

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

**INDEPENDENT POWER PRODUCERS OF )  
NEW YORK, INC., ASTORIA )  
GENERATING COMPANY, L.P., A US )  
POWER GENERATING COMPANY, )  
CONSUMERPOWERLINE, INC., EAST )  
COAST POWER, LLC, ENERGY )  
CURTAILMENT SPECIALISTS, INC., )  
NRG ENERGY, INC. AND TC )  
RAVENSWOOD, LLC )**

**Docket No. EL09-4-000**

**Complainants,** )

v. )

**NEW YORK INDEPENDENT SYSTEM )  
OPERATOR, INC. )**

**Respondent.** )

**ANSWER TO COMPLAINT  
OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rules 206(f) and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. §§ 385.206(f) and 385.213 (2008), the New York Independent System Operator, Inc. (the “NYISO”) hereby submits this Answer to the complaint requesting fast track processing of Independent Power Producers of New York, Inc., Astoria Generating Company, L.P., a US Power Generating Company, ConsumerPowerline, Inc., East Coast Power, LLC, Energy Curtailment Specialists, Inc., NRG Energy, Inc., and TC Ravenswood, LLC (collectively, the “Complainants”) (the “Complaint”).

## SUMMARY

The Complainants claim, among other things, that the expiration of the New York City Industrial and Commercial Incentive Program (“ICIP”) tax abatement will cause the New York City (“NYC”) Demand Curves (“NYC Demand Curves”) to produce unjust and unreasonable rates and creates an exigent circumstance that would warrant modifying the NYISO Services Tariff in the middle of the three-year reset period. To this end, the Complainants allege that the expiration of the ICIP tax abatement will have short- and long-term adverse effects on the NYISO capacity market and that a failure to reset the NYC Demand Curves will result in a decrease in participation by Special Case Resources (“SCRs”).

At the outset, it is apparent from the Complainants’ delay in filing the Complaint and the repetition of the same arguments previously submitted to the Board that “fast-track” procedures are not justified.

Further, as shown below, the expiration of the ICIP tax abatement will not cause the NYC Demand Curves to produce unjust and unreasonable rates. In contrast, the repeal of the ICIP is prospective only and the NYC is expected to meet its minimum capacity requirement in 2010. Additionally, the Complainants do not identify any new entrant that will demonstrably be undercompensated by the existing NYC Demand Curves.

The alleged short- and long-term adverse effects purportedly identified by the Complainants are unsubstantiated. The Complainants provide no information indicating that the NYC Demand Curve at the current level will not continue to attract sufficient SCRs. Moreover, SCRs are excluded from the replacement for the ICIP and are, thus, unaffected by the expiration of the tax abatement legislation. In addition, the Complainants have not identified any new

entrants that will be significantly affected, or deterred from entry, by the current set of NYC Demand Curves.

Notably, other industrial development incentives, such as the New York City Industrial Development Agency incentives, are available to replace the ICIP real property tax abatement. These incentive programs provide similar tax abatement incentives as the ICIP. The Complainants offer no evidence of any efforts to apply for or inquire into the available alternative industrial development incentives.

Finally, the expiration of the ICIP tax abatement has not created an “exigent circumstance” that would warrant modifying the NYISO Services Tariff in the middle of the three-year reset period. 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. 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 Curve. Moreover, Complainants’ “market efficiency” argument is simply another way of arguing for a different Demand Curve, since the Demand Curve determines the “efficient” market outcome. To find, as the Complainants advocate, that the ICIP repeal creates an “exigent circumstance” would result in significant uncertainty and instability in the NYC capacity market and would set a dangerous precedent for further adjustments to the Demand Curves.

Accordingly, for the reasons stated herein, the NYISO respectfully requests that the Commission dismiss the Complainants’ Complaint.

## COMMUNICATIONS AND CORRESPONDENCE

All communications, pleadings, and orders with respect to this proceeding should be sent to the following individuals:

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## I. INTRODUCTION AND BACKGROUND

### A. Background

As the Commission is aware, outcomes in the NYISO's ICAP Spot Market Auctions have since 2003 been determined by the use of administratively determined Demand Curves, the parameters of which are established in a triennial review process involving expert analysis and participation by all interested stakeholders.<sup>1,2</sup> The current Installed Capacity ("ICAP") Demand Curves ("ICAP Demand Curves") are based on economic and factual analyses that were completed in the summer of 2007. At that time, newly developed utility real property, including new generation, was eligible for a substantial reduction in real property taxes under the ICIP. ICIP was created by New York City Law 71 in 1984,<sup>3</sup> as authorized by New York State Law, Title 2D of the Real Property Tax Law.<sup>4</sup> The purpose of the program was to encourage development of greater investment in industrial and commercial facilities in New York City ("NYC").<sup>5</sup>

Consistent with the past practice of the New York State legislature, the Demand Curves were based on an assumption that the ICIP program would be continued when it came up for

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<sup>1</sup> Unless otherwise stated, capitalized terms used in this filing have the meanings specified in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff").

<sup>2</sup> See *NY Indep. Sys. Operator, Inc.*, 103 F.E.R.C. ¶ 61,201 (2003); *NY Indep. Sys. Operator, Inc.*, 105 F.E.R.C. ¶ 61,108 (2003); *Elec. Consumers Res. Council v. F.E.R.C.*, 407 F.3d 1232 (D.C. Cir. 2005).

<sup>3</sup> N.Y.C. ADMIN. CODE §§ 11-256–267 (1984).

<sup>4</sup> N.Y. REAL PROPERTY TAX LAW §§ 489-aaaa *et seq.*

<sup>5</sup> N.Y.C. COUNCIL, *Report of the Infrastructure Division*, June 12, 2001, available at <http://webdocs.nycouncil.info/attachments/52400.htm>.

renewal in June, 2008.<sup>6</sup> In June, however, Governor Paterson of New York signed into law legislation to replace the ICIP with a new tax abatement program that excludes “utility property.”<sup>7</sup> This change in legislation is prospective only, and does not affect the tax status of current beneficiaries of the ICIP.<sup>8</sup> The availability of the ICIP tax relief, however, was a significant factor in determining the cost of new entry (“CONE”) for a new peaking unit entering the market for ICAP in New York City. Net CONE is in turn a critical factor in setting the level of the ICAP Demand Curve for NYC.<sup>9</sup>

In July 2008, the NYISO Board of Directors (“Board”) solicited comments from transmission owners and generators in the NYC service area on the impact of the repeal of the ICIP tax abatement on the NYC Demand Curves and the extent to which the legislation supports a finding of “exigent circumstances.” After carefully reviewing the comments submitted, including comments submitted by the Complainants, the Board issued a decision on August 27, 2008 concluding that the repeal of the ICIP did not create an exigent circumstance that would warrant an off-cycle redetermination of the NYC Demand Curve.<sup>10</sup>

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<sup>6</sup> NATIONAL ECONOMIC RESEARCH ASSOCIATES, *Independent Study to Establish Parameters of the ICAP Demand Curve for the New York System Operator* at 35 (August 15, 2007) (hereinafter “NERA Report”), available at [http://www.nyiso.com/public/webdocs/committees/bic\\_icapwg/meeting\\_materials/2007-07-16/ICAPWG\\_Demand\\_Curve\\_Study\\_Report\\_71607\\_revised.pdf](http://www.nyiso.com/public/webdocs/committees/bic_icapwg/meeting_materials/2007-07-16/ICAPWG_Demand_Curve_Study_Report_71607_revised.pdf); included as Exhibit B to Attachment 3 of the NYISO’s November 30, 2007 tariff filing in Docket No. ER08-283-000.

