

125 FERC ¶ 61,311
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Independent Power Producers of New York, Inc., Docket No. EL09-4-000
Astoria Generating Company, L.P.,
ConsumerPowerline, Inc., East Coast Power, LLC,
Energy Curtailment Specialists, Inc., NRG Energy,
Inc., and TC Ravenswood, LLC

v.

New York Independent System Operator, Inc.

ORDER ON COMPLAINT

(Issued December 18, 2008)

1. On October 14, 2008, Independent Power Producers of New York, Inc.(IPPNY); Astoria Generating Company, L.P.; ConsumerPowerline, Inc.; East Coast Power, LLC; Energy Curtailment Specialists, Inc.; NRG Energy, Inc.; and TC Ravenswood, LLC (collectively, In-City Suppliers) filed a complaint against the New York Independent System Operator, Inc. (NYISO) under sections 206 and 306 of the Federal Power Act (FPA), alleging that NYISO violated its tariff in not adjusting the New York City Installed Capacity (ICAP) Demand Curves (NYC Demand Curves) following the elimination of a New York City tax exemption for utilities and that the rates derived from the NYC Demand Curves are unjust and unreasonable (Complaint). For the reasons discussed below, the Commission denies the Complaint.

I. Background

2. In-City Suppliers consists of owners and operators of electric generation facilities in New York City, demand response providers in New York City, and IPPNY, a trade association representing the independent power industry in New York State.

3. In 2003, the Commission accepted tariff sheets to NYISO's Market Administration and Control Area Service Tariff (Services Tariff) which established the ICAP Demand Curves in three areas – New York City, Long Island and the entire New York Control Area – with the goal of stabilizing prices and sending better price signals to

encourage the construction of new generation and thus enhance reliability.¹ The ICAP Demand Curve is used in determining the ICAP price in monthly ICAP spot market auctions.

4. NYISO administratively determines the parameters of the Demand Curve for each region using a lengthy process specified in its Services Tariff section 5.14.1(b) and its ICAP manual section 5.6. NYISO's tariff requires that a periodic review of the Demand Curves be performed every three years in accordance with the specified schedule and procedures.² The procedure includes selection of a consultant to perform required analyses, development of a consultant report, issuance of proposed Demand Curves, NYISO Board review of the proposed Demand Curves, and, finally, a filing before the Commission.³ Market participants and the NYISO Market Advisor review and comment on the proposal in many of the steps throughout the process.

5. The current ICAP Demand Curves, accepted by the Commission on January 29, 2008,⁴ are based on analyses completed in the summer of 2007. The parties agree that these analyses assumed the existence of New York City's Industrial and Commercial Incentive Program real property tax exemption for new investment in electric generating facilities (tax exemption), which reduced the net cost of new entry (CONE), a key element in the determination of the Demand Curves. Effective June 30, 2008, the New York legislature eliminated the tax exemption, thus increasing the cost of building new generating capacity and making capital improvements to existing generating facilities in New York City. The parties agree that factoring in the elimination of the tax exemption alone would result in a change in the 2008-2009 New York City Demand Curves of \$47.74/kW/yr, or approximately 39 percent.

II. The Complaint

6. In-City Suppliers assert that the elimination of the tax exemption significantly increases the cost of new entry in New York City and that without inclusion of real property taxes in the net CONE calculation, the New York City Demand Curves will

¹ *New York Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,201, at P 22, 31, *reh'g denied*, 105 FERC ¶ 61,108 (2003).

² *New York Indep. Sys. Operator, Inc.*, FERC Electric Tariff (Market Services Tariff), Original Vol. No. 2, Seventh Revised Sheet Nos. 156B-158, section 5.14.1(b).

³ *Id.*

⁴ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,064 (2008), *order on reh'g*, 125 FERC ¶ 61,299 (2008).

produce prices that are vastly understated, unjust and unreasonable and prejudicial to generators and demand response providers. In-City Suppliers also assert that NYISO violated its tariff by misinterpreting its own “exigent circumstances” standard for an out-of-cycle adjustment by limiting its analysis to reliability concerns. In-City Suppliers request that the Commission order modifications to the New York City Demand Curves for the remainder of Capability year 2008/2009 and for Capability Years 2009/2010 and 2010/2011 to account for the elimination of the tax exemption.

