

**REPLY COMMENTS OF  
INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.  
AND CONSUMERPOWERLINE, INC.  
ON A RECENT STATUTORY CHANGE TO THE  
NEW YORK CITY INDUSTRIAL AND COMMERCIAL INCENTIVE PROGRAM  
AND ITS SIGNIFICANT IMPACT ON THE  
INSTALLED CAPACITY DEMAND CURVES FOR NEW YORK CITY**

**INTRODUCTION**

On July 22, 2008, the New York Independent System Operator, Inc.'s ("NYISO") Board of Directors issued a Notice to Market Participants setting a schedule for comments and reply comments on whether the Installed Capacity Demand Curves ("Demand Curves") for New York City ("NYC Curves") should be revised under the Board's exigent circumstances authority due to the elimination of a major factual input that had been incorporated into the calculation of the net cost of new entry ("Net CONE") for the NYC Curves, specifically, the property tax exemption awarded to generating facilities under New York City's Industrial and Commercial Incentive Program ("ICIP Exemption").<sup>1</sup> Elimination of the ICIP Exemption directly impacts the Net CONE for New York City and results in NYC Curves that are understated by approximately 39%. In addition to the Independent Power Producers of New York, Inc. ("IPPNY"), several generating companies, and ConsumerPowerline, Inc. ("ConsumerPowerline"), the City of New York ("City"), New York State Department of Public Service ("DPS"), and a group of Transmission Owners, consumers, and others ("Joint Commenters") submitted initial comments. IPPNY and ConsumerPowerline respectfully submit this response to those other comments.

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<sup>1</sup> The ICIP Exemption applied to new generating facilities and new capital investments in existing generating facilities.

## RESPONSE

### **A. IPPNY And ConsumerPowerline Have Provided Ample Evidence To Demonstrate Exigent Circumstances And The Need For The Board To Take Immediate Corrective Action**

IPPNY and ConsumerPowerline note that the other comments suffer a common, significant shortcoming. They all suggest that there has not been any proof offered of the existence of exigent circumstances or the need to change the NYC Curves, now.<sup>2</sup> These arguments wholly lack merit. ConsumerPowerline, IPPNY, and four electric generating companies have presented extensive comments and three affidavits that collectively clearly establish both the existence of exigent circumstances and the need for an immediate correction to the NYC Curves. As these reply comments will demonstrate, none of the comments opposed to the NYISO making an exigent circumstances filing refute IPPNY and ConsumerPowerline's arguments or provide any legitimate basis for the Board to refrain from revising the NYC Curves to reflect the elimination of the ICIP Exemption.

In fact, if anything, the other comments actually reinforce the concerns IPPNY and ConsumerPowerline raised regarding the effect of this issue on the stability of, and investors' confidence in, the NYISO's wholesale markets. There is a pressing need for new capacity in New York City; a primary purpose of the Demand Curves is to provide appropriate price signals to retain existing, needed generation and to attract new entry when appropriate. The expiration of the ICIP Exemption has resulted in a significant deviation between the price signals conveyed by the NYC Curves and the actual Net CONE for the New York City market. IPPNY and ConsumerPowerline demonstrated that the failure of the Board to act now could diminish electric

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<sup>2</sup> Comments of the City of New York, dated July 31, 2008 ("NYC Comments"), pp. 2, 6; Comments of the DPS, dated July 31, 2008 ("DPS Comments"), p. 2; Comments of the Joint Commenters, dated July 31, 2008 ("JC Comments"), p. 3.

generation owners', developers', and investors' confidence in the NYISO's markets and may result in the deferral or cancellation of needed capacity projects for New York City.

Yet, notwithstanding the change in law and impending capacity needs in New York City, none of the other commenters are even willing to concede that during the next Demand Curve reset process, the now non-existent ICIP Exemption will be eliminated from the Demand Curve model. To the contrary, and as discussed more fully below, the City and Joint Commenters argue that some level of exemption may be appropriate because generation owners and developers *may* receive benefits under other New York City programs.<sup>3</sup> Likewise, the DPS suggests that “. . . the *appropriateness* of reflecting the elimination of ICIP tax abatements, should and will be addressed during the next update of the demand curves. [emphasis added]”<sup>4</sup>

As demonstrated in IPPNY and ConsumerPowerline's initial comments, electric generation owners and developers, including US Power Generating Company and NRG Energy, Inc., are making decisions, now, whether to make substantial infrastructure investments in New York City. In light of the other commenters' comments, these owners and developers are faced with even greater uncertainties as to the present and potential future price signals conveyed by the NYC Curves. That is, the comments call into question whether the NYC Curves will ever provide sufficient revenues to support the new entry that the NYISO has determined is needed to preserve system reliability.<sup>5</sup> New entry is no longer economic under the NYC Curves, causing

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<sup>3</sup> NYC Comments, *passim*, JC Comments, p. 5.

