UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Astoria Generating Company, L.P. and TC Ravenswood, LLC	)	
Complainants	)	
v.	)	**Docket No. EL11-50-000**
New York Independent System Operator, Inc.	)	
Respondent	)	

ANSWER AND REQUEST FOR EXPEDITED ACTION OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

In accordance with Rule 213 of the Commission's Rules of Practice and Procedure[1] and the July 14 *Notice* in this proceeding, the New York Independent System Operator, Inc. ("NYISO") respectfully submits this answer to the *Complaint Requesting Fast Track Processing, Emergency Interim Relief, and Shortened Comment Period* ("Complaint") that was submitted in this proceeding on July 11, 2011. For the reasons set forth herein, the Complaint can and should be dismissed based solely on the pleadings and all of its requested relief should be denied because the Complainants[2] have failed to satisfy their burden of proof.

If the Commission concludes, however, that it cannot resolve the issues in this proceeding without first reviewing the NYISO's actions to date the NYISO respectfully requests that the Commission conduct a confidential examination of them, and, if it deems necessary, initiate a confidential investigation under Part 1b of its Rules. As explained below in Section III.E.2, if the Commission decides to undertake such a confidential review, the NYISO

[1] 18 C.F.R. § 385.213 (2011).

[2] Complainants are Astoria Generating Company, L.P. and TC Ravenswood, LLC.

would promptly submit a confidential supplement to this answer detailing, for the Commission's consideration, the mitigation analyses that it has conducted.

This proposed procedural approach would best balance the need to protect the extraordinarily sensitive information[3] used to make exemption determinations, against the interests of the Complainants, other parties, and potential future entrants into the New York City capacity market. It would be consistent with representations by the Complainants and the NRG Companies[4] that they "do not seek — and the NYISO can point to no instance in which Complainants have sought — the confidential cost information or other data that the NYISO has received regarding any other supplier."[5] A confidential Commission review would also appear to be consistent with the desire of the NYISO, and other parties, that the issues in this proceeding be resolved as expeditiously as possible.[6]

Alternatively, the Commission could direct the NYISO to file its confidential supplement and then address any or all of the Complaint's allegations through whatever non-investigatory

[3] *See, e.g., West Deptford Energy, LLC*, 134 FERC ¶ 61,189 at P 26 (2011) (acknowledging that entities have "a legitimate interest in appropriately protecting the confidentiality of … data" where a release of such information could lead to competitive harm); *New York Independent System Operator, Inc.*, 129 FERC ¶ 61,103 at P 30 (2009) (granting requests for privileged and confidential treatment of commercially valuable generator or equipment specific data and transmission system information").

[4] The NRG Companies intervened and filed comments on July 27, 2011. *See Motion to Intervene and Comments of the NRG Companies In Support of Complaint And Request for Immediate Commission Action,* Docket No. EL11-50-000 (July 27, 2011) ("NRG Comments"). The NRG Companies are: NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC and Oswego Harbor Power LLC.

[5] *See Complainants Motion for Leave to Answer and Answer* at 3, Docket No. EL11-42-000 (filed July 21, 2011) ("Complainants' July 21 Answer").

[6] As discussed below in Section III.E.2, the use of confidential Commission reviews to screen challenges to independently made, and Market Monitoring Unit-reviewed, buyer-side market power mitigation determinations would help to avoid litigation over each mitigation determination that will be made by the NYISO, and by other ISOs/RTOs in the future. Encouraging serial litigation, and the increasingly wide circulation of extremely sensitive confidential data that would result from such litigation, raises special concerns regarding the integrity of the In-City Capacity market because it is relatively small and has a relatively small number of major participants.

procedure it deems appropriate, *e.g.*, an expedited "paper hearing" or technical conference. If the Commission deems it necessary to look beyond the four corners of the Complaint, the NYISO is confident that it would be vindicated and its determinations upheld regardless of the procedural path that the Commission chooses.

The NYISO respectfully requests that the Commission issue an order as expeditiously as practicable, consistent with due process, in this proceeding. Complainants have requested "fast-track processing" and the NRG Companies have requested "Immediate Commission Action" in their comments.[7] The NYISO does not oppose fast-tracking of a Commission determination so long as no party's ability to respond to the Complainant or to the NRG Comments is compromised. To be clear, the NYISO does not agree with Complainants' reasons for requesting expedited action or its request for "emergency" interim relief.[8] Instead, the NYISO believes that the Commission should act expeditiously to eliminate any market uncertainty that the Complaint may have created and to reject the Complaint's unfounded allegations concerning the NYISO's motives and conduct.

Finally, the NYISO notes that it has included a response to the *Motion to Intervene and Comments of Energy Curtailment Specialists, Inc. in Support of Request for Emergency, Interim Relief* ("ECS Comments") in this Answer.[9] A response to the ECS Comments was practicable because they are non-substantive. By contrast, the NRG Comments raise new arguments, request different relief, and were filed just a week before the answer deadline in this proceeding. Therefore, the NYISO has not addressed the NRG Comments in this Answer. The NYISO is

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

[8] As discussed in Section III.C, Complainants are not correct to suggest that if an order imposing its "interim relief" were issued by August 23, 2011 it could be implemented in advance of the September 2011 ICAP Spot Market Auction.

[9] *See* Section III.B.6. Under Commission Rule 213(a)(3), 18 C.F.R. § 213(a)(3) (2011), the NYISO may answer the ECS Comments as a matter of right.

entitled to answer the NRG Comments as a matter of right under Commission Rule 213(a)(3) and intends to do so no later than the customary fifteen day deadline, *i.e.,* by August 11, 2011.

I. BACKGROUND

The NYISO incorporates by reference Sections II.A through II.C. of its July 6, 2011 Answer in Docket No. EL11-42-000 ("July 6 Answer").[10] Section II.A contained a high level overview of the currently effective "In-City Buyer-Side Mitigation Measures,"[11] that is equally applicable to the "Pre-Amendment Rules."[12]

Section II.B described the reasons for, and the nature of the proposed enhancements to the Pre-Amendment Rules that were included in the In-City Buyer Side Mitigation Measures. Contrary to what the Complaint seeks to imply,[13] the fact that the NYISO proposed, and the Commission accepted, such enhancements does not indicate there were "problems" with the PreAmendment Rules. The In-City Buyer-Side Mitigation Measures enhanced the previous rules. The adoption of these new rules does not mean that the Pre-Amendment Rules were unjust, unreasonable, or otherwise defective.

It is clear, and the NYISO has repeatedly stated that,[14] however, the two rule sets apply to exemption and Offer Floor determinations made in different time periods. Specifically, the In-

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[10] *See Answer of the New York Independent System Operator, Inc.,* Docket No. EL11-42-000 (July 6, 2011), as modified by the errata filed July 7, 2011 ("July 6 Answer").

[11] The "In-City Buyer Side Mitigation Measures" are the currently-effective buyer-side capacity market mitigation provisions found in Attachment H of the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff").

[12] The "Pre-Amendment Rules" are the buyer-side capacity market power mitigation rules that existed in the Attachment H prior to the effective date of the In-City Buyer-Side Capacity Mitigation Measures.

[13] *See* Complaint at 14 (describing the "various problems" that "could result" under the PreAmendment Rules.)

[14] *See Answer of the New York Independent System Operator, Inc. to Comments* at 14 and n. 62 (filed July 21, 2011) ("July 21 Answer") (stating that "[t]he NYISO has been consistently clear, beginning with its September 2010 filing of the In-City Buyer-Side Mitigation Measures, that the

City Buyer-Side Mitigation Measures apply to determinations that will be made after November 27, 2010. The Pre-Amendment Rules govern any and all determinations made before that date. The Complaint expressly acknowledges this distinction,[15] and parties should not be permitted to blur the line between the two sets of rules.

Section II.C of the July 6 Answer emphasized that the NYISO recognizes the necessity of effective "supplier-side" and "buyer-side" market power mitigation measures and applies both with equal vigor. As was the case in Docket No. EL11-42-000, the Complainants have offered no evidence and cited no precedent in this proceeding to substantiate their assertion that the NYISO has been more "enthusiastic" in its pursuit of supplier-side than buyer-side market power.[16] In reality, the NYISO strives to follow comparable procedures in both areas.[17]

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revisions to the measures would not alter any determinations made under the Pre-Amendment Rules." July 6 Answer at n. 39, *citing Proposed Enhancements, to In-City Buyer-Side Capacity Mitigation Measures, Request for Expedited Commission Action, and Contingent Request for Waiver of Prior Notice Requirement,* Docket No. ER10-3043-000 (September 27, 2010) ("September Filing"). The September Filing was clear that "any exemption or Offer Floor determinations" under the version of Attachment H effective prior to the effectiveness of the revisions that it proposed "would not be altered or affected by the amendments proposed in this filing." *See* September Filing at 14. *See also, Request for Leave to Answer and Answer of the New York Independent System Operator, Inc.*, filed November 1, 2010 ("November Answer") at 14, n. 39, Docket No. ER10-3043-000)).

[15] *See* Complaint at 49, wherein Complainants state "[t]he EL11-42-000 proceeding addresses the prospective application of the [In-City Buyer-Side Mitigation Measures] to the 2009 and 2010 Class Years and later projects. By contrast, this Complaint addresses past mitigation determinations by the NYISO." The Complaint, however, is clear that it is challenging past mitigation determinations under the Pre-Amendment Rules without regard to their Class Year. Likewise, EL11-42-000 is clear that it is challenging determinations that will be made in the future under the In-City Buyer-Side Mitigation Measures, again without regard to the Class Year. Specifically, the Complaint in this Docket identifies in its challenge the determination for a Class Year 2009 project (BEC) and a Class Year 2010 project (AEII), and the complaint in Docket No. EL11-42-000 challenges determinations being made for a Class Year 2008 project (Hudson Transmission Partners).

