

May 7, 2012

**VIA E-MAIL**

Ms. Leigh Bullock  
Business Issues Committee Liaison  
New York Independent System Operator, Inc.  
10 Krey Boulevard  
Rensselaer, New York 12144

Re: NYISO NCZ Mitigation Proposal  
April 16, 2012 Joint Meeting

Dear Leigh:

In accordance with the request of NYISO Staff during the April 16, 2012 joint ICAP/PRL/MIWG meeting, GenOn New York, LLC and Entergy Nuclear Power Marketing, LLC (collectively, "New York Suppliers") hereby provide the following comments on the NYISO's April 16 draft NCZ Mitigation Proposal. These comments supplement the significant concerns that were raised during the meeting with respect to one aspect of this draft proposal, the NYISO's proposed changes to NYISO Services Tariff, Attachment H, Section 23.4.5.7.6.

The New York Suppliers wish to preface these comments in two respects. First, given the complexity and controversy that the development of market power mitigation rules has previously entailed in New York, the New York Suppliers repeatedly urged the NYISO during ICAP working group meetings to address these issues much earlier in the NCZ process. Thus, the New York Suppliers appreciate that the NYISO has agreed to revise its time line and address the market power mitigation rules at this juncture. Second, while the New York Suppliers had significant concerns with the NYISO's proposal to delay implementation of the NCZ until the completion of the next Demand Curve reset process (*i.e.*, 2014), the New York Suppliers elected to forego challenging the NYISO's latest submission to the FERC in which the NYISO asserted that it was not possible to adopt an annual NCZ approach at this time. The New York Suppliers did so, in part, to allow the NYISO to dedicate its resources to the NCZ work. However, the efficacy of the NCZs that are adopted must not be undermined by such delay.

As is apparent from the draft tariff language that the NYISO circulated prior to the April 16<sup>th</sup> meeting and as was confirmed by the NYISO during the meeting itself, the NYISO's NCZ mitigation proposal largely tracks the existing New York City capacity market mitigation rules with one important exception -- proposed Section 23.4.5.7.6. In stark contrast to the express New York City rules, that proposed section does not limit exemptions at the outset to existing,

steel in the ground facilities. Rather, inexplicably, the NYISO proposes to carve-out a much larger loophole by tying this exemption only to the purchase or transfer of CRIS rights.

After over five years of extensive review, modification and litigation over the New York City capacity market rules, much has been learned about how capacity market mitigation rules must be structured to be effective. That guidance should be used here. Review of development of the NYC rules demonstrates that the NYISO's departure from these rules in this respect is critically flawed.

As the FERC clearly established in the In City ICAP Proceeding,<sup>1</sup> at their core, the purpose of capacity market mitigation rules is "to provide a level of compensation that will attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators."<sup>2</sup> In the In City ICAP Proceeding, the NYISO proposed -- and the FERC approved -- a comprehensive set of revised supplier side market power mitigation rules tied together with a set of new buyer side market power mitigation rules that were designed to achieve this result. Holding that the new buyer side market power rules were required "to prevent uneconomic entry that would reduce prices in the NYC capacity market below just and reasonable levels,"<sup>3</sup> the Commission found that the artificially suppressed market prices that the exercise of buyer side market power would otherwise produce would inhibit new entry and thereby raise price and harm reliability in the long run to the detriment of consumers.<sup>4</sup>

The issue of initial unit exemption was heavily litigated in the In City ICAP Proceeding. In the end, the FERC approved the NYISO's proposal to exempt two new units, the NYPA Poletti II facility and the Astoria Energy I facility. The FERC's express rationale for doing so was that applying this rule to units that already had been constructed and were operating in the market, "misses the point of this prospective rule, which is to affect future actions." FERC further noted, "Deterrence of their entry, by definition, is no longer possible." Indeed, when the NYISO implemented the buyer side market power rules, it cited to the Commission's determination in this regard in support of its proposed tariff revision to limit exemptions to existing facilities on or before March 7, 2008, stating in its Filing Letter, "Section [23.4.5.7.6] implements the Commission's holding that existing ICAP suppliers should not be subject to an Offer Floor."<sup>5</sup>

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<sup>1</sup> See FERC Docket EL07-39-000, New York Independent System Operator, Inc., (hereinafter "In City ICAP Proceeding").

<sup>2</sup> See New York Independent System Operator, Inc., 118 FERC ¶ 61,182 (2007) at P 17.

<sup>3</sup> See New York Independent System Operator, Inc., 122 FERC ¶ 61,211 (2008) at P 100.

<sup>4</sup> Id. at P 103.

<sup>5</sup> See FERC Docket No. EL07-39-000, supra, "Second Tariff Compliance Filing of and Request for Waiver of the New York Independent System Operator, Inc. Implementing New York City ICAP Market Mitigation Measures," (filed May 6, 2008) at 10 (emphasis added).

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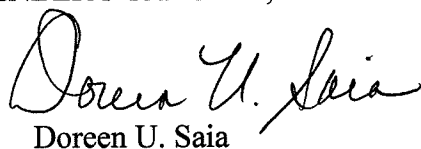
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Notwithstanding its own pleadings and the FERC orders in the In City ICAP Proceeding, the NYISO has proposed to stray away from this approach for the NCZ mitigation measures, proposing to use instead the purchase or transfer of CRIS rights. However, simply securing CRIS rights may very well come quite early in the development of a project when there are still many opportunities to deter entry that is uneconomic in nature. Adopting such a standard at this stage may also unfairly benefit some projects that chose to pursue this route more actively while disadvantaging others that chose instead to focus their efforts on other aspects of project development, e.g., siting, contract, financing or other issues.

In short, there is no reason whatsoever to depart from this one aspect of the New York City rules. Doing so, however, may very well undercut the efficacy of the development of new zones by allowing an uneconomic entrant to exploit the delays in implementing the NCZ (particularly for as long as the NYISO continues to apply a three year cycle to NCZ review) and unjustifiably duck underneath the mitigation. Thus, the New York Suppliers urge the NYISO to extend the "existing facility" rule that is contained in Attachment H for New York City to NCZs as well.

Very truly yours,

GREENBERG TRAURIG, LLP

A handwritten signature in cursive script, appearing to read "Doreen U. Saia".

Doreen U. Saia

Counsel to GenOn New York, LLC and Entergy Nuclear Power Marketing, LLC

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