UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric and Gas Corp., Rochester Gas and Electric Corp., and Central Hudson Gas and Electric Corp.,	)	
Complainants	)	**Docket No. EL15-26-000**
v.	)	
New York Independent System Operator, Inc.	)	
Respondent	)	

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

In accordance with Rule 213 of the Commission's Rules of Practice and Procedure, the New York Independent System Operator, Inc. ("NYISO") respectfully submits this request for leave to answer and answer to certain comments and protests filed in this proceeding. Nothing in any of the comments or protests justifies denying the *Complaint of the Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric and Gas Corp., Rochester Gas and Electric Corp., and Central Hudson Gas and Electric Corp.* ("Complaint"). The Complaint demonstrated the need to add a competitive entry exemption to the NYISO's buyer-side capacity market power mitigation measures ("BSM Rules").[1] It therefore satisfied the burden of proof under the Federal Power Act ("FPA") notwithstanding attempts by some parties to impose a more stringent standard of review.

[1] The BSM Rules are set forth in Section 23.4.5.7, *et seq.* of the Market Administration and Control Area Services Tariff ("Services Tariff").

The NYISO reiterates its strong support for the addition of a competitive entry exemption to the BSM Rules. The Complaint's proposed tariff revisions, including the modifications recommended by the NYISO in its January 15 Answer[2] (which are referred to therein and herein as the "proposed CEE rules"), would not be vulnerable to gaming or be impracticable to implement. Adopting the proposed CEE rules would also not violate the rights of earlier capacity market entrants or be inconsistent with their reasonable expectations.

Finally, this answer: (i) informs the Commission of the NYISO's views on certain additional modifications to the Complainant's proposed tariff revisions that other parties have proposed in this proceeding; and (ii) asks the Commission not to act on other proposed tariff revisions at this time. This answer also includes a corrected version of Attachment 1 to the January 15 Answer to address a typographical error in the original Attachment 1.

I. REQUEST FOR LEAVE TO ANSWER

The Commission's procedural rules authorize answers to pleadings styled as "comments." The Commission also has exercised its discretion to accept answers to protests when they help to clarify complex issues, provide additional information, or are otherwise helpful in the development of the record in a proceeding.[3] The Commission should follow its precedent and accept the NYISO's answer. This answer addresses inaccurate statements and mischaracterizations, clarifies complex issues, and provides additional information that will help

[2] *See Answer of the New York Independent System Operator, Inc. in Support of Complaint,* Docket No. EL15-26-000 (Jan. 15, 2015) ("January 15 Answer").

[3] *See, e.g., Southern California Edison Co.,* 135 FERC ¶ 61,093 at P 16 (2011) (accepting answers to protests "because those answers provided information that assisted [the Commission] in [its] decision-making process"); *New York Independent System Operator, Inc.,* 134 FERC ¶ 61,058 at P 24 (2011) (accepting the answers to protests and answers because they provided information that aided the Commission in better understanding the matters at issue in the proceeding); *PJM Interconnection, LLC,* 132 FERC ¶ 61,217 at P 9 (2010) (accepting answers to answers and protests because they assisted in the Commission's decision-making process).

the Commission to resolve the issues. The NYISO has limited its response to focus on the most significant issues. Its silence with respect to other matters in the comments and protests should not be construed as agreement with them.

II. ANSWER

A. Complainants Have Satisfied the Burden of Proof

The Independent Power Producers of New York, Inc. and the Electric Power Supply Association (collectively referred to herein as "IPPNY"), Entergy Nuclear Power Marketing, LLC ("Entergy"), and Cogen Technologies Linden Venture, L.P. ("Linden Cogen") all claim that the Complaint should be rejected because it allegedly does not satisfy the burden of proof. They contend that the Complaint fails to provide adequate justification for its proposed tariff revisions.[4] They claim that the Complaint would overturn,[5] and in some cases constitute a collateral attack on,[6] a supposedly settled Commission policy and that a competitive entry exemption would subvert the BSM Rules in fundamental ways.[7] IPPNY, Entergy, and Linden Cogen suggest that the Complaint could only be justified if extraordinary showings were made. For example, Linden Cogen would require the Complaint to have established that the existing BSM Rules have: "(i) impeded legitimate, economic entry of capacity; (ii) resulted in capacity shortages; or (iii) produced capacity prices that are unjust and unreasonable."[8]

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[4] *See Protest of Independent Power Producers of New York, Inc. and Electric Power Supply Association*, Docket No. EL15-26-000 at 10-11 (Jan.15, 2015) ("IPPNY Protest); *Motion to Intervene and Protest of Entergy Nuclear Power Marketing, LLC*, Docket No. EL15-26-000 at 7-10 (Jan. 15, 2015) ("Entergy Protest"); *and Protest of Cogen Technologies Linden Venture L.P.*, Docket No. EL15-26-000 at 15-24 (Jan. 15, 2015) ("Linden Cogen Protest").

