UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.)	Docket No. EL07-39-004 EL07-39-005 ER08-695-002 ER08-695-003

REQUEST FOR REHEARING OF THE NRG COMPANIES

Pursuant to Section 313 of the Federal Power Act[1] and Rule 713 of the Commission's Rules of Practice and Procedure,[2] NRG Power Marketing, Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC and Oswego Harbor Power (hereinafter the NRG Companies)[3] request rehearing of two decisions in the Commission's May 20, 2010 Order[4] in the above captioned proceeding.[5] In both decisions, the Commission lowered the minimum amount an entity must bid when it engages in uneconomic entry, *i.e.,* enters the market in New York City by building new capacity or reducing its demand even though anticipated revenues from FERC jurisdictional markets, including capacity markets, do not support such entry.

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1 16 U.S.C. § 825l (2010).

2 18 C.F.R. § 385.713 (2010).

3 The NRG Companies are members of the Independent Power Producers of New York, Inc. (IPPNY) and support IPPNY's rehearing filed today, including the accompanying "Affidavit of Mark D. Younger", included therein.

4 New York Independent System Operator, Inc., 131 FERC ¶ 61,170 (2010) ("May 20, 2010 Order").

5 The history of these proceedings has been detailed in prior orders. New York Independent System Operator, Inc., 122 FERC ¶ 61,211 (2008)("March 7, 2008 Order"); New York Independent System Operator, Inc., 124 FERC ¶ 61,301 (2008)("September 30, 2008 Order"); May 20, 2010 Order.

First, the Commission lowered, by over 22%, the minimum amount that uneconomic entrants, including those incented by large net buyers of capacity, must bid when selling uneconomic capacity they build. There was no reasoned basis for lowering the minimum amount particularly when such buyers have a direct interest in suppressing capacity prices, and lowering the offer floor will lower capacity prices.

Second, the Commission entirely eliminated any mitigation of load electing to enter the market by reducing demand when it exempted payments from the New York State Energy Research and Development Authority (NYSERDA) and ConEd's Distribution Load Relief Program (DLRP) from the offer floor. As a result, these Special Case Resources (SCRs), as they are known, will be able to suppress market prices in the New York Independent System Operator's (NYISO) capacity market by bidding lower than their actual costs when they enter the market, *i.e.,* reduce usage.

These two decisions should be reversed on rehearing. The decision to lower the offer floor was inconsistent with the calculation of the net-cost of new entry (net-CONE) in the NYISO capacity market. The goal underlying the NYISO capacity market is to allow a capacity supplier to recover the net-CONE of the proxy peaking unit in New York City, which is currently an LMS-100. The Commission's prior decisions set a offer floor at 75% of the number on the demand curve that will recover net-CONE. The number on the demand curve that will recover net-CONE is at 100% of the installed capacity (ICAP) requirement, not the number chosen *i.e.,* 75% of the price on the NYISO demand curve at 104% of the ICAP requirement.

Thus, the decision to use the 104% pricing point is inconsistent with the calculation of the demand curve in the NYISO's capacity market (and the NYISO's proposal in this proceeding which the Commission accepted).

The decision to exempt the NYSERDA rebates and the ConEd's DLRP payments was internally inconsistent. The Commission said that the minimum offer floor for SCRs should equal the "value that induce[s] the SCR to abstain [from using power]" and enter the market.[6] But then the Commission inexplicitly exempted the NYSERDA and ConEd payments from the offer floor even though these payments induce SCRs to enter the market by covering (i) certain costs that enable entry, such as metering or (ii) the costs of opportunities lost when SCRs do not use power and participate in the capacity market.

Both decisions lacked record support. The NYISO did not support reducing the offer floor by 22% – it supported the appropriately set offer floor at the 100% minimum requirement net-CONE price on the In-City Demand Curve. Moreover, throughout this proceeding, the New York Transmission Owners' (NYTOs) argued for no offer floor or as low of an offer floor as possible. Their arguments here were a continuation of those efforts and thus a collateral attack on the establishment of the offer floor at 75% of net-Cone. In any event, the correctly set floor would not prohibit them from building, even if uneconomic – it only would ensure that when they do build when uneconomic, FERC jurisdictional capacity markets can continue to function as intended by providing for capacity prices that recover the net-CONE

6 May 20, 2010 Order at P 136.

over the life of the project, *i.e.,* the capacity market prices will not be artificially depressed which was a core goal of the Commission's March 7 Order in this proceeding. Further the Commission provided no record support for lowering the offer floor, a matter particularly important because lowering the offer floor will reduce the protections capacity suppliers have against monopsony market power. Thus, the Commission should reinstate setting the Offer Floor at 100% minimum requirement net-CONE price point on the In-City Demand Curve.