[16] *See* Complaint at 3; *see also Complaint Requesting Fast Track Processing* at 2, Docket No. EL11-42-000 (filed June 3, 2011) ("EL11-42 Complaint").

[17] *See, e.g., New York Independent System Operator, Inc.*, *Compliance Filing of the New York Independent System Operator, Inc. Regarding the New York City ICAP Market Structure*, Docket No. EL07-39-000 at 28-29 (filed October 4, 2007) (stating that "uneconomic entry would be a significant concern if it can depress prices in the NYC capacity market… [T]he uneconomic entry mitigation measure would provide the NYC capacity market with protection that is the mirror image of the supplier

Following comparable procedures means that the NYISO affords competitively sensitive market participant information and confidential information regarding the NYISO's market monitoring and mitigation processes the same level of protection on both the supplier- and the buyer-side. Section II.C of the July 6 Answer explained that the NYISO's tariffs require it to protect buyer-side mitigation related information just as it protects supplier-side information. Section II.C also explained that the NYISO has been as transparent as possible in its administration of the In-City Buyer Side Mitigation Measures given the applicable confidentiality restrictions. Commission precedent is also clear that there must be some reasonable limits on the disclosure of market power mitigation related information. Such limits are needed to protect sensitive market participant information, to prevent collusive bidding behavior, and to avoid enabling market participants to inappropriately evade mitigation when it is warranted.[18]

As stated in the NYISO's July 6 Answer, its tariffs require that it treat as confidential and not disclose information regarding exemption determinations, including the existence or outcome of determinations. New Demand Side Resources (*i.e.,* Special Case Resources), including the NYISO's buyer-side mitigation exemption or Offer Floor determinations for them,[19] thus currently enjoy the same protection of their confidential information as traditional suppliers. The NYISO has always adhered to these tariff requirements, which are equally applicable to the Pre-

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measure: it would ensure that capacity auction prices are not significantly lower than legitimate competitive expectations, and that the market clears on the basis of legitimate expectations of supply and the Demand Curve").

[18] *See, e.g., Wholesale Competition in Regions with Organized Electric Markets,* Order No. 719, FERC Stats. & Regs. ¶31,281 at P 423 (2008) (retaining the requirement that offer and bid data be masked due to confidentiality concerns); *New York Independent System Operator, Inc.*, 129 FERC ¶ 61,103 at P 30 (2009) (explaining that "[t]he Commission also continues to recognize the confidential nature of bid data and continues to recognize concerns regarding entities that may use this information to gain competitive advantage").

[19] Services Tariff Attachment H §23.4.5.7.5.

Amendment Rules and to the In-City Buyer-Side Mitigation Measures. The NYISO has been as transparent as possible in light of these confidentiality restrictions.

The July 6 Answer further demonstrated that the NYISO affords the same protection to confidential information under its supplier-side mitigation rules as it does under its buyer-side mitigation rules. There is no principled basis for distinguishing between the confidentiality rules applicable to buyer-side and supplier-side market participants. If the Commission decided that the buyer side mitigation determinations under the Pre-Amendment Rules should be disclosed then the NYISO would presumably also be required to disclose: (i) the identity of Pivotal Suppliers, which would include the identification of all Affiliated Entities in their portfolios; and (ii) Installed Capacity Suppliers' requests for, and the results of, supplier-side Going Forward Cost ("GFC") determinations.[20] There is no basis for the Commission to impose tariff or other rule changes that would reduce confidentiality protections on the buyer-side without making corresponding changes to the supplier-side.

Finally, Section II.C explained that, as in supplier-side mitigation, the NYISO does not conduct buyer-side mitigation in isolation. The independent Market Monitoring Unit ("MMU") for the NYISO has been involved in, and made recommendations regarding, the NYISO's implementation of both the Pre-Amendment Rules and the In-City Buyer-Side Mitigation Measures. The MMU has authorized the NYISO to state that it reviewed and commented on the NYISO's market mitigation evaluations and did not identify any tariff

[20] *See* Services Tariff Attachment H section 23.4.5.3.

violations.[21] To the extent that the MMU had any concerns that the NYISO's implementation of the Pre-Amendment Rules was inconsistent with its tariff, it would have referred the matter to the Commission, in accordance with its responsibilities under the Commission's regulations[22] and Attachment O to the Services Tariff.[23]

II. EXEMPTION DETERMINATIONS UNDER THE PRE-AMENDMENT RULES

As noted above, notwithstanding the fact that a buyer-side or supplier-side mitigation determination has been requested, the outcome, the details of the NYISO's analysis, and the underlying data used in it, are confidential and protected information under the NYISO's tariffs.[24] Nevertheless, the NYISO wishes to be as responsive as possible to the Complaint and to facilitate efficient Commission review. Complainants targeted two projects in the complaint: the Astoria Energy Project II ("AEII"), and the Bayonne Energy Center ("BEC"). The NYISO has obtained authorization to disclose that: (i) buyer-side exemption determinations under the Pre-Amendment Rules were requested for the AEII and the BEC projects; and (ii) the NYISO separately informed both AEII and BEC that it determined that the projects were exempt from Offer Floor mitigation.[25] The NYISO is not authorized to disclose any other information regarding the AEII and BEC determinations, including any protected cost information, or to state

[21] *See Initial Answer of The New York Independent System Operator, Inc. in Opposition to Request for Shortened Answer Period And For "Emergency" Interim Relief* at 5, Docket No. EL11-50 (filed July 12, 2011) ("Initial Answer"); *see also* July 6 Answer at 6; July 21 Answer at 4-5.

[22] *See* 18 C.F.R.§ 35.38(g)(3)(ii)(C) (2011).

[23] Services Tariff Attachment O, Section 30.1.1.

[24] *See, e.g.,* Sections 30.6.2.1, 30.6.4 of the NYISO Market Monitoring Plan, Article 6 of the Services Tariff, and the Code of Conduct rules in NYISO OATT Attachment F, Section 12.4.

[25] The NYISO understands that the MMU has taken the position in Docket No. EL11-42-000 that the NYISO's future determinations of whether a project was exempt or subject to an Offer Floor should be disclosed. The NYISO will address that point in that docket.

whether any other exemption requests were received, or any mitigation determinations were made, under the Pre-Amendment Rules.

III. ANSWER

A. It Is Essential that the Commission Require Complainants to Fully Satisfy their Burden of Proof in this Proceeding

The Commission has repeatedly held that complainants bear the burden of proof under Rule 206, which governs complaints submitted under both Sections 206 and 306 of the Federal Power Act ("FPA"). Complainants must offer "clear and convincing" evidence to support their requests for relief.[26] The Commission rightly looks with disfavor on "poorly supported" complaints based on nothing but speculation and "broad allegations" of violations.[27]

The evidentiary bar should be high for challenges to ISO/RTO mitigation determinations that are made with the involvement of an MMU when, as here, the MMU has not raised any concerns about the ISO/RTO's adherence to its tariff. Because the impacts of each mitigation determination can be substantial, especially in a relatively small market like New York City, other market participants have strong economic incentives to challenge them. This is true for both: (i) incumbent suppliers, and competing potential entrants, who have financial incentives to attack decisions exempting rivals from mitigation; and (ii) load side interests that have equally

[26] *See Astoria Gas Turbine Power LLC v. New York Independent System Operator, Inc.,* 131 FERC ¶ 61,205 at P 19 (2010) ("NRG, as the complainant, bears the burden of proof in this case, but failed to demonstrate with clear and convincing evidence that it met that burden.").

[27] *See, e.g.*, *Arena Energy, LP v. Sea Robin Pipeline Company, LLC*, 133 FERC ¶ 61,140, at P 59 (2010) (denying a request to remove provisions from a tariff because the claims regarding the misuse of certain tariff provisions were speculative and unsupported and the tariff was not shown to be unjust and unreasonable); *Public Service Company of New Mexico*, 95 FERC ¶ 61,481, at 62,715 (2001) (rejecting as speculative, unsupported and without merit a claim that the Public Service Company of New Mexico (PSNM) would reap windfall profits because [it] would not likely lay off generation at times of over-deliveries as there was no showing that PSNM had engaged in such a practice historically); *Trans-Allegheny Interstate Line Company*, 119 FERC ¶ 61,219, at P 62 (2007) (finding that concerns over discrimination were unsupported and speculative, and there was no evidence that would cause the Commission to suspect that a holding company would favor one affiliate over another).

strong short-term incentives to attack decisions denying exemptions. If the Commission is overly permissive in allowing such challenges to proceed to litigation there is likely to be a proliferation of litigated disputes over all new entry mitigation determinations. Such litigation would create additional uncertainty, risk, and expense for potential new entrants that would only serve to discourage new entry.

Holding Complainants to their burden of proof would also preserve the integrity of the Commission's market monitoring policies which require mitigation to be conducted by independent entities. The NYISO previously identified that the Complainants in this proceeding were seeking to usurp this function.[28] As the NYISO illustrates in Section III.E.2 below, the Commission has options for reviewing challenges to exemption determinations without permitting Complainants, or other market participants, to usurp mitigation functions that the NYISO's tariffs and Commission policy properly assign to the NYISO and the MMU. For example, the Commission has in prior proceedings directed confidential investigations, or held complaint proceedings in abeyance pending the outcome of a confidential investigation, where further information was required to issue orders on complaints.[29]

[28] July 6 Answer at 63.

[29] *See, e.g., DC Energy, LLC v. H.Q. Energy Services (U.S.) Inc.*, 120 FERC ¶ 61,281 at P 17 (2007) (ordering a non-public investigation for additional fact gathering and directing Enforcement staff to report its findings to the Commission so that the Commission could issue further order on the compalint); *PJM Interconnection, L.L.C.,* 123 FERC ¶ 61,103 at P 15 (2008) (holding a proceeding in abeyance because the pleadings did not provide sufficient information and ordering a Part 1b investigation and directing Enforcement staff to report its findings so that the Commission could issue a further order on the complaint) (footnote omitted).