[5] *See* Linden Cogen Protest at 25.

[6] *See* Entergy Protest at 13 *and* Linden Cogen Protest at 14.

[7] *See* Linden Cogen Protest at 17.

[8] Linden Cogen Protest at 4.

In reality, the Complaint more than adequately satisfied the requirement that complaints be supported by "substantial evidence."[9] The Commission has stated that "rather than bald allegations, [complaining parties] must make an adequate proffer of evidence, including pertinent information and analysis to support its claims."[10] The Complaint met that standard by explaining how the existing BSM Rules could potentially result in over-mitigation and deter new entry. The Complaint included "pertinent information and analysis;" for example, in the Miller Affidavit,[11] by incorporating past statements by the NYISO and the independent Market Monitoring Unit ("MMU") highlighting the need for a competitive entry exemption,[12] and by pointing to relevant precedent from other markets.[13] The Complaint's argument for an exemption is buttressed by the January 15 Answer and the MMU's comments filed in this proceeding.[14]

Similarly, the Complaint more than sufficiently explains why the proposed tariff language implementing a competitive entry exemption should be accepted by the Commission.

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[9] Commission precedent is clear that the Complaint need only demonstrate by a preponderance of the evidence that the establishment of a competitive entry exemption is justified. *See, e.g., Louisiana Pub. Serv. Corp. v. Entergy Corp., et. al.*, 139 FERC ¶ 61,240 at n. 217 (2012).

[10] *See, e.g., Illinois Municipal Electric Agency v. Central Illinois Public Serv. Co.*, 76 FERC ¶ 61,084, at p. 61,482 (1996).

[11] *See, e.g.,* Affidavit of Richard B. Miller, Exhibit A to Complaint ("Miller Affidavit") at PP 30-32.

[12] *See, e.g.,* Complaint at 7, discussing the NYISO's proposal to the Management Committee to adopt a Competitive Entry Exemption; and Miller Affidavit at P 25, citing the MMU's *2013 State of the Market Report for the New York ISO Markets* (May 2014) ("2013 SOM Report").

[13] Complaint at 6-7, 11-12 and Miller Affidavit at P 27. Commission precedent regarding other ISOs/RTOs is not always dispositive for questions concerning the NYISO and there are often important differences between regional capacity market designs. *See, e.g., Answer of the New York Independent System Operator, Inc.*, Docket No. EL15-33 (Jan. 15, 2015) at 10-11. Nevertheless, in this instance, the general rationale underlying the Commission's acceptance of a competitive entry exemption in the PJM Interconnection-administered market is valid in the context of the NYISO-administered capacity market.

[14] *See Motion to Intervene and Comments of the New York ISO's Market Monitoring Unit* (Jan. 15, 2015) ("MMU Comments").

The January 15 Answer supplements and reinforces the Complaint while recommending that some improvements be included in the proposed CEE rules.

Commission precedent does not require that the Complaint make the extraordinary showings that IPPNY, Entergy, and Linden Cogen demand.[15] The Commission should not deviate from its normal standard of review in this case, *e.g.*, by insisting on impracticably definitive proof that entry has been, or would be, discouraged absent a competitive entry exemption.[16] It is sufficient for the Complaint to have demonstrated that the absence of competitive entry exemption is unreasonable, has the potential to be a barrier to entry, and that its application is unlikely to harm the market. Despite what IPPNY, Entergy, and Linden Cogen have claimed, adopting a competitive entry exemption would not fatally undermine the BSM Rules. It would instead introduce a necessary improvement that would reduce the risk of over-mitigation without leading to under-mitigation.[17]

The Complaint is consistent with, and does not constitute a collateral attack on, Commission orders approving the BSM Rules. Specifically, the Commission's Order in September 2008 accepting the NYISO's proposal to eliminate an unworkable "net buyer"

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[15] *See, e.g.,* IPPNY Protest at 10-18; Linden Cogen Protest at 15-21; *and* Entergy Protest at 7-10 and Attachment A, Affidavit of Alfred M. Schnitzer at 15 (arguing that the Complainants must show the existing "BSM tariff provisions have actually prevented economic entry").

[16] *See, e.g., Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 FR 49842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323 (2011) at P 58, citing *Associated Gas Distributors v. Federal Energy Regulatory Comm'n*, 824 F.2d 981, 1008-09 (D.C. Cir. 1987) ("Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall.").