Finally, the Commission did not explain its rationale for exempting the two programs from the SCR offer floor; simply stating that its decision was "based on the information provided in this proceeding[7] and, similar to lowering the offer floor by over 22%, never addressed the impact that exempting these payments from the offer floor will have on the ability of the capacity market to support new entry.

At a minimum, in the case of SCRs, the Commission should (i) defer approving any exemption from the offer floor pending action on the NYISO filing regarding the specific criteria for including a specific subsidy or benefit in the calculation of the SCR offer floor and (ii) clarify that its decision was based on the specific facts and circumstances involving subsidy and benefit payments in New York.

7 May 20, 2010 Order at P 137.

I. REHEARING

A. The Commission should have Calculated the Offer Floor for Uneconomic Entry in the Same Manner as it Clears the In-City Demand Curve, *i.e.*, applying actual net-CONE, *i.e.,* at price at 100% of the ICAP Requirement and thus not Unjustifiably Reduced the Offer Floor by over 22%.

1. The Commission should Continue to set the Offer Floor based on the Net-CONE 100% Minimum Requirement Point on the In-City Demand Curve.

In the May 20, 2010 Order, the Commission, in clarifying what it termed was "some confusion regarding the NYISO's use of the term "net-CONE,"[8] reduced the offer floor for uneconomic entry in New York City, by over 22%, from $92.385/kW-year,[9] under the NYISO's proposal, to $71.855/kW-year under the May 20, 2010 Order.[10] The over 22% reduction results from the Commission's decision to use a different (and lower) number for net-CONE when setting the offer floor than it used to calculate net-CONE for constructing a LMS-100 generation facility in New York City, *i.e.,* the levelized costs of a new peaking unit less or, net of, energy and ancillary services revenues that reflect projected surpluses of capacity in New York.

The Commission should have required the NYISO to calculate the offer floor the same way that the NYISO sets the price points to clear the In-City Demand Curve, *i.e.,* as 75% of the price at 100% of the ICAP requirement. The NYISO Demand Curve is designed to recover net-CONE at 100% of the ICAP

8 May 20, 2010 Order at P 31.

9 This figure equals 75% of the 2008 net-CONE of $123.18/kW-year.

10 This figure equals 75% of the price at $95.81/kW-year, the price on the demand curve at 104% of the ICAP requirement.

requirement.[11] The offer floor, on the other hand, is designed to ensure that uneconomic entry does not compromise the ability of the market to provide for just and reasonable rates, even when buyer-side interests or other entities engage in uneconomic entry, *i.e.,* building a new unit that would lose money if they received revenues from only the FERC jurisdictional markets. To that end, the Commission sets a minimum amount of net-CONE that must be bid, 75%, and thus in determining the number for net-CONE, the Commission should have used the same amount upon which net-CONE is applied to the In-City Demand Curve in the first instance, *i.e.,* 100% of the ICAP requirement not the amount at 104% of the ICAP requirement. Otherwise, the rate that the Commission previously determined would return a just and reasonable rate of return for capacity sellers will yield insufficiently low revenues.

2. The Commission should not have Calculated the Offer Floor at 104% of the ICAP Requirement.

The 104% of the ICAP requirement is an adjustment to account for the risk that, on average, the market will exceed the minimum capacity requirement, without which the revenues from the demand curve at the 100% ICAP requirement would not otherwise support new entry. The 104% number should not be used for setting the offer floor.

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11 *Affidavit of Eugene T. Meehan in Support of the Compliance Filing of the New York Independent System Operator, Inc., Regarding the New York City ICAP Market Structure*, filed October 4, 2007 in Docket No. EL07-39-000 at P 17. "The ICAP Demand Curve is intended to attract sufficient new generation from peaking units to maintain supply adequacy. To achieve this result, the net CONE established in the study, which is the estimated net cost for a new peaking unit, is used at 100% of the minimum requirement."

Let's start with an example. In setting the demand curve, the NYISO first determines the CONE of the proxy generation unit, the LMS-100. Assume for simplicity that the cost of the LMS-100 equals $120/kW-year. The NYISO then calculates net-CONE by taking CONE ($120/kW-year in the example) and projecting the revenues to be generated by the proxy unit from the energy and ancillary services markets. Let's assume that the projection, assuming no surplus of capacity in the market, is at $20/kw-year, such that net-CONE under this example would be $100/kw-year ($120/kW-year CONE minus $20/kW-year projection of energy and ancillary services revenues with no surplus.)