<sup>7</sup> N.Y. REAL PROPERTY TAX LAW § 489-cccc(3)(b) (McKinney 2008) (stating “no abatement benefits under this title shall be granted for work to be performed on property to be used for the following purposes: Utility property. No abatement benefits under this title shall be provided for utility property”).

<sup>8</sup> *Id.*

<sup>9</sup> See NERA Report at 54.

<sup>10</sup> NYISO Board of Directors Decision on Whether Repeal of the ICIP Requires Resetting the NYC ICAP Demand Curve (August 27, 2008) (“NYISO Board Decision”), copy attached, and

## **B. The ICAP Demand Curves**

In the process of developing the Demand Curves now in effect, the NYISO retained National Economic Research Associates (“NERA”) as consultants to conduct an analysis of the level of the CONE on which Demand Curves should be based. At the conclusion of its analysis, NERA produced a spreadsheet model for the calculation of a revised NYC Demand Curve. This spreadsheet included a true/false switch for the ICIP tax benefit. The Demand Curve for NYC that was adopted was based, among other considerations, on the assumption that the ICIP factor was true. Changing this factor to false in the NERA spreadsheet, without making any other changes, causes the net CONE to increase by approximately 39%.<sup>11</sup>

An increase in the net CONE by 39% would, under 2008 capacity market conditions, have been expected to increase the current NYC clearing price from about \$6/kw-month to approximately \$8.34/kw-month. A price increase of \$2.34/kw-month would have translated into an increase of approximately \$22 million per month in capacity payments, or \$132 million for the 2008 Summer Capability Period. Since roughly 2,000 MW of capacity is owned by NYC LSEs, however, the net impact would be slightly over \$100 million in additional payments to current ICAP suppliers in NYC, collected from LSEs in NYC, but could be somewhat less depending on the hedging arrangements in bilateral contracts. It is also likely that capacity payments to NYC suppliers would increase in the 2008-2009 Winter Capability Period as well, but the \$100 million figure approximates a lower bound on the annual impact.<sup>12</sup> The 2008 price

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*available at*

[http://www.nyiso.com/public/webdocs/documents/regulatory/market\\_participant\\_notices/ICIP\\_Repeal.pdf](http://www.nyiso.com/public/webdocs/documents/regulatory/market_participant_notices/ICIP_Repeal.pdf).

<sup>11</sup> Baker Aff. ¶ 18; Younger Aff. at ¶ 37.

<sup>12</sup> Lawrence Aff. at ¶¶ 9–10.

impact approximates what would be expected in 2009 from changing the ICIP assumption without making any other changes in the NYC Demand Curve.<sup>13</sup>

The NYISO projects that capacity supplies in NYC will remain at levels above the minimum capacity requirement through the period covered by the current NYC Demand Curves, which extend to the end of the 2010-2011 Winter Capability Period.<sup>14</sup> While the surplus will likely decrease over this period, supplies will nonetheless exceed the minimum locational requirement for NYC.<sup>15</sup> Indeed, the Complainants' expert, Mr. Younger, agrees that this will be the case.<sup>16</sup>

## II. ANSWER

### A. THE COMPLAINANTS' DELAY IN FILING THE COMPLAINT AND REPETITION OF THE SAME ARGUMENTS PREVIOUSLY SUBMITTED TO THE BOARD DEMONSTRATES THAT "FAST-TRACK" PROCEDURES ARE NOT JUSTIFIED.

The Complainants argue that "fast-track" processing and a quick resetting of the current curves is necessary in order to attract and retain investment.<sup>17</sup> The Board issued its decision determining that the repeal of the ICIP did not warrant an off-cycle redetermination of the NYC Demand Curve on August 27, 2008. Using virtually the same arguments and support that the suppliers submitted to the Board as comments on the impact of the ICIP repeal, the Complainants did not file this complaint until October 14, 2008—seven (7) weeks after the NYISO Board Decision. The length of time between the NYISO Board Decision and the filing

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<sup>13</sup> *Id.* at ¶¶ 5–8.

<sup>14</sup> *Id.* at ¶ 12.

<sup>15</sup> *Id.*

<sup>16</sup> Younger Aff. at ¶ 80.

<sup>17</sup> Complaint at 6.



of this Complaint, as well as the lack of any new or additional information provided in the Complaint, indicates that “fast-track” processing is not warranted. The Complainants themselves did not find the matter so urgent as to file the same material it submitted to the Board to the Commission until seven (7) weeks after the issuance of the NYISO Board Decision.

**B. THE REPEAL OF THE ICIP DOES NOT AUTOMATICALLY RENDER THE CURRENT NYC DEMAND CURVES “UNJUST AND UNREASONABLE.”**

The Complainants argue that the expiration of the ICIP real property tax abatement will cause the NYC Demand Curves to produce unjust and unreasonable rates.<sup>18</sup> In his affidavit, Mark Younger claims that due to the repeal of the ICIP real property tax abatement, the added tax burden has raised the annualized capital cost of the proxy unit from \$188.07/kW-year to \$235.81/kW-year.<sup>19</sup> As a result, the net CONE of the unit has assertedly risen from \$123.18/kW-year to \$170.92/kW-year.<sup>20</sup> Mr. Younger concludes that the \$123.18/kW-year maintained by the current NYC Demand Curves would equate to a minimum capacity requirement level of 74.4%, which is below the 80% minimum locational capacity established for NYC, and, as a result, the existing NYC Demand Curves are unjust and unreasonable.<sup>21</sup>

Mr. Younger ignores the facts, however, that the repeal of the ICIP is not retroactive, that by the Complainants’ own admission, NYC is expected to meet its minimum capacity requirement in 2010, and that the Complainants do not identify any new entrant that will

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<sup>18</sup> *Id.* at 18.

<sup>19</sup> Younger Aff. at ¶ 40.

