

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent System Operator, Inc.) Docket No. ER03-647-000

**REQUEST FOR LEAVE TO SUBMIT
LIMITED ANSWER, AND LIMITED ANSWER, OF
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rules 212 and 213 of the Commission’s Rules of Practice and Procedure,¹ the New York Independent System Operator, Inc. (“NYISO”) hereby submits its limited answer to the 38 motions, comments, and protests filed to date in the above-captioned proceeding.² Though designated as “protests,” many of the interventions filed in this docket are in fact motions seeking affirmative relief from the Commission.³ The Commission’s Rules of Practice and Procedure permit the NYISO to respond to such motions.⁴

To the extent that the NYISO’s limited answer is not expressly permitted under Rule 213, the NYISO respectfully requests leave to submit a limited answer to provide information that will be useful to the Commission in response to the comments and protests

¹ 18 C.F.R. § 385.212 and 385.213 (2002).

² See Attachment I, listing (i) the 17 motions and one answer, submitted to date, in opposition to the ICAP Demand Curve, (ii) the 13 motions filed to date in support, and (iii) the seven general motions to intervene filed in this proceeding.

³ E.g., *Retail Suppliers Motion* (requesting summary rejection of the ICAP Demand Curve or a five-month delay of the effective date of the ICAP Demand Curve). See *infra* note 6 and accompanying text for additional examples of motions that seek affirmative relief in this proceeding.

⁴ Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure provides that an answer may not be made to a protest unless approved by the Commission. Rule 213(a)(3) allows an answer to any other pleading, including motions that seek affirmative relief from the Commission. 18 C.F.R. § 385.213(a)(2)-(3).

to the NYISO's filings,⁵ and to correct certain inaccuracies in the protests filed with the Commission.

INTRODUCTION

The stakeholder process that resulted in the demand curve was as thorough as for any proposal that has been considered at the NYISO. It began two years ago. After passing the Unforced Capacity enhancements to the Installed Capacity ("ICAP") market, which was subsequently approved by the Commission on September 4, 2001, the Management Committee ("MC") directed the ICAP Working Group ("ICAPWG") in June 2001 to consider additional enhancements to the ICAP market. The ICAPWG held 11 meetings between June 2001 and May 2002, during which stakeholders, including representatives of virtually all the parties opposing NYISO's March 21 Filing, were encouraged to present and discuss a wide range of proposals about potential ICAP enhancements.

It was the New York State Public Service Commission ("NYPSC") that introduced the ICAP Demand Curve concept, at the May 21, 2002 ICAPWG meeting. The ICAPWG devoted 18 meetings between May and December 2002 to the ICAP Demand Curve proposal. A proposed ICAP Demand Curve, which did not include a phased-in approach,⁶ was voted on and rejected at the December 13, 2002 Business Issues Committee ("BIC") meeting. A group of stakeholders, including the NYPSC, worked with the NYISO to refine

⁵ *New York Independent System Operator, Inc.'s Filing of Revisions to the ISO Market Administration and Control Area Services Tariff: ICAP Demand Curve*, Docket No. ER03-647-000 (March 21, 2003); *Correction of New York Independent System Operator, Inc.'s Filing of Revisions to the ISO Market Administration and Control Area Services Tariff: ICAP Demand Curve*, Docket No. ER03-647-000 (March 25, 2003) [collectively, the "NYISO's March 21 Filing"].

⁶ Ultimately, the stakeholders agreed on consensus demand curve levels significantly below the cost of new entry at the minimum capacity requirement amount, effectively including an agreed level of offsets in the first two years. Patton Supp. Aff. ¶ 27.

the proposal with a phase-in for the first two years, and presented it at the February 11 BIC meeting, where it passed. It then passed at the special MC meeting on February 13 and was subsequently approved by the NYISO Board. The NYISO's Independent Market Advisor, Dr. David Patton, participated in discussions at various points in the process and presented an analysis of costs at the BIC and MC meetings where the proposed ICAP Demand Curve was considered.

The process that led to the ICAP Demand Curve is an example of the sort of collaboration among the State regulators, the Independent System Operator, and the stakeholders that the Commission has sought to encourage.

The arguments so painstakingly made to the Commission by opponents of the ICAP Demand Curve can be reduced to variations on a single familiar theme: delay. Opponents complain that the studies in support of the ICAP Demand Curve could have gone further, or in a different direction; that more studies, or different studies, are needed; that more stakeholder process would illuminate the issues further; that the change contemplated must be reexamined anew against other potential changes previously rejected; and that the proposal must be offered with, not merely a reasonable assurance of achieving the expected benefits after a thorough consideration of the merits, but a guarantee.

New York is already approaching a serious deficiency in Capacity.⁷ The ICAP Demand Curve will increase the stability of Installed Capacity prices, sending more

⁷ In the *Locational Installed Capacity Requirements Study*, approved by the NYISO Operating Committee on February 12, 2003, the NYISO has forecasted an Installed Capacity requirement of 37,087 MW for the New York Control Area ("NYCA") during the 2003 Capability Year and identified only 36,527 MW of existing Installed Capacity for the NYCA. The NYISO has acquired an additional 560 MW of Installed Capacity from Special Case Resources and is looking to 1,080 MW from proposed new generating units to meet the NYCA requirement. Similarly, the NYISO has forecasted a locational Installed Capacity requirement of 8,816 MW for New York City for the 2003 Capability Year, and only 8,749 MW of Installed Capacity has been identified in New York City. The NYISO has acquired 78 MW of Special Case Resources in order to just meet
(continued...)

appropriate signals to potential investors for construction of new generation, enhancing reliability, encouraging long-term bilateral transactions, and, ultimately, benefiting New York State consumers. The NYISO asks that the Commission reject the opponents' barely-veiled requests for delay and approve the ICAP Demand Curve for immediate implementation in this Summer Capability Period.

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II. REQUEST FOR LEAVE TO SUBMIT LIMITED ANSWER

The NYISO recognizes that the Commission generally discourages answers to comments and protests. Although many of the interventions filed in this proceeding have been labeled "protests," they are in fact motions seeking affirmative relief from the Commission. For example, Strategic Energy Inc. seeks an Order from the Commission that would require the NYISO to consider certain alternatives designated by Strategic Energy.⁸ The City of New York requests a reduction of the current and proposed multiplier for the

the locational requirement. *Locational Installed Capacity Requirements Study* (February 12, 2003) at www.nyiso.com/markets/icapinfo.html.

⁸ *Strategic Energy Motion* at 12.