7. In-City Suppliers state that the elimination of the tax exemption and the resultant shortfall in the New York City Demand Curves will have both short- and long-term effects. In the short term, according to In-City Suppliers, allowing the New York City Demand Curves to remain in place would affect near-term decisions on upgrades, repowerings, and small new generators, as well as participation by demand side providers in the capacity markets. Specifically, In-City Suppliers contend that the failure to correct the Demand Curves jeopardizes the Linden Variable Frequency Transformer project (Linden project), projected to commence commercial operation by the fourth quarter of 2009, and Astoria Generating’s South Pier Improvement Project, (South Pier project) projected for 2010. According to In-City Suppliers, generators in PJM will presumably review the Demand Curves in deciding whether to sell capacity in the New York City capacity market via the Linden project and may choose to sell in PJM instead. Further, according to In-City Suppliers, the elimination of the tax exemption will increase operating costs for the South Pier project by \$6 million in year one, a cost which the New York City curves will now insufficiently offset. In addition, In-City Suppliers claim that the NYISO Board’s decision produces increased regulatory uncertainty regarding future capacity prices and that these two factors will force Astoria Generating to slow development of the South Pier project.

8. In-City Suppliers contend that over the long-term, the existing Demand Curves will chill investment in new and existing generation and could result in the application of inappropriately low mitigated price to the uneconomic new entrant⁵ and all suppliers in the New York City spot market auctions when that entrant’s bid sets the market clearing price, which, in turn, is likely to adversely affect the voluntary monthly and strip auctions and the bilateral markets.

9. In-City Suppliers state that the tax exemption is a critical factual input that, unlike other factors in the Demand Curve determination, does not involve subjective determinations that are likely to vary over time, and it can be included or excluded from the calculation of the curves without changing any other variable or assumption.

⁵ NYISO uses the New York City Demand Curves to determine whether it is appropriate to apply its load side capacity mitigation rules to determine if a new entrant is required to submit bids at the Offer Floor.

10. In-City Suppliers contend that in denying the request to revise the New York City Demand Curves, NYISO violated its Services Tariff by misinterpreting its own “exigent circumstances” standard in an unduly discriminatory manner by limiting its analysis to reliability concerns. In-City Suppliers state that the NYISO Board relied on NYISO’s unfiled ICAP Manual, to the effect that “[o]nce the ICAP Demand Curves have been approved by FERC, they shall remain binding for the 3-year period until the next review, absent exigent circumstances.”⁶ According to In-City Suppliers, section 19.01 of the ISO Agreement allows the board to take unilateral action to amend a tariff “to address exigent circumstances related to the reliability of the [New York State] Power System *or to address exigent circumstances related to an ISO Administered Market.*”⁷ In-City Suppliers contend that the Board applied only the first prong of the test and concluded that, in considering an off-cycle resetting of the Demand Curves, a finding of “exigent circumstances” should be reserved for situations in which there is a significant likelihood that reliability would be compromised because of a lack of capacity, and a resetting of the Demand Curve would materially contribute to maintaining reliability. In-City Suppliers state that the available facts show an imminent and substantial threat to reliability over the remaining term of the current curves. Further, In-City Suppliers contend that NYISO is obliged to monitor issues that could adversely affect the continued viability of the wholesale markets and take reasonable and appropriate steps to prevent harm to the marketplace. In-City Suppliers contend that by signaling to investors and market participants that it will tolerate inaccurate and inefficient prices for an extended period of time, NYISO is not upholding its responsibility to oversee the NYISO administered markets.

11. In-City Suppliers state that the Commission previously denied an off-cycle revision to the Demand Curves when newly available data affected an estimate of the summer/winter differential that had been made in the reset process.⁸ In-City Suppliers contend that the Commission’s reasoning in that case, is not applicable here where a major factual input, not an estimate, is at issue and where the impact due to the change in that input is so severe. In-City Suppliers further contend that contrary to the prior case, where the modifications represented a four percent delta, here the nearly 40 percent impact is far more severe and there is no countervailing assumption that could offset the

⁶ New York Indep. Sys. Operator, Inc., *Installed Capacity Manual*, at § 5.6.7 (October, 2008), *available at* http://www.nyiso.com/public/webdocs/products/icap/icap_manual/icap_mnl.pdf.