<sup>4</sup> DPS Comments, pp. 2-3.

<sup>5</sup> The NYISO's 2008 Gold Book projects that, absent market response, there will be a capacity shortfall in New York City by the summer of 2010. Likewise, the NYISO's 2007 Reliability Needs Assessments project that approximately 1,000 MW is needed in New York City.

greater difficulties for project managers to convince senior management, investors, and financiers that they should continue to pursue their current development efforts or consider new projects.<sup>6</sup>

For these reasons, as well as those set forth below, the arguments supporting continuation of the NYC Curves without change lack merit. The calculation of the NYC Curves, and their underlying Net CONE, must be based on the costs of a new generating facility in New York City.<sup>7</sup> As a matter of law, no new generating facility can receive an ICIP Exemption or qualify for any similar, as-of-right property tax exemption. None of the other comments provide any reasonable justification to cause the Board to refrain from removing the ICIP Exemption in the calculation of the Net CONE for New York City. Instead, they exacerbate the concerns regarding the stability and certainty of the capacity markets and price signals conveyed by the NYC Curves. Therefore, it is even more imperative that the Board act immediately to maintain investor confidence in the NYISO's markets.

**B. The Demand Curves Must Provide Proper Price Signals During All Periods Irrespective Of The Level Of Capacity Surplus Or Deficiency**

All of the other commenters recommend that the Board take no action now. The DPS and Joint Commenters justify this recommendation on the claim that no new generation is expected to commence operation prior to May 2011,<sup>8</sup> while the City contends that the change in law should not create an “additional barrier to the development of new generation.”<sup>9</sup> Not only are these claims factually erroneous, they are wholly inconsistent with the purpose of the

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<sup>6</sup> Additionally, as explained in IPPNY and ConsumerPowerline's initial comments, understating the Net CONE also negatively impacts the mitigation measures recently approved by the FERC for the New York City capacity market. Because the resulting inappropriate suppression of market prices would have long term effects, that factor will contribute to the potential deleterious consequences mentioned above.

<sup>7</sup> NYISO Market Administration and Control Area Services Tariff, Section 5.14.1(b).

<sup>8</sup> DPS Comments, p. 2, JC Comments, p. 4.

<sup>9</sup> NYC Comments, p. 2.

Demand Curves, as stated above. The initial comments and supporting affidavits submitted by IPPNY and ConsumerPowerline amply demonstrate that there is a need for new capacity prior to May 2011, the failure to take action now could cause delays to projects now under development, and proper price signals are needed to ensure the continuation and expansion of demand response providers' participation in the capacity markets.

In response to similar objections raised in 2003 to the Demand Curves, the PSC explained:

To avert shortages, new investments must be signaled well in advance of an actual shortage. The Demand Curve approach should help attract new investments by signaling reserve margin shortages in advance through gradually increasing capacity prices.<sup>10</sup>

Inasmuch as the NYISO's own reports conclude that New York is facing a substantial need for new capacity over the next ten years, and for the reason well-stated by the PSC, it is imperative that the Board provide appropriate price signals to the marketplace, now and in the future.<sup>11</sup>

Arguments that no action is necessary until the day the need arises are not only frivolous, they are irresponsible and inconsistent with the need to ensure the reliability of the State's electric system. Moreover, the failure to provide sufficient forward price signals may well cause the NYISO and the PSC to resort to gap and/or regulatory backstop solutions, the costs for and risks of which consumers, as ratepayers, will be entirely responsible,<sup>12</sup> or to other actions that

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<sup>10</sup> *New York Independent System Operator, Inc.*, Docket No. ER03-647-000, Answer of the New York State Public Service Commission to the Motion for Clarification of KeySpan-Ravenswood, LLC," dated July 8, 2003 ("PSC July 8 Answer"), p. 5.