ICAP deficiency charge.⁹ Agway Energy Services, Inc., ECONergy Energy Company, Inc. and Mirabito Gas & Electric, Inc. ask the Commission to alter the Management Committee's official vote on the ICAP Demand Curve.¹⁰ The Retail Suppliers Alliance requests summary rejection of the ICAP Demand Curve or a five-month delay of the effective date.¹¹ Con Edison and The Energy East Companies each request a full hearing before the Commission.¹² Several Protestors ask the Commission to refuse to consider the NYISO's March 21 Filing until an inter-regional approach to resource adequacy is developed and approved.¹³ The Commission's Rules of Practice and Procedure permit the NYISO to respond to such motions.¹⁴

Even if the interventions are deemed protests rather than affirmative motions, the Commission should allow the NYISO's answer. The Commission has allowed answers to comments and protests when, as here, they help clarify complex issues, provide additional information that will assist the Commission, or are otherwise helpful in the development of the record in a proceeding.¹⁵ The NYISO respectfully requests that the Commission exercise its discretion and accept the NYISO's limited answer.

⁹ *City of New York Motion* at 15.

¹⁰ *Agway Motion* at 14.

¹¹ *Retail Suppliers Motion* at 24.

¹² *Con Edison Motion* at 37; *Energy East Companies Motion* at 38.

¹³ *E.g., Delaware Municipal Motion* at 8; *PJM Motion* at 3.

¹⁴ *See* 18 C.F.R. § 385.213(a)(2)-(3).

¹⁵ *See, e.g., Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 (2000) (accepting an answer that was "helpful in the development of the record . . ."); *New York Independent System Operator, Inc.*, 91 FERC ¶ 61,218 at 61,797 (2000) (allowing an answer deemed "useful in addressing the issues arising in these proceedings . . ."); *Central Hudson Gas & Electric Corp.*, 88

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III. LIMITED ANSWER

A. The ICAP Demand Curve is a Just and Reasonable Approach that Will Benefit Consumers, Enhance Reliability, and Encourage Construction of New Generation in New York

1. The “Just and Reasonable” Standard Under the Federal Power Act

In the 17 motions and one answer opposing the NYISO’s March 21 Filing, the parties argue that the Filing fails to meet the “just and reasonable” standard under Section 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824d.¹⁶ Multi-Sector Protestors, Strategic Energy, L.L.C., and The Energy East Companies, also assert that in order to be “just and reasonable” the ICAP Demand Curve must be supported by a cost of service study.¹⁷

Nothing in Section 205 of the FPA, or elsewhere in the FPA, requires that just and reasonable rates be based on the actual cost of providing service. Under long-standing Supreme Court case law, rates must fall within a zone of reasonableness where they are neither so low as to be “less than compensatory” nor so high as to be “excessive” to consumers. The Commission is not required to rigidly adhere to a cost-based determination of rates.¹⁸ Courts have instead recognized that the Commission has considerable flexibility in selecting a methodology to determine just and reasonable rates, and a rate does not have to be cost-based to be just and reasonable. As the Commission itself has held, the “view that

FERC ¶ 61,137 at 61,381 (1999) (accepting otherwise prohibited pleadings because they helped to clarify the issues and because of the complex nature of the proceeding).

¹⁶ See *infra* Attachment I (listing motions opposing the NYISO’s March 21 Filing).

¹⁷ *Multi-Sector Protestors Motion* at 17; *Strategic Energy Motion* at 6-7; *Energy East Companies Motion* at 15-16.

¹⁸ *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1034 (1984); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602-03 (1944). See *FERC v. Pennzoil Producing Co.*, 439 U.S. 508 (1979); *Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968).

only cost-based or formula rate models satisfy the statutory framework fundamentally misapprehends the Commission's ratemaking authority."¹⁹

The Supreme Court "has repeatedly held that the just and reasonable standard does not compel the Commission to use any single pricing formula" ²⁰ There is no precise legal formulation for setting a just and reasonable rate and no bright line for determining when a rate becomes unjust and unreasonable. The FPA "does not dictate the ratemaking methodology to be followed or the elements that must be included in a lawful tariff."²¹ As described in the NYISO's March 21 Filing, the 13 motions in support of that Filing, and below in this limited answer by the NYISO, the demand curve is a just and reasonable approach to Installed Capacity in New York.

2. The ICAP Demand Curve Will Provide Significant Long-Term Benefits to Consumers

The NYISO's March 21 Filing, the affidavits of the Independent Market Advisor, David B. Patton, Ph.D.,²² and the 13 sets of comments filed in support of the NYISO's March 21 Filing,²³ provide an exhaustive explanation of the significant benefits to consumers

¹⁹ *California ex rel. Lockyer v. British Columbia Power Exch. Corp.*, 99 FERC ¶ 61,247, 62,062 (2002).

²⁰ *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Co.*, 498 U.S. 211, 224 (1991). *See also FPC v. Hope Natural Gas Co* at 602. ("Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling It is not the theory but the impact of the rate order that counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.") *See also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1988); *Permian Basin Area Rate Cases* at 747.

²¹ *Lockyer*, 99 FERC at 62,062.

²² Dr. Patton's affidavit, dated March 21, 2003, ("Patton Aff.") was included as Attachment IV to the NYISO's March 21 Filing. Dr. Patton's Supplemental Affidavit ("Patton Supp. Aff.") is attached hereto as Attachment II.

²³ *See supra* note 2 (listing motions in support of the NYISO's March 21 Filing).

under the proposed ICAP Demand Curve. Those benefits include savings for consumers that will average \$100 million annually when Capacity in New York is increased by one percent, according to Dr. Patton's analysis, which was described at some length in his affidavit attached to the NYISO's March 21 Filing.²⁴ Consumers would also benefit from the significant reduction in the frequency of shortage conditions that produce price spikes in the Energy market, and the increased reliability of the system derived from incentives under the ICAP Demand Curve to construct new generation in New York.²⁵

Virtually all of the Protestors claim that the NYISO somehow has not properly estimated the consumer benefits of the ICAP Demand Curve.²⁶ In an affidavit in support of Con Edison's motion, for example, Dr. Hieronymus claims that the estimated long-term benefits of the ICAP Demand Curve "decay quickly as additional generation is added."²⁷ Dr. Hieronymus ignores that the NYISO's estimate of consumer benefits takes into account the impact of additional Capacity. Dr. Patton's analysis of consumer benefits was repeated for Capacity margin levels ranging from three percentage points lower and three percentage points higher than the current Capacity margin. The estimated \$100 million in benefits to consumers is an average of the results across this range, with higher incremental benefits occurring at lower Capacity margins and lower incremental benefits occurring at higher Capacity margins.²⁸

²⁴ Patton Aff. ¶¶ 22-28.