<sup>20</sup> *Id.* at ¶¶ 40–41.

<sup>21</sup> *Id.* at ¶¶ 45–46.

demonstrably be undercompensated by the existing Demand Curves.<sup>22</sup> Instead, it is plain that the \$100 million payment identified above will go to existing generators that continue to qualify for the ICIP program, and that have not shown that they are not receiving adequate capacity payments. Indeed, since the ICIP repeal was not retroactive, claims by existing generation that the current Demand Curves are “unjust and unreasonable” amount little more than a collateral attack on the Commission’s order approving the current curves.<sup>23</sup>

Correspondingly, 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 Demand Curve reset process. Since that process has not yet occurred, there can be absolutely no basis to assert that the curves resulting from that process will not be set at appropriate levels. To the contrary, the NYISO Board Decision specifically 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 ICIP, 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.<sup>24</sup>

The history of the prior resets shows that the Demand Curves have been set at appropriate levels based on all the relevant facts and circumstances, and there is no reason to presuppose that, consistent with the Board’s directive, this will not be true for the next reset. Moreover, the reset curves will be fully subject to Commission review before they go into effect.

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<sup>22</sup> *Id.* at ¶ 80. Mr. Younger states in his affidavit that “NYC is now expected to barely meet its minimum capacity requirement in 2010 . . .” *Id.*

<sup>23</sup> *See, e.g., City of Nephi v. F.E.R.C.*, 147 F.3d 929, 934 (D.C. Cir. 1988) (barring petitioner’s argument of undue discrimination against small customers as a collateral attack because it should have been raised during review of the order).

<sup>24</sup> NYISO Board Decision at 5.

On the other side of the capacity payments, the Complainants ignore the effect of their requested increase in the Demand Curves on loads. As shown above, the requested reset would transfer some \$100 million to existing suppliers, for which loads would receive no quantifiable incremental reliability benefit during the term of the existing curves. The Complaint cannot establish that the existing Demand Curve for NYC is unjust and unreasonable without dealing with both sides of the equation. Additionally, the expiration of the ICIP tax abatement will have no impact on the tax status of SCRs as SCRs are not “utility property,” which further confirms that the Demand Curves are not unjust or unreasonable for incumbent suppliers.

While NYC is expected to meet its 2010 minimum capacity requirement, clearing prices will increase as supply nears the minimum capacity requirement, to the benefit of all suppliers in the NYC capacity market. In the meantime, there is no indication that the current NYC Demand curves either now or for the remainder of their term provide unjust and unreasonable rates to generators and demand response providers.<sup>25</sup> Further, as the Complainants acknowledge, they “inevitably bear some level of uncertainty in prices and must make determinations regarding expected outcomes.”<sup>26</sup> The fluctuation in pricing that may occur as a result of the ICIP repeal does not fall outside the range of just and reasonable rates.

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<sup>25</sup> See *Sithe New England Holdings, LLC v. F.E.R.C.*, 308 F.3d 71, 77 (1st Cir. 2002) (finding that ICAP charges are not part of the compensation to sellers required by the Federal Power Act, and holding that: “If ICAP charges were abolished by FERC tomorrow, the sellers could object that FERC as behaving unreasonably in its ‘on and off’ regulatory policies but not that they were deprived of a just and reasonable rate.”)

<sup>26</sup> Complaint at 19.

**C. THE COMPLAINANTS' CONTENTION THAT ADVERSE SHORT- OR LONG-TERM EFFECTS WILL OCCUR AS A RESULT OF CONTINUING TO APPLY THE PRESENT NYC DEMAND CURVES IS UNSUBSTANTIATED.**

The Complainants argue that the expiration of the ICIP real property tax abatement will have deleterious effects for the NYISO markets in both the short term and long term. In the short term, the Complainants claim that deficiencies in the NYC Demand Curves will affect near-term decisions on upgrades, repowerings, and small new generators, as well as participation by SCRs.<sup>27</sup> Over the long term, the Complainants claim that if the ICIP real property tax exemption is not removed as an input into the net CONE, the bid floor of the NYISO's proposed mitigation measures for the NYC will artificially depress capacity prices in NYC.<sup>28</sup>

The Complainants do not substantiate their assertion of potential adverse short term effects from the expiration of the ICIP on the NYISO markets. It is evident from Mr. Younger's affidavit that NYC is expected to meet its minimum capacity requirement through the duration of the current curves.<sup>29</sup> The Complainants only speculate that this might not be the case because the NYISO's capacity supply projections include SCRs, and the Complainants claim that "SCR providers could easily elect to leave, or forego further entry into, the NYC market" if the clearing price does not equal market costs.<sup>30</sup> The Complainants, however, provide no information indicating that the NYC Demand Curves at the current levels will not continue to attract the volume of SCRs expected by the NYISO. In this regard, SCRs are not "utility property," and thus would not be excluded from the replacement for the ICIP. Thus, the Complainants have not

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<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 29.

<sup>29</sup> Younger Aff. at ¶ 80.

<sup>30</sup> Complaint at 25.

shown that a change in the costs of new entry for utility property would have any adverse effect on the continuation of the willingness of SCRs to participate in the NYC capacity market under the current Demand Curve. Of course, SCRs would presumably always prefer to get higher capacity payments, but that proves too much.

Marie Pieniasek states in her affidavit that if the NYISO capacity market fails to send adequate price signals, “demand response resources will face increased hours of activation,” which “will result in a loss of demand resources in the New York City ICAP market.”<sup>31</sup> Mr. Younger makes a similar statement, observing that “[w]ith the NYC market barely meeting its minimum capacity requirement . . . it is likely that the number of expected SCR resource calls would increase significantly thereby increasing the resource’s cost of program participation significantly.”<sup>32</sup>

Ms. Pieniasek and Mr. Younger fail to mention, however, that prices under the NYC Demand Curves will increase as supply decreases. Currently, as the NYISO market is in a capacity surplus, prices are low and there is less likelihood that SCRs will get called upon to provide service. Correspondingly, if the supply curve approaches the minimum capacity requirement, it may be that SCRs may be more likely to be called on until new entry actually occurs, but it is also necessarily true that prices as determined by the Demand Curve would increase. The Complainants provide no evidence that as prices increase up the Demand Curve, SCRs will not continue to make the cost-benefit trade-off in favor of market participation. Ms. Pieniasek and Mr. Younger make no showing that, as prices increase along the Demand Curve as

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<sup>31</sup> Pieniasek Aff. at ¶ 9. Stephen Lynch makes a similar observation in his affidavit: “The combination of depressed prices and increased calls will make participation in the NYC markets untenable for SCR resources with high opportunity costs.” Lynch Aff. at ¶ 7.

