

## 23.2 Conduct Warranting Mitigation

### 23.2.1 Definitions

The following definitions are applicable to this Attachment H:

For purposes of Section 23.4.5 of this Attachment H, “Additional CRIS MW” shall mean the MW of Capacity for which CRIS was requested for an Examined Facility pursuant to the provisions in ISO OATT Sections 25, 30, or 32 (OATT Attachments S, X, or Z), including either: (i) all, or a portion, of the MW of Capacity of that Examined Facility for which CRIS had not been obtained in prior Class Years through a prior Class Year process or through a transfer completed in accordance with OATT Section 25 (OATT Attachment S); and/or (ii) all, or a portion, of an increase in the Capacity of that Examined Facility. Additional CRIS MW does not include any MW quantity of CRIS that is exempt from an Offer Floor pursuant to Section 23.4.5.7.6(a) or (b), Section 23.4.5.7.10, or an increase of 2 MW or less in an Examined Facility’s MW quantity of CRIS obtained pursuant to Section 30.3.2.6 of Attachment X to the OATT.

For purposes of Section 23.4.5 of this Attachment H, “Affiliated Entity” shall mean, with respect to a person or Entity:

- i) all persons or Entities that directly or indirectly control such person or Entity;
- ii) all persons or Entities that are directly or indirectly controlled by or under common control with such person or Entity, and (1) are authorized under ISO Procedures to participate in a market for Capacity administered by the ISO, or (2) possess, directly or indirectly, an ownership, voting or equivalent interest of ten percent or more in a Mitigated Capacity Zone Installed Capacity Supplier;
- iii) all persons or Entities that provide services to such person or Entity, or for which such person or Entity provides services, if such services relate to the determination or submission of offers for Unforced Capacity in a market administered by the ISO; or
- iv) all persons or Entities with which such person or Entity has any form of agreement under which such person or Entity has retained or has conferred rights of Control of Unforced Capacity.

In the foregoing definition, “control” means the possession, directly or indirectly, of the power to direct the management or policies of a person or Entity, and shall be rebuttably presumed from an ownership, voting or equivalent interest of ten percent or more.

**Catastrophic Failure:** shall mean a Forced Outage initially suffered by a Generator which would have reasonably required a repair time of at least 270 days, from the date of the event resulting in the Forced Outage, had it, or a comparable Forced Outage been suffered at a generating facility that is reasonably the same as or similar to the Generator’s, the owner of which is intending to return to service. Repair time includes the reasonable number of days for

initial clean up, safety inspections, engineering assessment; damage assessment, cost estimates; site prep and clean up, equipment orders, and actual repair, provided the foregoing are necessitated by the Catastrophic Failure. The determination that a Generator has suffered a Catastrophic Failure shall be based on a technical/engineering evaluation, shall be made by the ISO, and may be made at any time following the event that caused the Forced Outage provided that adequate information is provided to the ISO to support such determination.

“Class Year Study” means a Class Year Interconnection Facilities Study as that term is defined in OATT Section 25 (OATT Attachment S).

“Commenced Construction” shall mean (a) all of the following site preparation work is completed: ingress and egress routes exist; the site on which the project will be located is cleared and graded; there is power service to the site; footings are prepared; and foundations have been poured consistent with purchased equipment specifications and project design; or (b) the following financial commitments have been made: (i) (A) an engineering, procurement, and construction contract (“EPC”) has been executed by all parties and is effective; or (B) contracts (collectively, “EPC Equivalents”) for all of the following have been executed by all parties and is effective: (1) project engineering, (2) procurement of all major equipment, and (3) construction of the project, and (ii) the cumulative payments made by the developer under the EPC or EPC Equivalents to the counterparties to those respective agreements is equal to at least thirty (30) percent of the total costs of the EPC or EPC Equivalents.

“Constrained Area” shall mean: (a) the In-City area, including any areas subject to transmission constraints within the In-City area that give rise to significant locational market power; and (b) any other area in the New York Control Area that has been identified by the ISO as subject to transmission constraints that give rise to significant locational market power, and that has been approved by the Commission for designation as a Constrained Area.