²⁵ Patton Aff. ¶¶ 15-22.

²⁶ E.g., *Con Edison Motion* at 7-9; *Strategic Energy Motion* at 3-5; *Multi-Sector Protestors Motion* at 6-10.

²⁷ *Con Edison Motion*, Hieronymus Aff. ¶ 19-20.

²⁸ Patton Aff. ¶ 27; Patton Supp. Aff. ¶¶ 6-7.

The City of New York asserts that Dr. Patton overestimated the value of the benefits to consumers because his analysis fails to appropriately consider the impact of Capacity contracts.²⁹ Dr. Hieronymus also claims that the estimated benefits of implementing the ICAP Demand Curve are overstated, because Bilateral Transactions were considered in the transition cost but were not also included in the benefits analysis.³⁰ Dr. Patton has indicated, however, that including Bilateral Transactions in the benefits analysis would have been inappropriate because the transition cost looks at the first year under the ICAP Demand Curve, while the benefits estimate is intended to address long-term impacts.³¹ In the long-term, Bilateral Transactions will expire or be renegotiated with pricing provisions that are based on price expectations from the ICAP Spot Market.³²

3. The ICAP Demand Curve Will Enhance Reliability and Encourage Construction of New Generation in New York

The current Installed Capacity market has resulted in an unpredictable “boom or bust” scenario. Installed Capacity prices drop dramatically at the point that the minimum Installed Capacity requirement is satisfied and increase just as dramatically when any shortage of Installed Capacity exists. As set forth in Dr. Patton’s March 21 affidavit, the ICAP Demand

²⁹ *City of New York Motion*, Pechman Aff. ¶¶ 33-35.

³⁰ *Con Edison Motion*, Hieronymus Aff. ¶ 21.

³¹ Patton Aff. ¶¶ 58-67.

³² Patton Supp. Aff. ¶ 8. Con Edison also asserts that the ICAP Demand Curve is not a “genuine demand curve” because it is not based on the value of lost load and the loss of load probability. Though this argument does not impact the NYISO’s March 21 Filing, it makes clear Con Edison’s failure to recognize the relationship in this proceeding between Energy, Operating Reserves, and Installed Capacity payments. Installed Capacity prices alone need not recover the expected value of lost load because suppliers will receive payments in the Energy and Ancillary Services markets during shortage conditions that should be related to the expected value of lost load. Patton Supp. Aff. ¶¶ 3-5. Con Edison’s argument about the demand curve proposal applies equally to the existing Installed Capacity market design that is similarly not based on the expected cost of losing load. Therefore, Con Edison’s argument cannot be used to support the retention of the current vertical demand curve for capacity.

Curve proposal will increase the stability of Installed Capacity prices, producing more effective signals for new investment in generation in New York.³³ The ICAP Demand Curve will also facilitate long-term Capacity contracts that provide an important means to finance new generation projects and to obtain reinvestment in existing generation that might otherwise be retired from the Installed Capacity market, thus enhancing reliability.³⁴

Con Edison argues that Installed Capacity payments under the existing market structure are sufficient to support the needed generation supply in New York.³⁵ Con Edison's conclusion is based primarily on the Installed Capacity prices from the Summer 2001 Capability Period when the surplus was relatively limited, and the price ranged from \$6 to \$8 per kW-month. Those prices do not reflect the current market. More recent results differ significantly: The monthly prices during Summer 2002, when a surplus existed, cleared at less than \$1 per kW-month on average. The market is expected under the current market design to encourage this volatility.³⁶

The Protestors generally argue that the ICAP Demand Curve will not result in new entry to the New York market. The City of New York asserts that "[n]o one can offer assurance" that the ICAP Demand Curve will result in new construction because Capacity revenue alone is not the determining factor for construction.³⁷ Multi-Sector Protestors make

³³ Patton Aff. ¶¶ 19-20.

³⁴ Patton Aff. ¶ 28.

³⁵ *Con Edison Motion*, Hieronymus Aff. ¶ 54.

³⁶ Patton Supp. Aff. ¶ 9.

³⁷ *City of New York Motion* at 6-8, Pechman Aff. ¶¶ 44-56.

a similar assertion.³⁸ In his affidavit for Con Edison, Dr. Hieronymus alleges that the ICAP Demand Curve will not encourage investment in new generating resources in New York. Dr. Hieronymus claims that broad fluctuation in supply and demand conditions in the current New York market create a disincentive for Bilateral Transactions and new investment.³⁹ Con Edison also argues that long-term price stability in the Installed Capacity market will result in lower Energy prices, providing further disincentives for new investment.⁴⁰

In fact, the ICAP Demand Curve is intended to mitigate these problems. The stabilized prices in the Installed Capacity market that will result from the ICAP Demand Curve will give investors more accurate and reliable market signals for deciding whether to build or retire resources. Prices in the Energy market will inevitably reach an equilibrium with or without a change in the Installed Capacity market.⁴¹

Con Edison also argues that new investment may be discouraged when it appears that the most economic investment in new resources will result in unnecessary Capacity in a particular locality (“lumpy investment”). Dr. Hieronymus argues that lumpy investment will cause prices for Installed Capacity to fall in the given locality. As a result, Dr. Hieronymus claims, the market-clearing price in the Installed Capacity market may be below the target price at the minimum requirement that is set to recover the cost of new entry.⁴² Under the ICAP Demand Curve, however, Installed Capacity revenues will continue to be

³⁸ *Multi-Sector Protestors Motion* at 13-14.

³⁹ *Con Edison Motion*, Hieronymus Aff. ¶¶ 48-50.

⁴⁰ *Con Edison Motion*, Hieronymus Aff. ¶ 48-50; Patton Supp. Aff. ¶ 11.

⁴¹ Patton Supp. Aff. ¶ 11.

⁴² *Con Edison Motion*, Hieronymus Aff. ¶ 47.

supplemented by Energy and Ancillary Services revenues. The result will be more stable prices than those that appear in the current Installed Capacity market where, under the existing vertical demand curve, Installed Capacity prices can draw close to zero.⁴³ As explained in Dr. Patton's affidavits, the ICAP Demand Curve will reduce the amount of these price spikes and mitigate problems associated with lumpy investment.⁴⁴

4. The ICAP Demand Curve Will Facilitate Long-Term Bilateral Transactions

Currently, the volatility and uncertainty of prices in New York's Installed Capacity market makes it difficult for Load Serving Entities ("LSEs") and existing Installed Capacity Suppliers to reach agreement on prices for long-term bilateral Capacity contracts.⁴⁵ The ICAP Demand Curve, however, reduces that volatility and uncertainty by recognizing the value of Installed Capacity above the minimum requirement level. By reducing volatility of future clearing prices, the ICAP Demand Curve will encourage long-term Capacity contracts.⁴⁶

Con Edison alleges that the ICAP Demand Curve will reduce the incentives for LSEs to enter into long-term Bilateral Transactions for Installed Capacity.⁴⁷ Under the existing vertical demand curve, however, LSEs may be discouraged from entering into Bilateral Transactions as a result of continued price spikes and may ultimately be forced to pass those

⁴³ Patton Supp. Aff. ¶¶ 12-13.