[17] *See, e.g., Post-Technical Conference Comments of the New York Independent System Operator, Inc.* at 13, Docket No. AD13-7-000 (Jan. 18, 2014); *Written Statement of Emilie Nelson, Vice President – Market Operations, on Behalf of the New York Independent System Operator*, Inc. at 28-29, Docket No. AD14-18-000 (Nov. 5, 2014); *and Written Statement of Dr. David B. Patton, Market Monitoring Unit for the New York Independent System Operator* at 7, Docket No. AD14-18-000 (Nov. 5, 2014)

requirement,[18] which is discussed further below, in no way precludes the adoption of a competitive entry exemption today. Even if the earlier order could reasonably be interpreted as intentionally establishing a rule that competitive entrants[19] must be subject to mitigation, it would not mean that the rule could not be changed in response to the Complaint[20] and in light of evolving Commission policy.

B. The Proposed CEE Rules Will Not Permit Applicants to Inappropriately Obtain Competitive Entry Exemptions and Will Not Have the Risks that Led to the Elimination of the Net Buyer Rule in 2008

IPPNY, EPSA, and Linden Cogen argue that a competitive entry exemption should be rejected alleging that the proposed rules are too weak. They claim that the proposal would force the NYISO to rely "on a process of self-certification in which it must trust new entrants to certify that they are not a party to any prohibited contracts."[21] They also suggest that the proposal is inconsistent with past NYISO statements explaining why including a "net buyer" rule in the BSM Rules was impracticable.[22] IPPNY argues that "the duration for required certification is

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[18] *New York Independent System Operator, Inc.*, 124 FERC ¶ 61,301 at P 29 (2008) ("September 2008 Order") ("Parties requesting rehearing have convinced us that defining net buyers raises significant complications and provides undesirable incentives for parties to evade mitigation measures.")

[19] References to "competitive entrants" in this Answer are meant to apply to entrants that would qualify for the competitive entry exemption under the BSM Rules proposed in this proceeding.

[20] It is well-established that the Commission can abandon precedents or practices that it no longer believes are correct, so long as it provides a reasoned analysis for its decision. *See Williams Gas Processing-Gulf Coast Company, L.P. v. Federal Energy Regulatory Comm'n*, 475 F.3d 319, 326 (D.C. Cir. 2006)("Indeed we expect that an agency may well change its past practices with advances in knowledge in its given field or as its relevant experience and expertise expands.") *and ANR Pipeline Co. v. Federal Energy Regulatory Comm'n*, 205 F.3d 403, 407 (D.C. Cir. 2000)("An agency may not of course depart from prior policy without explanation. But FERC explained how changed circumstances justified a new policy.").

[21] IPPNY Protest at 18. *See also* Entergy Protest at 25.

[22] In May 2008, the Commission conditionally approved rules that limited the applicability of the original version of the BSM Rules to "net buyers." *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 (2008). A "net buyer" was defined as "a market participant whose capacity purchase obligation as an LSE outweighs the amount of capacity supply it owns or controls." *Id.* at n5. The NYISO ultimately concluded, and persuaded the Commission on rehearing, that the net buyer limitation

insufficient" and would allow entrants to game the exemption by waiting until after they commence operations to obtain subsidies.[23]

None of these objections has merit. First, the NYISO will not be relying solely on the certification requirement. In fact, under the proposed rule, the NYISO will be conducting its own review, in consultation with the MMU, to determine eligibility for competitive entry exemptions.[24] The certification requirement is a critically important and necessary part of those reviews, but neither the NYISO nor the MMU will simply rely on, or accept, certifications without further review.

Further, pursuant to the proposed tariff revisions, the MMU will publish a report on the NYISO's competitive entry determinations.[25] The reports will increase transparency regarding the application of the exemption in the same way as the MMU's reports assessing whether mitigation and Offer Floor determinations and calculations are conducted in accordance with the Services Tariff.[26] The MMU's reports have strengthened market participant understanding of and confidence in the application of the BSM Rules and can be expected to do the same for competitive entry determinations.

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should be dropped, principally because it would be impractical to implement and would be vulnerable to applicants establishing corporate structures aimed at gaming the "net buyer" definition. September 2008 Order at P 29.

[23] IPPNY Protest at 19. *See also* Entergy Protest at 25.

[24] *See* Exhibit B to Complaint at Section 23.4.5.7.8.1.5 ("When evaluating eligibility for a Competitive Entry Exemption the ISO shall consult with the Market Monitoring Unit") and at Section 23.4.5.7.8.4.2 ("Concurrent with the ISO's posting of its final determination, the Market Monitoring Unit shall publish a report on the ISO's determination in accordance with Sections 30.4.6.2.11 and 30.10.4 of Attachment 0 to this Services Tariff.").

[25] *Id*. *See also* January 15 Answer at Attachment 5, proposed revisions to Section 30.4.6.2.11 (proposed renumbering to 30.4.6.2.12), Open Access Transmission Tariff ("OATT") Attachment O.