<sup>11</sup> See footnote 4, above.

<sup>12</sup> According to the NYISO's 2007 Annual Report (p. 15), competitive markets save consumers \$100-\$200 million per year as compared to costs consumers would experience under the former, vertically integrated markets. Additionally, market-based generating facilities shield consumers from cost overruns and long term contracts. If the NYISO is required to resort to regulatory backstop solutions due to the failure to provide appropriate price signals for merchant entry, those savings, and the efficiencies of the competitive markets, are likely to disappear.

would be inconsistent with, and equally as detrimental to, the proper functioning of the competitive markets.

**C. The City of New York’s Initial Comments Do Not Provide Any Basis To Refrain From Correcting the NYC Curves**

**1. Discretionary Programs Cannot Be Relied Upon To Calculate The Net CONE For The New York City Proxy Unit**

The City argues that no changes to the NYC Curves are warranted because it has other programs that *may* provide some of the same benefits as the ICIP. The City concedes, however, that all of its other programs are discretionary.<sup>13</sup> Indeed, the City nowhere states, or could state, that any new generating facility (or expanded or repowered existing facility) *will* receive any property tax relief or that the relief will match that provided by the ICIP Exemption.<sup>14</sup>

Moreover, whereas the ICIP Exemption relieved a generating facility owner from the payment of property taxes for a set period of time, other programs commonly require the developer/owner to make an annual payment in lieu of property taxes.<sup>15</sup>

Under the NYISO’s administrative approach, the Net CONE for the proxy unit represents the costs faced by the participants in the competitive market (*i.e.*, developers that cannot turn to rate-based revenue, long-term contracts, or other sources of revenues for their generation projects). Therefore, the proxy value cannot be based on factors that the City of New York acknowledges are unknown, unknowable and not available as a matter of right. In fact, the issue

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<sup>13</sup> NYC Comments, p. 5.

<sup>14</sup> The City’s exact statement is: “[t]hus, *it is not only unknown*, it is at this early juncture *unknowable* to what extent NYCIDA or other City incentive programs can become close substitutes for the previous form of ICIP. [emphasis added]” *Id.*, p. 6.

<sup>15</sup> *Id.*, fn. 5. For example, a project receiving a package of benefits through an Industrial Development Agency (“IDA”) typically is exempt from property taxes (because the real property is transferred to and passively owned by the IDA), but the developer is required to make annual payments to the host municipality and school district in lieu of paying property taxes, and it is often required to fund other community programs as well.

of whether the Net CONE of a proxy unit should include discretionary benefits has already been addressed and found to be improper.

During the most recent Demand Curve reset process, an issue arose regarding whether the design of the New York City proxy unit should include dual fuel capability. Although Consolidated Edison Company of New York, Inc.'s ("Con Edison") Electric Tariff requires electric generating facilities located in New York City to have dual fuel capability to qualify for Power Generation Transportation Service, Con Edison claimed that it may waive this tariff requirement for certain projects.<sup>16</sup> Thus, Con Edison argued, the proxy unit should be designed as natural gas-fired, only (which would reduce its cost). After carefully considering the issue, the NYISO's consultant concluded the Net CONE set for a proxy unit cannot be based on the assumption that the proxy unit would obtain discretionary benefits, stating: "[g]iven the possibility that a new peaking unit in New York City may be required to have this capability, dual fuel capability has been assumed for Zone J."<sup>17</sup> NYISO Staff, the Board, and the FERC agreed with this conclusion as they accepted this aspect of the consultation's recommendation, and the corresponding Federal Power Act Section 205 filing, without change.

The same analysis applies to this situation. As the City acknowledges, the ICIP Exemption involved no exercise of discretion,<sup>18</sup> whereas all of the other programs it references are subject to discretion. Just as the New York City proxy unit was designed with dual fuel capability because every project may be faced with that requirement, the Net CONE must be premised on the project fully paying property taxes because there is no certainty that any

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<sup>16</sup> "Independent Study to Establish Parameters of the ICAP Demand Curve for the New York Independent System Operator," dated August 15, 2007 ("NERA Report"), p. 32; included as Exhibit B to Attachment 3 of the NYISO's November 30, 2007 tariff filing in Docket No. ER08-283-000.