⁴⁴ Patton Aff. ¶¶ 13-14.

⁴⁵ Patton Aff. ¶ 29.

⁴⁶ Patton Aff. ¶ 29.

⁴⁷ *Con Edison Motion*, Hieronymus Aff. ¶¶ 49-50.

costs on to consumers.⁴⁸ Given the volatility of the current Installed Capacity market, state regulators may prohibit such recovery of costs associated with Bilateral Transactions.⁴⁹ The ICAP Demand Curve will avoid this result by stabilizing prices in the Installed Capacity market.

The City of New York argues that the ICAP Demand Curve may reduce incentives for long-term Capacity contracts because LSE's won't know exactly how much Capacity they need to purchase.⁵⁰ Similarly, the Energy East Companies and Dr. Hieronymus assert that because the precise Capacity obligation is unknown until completion of the Monthly auction, the proposal creates a risk to LSEs that cannot be hedged and a disincentive to entering into Bilateral Transactions for Capacity.⁵¹ On the contrary, Dr. Patton explains that in the proposed Installed Capacity market, an LSE will be able to purchase any amount of Capacity in the Monthly auction and may then offer any excess amount of Capacity it has into the ICAP Spot Market Auction. This same opportunity for re-sale exists for capacity purchased under bilateral contracts. This auction structure will allow LSEs to manage their risks through familiar financial instruments such as contracts for differences, which LSEs commonly use in energy markets in order to hedge their risks from the outset.⁵²

⁴⁸ Patton Supp. Aff. ¶ 16.

⁴⁹ Patton Supp. Aff. ¶ 15.

⁵⁰ *City of New York Motion*, Pechman Aff. ¶ 52.

⁵¹ *The Energy East Companies Motion* at 31; *Con Edison Motion*, Hieronymus Aff. ¶¶ 48-49; Patton Supp. Aff. ¶ 14.

⁵² Patton Supp. Aff. ¶ 17.

5. The ICAP Demand Curve Reduces Incentives to Withhold Installed Capacity

The ICAP Demand Curve will significantly reduce, and potentially eliminate, the incentives to withhold Capacity from the market. As Dr. Patton explains, this reduction in the incentive to withhold arises because, unlike the current vertical demand curve, the ICAP Demand Curve will result in only modest price increases as the total level of Capacity in the Installed Capacity market decreases.⁵³

Dr. Hieronymus claims that incentives to withhold Installed Capacity in New York City are not reduced by the ICAP Demand Curve. Dr. Hieronymus' affidavit, however, actually describes incentives to withhold that are substantially lower than those that exist in the current Installed Capacity market.⁵⁴ Dr. Hieronymus also fails to address the fact that these divested units are required to bid all of their capacity into the "In-City" ICAP market and to recognize the bid/price cap that applies to all resources divested by Con Edison within New York City, which constitute approximately two-thirds of the Installed Capacity needed to meet the New York City requirements.⁵⁵

Dr. Hieronymus claims that market monitoring will not sufficiently address the problem of market power after the implementation of the ICAP Demand Curve. As support for this claim, he suggests that alleged abuses of market power during the 2001-2002 Winter Capability Period were not addressed.⁵⁶ The City of New York raises the same issue.⁵⁷

⁵³ Patton Aff. ¶¶ 33-41.

⁵⁴ *Con Edison Motion*, Hieronymus Aff. ¶¶ 58-59.

⁵⁵ Patton Supp. Aff. ¶ 18.

⁵⁶ *Con Edison Motion*, Hieronymus Aff. ¶ 61.

⁵⁷ *City of New York Motion*, Pechman Aff. ¶¶ 53-56.

Although last winter's Installed Capacity was offered at prices higher than expected for a less concentrated market, the Installed Capacity was completely offered. This result is consistent with the concentration of supply found in the current Installed Capacity market.⁵⁸ The NYISO has addressed these issues by implementing a mandatory offer provision and creating a price cap for owners of divested generation in New York City. Incentives for new investment in New York City, which is already nearing deficiency,⁵⁹ would have been discouraged if more aggressive mitigation had been implemented.⁶⁰ The In-City market mitigation rules and NYISO's Market Monitoring Plan - Market Mitigation Measures will remain in place after implementation of the ICAP Demand Curve.

Dr. Bowring, the market monitor for PJM, claims that the impact of market power in New York could adversely affect the PJM Capacity market.⁶¹ Dr. Bowring incorrectly assumes that market power issues will be more problematic under the ICAP Demand Curve than in the current market. In contrast to the current market, which provides significant incentives for withholding as Installed Capacity surpluses decrease, a market under the ICAP Demand Curve will substantially reduce these incentives, and prices will not increase in the statewide market.⁶²

6. The ICAP Demand Curve is Not a Temporary Measure

⁵⁸ Patton Aff. ¶¶ 47-57.

⁵⁹ Patton Aff. ¶¶ 30-32.

⁶⁰ Patton Supp. Aff. ¶ 19.

⁶¹ *PJM Motion*, Bowring Aff. ¶ 10.

⁶² Patton Supp. Aff. ¶ 20; see the discussion below addressing PJM's complaints about the ICAP Demand Curve proposal and its potential impacts on PJM.

Several intervenors mistakenly argue that the ICAP Demand Curve is intended merely as a temporary, two-year measure. Paul D. Tonko, for example, states that “. . . large facilities would likely only come on-line during *the third and final year of the demand curve*. Therefore the limited time period of the proposal provides no long-term assurances for new generation”⁶³

The ICAP Demand Curve is not proposed by design as a temporary measure. As set forth in Section 5.14(b) of the proposed revisions to the ISO Market Administration and Control Area Services Tariff (the “Services Tariff”), Attachment I to the NYISO’s March 21 Filing, the ICAP Demand Curve will be reviewed every three years.⁶⁴ The review will consider, among other data, variables such as the cost of new entry in New York City, Long Island and the NYCA.⁶⁵ Based on that review, the points on the ICAP Demand Curve may be adjusted and, following review and approval by the Commission, new ICAP Demand Curves (one to determine the locational component of LSE Unforced Capacity Obligations for the Long Island Locality, one to determine the locational component of LSE Unforced Capacity Obligations for the New York City Locality, and one to determine the total LSE

⁶³ *Tonko Motion* at 16 (emphasis added).