B. Complainants Have Not Met Their Burden of Showing that a NYISO Determination to Exempt Any New Entrant Was Contrary to the Tariff or Otherwise Unjust and Unreasonable

Complainants assert that any NYISO decision to exempt AEII would be "blatantly erroneous"[30] and "patently absurd."[31] They also argue that it would necessarily cause them, or at least USPG, great financial harm in violation of their claimed statutory and Constitutional rights. Complainants have failed to carry their burden of proof on these points and the Complaint should therefore be denied.

1. The NYISO Has Acted Independently at All Times

Complainants falsely accuse the NYISO of acting in an arbitrary and inequitable fashion "at the behest of" the New York Power Authority ("NYPA") and other unnamed New York State entities and individuals.[32] They offer no factual evidence to support these unfounded and irresponsible claims. The NYISO categorically denies these accusations and urges the Commission to summarily reject the Complainants' conspiracy theories. The NYISO properly applied the tariff in all respects without undue influence by any entity.

2. Lower Capacity Prices Are Not Evidence that the NYISO Has Violated its Tariff or that Existing Tariff Provisions Are Unjust and Unreasonable

Complainants repeatedly insist[33] that the NYISO's exemption determination with respect to AEII has caused, and will cause, them harm that should be remedied by the Commission. By their logic, any mitigation determination that would result in significantly lower capacity prices necessarily demonstrates that the mitigation determination must have either violated the Services

[30] Complaint at 2.

[31] Complaint at n.60.

[32] *See* Complaint at 4.

[33] *See, e.g.*, Complaint at 4, 5, 7, 19, 24, 50.

Tariff, or if compliant, otherwise been unjust and unreasonable. This is a false equation. There is nothing inherently unreasonable or unlawful about new entry causing market prices to be lower, even if the decline is significant. The fact that new entry has the effect of lowering prices likewise does not mean that the Pre-Amendment Rules were unjust or unreasonable, or that the NYISO failed to implement them properly. As the Commission recently, and properly, re-emphasized, "[t]he whole purpose of the NYC mitigation program is to deter uneconomic entry, not economic entry."[34]

Nor does the fact that new entry might substantially reduce capacity market prices inherently mean that the tariff must have been violated. The Pre-Amendment Rules and the buyer-side mitigation measures were never intended to provide a blanket guarantee that new entry would never substantially reduce prices. Nor do they guarantee that a new entrant with a contract to sell power would automatically be deemed to be improperly subsidized and thus subject to an Offer Floor. Instead, the Pre-Amendment Rules included two objective tests for determining whether new entrants should be mitigated. New entrants that qualified for those exemptions would receive them regardless of their entry's impact on prices or the nature of their contracts with their customers. In the same vein, entrants that failed to meet the tariff criteria would be subject to an Offer Floor regardless of their other characteristics. The Complaint does not demonstrate that the Pre-Amendment Rules were flawed or that the NYISO did not follow them.[35] Similarly, Complainants' recent *Motion to Lodge* provides evidence of nothing besides the fact that a reduction in capacity revenues received through the ICAP auctions may affect the cash flow of one Complainant, and therefore its ability to cover operating expenses. It offers no

[34] *New York Independent System Operator, Inc.,* 136 FERC ¶ 61,077 at P 28 (2011).

[35] As noted above in Section I, the Commission never found that the Pre-Amendment Rules required revision; it accepted the NYISO's proposal to enhance them when it accepted the In-City BuyerSide Mitigation Measures.

support for the claims that the reduced revenues are unlawful, unconstitutional, or in any way contrary to Commission policy favoring competition and economic new entry.

Complainants acknowledge that the Commission recently confirmed that suppliers do not have a statutory, let alone a Constitutional, property right that entitles them to receive their desired level of income.[36] As the Commission explained, the regulatory paradigm has changed significantly in recent years and it is now universally understood that suppliers will sometimes earn substantially more, and sometimes substantially less, than what they would have received under cost-based ratemaking. The Commission has been equally clear that in a competitive market, resources are not guaranteed cost recovery. They are only, as Complainants acknowledge, guaranteed a "reasonable opportunity" to recover their costs.[37] "In a competitive market, the Commission is responsible only for assuring that [a resource] is provided the *opportunity* to recover its costs, not a guarantee of cost recovery."[38] It is simply incorrect for Complainants to suggest that a diminution of their capacity revenue, regardless of whether it was expected or unexpected, and the possibility that such revenues may be lower than expected in the future, have somehow deprived them of a "reasonable opportunity" to recover their costs.

Furthermore, the ground on which Complainants attempt to distinguish the recent ISO-New England case from this one is irrelevant to the fundamental paradigm shift described by the

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[36] Complaint at 43-44.

[37] Complaint at 44.

[38] *See ISO New England, Inc. and New England Power Pool Participants Committee*, 135 FERC ¶ 61,029 at P 254 (2011) (citing *ISO New England Inc.*, 132 FERC ¶ 61,187, at P 10 (2010) (citing *ISO New England Inc.*, 128 FERC ¶ 61,023, at P 34 (2009); *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311, at P 29 (2005) (*Bridgeport)* ("While we do not deny Bridgeport's right to file for a cost-based rate, the Commission has no obligation in a competitive marketplace to guarantee Bridgeport its full traditional cost-of-service. Rather, in a competitive market, the Commission is responsible only for assuring that Bridgeport is provided the *opportunity* to recover its costs." (emphasis added)); *see also ISO New England Inc.*, 132 FERC ¶ 61,044, at P 28 (2010) (citing *Bridgeport*); *FPC v. Hope Natural Gas Co*., 320 U.S. 591, 603, 64 S. Ct. 281, 88 L. Ed. 333 (1944); *Bluefield Water Works & Improvement Co. v. PSC*, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923).

Commission in that order. Complainants assert that, "[u]nlike the ISO-NE capacity market, the NYC capacity market has no pre-determined price floor 'to address the effect of historical [out-of-market] capacity on market prices.'"[39] This misses the larger point, namely, that in a competitive market, neither Constitutional due process nor the FPA's just and reasonable standard require that there be a guarantee of cost recovery by a generator. A pre-determined offer floor is not necessary to provide generators with a reasonable opportunity to recover their costs, and, indeed, Complainants do not expressly claim that one is necessary. Complainants make much of the dangers of artificial price suppression but do not demonstrate that it has occurred. The Affidavit of Mark Sudbey attached to the Complaint ("Sudbey Affidavit") makes a similarly unsupported and disconnected leap from the fact that July In-City ICAP Spot Auction prices were lower than Complainants anticipated to the claim that this can only be the result of artificial price suppression due to a faulty exemption determination.[40] Complainants state that "otherwise economic merchant assets would be compelled to prematurely retire or, if told that retirement would jeopardize reliability, seek reliability must-run contracts or similar out-of-market mechanism."[41]

To be clear, the NYISO agrees with Complainants that "artificial price suppression" is harmful. The NYISO has never been part of an artificial price suppression scheme. The fact that capacity prices have fallen, even to levels that might make some of their existing capacity

[39] Complaint at 43.

[40] Complaint at 22, Sudbey Affidavit at P 8. Mr. Sudbey also asserts that unless the claimed "artificial price suppression" is corrected through the provision of supplemental revenues through, for example, reliability must-run contracts, some suppliers may be unable to remain operational or may be forced to file for bankruptcy protection." Generator bankruptcies are an unfortunate reality of competitive electricity markets and there have been several in New York and New England over the past decade. But the fact that an entity may seek protection in the Bankruptcy courts, is not, by itself, conclusive evidence that an ISO has misapplied its tariffs, engaged in "artificial price suppression" or that the prices determined in competitive auctions are otherwise unjust and unreasonable.

[41] Complaint at 5.

uneconomic, does not demonstrate that Complainants are the victims of such a scheme. Moreover, there is no merit to Complainants' allegations that New York City is a "bifurcated" capacity market which treats existing generation in a discriminatory fashion.[42]

Indeed, it is not unreasonable that economic new entry could reduce prices, perhaps significantly, given the well understood fact that new entry, especially into the In-City Capacity Market, is likely to be "lumpy" in nature. For example, AEII constitutes, and BEC would constitute, approximately five percent of the total In-City Unforced Capacity. The offers of an existing capacity resource that cleared the market before the entry of a relatively large new competitor may not necessarily clear, in whole or in part, after that entry. The Commission has, and even the Complainants have, recognized that lumpiness of new entry is to be expected in the In-City Capacity market.[43] The existence of such effects, and resulting reductions in capacity market prices, do not demonstrate non-compliance or a failure of applicable tariff provisions.

Complainants also ignore the numerous other variables that could affect capacity prices as well as the non-capacity market-related variables that impact whether market participants truly have a reasonable opportunity to recover their costs. Among things, entry and retirement decisions by other market participants, variations in generator outage rates, changes to the Installed Reserve Margin, unexpected fluctuations in energy and ancillary services revenues (including those associated with unexpectedly severe and protracted summer weather conditions), can all impact capacity prices and/or overall supplier revenues. Given all of these variables, a few months of lower than expected capacity revenue cannot possibly suffice to show

[42] Complaint at 19-20.

[43] *See, New York Independent System Operator, Inc.*, at P 120 (2011) (requiring the NYISO to account for "the lumpy nature of capacity additions"); *see also Protest and Comments of the New York City Suppliers* at 11 (asking the Commission to require the NYISO to take into account factors affecting the average excess capacity level, including "lumpy additions"). Complainants here were signatories to that pleading.

that either Complainant has, or will be, deprived of a reasonable opportunity to recover their costs. If it could, then the Commission's holding in *ISO-New England, Inc.* that competitive suppliers will sometimes recover less than their costs would have no meaning.