<sup>32</sup> Younger Aff. at ¶ 81.

supply decreases, the price increase would not provide sufficient incentives for SCRs, notwithstanding the potential—not quantified by Ms. Pieniazek or Mr. Younger—that SCRs may be called on more often. This deficiency in the Complaint is telling, since at the current Demand Curve levels SCRs have provided significant amounts of ICAP in New York City,<sup>33</sup> which indicates that no chilling effect has occurred as a result of the ICIP repeal.

Additionally, the Complainants do not identify any specific new entrant that will be significantly affected, or deterred from entry, by the current set of NYC Demand Curves. Liam Baker’s affidavit purports to identify one potential entrant in the NYC capacity market before the next reset process: 100 MW of new capacity being considered by Astoria Generating Company L.P. (“Astoria Generating”) as part of the South Pier Improvement Project (“SPIP”).<sup>34</sup> Mr. Baker only says that the current schedule “contemplates” completion of the project by summer 2010,<sup>35</sup> and no further information on the status of the project is provided, such as whether the SPIP should be a candidate for Class Year 2009 for a NYISO generation interconnection Feasibility Study. Moreover, even if this new generating facility achieved its goal of coming on line in summer 2010, it would only be on line for a matter of months before the new NYC Demand Curves will be in place. The brief period for which the NYC Demand Curves may apply to the Astoria Generating facility suggests that this potential entrant will not be significantly affected by the ICIP repeal. Equally important, there is no information in the record indicating that Astoria Generating has applied for a replacement tax benefit, or made any effort to determine whether NYC would exercise its discretion to replace the prior benefit for this

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<sup>33</sup> Lawrence Aff. at ¶ 11.

<sup>34</sup> Baker Aff. at ¶ 6.

<sup>35</sup> *Id.* at ¶ 10.

merchant project. If, as Mr. Baker suggests, the tax status of the Astoria facility is critical to its coming on line, the developers of the project would seem to have a compelling case for receiving property tax benefits to replace the ICIP. They cannot claim that there are no replacement tax benefits if they have not even asked.

Mr. Baker also states that the annual NYC property tax rate without the ICIP would cost the SPIP approximately \$6 million.<sup>36</sup> Mr. Baker does not, however, quantify an asserted cost impact on the SPIP of the UCAP price difference between the current Demand Curves and the level at which the curve should assertedly be with the expiration of the ICIP. While the SPIP is assertedly a 100 MW project, it would be selling UCAP, a lesser value, under the curve. Mr. Baker provides no information or data on what the UCAP value of the project would be. Additionally, Mr. Baker does not project what the clearing price difference under the two curves would allegedly be in the Summer of 2010. Finally, if the main impact would be in the summer, then the Demand Curve impact difference would be limited to six months. Even if the asserted impact would include the 2010-2011 Winter Capability Period, the prices in the winter would not be the same as in the summer. Mr. Baker's affidavit provides no information on any of these crucial factors for quantifying the alleged impact on the SPIP for the failure to reset the Demand Curve.

It may well be that certain decisions concerning the Astoria Generation and other projects must be made before the expiration of the current Demand Curves, but the Complainants' description of the decision-making process of entities contemplating new entry is not convincing.<sup>37</sup> While the level of the current NYC Demand Curves and the repeal of the ICIP

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<sup>36</sup> Baker Aff. at ¶ 27.

<sup>37</sup> Complaint at 22.

may not be irrelevant to decisions on future entry, the fact remains that a new entrant would not be eligible for any capacity payments until it in fact comes on line and can provide Installed Capacity.<sup>38</sup> Thus, any rational 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 the Demand Curves resulting from the next and subsequent reset procedures. As discussed above, there is no reason to suppose that the next set of Demand Curves will not appropriately account for the property tax status of new generation projects in New York City. Rational decisions based on price projections would take into account the NYISO's history of resetting the demand curves, and the Board's recent decision that the tax status of new generation would be considered in the next Demand Curve reset process. Against this background, if the tax status of new generation has in fact changed, then a rational developer would place little reliance on the current Demand Curves.

The Complainants also overstate the potential adverse long-term effects of the expiration of the ICIP on the NYISO markets. The Complainants contend that the bid floor of the NYISO's proposed mitigation measures for NYC will artificially depress capacity prices in NYC.<sup>39</sup> The Complainants, however, offer no evidence that there is likely to be any new entry during the remaining period of the current NYC Demand Curves that would have the potential to distort clearing prices absent application of a bid floor. Under the mitigation measures approved by the Commission, bid floors only apply to uneconomic new entry. If there is no such entry, the bid floor provisions will have no effect on the market. As a result, there is no basis on which to

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<sup>38</sup> Services Tariff § 5.12.

<sup>39</sup> Complaint at 29.



conclude that the expiration of the ICIP will have adverse long-term effects on the NYISO markets.

**D. OTHER INDUSTRIAL DEVELOPMENT INCENTIVES ARE AVAILABLE TO REPLACE THE ICIP REAL PROPERTY TAX ABATEMENT.**

The Complainants acknowledge the potential eligibility of new generation for industrial development incentives in the absence of the ICIP, but argue that does not justify maintaining the current NYC Demand Curves.<sup>40</sup> The Complainants maintain that the issue of whether to adjust CONE to account for discretionary acts was addressed, and rejected, in the 2007 reset process. This is an over generalization that mischaracterizes the 2007 reset process.

The Complaint asserts that during the 2007 reset process, Con Edison argued that the proxy unit should be considered to be natural gas-fired only, rather than having dual-fuel capability, because Con Edison assertedly could waive a tariff requirement for dual fuel capability for certain projects.<sup>41</sup> NERA concluded, however, that given the possibility that New York Public Service Commission or other operating requirements may require a new peaking unit in NYC to have this capability, dual-fuel capability should be assumed.<sup>42</sup> Thus, the NERA conclusion turned not on whether Con Edison had some measure of discretion over dual fuel capability, but what the likely requirements for a new peaking unit would ultimately be.

Here, the Complainants simply assume without any evidence that no replacement tax benefits would ever be available for new generation. Any discretionary tax program here would be administered by the New York state government, by an agency with a mandate to promote

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<sup>40</sup> Complaint at 34.

<sup>41</sup> *Id.*; see also NERA Report at 32.

<sup>42</sup> NERA Report at 31–32.

appropriate industrial development. The Complainants provide no evidence that suggests that this process would be inherently biased against new generation facilities that were needed in NYC. To the contrary, recent evidence suggests that alternative benefits are available to merchant generators. The New York City Industrial Development Agency (“NYCIDA”), for example, provides large-scale conduit financing and tax exemptions to businesses, including both commercial and industrial enterprises. As recently as 1997, substantial NYCIDA benefits were provided to a merchant generator.<sup>43</sup> The Complainants offer no evidence of any efforts to apply for or inquire into alternative industrial development incentives, let alone any efforts that confirm that new merchant generation will henceforth be denied any property tax benefits.