⁶⁴ The first review will result in adjustments, if needed, of demand curves for the third year out, after the two-year phase-in period. Con Edison argues in its Answer, at 6-7, without any supporting authority, that the proposal is “defectively vague” because the third year demand curves are not now defined. The process for defining them is laid out in the ICAP Demand Curve proposal. Dr. Patton describes in his supplemental affidavit why offsets to the demand curves should not be explicitly set to the actual net revenue expected from the energy and ancillary services markets. Patton Supp. Aff. ¶¶ 27-31.

⁶⁵ Dr. Patton reviewed the new entry costs used to set the ICAP Demand Curve and concluded that net revenues from New York markets in 2002 were not sufficient to cover the annual entry costs of a new gas turbine, Patton Supp. Aff. ¶ 35, and that the ICAP Demand Curves proposed are reasonable for initial implementation. Patton Supp. Aff. ¶ 31; *See also NYPSC Motion*, Paynter Aff. ¶¶ 61-63. Contrary to assertions in *Con Edison’s Answer* at 8, Dr. Patton’s estimated costs of new entry contained in his 2002 Annual Report do not affect the demand curve justification or parameters, because the consensus capacity demand curves were set at reasonable levels well below the ICAPWG entry cost estimates and estimates in the 2002 Annual Report. Patton Supp. Aff. ¶¶ 32-36.

Unforced Capacity Obligations for all LSEs) will be put in place for another three-year period.

The ICAP Demand Curves will be subject to review and adjustment to accurately reflect conditions in the New York market. To the extent that intervenors urge rejection of the ICAP Demand Curve based on the mistaken belief that the ICAP Demand Curve is only a temporary measure by design, and therefore cannot by definition contribute to long-term stability, their arguments must be ignored. Of course, the proposed Tariff changes, like any others, are always subject to review by the NYISO and Market Participants and may be changed as a result of new information or experience with the program.

B. The Demand Curve Does Not Adversely Impact PJM

PJM argues that (1) the ICAP Demand Curve should be rejected and no changes made until the Resource Adequacy Model (“RAM”) is completed, (2) the ICAP Demand Curve approach could negatively affect PJM Capacity markets by increasing Capacity exports from PJM, resulting in increased Capacity prices in PJM, (3) there are not adequate market power mitigation mechanisms in the proposal, so PJM’s Capacity markets could be affected by market power that might be exercised, and (4) the supplemental supply fee proposed creates incentives to withhold Capacity from the market.⁶⁶

PJM states unequivocally that the “administrative demand curve approach has not achieved consensus or even majority support in the RAM group,”⁶⁷ and that the ICAP Demand Curve does not enjoy “consensus support from the stakeholders in the inter-ISO

⁶⁶ *PJM Motion* at 2-3; Bowring Declaration ¶¶ 3, 4, 8, 10, and 11.

⁶⁷ Bowring Declaration ¶ 3.

process.”⁶⁸ PJM argues “the Commission should wait until the inter-ISO process is completed” before acting.

No proposal has yet “achieved consensus” or “majority support” because the RAM process is not complete. As noted in NYISO’s March 21 Filing, PJM joined NYISO and ISO New England on January 10, 2003 in filing joint comments with the Commission on resource adequacy, stating that the three ISOs will work through the RAM to develop the key market design elements for the central resource market, “including . . . the possible use of a demand curve for price determination.”⁶⁹ On April 4, 2003, the three ISOs issued a Request for Proposals, which includes the demand curve as one of the market design options to be evaluated by an expert consultant. The current “consensus” is that the demand curve should be analyzed, along with other methodologies, as a candidate for the final Capacity market design. PJM’s bald assertion that the demand curve is not supported by the stakeholders in the inter-ISO process⁷⁰ is belied by the consensus among the NYISO Market Participants, stakeholders in the inter-ISO process, that resulted in the NYISO’s March 21 Filing.

PJM seems to assert that the RAM process should preclude any improvements in the ISOs’ existing ICAP markets to address current issues. A key principle of the RAM Group is that the capacity resource market should be a forward market design to allow equal time for new resources to respond and to provide price certainty to loads. The RAM schedule calls for the development of a recommended forward market design during 2003, followed by vetting through each of the ISOs’ stakeholder processes. Anticipating a FERC filing and

⁶⁸ *PJM Motion* at 2.

⁶⁹ NYISO’s March 21 Filing at 6-7; *Joint Comments of ISO New England, New York Independent System Operator, Inc., and PJM Interconnection, L.L.C. on Resource Adequacy*, Jan. 10, 2003, at 5.

⁷⁰ *PJM Motion* at 3.

approval in early 2004, the first application of the new forward market design could be held in mid-2004. The first auction held in 2004 would be for the year 2006-2007. Therefore, the PJM position of waiting for the conclusion of the RAM process is a prescription for inaction for at least the next three to four years that the Commission should decline.⁷¹

PJM also argues that the ICAP Demand Curve, labeled a “regulatory intervention,” could affect PJM by increasing Capacity exports from PJM, resulting in higher Capacity prices in PJM.⁷² The Capacity market itself is a “regulatory intervention,” a product created administratively to ensure the reliability of the electricity system.⁷³ To suggest that the current vertical demand curve is any less of a regulatory intervention than the proposed demand curve is misleading.⁷⁴

That the ICAP Demand Curve may increase Capacity exports to New York is not a reason to reject the ICAP Demand Curve. PJM is a large net exporter of Energy to New York, averaging more than 1000 MW each hour in 2002. PJM also has substantial excess Capacity not needed for reliability in PJM. Finally, even if prices are affected in PJM, it would be a desirable, appropriate result of well-functioning markets.⁷⁵

PJM claims that “to the extent that market power is exercised in the NYISO Capacity markets, the impact of that market power could extend to the PJM Capacity market.”⁷⁶ This

⁷¹ See NYISO’s March 21 Filing at 7.

⁷² Patton Supp. Aff. ¶ 23.

⁷³ Patton Aff. ¶ 7.

⁷⁴ Patton Supp. Aff. ¶ 24.

⁷⁵ Patton Supp. Aff. ¶ 25.