Finally, the Commission should reject Complainants' assertion that fluctuations in capacity prices unconstitutionally deprive them of a reasonable opportunity to recover their costs, and that they are entitled to additional revenues, such as through the negotiation of reliability must-run ("RMR") contracts. As Complainants correctly acknowledge, the RMR mechanism is strongly disfavored by the Commission.[44] Absolutely nothing in the pleadings demonstrates the need for an RMR contract to maintain system reliability in New York City.

Complainants are members of the Independent Power Producers of New York, Inc. ("IPPNY"), which recently proposed in the NYISO's stakeholder process modifications to the NYISO's tariff rules to clarify when and how RMR mechanisms could be implemented in New York.[45] The NYISO is reviewing the adequacy of available cost recovery mechanisms with its stakeholders and reporting to the Commission regarding those discussions in Docket No. ER10-2220-000.[46] The Commission should therefore not make any rulings regarding RMR mechanisms in this proceeding. Doing so would, at a minimum, be premature and would unnecessarily preempt further stakeholder discussions.

3. The NYISO Has Not Taken the Position that any Potential New Entrant Was an "Existing Facility" for Purposes of the In-City BuyerSide Mitigation Measures

[44] *See* Complaint at n. 9.

[45] IPPNY's proposal is with the July 18, 2011 meeting materials of the NYISO's Electric System Planning Working Group on July 18, 2011, available at < http://www.nyiso.com/public/markets_operations/committees/meeting_materials/index.jsp?com=bic_espwg>.

[46] *See, e.g.*, *New York Independent System Operator, Inc.'s First Informational Report on Efforts to Develop Rules Addressing Compensation to Generators that Are Determined to Be Needed for Reliability*, Docket No. ER10-2220-000 (filed on April 4, 2011).

Complainants begin the substantive portion of their argument by asserting that the NYISO could not have lawfully exempted AEII or BEC as an "existing facility" under Section 23.4.5.7.6 of Attachment H.[47] The NYISO agrees.

The NYISO has never exempted any new or potential new entrant into the New York City capacity market on the ground that it was an "existing facility" on or before March 7, 2008. The Commission's orders regarding which facilities constitute "existing facilities" are clear.[48] The Commission should thus ignore this portion of the Complaint.[49]

4. It is Public Knowledge that the NYISO Has Not Made Mitigation Determinations Under the In-City Buyer-Side Mitigation Measures

Complainants also claim that the NYISO might have improperly issued exemption determinations under the In-City Buyer-Side Mitigation Measures.[50] The NYISO has repeatedly stated, both to its stakeholders, and on the record in Commission proceedings, that, in accordance with Attachment H, it would not make final determinations under the In-City Buyer-Side Mitigation Measures until after the Class Year Facilities Study process was complete, including all projects posting security, in accordance with OATT Attachment S.[51] Complainants are well

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[47] Complaint at 27-30.

[48] *See, New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 at P 118 (2008) (noting that the existing facilities were two specific units which entered the In-City market in early 2006, *i.e.*, a NYPA unit brought online in January 2006 ("NYPA Unit") and a Consolidated Edison Company unit brought online in April 2006 ("ConEd Unit"); *New York Independent System Operator, Inc.*, 124 FERC ¶ 61,301 at P 44 (2008) (affirming on rehearing the acceptance of the exemption for "existing facilities," *i.e.,* the Con Edison Unit and the NYPA Unit).

[49] The NYISO is discussing with its stakeholders whether buyer-side mitigation tariff provisions should be developed that would specify a different test for existing facilities that are the subject of repowering proposals. The Pre-Amendment Rules and the In-City Buyer-Side Mitigation Rules apply in the same manner to any entrant, regardless of whether it might be construed to be a "repowering." This fact is not directly relevant to the merits of the Complaint but the NYISO notes it here to avoid any possible future misunderstanding.

[50] *See* Complaint at 37-39.

[51] *See, e.g.,* July 6 Answer at 60-61; July 21 Answer at 4, n.13.

aware of the NYISO's statements. The NYISO has not, and will not, take any action contrary to these statements or its tariff. The Commission should therefore ignore this portion of the Complaint.

5. Complainants "Showing" that AEII or BEC Could Not Reasonably Have Been Exempted from Mitigation Under the Pre-Amendment Rules Is a Product of their Own Assumptions

Complainants argue at length that there is no way that NYISO could have reasonably exempted, or "under-mitigated," AEII or BEC under the Pre-Amendment Rules. They base this conclusion on Mr. Younger's analysis which is, necessarily, based on publicly available information since Mr. Younger did not, and should not, have access to the same confidential information as the NYISO. However, Mr. Younger also relies on a number of assumptions that are either incorrect or differ from those employed by the NYISO.

It is Mr. Younger's choice of assumptions that yields his conclusion that a determination to exempt AEII or BEC would not be justifiable. For example, for AEII, Mr. Younger uses the cost of capital from the ICAP Demand Curve reset. The cost of debt and equity, and the respective percentages thereof, that underlie the Demand Curve reset cost of capital bear no relation to even publically available information regarding AEII's financing costs. Further, Mr. Younger estimates net energy revenues for a combined cycle plant[52] based on information provided in the Demand Curve reset docket. However, his net energy revenues use gas prices for the period November 1, 2006 to October 31, 2009, rather than the period he uses for the balance of his analysis: May 2011 through April 2013.

[52] Younger at PP 59-60.

Complainants therefore certainly have not shown that the NYISO's exemption determinations were "patently absurd"[53] or only explicable by "contorted readings" or "outright violations" of the Services Tariff.[54] On its face, the Complaint does not satisfy the burden of proof under Rule 206, which requires that it convincingly establish these claims or demonstrate that recent In-City ICAP Spot Market Auction prices deprived any market participant of a reasonable opportunity to recover its costs.

6. The NYISO Has Not Taken any Action that Would Harm the Legitimate Interests of Demand Side Resources

Complainants suggest several times that the NYISO's exemption determinations will injure Demand Side Resources.[55] These suggestions are echoed by ECS which states that it shares the Complainants' belief, without offering any evidence, that the NYISO has improperly administered its tariff and artificially suppressed prices.

The ECS Comments in this proceeding, as in EL11-42-000, are devoid of any substance or merit.[56] They simply assume that Complainants' allegations are true and ask the Commission to proceed as if they were. Because there is no evidentiary value to such unsupported assertions, they should be disregarded. The only new "argument" offered by ECS is its obscure claim that the concerns for the adequacy of demand side resource compensation in Commission Order No. 745, which provides for eligible demand side resources to receive full locational marginal price compensation for energy, somehow also justify a ruling in favor of Complainants in this proceeding.

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[53] Complaint at 25, n .25.

[54] *Id.* at 8.

[55] *See* Complaint at 19, 21,39, 42, 50.

[56] July 21 Answer at 15-16.

As the NYISO stated in Docket No. EL11-42-000, it agrees that market power mitigation measures must be implemented properly. Neither Complainants nor ECS have shown, however, that the NYISO's exemption determinations with respect to AEII and BEC were improper. Similarly, the NYISO agrees that market power mitigation should prevent artificial price suppression but disagrees that there is any evidence that it has occurred here. Thus, there has been, and will be, no legally cognizable injury to ECS, demand side resources, or market participants in general. Nor will there be any harm particular to demand side resources that could possibly make Order No. 745 relevant here. In short, the ECS Comments are nothing more than a thinly-veiled expression of ECS's desire for higher In-City capacity prices. The Commission should afford no weight to any attempt by any market participant to use mitigation rules to reverse price shifts that are contrary to its short-term financial interests.

C. The Commission Must Deny Complainants' Request for "Emergency" Interim Relief

As the NYISO explained in its Initial Answer, Complainants have requested "emergency" interim relief in this proceeding that is truly extraordinary. The Commission appears to have recognized that such extraordinary action is unwarranted since it refused to grant Complainants' request[57] for the issuance of an "emergency" order before the August 2011 ICAP Spot Market Auction could be held. Nevertheless, the NYISO wishes to emphasize that the arguments that it previously made against granting the "emergency relief" of imposing "an Offer Floor of 75 percent of Mitigation Net CONE to offers for the Astoria II Project and all other projects that received mitigation determinations prior to November 27, 2010,"[58] before the August 2011 ICAP Spot Market Auction are equally valid with respect to subsequent ICAP Spot

[57] Complaint at 7-8, 18-25, 52.

[58] Complaint at 8.

Market Auctions. The NYISO therefore incorporates by reference the arguments from Section II of its Initial Answer here.[59] Those arguments also support denial of the Complainants' request for interim relief by August 23, 2011, as set forth in their recent *Motion to Lodge*.[60]

Additionally, if Commission is inclined to consider the Complainants' unfounded and unsupported request for relief, the Commission should be aware that the NYISO would be required to make, test, and deploy software revisions. The NYISO presently cannot predict exactly how long it would take to implement the software changes to accomplish what the Complainants suggest, though it is clear that it would be not possible to do so in time for the September ICAP Spot Market Auction if it received a Commission Order on August 23, 2011. It is also important to note that although Installed Capacity Suppliers that are subject to an Offer Floor can only offer into the ICAP Spot Market Auction,[61] the Complainants do not recognize that Installed Capacity Suppliers for which the NYISO made an exemption determination are permitted to, and may have, committed their capacity in the ICAP markets. Thus, without disclosing confidential information, it is possible that granting Complainants' request for relief would require that ICAP transactions somehow be undone.

Additionally, the Complaint fails to demonstrate that either Complainant is in imminent danger of the kind of harm that would justify extraordinary Commission action, necessitating the extraordinary effort that such relief would require. Moreover, the Commission should carefully

[59] The NYISO also notes that the Complaint argues that, to the extent its "emergency" relief is denied, the Commission still has authority to later undo ICAP Spot Market Auction results to the extent that it finds that a tariff violation has occurred. There is no need for the Commission to address this issue at this time because there has been no tariff violation. If however, the Commission were to reach this issue, it should seek additional comments before exercising its authority to fashion an equitable remedy given the complex questions that would then arise.