It is, then, at best unclear whether the CONE for new generation entering NYC will increase by the full amount of the property taxes that would be payable in the absence of the ICIP. Ultimately, the issue for the determination of CONE for purposes of the Demand Curves is not the ICIP as such, but the going-forward tax and other costs of new generation entering the NYC capacity market in the post-ICIP environment. The availability of alternative industrial development incentives and any other factors bearing on the future tax status of new generation in New York City would have to be taken into account. Additionally, other factors affecting CONE may have changed since the conclusion of the last Demand Curves reset. As a result, it is highly unlikely that the NYC Demand Curves could be accurately redetermined simply by changing the ICIP variable in the NERA model from true to false. Rather, a full analysis of the

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<sup>43</sup> In 1995, and again in 1997, Brooklyn Navy Yard Cogeneration Partners, L.P. (“Brooklyn Navy Yard”) received NYCIDA grants including the use of tax exempt bonds. The Public Service Commission authorized the issuance of \$540,000,000 in bonds by Brooklyn Navy Yard. *See Petition of BNYCP for Authority to Issue Long-Term Debt in an Amount Not to Exceed \$540,000,000*, Public Service Commission Case 97-E-1935, *Order Approving Petition* (issued and effective December 3, 1997). Note that the particular tax-exempt bonding authority that was

factors affecting the CONE for new capacity in NYC would be required. Complainants' contention that the Demand Curve could be reset by simply flipping a switch in the NERA spreadsheet is a simplification that is not justified by the facts.

**E. THE REPEAL OF THE ICIP REAL PROPERTY TAX ABATEMENT DOES NOT CREATE “EXIGENT CIRCUMSTANCES” THAT WOULD WARRANT MODIFICATION OF THE NYC DEMAND CURVE IN THE MIDDLE OF THE THREE-YEAR RESET PERIOD.**

The Complainants argue that the expiration of the ICIP real property tax abatement creates an “exigent circumstance” that justifies modifying the NYC Demand Curves in the middle of the three-year reset period.<sup>44</sup> The Complainants maintain that the proper test for a finding of “exigent circumstances” in the capacity context is a market inefficiency standard.<sup>45</sup> The Complainants mischaracterize and misapply the standard for finding “exigent circumstances” in the capacity context.

Section 5.6.7. of the ICAP Manual states that: “Once 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.” No further guidance on determining when circumstances have become “exigent” is provided in the ICAP Manual.

The purpose of the Demand Curves is to preserve the reliability of the New York electric system by providing price incentives for the development of capacity that will meet or slightly exceed the applicable minimum Installed Capacity requirements.<sup>46</sup> Consistent with this purpose,

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utilized by NYCIDA for the Brooklyn Navy Yard arrangements in 1995-1997 has now expired; this example is therefore illustrative only.

<sup>44</sup> Complaint at 37.

<sup>45</sup> *Id.* at 37–40.

<sup>46</sup> *See New York Indep. Sys. Operator, Inc.*, 103 FERC ¶61,201 (2003).

a finding of “exigent circumstances” should be reserved for situations in which there is (i) a significant likelihood that reliability would be compromised because of a lack of capacity, and (ii) an off-cycle resetting the Demand Curve would materially contribute to reliability being maintained.

The NYISO’s conclusion is supported by the standard for action in “exigent circumstances” specified in § 19.01 of the NYISO Agreement. Section 19.01 states that

the ISO Board may submit to the Commission a proposed amendment to the ISO OATT, the ISO Services Tariff or the ISO Agreement under Section 205 of the FPA, without the concurrence of the Management Committee, under the following circumstances: the ISO Board certifies that (1) the proposed amendment is necessary to address exigent circumstances related to the reliability of the NYS Power System or to address exigent circumstances related to an ISO Administered Market; and (2) the urgency of the situation justifies a deviation from the normal ISO governance procedures.<sup>47</sup>

Thus, the NYISO Agreement distinguishes between exigent circumstances relating to reliability, and those relating to an ISO administered market.

Previous holdings of the Commission provide insight into whether an asserted deficiency in a current Demand Curve warrants an off-cycle revision of the Demand Curves once they have been through the stakeholder process and approved by the Commission. This situation arose in 2005, in connection with changes in the data reported in the 2004 Gold Book, which was used in setting the Demand Curves, as compared to later data in the 2005 Gold Book. The Commission rejected “exigent circumstances” arguments that the Demand Curves should be revised in light of the new Gold Book data, holding that “the entire ICAP Demand Curve process is based on the premise that it is important to the market to have price stability and certainty,” and that “[s]tability and certainty would be sacrificed if . . . we acted prospectively but outside the

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<sup>47</sup> ISO Agreement § 19.01.

envisioned three year process for developing ICAP Demand Curves.”<sup>48</sup> The Commission was also concerned that revising the Demand Curve “would create a precedent for further—month-by-month, perhaps—adjustments as data and circumstances change in New York over the three year period, which would promote uncertainty rather than stability.”<sup>49</sup> The Commission further noted that “as in a cost-of-service rate case involving test year data, at a certain point, a decision must be made based on the information on hand, and adjustments based on selected post test year data can throw off the balance between offsetting factors.”<sup>50</sup> Finally, the Commission concluded that if a complex analysis of potentially off-setting facts and circumstances were required, that analysis should be reserved for the triennial update process.<sup>51</sup> Taken together, these holdings indicate that substantial weight should be given to the values of stability and certainty inherent 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 for which a reset of the Demand Curve could be readily determined and would provide a material remedy.

The Complainants maintain that “[i]n none of [the] previous exigent circumstances filings has the NYISO limited itself only to cases where failing to make the filing would constitute a threat to reliability . . . ,”<sup>52</sup> but rather acted to prevent “inefficient market outcomes” and should do so here.<sup>53</sup> The Complainants fail to note that none of the previous exigent

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<sup>48</sup> *New York Indep. Sys. Operator, Inc.*, 112 FERC ¶61,283 at P 39 (2005).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at P 38.

<sup>51</sup> *Id.* at P 40.

<sup>52</sup> Complaint at 36.

<sup>53</sup> *Id.* at 37.

circumstances filings to which they refer involved the capacity market. Rather, the previous filings concerned situations such as the sanctions for violation of market mitigation standards.<sup>54</sup> The purpose of the exigent circumstances filings in those situations was the need to implement needed market power mitigation measures in order to ensure that supply and demand cleared at competitive levels and thus the relevant markets achieved competitive outcomes. Here, however, demand is set by the Demand Curve, and there are no issues about withholding supply, because withholding is precluded by the ICAP mitigation measures. Thus, the Complainants' effort to invoke market inefficiency as an "exigent circumstance" is circular. Asserting that the ICAP market is inefficient because supply and demand are clearing at the incorrect level is simply another way of saying that the Demand Curve is wrong and should be moved to the level that the suppliers would prefer. Given that the purpose of the Demand Curves is to ensure reliability, however, the Demand Curve is only at the wrong level if it is adversely affecting reliability. Hence, the Board was correct in focusing on reliability as the determinant of whether there was an "exigent circumstance."