[26] *Astoria Generating Company L.P. v. New York Independent System Operator, Inc*., 139 FERC ¶ 61,244 at P 30 (2012). *See also* New York Independent System Operator, Inc., *Compliance Filing*, Docket No. ER12-2414-000 (Aug. 6, 2012, corrected Aug. 7, 2012).

At the same time, the certification requirement will help to make the administration of the proposed CEE rules feasible even though the NYISO indicated in 2008 that the "net buyer" rule it proposed in 2007 was not. As the September 2008 Order recounted, the NYISO argued that a net buyer rule would create problematic incentives for "buyers to behave strategically to avoid categorization as net buyers."[27] The NYISO was also concerned that contractual relationships designed to circumvent a net buyer rule would be very difficult to identify and evaluate.[28]

The proposed CEE rules avoid these problems by not requiring an evaluation of the nature or objectives of sponsoring entities. They simply prohibit "non-qualifying contractual relationships" with realistically foreseeable sponsors of uneconomic entry. The definition of "non-qualifying contractual relationships" is intentionally broad to capture the whole range of possible subsidy arrangements. Exceptions to the definition are intentionally limited and specific. The entrant seeking an exemption has the obligation to review its own arrangements and then certify that it does not have prohibited contractual relationships. An entrant faces serious compliance risks if it provides false, misleading, or inaccurate information. Moreover, the NYISO and all stakeholders can reasonably have greater confidence in a certification requirement today than was the case in 2008. Seven years ago, the Commission's enforcement program was still new and relatively untested. Today the Office of Enforcement has a well-known record of taking forceful action against parties that make false or misleading statements to ISOs/RTOs.[29]

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[27] September 2008 Order at P 28.

[28] *Id.*

[29] *See e.g., In Re Make-Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068 (2013) (assessing a civil penalty of $285,000,000 and a disgorgement of $125,000,000 on JP Morgan Ventures Energy Corporation for, among other things, making false statements or material omissions to the California Independent System Operator Corporation ("CAISO") and the Midcontinent Independent System Operator, Inc.); *Gila River Power, LLC*, 141 FERC ¶ 61,136 (2012) (assessing a civil penalty of

It is not plausible for IPPNY to claim that the certification requirement would allow for gaming because the certifications would terminate at the time "the Generator first produces or the UDR project first transmits energy (the "Entry Date").[30] The NYISO's and MMU's oversight and review will not cease at the Entry Date. If an entrant obtains an exemption based on a certification that it has no arrangement or unwritten understanding for a disqualifying subsidy only to then enter into, or reveal, such an arrangement after the Entry Date it would obviously raise serious concerns. Such concerns would be scrutinized by both the NYISO and the MMU and come to the Commission's attention. Given the Commission's enforcement history it seems very unlikely that entrants would pursue the stratagems suggested by IPPNY. If they did they could also be subject to the proposed tariff-based penalties described in the January 15 Answer.

It is also highly unlikely that a prospective entrant would be able to obtain financing if it engaged in a scheme to misrepresent itself as a competitive entrant while actually intending to receive subsidies under secret post-Entry Date arrangements. As a practical matter, projects have their financing in place well before they are ready to commence operations. Investors are very unlikely to support projects whose business plans are predicated on making false statements to the NYISO and knowingly risking severe penalties. These factors, along with the transparency of the NYISO's application of the BSM Rules and the NYISO's and the MMU's scrutiny, provide adequate protections.

$2,500,000 and the disgorgement of $911,553 for, among other things, submitting inaccurate information to the CAISO); *and Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056 (2013) (assessing a penalty of $1,500,000 and a disgorgement of $172,645 for, among other things, submitting inaccurate information to the CAISO).

[30] "Entry Date" for purposes of a competitive entry exemption is defined in proposed Section 23.4.5.7.8.1 of the Services Tariff.

C. Adopting the Proposed CEE Rules Would Not Violate the Rights, or the Reasonable Expectations, of Earlier Entrants

Linden Cogen argues that its investors made their investment in December 2013 with the understanding that the BSM Rules "would guard against capacity price volatility as a result of uneconomic new entry (whether the new entry was subsidized or not)."[31] It contends that investors and Market Participants are entitled to assume that important market rules, including the BSM Rules, "will not be materially modified absent compelling changes in facts or circumstances."[32]

The NYISO agrees that stable market rules are important. It has recently emphasized, that stability promotes confidence and encourages investments.[33] But the NYISO has also stated that market rules must continue to improve through incremental enhancements and "measured changes."[34] The proposed CEE rules are an example of an incremental improvement that will protect against over-mitigation without undermining the purpose of the BSM Rules. Market improvements are not prohibited simply because certain market participants might prefer that rules not evolve.