But in setting the demand curve, the NYISO projects a surplus of capacity and this surplus will lower the projection of revenues from the energy and ancillary services markets. Let's assume for purposes of this example that the NYISO lowers the projection by $5/kW-year to $15/kW-year.) Thus, when the NYISO reflects surplus in the market, net-CONE is $105/kW-year, not $100/kW-year in a scenario with no surpluses, and the $105/kW-year is used in setting the price at 100% of the ICAP requirement.

In other words, the NYISO determines the dollar value of net-CONE by making a number of adjustments for various risk factors so that the discrete dollar value of net-CONE at 100% of the ICAP requirement, can reasonably be expected to return sufficient revenues to cover the cost of a new entrant over time. One such risk adjustment reflects projected capacity surpluses over time. The NYISO makes an adjustment based on the assumption that available capacity would equal or

slightly exceed the minimum ICAP requirement, thereby lowering the revenues in energy and ancillary services markets and thereby increasing the amount of net-CONE that would be needed from capacity market but for the adjustment to lower energy and ancillary services revenues. That adjustment is reflected in the 104% ICAP requirement – the NYISO adjusted the demand curve to reflect the fact that over time the expected clearing price would be below the target reserve point.

That adjustment, however, does not mean that net-CONE was set at 104% of the ICAP requirement or that the offer floor should be set at 75% of that amount. Net-CONE was not set at 104% of the ICAP requirement – net-Cone was set at 100% of the ICAP requirement – and net-CONE will not be recovered at 104% of the ICAP requirement. Net-CONE on the demand curve to support new entry will only be recovered at the 100% ICAP value, $105/kW-year in the example above.

In addition, by calculating net-CONE in this fashion, the Commission eliminated a risk factor adjustment the NYISO made to ensure that net-CONE will be recovered from the capacity market. The Commission acted as if net-CONE was never calculated with an adjustment for surplus capacity when in fact it had been.

Further, by calculating the offer floor using 75% of the lower number, the Commission will not be setting the offer floor at 75% of the amount necessary to recover net-CONE, *i.e.,* the amount at the 100% demand requirement. Rather the offer floor will only cover 58.34% of net-CONE rather than the 75% intended by the NYISO.

Finally, the decision was counterproductive. The NYISO made the adjustment of 104% of the ICAP to ensure that at 100% of the ICAP requirement sufficient revenues will be produced to cover the cost of a new entrant over time. The Commission, however, took that one adjustment in isolation and in the process lowered the offer floor which in turn, as set forth further below, would create the potential for buyers to engage in a greater amount of uneconomic entry, keeping the market persistently long by a larger proportion, thereby further compromising the fundamental goal of the demand curve and this proceeding: to provide a level of compensation to attract and retain needed infrastructure to promote long-term reliability while neither over or under compensating generators.

3. The Commission's Decision Lacked Record Support.

The Commission had no record to support the inconsistency between applying a 100% net-CONE price point to clear the In-City Demand Curve while calculating the offer floor at 104% of the ICAP requirement. While the Commission stated there was "some confusion regarding the NYISO's use of the term "net-CONE,"[12] the NYISO was not confused. The NYISO proposed and the Commission accepted setting the "floor at 75 percent of net Cost of New Entry ("CONE") in the area where the new plant is proposed."[13] The net-CONE for any plant in New York City in 2008 was $123.18/kW-year and thus consistent with the NYISO proposal, the offer should have been set at $92.385/kW-year, 75% of that amount.

12 May 20, 2010 Order at P 31.

13 *Affidavit of David B. Patton, Ph.D*, filed October 4, 2007 in Docket No. EL07-39-000 at P 67.

Not surprisingly given their proposal, the NYISO supported basing net-CONE on the price derived at 100% of the ICAP requirement, that took into account the adjustment for excess capacity – it did not support the lower number approved in the May 20, 2010 Order that calculated net-CONE without the adjustment for excess capacity.[14] In supporting this appropriately set number, the NYISO disagreed that the offer floor should be lowered simply because the Commission included a risk factor adjustment when it calculated the over CONE figure to account for expected surpluses over time. The NYISO said:

> In sum, while the 104% average capacity level assumption resulted in an adjustment of the levelized net-Cone number, it did not change the setting of the resulting net-Cone at 100% of the minimum capacity requirement.[15]

In addition, the arguments of the New York TOs did not support the decision to lower the offer floor. For example, the TOs lamented that using the NYISO's proposed definition for net-Cone, would mean that "the addition of even a small new generator could cause the price of ICAP to fall below the Offer Floor"[16] and added that "if the amount of In-City ICAP provided is initially equal to 104% In-City ICAP Requirement…then the addition of more than 48 MW of In-City ICAP would push the price of the In-City ICAP below the Offer Floor."[17]

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14 May 20, 2010 Order at P 31.