⁷⁶ Bowring Declaration ¶ 10.

is why it is important to adopt the ICAP Demand Curve.⁷⁷ The ICAP Demand Curve virtually eliminates any incentive to withhold resources to raise prices in the statewide market.⁷⁸ It is the current system, not the ICAP Demand Curve, that provides substantial incentives to withhold as the Capacity surplus decreases, which could in fact result in the effect on the PJM markets that PJM predicts.⁷⁹

PJM (and other Protestors, including Con Edison) argues that the supplemental supply fee proposed by the NYISO may create incentives to withhold Capacity from the market.⁸⁰ The supplemental supply fee will be applied to any LSE that has not met its Installed Capacity requirement after the ICAP Spot Market Auction is completed. The supplemental supply fee will equal 1.5 times the estimated cost of new entry.⁸¹ The deficiency payments would be used by the NYISO to purchase Installed Capacity at the lowest available price from suppliers, including those that offered Installed Capacity at greater than the market-clearing price in the ICAP Spot Market Auction and those that did

⁷⁷ Patton Supp. Aff. ¶ 20.

⁷⁸ Patton Aff. ¶¶ 33-41.

⁷⁹ Patton Supp. Aff. ¶ 20.

⁸⁰ *PJM Motion* at 3; *Con Edison Motion* at 20-21; Hieronymus Aff. ¶ 61.

⁸¹ NYISO's March 21 Filing at 10. The current ICAP deficiency charge is three times the cost of new entry. While Con Edison filed a 37-page affidavit, complaining about every aspect of the ICAP Demand Curve, from its name ("inaptly called" a demand curve, *Con Edison Motion* at 4), to the rejection by Market Participants of a competing proposal offered and subsequently withdrawn by Con Edison and others ("NYISO ignored alternative ICAP solutions", *Con Edison Motion* at 33), Con Edison has cherry-picked one provision alone from the demand curve filing and asks the Commission to approve it: the change from three to 1.5 times the cost of new entry for the deficiency charge. Miraculously, apparently, the same vote that Con Edison argues was defective and negates the validity of the NYISO's entire 205 filing with the Commission on the demand curve (see *Con Edison Motion* at 3, 29) also allowed Market Participants to "agree" that 1.5 times the cost, rather than three times, is "adequate and reasonable." *Con Edison Motion* at 33.

not offer Installed Capacity in the auction.⁸² The negotiated price paid to these suppliers is subject to the Market Monitoring Plan - Market Mitigation Measures.⁸³

Dr. Patton pointed out in his affidavit attached to the NYISO's March 21 Filing that the supplemental supply fee provision might affect the incentives of the existing suppliers to offer resources in the deficiency auction, because the supplemental supply fee creates the opportunity to receive higher prices than the Capacity clearing price from the deficiency auction.⁸⁴

As Dr. Patton describes in his Supplemental Affidavit, he has worked with stakeholders and the NYISO since the NYISO's March 21, 2003 Filing to develop a proposal to address this potential issue.⁸⁵ The proposal received wide support, has been approved by the Market Participants, and is pending before the NYISO Board. If approved by the Board and the Commission, it would address supplemental supply fee issues.⁸⁶

C. The Demand Curve is Consistent with NYISO's Position in SMD

The Retail Suppliers Alliance and the Multi-Sector Protestors both inaccurately assert that the NYISO has taken a position contrary to its March 21 Filing in comments previously submitted by the NYISO for the SMD NOPR, Docket No. RM01-12-000 (Feb. 19, 2003).⁸⁷

⁸² NYISO's March 21 Filing at 10-11.

⁸³ NYISO's March 21 Filing at 11.

⁸⁴ Patton Affidavit ¶¶ 42-46.

⁸⁵ Patton Supp. Aff. ¶ 21.

⁸⁶ Patton Supp. Aff. ¶ 22; *see also* NYPSC Motion, Paynter Aff. ¶¶ 66-69. If approved by the NYISO Board, the change will be filed with the Commission. The proposals voted on at the BIC and the MC are available online at www.nyiso.com/services/documents/groups/index.html.

⁸⁷ *Retail Suppliers Motion* at 22; *Multi-Sector Protestors Motion* at 15.

Retail Suppliers quote the following passage from NYISO's SMD comments submitted on February 19, 2003:

Similarly, the New York State Public Service Commission ("NYPSC") backs many aspects of the RAM Group proposal but also backs a number of particular changes. While many of the ideas advanced by these and other parties may be meritorious, it would be premature for the Commission to formally adopt any of them at this time. The better alternative would be to trust the RAM Group to consider all of these concepts and to let it formulate a consensus proposal for submission to the Commission. The Commission should give the RAM Group the time it needs to complete this work.⁸⁸

The NYISO's comments in the SMD docket went on to caution the Commission not to impose its own or any other party's resource adequacy design for the Northeast region before the RAM process plays out, with no intention of precluding any proposed enhancements urged by Market Participants within any ISO's region to improve their current respective ICAP auction procedures. As discussed in the NYISO's March 21 Filing, the RAM Group may ultimately adopt a similar approach to the Installed Capacity market, and ISO New England, NYISO, and PJM filed joint comments stating that they would look at a demand curve as a possible central market design element.⁸⁹ If and when the RAM Group adopts a particular approach, the NYISO, along with its stakeholders, will evaluate it for application to New York. At this time, however, the NYISO and its Market Participants believe that the ICAP Demand Curve is the appropriate method the New York Capacity market at this time.

⁸⁸ *Retail Suppliers Motion* at 22.

⁸⁹ NYISO's March 21 Filing at 6-7.

Inexplicably, Con Edison claims that “the NYISO admits [that the ICAP Demand Curve is] inconsistent with the direction that the region’s ISOs are currently contemplating, as evidenced by the ongoing discussion in the [RAM] group.”⁹⁰ In fact, NYISO expressly states in the March 21 Filing that the RAM Group is actively considering the application of a demand curve for the future regional Capacity markets.⁹¹ As noted above, the mechanism that is ultimately selected by the RAM Group would first be thoroughly vetted within each ISO’s respective stakeholder processes and then be submitted to the Commission for approval prior to implementation. As stated in the NYISO’s March 21 Filing, it is the NYISO’s intention to transition to the RAM Group’s ultimate market design, as appropriate.⁹² If the RAM process selects a demand curve approach, then the NYISO’s decision to implement the ICAP Demand Curve now will simplify any transition.