[60] *Motion to Lodge* at 5, Docket No. EL11-50-000 (filed July 29, 2011) ("Motion to Lodge").

[61] *See* Services Tariff Attachment H section 23.4.5.7.1.

consider recently submitted comments describing the harms that other parties would suffer if the request for "emergency" relief were granted.[62]

D. Complainants Have Not Shown that there is Any Reason for the Commission to Require Exemption Determinations to be Withdrawn and Projects to be Reexamined

The Commission should reject Complainants' unsupported request pursuant to Section 206 of the FPA to require that "(1) any exemptions granted to the Astoria II and/or Bayonne Projects be withdrawn; (2) the NYISO make new exemption and Unit Net CONE determinations for these projects in accordance with the currently-effective requirements of the Services Tariff; and (3) the NYISO establish new Offer Floors for both Projects pursuant to Section 23.4.5.7 of the currently-effective Services Tariff."[63]

The NYISO has already demonstrated that Complainants' have not made a sufficient showing to justify any form of relief. In addition, their second request is contrary to the NYISO's tariff enhancements that are now part of the In-City Buyer-Side Mitigation Measures. The NYISO was clear when it filed those enhancements that they would not alter any determinations made under the Pre-Amendment Rules. Proposed new entrants had a right under the Pre-Amendment Rules to request an exemption determination under those rules prior to November 27, 2010, and the NYISO has at all times acted within the tariff provisions then in effect.

Complainants are, in effect, asking the Commission to retroactively revise the Pre-Amendment rules to take away the right to request a determination. To the extent that the

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[62] *See Motion of the New York Power Authority and the City of New York Supporting the New York Independent System Operator, Inc. Opposition for Shortened Answer Period and for "Emergency" Interim Relief*, Docket No. EL11-50-000 (filed July 13, 2011); *Motion to Intervene and Answer in Opposition to Shortened Comment Period of Bayonne Energy Center, LLC*, Docket No. EL11-50-000 (filed July 13, 2011).

[63] Complaint at 42.

Commission does not conclude that this would constitute retroactive ratemaking, Complainants have not met their Section 206 burden of showing that their proposed amendment would be just and reasonable.[64]

Complainants are also seeking for the Commission to revise the currently-effective InCity Buyer-Side Mitigation Measures. To reevaluate these facilities would be contrary to the express terms of the In-City Buyer- Side Mitigation Measures:

> An Examined Facility for which an exemption or Offer Floor determination has been rendered may only be reevaluated for an exemption or Offer Floor determination if it meets the criteria in Section 23.4.5.7.3 (I) and either (a) enters a new Class Year for CRIS or (b) intends to receive transferred CRIS rights at the same location. An Examined Facility under the criteria in 23.4.5.7.3 (II) that did receive CRIS rights will be bound by the determination rendered and will not be reevaluated, and an Examined Facility under the criteria in 23.4.5.7.3 (III) will not be reevaluated.[65]

Once again, Complainants have not met their Section 206 burden of showing that their proposed amendment to the current tariff would be just and reasonable.

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[64] The Complainants' assertion that they have no obligation under Section 206 of the FPA to show that their proposed tariff revisions are just and reasonable under *Maryland Public Service Commission v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011) is misplaced. That decision did not overturn the "dual burden" standard, but rather explained that the Commission bears the responsibility to determine a just and reasonable rate, if complainants do not propose one. That observation does not alter the Commission's long-standing precedent that a complainant, to the extent it proposes a rate change under Section 206 bears the "dual burden" of showing that the existing rate is unjust and unreasonable and that the new rate would be just and reasonable. *See, e.g.*, *California Municipal Utilities Association, et al. v. California Independent System Operator Corporation*, 126 FERC ¶ 61,315 at P 71 (2009) (stating that "in meeting its FPA section 206 burden, a challenging party must furnish the Commission with a satisfactory evidentiary record that demonstrates how and why the existing rate is unjust and unreasonable; then, and only then, may a challenging party submit an alternative rate or revision to the filed rate proffered as just and reasonable, and must provide evidence as to the justness and reasonableness of the new rate. This 'dual' burden also has a lengthy history at the Commission."); *Arkansas Public Service Commission v. Entergy Corporation, et al.*, 128 FERC ¶ 61,020 at P 23 (2009) (finding that pursuant to Section 206 of the FPA "[t]he complainant must establish that the current rate is unjust and unreasonable and the complainant must then establish that its alternative rate proposal is just and reasonable").

[65] Services Tariff Attachment H § 23.4.5.7.3.5.

E. If the Commission Decides that the NYISO's Mitigation Determinations Warrant Further Review, it Should Proceed in the Manner that Would Best Balance the Need to Protect Confidential and Commercially Sensitive Information, the Need to Avoid Establishing Artificial Barriers to Investment, and the Interests of Parties that Oppose the Determinations

For the reasons set forth above, the Complaint should be rejected based solely on the pleadings and without any further Commission action because Complainants have failed to satisfy their burden of proof. If, however, the Commission were to conclude that it wants to review any or all of the decisions made by the NYISO under the Pre-Amendment Rules, the NYISO will fully cooperate. The NYISO would only request that the Commission proceed in the manner that best balances the competing interests involved.

As discussed below, the NYISO believes that the best option, particularly given the circumstances of this case and the precedent it may establish for future buyer-side mitigation determinations across the organized markets, would be for Commission staff to begin by reviewing the NYISO's actual analysis, and if necessary, commence a confidential investigation under Part 1b. The Commission's review would evaluate the NYISO's actual analysis, including the underlying data and assumptions, supporting its exemption determinations for AEII and BEC.[66] At the conclusion of the Commission's confidential review, it could issue an order validating the NYISO's determinations, instructing the NYISO to modify them, or, to the extent necessary, directing additional proceedings.

The Commission has discretion to utilize investigatory procedures instead of following its traditional approach under which confidential and commercially sensitive information regarding the mitigation determinations could be available to any party that signs a non-disclosure certificate under a protective order. As discussed below, there are several important

[66] As described in Section III.E.2 the NYISO has prepared a confidential supplement to this answer which includes all of this information.

reasons why the traditional approach is not suited to this case, and an alternative approach would better suit the circumstances here and in similar cases. This proposed process is also consistent with the representation by Complainants and the NRG Companies in their recent answer in Docket No. EL11-42-000, that they "do not seek — and the NYISO can point to no instance in which Complainants have sought — the confidential cost information or other data that the NYISO has received regarding any other supplier."[67]

1. If the Complaint Is Not Dismissed Based on the Pleadings the Commission Will Be Making Precedent-Setting Procedural Determinations

To the NYISO's knowledge, the Commission has never before initiated a review of an ISO/RTO's buyer-side mitigation determination. If the Commission were to do so here, it would have to establish rules governing such proceedings. Among other things, it would need to determine the role of the parties, including direct competitors of the entities for which determinations were made and, to the extent that they were involved in reviewing data and analyses, how much access they should have to confidential information. The Commission would also need to consider the implications of its choices on potential future developers and project investors, as well as for future proceedings both in the NYISO and in other organized markets that have buyer-side mitigation rules.

As noted in Section III.A, this proceeding exemplifies the fact that buyer-side mitigation determinations can have implications that create clear economic incentives for market participants to litigate. If the Commission were to amplify those incentives by too readily allowing market participants to use exemption challenges to discover potential competitors' competitively sensitive information, it could all but guarantee that every exemption

[67] *See Complainants' Motion for Leave to Answer and Answer* at 3, Docket No. EL11-42-000 (filed July 21, 2011) ("Complainants' July 21 Answer").

determination would be litigated. Adopting rules that encouraged litigation would impose significant burdens on ISOs/RTOs, which must make many mitigation determinations,[68] as well as on the Commission itself. More importantly, if potential new entrants know that entry is likely to be subject to the costs and uncertainty of litigation, then there would be a serious danger that new investment could be discouraged, regardless of whether it were economic.

Contrary to what Complainants imply in this proceeding, and elsewhere,[69] it is not the NYISO's position that market participants that wish to challenge a mitigation determination should have no recourse. Such entities should have the ability to raise their concerns with the Commission and to seek Commission review, in addition to the opportunities they already have to bring concerns to the MMU's attention. As stated above in Section III.A, however, the threshold for initiating such challenges should not be so low as to permit market participants to set themselves up as redundant, *de facto,* market monitors. Nor should the Commission establish procedures that promote litigation over each and every mitigation determination since that could discourage new investment. It also would create a precedent for parties to challenge supplier-side mitigation determinations, and related GFC determinations. The NYISO believes that the procedural approach outlined in Section III.E would avoid these dangers and conserve the NYISO's and the Commission's resources, while protecting the interests of Complainants and other parties.

[68] For example, the NYISO is required to make buyer-side exemption determinations for each new In-City Special Case Resource. There are more than 2,800 In-City Special Case Resources as of the date of this answer. On average, approximately 25 new Special Case Resources enter the In-City market each month. That average excludes the month of May 2011, in which there were 877 new enrollments. Competitors (whether other Responsible Interface Parties on behalf of Special Case Resources, or traditional resources) may seek to challenge the determinations regarding Special Case Resources or otherwise use information they learn in the course of a Commission proceeding involving challenges to mitigation determinations, even unintentionally, when participating in the market.

[69] Complainants' July 21 Answer at 2, 8.

2. If the Commission Decides that the NYISO's Determinations Should Be Reviewed it Can, and Should, Begin with a Confidential Examination of its Own

The NYISO has prepared a confidential supplement to this answer describing in detail its analyses for AEII and BEC exemption determinations, including relevant facts, assumptions, and calculations. This supplement necessarily includes highly sensitive confidential information regarding AEII's and BEC's costs, operating data, and other matters. If the Commission decides that it will not dismiss the Complaint based solely on the pleadings, the NYISO is prepared to promptly file the confidential supplement to this answer.[70] The Commission would then have immediate access to the information necessary for a prompt and comprehensive review.