⁷ Indep. Sys. Operator Agreement § 19.01, at 95, *available at*: http://www.nyiso.com/public/webdocs/documents/regulatory/agreements/nyiso_agreement/iso_agreement.pdf (emphasis added by In-City Suppliers).

⁸ *New York Indep. Sys. Operator, Inc.*, 112 FERC ¶ 61,283 (2005).

cost correction. In-City Suppliers add that the NYISO Board speculated that other benefits may be available to new generators but the potential that some new infrastructure investment may become eligible for some level of discretionary tax relief does not justify maintaining the current New York City Curves at suppressed levels for all new investments.

12. In-City Suppliers include in their complaint an affidavit of consultant Mark Younger, who attests that NYISO's 2008 Gold book demonstrates that there is a need for additional capacity in New York City by the summer 2010 which must be met by retaining existing needed facilities and securing new entry into the market.⁹ Mr. Younger further states that whether the curves are revised to account for the elimination of the tax exemption is likely to dictate whether new merchant entry is achieved.

13. In-City Suppliers also include affidavits from consultants specializing in Special Case Resources who attest that while special case resources are, unlike generating facilities, included in a program that replaces the tax exemption, they are nonetheless, very price sensitive and sensitive to the frequency of being called upon to provide load reductions. According to the consultants, they could easily elect to leave, or forgo further entry into, the New York City market if the clearing price is not consistent with actual market-based costs, and thus, Special Case Resource providers are expected to face an increased number of calls.¹⁰

III. Notice of Filing and Responsive Pleadings

14. Notice of In-City Suppliers' Complaint was published in the *Federal Register*, 73 Fed. Reg. 62,492 (2008), with interventions and protests due on or before November 3, 2008.

15. Mirant Energy Trading, LLC, Mirant New York, LLC, and Mirant Bowline, LLC (Mirant Parties) and Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. filed timely motions to intervene. New York Transmission Owners (Transmission Owners)¹¹ and the City of New York filed timely motions to intervene and

⁹ IPPNY, *et al.* October 14, 2008 Complaint, exhibit 1 at P 79.

¹⁰ *Id.*, exhibit 4 at P 7, exhibit 5 at P 12.

¹¹ New York Transmission Owners refers to Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation, individually and collectively.

protests. The New York State Department of Public Service (New York Commission) filed a notice of intervention and protest. The PSEG Power Companies filed a timely motion to intervene and comments in support of the complaint. On November 3, 2008, NYISO filed an answer to the Complaint.

A. NYISO's Answer to the Complaint

16. NYISO states that in July 2008 the NYISO Board solicited comments from transmission owners and generators in the New York City service area on the impact of the elimination of the tax exemption. NYISO further states that after reviewing the comments submitted, including those submitted by complainants, the NYISO Board issued a decision on August 27, 2008 concluding that the elimination of the tax exemption did not create an exigent circumstance that would warrant an off-cycle redetermination of the New York City Demand Curve.

17. According to NYISO an increase in the CONE to reflect the elimination of the tax exemption, under 2008 capacity market conditions, would have translated into an increase of \$22 million per month in capacity payments, or \$132 million for the 2008 Summer Capability Period. NYISO adds that since roughly 2000 MW of capacity is owned by New York City Load Serving Entities, however, the net impact would be slightly over \$100 million in additional payments to current ICAP suppliers in New York City, collected from Load Serving Entities in New York City. Further, according to NYISO, it is likely that capacity payments to New York City suppliers would increase in the 2008-2009 Winter Capability Period as well.

18. NYISO states that the elimination of the tax exemption will not cause the Demand Curves to produce unjust and unreasonable rates in that the elimination of the tax exemption is prospective only and New York City is expected to meet its minimum capacity requirement in 2010. Further, according to NYISO, the complainants do not identify any new entrant that will demonstrably be undercompensated by the existing New York City Demand Curves. Instead, NYISO states, the \$100 million payment will go to existing generators that continue to qualify for the tax exemption, and that have not shown that they are not receiving adequate capacity payments. NYISO contends that complainants ignore the effect of their requested increase in the Demand Curves on loads, who would transfer some \$100 million dollars to existing suppliers and receive no quantifiable incremental reliability benefit during the term of the existing curves. NYISO further contends that the claims that the Demand Curves are unjust and unreasonable is little more than a collateral attack on the Commission's order approving the current curves. NYISO adds that, to the extent new entry occurs after the 2010-2011 Winter Capability Period, its capacity payments will be determined by the new curves resulting from the next review cycle. NYISO states that the NYISO Board decision states that the Board "fully expects" that the next resetting of the Demand Curves

will be made on the basis of a thorough evaluation of the available facts, including those relating to any tax or other benefits available to generation projects. The effects of the repeal of the [tax exemption], along with the availability of any other development incentives and other CONE factors should and will be considered in the next Demand Curves reset process.¹²