D. The ICAP Demand Curve Was Properly Approved by the Market Participants

Con Edison, Agway Energy Services, Inc., ECONergy Energy Company, Inc. and Mirabito Gas & Electric, Inc., among others, argue that the Management Committee vote approving the ICAP Demand Curve was flawed. Con Edison asks the Commission to overturn that vote, consider the NYISO’s March 21 Filing as a filing under Section 206 of the FPA, and conclude that the NYISO’s 205 Filing fails as a 206 Filing. As discussed in some detail in the NYISO’s March 21 Filing, the NYISO Board thoroughly reviewed the Management Committee vote and determined that it was conducted properly and in

⁹⁰ *Con Edison Motion* at 16.

⁹¹ NYISO’s March 21 Filing at 6-7.

⁹² NYISO’s March 21 Filing at 7.

accordance with the ISO Agreement. NYISO's March 21 Filing at 12-13; NYISO Board Decision in Attachment V to the NYISO's March 21 Filing. Following that determination, in accordance with Section 19.01 of the ISO Agreement, the NYISO's March 21 Filing was appropriately submitted to the Commission pursuant to Section 205 of the FPA.⁹³

Because the NYISO's March 21 Filing fully addresses the proper stakeholder approval of the ICAP Demand Curve, those issues need not be reiterated here.⁹⁴ Two issues raised by Protestors, however, require clarification. First, Con Edison incorrectly alleges that three of the new Members that were prohibited from voting on the ICAP Demand Curve (Agway, ECONergy and Mirabito) should have been permitted to vote because they were represented by proxies, not by representatives.⁹⁵ Representatives must be designated seven days' in advance of voting; proxies must be designated "as soon as possible . . . before the taking of any vote."⁹⁶

The new Members acknowledge in their own Motion to Intervene that they were represented at the February 13th meeting by representatives, not by proxies.⁹⁷ Proxies, in fact, must be designated by a representative of the Member. Management Committee By-Laws § 2.05 (a Member may attend by proxy "so long as *the representative* gives notice . . . as soon as possible and before the taking of any vote to which the proxy will apply")

⁹³ Independent System Operator Agreement § 19.01 (where both the NYISO Board and the Management Committee agree on a proposed tariff revision, the "ISO shall file the proposed amendment with the Commission pursuant to Section 205 of the FPA").

⁹⁴ NYISO's March 21 Filing at 12-13.

⁹⁵ *Con Edison Motion* at 24-25.

⁹⁶ Management Committee By-Laws § 2.05.

⁹⁷ *Agway Energy Services, Inc. Motion* at 5.

(emphasis added). The new Members had not provided the required seven days' notice to designate their representatives; therefore, they had no active representative to provide a proxy designation that could be effective at that meeting.

Second, Con Edison, Agway, ECONergy and Mirabito argue that the Chair of the Management Committee enforced the seven days' notice requirement inconsistently at the February 13th meeting, because the Members that were prohibited from voting on the ICAP Demand Curve were permitted to vote on a motion to adjourn the February 13th meeting.⁹⁸ Prior to calling for a vote on the motion to adjourn, the Chair of the Management Committee advised the new Members that they would be ineligible to vote on the ICAP Demand Curve motion at the February 13th meeting.⁹⁹ The Management Committee Chair, nevertheless, allowed the new Members to vote on a motion to adjourn the meeting, advising the new Members that they would be allowed to vote on the ICAP Demand Curve at a subsequent meeting if the motion to adjourn passed. Agway and Mirabito chose to vote against the motion to adjourn.

E. The *Sithe New England* Decision Does Not Apply Here

1. Protestors Mischaracterize the Holding in *Sithe New England*

The Energy East Companies and Con Edison mischaracterize the Court of Appeals' decision in *Sithe New England Holdings, LLC v. Federal Energy Regulatory Comm'n*, 308 F.3d 771 (1st Cir. 2002) as supporting their position against the ICAP Demand Curve.¹⁰⁰ In fact, that case is not applicable here.

⁹⁸ *Con Edison Motion* at 24; *Agway Services, Inc. Motion* at 6.

⁹⁹ *Meeting Minutes* at 2 (Feb. 13, 2003) available at www.nyiso.com.

¹⁰⁰ *Con Edison Motion* at 27-29; *The Energy East Companies Motion* at 19-20.

In *Sithe New England* the issue was whether the Commission should have applied an increased ICAP deficiency charge retroactively to a thirteen-month period prior to the Commission's approval of the increased charge. The Commission refused to impose the charge retroactively, and the U.S. Court of Appeals for the First Circuit upheld that decision. The Court concluded that the Commission had the authority to retroactively increase the ICAP charge for the prior period but that the Commission's failure to do so was not unreasonable in light of the arguments that could be made both for and against the impact of a retroactive increase in the ICAP deficiency charge.

In doing so, the Court of Appeals clearly recognized that a robust ICAP market spurs new investment in generation. Indeed, in the predecessor case where the First Circuit considered that same ICAP deficiency charge, *Central Maine v. Federal Energy Regulatory Comm'n*, the Court held that the Commission was justified in increasing the New England ICAP charge prospectively. 252 F.3d 34 (1st Cir. 2001). The *Sithe New England* decision stands for nothing more than the proposition that, while the Commission was permitted to increase the ICAP charge retroactively, it was not required to do so, because the retroactive increase of the charge would have little effect on the decisions that had already been made regarding investment in new generation.

The NYISO does not seek to apply the ICAP Demand Curve retroactively. Costs relating to the ICAP Demand Curve will apply only after the effective date requested in the NYISO's March 21 Filing. Contrary to Con Edison's assertion,¹⁰¹ the NYISO has never suggested that the ICAP Demand Curve should be approved to compensate existing generators for past investment. Con Edison ignores the point of both this proceeding and of

¹⁰¹ *Con Edison Motion* at 27-28.

Sithe New England – Installed Capacity, in this case in the form of the ICAP Demand Curve, is needed to send the correct economic signals to the market about the need for additional generation Capacity.

2. *Sithe New England* Does Not Establish that ICAP is an Incentive Rate

The Electricity Consumers Resource Council (“ELCON”) argues that the *Sithe New England* decision “affirmed that ICAP is appropriately treated as an incentive rate.”¹⁰² ELCON asserts that ICAP charges generally, and the ICAP Demand Curve in particular, therefore are subject to the standards applied in a variety of cases involving incentive ratemaking for oil and gas pipelines.¹⁰³ Those cases establish the broad principle that, in order to be approved, incentive rates must be supported by findings that the rates will achieve the desired outcomes.¹⁰⁴

Contrary to ELCON’s assertions, the *Sithe New England* decision did not establish that ICAP charges are subject to the incentive ratemaking cases cited by ELCON. The *Sithe New England* decision does not even reference the incentive ratemaking cases discussed by ELCON. Nevertheless, the ICAP Demand Curve is fully consistent with the broad principles

¹⁰² *Electric Consumers Resource Council Motion* at 4-11.