For purposes of Section 23.4.5 of this Attachment H, “Control” with respect to Unforced Capacity shall mean the ability to determine the quantity or price of offers to supply Unforced Capacity from a Mitigated Capacity Zone Installed Capacity Supplier submitted into an ICAP Spot Market Auction.

For purposes of Section 23.4.5.7 “CRIS MW” shall mean the MW of Capacity for which CRIS was assigned to a Generator or UDR project pursuant to ISO OATT Sections 25, 30, or 32 (OATT Attachments S, X, or Z).

“Developer” shall have the meaning specified in the ISO’s Open Access Transmission Tariff.

“Electric Facility” shall mean a Generator or an electric transmission facility.

For purposes of Section 23.4.5 of this Attachment H, “Entity” shall mean a corporation, partnership, limited liability corporation or partnership, firm, joint venture, association, joint-stock company, trust, unincorporated organization or other form of legal or juridical organization or entity.

Exceptional Circumstances: shall mean one or more unavoidable circumstances, as determined by the ISO, that individually or collectively make unavailable data necessary for the ISO to

perform an audit and review of a Market Party, pursuant to Section 23.4.5.6.2 of this Services Tariff. Exceptional Circumstances may include, but are not limited to: the inaccessibility of the physical facility; the inaccessibility of necessary documentation or other data; and the unavailability of information regarding the regulatory obligations with which the Market Party will be required to comply in order to return its Generator to service which regulatory obligations are not yet known but which will be made known by the applicable regulatory authority under existing laws and regulations provided that none of the above described circumstances are the result of delay or inaction by the Market Party. The magnitude of the repair cost, alone, shall not be an Exceptional Circumstance.

“Excess Repowering MW” shall mean the amount of CRIS MW requested by a Repowering Examined Facility that is greater than the number of exempt CRIS MW held by the Exiting Capacity Facility as of the date of the request for a Repowering Examined Facility exemption.

“Exiting Capacity Facility” shall mean a Generator or UDR project that: (a) if a Generator, is included in the plan described in Section 23.4.5.7.7.1.1 of a single Generator, or if a UDR project, is included in the plan described in Section 23.4.5.7.7.1.1 of a single UDR project, that is seeking to obtain a Repowering Examined Facility exemption or Replacement Examined Facility treatment, pursuant to Section 23.4.5.7.7.2 or 23.4.5.7.7.3, respectively; (b) has an exemption from Offer Floor mitigation for some or all of its CRIS MW pursuant to either Section 23.4.5.7 (after clearing for twelve, not-necessarily consecutive, months) 23.4.5.7.2, or 23.4.5.7.6; (c) promptly after the Repowering Examined Facility or Replacement Examined Facility is notified by the ISO that it has been determined to be exempt pursuant to Section 23.4.5.7.7.2 or 23.4.5.7.7.3, respectively, the Exiting Capacity Facility provides written notice to the New York State Public Service Commission that it intends to retire, and (d) must permanently exit all ISO Administered Markets prior to the earlier of (i) 180 days from the last day of the calendar month in which the Repowering Examined Facility or Replacement Examined Facility first synchronizes to the grid and produces or transmits electrical energy, and (ii) the first Obligation Procurement Period for which the Repowering Examined or Replacement Examined Facility first offers UCAP (such earlier date, the “Permanent Exit Date”). More than one Exiting Capacity Facility may be included in a single Generator’s or UDR project’s Section 23.4.5.7.7.1.1 plan. In addition: (x) a Generator cannot be included in the Section 23.4.5.7.7.1.1 plan of a UDR project and a UDR project cannot be included in a Generator’s Section 23.4.5.7.7.1.1 plan; (y) only one Section 23.4.5.7.7.1.1. plan may be submitted for a project, and mutually exclusive alternatives may not be included in a plan; and (z) an Exiting Capacity Facility may not be included in more than one Section 23.4.5.7.7.1.1 plan per Class Year. If a Section 23.4.5.7.7.1.1 plan that does not conform to one or more the requirements in this definition is received, it will be deemed to not satisfy the requirements of Section 23.4.5.7.7.1.1. A Generator or UDR project that was an Exiting Capacity Facility is no longer an Exiting Capacity Facility as of the date the ISO posts on its website, in accordance with Section 23.4.5.7.7.2, the determination that the Repowering Examined Facility or Replacement Examined Facility is non-exempt.