15 *Motion for Leave to Respond, and Response of the New York Independent System Operator, Inc.*, filed June 11, 2008 in Docket Nos. ER08-695-001 and EL07-39-000 at 12.

16 *Request for Rehearing of the New York Transmission Owners*, filed October 30, 2008 in Docket Nos. EL07-39-002, ER08-695-000 and 001 at 7.

17 *Id.* at 7-8.

But that was a collateral attack on the offer floor of 75% of net-CONE set in this proceeding. Because when the NYTOs build they want to bid that capacity into the market at zero, throughout this proceeding, the NYTOs argued against an offer floor of 75% of net-CONE.[18] Having failed to stop an offer floor of 75%, on compliance the NYTOs took another tack, attempting to lower the net-CONE upon which to apply the 75% offer floor and, as set forth above, those arguments should fail.

In any event, their arguments are only a justification for building when it is uneconomic, and for setting the offer floor as close to their preferred level of zero as possible when they engage in such uneconomic entry, thereby further artificially depressing capacity prices, an outcome that is simply not sustainable over the long term. The appropriately set offer floor does not prevent TOs like ConEd from building, even if uneconomic – it only ensures that when they do build when uneconomic, FERC jurisdictional capacity markets function as intended by ensuring that such uneconomic entry does not artificially suppress the market clearing prices.

a. The Commission's Decision Lacks Any Record Support for Allowing Uneconomic Supply to be Built in New York City to Depress Capacity Prices.

More striking, the Commission's decision to calculate the offer floor inconsistently, lacked the support in the record to justify reducing the mitigation on

18 *See e.g.* the *Initial Comments of Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc.,* filed November 19, 2007 in Docket No. EL07-39 at pages 30-31 (stating that the offer floor of 75% of net-CONE would discourage new entry).

uneconomic additions, *i.e.*, by not applying the appropriately set offer floor, particularly when the reduced mitigation will lower capacity prices in the City and the ability of FERC jurisdictional capacity markets to support new entry.[19]

Simply put, because the offer floor is intended to prevent capacity prices from falling below a certain level due to uneconomic entry, by reducing the offer floor, the Commission's decision effectively eliminates key protections against the exercise of buyer-side market power. Without these protections, load-side interests will have the economic incentive and the means to artificially lower capacity prices in New York City.

Specifically, when an entity builds capacity that is "uneconomic," the offer floor becomes, as the name implies, a floor below which capacity prices will not fall as a result of the load's uneconomic addition. In such cases, the resource will not be permitted to clear the capacity market (and, thus, cause the price to plummet) unless demand curve prices are sufficiently high such that the additional capacity is "economic" in the auction as compared to its mitigated offer. Thus by reducing the offer floor by over 22%, the Commission makes it possible for more capacity to clear the market and correspondingly, for the capacity prices in New York City to be artificially suppressed even further. In short, the lower the offer floor, the more uneconomic entrants will be able to artificially lower capacity prices, and the less likely that FERC jurisdictional capacity markets will return a just and reasonable rate to capacity suppliers.

19 *See*, e.g., *Algonquin Gas Trans. Co. v. FERC*, 948 F.2d 1305, 1315 (D.C. Cir. 1991) (requiring the Commission to explicitly consider the impacts of its order).

By lowering capacity prices, the Commission will perpetuate the vicious cycle that currently exists in New York City; specifically, as capacity prices are lowered, new capacity cannot be built based on anticipated prices in FERC jurisdictional capacity markets. But New York policymakers (and the Commission) want new, cleaner-burning, more fuel-efficient capacity to be built. Because FERC jurisdictional capacity markets will not support such entry, New York policymakers will then turn to procuring such capacity outside of the FERC jurisdictional markets. By necessity the capacity procured will be above the prices produced in the FERC jurisdictional capacity markets – indeed the prices in the FERC jurisdictional markets would not support such entry even if policymakers want such capacity to be built – and that capacity will be constrained by the contracting party to bid into the market at below its costs or the (currently lower) offer floor. This cycle simply repeats itself as New York policymakers provide ever-increasing subsidies to make up for the deficiencies in the FERC-jurisdictional markets. This cycle could eventually lead to the need to construct generation for reliability, because investors will be unable to rely on the integrity of the NYISO market to support entry because of the risk that the FERC-jurisdictional markets will continue to be undermined by subsidized entry. The Commission should not allow such an extreme outcome and on rehearing should calculate the offer consistently, *i.e.,* based on 100% of the ICAP requirement.