Moreover, the Complainants fail to account for the substantial weight given by the Commission to stability and certainty in the triennial reset cycle. Adopting the Complainants' standard for a finding of "exigent circumstances" as market efficiency in the capacity context would result in significant uncertainty and instability in the NYC capacity market. The Complainants' overbroad characterization of "exigent circumstances" would send a signal to investors and market participants that pricing in the capacity market may be subject to revision at any time when an assertedly "inefficient" market outcome occurs, which is another way of

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<sup>54</sup> See, e.g., Docket No. ER08-1281, *New York Indep. Sys. Operator, Inc.* (July 21, 2008); *New York Indep. Sys. Operator, Inc.*, 115 FERC ¶61,005 (2006); and *New York Indep. Sys. Operator, Inc.*, 97 FERC ¶61,334 (2001).

saying that the Demand Curves should be revised whenever there is an assertedly significant change in any variable that went into the determination of the then-current curves. This is the wrong message to send to investors and would set a dangerous precedent for further adjustments to the Demand Curves.

### **III. COMPLIANCE WITH RULE 213 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE**

#### **A. Disputed Material Allegations**

As demonstrated throughout this Answer, the NYISO specifically denies each of the material allegations in the Complaint, including the following:

- The NYISO denies that the current NYC Demand Curve is unjust and unreasonable.
- The NYISO denies that the failure to reset the NYC Demand Curve would adversely affect long-term investment decisions.
- The NYISO denies that the failure to reset the NYC Demand Curve would adversely affect short-term decisions on upgrades, repowerings, and development of small generators.
- The NYISO denies that the failure to reset the NYC Demand Curve would result in artificially low bid floors by distorting the *ex ante* test as applied to uneconomic entry.
- The NYISO denies that the failure to reset the NYC Demand Curve would result in a decrease in participation by SCRs.
- The NYISO denies that correcting for the ICIP repeal requires only a simple mechanical calculation that does not require any judgment to account for other relevant factors.
- The NYISO denies that the Board adopted an overly narrow definition of “exigent circumstances.”
- The NYISO denies that replacement of the ICIP with discretionary property tax benefit programs mandates resetting the current NYC Demand Curve.

#### **B. Law Upon Which This Answer Relies**

The law upon which the Answer relies is set forth in the Answer.

### **C. Defenses**

The defenses relied upon are set forth in the Answer.

### **D. Process for Resolution of the Complaint**

1. The Complaint should be dismissed on the pleadings.
2. Dispute resolution. This dispute has been the subject of extensive deliberations within the NYISO stakeholder process, culminating in a resolution by the NYISO Board of Directors based on written submissions and oral presentations from interested stakeholders. Accordingly, the NYISO does not believe that further alternative dispute resolution proceedings are likely to be useful.

### **E. Exhibits**

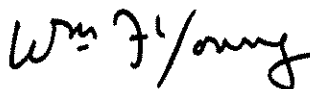
The following documents are attached to this Answer:

1. NYISO Board of Directors Decision on Whether Repeal of the ICIP Requires Resetting the NYC ICAP Demand Curve (Attachment 1)
2. Affidavit of David Lawrence (Attachment 2)

## **IV. CONCLUSION**

WHEREFORE, for the reasons set forth above, the NYISO respectfully requests that the Commission exercise its discretion not to order modifications to the NYISO's Services Tariff in light of the expiration of the ICIP tax abatement.

Respectfully submitted,



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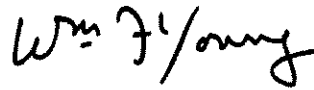
Dated: November 3, 2008



**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated at Washington, D.C. this 3rd day of November, 2008.



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**ATTACHMENT 1**

AUGUST 27, 2008

**NYISO BOARD OF DIRECTORS DECISION  
ON  
WHETHER REPEAL OF THE ICIP REQUIRES  
RESETTING THE NYC ICAP DEMAND CURVE**

**Background**

The current ICAP Demand Curves are based on economic and factual analyses that were completed last summer.<sup>1</sup> At that time, newly developed utility real property, including new generation, was eligible for a substantial reduction in real property taxes under the New York City Industrial and Commercial Incentive Program ("ICIP"). Consistent with the past practice of the New York State legislature, the Demand Curves were based on an assumption that the ICIP program, which started in the early 1990's, would be continued when it came up for renewal in June, 2008. This past June, however, Governor Paterson signed into law legislation to replace the ICIP with a new tax abatement program that excludes "utility property." This change is prospective only, and does not affect the tax status of current beneficiaries of the ICIP. The availability of the ICIP tax relief, however, was a significant factor in determining the cost of new entry (CONE) for a new peaking unit entering the market for Installed Capacity in New York City ("NYC"). Net CONE is in turn a critical factor in setting the level of the ICAP Demand Curve for NYC.

**Issue to be Decided**

Does the exclusion of new electric generators from the real property tax incentives that replaced the ICIP give rise to an "exigent circumstance" that warrants resetting the ICAP Demand Curve for NYC prior to the next regularly scheduled revisions of the Demand Curves?

**Facts**

In the process giving rise to the Demand Curves now in effect, the NYISO retained National Economic Research Associates ("NERA") as consultants to conduct an analysis of the level of the CONE on which the Demand Curves should be based. At the conclusion of its analysis, NERA produced a spreadsheet model for the calculation of a revised NYC Demand Curve. This included a true/false switch for the ICIP tax benefit. The Demand Curve for NYC that was adopted was based, among other considerations, on the assumption that the ICIP factor was true. Changing this factor to false in the NERA spreadsheet, without making any other changes, causes the net CONE to increase by approximately 39%. This would result in a

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<sup>1</sup> Unless otherwise specified, capitalized terms have the meanings specified in the Market Administration and Control Area Services Tariff ("Services Tariff") of the New York Independent System Operator, Inc. ("NYISO").

concomitant increase in capacity payments under the Demand Curve to NYC ICAP suppliers of the same amount.