19. NYISO states that the alleged short- and long-term effects are unsubstantiated, the complainants provide no information indicating that the Demand Curve at the current level will fail to attract sufficient Special Case Resources, and complainants have not identified any new entrants that will be significantly affected. With regard to Special Case Resources, NYISO asserts that the complainants provide no evidence that they will not continue to make the cost-benefit trade-off in favor of market participation. NYISO states that at the current Demand Curve levels special Case Resources have provided significant amounts of ICAP in New York City, which indicates that no chilling effect has occurred as a result of the elimination of the tax exemption. NYISO adds that the elimination of the tax exemption will have no impact on the tax status of special case resources since they are not “utility property” and the increase in clearing prices as supply nears the minimum capacity requirement, will benefit all suppliers in the New York City capacity market, including Special Case Resources. With regard to the deterrence of new entrants, NYISO states that Complainants provide little information on the South Pier Project but the brief period for which the Demand Curves may apply to it suggests that this potential entrant will not be significantly affected by the elimination of the tax exemption. According to NYISO, there is no information in the record as to whether Astoria Generation has applied for a replacement tax benefit. NYISO states that a new entrant would not be eligible for any capacity payments until it in fact comes on line and can provide Installed Capacity; thus, economic projections would have to look at the expected income stream over the life of the project and any projects that come on line after the current Demand Curves expire will only receive capacity payments determined by subsequent Demand Curves.

20. NYISO adds that other industrial development incentives with similar tax abatement incentives are available to replace the elimination of the tax exemption and the complainants offer no evidence of efforts to apply for or inquire into these available alternatives.

21. NYISO asserts that the elimination of the tax exemption has not created an “exigent circumstance” that would warrant modification of the NYISO Services Tariff in the middle of the three-year reset period. NYISO states that section 5.6.7 of the ICAP

¹² NYISO Nov. 3, 2008 Answer at 10, quoting NYISO Board Decision at 5.

Manual provides that: “Once the ICAP Demand Curves have been approved by [the Commission] they shall remain binding for the 3-year period until the next review, absent exigent circumstances.”¹³

22. NYISO further asserts that previous holdings by the Commission indicate that substantial weight should be given to the values of stability and certainty in the triennial reset cycle, and that an off-cycle revision to a Demand Curve should not be made in the absence of compelling evidence of an imminent and substantial threat to reliability. NYISO contends that the purpose of the Demand Curves is to ensure reliability; thus, the proper standard for a finding of “exigent circumstances” is whether reliability would be adversely affected by not resetting the Demand Curves. Moreover, according to NYISO, complainants’ “market efficiency” argument is simply another way of arguing for a different Demand Curve, since the Demand Curve determines the “efficient” market outcome. Finally, NYISO states that to find that the elimination of the tax exemption creates an “exigent circumstance” would result in significant uncertainty and instability in the New York City capacity market and would set a dangerous precedent for further adjustments to the Demand Curves.

B. Protests

23. Protestors assert that the NYISO Board’s decision is reasonable and that In-city Suppliers have failed to provide sufficient justification for circumventing NYISO’s three-year reset process in order to address a single factor affecting the Demand Curves that may adversely affect the economic interests of one party or one market sector. Transmission Owners state that the three-year reset process was established with the understanding that setting the curves is a complex and time consuming process, the factors that affect the curves are subject to constant change, and such change will be evaluated and properly addressed in a comprehensive review at the next reset process. Transmission Owners contend that the prices of key commodities, such as copper, have recently undergone a significant decline that should justify updating in the curves, thus, they argue that updating the curves requires an update of all the underlying elements in order for the curves to be complete and accurate.