The Commission's decision is devoid of any discussion of these issues, contrary to law and should be reversed on rehearing.

B. The Commission Acted Inconsistently in Exempting NYSERDA Rebates and ConEd's Distribution Load Relief Program from the Offer Floor for SCRs because these Programs Induce SCRs to Curtail Usage, *i.e.,* Enter the Market.

1. Mitigation of Buyer-Side Market Power from SCRs is Not Inconsistent with State Goals.

In this proceeding, the Commission rejected ConEd's, the New York Public Service Commission's (NYPSC) and the RIP Coalition's[20] request for a blanket exemption from the offer floor for any subsidies or other benefits designed to encourage SCRs to enter the market. The Commission correctly recognized that the offer floor should reflect the costs that induce SCRs to abstain from using power, *i.e.*, the value that the SCR receives from the Responsible Interface Party and from third parties in the form of benefits and subsidies. As the Commission found:

> An SCR engaged in demand response agrees to curtail power usage to make capacity available. The best representation of the opportunity cost of that curtailment is the value that will induce the SCR to abstain. Offering this capacity at less than the opportunity costs is an uneconomic offer and will unreasonably drive down the price of capacity. NYISO's proposed offer floor prevents uneconomic SCR entry into the market.[21]

But then the Commission acted totally inconsistent with that recognition – under the guise of not "interfer[ing] with state programs that further specific legitimate policy goals,"[22] the Commission exempted from the offer floor payments or rebates received from NYSERDA and ConEd's DLRP, which are the two main subsidies SCRs receive in New York.

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20 The RIP Coalition consists of CPower, Inc., EnerNOC, Inc., Energy Curtailment Specialists, Inc., Energy Spectrum Inc. and Innovative Power, LLC.

21 May 20, 2010 Order at P 136.

22 May 20, 2010 Order at P 137.

The Commission did not adequately explain this statement and, properly framed, the issue in this proceeding is not whether the Commission should interfere with state policy objectives of encouraging demand resource, but rather whether the Commission should allow SCRs to participate in FERC jurisdictional wholesale markets without mitigation; despite an economic interest and now an opportunity to suppress capacity market prices. In short, the Commission's order provides no reasoned basis for why applying buyer-side mitigation to new SCR entrants is inconsistent with state policies or undermines New York's incentivizing of demand response.

Nothing about the offer floor prevents the State from pursuing legitimate public policy objectives, it is simply that in doing so it cannot be done at the expense of maintaining the pricing integrity of the FERC jurisdictional capacity market. If FERC rules apply an offer floor that causes such uneconomic entry to not clear the capacity market, State programs can still pursue such entry and the realization of any associated public policy benefits, but it will simply need to do so without revenues from the NYISO capacity market until such time as that entry is no longer uneconomic.

Additionally, the NYISO has warned that participation by SCRs must not come at the expense of skewing market prices.

> As with market entry by "green" or other suppliers that may be considered desirable, the mitigation measures in the October 30 Compliance Filing [the filing proposing SCR mitigation] do not foreclose programs encouraging demand response resources – as long

> as such programs do not result in distorting the price signals generated by the New York capacity markets.[23]

Further, the NYSIO added that, regardless of how salutary the state's goals, its primary concern is over the FERC-jurisdictional markets and ensuring that capacity suppliers continue to receive a just and reasonable rate of return.

> Concerns with the validity of the price signals produced by the capacity markets are particularly important in the case of SCRs since, by their nature, at best SCRs can provide only a limited portion of the total capacity requirements in New York. If SCR entry inhibits needed generator entry, [*i.e.* for new, cleaner-burning, more fuel-efficient generation] end-users in New York would not be better off as a result of the SCR capacity, however beneficial it might otherwise be.[24]

In sum, if SCRs cannot participate in the wholesale market under a properly calculated offer floor, designed to prevent uneconomic entry, then they rightly should be excluded from the market, lest capacity markets be damaged.