For purposes of Section 23.4.5 of this Attachment H, **“Going-Forward Costs”** shall mean: either (a) the costs, including but not limited to mandatory capital expenditures necessary to comply with federal or state environmental, safety or reliability requirements that must be met in order to supply Installed Capacity, net of anticipated energy and ancillary services revenues, as

determined by the ISO as specified in Section 23.4.5.3, for each of the following instances, as applicable, of supplying Installed Capacity that could be avoided if an Installed Capacity Supplier otherwise capable of supplying Installed Capacity were either (1) to cease supplying Installed Capacity and Energy for a period of one year or more while retaining the ability to re-enter such markets, or (2) to retire permanently from supplying Installed Capacity and Energy; or (b) the opportunity costs of foregone sales outside of a Mitigated Capacity Zone, net of costs that would have been incurred as a result of the foregone sale if it had taken place.

For purposes of Section 23.4.5 of this Attachment H, “**Indicative Mitigation Net CONE**” shall mean the capacity price calculated by the NYISO for informational purposes only if there is not an effective ICAP Demand Curve and the Commission (i) has accepted an ICAP Demand Curve for the Mitigated Capacity Zone that will become effective when the Mitigated Capacity Zone is first effective, in which case, the Indicative Mitigation Net CONE shall be the capacity price on such ICAP Demand Curve for the Mitigated Capacity Zone corresponding to the average amount of excess capacity above the Indicative NCZ Locational Minimum Installed Capacity Requirement, as applicable, expressed as a percentage of that requirement that formed the basis for the ICAP Demand Curve accepted by the Commission; or, (ii) has not accepted an ICAP Demand Curve for the Mitigated Capacity Zone, but the ISO has filed an ICAP Demand Curve for the Mitigated Capacity Zone pursuant to Services Tariff Section 5.14.1.2.11, in which case the Indicative Mitigation Net CONE shall be the capacity price on such ICAP Demand Curve corresponding to the average amount of excess capacity above the Indicative NCZ Locational Minimum Installed Capacity Requirement, expressed as a percentage of that requirement, that formed the basis for such ICAP Demand Curve.

“**Initial Decision Period**” shall have the meaning specified in [Section 25 \(Attachment S\)](#) of the ISO’s Open Access Transmission Tariff.

“**Interconnection Customer**” shall have the meaning specified in [Section 32 \(Attachment Z\)](#) of the ISO’s Open Access Transmission Tariff.

“**Interconnection Facilities Study Agreement**” shall have the meaning specified in [Section 30 \(Attachment X\)](#) of the ISO’s Open Access Transmission Tariff.

“**Market Monitoring Unit**” shall have the same meaning in these Mitigation Measures as it has in Attachment O.

“**Market Party**” shall mean any person or entity that is, [or for purposes of the determinations to be made pursuant to Section 23.4.5.7 of this Attachment H proposes or plans a project that would be](#), a buyer or a seller in, or that makes bids or offers to buy or sell in, or that schedules or seeks to schedule Transactions with the ISO in or affecting any of the ISO Administered Markets, or any combination of the foregoing. [For purposes of the determinations to be made pursuant to Section 23.4.5.7 of this Attachment H, any entity proposing or planning a project would be considered a “Market Party” on the earlier of the: \(a\) date when the entity submits for such project an Interconnection Request that includes a request for a Repowering Examined Facility exemption or Replacement Facility treatment; or \(b\) for a project not subject to a deliverability requirement that plans to commence commercial operation connected to a Transmission Owner, the project’s commercial operation date.](#)

For purposes of Section 23.4.5 of this Attachment H, “**Mitigated UCAP**” shall mean one or more megawatts of Unforced Capacity that are subject to Control by a Market Party that has been identified by the ISO as a Pivotal Supplier.