24. Transmission Owners further contend that the NYISO Board concluded that capacity supplies in New York are expected to remain at levels above the minimum capacity requirement through the period covered by the current curves and that no party has identified any actual or planned capacity that would be subject to a bid floor determined by the current set of New York City curves. Transmission Owners state that

¹³ New York Indep. Sys. Operator, Inc., *Installed Capacity Manual*, at § 5.6.7 (October, 2008), available at http://www.nyiso.com/public/webdocs/products/icap/icap_manual/icap_mnl.pdf.

the NYISO Board's reliance on prior Commission holdings in which the Commission declined to approve an off-cycle revision based on an asserted deficiency in the current Demand Curves indicate that the Commission would give substantial weight to the values of stability and certainty inherent in the triennial reset cycle, and thus would be unlikely to approve an off-cycle revision in the absence of an imminent and substantial threat to reliability.

25. Transmission Owners claim that In-City Suppliers have not substantiated their contentions; it is not reasonable to assume developers of new generators with a 30 to 40 year useful life will base their decisions on the current curves; and moreover, necessary lead time would preclude most projects from commencing commercial operations prior to the May 2011 reset date. Finally, Transmission Owners state that the tax exemption at issue here is not the only source of real property tax exemptions or abatement available to generation developers in New York City. Transmission Owners conclude that the In-City Suppliers have provided no justification for the Commission's overturning the NYISO Board's well-reasoned determination, they have failed to meet the burden of proof under section 206 of the FPA that the public interest requires the Commission to overturn the decision, and they have also failed to demonstrate injury.

26. The City of New York argues that In-City Suppliers complaint is unsupported, the issues raised are without foundation and, in any case, they are premature and unripe for consideration before the NYISO Demand Curve reset process which will commence in 2009. The City of New York notes that the elimination of the tax exemption will only be applied prospectively; thus, under the complainant's proposal, New York City capacity providers that have already availed themselves of the tax provision would continue to obtain its benefits and also benefit from a 39 percent upward revision of capacity prices.

27. According to the City of New York, alternative city property tax abatement and incentive programs are available that are comparable and in some cases more advantageous than the tax exemption at issue here. In particular, the City of New York points to incentives offered by its Industrial Development Agency and includes an affidavit from the Industrial Development Agency Director that asserts that the relevant parties have not to date applied for any benefits or incentives from the Industrial Development Agency. The City of New York further asserts that there is relatively recent evidence that no inherent impediment exists to the receipt of substantial Industrial Development Agency benefits by a merchant generator.¹⁴

28. The City of New York states that the affidavits purporting to describe the consequences of the elimination of the tax exemption are speculative and, in some cases,

¹⁴ City of New York points to the 1995 and 1997 receipt by Brooklyn Navy Yard Cogeneration Partners, L.P. grants including the use of tax exempt bonds.

inaccurate and that the consequences are at best unclear. It further states that the complainants fail to support their claim of an emergency or exigent circumstances and thus do not carry their burden of proof.

29. The New York Commission states that the elimination of the tax exemption will not affect existing generation facilities and thus, complainants face a potential windfall in ICAP revenues if granted the requested relief. The New York Commission states that the increase in revenues could amount to nearly \$100 million for 2008 and 2009, and exceed \$300 million in 2010. Further, according to the New York Commission, granting the Complainants' requested relief would impact ratepayers since market-clearing prices would be expected to increase by approximately the same percentage as the net CONE. The New York Commission states that the proposed relief raises issues of fairness and economic efficiency since existing generators would continue to receive the tax exemption while new generators might not receive the same treatment. The New York Commission also states that the adequacy of ICAP price signals and the appropriateness of reflecting the elimination of the tax exemption should and will be addressed during the next update of the Demand Curves. The New York Commission assert that the complainants appear to claim that they are being deprived of some right accorded under law, but that such a claim should be rejected because complainants have no statutory entitlement to ICAP payments.¹⁵ Finally, the New York Commission states that the Commission should dismiss complainants' implication that investments in new resources needed to meet reliability needs could be discouraged absent an immediate adjustment of the Demand Curves. The New York Commission contends that (1) the anticipated in-service date for a new facility in New York City is after the Demand Curve is scheduled for a reset, (2) NYISO's 2008 Comprehensive Reliability Plan indicates that adequate amounts of resources will be available to meet reliability needs through 2013, and (3) NYISO's Comprehensive Reliability Plan does not rely upon any of the units that complainants claim are at risk if the Demand Curve is not revised upward prior to the reset. Consequently, according to the New York Commission, it is highly unlikely that new generation facilities will obtain compensation under the current Demand Curves for any significant period of time, if at all.