Consistent with its standard investigative procedures, if the Commission desired additional information, the Commission's staff could then conduct a preliminary confidential examination, and if necessary, proceed to a full investigation under Part 1b of its rules.[71] The NYISO would, of course, cooperate fully with any examination or investigation. The NYISO is authorized to state that the MMU is prepared to do so as well. The NYISO has every confidence that such an inquiry would result in a Commission order fully upholding its determinations.

It is well established that the Commission may conduct confidential investigations without including third parties and thus third parties have no right to participate in such

[70] To the extent necessary, the NYISO respectfully requests limited waiver of Commission Rule 213(c) and (e)(1), so that its decision to await Commission guidance on whether it is necessary to submit a confidential supplement is not construed as a failure to answer any element of the Complaint. Alternatively, to the extent that the Commission concludes that such a waiver is necessary but declines to grant it, the NYISO respectfully requests that its proposal to submit a confidential supplement be treated as a timely request for an extension of time to file a "complete" answer.

[71] *See* < http://www.ferc.gov/enforcement/investigations.asp> (explaining that the Commission's regulations allow for investigations "relating to any matter subject to the Commission's jurisdiction" and that investigations can be initiated through the receipt of both internal and external information. Information is treated as non-public and involves fact-gathering by Enforcement staff through "customary discovery methods." *See also*, *Enforcement of Statutes, Regulations and Orders,* Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 (2008) (explaining FERC's investigatory authority).

investigations.[72] The Commission has used investigations to resolve significant issues of potentially great public interest without permitting intervention by State public utility commissions, attorneys general, and consumer representatives, let alone by market participants.[73] The Commission has discretion to initiate an investigation in this proceeding, or to hold this proceeding in abeyance and initiate a separate investigation docket, as it deems appropriate.[74]

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[72] *See, e.g., In re Edison Mission,* 125 FERC 61,020 (2008); *see also*, 18 CFR 1b.11 (2011) ("There are no parties, as that term is used in adjudicative proceedings, in an investigation under this part, and no person may intervene or participate as a matter of right in any investigation under this part."); 18 CFR 385.101(b)(1) (stating that the Commission's Rules of Practice and Procedure do "not apply to investigations under part 1b of this chapter."); *Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, 103 FERC P 61019 (2003) ("[M]ovants correctly acknowledge that they have no right to intervene in this non-public investigation. The Commission's regulations clearly distinguish investigations from other proceedings.").

[73] *Id, see also Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, 103 FERC P 61019 at P 15 (declining to grant intervention as a matter of discretion in an investigation concerning alleged price manipulation during the California energy crisis to, *inter alia*, the California Public Utilities Commission, the California Electricity Oversight Board, and the California Attorney General). While the Commission retains discretion to permit third parties to participate in investigation proceedings and has made rare exceptions to the general rule of denying such requests in the past, there is nothing to justify doing so here, and indeed ample reason to deny an exception. The issues at stake in this proceeding, while important, are no more important than those in cases where the Commission declined to allow State regulators participate in investigations of alleged market abuses. Moreover, the need for third party involvement is necessarily less in a case involving a challenge to an independent determination by the NYISO that has already been reviewed by the independent MMU.

[74] *See, e.g., DC Energy, LLC v. H.Q. Energy Services (U.S.) Inc.*, 120 FERC ¶ 61,281 at P 17 (2007) (finding that "[b]ased on the pleadings alone, the Commission does not have sufficient information to grant or deny [DC Energy's] complaint [alleging that H.Q. Energy manipulated the NYISO's energy and Transmission Congestion Credit markets]. Accordingly, the Commission finds that it should gather additional facts through a non-public investigation into the allegations raised by DC Energy under 18 C.F.R. § 1c.2 (2007), as explained in Order No. 670. The Commission will therefore institute an investigation under 18 C.F.R. § 1b.5 (2007). The Commission directs the Office of Enforcement to conduct the investigation. At the conclusion of the investigation, the Office of Enforcement is directed to report its findings to the Commission. Following that report, the Commission expects to issue a further order on the complaint."); *PJM Interconnection, L.L.C.,* 123 FERC ¶ 61,103 at P 15 (2008) ("Based on the pleadings alone, the Commission does not have sufficient information to grant or deny the complaint. As we noted above, the Commission's Office of Enforcement already instituted an investigation, pursuant to *18 C.F.R.§ 1b.6 (2007),* in January 2008 of the Tower Companies' activities in PJM's markets. Pending completion of the investigation, the Commission will hold PJM's complaint [alleging that the Tower Companies manipulated PJM's Day-ahead energy and Financial Transmission Rights markets] in abeyance. At the conclusion of the investigation, the Office of Enforcement is directed to report its findings to the Commission. Following that report, the Commission expects to issue a further order on the complaint.") (footnote omitted).

There are a number of reasons why the Commission should begin with a confidential examination and/or investigation in this proceeding. As the Commission is aware, information regarding buyer-side market mitigation determinations is highly sensitive and its disclosure has the potential to undermine competition. If the information that the NYISO uses to make such determinations were to be disclosed, even inadvertently, it would be at least as damaging to the entity in question, and to the market as a whole, as the disclosure of energy reference level data such as heat rates or variable operating and maintenance information.[75] Indeed, heat rate and variable operating and maintenance data are all part of the Unit Net CONE calculation.

This case implicates the confidential information of projects that parties, including rival entrants, would presumably seek to obtain under traditional protective agreement procedures.[76] Future cases involving future mitigation determinations would have the same characteristic. Over time, market participants would gain access to the information of an ever greater number of competitors. The greater the amount of information circulated under protective agreements, and the greater the number of entities that have access to that information, the greater the risk that confidential information would be disclosed in violation of the protective agreements, inadvertently or otherwise. Disclosures are inevitable over time and it would not be reasoned decision-making for the Commission to simply presume that they will not occur. Even absent impermissible disclosures, there is a risk that individual market participants would use the body

[75] *See New York Independent System Operator, Inc.*, 129 FERC ¶ 61,103 at P 30 (2009) (finding that "generator or equipment specific data, and transmission system information which is commercially valuable, necessary to participation in the marketplace, and not yet public is confidential. This includes bidding strategies that have not yet been made public, generator reference prices, and generator costs").

[76] Complainants and the NRG Companies represented to the Commission after the Complainants' filed this Complaint, that they "do not seek — and the NYISO can point to no instance in which Complainants have sought — the confidential cost information or other data that the NYISO has received regarding any other supplier." Complainants' July 21 Answer at 5. Even if the Complainants hold true to their recent representation to the Commission, there may be other new entrants or parties that seek such information.

of confidential information they accumulate over time to gain insights regarding their competitors' costs and strategies, and the workings of the market as a whole that would provide them with an unfair and inappropriate advantage.[77] Those employees and representatives that have access to the information through a proceeding would have the knowledge and, even if they did not intentionally or knowingly use it for an impermissible purpose, it is not reasonable to believe that it would not influence their decisions, actions, input, or advice other than in the one Commission proceeding in which the information was received. These dangers are especially acute in relatively small markets that currently have a relatively small number of major participants, such as the New York City capacity market. For example, the New York City applicable Generator UCAP for August 2011 is 9,484 MW and the New York City Load Requirement is 8,832 MW. The 3 largest New York City capacity supplier organizations make up more than 58 percent of that Generator UCAP. The 3 largest New York City loads make up more than 65 percent of the New York City Load Requirements.

All of these dangers would be avoided if the Commission exercised its discretion to initiate a confidential examination (or Part 1b investigation). In addition to better protecting sensitive information than traditional protective agreements and preventing market participants from accumulating other market participants' competitively sensitive information over time, a confidential examination or investigation could also be conducted quickly, which is consistent with Complainants' stated desire for near-immediate Commission action in this proceeding. At the end of its inquiry, the Commission could issue an order accepting the NYISO's

[77] Furthermore, there is a risk that individuals eligible to be "reviewing representatives" in one proceeding might become "competitive duty personnel," and vice versa, over time, thereby furthering the potential for knowledge of competitors' confidential information to accumulate within a single company over time. The potential for attorneys, consultants, and senior corporate officers to become conduits for the dissemination of confidential information - even inadvertently, or unintentionally through their decisions and advice being influenced by knowing such information, would also be heightened over the course of multiple cases.

determinations, requiring changes, or directing additional proceedings. If additional proceedings were held, any such proceedings could be more tightly focused and useful since the Commission would be able to use the knowledge gained from its inquiry to inform the scope of any additional procedures. Conducting an examination or investigation would also give the Commission a strong factual basis for its ultimate decision.[78]

As identified above, Complainants and the NRG Companies represented to the Commission after this Complaint was filed, and in the context of buyer-side mitigation determinations, that they "do not seek" and have not sought "the confidential cost information or other data that the NYISO has received regarding any other supplier."[79] These statements suggest that the Complainants and the NRG Companies should have no principled objection to leaving the review of confidential data in this proceeding to the Commission. The NYISO's approach would facilitate Commission review, satisfy Complainants desire to "confirm" the NYISO's mitigation determinations,[80] and still protect commercially sensitive information from improper disclosure. Complainants have also suggested that an MMU certification of NYISO exemption determinations would satisfy them.[81] NYISO's suggested procedure amounts to Commission review of NYISO determinations already vetted by the independent MMU.

Using investigatory procedures, instead of traditional protective agreement procedures, also would not deprive Complainants, or other parties in this case, of any due process rights that they might claim. The United States Supreme Court has established that regulators and courts must balance the competing interests involved when deciding whether additional procedures are

[78] *See supra* note 74.