<sup>17</sup> *Id.*, pp. 32-33.

<sup>18</sup> NYC Comments, p. 5.

particular project will receive an abatement or exemption (or that every project will receive the same level of abatement or exemption).<sup>19</sup>

2. The Effect Of The Elimination Of The ICIP Exemption Is Known And Substantial

The City also argues, erroneously, that no changes should be made to the NYC Curves because the effect of the elimination of the ICIP Exemption is speculative.<sup>20</sup> The expiration of the ICIP Exemption will impose additional costs on developers seeking to build new generating facilities in New York City and on generation owners seeking to upgrade, expand, or repower their existing generating facilities. Because the NYC Curves are based on a Net CONE that includes a total property tax exemption, however, they do not represent the actual Net CONE and cannot provide appropriate price signals or revenue recovery to generation owners or developers. As discussed in the affidavits submitted in support of IPPNY and ConsumerPowerline's initial comments, this divergence has real implications right now. Accordingly, the effect of the statutory change is clearly not speculative.

The City of New York further asserts that it was speculative to assume that the ICIP would continue beyond June 30, 2008, so its expiration does not constitute an exigent circumstance.<sup>21</sup> Had the NYISO, its consultants, and the Federal Energy Regulatory Commission ("FERC") incorporated or recognized the statute's sunset date in their respective analyses and conclusions, the City's argument may have merit. However, because they did not, and because the City did not attempt to correct the record on this issue, the City's assertion is not persuasive.

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<sup>19</sup> On this latter point, the City acknowledges that decisions under its other programs are made on a case-by-case basis and can vary from one project to another. *See, e.g.*, NYC Comments, p. 5.

<sup>20</sup> *Id.*, p. 7.

<sup>21</sup> *Id.*, pp. 7-8.

The NERA Report explicitly states:

Property taxes for NYC may be used with or without the Industrial and Commercial Incentive Program (ICIP). The effect is very significant. The ICIP renewal for the next three years was passed by the Legislature in late June 2007 and has been signed in to [sic] law. *Hence the optional feature here is now moot.* [emphasis added]<sup>22</sup>

Based on this assumption, NERA proposed NYC Curves that exclude property taxes for all three years. The NYISO, its Board, and the FERC accepted this assumption and the corresponding Curves. At no point during the reset process, or in the subsequent FERC proceeding, did the City, any other party, or the NYISO, seek to correct this statement or otherwise clarify that the ICIP Exemption was not extended after June 30, 2008 as a matter of law and should not be assumed to remain in effect for the 2009-2010 and 2010-2011 Capability Years. Therefore, the Board should not decide this matter based on the City's initial silence and hindsight rationalization.

**D. The Department Of Public Service's Initial Comments Similarly Provide No Legitimate Reason To Refrain From Correcting The NYC Curves**

The DPS raises three points, none of which refute the arguments advanced by IPPNY and ConsumerPowerline or justify inaction by the Board. In addition to its claim that no action needs to be taken now (which is addressed in Point B, above), the DPS argues that existing capacity and new capacity should be treated differently. It also claims that revising the NYC Curves would result in a "windfall" to suppliers.

These arguments simply cannot be squared with the New York State Public Service Commission ("PSC") strong and longstanding support for the construct and underpinnings of the capacity markets and, specifically, the Demand Curves. When the NYISO proposed the Demand

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<sup>22</sup> NERA Report, p. 61

Curve construct to the FERC in 2003, the PSC submitted extensive comments and affidavits in support of the Curves.<sup>23</sup> In all of those comments, and contrary to the DPS's comments in this matter, the PSC correctly argued that the purpose of the Demand Curves is to provide appropriate price signals to retain needed existing generating facilities and encourage new entry.<sup>24</sup> In fact, the PSC went so far as to argue that because providing proper economic signals is so important to the success of the competitive markets and the attraction of new, market-based investments, it is preferable to err on the side of overstating the Net CONE, not understating it. Specifically, Dr. Thomas Paynter, an economist employed by the DPS and one of creators of the Demand Curves, explained:

It is prudent, from a resource adequacy standpoint, to err somewhat on the side of an overestimate of the capacity payment needed to ensure that entry of new generation becomes economic as the system's capacity drops down toward its minimum required level. . . . A slight overstatement causes little harm since, if new entry truly is less costly than the estimate, additional new entry will add to the system's capacity and move down the demand curve to the point at which the demand curve's price equals the cost of new entry. This is the self-correcting aspect of the downward sloping demand curve. The added cost to society is simply the cost of slightly more capacity (a few percent), which is partially offset by the benefits of greater reliability and lower energy prices.<sup>25</sup>

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<sup>23</sup> *New York Independent System Operator, Inc.*, Docket No. ER03-647-000, "Notice of Intervention and Comments in Support of the New York Public Service Commission," dated April 11, 2003 ("PSC April 11 Comments"); Affidavit of Dr. Thomas S. Paynter, sworn to on April 11, 2003 ("Paynter Aff."); Affidavit of Harvey Arnett, sworn to on April 11, 2003 ("Arnett Aff."); "Motion to File Answer and Answer of the New York State Public Service Commission," dated May 1, 2003 ("PSC May 1 Answer"); PSC July 8 Answer, *supra*.

<sup>24</sup> PSC April 11 Comments, p. 3; PSC May 1 Answer, p. 2; PSC July 8 Answer, p. 3.

<sup>25</sup> Paynter Aff., ¶ 58.

1. The Demand Curve Clearing Price Properly Applies To Both New And Existing Generation

The DPS's first contention is contrary to a fundamental element of the Demand Curves – that there should not be any differentiation between existing and new generating facilities. In fact, in responding to objections regarding the lack of this exact differentiation, the PSC argued that the Demand Curves should apply equally to all suppliers because the State's reliability needs require both the maintenance of existing facilities and the addition of new facilities. Specifically, the PSC stated:

[A] demand curve should reflect the long-run cost of capacity in order to *retain* and attract sufficient generation. [emphasis added]

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[The Demand Curve] should also serve as an insurance policy against unexpected plant closings in the short-term. [footnote omitted]<sup>26</sup>

The FERC agreed with the PSC, holding:

With regard to NYC and Morgan Stanley's contention that the proposed ICAP Demand Curve is a blunt instrument that fails to distinguish between old and new generation, the Commission finds that all capacity suppliers, regardless of the age of their resources, are entitled to the same treatment in the ICAP market. While the Commission understands that certain generators may realize greater profits than others, that is simply a fact of the marketplace. The Commission does not see how such generators could receive ICAP revenues that were fundamentally different from those paid to other generators. Moreover, those are the types of market signals the Commission would expect to encourage new generation additions.<sup>27</sup>

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<sup>26</sup> PSC April 11 Comments, pp. 12, 17.

<sup>27</sup> *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,201 (2003), P 81.

The FERC has reaffirmed this principle of paying all suppliers the same price on at least three occasions.<sup>28</sup>

2. The Demand Curves Do Not Result In Double Compensation For Existing Or New Generating Facilities

The DPS's claims regarding double compensation are also refuted by the PSC's own arguments in support of the Demand Curves. In response to objections that the Demand Curves constitute impermissible incentive ratemaking, the PSC replied:

[T]he ICAP demand curve will not create any conflicting or unnecessarily duplicative incentives. The ICAP demand curve . . . would be the only payment generators receive for meeting installed reserve requirements. . . .It is unnecessary to look at the specific costs of each generator . . .because to do so would make it impossible to implement any industry-wide program.<sup>29</sup>

In other words, the Demand Curves do not provide for double compensation for any generating facility, and it is improper to look at the costs of individual facilities in applying the Demand Curves. Accordingly, the fact that modified NYC Curves would apply equally to existing and new generators does not constitute a valid reason to refrain from correcting the NYC Curves so that, going forward, these Curves accurately reflect the change in law and the actual cost of capacity in New York City.

3. Correcting the NYC Curves Will Not Create Windfall Profits For Existing Generation Owners

Other statements by the PSC in support of the Demand Curves demonstrate why the DPS's bald claim that correcting the NYC Curves would produce windfall profits to existing generators is erroneous. Dr. Thomas Paynter explained:

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<sup>28</sup> See *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 (2007), P 92; *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,289 (2006), P 203; *California Independent System Operator Corp.*, 112 FERC ¶ 61,013 (2005), P 73. The FERC's rationale in each case was based largely on Section 205(b) of the Federal Power Act (16 U.S.C. §824d(b)), which prohibits undue preferences, prejudices, or disadvantages to any entity.