C. Comments in Support of the Complaint

30. PSEG filed comments in support of the relief being sought by the complainants. PSEG contends that, to operate as intended, the capacity market design for New York City requires that the CONE value accurately reflect the actual cost of new entry in capacity auctions and that the use of significantly understated CONE values will send inaccurate price signals and will not provide the necessary incentives for new entry or for capital expenditures needed to maintain existing resources. PSEG argues that the instant

¹⁵ *Citing Sithe New England Holdings v. FERC*, 308 F.3d 71, 77 (1st Cir. 2002).

situation fits the exigent circumstances provision of the NYISO tariff and NYISO has failed to act in accord with its tariff obligations by refusing to initiate a filing under section 205 of the FPA.

IV. Discussion

A. Procedural Matters

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

32. The Commission denies the complaint and the requested relief for the reasons discussed below.

33. In-City Suppliers contend that existing rates in New York City are unjust and unreasonable in light of the elimination of the tax exemption and that NYISO violated its tariff in refusing to adjust the Demand Curves to reflect the elimination of the tax exemption. We agree with NYISO and other parties opposing the complaint and adopt their arguments. Accordingly, we find that the In-City Suppliers have failed to meet their burden of proof in demonstrating that the rates are unjust and unreasonable. In setting a just and reasonable rate, the Commission does not look at a single component but rather, looks at all components, "some of which may have gone up over time and some of which may have gone down over time, thus a change in a single component . . . does not therefore necessarily mean that the overall rate has become unjust and unreasonable."¹⁶ While the elimination of the tax exemption could have a significant impact on the estimated CONE, the true impact on rates is not clear since offsetting factors may exist. By seeking to change NYISO's Demand Curve under section 206, In-City Suppliers must take into account all changes relevant to the setting of the NYC Demand Curves following their effective date, including changes in all cost and revenue components of the Demand Curve, and not just a change in the property tax component. Commission precedent as well as equity considerations requires that we consider all changes that would affect the current rate, including any offsetting factors, in determining whether the

¹⁶ *Houlton Water Co. v. Maine Public Service Co.* 55 FERC ¶ 61,037, at P 61 and 110 (1991).

currently approved Demand Curve has become unjust and unreasonable.¹⁷ By focusing only on the change in the tax element of the Demand Curve and not considering changes in all other factors including, for example, alternative city property tax abatement and incentive programs that are available and in some cases may be more advantageous than the property tax exemption at issue here, In-City Suppliers have not met their section 206 burden.

34. We note that adjusting the Demand Curve off-cycle to account for the elimination of a tax exemption that does not apply to existing suppliers translates into immediately higher capacity payments for existing suppliers, not a higher payment for capacity for new entrants. Capacity payments for new entrants would depend on updated Demand Curves in effect when they enter the market.¹⁸ Further, Complainants have not shown that it is reasonable to believe that developers of new capacity would base their decisions to build solely on capacity prices in effect for only the next couple of years rather than considering both current and expected future prices based on the expected triennial demand curve revisions. Thus, we agree with NYISO that it is reasonable to await the scheduled three year update to account for the elimination of the tax exemption and other changes which will apply to Demand Curves for the 2011-12 Capability Year.

35. The Commission must balance the need for an out-of-cycle adjustment to provide proper price signals to encourage new economic capacity entry against the value of price stability, and certainty to customers in the market. The ICAP Demand Curve process is based on the premise that price stability and certainty are important to the market.

¹⁷ *Id.* We note that our action in another order issued today in Docket No. ER08-283-002 granting rehearing, in part, of the January 29, 2008 Order that accepted the subject demand curves is distinguishable from the instant case in that it concerns a correction of the underlying ICAP Demand Curve methodology rather than, as here, a proposed change in an input to the methodology. *See New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,299 (2008).

¹⁸ Moreover, in response to In-City Suppliers' argument that the current Demand Curves send inappropriate price signals that discourage the entry of new capacity, the establishment of the Demand Curves based on the cost of new entry does not guarantee that the price established in the monthly auctions will equal or exceed that cost. The mechanism still involves the market setting the price, i.e., the monthly auctions establish the supply/demand intersect point at which, in times like these of excess capacity, the price will be expected to fall below the reference point cost of new entry. So, even if the demand curve were raised to reflect only the impact of the elimination of the tax exemption, the auctions still would not necessarily result in prices that for the next few years would be at a level to recover the cost of new entry. They are no less just and reasonable because of that fact.