Investors in December 2013 could not have reasonably expected that there would never be a competitive entry exemption in New York. As the January 15 Answer noted, the NYISO first proposed a competitive entry exemption in 2012 and pursued its adoption via its stakeholder

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[31] Linden Cogen Protest at 24.

[32] *Id.*

[33] *See, e.g. Written Statement of Emilie Nelson, Vice President – Market Operations, on behalf of the New York Independent System Operator, Inc.*, Joint Technical Conference on New York Markets & Infrastructure, Docket No. AD14-18-000 at 31 (explaining that "maintaining a stable market design over time contributes to market certainty. Such certainty is essential to facilitating long-term investment in existing and new resources."), *available at* <http://www.ferc.gov/CalendarFiles/20141119133149-NYISO%20Nelson%20Written%20Statement.pdf> ("Nelson Statement").

[34] Nelson Statement at 31.

process through to the stakeholder votes in May 2014.[35] The MMU has called for such an exemption in its last two *State of the Market Reports*.[36]

D. The NYISO's Views on the MMU's and the City of New York's Requested Additional Modifications to the Complainant's Proposed Tariff Revisions

As noted above, the NYISO proposed certain modifications to Complainants' proposal. In general, the NYISO asked the Commission to restore certain language to make the rules proposed by the Complainants more readily implementable, effective, and complete. The MMU's comments support the NYISO's proposal and make certain recommendations for further revisions.[37] The City of New York ("City") also proposed additional adjustments. The NYISO addresses these proposals below.

1. The NYISO Takes No Position on the MMU's Proposal that All Contracts with Non-Qualifying Entity Sponsors Must Be Priced at Fair Market Value or Cost of Service Value, as Appropriate, to Avoid Classification as "Non-Qualifying Contractual Relationships"

The MMU recommends that the *de minimis* exception to the non-qualifying contractual relationship rule be revised. It would require that contracts with Non-Qualifying Entity Sponsors be priced at "fair market value or cost of service levels, as appropriate based on the type of contract."[38] The MMU expresses concern that without such a requirement the *de minimis* exception would still "potentially allow a material amount of subsidies to be provided to the

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[35] *See* January 15 Answer at 4-5 n.12-14.

[36] *See* 2013 SOM Report at xii, 25-26, 95, available at: <https://www.potomaceconomics.com/uploads/nyiso_reports/NYISO_2013_SOM_Report.pdf>. *See also 2012 State of the Market Report for the New York ISO Markets* at vii, 23-24, 80 (April 2013), available at: <https://www.potomaceconomics.com/uploads/nyiso_reports/NYISO_2012_SOM_Report_2013-04-17.pdf> and *Comments of MMU on the 2014 Reliability Needs Assessment* (Aug. 13, 2014), available at: <http://www.nyiso.com/public/webdocs/markets_operations/committees/mc/meeting_materials/2014-08-27/MMU%20Review%20of%202014%20RNA_final.pdf>.

[37] MMU Comments at 6-9.

[38] *Id.* at 7, *see also id.* at 9-10.

developer."[39] The NYISO also understands the MMU to be recommending that all contracts with Non-Qualifying Entity Sponsors, including those listed in proposed Services Tariff Section 23.4.5.7.8.1.3 and regardless of whether they are of *de minimis* value, be priced at fair market value or cost of service if they are to be considered non-qualifying contractual relationships.

The NYISO takes no position on the MMU's recommendations on this issue. It strongly agrees that competitive entrants should not have any contracts that subsidize entry.[40] The January 15 Answer explained that the proposed CEE rules are meant to guard against such subsidies. The *de minimis* rule, the list of contracts that would not count as non-qualifying contractual relationships, and the need to guard against subsidies were all discussed in depth during the stakeholder process that concluded in May 2014.

If the Commission accepts the MMU's recommendations on this issue it should clarify that the burden would be on the entrant to demonstrate that its contracts were priced at fair market value or cost of service value. As with any other data submission under the BSM Rules, the NYISO would then review the information submitted to determine its reasonableness, with input from the MMU. The Commission should also clarify that "fair market value" will not necessarily be a single "correct" value and may be a range of reasonable values.

2. The NYISO Supports the MMU's Proposed Certification Requirement Regarding "Indirect" Contracts

The MMU also recommended, with respect to "indirect" contracts, that an entrant be required to "certify that none of its suppliers or customers, and no entity in the chain of its contractual relationships with it suppliers or customers, are parties to non-qualifying contractual relationships that are contingent on the project's completion." The NYISO supports this

[39] *Id*. at 10.