The NYISO staff has determined that changing the net CONE by 39% would, under current capacity market conditions, likely increase the current NYC clearing price from about \$6/kw-month to about \$8.34/kw-month. A price increase of \$2.34/kw-month would translate into an increase of approximately \$22 million per month in capacity payments, or \$132 million for the 2008 Summer Capability Period. Since roughly 2,000 MW of capacity is owned by NYC LSEs, however, the net impact would be slightly over \$100 million in additional payments to ICAP suppliers in NYC, collected from LSEs in NYC, but could be somewhat less depending on the hedging arrangements in bilateral contracts. It is also likely that capacity payments to NYC suppliers would increase in the Winter Capability Period as well, but the \$100 million figure approximates a lower bound on the annual impact.

The NYISO staff has also advised the Board that capacity supplies in NYC are expected to remain at levels above the minimum capacity requirement through the period covered by the current Demand Curves, which extend to the end of the 2010-2011 Winter Capability Period. While the surplus will likely decrease over this period, supplies will nonetheless exceed the minimum locational requirement for NYC.

In addition to obtaining information from the NYISO staff, the Board has considered the comments and reply comments that it requested from interested stakeholders. The principal advocates of changing the Demand Curve were the Independent Power Producers of New York, Inc. ("IPPNY"), joined by several suppliers of Special Case Resources ("SCRs") (together "IPPNY Comments"). Comments opposing changing the Demand Curve were received from a coalition of LSEs and electricity consumers, as well as the New York Dept. of Public Service and the City of New York.

The IPPNY Comments assert that the NYISO's 2008 Load and Capacity Data Report ("Gold Book") projects a capacity shortfall in New York City in the summer of 2010, and therefore an "exigent circumstance" exists.<sup>2</sup> The Gold Book data does not, however, include capacity from Special Case Resources ("SCRs") or the Linden VFT project, both of which are reasonably expected by the NYISO staff to provide significant amounts of capacity in NYC. While the IPPNY Comments assert that SCRs could elect to leave, or forego further entry into, the NYC market if the Demand Curve is not revised, the comments provide no facts or other reasons to conclude that the Demand Curve at the current level will not continue to attract approximately 450 MW of SCRs, as has been the case. In this connection, the Board notes that SCRs are not "utility property," and thus would not be excluded from the replacement for the ICIP.

The comments received by the Board do not identify any specific new entrant that will be adversely affected, or deterred from entry, by the current set of NYC Demand Curves. Mr. Baker's affidavit in support of the IPPNY Comments contends that 100 MW of new capacity is being contemplated by US Power Generating Company ("USPG"), but states only that it is

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<sup>2</sup> IPPNY Comments at 15.

USPG's "goal" to commence commercial operations by the summer of 2010. At the same time, the NYISO staff advises that this project has not yet completed the necessary steps for inclusion in Class Year 2009 for the requisite Feasibility Study for operation in 2010. The staff also advises that even if there were sufficient evidence that this project would be delayed because of concerns about the level of the current Demand Curve, NYC capacity levels would continue to be expected to exceed minimum requirements through the period covered by the current Demand Curves.

It is at best unclear whether the CONE for new generation entering NYC will increase by the full amount of the property taxes that would be payable in the absence of the ICIP. As indicated in the comments of New York City, new generator projects in NYC may be eligible for industrial development incentives in the absence of the ICIP.<sup>3</sup> In addition, other factors affecting CONE may have changed since the conclusion of the last Demand Curves reset process. Given these realities, the Board is not confident that the NYC Demand Curves could be accurately redetermined simply by changing the ICIP variable in the NERA model from true to false. Rather, a full analysis of the factors affecting the CONE for new capacity in NYC would be required.

The IPPNY Comments contend that if the current Demand Curve is not revised to reflect the repeal of the ICIP, the bid floor in the NYISO's proposed mitigation measures for NYC will artificially depress capacity prices in NYC.<sup>4</sup> None of the comments, however, identify any actual or planned facility that would be subject to a bid floor determined by the current set of NYC Demand Curves.

### **The "Exigent Circumstances" Standard**

The ICAP Manual states that: "Once 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."<sup>5</sup> The ICAP Manual provides no further guidance on determining whether "exigent circumstances" exist.

The fundamental purpose of the Demand Curves is to preserve the reliability of the New York electric system by providing price incentives for the development of capacity that will meet or slightly exceed the applicable minimum Installed Capacity requirements.<sup>6</sup> The Board concludes from this purpose that a finding of "exigent circumstances" in this context should be reserved for situations in which there is a significant likelihood that reliability would be compromised because of a lack of capacity, and an off-cycle resetting the Demand Curve would materially contribute to reliability being maintained.

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<sup>3</sup> See NYC Comments at 4-5.

<sup>4</sup> IPPNY Comments at 18.

<sup>5</sup> ICAP Manual § 5.6.7.

<sup>6</sup> See *New York Indep. Sys. Operator, Inc.*, 103 FERC ¶61,201 (2003).

This conclusion is supported by the standard for action in “exigent circumstances” specified in § 19.01 of the NYISO Agreement. Section 19.01 states that the Board may take unilateral action to amend a NYISO tariff or certain other documents if “the proposed amendment is necessary to address exigent circumstances related to the reliability of the NYS Power System or to address exigent circumstances related to an ISO Administered Market.” The Board’s conclusion is also consistent with the recommendation of its independent Market Advisor on the application of the “exigent circumstances” standard in the context of revising the Demand Curves.

The Board is also mindful of the holdings of the Federal Energy Regulatory Commission (“Commission”) on whether an asserted deficiency in a current Demand Curve warrants an off-cycle revision to the Demand Curves once they have been through the stakeholder process and approved by the Commission. This situation arose in 2005, in connection with changes in the data reported in the 2004 Gold Book, which was used in setting the Demand Curves, as compared to later data in the 2005 Gold Book. The Commission rejected arguments that the Demand Curves should be revised in light of the new Gold Book data, holding that “the entire ICAP Demand Curve process is based on the premise that it is important to the market to have price stability and certainty,” and that “[s]tability and certainty would be sacrificed if . . . we acted prospectively but outside the envisioned three year process for developing ICAP Demand Curves.”<sup>7</sup> The Commission was also concerned that revising the Demand Curve “would create a precedent for further—month-by-month, perhaps—adjustments as data and circumstances change in New York over the three year period, which would promote uncertainty rather than stability.”<sup>8</sup> The Commission further noted that “as in a cost-of-service rate case involving test year data, at a certain point, a decision must be made based on the information on hand, and adjustments based on selected post test year data can throw off the balance between offsetting factors.”<sup>9</sup> Finally, the Commission concluded that if a complex analysis of potentially off-setting facts and circumstances were required, that analysis should be reserved for the triennial update process.<sup>10</sup> Taken together, these holdings 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 to a Demand Curve in the absence of compelling evidence of an imminent and substantial threat to reliability for which a reset the Demand Curve could be readily determined and would provide a material remedy.