2. The NYSERDA Rebates and ConEd Payments Induce SCRs to Enter the Market and thus Consistent with its Order, these Payments should have been included in the Offer Floor.

The NYSERDA rebates and payments under the ConEd DLRP induce SCRs to enter the market, *i.e.*, abstain from usage. a proposition that NYSERDA and others have recognized and, thus, there was no reasoned basis for the Commission's decision to exclude these programs from the offer floor. The NYSERDA rebates, for example, pay for the costs of meters and equipment upgrades so that SCRs can participate in curtailment programs such as the NYISO's capacity market. As

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23 *Motion for Leave to Respond, and Response, of the New York Independent System Operator, Inc.*, filed December 17, 2008 in Docket Nos. EL07-39-005 and ER08-695-003 at 8-9.

24 *Id*. at 9.

NYSERDA states on its website, "[t]he New York State Energy Research and Development Authority (NYSERDA) offers incentives to offset the cost of equipment that enables facilities to participate in Demand Response Programs."[25] Moreover, such incentives are directly tied to participation as an SCR ICAP provider in the NYISO market.[26] Similarly, the ConEd DLRP pays customers an additional capacity payment for actually reducing at least 50 kW of load for a period of not less than four hours and demand response providers look to both the NYISO and ConEd payments to incent them to enter the market.[27] Given that SCRs abstain from using power because of these payments, to be consistent with the May 20, 2010 Order, the Commission should have included those payments in the offer floor.

3. The Commission's Order Provided Scant Support for Exempting the Two Programs.

In exempting these two programs from the offer floor, the Commission's order provides scant support, simply exempting these programs "[b]ased on the information provided in this proceeding."[28] But the Commission did not identify in any way the specific information upon which it had relied and did not provide the information and did not provide the criteria it used in determining that the information provided supported exempting these two programs from the offer floor –

25 New York State Energy Research and Development Authority Existing Facilities Program, included as Attachment A.

26 *Id.*; see also *Protest of the Public Service Commission of New York*, filed December 2, 2008 in Docket Nos. EL07-39-005 and ER08-695-003 at 4, 6 ("NY PSC December 2008 Protest").

27 Joint Comments of Energy Curtailment Specialists, Inc. and ConsumerPowerline, *In re Tariff Filing of Consolidated Edison Company of New York, Inc. to Modify Rider U-Distribution Load Relief Program*, Case 08-E-0176 at 3 (filed March 27, 2008) .

28 May 20, 2010 Order at P 137.

an analysis the Commission is required to provide in its orders to ensure that its decisions have a reasoned basis.[29]

Moreover, the Commission compounded the error by establishing a further proceeding to determine the criteria for exempting additional state programs aimed at SCRs from the offer floor.[30] After exempting these programs from the offer floor (albeit wrongly), the Commission said:

> With regard to future programs, we direct NYISO to file tariff sheets within 30 days of this order reflecting provisions explaining, with specificity, the criteria it proposes to use in evaluating whether to include a specific subsidy or other benefit in its calculation of SCR offer floors. In its filing, NYISO should provide full support for the criteria it has chosen.

Reasoned decision making required that the Commission determine and explain the criteria for exempting these two programs rather than exempting these two programs – based on some unspecified information – and then establishing a further proceeding to flesh out the criteria for how other programs could also be

29 *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal quotation marks omitted); Keyspan-Ravenswood, LLC v. FERC, 474 F.3d 804, 812 (D.C. Cir. 2007) (finding that the articulated explanation was insufficient to "discern a reasoned path to the decision the Commission reached.") (internal quotation marks omitted); see also Miss. Pub. Serv. Comm'n v. FERC, 234 F.3d 36, 41 (D.C. Cir. 2000) (finding that a "passing reference to relevant factors, however, is not sufficient" and that the Commission must "fully articulate the basis for its decision.") (internal quotations omitted).

30 *ANR Pipeline Co. v. FERC*, 931 F.2d 88, 92-93 (D.C. Cir. 1991) (finding the Commission "lack[ed] the clarity and consistency necessary" in granting summary disposition while at the same time expressly leaving open the same issue at hearing).

exempted in the future. In short, it is completely unclear why these programs were given a "waiver" from the outset.[31]

In any event, the information provided in this proceeding did not support exempting these two programs. For example, the NYPSC talked broadly of supporting "New York's policy objectives of promoting demand response"[32] and asserted that including such benefits and subsidies in the offer floor, "will make it less likely that SCRs will be selected by the NYISO as an ICAP provider or be willing to participate in the NYC ICAP market."[33] Con Ed struck a similar theme, arguing that including such payments "would raise the floor price such that many of these SCRs would no longer be willing to provide this distribution load relief service to Con Edison."[34]

But the ability to participate in wholesale markets is not without limitation. Throughout this proceeding, the Commission found that uneconomic entry can produce unjust and unreasonable prices by artificially depressing capacity prices. In response the Commission established an appropriate offer floor and applied that floor. To be an effective tool, the offer floor must prevail when state initiatives

31 *ANR Pipeline Co.* at 93 ("Having found it proper to allow a full airing of the cost-tracking question, the Commission could not simultaneously describe the matter as one where the facts are not in dispute." (internal quotations omitted)).