[79] *See* Complainants' July 21 Answer at 3.

[80] Complaint at 26.

[81] *See* EL11-42 Complaint at 6, 46.

required in an administrative proceeding.[82] In this case, for all of the reasons set forth above, the balance of interests favors starting, and potentially ending, the inquiry with a confidential Commission staff review. Other decisional authorities have relied on confidential review in analogous circumstances without any apparent violations of due process.[83]

The NYISO's proposed approach would not be inconsistent with the Commission's rulings in *West Deptford Energy, LLC* ("*WDE*"). The applicant in *WDE* was seeking to protect comparably sensitive information[84] but did not request, and thus the Commission did not address, the possibility of the Commission first conducting a confidential review, or an investigation under Part 1b. There is nothing in *WDE* that would preclude the Commission from conducting such a "screening" review here or for the entirety of the proceeding, or in future challenges to mitigation determinations.

In addition, the applicant in *WDE* voluntarily initiated a Commission proceeding by requesting a Commission ruling under a PJM tariff provision that has no analogue in the NYISO tariff. *WDE* involved a request that the Commission make an exemption determination itself instead of reviewing determinations already made by an ISO in collaboration with an

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[82] *Matthews v. Eldridge*, 425 U.S. 319 (1976).

[83] *See, e.g., Tavoulareas v. Washington Post Co.*, 724 F.2d 2010, 1023 (C.A.D.C. 1984) (stating that an entity "has a constitutionally protected privacy interest in avoiding the public disclosure of sensitive commercial information not used at trial. Given the long tradition of common law protection of confidential commercial information …, and the crucial importance of such material to continuing business operations, a company's sensitive commercial documents not yet in the public domain fall within the Constitution's protection of corporate privacy interests. Few categories of business information are more analogous to individuals' constitutionally protected personal affairs than trade secrets and related commercial information"; 29 U.S.C. § 664 (requiring the Occupational Safety and Health Administration ("OSHA") to keep confidential, with disclosure limited to other officers or employees of OSHA, any trade secrets obtained in the course of an investigation or a proceeding).

[84] In that regard, the fact that the applicant in *WDE* chose to withdraw its filing, rather than permit its confidential data to be disclosed under a protective agreement, indicates that it is unreasonable to expect potential entrants to rely on such agreements to protect the kind of information implicated in this proceeding.

independent MMU. The applicant in *WDE* emphasized that the determination it was seeking was limited to itself. By contrast, the Complainants in this case have targeted at least two entities, and many others would presumably have their information disclosed under protective agreements in similar proceedings in the future.[85] The applicant in WDE was a relatively small potential entrant into a very large market. This case involves larger entities in the much smaller New York City market. The New York City capacity market presently has approximately 9,900 MW of Unforced Capacity. The price sensitivity of the New York City market is demonstrated by the fact that 100 MW equates to $1.06/kW-month on the currently effective New York City Demand Curve. Comparatively, WDE is a proposed 650 MW resource that would sell into a much larger market in PJM.

Because of the limited scope of the issues in *WDE*, the Commission did not have to consider precedential impacts, including the likely proliferation of future exemption determination litigation in all organized markets that have mitigation rules. Due to these differences, the Commission's finding in *WDE* that the balance of interests favored third party access to confidential information is not controlling here.[86]

Therefore, to the extent that the Commission decides that it will not dismiss the Complaint based solely on the pleadings, it should direct the NYISO to file its confidential supplement, and begin an expedited confidential examination of the NYISO's determinations that are the subject of this proceeding. If that review proved to be insufficient to support a Commission order resolving all issues, the Commission could then initiate an expedited investigation under Part 1b to consider any remaining questions more closely. If the

[85] *See* EL11-42 Complaint at 45 (asking the Commission to "adopt certain safeguards … both for the projects that are currently being studied … and for any future projects").

[86] To the extent the Commission holds that its finding in *WDE* is applicable in this proceeding, the NYISO reserves the right to request reconsideration of that decision.

Commission were to conclude that further proceedings were necessary it could proceed as discussed in the next section.

3. To the Extent that the Commission Decides that Non-Confidential Proceedings Are Warranted, It Should Initiate Expedited Paper Hearing or Technical Conference Procedures

In the event that the Commission determines that additional proceedings are necessary at the conclusion of a confidential examination, or in lieu of such an examination, the NYISO respectfully recommends that it initiate expedited paper hearing or technical conference proceedings to consider any issues that it believes require further on-the-record development. If the Commission were to reach this conclusion, the NYISO would be prepared to promptly file the confidential supplemental answer described in Section III.E.2 above, along with a proposed form of protective agreement.

It is well-established that the Commission has discretion to decide which procedures would be best suited to resolving factual questions and developing an appropriate record.[87] The Commission has stated that "[a] paper hearing procedure is appropriate where witness motive, intent, and credibility are not at issue and issues of material fact can be adequately addressed on the written record."[88] In this case, all such issues could be resolved based on written arguments prepared by parties that executed non-disclosure certificates after the NYISO submitted its confidential supplement. The Commission has recently used paper hearing procedures to

[87] *See, e.g.*, *Blumenthal v. FERC*, 613 F.3d 1142, 1144-45 (D.C. Cir. 2010) (finding that "FERC's choice whether to hold an evidentiary hearing 'is generally discretionary.' … Even when there are disputed factual issues, FERC does not need to conduct an evidentiary hearing if it can adequately resolve the issues on a written record") (internal citations omitted); *Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997) ("FERC may resolve factual issues on a written record, unless motive, intent, or credibility are at issue or there is a dispute over a past event").

[88] *See Ameren Services Co. and Northern Indiana Public Service Co. v. Midwest Independent Transmission System, Inc.* 131 FERC ¶ 61,214 at PP 10-11 (2011).

explore a number of buyer-side capacity market mitigation issues in ISO-NE.[89] The only relevant questions would concern the conformance of the NYISO's exemption analysis, assumptions, and estimates with the Pre-Amendment Rules. All relevant information would be contained in the confidential supplement**.** There would be no need to examine the "motive, intent, and credibility" of witnesses because there has been no credible claim that would call into question the motive, intent, or credibility of the NYISO staff, or the MMU, in making the determinations. Moreover, a paper hearing could be concluded more rapidly than a traditional hearing. A paper hearing would lead directly to a Commission decision without the intermediate steps associated with the issuance and review of an administrative law judge's non-binding initial decision. If Complainants and others genuinely believe that time is of the essence in this proceeding, they should have no objection to expedited paper hearing procedures.

Alternatively, the Commission could expeditiously hold a technical conference where the Commission staff and parties that have executed non-disclosure certificates could discuss whatever issues the Commission deems necessary. The NYISO has some concern that the risk of confidential information being disclosed would be greater at a technical conference than in paper hearing because there would be more face-to-face and verbal interactions among the parties. By its very nature, a paper hearing would also seem to allow for more in-depth consideration of a broader range of issues. Nevertheless, it appears to the NYISO that a technical conference could be a viable alternative, especially if the issues where the Commission thinks it necessary to develop additional record are narrow in scope.

[89] *See ISO New England, Inc. and New England Power Pool Participants Committee*, 135 FERC ¶ 61,029 (2011).

IV. REQUEST FOR EXPEDITED ACTION

Regardless of the procedural approach that the Commission chooses in response to the Complaint, the NYISO respectfully requests that it issue an order as expeditiously as practicable consistent with affording all parties a reasonable opportunity to respond to the NRG Comments, which are effectively a supplement to the Complaint that advances new arguments.[90] Although the Complaint lacks merit, and its arguments for "emergency" interim relief are unsupported and invalid, it nevertheless has the potential to create harmful market uncertainty. Such uncertainty may distort the ICAP Spot Market Auctions and discourage potential new entrants. An expedited Commission order could dispel any such uncertainty.

Given that the Complainants have already requested fast-track processing they presumably would not oppose the NYISO's request for expedited action even though the NYISO seeks it for wholly different reasons. Similarly, the NRG Companies have asked for "immediate action," albeit for invalid reasons, and thus should have no objection to the NYISO's request.

V. COMPLIANCE WITH COMMISSION RULE 213(c)(2)(i)

Attachment 1 to this Answer addresses the formal requirements of Commission Rule 213(c)(2) in order to ensure the NYISO's compliance with them.

VI. CONCLUSION

For the foregoing reasons, the NYISO respectfully requests that the Commission deny the Complaint in its entirety based solely upon the pleadings. In the alternative, the NYISO respectfully requests that the Commission review and uphold the NYISO's actions using the

[90] As explained in Section III.C, above, this request for expedited action should not be construed as support for the Complainants' requests for "emergency" interim relief.

procedures that it determines are most consistent with the need to protect confidential information.

Respectfully submitted,

/s/ Gloria Kavanah
Counsel to the
New York Independent System Operator, Inc.

August 3, 2011

CERTIFICATE OF SERVICE

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

Dated at Washington, DC, this 3rd day of August, 2011.

/s/ Vanessa Colón
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

Attachment 1

Compliance with Commission Rule 213(c)(2)

A. Specific Admissions and Denials of Material Allegations

In accordance with Commission Rule 213(c)(2)(i), to the extent practicable and to the best of the NYISO's knowledge and belief at this time, the NYISO admits or denies the factual allegations in the Complaint, including the Motion to Lodge, below. To the extent that any fact or allegation in the Complaint is not specifically admitted below, it is denied. Except as specifically stated herein, the NYISO does not admit any facts in the form or manner stated in the Complaint. Denials of allegations made in the text of the Complaint (including the Motion to Lodge) should be understood as encompassing all related allegations and assertions in the affidavits accompanying the Complaint and in the Motion to Lodge.