[40] *See* Exhibit B to Complaint at Section 23.4.5.7.8.1.3.

recommendation. It notes, however, that it interprets the reference to the time of a project's "completion" as a reference to non-qualifying contracts that are contingent on a project reaching the "Entry Date" defined above. This interpretation would result in a clear requirement that was consistent with other parts of the proposed tariff revisions. It also would avoid the potential subjectivity and uncertainty of defining project "completion dates." If the Commission accepts the MMU's recommendation on this point it should clarify that the NYISO's interpretation is correct.

3. The NYISO Has No Objection to the MMU's Recommendations Regarding Short-Term Hedges and Unexecuted or Informal Agreements

The MMU also asked that: (i) a single type of contract, *i.e.*, those providing a short term financial hedge of up to one year with Non-Qualifying Entity Sponsors,[41] be removed from the list of permissible contracts in Section 23.4.5.7.8.1.3;[42] and (ii) applicants be required to certify that they do not have unexecuted agreements or informal understandings with Non-Qualifying Entity Sponsors.[43] The NYISO has no objection to these recommendations.

4. The NYISO Has No Objection to the City of New York's Proposed Expansion of One Exception to the List of Non-Qualifying Contractual Relationships

The City proposes an additional modification to Section 23.4.5.7.8.1.3(vi), which as proposed in the Complaint and in the stakeholder process, excludes payment-in-lieu of taxes and siting incentives (such as tax abatements) from the definition of "non-qualifying contractual

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[41] The language proposed in the Complaint, which conforms to the language that the NYISO presented to stakeholders in May 2014 would only encompass "a short term financial hedge not to exceed one year in duration with a Non-Qualifying Entry Sponsor, as long as there is no provision for renewal or extension in the financial hedge." *See* Attachment 4 to January 15 Answer and Exhibit B to Complaint at Section 23.4.5.7. 8.1.3(x).

[42] MMU Comments at 10.

[43] *Id.* at 11.

relationships" so long as they are "generally available to industrial entities." The City requests that this clause be changed to read "generally available to industrial or commercial entities."[44] The NYISO has no objection to this change.

The City also expresses support for what appears to be, but actually is not, a Complainant-proposed change to the proposed CEE Rules the NYISO presented for a stakeholder vote in May 2014, related to gas transportation agreements. Specifically, Exhibit B to the Complaint shows redlined deletions to Section 23.4.5.7. 8.1.3(viii) and (x) to eliminate language that would prevent some, but not all, gas transportation agreements from being treated as non-qualifying contractual relationships. The City supports these deletions, which it appears to believe were proposed by Complainant. But in fact the deleted language was not included in the competitive entry exemption language that the NYISO presented to stakeholders in May 2014.[45] The January 15 Answer also showed this language as struck.[46] Thus, to be clear, the NYISO agrees that the deleted language related to gas transportation agreements from Section 23.4.5.7.8.1.3(vii) and (x), which appears with redlined strikethrough in Exhibit B to the Complaint, should not be included in the tariff rule.

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[44] City Comments at 11.

[45] In its May 12, 2014 presentation of the competitive entry exemption to the NYISO Business Issues Committee, the NYISO proposed eliminating and showed as struck-through language related to gas transportation agreements in proposed Section 23.4.5.7.8.1.3 (viii) and (x). *See* revisions to proposed Section 23.4.5.7.8.1.3, presented to the Business Issues Committee on May 12, 2014, *available at* http://www.nyiso.com/public/webdocs/markets_operations/committees/bic/meeting_materials/2014-05-12/agenda_07_MST%2023%204.pdf. The struck language was removed entirely from the proposed tariff language presented to the Management Committee on May 28, 2014. *See* proposed Section 23.4.5.7.8.1.3, , *available at* <http://www.nyiso.com/public/webdocs/markets_operations/committees/mc/meeting_materials/2014-05-28/CEE%20MST%2023%204%20redline.pdf>. *See also* Exhibit B to Complaint.

[46] *See* January 15 Answer at Attachment 4.

E. The NYISO Does Not Support the Adoption of a "Vintaging" Rule at this Time

The New York Power Authority and Long Island Power Authority (collectively, the "NY Public Authorities") support a competitive entry exemption but express concern that there could be "a bias toward the Competitive Entry Exemption as the only viable exemption from BSM Rules, thus disadvantaging previously mitigated projects by moving them further outside of the ICAP market supply stack." [47] They argue that a competitive entry exemption should not be implemented without a "vintaging" rule. They provide little detail on their proposal but it seems clear that the underlying idea[48] is to revise the Services Tariff to prevent a new entrant that obtained a competitive entry exemption from extending the period that currently mitigated projects would be subject to an Offer Floor.[49]

The Commission should not require the NYISO to adopt a vintaging rule at this time. Under the currently effective BSM Rules, entrants that have previously been mitigated are not treated any differently when a subsequent entrant obtains an exemption or receives a lower Offer Floor. The Commission has held that entrants that are subject to an Offer Floor should cease to be mitigated to the extent that their capacity cleared the market for twelve, not necessarily consecutive, months.[50] The Commission has previously rejected proposals to set a maximum

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[47] *Motion to Intervene and Joint Comments of New York Power Authority and Long Island Power Authority and its Operating Subsidiary, Long Island Lighting Company d/b/a Power Supply Long Island*, Docket No. EL15-26-000 (Jan. 15, 2015) at 3, 8 (the "New York Public Authorities' Comments").