32 NY PSC December 2008 Protest at 4.

33 *Id*. at 3.

34 *Comments of Consolidated Edison Company of New York, Inc.*, filed December 2, 2008 in Docket Nos. EL07-39-005 and ER08-695-003, at 3.

adversely impact the just and reasonable capacity rate. Otherwise the exemption swallows the rule.[35]

More specifically to SCRs, SCRs are treated as an equivalent resource in many NYISO markets, receiving the same payments and having the potential for the same impacts on those markets as more traditional resources. In the case of capacity markets, the Commission found that SCRs (i) can have a very significant effect on prices and (ii) exempting SCRs from the offer floor will give demand resources the incentive and ability to suppress capacity prices. For that reason, the Commission found it appropriate for NYISO's in-City market mitigation rules to apply to SCRs in the same manner as all other in-City market participants.[36]

Having found that an offer floor is the key to ensuring just and reasonable rates and that such offer floor should be applied to SCRs, the Commission should not have reduced the offer floor for SCRs by exempting the two programs that induce SCRs to enter the market.

4. At a Minimum, the Commission Should (i) Defer Exempting these Two Programs from the Offer Floor Pending a Decision on the NYISO Filing to Specify the Criteria for Exemption of State Programs from the Offer Floor and (ii) Clarify that Any Decision on that Filing should be based on the Facts and Circumstances of the New York Programs.

At a minimum, the Commission should defer any final decision exempting these programs from the offer floor, pending acting on the NYISO filing, described above.[37] The record in this proceeding reflected much back and forth between the

35 March 7, 2008 Order at PP 109-112. .

36 September 30, 2008 Order at P 41.

37 *See supra* notes 26, 27 and accompanying text.

various interested parties on exempting New York state subsidies and benefits from the offer floor. The Commission would benefit from the NYISO's views and further debate on the criteria, prior to making a final decision. Moreover, the Commission should not make any decision to exempt the two main programs from the offer floor inconsistent with the criteria ultimately adopted, and thus should defer finalizing its decision to exempt these two programs, pending Commission action and stakeholder consideration of the criteria that FERC has directed the NYISO to file.

In addition, the Commission should clarify that any ultimate decision here is based on the specific facts and circumstances of the subsidies and payments in New York. Among the various states there are myriad of programs that induce SCRs to enter the market, programs that might be fundamentally different than the New York programs at issue here. The Commission should recognize that diversity by clarifying that any ultimate decision here should be based on the facts and circumstances specific to the programs in New York.

II. STATEMENT OF ISSUES

Pursuant to Rule 713(c)(1) and (c)(2) of the Commission's Rules of Practice and Procedure,[38] the NRG Companies respectfully submits the following specifications of errors and statement of issues:

1. The May 20, 2010 Order was in error by reducing the offer floor by 22% and by not calculating the offer floor consistent with the net-CONE under the ICAP demand curve, i.e., at the price that reflects 100% of ICAP requirement.[39]

2. The May 20, 2010 Order was in error because the Commission should not have calculated the minimum offer floor at 104% of the ICAP requirement.[40]

3. The May 20, 2010 Order was in error because the record developed in the proceeding does not support the Commission's decision to reduce the minimum offer floor for uneconomic entry by over 22%. Neither the actions of the NYISO nor the comments of the New York TOs – a collateral attack on the offer floor of 75% of net-CONE – support the Commission's decision.[41]

4. The May 20, 2010 Order was in error because the Commission provided no record support for reducing the offer floor by over 22% when such action will lower capacity prices in New York City and thereby perpetuate the current cycle that results in uneconomic capacity additions.[42]

5. The May 20, 2010 Order was in error because reducing the offer floor by over 22% will artificially lower future capacity prices, thereby preventing entry of more fuel-efficient, cleaner burning generation, contrary to the initiatives of New York policymakers and the Commission.[43]

6. The May 20, 2010 Order was in error in exempting NYERSDA Rebates and ConEd's Distribution Load Relief Program from the offer floor for

38 18 C.F.R. § 386.713(c)(1), (2).