- The NYISO categorically denies all allegations and characterizations that it has been, or is, influenced by NYPA or any other New York State entity, in its implementation of the buyer-side market power mitigation rules (both the Pre-Amendment Rule and to the extent referenced, the In-city Buyer Side Mitigation Rules), that it or its conduct is "part of a targeted pattern" of efforts to lower prices in the short-term, and that it is seeking "to effectively nullify" its buyer-side market power mitigation rules (Complaint at 4-5, 5-6, 19-20).

- The NYISO denies all allegations and characterizations that its implementation of its buyer-side market power mitigation rules (both the Pre-Amendment Rule and to the extent referenced, the In-city Buyer Side Mitigation Rules) was "erroneous," "blatantly erroneous," "improper," "patently absurd" or predicated upon a misreading or other violation the Services Tariff or Commission orders and policies, or that there were "many deficiencies" in the NYISO's analysis. This denial encompasses all determinations that were made, or that may have been made, under the buyer-side market power mitigation rules including those with respect to AEII, BEC, or any other potential new entrant (Complaint at 1-2, 3, 4, 6, 18, 23, 25; Motion to Lodge at 1-3, 5).

- The NYISO denies that "[t]he details of NYISO's application of the Buyer Side Market Power Rules have long been a concern of market participants." The statement is overbroad because while the Complainants, their trade associations, and a handful of other market participants have expressed concerns regarding the NYISO's implementation of its buyer-side mitigation measures, the majority of NYISO market participants have not (Complaint at 2).

- The NYISO admits that it received requests for exemption determinations for AEII and BEC and that it determined prior to the effective date of the In-City Buyer-Side Mitigation Measures that both projects are exempt from Offer Floor mitigation (Complaint at 1-2).

- The NYISO admits that the purpose of its buyer-side market power mitigation rules was, and is, to "prevent uneconomic entry from artificially depressing ICAP clearing prices" (Complaint at 2).

- The NYISO denies that the July (or August) ICAP Spot Market Auction Results demonstrate that artificial price suppression has occurred or that the NYISO has failed to prevent it (Complaint at 2, 8, 19, 21, 22, 39, 44, 49).

- The NYISO neither admits nor denies that AEII cost more than $1.3 billion to build. The information that the NYISO has regarding AEII's costs is competitively sensitive and confidential information the NYISO is not authorized to release it at this time (Complaint at 2).

- The NYISO neither admits nor denies that AEII's entry "drove a 50 percent decrease in the market-clearing price relative to the prior month's ICAP Spot Market Auction" and that it will drive prices to or near zero in future auctions. The confidentiality provisions of the NYISO tariffs' prevent it from disclosing information regarding a named supplier's participation in its auctions. (The limited exception to the prohibition on the NYISO's release of auction information, not applicable to the Complaints' statement, is governed by Services Tariff §6.3.) The NYISO is not required to, and will not, speculate regarding future auction prices (Complaint at 2, 3, 5, 19, 21, 50).

- The NYISO denies all allegations that it has been a less "enthusiastic" proponent of buyer-side than of seller-side mitigation (Complaint at 2-3).

- The NYISO neither admits nor denies the allegation that other ISOs/RTOs have been less "enthusiastic" proponents of buyer-side than of seller-side mitigation. The NYISO has no direct knowledge of other ISOs/RTOs intentions or objectives in administering their market power mitigation programs (Complaint at 2-3).

- The NYISO denies that AEII is a "poster child" for the kind of uneconomic entry that should be subject to mitigation. The NYISO has properly determined that AEII should be exempt from Offer Floor mitigation under the Services Tariff (Complaint at 3).

- The NYISO neither admits nor denies that AEII is "completely insulated from market forces" because of its PPA. The question of whether AEII is "insulated from" all market forces encompasses economic factors that are beyond the scope of the NYISO's capacity market rules (Complaint at 3).

- The NYISO neither admits nor denies claims that the entry of AEII will "cause units valued at a fraction of its cost to be unable to cover their cash costs, much less to earn a return or make debt payments." The statement is over broad and does not recognize other potential causes for a unit's financial concerns, or the impact of changing market conditions on their finances. To the extent the NYISO possesses information on an individual unit's finances, that information is commercially sensitive and confidential information (Complaint at 3).

- The NYISO denies all claims and characterizations that its administration of its buyer-side market power mitigation rules (both the Pre-Amendment Rules and the In-City Buyer-Side Mitigation Measures) has been characterized by "opaqueness," insufficient transparency, "black-box secrecy," a "shroud" of secrecy, or the keeping of "dirty little secrets" (Complaint at 3-4, 5-6).

- The NYISO denies that its determinations that AEII and BEC should not be subject to Offer Floor mitigation must be remedied to avoid "irreparable harm" to the In-City capacity market, to consumers, or to competitive markets in general (Complaint at 4, 5).

- The NYISO neither admits nor denies allegations regarding the motives or intentions of NYPA or other New York State entities. The NYISO has no knowledge of any other entity's motives or intentions. The NYISO is not aware of any effort by NYPA or other State entities to influence the NYISO's buyer-side market power mitigation process and, as stated above, categorically denies all claims that its determinations were influenced by them (Complaint at 4-5, 5-6).

- The NYISO denies that it has a "bias against generators" and that its April 11, 2011 letter to the editor of the *New York Post* somehow constitutes evidence of such "bias" (Complaint at 4).

- The NYISO neither admits nor denies that Complainants "earn as much as eighty percent of their annual revenues from sale of capacity in the Summer Capability Period" or that Astoria Generating "may be forced to pursue a restructuring in the bankruptcy courts." Individual market participants have much greater knowledge of their financial circumstances, and financial prospects, than the NYISO (Complaint at 6, 20, 21-22; Motion to Lodge at 2).

- The NYISO denies that Complainants' request for "emergency" interim relief is justified, that granting it would "avoid irreparable harm to the greatest number of parties . . . ," or would not harm other parties, or that "market participants" will lose confidence in the NYISO-administered capacity markets if emergency relief is not granted (Complaint at 7-8, 19; Motion to Lodge at 3).

- The NYISO denies Complainants' implicit suggestion that new entry that contributes to lower capacity prices constitutes legally cognizable "irreparable harm" to Complainants or to any other entity that enjoyed higher capacity revenues prior to the new entry (Complaint at 7).

- The NYISO denies Complainants' suggestion that the issuance of a Commission order granting their requested "emergency" relief by August 23, 2011 could be implemented in time to impact the September ICAP Spot Market Auction (Motion to Lodge at 4-5).[91]

[91] The NYISO is not addressing the claims regarding actions that might be taken before the August ICAP Spot Market Auction because those claims are now moot (Complaint at 8).

- The NYISO admits that the descriptions set forth in Section II of the Complaint, "Description of Complainants and Respondent," are accurate (Complaint at 10-11).

- The NYISO admits that the recitation of the sequence of filings and orders, as well as the description of auction results, in Section III "Background" and (with respect to auction results) in the Motion to Lodge is accurate (Complaint at 12-17; Motion to Lodge at 1, 3).

- The NYISO neither admits nor denies the accuracy of Complainants' descriptions and characterizations of the filings and orders referenced in Section III (Complaint at 12-17).

- The NYISO denies that Complainants, or other suppliers, have been deprived of a reasonable opportunity to recover their costs (Complaint at 3, 18, 20-21, 45-46; Motion to Lodge at 2).

- The NYISO denies that capacity prices in the July and August ICAP Spot Market Auctions were below what would be expected in a reasonably competitive market (Complaint at 18-20, Motion to Lodge at 2).

- The NYISO denies that it has taken any actions that would harm the legitimate interests of demand side resources (Complaint at 19, 21, 39, 42, 50; Motion to Lodge at 4).

- The NYISO denies that New York City has been "bifurcated into two wholesale markets," one for "favored" new resources and the other for existing resources (Complaint at 19-20).

- The NYISO denies that there is a need for "provision of supplemental revenues through, for example, reliability must-run contracts" to protect existing suppliers from capacity price reductions associated with the entry of AEII or other new entry (Complaint at 22).

- The NYISO denies Complainants' assertion that they are likely to prevail on the merits (Complaint at 25, n. 25).

- The NYISO denies any suggestion Complainants may be making that the S&P Report is evidence that recent capacity prices are depriving them of a reasonable opportunity to recover their costs or that it somehow buttresses the legal case for their request for emergency relief (Motion to Lodge at 3-4).

B. Defenses

In accordance with Commission Rule 213(c)(2)(ii), the NYISO sets forth the following defenses.

- Complainants have failed to meet their burden of proof under Sections 206 and 306 of the FPA, and Commission Rule 206.

- Complainants have not shown that the NYISO's exemption determinations were contrary to the tariff or otherwise unjust and unreasonable, let alone that they were "absurd" or that they could have only been reached in "blatant violation" of the Services Tariff.

- Complainants have not shown that the NYISO was under the influence of New York State or any New York State entity, or that its independence was somehow compromised or "tainted" when it made its exemption determinations.

- Complainants have not shown that the decline in capacity prices from the June to the July and August ICAP Spot Market Auctions, or the possibility that prices in future auctions will be lower than they were in the recent past, deprives Complainants of a "reasonable opportunity to recover their costs."

- Complainants' purported "demonstration" that the NYISO's decision to exempt AEII was "absurd" is a function of their own carefully selected assumptions.

- Complainants have not demonstrated that an RMR mechanism is needed in New York.

C. Proposed Resolution Process

Commission Rule 213(c)(4) states that an answer "is also required to describe the formal or consensual process it proposes for the resolving the complaint." In compliance with that requirement, the NYISO requests that the Complaint be dismissed based solely on the pleadings in this proceeding. In the alternative, as described in the body of the Answer, the Commission should start by conducting a confidential examination, and if necessary investigation, of the NYISO's determinations with respect to AEII and BEC. The Commission should only consider additional proceedings, *e.g.,* an expedited paper hearing or technical conference, to the extent that it finds that its confidential review does not provide a sufficient basis for it to act on Complainants' challenge to the NYISO's determinations.