[48] *Id.* at 8-10. The City expressed high level support for the NY Public Authorities' vintaging proposal. *See* City Comments at 9.

[49] Capitalized terms that are not otherwise defined in this Answer shall have the meaning specified in the Services Tariff, and if not defined therein, then as defined in the NYISO's OATT.

[50] *Id.* at P 49. *See also* Letter Order Accepting Tariff Revisions (March 17, 2011). The rule by which a unit that had been mitigated ceases to be subject to an Offer Floor is embodied in Services Tariff Section 23.4.5.7.

limit on the duration of Offer Floor mitigation.[51] The NY Public Authorities' Comments have not justified changing this timing rule. Moreover, it is presently unclear how a vintaging rule could be practically implemented.

F. The Commission Should Reject Broad Attacks on the BSM Rules

Cricket Valley Energy Center, LLC ("CVEC") criticizes several aspects of the BSM Rules that have no connection to the question of whether they should include a competitive entry exemption.[52] Its Comments include arguments that are beyond the scope of this proceeding, make impermissible collateral attacks on the Commission's orders, and are based on inaccurate statements and mischaracterizations regarding the NYISO's administration of the BSM Rules.[53] Because these arguments are beyond the scope of this proceeding the NYISO is not responding to them here.

III. CORRECTED VERSION OF ATTACHMENT 1 TO JANUARY 15 ANSWER

Attachment 1 to the January 15 Answer addressed the formal requirements of Commission Rule 213(c)(2). It has come to the NYISO's attention that Attachment 1 included a typographical error. Specifically, one of the "admissions" in that attachment stated that competitive entrants should be permitted "to take the risk of investing in projects that the NYISO

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[51] *New York Independent System Operator, Inc.*, 133 FERC ¶ 61,178 at P 48 (2010).

[52] *See* Motion to Intervene and Comments of Cricket Valley Energy Center LLC, Docket No. EL15-26-000 (Jan. 15, 2015) ("CVEC Comments") at 5 (arguing that it is unjust and unreasonable to apply the BSM Rules to projects that have already invested considerable time and expense in the NYISO's multi-year interconnection queue") *and* at 8 (criticizing the BSM Rules for not providing an "appropriate mechanism to discern an intent to depress price as a motivation for investing in a project").

[53] For example, CVEC asserts it is "unfair and unreasonable" for BSM Rule determinations to be issued at the Project Cost Allocation stage in the interconnection process. *See* CVEC Comments at 7. But that is a well settled tariff provision, *See* Services Tariff Section 23.4.5.7.3.2 and 23.4.5.7.3.3. CVEC also claims that it is "unjust and unreasonable" for the NYISO to "second guess" or substitute its own estimated cost of entry rather than just accept the costs the developer submits. CVEC Comments at 12-14. But the NYISO is obligated to make the determination of the cost of new entry, including seeking comment from the independent MMU, *see* Services Tariff Section 23.4.5.7.3.2.

forecasts to be *economic* without being subject to an Offer Floor." (Emphasis Added) The admission should refer to project that the NYISO forecasts to be "uneconomic." Accordingly, the NYISO has attached a corrected version of Attachment 1 to this answer that fixes the typographical error.

IV. CONCLUSION

For the reasons set forth above and in the January 15 Answer, the NYISO respectfully requests that the Commission: (i) accept this Answer; (ii) grant the Complaint; and (iii) direct it to make a compliance filing to establish a competitive entry exemption under the BSM Rules as proposed by the Complaint with the revisions and additions discussed in the January 15 Answer. The NYISO stated its views on the additional tariff revisions proposed by the MMU for the Commission's consideration, and has no objection to the one additional revision described above proposed by the City.

Respectfully submitted,

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

January 30, 2015

cc: Michael Bardee
Gregory Berson
Anna Cochrane
Morris Margolis
David Morenoff
Daniel Nowak
Kathleen Schnorf
Jamie Simler
Kevin Siqveland

Attachment 1

Attachment 1[1]

Compliance with Commission Rule 213(c)(2) – Corrected

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 below the factual allegations in the Complaint.[2] To the extent that any fact or allegation in the Complaint is not specifically admitted below, it is denied. Except as specifically stated below, the NYISO does not admit any facts in the form or manner stated in the Complaint.