39 *See supra* Section I.A.1.

40 *See supra* Section I.A.2.

41 *See supra* SectionI.A.3.

42 *See supra* Section I.A.3(a).

43 *Id.*

SCRs because NYSERDA rebates and ConEd Distribution Load Relief Program payments induce SCRs to enter the market.[44]

7. The May 20, 2010 Order was in error because the Commission did not provide a satisfactory explanation for its decision to exempt NYERSDA rebates and ConEd's Distribution Load Relief Program payments from the offer floor for SCRs.[45]

8. The May 20, 2010 Order was in error because the information provided in the proceeding does not support exempting NYERSDA rebates and ConEd's Distribution Load Relief Program payments from the offer floor for SCRs.[46]

9. The May 20, 2010 Order was in error in exempting NYERSDA Rebates and ConEd's Distribution Load Relief Program in order to avoid interference with state programs,[47] because by exempting the two programs, the Commission is allowing SCRs to skew market prices and prevent new entry through FERC jurisdictional capacity markets.[48]

10. At a minimum, the Commission should defer exempting these two programs from the offer floor pending a decision on the NYISO filing to specify the criteria for exempting state programs from the offer floor and clarify that any decision on that filing should be based on the facts and circumstances of the New York programs.[49]

44 *See supra* Section I.B.1.

45 *See supra* Section I.B.2.

46 *Id.*

47 May 20, 2010 Order at P 137.

48 *See supra* Section I.B.2.

49 *See supra* Section I.B.3.

III. CONCLUSION

Wherefore, the Commission should grant the relief as set forth above.

Respectfully Submitted,

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ATTACHMENT A

New York State Energy Research and Development Authority
Existing Facilities Program

Demand Response Incentives

Program Overview
How to Participate
Program Application
> Apply Online
> Download Application
Download Program
>Printer Friendly

The New York State Energy Research and Development Authority (NYSERDA) offers incentives to offset the cost of equipment that enables facilities to participate in Demand Response Programs. Common measures include: load shedding controls and automation equipment, installation of new generators, or modifications to existing generators or switchgear.

Bonus incentives are available for 'fleet' installation of demand response enabled air-conditioner (window, through-the-wall, PTAC & PTHP) and load shedding ballasts to offset the cost of adding integrated tamper-proof direct load control or shedding capability.

INCENTIVE

	Upstate	Con Edison
Demand Response	$100/kW	$200/kW
Fleet-Integrated Demand Response Bonus		
Room Air Conditioners	$100/kW	$100/kW
Load-Shedding Ballast	$50/kW	$50/kW

Incentives are capped at 75% of project cost. Projects achieving both electric efficiency and demand response can qualify for both incentives, but the total incentive is capped at 75% of project cost. Please visit Con Edison's Demand Response Page for more information.

ELIGIBILITY

- All facilities must register in the New York Independent System Operator's (NYISO's) Special Case Resource (SCR) Program or Demand Side Ancillary Services Program (DSASP). The NYSERDA approved kW will not exceed the kW committed to SCR or DSASP.
- Generator Eligibility – Generator projects must be located within Con Edison territory to be eligible for funding. New generators must meet the most recent manufacturing New Source Performance Standards (currently, engines < 750 hp must be Tier 3, and engines > 750 hp must be Tier 2). Existing generators must emit less than 7.5 g/bhp-h of NOx. If future DEC regulations are stricter than these requirements, DEC regulations will supersede these requirements.
- Generator Run Hours – Generators must run only during SCR events and for limited testing.

Window, Through-the-Wall, PTAC & PTHP Air Conditioners Bonus

- Bonus incentive of $100/KW of direct load capacity to the fleet.
- Minimumproject size of 100 enabled window, through-the-wall, PTAC of PTHPs in a single facility, 7,000 Btu cooling or larger.
- Air conditioners must be EnergyStar and PTAC/PTHPs must meet the Energy Conservation Construction Code of NYS
- Verified proper disposal of decommissioned air conditioners is required.

Load Shedding Ballasts

- Bonus incentive of up to $50/ kW of load shedding capacity enabled by a load-shed ballast system;
- Lighting must meet the applicable eligibility criteria under Performance-Based Incentives for Electrical Efficiency
- The entire enabled load-shed capacity must be sold into the NYISO ICAP/SCR

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