<sup>29</sup> PSC May 1 Answer, p. 8.

[I]t is the cost of entrance that determines overall price levels and it is the amount of new entry, and exit, that determines the reliability of service seen by a buyer in the market place.<sup>30</sup>

As the PSC repeatedly emphasized to the FERC, the Demand Curves are based on the costs of a new generating facility, net of its expected energy and ancillary service revenues.<sup>31</sup> In IPPNY and ConsumerPowerline's initial comments, we explained that if the ICIP Exemption had lapsed during the Demand Curve reset process, the Demand Curve model and the calculation of the Net CONE would not have included it. Indeed, because the Demand Curves are based solely on the costs and revenues of a brand new, proxy LMS 100 gas turbine unit, IPPNY and ConsumerPowerline feel confident in asserting that no participant in the Demand Curve reset process would have argued that an adjustment for the ICIP Exemption should have been included because some existing facilities may have been receiving it on all or a portion of their facilities. Thus, the issue of whether existing generating facilities receive ICIP Exemptions is irrelevant to the Board's consideration of whether there are exigent circumstances and whether the Net CONE for the NYC Curves should be corrected to remove the ICIP Exemption.

Moreover, the DPS is absolutely wrong to characterize the ICIP Exemption as the equivalent of "compensation for NYC property taxes."<sup>32</sup> Like all other eligible commercial and industrial properties in New York City, including certain properties owned by Con Edison, generating facilities were able, in whole or in part (depending on whether the investment was for a new facility or equipment upgrades to existing facilities) to receive a temporary reduction in their property taxes under the ICIP. Those savings do not comprise revenues to any company and are not treated as such on their books and records. In fact, the Uniform System of Accounts

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<sup>30</sup> Paynter Aff., ¶ 9.

<sup>31</sup> PSC April 11 Comments, p. 12; PSC May 1 Answer, p. 8; PSC July 8 Answer, p. 3.

<sup>32</sup> DPS Comments, p. 2.

does not treat property tax exemptions as revenues – property taxes and property tax exemptions are classified as Current and Accrued Liabilities under Account 1228.<sup>33</sup>

#### 4. The DPS' Calculation Of The Consumer Impact Is Overstated

As to the DPS's related claim that correcting the Demand Curves would adversely impact consumers, the DPS attempts to obfuscate the true impact by limiting its discussion to the change in revenues that would be produced by correcting the NYC Curves. In IPPNY and ConsumerPowerline's initial comments, we acknowledged that eliminating the ICIP Exemption causes the price points on the NYC Curves to increase commensurately. However, even in the event that this may lead to an overall increase in payments, this short term effect, standing alone, should not be a determinative factor in the Board's consideration of this issue. Nothing presented in the DPS' comments (or in any of the other comments submitted to the Board) refute IPPNY and ConsumerPowerline's arguments.

Although the DPS did not provide any information supporting its calculation of the claimed effect of correcting the NYC Curves, it appears that the DPS has done its calculations with the assumption that the amount of capacity sold would remain the same after the NYC Curves are corrected. Such an assumption is illogical and inconsistent with the fundamental principle underlying the Demand Curves, and economic markets in general, that higher capacity clearing prices will lead to new entry. To the extent that additional suppliers participate in the capacity market, the clearing price under the NYC Curves will shift to the right (*i.e.*, go down) and the consumer impact will be reduced correspondingly.<sup>34</sup>

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<sup>33</sup> See 16 NYCRR Part 180, *et seq.*, particularly, Balance Sheet Accounts D C 1228 and D C 1508.

<sup>34</sup> An addition of approximately 275 MW of new resources would eliminate the DPS' entire claimed consumer impact in 2008 and 2009.

The DPS estimates also fail to capture the impact on later years or on the state-wide capacity market. A failure to correct the NYC Curve will delay the development of new resources and will therefore result in less capacity in the market for the number of years after the next reset that is required to develop trust in the markets and complete delayed projects. Consequently, correcting the NYC Curves now and retaining the trust in the markets is expected to result in lower prices in future years than if the Curves are not corrected.