Further, the adverse affect of price increases on customers in the current market for existing capacity also must be weighed against the uncertain potential benefit to the market that such price increases may encourage new economic entry. To reopen and start anew the lengthy review process now would re-ignite the debate over all of the factors that determine the Demand Curves and would promote confusion and uncertainty rather than stability in the market with uncertain future benefits.

36. We also find that NYISO did not violate its tariff and acted reasonably and within its discretion in deciding not to file under section 205 to adjust the Demand Curves in response to the elimination of the tax exemption. The NYISO Services Tariff states that a periodic review of the ICAP Demand Curves shall be performed every three years in accordance with ISO Procedures.¹⁹ The NYISO ICAP Manual, in turn, provides in section 5.6.7 that “[o]nce the ICAP Demand Curves have been approved by the FERC, they shall remain binding for the 3-year period until the next review, absent exigent circumstances.” As NYISO points out, and the NYISO Board found, the ICAP Manual does not define what “exigent circumstances” means in that context. In its decision to exercise its discretion to not file under section 205 to modify the Demand Curves, the NYISO Board found that because the fundamental purpose of the ICAP Demand Curves is to preserve the reliability of the New York electric system, the term “exigent circumstances” in this context should mean circumstances “in which there is a significant likelihood that reliability would be compromised because of a lack of capacity, and an off-cycle resetting of the Demand Curves would materially contribute to reliability being maintained.”²⁰ The NYISO Board considered the matter and determined that reliability was not likely to be compromised because of a lack of capacity; nor would a mid-cycle resetting of the Demand Curves contribute to reliability being maintained. We find that this was a reasonable interpretation of NYISO’s own ICAP Manual procedures and, in light of the facts as discussed earlier herein and in its Answer, and consistent with Commission precedent,²¹ NYISO reasonably exercised its discretion in adopting the finding of the Board that such “exigent circumstances” warranting a reopening of the Demand Curve setting process and filing under section 205 to re-set the Demand Curves do not exist here.

37. Further, we find that the In-City Suppliers’ arguments, that the ISO Agreement informs the issue and that NYISO is required by that agreement to make a section 205

¹⁹ Market Services Tariff, Original Vol. No. 2, Seventh Revised Sheet No. 157, section 5.12.1(b).

²⁰ NYISO November 3, 2008 Answer, Attachment 1, at 3.

²¹ See, e.g., *New York Indep. Sys. Operator, Inc.*, 112 FERC ¶ 61,283, at P 39 (2005).

filing to address the impact on markets irrespective of reliability, read too much into that agreement. Section 19.01 of the ISO Agreement requires NYISO to file section 205 tariff changes if both the NYISO Board and the Management Committee agree on the proposed tariff change. The only purpose of the “exigent circumstances” provision of section 19.01 is to permit the NYISO Board to file section 205 tariff changes without the agreement of the Management Committee if either of two “exigent circumstances” is shown: “related to the reliability of the NYS Power System or to address exigent circumstances related to an ISO Administered Market.”²² Accordingly, section 19.01 of the ISO Agreement does not mandate that NYISO make any particular section 205 filing at any time; rather, it simply provides a more expeditious procedure to make such filings if the NYISO Board and Management Committee do not agree on whether the particular proposed tariff amendment should be made. Moreover, section 19.01 applies to all tariff change proposals by NYISO and thus, unlike the relevant provision of the ICAP Manual, is not limited to changes in the ICAP Demand curve, which implicates system reliability. The In-City Suppliers argue that NYISO abused its discretion and violated its tariff in not doing so. We disagree. We believe that the NYISO’s decision was a reasonable one, it acted within its discretion, and In-City Suppliers have not shown otherwise.

38. Accordingly, we deny the complaint.

The Commission orders:

In-City Suppliers complaint in this proceeding is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²² Indep. Sys. Operator Agreement § 19.01, at 95, *available at*: http://www.nyiso.com/public/webdocs/documents/regulatory/agreements/nyiso_agreement/iso_agreement.pdf (emphasis added by In-City Suppliers).