For purposes of Section 23.4.5 of this Attachment H, “**Mitigation Net CONE**” shall mean the capacity price on the currently effective ICAP Demand Curve for the Mitigated Capacity Zone corresponding to the average amount of excess capacity above the Mitigated Capacity Zone Installed Capacity requirement, expressed as a percentage of that requirement, that formed the basis for the ICAP Demand Curve approved by the Commission.

“**NCZ Examined Project**” shall mean any Generator or UDR project that is not exempt pursuant to 23.4.5.7.7 and either (i) is in a Class Year on the date the Commission accepts the first ICAP Demand Curve to apply to a Mitigated Capacity Zone, (ii) meets the criteria specified in 23.4.5.7.3(II), or (iii) meets the criteria specified in 23.4.5.7.3(III) but the time period therein has passed on the date the Commission accepts the first ICAP Demand Curve. An NCZ Examined Project may be at any phase of development or in operation or an Installed Capacity Supplier.

For purposes of Section 23.4.5 of this Attachment H, “**Net CONE**” shall mean the localized levelized embedded costs of a peaking unit in a Mitigated Capacity Zone, net of the likely projected annual Energy and Ancillary Services revenues of such unit, as determined in connection with establishing the Demand Curve for a Mitigated Capacity Zone pursuant to Section 5.14.1.2 of the Services Tariff, or as escalated as specified in Section 23.4.5.7 of Attachment H.

“**New Capacity**” shall mean a new Generator, a substantial addition to the capacity of an existing Generator, or the reactivation of all or a portion of a Generator that has been out of service for five years or more that commences commercial service after the effective date of this definition.

For purposes of Section 23.4.5 of this Attachment H, “**Offer Floor**” for a Mitigated Capacity Zone Installed Capacity Supplier that is not a Special Case Resource shall mean the lesser of a numerical value equal to 75% of the Mitigation Net CONE translated into a seasonally adjusted monthly UCAP value (“**Mitigation Net CONE Offer Floor**”), or (ii) a numerical value determined as specified in Section 23.4.5.7.3, translated into a seasonally adjusted monthly UCAP value using an appropriate class outage rate, (“**Unit Net CONE Offer Floor**”). The Offer Floor for a Mitigated Capacity Zone Installed Capacity Supplier that is a Special Case Resource shall mean a numerical value determined as specified in Section 23.4.5.7.5. **The Offer Floor for Additional CRIS MW shall mean a numerical value determined as specified in Section 23.4.5.7.6.**

For purposes of Section 23.4.5 of this Attachment H, “**Pivotal Supplier**” shall mean (i) for the New York City Locality, a Market Party that, together with any of its Affiliated Entities, (a) Controls 500 MW or more of Unforced Capacity, and (b) Controls Unforced Capacity some portion of which is necessary to meet the New York City Locality Locational Minimum Installed Capacity Requirement in an ICAP Spot Market Auction; (ii) for the G-J Locality, a Market Party that, together with any of its Affiliated Entities, (a) Controls 650 MW or more of Unforced

Capacity; and (b) Controls Unforced Capacity some portion of which is necessary to meet the G-J Locality Locational Minimum Installed Capacity Requirement in an ICAP Spot Market Auction; and (iii) for each Mitigated Capacity Zone except the New York City Locality and the G-J Locality, if any, a Market Party that Controls at least the quantity of MW of Unforced Capacity specified for the Mitigated Capacity Zone and accepted by the Commission.

**“Project Cost Allocation”** shall have the meaning specified in [Section 25 \(Attachment S\)](#) of the ISO’s Open Access Transmission Tariff.

**“Replacement Examined Facility”** [a Generator or UDR project that satisfies all of the requirements specified in Section 23.4.5.7.7.1 and that seeks to obtain Replacement Examined Facility treatment pursuant to Section 23.4.5.7.7.3.](#)

**“Repowering Examined Facility”** [a Generator or UDR project that satisfies all of the requirements specified in Section 23.4.5.7.7.1 and that seeks to obtain a Repowering Examined Facility exemption pursuant to Section 23.4.5.7.7.2.](#)

For purposes of Section 23.4.5 of this Attachment H, **“Responsible Market Party”** shall mean the Market Party that is authorized, in accordance with ISO Procedures, to submit offers in an ICAP Spot Market Auction to sell Unforced Capacity from a specified Installed Capacity Supplier.