Furthermore, correcting the NYC Curves provides the right outcome for consumers in both the short term and the long term. In the short term, the increased clearing price will likely induce even greater participation by demand response providers, which participation provides myriad consumer benefits (*e.g.*, increased reliability of both the transmission and distributions systems in New York City, reductions in peak energy demands, and reduced air emissions on high electric demand days). In the long term, the accurate price signals will promote new entry, thereby ensuring resource adequacy and system reliability.

Nevertheless, inasmuch as the Board did ask for information on this issue, IPPNY and ConsumerPowerline have roughly calculated the potential impact on consumers using information set forth in a May 12, 2008 Con Edison press release announcing its most recent electric rate case filing with the PSC. Con Edison reported that it is seeking a \$654 million revenue increase, which it claims equates to a 5.8% average increase in customers' bills.<sup>35</sup> Thus, even using the overstated DPS impact figures, the potential impact is equivalent to approximately nine-tenths of one percent of customers' total bills. For residential customers, the impact of correction the NYC Curves to send appropriate price signals would be less than a dollar per month.

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<sup>35</sup> Con Edison Press Release, dated May 12, 2008; found at <http://www.coned.com/newsroom/news/pr20080509.asp>.

**E. The Joint Commenters Present No Justifiable Basis For Failing To Address This Exigent Circumstance**

1. The Joint Commenters Have Materially Misrepresented the Board's Statements

The comments submitted by the Joint Commenters contain little substance and therefore warrant only a brief response. Most importantly, IPPNY and ConsumerPowerline note that the Joint Commenters have misrepresented Robert Hiney's comments at the July 15, 2008 Liaison Committee meeting. While Mr. Hiney is certainly able to convey to the rest of the Board what he stated at that meeting, and IPPNY and ConsumerPowerline will defer to his recollections, we respectfully submit that, contrary to the Joint Commenters' assertion, Mr. Hiney did not state that the Board had reached any firm or final conclusion on this matter.<sup>36</sup> Indeed, if the Board had already reached a final conclusion, there would be no reason to, and it would not have, solicited two rounds of comments from Market Participants.

Rather, Mr. Hiney reported that the Board received a presentation from NYISO Staff, and that, based on that presentation and its associated discussion, the Board's initial reaction was that no changes were warranted, now, and that the NYC Curves would be revised to reflect the elimination of the ICIP Exemption as part of the next Demand Curve reset process. In light of the concerns that were raised, some of which Mr. Hiney noted that the Board had not previously been presented with or considered, the Board established that it wanted to receive input from Market Participants before making its final determination on the issue. Accordingly, the premise upon which the Board should consider this matter is not, as the Joint Commenters suggest, whether to revisit its decision; it is what course of action the Board should decide to undertake.

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<sup>36</sup> See JC Comments, p. 2.

2. The Demand Curves Must Be Adjusted Under Circumstances, As Here, When a Material Change to a Major Factual Input Has Occurred And Nearly The Entire Reset Period Remains

The Joint Commenters argue that the Board should not make a change that benefits only one sector or involves only one element of the Demand Curves. They also contend that revising the NYC Curves to reflect this significant change “would set a harmful precedent.”<sup>37</sup> None of these assertions have merit, nor were they supported by anything other than bald, conclusory statements.

First, the issue confronting the Board is not whether to benefit or harm any sector or individual Market Participant. The issue is whether the Board wants to ensure the continued validity and credibility of, and confidence in, its capacity markets. As discussed above, the purpose of the Demand Curves is to provide proper price signals to promote new and retain needed capacity. It is indisputable that the four-month old NYC Curves – based, as they now are, on a massively understated Net CONE – no longer provide reasonable or correct price signals for entering the New York City market, and, unless corrected, will continue to provide grossly inaccurate price signals for the next 32 months.

Second, the NYISO Agreement and the ICAP Manual expressly provide for changes to the Demand Curves when exigent circumstances occur. Thus, IPPNY and ConsumerPowerline are not asking the Board to set any precedent. Rather, they are simply asking the Board to invoke and follow the procedure that has been in place since the inception of the NYISO – a procedure that the Board invoked as recently as last month.<sup>38</sup> Indeed, to do nothing in this

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<sup>37</sup> *Id.*, p. 4.

