Motion in Support of the Appeal Filed by the Indicated New York Transmission Owners and in Opposition to the Appeal Filed by the Independent Power Producers of New York, Inc.*, and (iv) the New York State Consumer Protection Board filed a *Response* in support of the Indicated NYTOs.

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described in Section B.4 above.

With respect to the Indicated NYTOs appeal, the Board emphasized that the minimum mitigation period preserved the deterrent value of the Offer Floor and functioned as a check against the possibility that the Cleared UCAP formula might allow an Offer Floor to be removed prematurely. Permitting an Offer Floor to be lifted in fewer than six Capability Periods would dilute the deterrent to buyers that might enter into contracts with an otherwise uneconomic unit simply to depress Capacity prices.

Finally, the Board instructed NYISO management to: (i) pursue the additional In-City Buyer-Side Mitigation Measures issues that had previously been set aside for further consideration by the stakeholder Business Issues Committee and Management Committee; and (ii) initiate discussions with stakeholders on several related issues of particular interest to the Board.³⁵ Consistent with these dictates, NYISO management will address these questions in the first instance through the NYISO's normal stakeholder process.

V. Request for Expedited Commission Action and Shortened Comment Period and Contingent Request for Waiver of Prior Notice Period

The NYISO requests that the Commission act expeditiously and issue an order accepting the proposed tariff revisions no later than thirty days from the date of this filing, *i.e.*, by October 27, 2010. Many of the benefits associated with the proposed tariff improvements are premised on their being implemented coincident with developers' consideration of their Project Cost Allocations. Developers receive these allocations each year promptly after the NYISO Operating Committee approves the Annual Transmission Reliability Assessment and the Class Year Deliverability Study.³⁶ Operating Committee approval of those studies this year is expected to occur in early November. By issuing an order no later than one month from the date of this filing the Commission would afford the NYISO and developers sufficient time to be ready for November.

To the extent that the Commission deems it necessary for it to issue an order within thirty days, the NYISO respectfully requests a shortened comment period. Granting this request would not harm interested parties because the proposed tariff revisions were accepted by the Management Committee a month ago in the exact form that they appear in this filing. Furthermore, the controversial questions related to the proposed tariff revisions have already

³⁵See Section C of the attached Board Decision.

³⁶See OATT Attachment S, Section 25.8.2.

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been the subject of appeals to the NYISO's Board. As was noted above, IPPNY and the Indicated NYTO prepared written submissions setting forth their arguments as part of the appeal process. Several other entities filed written motions in support of and/or opposition to these appeals. Clearly, those stakeholders that have shown the greatest interest in the proposed improvements to the In-City Buyer-Side Mitigation Measures have had ample time to formulate their arguments and to consider those advanced by others. To the extent that stakeholders might wish to participate in proceedings before the Commission, it should not be difficult for them to quickly update, and if necessary, supplement their prior submissions.

In the event that the Commission issues an order accepting the proposed tariff improvements within thirty days, the NYISO respectfully requests that they become effective, except with respect to certain information related provisions, one day after the order is issued, *i.e.*, no later than October 28, 2010. The NYISO also requests that the portions of proposed new Sections 23.4.5.7.3 and 23.4.5.7.3.3 that establish proposed information and data submission requirements, and proposed new Section 23.4.5.7.3.4 (which defines the consequences of non-compliance with those provisions), become effective one day after the date of this filing, *i.e.*, on September 28, 2010. Good cause would exist to waive the standard sixty day prior notice requirement³⁷ and grant the requested early effective dates because, as was noted above, many of the proposed enhancements' benefits are tied to their being implemented in advance of the November 2010 Initial Decision Period. For most of the proposed tariff provisions, an effective date no later than October 28 is the latest practicable date if the NYISO is to be prepared for November. The exception is the information and data related provisions. The NYISO will need to collect the required information quite soon in order to complete exemption analyses in November, which necessitates the earliest possible effective date for those provisions, *i.e.*, one day after the date of filing.³⁸

If, on the other hand, the Commission does not issue the requested order within thirty days then there would be no need for a waiver of the prior notice period since the NYISO would not be in a position to implement the new tariff language in time for November. In that case the NYISO would ask that all of the proposed tariff revisions to go into effect at the conclusion of the usual notice period. This would avoid ambiguity over whether the rules in the current

³⁷18 C.F.R. §§ 35.3 and 35.11 (2009).

³⁸Specifically, the NYISO intends to ask potential new entrants to submit the information required under the proposed tariff enhancements shortly after it makes this filing. Granting a next-day effective date would eliminate any possible uncertainty concerning the NYISO's authority to collect the information and the applicability of the proposed rule specifying that a failure to provide information in a timely manner would automatically trigger Offer Floor mitigation.

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version of Attachment H, or the improved versions proposed by this filing, will be in place this November. If the Commission does not issue an order by October 27 then the proposed revisions will not have a significant practical impact until the NYISO commences the November 2011 interconnection cost allocation process.

VI. Request for Waiver of Inapplicable Cost of Service Requirements Under Part 35 of the Commission's Regulations

Section 35.13 of the Commission's regulations generally requires public utilities to file certain cost and other information related to an examination of traditional cost-of-service rates to support proposed changes to their tariffs or rate schedules. However, the tariff modifications proposed herein are not traditional "rates." Further, the NYISO is not a traditional investor-owned utility. The Commission's established general practice has not been to apply the traditional Section 35.13 requirements to such filings. Nevertheless, to the extent necessary, the NYISO requests waiver of Section 35.13. Notwithstanding the request for waiver, the NYISO submits the additional information enumerated below is in substantial compliance with relevant provisions of Section 35.13:

- 35.13(b)(1) - Materials included herewith are listed in Section I of this filing letter.
- 35.13(b)(2) - The NYISO's alternative effective date requests are set forth in Section V of this filing letter.
- 35.13(b)(3) - Service has been made as provided in Section VIII of this filing letter.
- 35.13(b)(4) and (5) - A description of the materials submitted in this filing, and of the reasons for this filing, is provided throughout this filing letter, particularly in Section III.
- 35.13(b)(6) - The NYISO's approval of these modifications is evidenced by this filing. As discussed in Section IV of this filing letter, the changes have been approved by the NYISO's Management Committee and its Board.
- 35.13(b)(7) - The NYISO has no knowledge of any relevant expenses or costs of service that have been alleged or judged in any administrative or judicial proceeding to be illegal, duplicative, or unnecessary costs that are demonstrably the product of discriminatory employment practices.

VII. Communications and Correspondence

All communications and services in this proceeding should be directed to:

Robert E. Fernandez, General Counsel
Elaine D. Robinson, Director of Regulatory Affairs

*Ted J. Murphy
Vanessa A Colón



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VIII. Service

This filing will be posted on the NYISO's website at www.nyiso.com. In addition, the NYISO will email an electronic link to this filing to the official representative of each of its customers, to each participant on its stakeholder committees, to the New York Public Service Commission, and to the electric utility regulatory agencies of New Jersey and Pennsylvania. The NYISO will also make a paper copy available to any interested party that requests one.

IX. Conclusion

Wherefore, for the foregoing reasons, the New York Independent System Operator, Inc. respectfully requests that the Commission accept the proposed tariff revisions described in this filing, act expeditiously, and grant the waivers and effective dates described in Section V above.

Respectfully Submitted,

/s/Ted J. Murphy
Counsel to the
New York System Operator, Inc.