**“Revised Project Cost Allocation”** shall have the meaning specified in [Section 25 \(Attachment S\)](#) of the ISO’s Open Access Transmission Tariff.

**“Site”** [shall include the property where the Exiting Capacity Facility is located, and any contiguous property, provided that all such property is owned or controlled by the Exiting Capacity Facility’s owner\(s\) as of the date of the Repowering Examined Facility’s Interconnection Request. For purposes of this definition, Exiting Capacity Facilities that are UDR projects shall be deemed to be “located” on the property that includes the UDR project’s Point of Interconnection \(as that term is defined in OATT Sections 30 and 32 \(OATT Attachments X and Z\)\) and not on other properties where components of the UDR project may be physically located. Where an Exiting Capacity Facility that is not a UDR project is located on property that was initially developed for purposes of electric generation prior to divestiture pursuant to New York State Public Service Commission Opinion No. 96-12 \(effective May 20, 1996, NYPS Case No. 94-E-0952, \*et al.\*\) the term “Site” shall also include all contiguous property that had common ownership immediately prior to divestiture that was not used solely for the purposes of distribution or transmission of \(i\) electricity, \(ii\) natural gas, or \(iii\) steam.](#)

**“Subsequent Decision Period”** shall have the meaning specified in [Section 25 \(Attachment S\)](#) of the ISO’s Open Access Transmission Tariff.

For purposes of Section 23.4.5 of this Attachment H, **“Surplus Capacity”** shall mean the amount of Installed Capacity, in MW, available in a Mitigated Capacity Zone in excess of the Locational Minimum Installed Capacity Requirement for such Mitigated Capacity Zone.

**“Total Evaluated CRIS MW”** [shall mean the Additional CRIS MW requested plus either \(i\) if the Installed Capacity Supplier previously received an exemption under Sections 23.4.5.7.2\(b\),](#)

23.4.5.7.6(b), or 23.4.5.7.10, all prior Additional CRIS MW since the facility was last exempted under Sections 23.4.5.7.2(b), 23.4.5.7.6(b), or 23.4.5.7.10, or (ii) for all other Installed Capacity Suppliers, all MW of Capacity for which an Examined Facility obtained CRIS pursuant to the provisions in ISO OATT Sections 25, 30, or 32 (OATT Attachments S, X, or Z).

For purposes of Section 23.4.5 of this Attachment H, “**UCAP Offer Reference Level**” shall mean a dollar value equal to the projected clearing price for each ICAP Spot Market Auction determined by the ISO on the basis of the applicable ICAP Demand Curve and the total quantity of Unforced Capacity from all Installed Capacity Suppliers in a Mitigated Capacity Zone for the period covered by the applicable ICAP Spot Market Auction.

For purposes of Section 23.4.5 of this Attachment H, “**Unit Net CONE**” shall mean localized levelized embedded costs of a specified Installed Capacity Supplier, including interconnection costs, and for an Installed Capacity Supplier located outside a Mitigated Capacity Zone including embedded costs of transmission service, in either case net of likely projected annual Energy and Ancillary Services revenues, as determined by the ISO, translated into a seasonally adjusted monthly UCAP value using an appropriate class outage rate. When determining the Unit Net CONE of an Examined Facility, the cost associated with any equipment from an Exiting Capacity Facility shall be the cost of purchasing such equipment new.

## **23.2.2 Conduct Subject to Mitigation**

Mitigation Measures may be applied: (i) to the bidding, scheduling or operation of an “Electric Facility”; or (ii) as specified in Section 23.2.4.2.

## **23.2.3 Conditions for the Imposition of Mitigation Measures**

23.2.3.1 To achieve the foregoing purpose and objectives, Mitigation Measures should only be imposed to remedy conduct that would substantially distort or impair the competitiveness of any of the ISO Administered Markets.