<sup>38</sup> *See New York Independent System Operator, Inc.*, Docket No. ER08-1281-000, in which the NYISO Board found exigent circumstances requiring it to amend its Open Access Transmission Tariff on less than one day’s notice to prohibit External Transactions scheduled along circuitous routes around Lake Erie.

instance would render the exigent circumstances provision of the Demand Curve Adjustment Process, set forth in Section 5.6.7 of the ICAP Manual, absolutely meaningless.

Third, while neither the NYISO Agreement nor the ICAP Manual defines “exigent circumstances,” IPPNY and ConsumerPowerline respectfully submit that at issue here is a major factual input, not the estimates that were subjectively developed, which directly impacts the Net CONE for the New York City market. That is, the exigent circumstances relate solely to the change in a substantial, quantifiable, objective, factual input that was not contemplated at the time the Demand Curves were developed or approved. In contrast, the fact that subjective estimates may be higher or lower than assumed is, by definition, both expected and accepted.

As explained by Mr. Younger in his July 31, 2008 affidavit, the Demand Curve model includes a binomial variable for the ICIP Exemption, thereby allowing the NYISO to correct that single input. Accordingly, a wholesale review of and revision to the NYC Curves is not required.

3. The Joint Commenters Have Failed To Demonstrate That Correcting the Curves Will Upset Price Certainty

Although the Joint Commenters also argue that correcting the NYC Curves “would upset the goals of price stability and certainty,”<sup>39</sup> they offer no explanation or support for this conclusory statement. In contrast, IPPNY and ConsumerPowerline, through their comments and accompanying affidavits, offer extensive factual support for their assertion that failing to act would create instability and uncertainty, and that immediate action is needed to preserve the credibility of, and investor confidence in, the NYISO’s capacity markets.

Further, in addressing claims that the NYISO’s ability to revise the Demand Curves at any time creates uncertainty, the FERC stated:

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<sup>39</sup> *Id.*

As to the amount of uncertainty caused by any potential adjustment, the Commission finds that employing a demand curve based on irrelevant or outdated parameters would likely be more damaging to the ICAP market than any potential adjustment that reflected stakeholder input and independence.<sup>40</sup>

That same conclusion applies to this situation. The ICIP Exemption is now an irrelevant and outdated parameter, and its continued inclusion in the NYC Curves would be more damaging and create more uncertainty than correcting the Curves.

4. The Joint Commenters Have Misconstrued the FERC's 2005 Demand Curve Order

Finally, the Joint Commenters' discussion of the FERC's Order on IPPNY's 2005 request to revisit the Demand Curves does not properly describe or apply the FERC's decision.<sup>41</sup> In particular, their statement that the FERC held that if one element of the Demand Curves is updated, all elements would have to be updated is not a correct recitation or representation of the Order. The FERC explained that updating the Demand Curves to reflect the data in the most recent Gold Book would necessitate an evaluation of the basis *of that data* and the reasonableness of the results derived *from that data*.<sup>42</sup> The FERC did not hold, however, that all inputs and assumptions to the calculation of the Demand Curve would need to be updated.

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<sup>40</sup> *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,201 (2003), P. 61.

<sup>41</sup> JC Comments, pp. 6-7. IPPNY and ConsumerPowerline discussed that decision, and why it supports correcting the NYC Curves, at length in their initial comments and will not repeat it here.

<sup>42</sup> *New York Independent System Operator, Inc.*, 112 FERC ¶ 61,283 (2005), P 40.

**CONCLUSION**

For the foregoing reasons, IPPNY and ConsumerPowerline respectfully request that the NYISO's Board of Directors determine at its August Board meeting that there are exigent circumstances associated with the change in law which eliminated the ICIP Exemption and directly causes the administratively determined Net CONE to fail to reflect the actual Net CONE in New York City for the remaining 32 months of the current 36 month reset period. These exigent circumstances require immediate revision of the NYC Demand Curves for the remainder of the 2008-2009 Capability Year and the full 2009-2010 and 2010-2011 Capability Years. IPPNY and ConsumerPowerline further respectfully request that the Board expeditiously seek FERC approval under FPA §205 of the revised NYC Curves that result from the elimination of the ICIP Exemption.

Respectfully submitted,



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/s/  
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Dated: August 8, 2008  
Albany, New York