1. Denials

- The NYISO strongly supports the Complaint but denies that certain of the Complainants' proposed modifications to the competitive entry exemption proposal developed by the NYISO in its stakeholder process are appropriate. The Commission should direct the NYISO to file the tariff revisions proposed in the Complaint, revised to include and replace certain proposals in the Complaint with the version previously advanced by the NYISO and described in the Answer.

2. Admissions

- The NYISO admits that the BSM Rules should be modified to include a generally applicable, tariff-based competitive entry exemption, with clear and transparent eligibility criteria that can be administered consistently, in order to prevent over-mitigation by permitting truly competitive entrants (generally, as described therein) to take the risk of investing in projects that the NYISO forecasts to be uneconomic without being subject to an Offer Floor. Complaint at 3.

- The NYISO admits that it is the entity responsible for providing open access transmission service, maintaining reliability and administering non-discriminatory competitive wholesale markets for electricity, capacity and ancillary services in New York State, and for implementing mitigation measures pursuant to the provisions of the Services Tariff. Complaint at 17.

- The NYISO admits that it administers the ICAP market, which is designed to provide economic signals to procure sufficient capacity to meet New York's peak demand plus its planning reserve margin, and that it runs the monthly spot auctions in which suppliers sell capacity for the upcoming month. Complaint at 4.

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[1] As described in Section III of the NYISO's answer to comments and protests with which this Attachment 1 is filed, this Attachment 1 corrects a typographical error in Attachment 1 to the NYISO's January 15 Answer. The correction is in the first bullet of A.2 above. It replaces the word "economic" with "uneconomic."

[2] Capitalized terms that are not otherwise defined in this Attachment or the Answer shall have the meaning specified in the Services Tariff, and if not defined therein, then as defined in the NYISO's Open Access Transmission Tariff.

Attachment 1

- The NYISO admits that it administers both buyer and seller market power mitigation rules, which the Commission approved in 2008, pursuant to Section 23 of its Services Tariff. Complaint at 5.

- The NYISO admits that the BSM Rules are intended to avoid artificially depressed prices and to assure that the market clearing capacity prices reflect competitive outcomes. Complaint at 2, 5.

- The NYISO admits that the BSM Rules are applicable to each proposed new generating unit or UDR project that seeks to sell capacity into a Mitigated Capacity Zone. Complaint at 5.

- The NYISO admits that a new entrant in a Mitigated Capacity Zone must offer capacity at a price no lower than the applicable Offer Floor, unless it is exempt under the "Part A" or "Part B" tests in the BSM Rules. Complaint at 6.

- The NYISO admits that, pursuant to the BSM Rules, it conducts the mitigation exemption tests for a unit based on a Mitigation Study Period (as defined in the BSM Rules) that commences three years from the start of the year of the Class Year, and that the Part A and Part B tests are based on a forecast of market prices during that Mitigation Study Period. Complaint at 9.

- The NYISO admits that its forecasts cannot account for all future market conditions but notes that improvements to the forecast used in the buyer-side mitigation determinations are being developed through its stakeholder process. Complaint at 9, 10.

- The NYISO admits that its MMU (and the NYISO) recognized the need for a competitive entry exemption in 2012 (or earlier). Complaint at 7, 10, 11.

- The NYISO admits that it has proposed a competitive entry exemption but that its proposals were not approved by the supermajority of the NYISO's stakeholders, as was required to submit the rule changes to the Commission under Section 205 of the FPA. Complaint at 3, 7, 10, 12, 13.

- The NYISO admits that, under its proposal, eligibility for the exemption would not be limited if an entrant had certain arrangements with Non-Qualifying Entity Sponsors, such as fair market value leases or sale agreements for land, standardized interconnection agreements, developmental grants and service agreements for natural gas, and that certain non-qualifying contractual relationships would be allowed up to a *de minimis* amount of 5% of the project's expected capital costs. Complaint at 12.

B. Defenses

Commission Rule 213(c)(2)(ii) requires answers to set forth every defense "to the extent practicable." The NYISO supports the Complaint and urges the Commission to grant it promptly with limited modifications.

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 resolving the complaint." As explained in the Complaint and in the

Attachment 1

Answer, the NYISO and its stakeholders have been discussing the implementation of a competitive entry exemption to the BSM Rules for over two years. The NYISO exhausted the stakeholder process without resolution and does not believe that further stakeholder discussions will result in a viable competitive entry exemption proposal.

CERTIFICATE OF SERVICE

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

Dated at Rensselaer, NY this 30th day of January, 2015.

/s/ Joy A. Zimberlin

Joy A. Zimberlin
New York Independent System Operator, Inc.
10 Krey Blvd.
Rensselaer, NY 12144
(518) 356-6207