¹⁰³ *Id.* at 7-11. Cases cited by ELCON in this context include: *City of Charlottesville v. Federal Energy Regulatory Comm’n*, 661 F.2d 945 (D.C. Cir. 1981) (involving tax savings for gas pipelines); *Farmers Union Central Exchange Inc. v. Federal Energy Regulatory Comm’n*, 734 F.2d 1486 (D.C. Cir. 1984) (involving the ratemaking methodology for oil pipelines); *Public Service Comm’n v. Federal Energy Regulatory Comm’n*, 589 F.2d 542 (D.C. Cir. 1978) (involving an “optional certificate program” for natural gas producers).

¹⁰⁴ The Retail Suppliers Alliance cites cases that similarly require a demonstrable connection between the costs of a filing and the benefits that it is intended to produce. *Retail Suppliers Motion* at 15, citing, *inter alia*, *Public Service Comm’n v. Federal Energy Regulatory Comm’n*, 589 F.2d 542 (D.C. Cir. 1978), *Mobil Oil Corp. v. Federal Power Comm’n*, 417 U.S. 283, 318 (1974), and *The Second National Natural Gas Rate Cases, American Public Gas Assoc’n v. Federal Power Comm’n*, 567 F.2d 1016, 1059-60 (D.C. Cir. 1977). Assuming those cases applied to this proceeding, and the NYISO believes they do not, the NYISO’s March 21 Filing and Dr. Patton’s affidavits clearly demonstrate the significant benefits in new investment and increased reliability that will result from the ICAP Demand Curve.

in those cases. As discussed in greater detail in this filing and in the NYISO's March 21 Filing, the ICAP Demand Curve will provide significant benefits to New York consumers by reducing price spikes, increasing reliability, and encouraging new construction in the New York market.¹⁰⁵

F. An Evidentiary Hearing is Not Necessary

The Energy East Companies, Con Edison and several other Protestors call for a full evidentiary hearing on the ICAP Demand Curve.¹⁰⁶ It is difficult to imagine what benefit could be gained from such a hearing.

The ICAP Demand Curve is the result of nearly a year of discussions among Market Participants and interested stakeholders. Following Management Committee approval, the ICAP Demand Curve was the subject of an appeal to the NYISO Board in which many of the parties to this proceeding actively participated. The Commission now has before it what can only be described as an exhaustive record on the proposed ICAP Demand Curve, including more than 700 pages in 37 motions to intervene and one answer. An evidentiary hearing will merely provide a forum for the parties to repeat orally arguments already before the

¹⁰⁵ ELCON also cites the Commission's 1992 Policy Statement on Incentive Regulation, 61 FERC ¶ 61,168 (1992) (the "1992 Policy Statement"). *Electric Consumers Resource Council Motion* at 11-12. Aside from the fact that the Commission has said that the 1992 Policy Statement is not binding law, *FERC Order Denying Rehearing*, Docket No. PL92-1-001 (Apr. 22, 1993), the 1992 Policy Statement is not relevant to this proceeding. The 1992 Policy Statement was issued before ISO-administered open-access markets and the Commission's Orders 888 and 2000. ELCON states that Order 2000 affirmed the Commission's continued endorsement of the 1992 Policy Statement. Order 2000, however, did not address Installed Capacity markets. In fact, the Commission's only reference to the 1992 Policy Statement in Order 2000 was a brief statement in the context of performance based rates, not a reference to the Installed Capacity markets. The 1992 Policy Statement has not been, and should not be, applied to an ISO-administered Installed Capacity market. The 1992 Policy Statement was intended to be applied only to non-competitive markets and not to competitive bid-based markets like the NYISO Installed Capacity market. *See* 1992 Policy Statement at ¶ 61,168. Notably, the 1992 Policy Statement is not referenced anywhere in the Commission's recent Proposed Pricing Policy for Efficient Operation and Expansion of the Transmission Grid, 102 FERC ¶ 61,032 (Jan. 15, 2003).

¹⁰⁶ *E.g., The Energy East Companies Motion* at 45-47; *Con Edison Motion* at 37 (requesting an evidentiary hearing or stakeholder process).

Commission, often in multiple pleadings pressing similar points, and to create the potential for unnecessary delay in the implementation of the ICAP Demand Curve should the Commission approve it.

Several intervenors make clear their intent to achieve such a delay. The Retail Supplier's Alliance's Motion affirmatively requests that "in the event the Commission were to allow the Demand Curve proposal to take effect, it should . . . suspend the effectiveness of the disputed tariff filing for the full 5 month period" under Section 205 of the FPA.¹⁰⁷ Select Energy also requests a five-month delay.¹⁰⁸ The five-month delay under Section 205(e) is applicable only if the Commission schedules a hearing on the NYISO's March 21 Filing. The decision to schedule a hearing or not is entirely within the Commission's discretion.¹⁰⁹ A hearing in this proceeding is not necessary and would guarantee a lengthy delay in implementation of the demand curve if it is ultimately approved by the Commission.

Con Edison also suggests that the Commission could establish "a stakeholder process" as an alternative to an "evidentiary hearing." There has already been a lengthy stakeholder process, and it resulted in the demand curve filing. Those who do not support the legitimate outcome of the NYISO's extensive stakeholder process should not be allowed to impede implementation of the agreed-upon outcome by extending the process indefinitely.

¹⁰⁷ *Retail Suppliers Motion* at 24.

¹⁰⁸ *Select Energy Motion* at pt. VI.

¹⁰⁹ In *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir.1993), the United States Court of Appeals for the District of Columbia said, ". . . we have held on several occasions that FERC need not conduct an evidentiary hearing when there are no disputed issues of material fact . . . and that even where there are such disputed issues, FERC need not conduct such a hearing if they may be adequately resolved on the written record." See also *Union Pacific Fuels, Inc. et al. v. FERC*, 129 F.3d 157 (D.C. Cir. 1997).

There is no issue that has been raised in the ample written record here on the ICAP Demand Curve that the Commission cannot resolve based on that record.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc., respectfully requests that the Commission: (i) grant its request for leave to submit a limited answer in this proceeding; (ii) reject the relief requested in the protests filed in this docket; and (iii) accept the filed tariff revisions implementing the ICAP Demand Curve.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties listed on the official service list maintained by the Secretary of the Commission in Docket No. ER03-647-000 in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure 18 C.F.R. § 385.2010 (2002).

Dated at Washington, D.C. this 2nd day of May 2003.

/s/ Catherine A. Karimi

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