Accordingly, the ISO shall seek to impose Mitigation Measures only to remedy conduct that:

23.2.3.1.1 is significantly inconsistent with competitive conduct; and

23.2.3.1.2 would result in a material change in one or more prices in an ISO Administered Market or production cost guarantee payments (“guarantee payments”) to a Market Party.

23.2.3.2 In general, the ISO shall consider a Market Party's or its Affiliates' conduct to be inconsistent with competitive conduct if the conduct would not be in the economic interest of the Market Party or its Affiliates in the absence of market power. The categories of conduct that are inconsistent with competitive conduct include, but may not be limited to, the three categories of conduct specified in Section 23.2.4 below.

#### **23.2.4 Categories of Conduct that May Warrant Mitigation**

23.2.4.1 The following categories of conduct, whether by a single firm or by multiple firms acting in concert, may cause a material effect on prices or guarantee payments in an ISO Administered Market if exercised from a position of market power. Accordingly, the ISO shall monitor the ISO Administered Markets for the following categories of conduct, and shall impose appropriate Mitigation Measures if such conduct is detected and the other applicable conditions for the imposition of Mitigation Measures are met:

23.2.4.1.1 Physical withholding of an Electric Facility, that is, not offering to sell or schedule the output of or services provided by an Electric Facility capable of serving an ISO Administered Market. Such withholding may include, but not be limited to, (i) falsely declaring that an Electric Facility has been forced out of service or otherwise become unavailable, (ii) refusing to offer Bids or schedules for an Electric Facility when such conduct would not be in the economic interest

of the Market Party or its Affiliates in the absence of market power; (iii); making an unjustifiable change to one or more operating parameters of a Generator that reduces its ability to provide Energy or Ancillary Services or (iv) operating a Generator in real-time at a lower output level than the Generator would have been expected to produce had the Generator followed the ISO's dispatch instructions, in a manner that is not attributable to the Generator's verifiable physical operating capabilities and that would not be in the economic interest of the Market Party or its Affiliates in the absence of market power.

For purposes of this Section and Section 23.4.3.2, the term "unjustifiable change" shall mean a change in an Electric Facility's operating parameters that is: (a) not attributable to the Electric Facility's verifiable physical operating capabilities, and (b) is not a rational competitive response to economic factors other than market power.

23.2.4.1.2 Economic withholding of an Electric Facility, that is, submitting Bids for an Electric Facility that are unjustifiably high so that (i) the Electric Facility is not or will not be dispatched or scheduled, or (ii) the Bids will set a market clearing price.

23.2.4.1.3 Uneconomic production from an Electric Facility, that is, increasing the output of an Electric Facility to levels that would otherwise be uneconomic in order to cause, and obtain benefits from, a transmission constraint.

23.2.4.2 Mitigation Measures may also be imposed, subject to FERC's approval, to mitigate the market effects of a rule, standard, procedure or design feature of an ISO Administered Market that allows a Market Party or its Affiliate to manipulate

market prices or otherwise impair the efficient operation of that market, pending the revision of such rule, standard, procedure or design feature to preclude such manipulation of prices or impairment of efficiency.

23.2.4.3 Taking advantage of opportunities to sell at a higher price or buy at a lower price in a market other than an ISO Administered Market shall not be deemed a form of withholding or otherwise inconsistent with competitive conduct.

23.2.4.4 The ISO and the Market Monitoring Unit shall monitor the ISO Administered Markets for other categories of conduct, whether by a single firm or by multiple firms acting in concert, that have material effects on prices or guarantee payments in an ISO Administered Market. The ISO shall: (i) seek to amend the foregoing list as may be appropriate, in accordance with the procedures and requirements for amending the Plan, to include any such conduct that would substantially distort or impair the competitiveness of any of the ISO Administered Markets; and (ii) seek such other authorization to mitigate the effects of such conduct from the FERC as may be appropriate. The responsibilities of the Market Monitoring Unit that are addressed in this section of the Mitigation Measures are also addressed in Section 30.4.6.2.2 of Attachment O.