### **Analysis and Conclusions**

Applying the facts discussed above to its analysis of the “exigent circumstances” standard, the Board determines that the repeal of the ICIP does not present an exigent circumstance that would warrant an off-cycle redetermination of the NYC Demand Curve. The

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<sup>7</sup> *New York Indep. Sys. Operator, Inc.*, 112 FERC ¶61,283 at P 39 (2005).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at P 38.

<sup>10</sup> *Id.* at P 40.

Board does not believe that the available facts show that there is an imminent and substantial threat to reliability over the remaining term of the current NYC Demand Curves unless those curves are redetermined. Longer term, the Demand Curves will continue to attain their purpose of attracting and retaining sufficient Installed Capacity to NYC by meeting expectations that in each reset cycle the Demand Curves will be set at appropriate levels based on a full consideration of all the relevant facts and circumstances bearing on the net CONE determination. The Board believes the NYISO has developed a good track record in meeting these expectations, and that entry by future generation projects will be based on those expectations rather than the level of current Demand Curves that will not apply to those projects.

The Board rejects any suggestion that a determination not to engage in an off-cycle redetermination of the NYC Demand Curve would in any way prejudice or compromise the determination of the CONE in the next regular reset process. Whatever the views of any group of stakeholders in the current controversy, the Services Tariff directs that the periodic review of the Demand Curves determine “the current localized levelized embedded cost of a peaking unit in each NYCA Locality and the Rest of State to meet minimum capacity requirements.”<sup>11</sup> The Board fully expects that this determination 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 ICIP, 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.



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<sup>11</sup> Services Tariff § 5.14.1(b).

**ATTACHMENT 2**



UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

INDEPENDENT POWER PRODUCERS OF )  
NEW YORK, INC., ASTORIA )  
GENERATING COMPANY, L.P., A US )  
POWER GENERATING COMPANY, )  
CONSUMERPOWERLINE, INC., EAST )  
COAST POWER, LLC, ENERGY )  
CURTAILMENT SPECIALISTS, INC., )  
NRG ENERGY, INC. AND TC )  
RAVENSWOOD, LLC )

Docket No. EL09-4-000

Complainants, )

v. )

NEW YORK INDEPENDENT SYSTEM )  
OPERATOR, INC. )

Respondent. )

AFFIDAVIT OF DAVID J. LAWRENCE

STATE OF NEW YORK )  
 ) ss  
COUNTY OF ALBANY )

DAVID J. LAWRENCE, being duly sworn, deposes and states:

1. I am the Manager of Auxiliary Market Products at the New York Independent System Operator, Inc. (the "NYISO"), an independent not-for-profit corporation organized under the laws of the State of New York. I have held this position since November 2005. In this position, I am responsible for working with stakeholders and staff of the NYISO to design, implement, and enhance the NYISO's Installed Capacity ("ICAP") and Demand Response products.

2. Prior to joining the NYISO, I was employed by for 24 years by Power Technologies, Inc., where, amongst other positions, I served as the Director of the Instrumentation and Energy Management Department. I received my Bachelor of Science degree in Engineering and a Master of Science degree in Electric Power Engineering from Rensselaer Polytechnic Institute in Troy, New York.

3. The NYISO operates the State of New York's high voltage electric transmission system and administers the state's competitive wholesale electrical markets. The NYISO is responsible for assuring the reliability of the New York State power system and has no financial interest in any transaction for the generation or transmission of electricity.

4. The purpose of my Affidavit is to provide information regarding the NYISO's capacity market in response to the Complaint filed by the Independent Power Producers of New York, Inc., Astoria Generating Company, L.P., a US Power Generating Company, ConsumerPowerline, Inc., East Coast Power, LLC, Energy Curtailment Specialists, Inc., NRG Energy, Inc. and TC Ravenswood, LLC (the "Complainants"). The Complaint alleges, among other things, that the expiration of the New York City ("NYC") Industrial and Commercial Incentive Program ("ICIP") tax abatement will cause the New York City Demand Curve ("NYC Demand Curve") to produce unjust and unreasonable rates and creates an exigent circumstance sufficient to justify modifying the NYISO Services Tariff in the middle of the three-year reset period.

5. Based on the analysis provided by National Economic Research Associates ("NERA") and Sargent & Lundy as part of the most recent Demand Curve reset process, removing the ICIP tax abatement for the NYC power plants would, assuming no other property tax abatement or other relief were available, increase the NYC Demand Curve reference value (the value on the Demand Curve at the minimum capacity requirement) by approximately 39 percent.

6. Under the ICAP market conditions in 2008, this would likely have resulted in increasing the current NYC clearing price of roughly \$6/kw-month to about \$8.34/kw-month.

7. A price increase of \$2.34/kw-month would have translated into an approximately \$22 million per month increase in ICAP payments, or \$132 million for the 2008 Summer Capability Period.

8. The 2008 price impact approximates what would be expected in 2009. Demand Curve escalation (7.8%) as well as changes in the actual NYC Locality Requirement, and in supplier Installed Capacities and Equivalent Forced Outage Rates would have relatively minor impacts on the overall market impact assessment.

9. Since roughly 2000 MW of capacity is owned by NYC Load-Serving Entities (“LSEs”), such as Con Edison and NYPA, the full \$132 million impact will not be felt by LSEs; conservatively, the impact would be slightly over \$100 million for the Summer Capability Period.

10. The \$100 million figure represents additional payments to ICAP suppliers in NYC, collected from all LSEs in NYC. It is also likely that capacity payments to NYC suppliers will increase in the Winter Capability Period as well.

11. During the 2008 Summer Capability Period, an average of 498 MW of SCRs made offers that cleared in the NYC ICAP Spot Market Auction.

12. With the exception of Special Case Resource forecasts, the NYC adequacy forecasts provided in the Younger affidavit (paragraphs 78-82) are factually correct. The NYISO’s draft 2009 Reliability Needs Assessment, however, includes 622 MW of SCRs, a forecast based on Summer 2008 registrations. In addition, the entry of the Linden VFT, noted in the Younger affidavit at 82, will provide an additional 300 MW of UDRs not reflected in the 2010 Summer

Generating Capacity (9,161 MW). Taken together, the increased levels of SCRs and the Linden VFT project will result in supply meeting the 2010 minimum capacity requirement. This projection does not include capacity from the South Pier Improvement Project.

13. This concludes my Affidavit.

Affidavit of David J. Lawrence

SWORN AND SIGNED:

  
DAVID J. LAWRENCE

SUBSCRIBED AND SWORN to before me this 3<sup>rd</sup> day of Nov., 2008.

  
Notary Public

My Commission expires: March 21, 2010

DIANE L. EGAN  
Notary Public, State of New York  
Qualified in Schenectady County  
No. 4924890  
Commission Expires March 21, 20 10