152 FERC ¶ 61,110
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Consolidated Edison Company of New York, Inc.,
Orange and Rockland Utilities, Inc.,
New York State Electric and Gas Corp.,
Rochester Gas and Electric Corp., and
Central Hudson Gas and Electric Corp.

v. Docket No. EL15-26-001

New York Independent System Operator, Inc.

New York Independent System Operator, Inc. Docket No. ER15-1498-000

ORDER ON CLARIFICATION, REHEARING, AND COMPLIANCE

(Issued August 4, 2015)

1. On February 26, 2015, the Commission issued an order granting in part the complaint filed by Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric and Gas Corp., Rochester Gas and Electric Corp., and Central Hudson Gas and Electric Corp. (collectively, Complainants) against the New York Independent System Operator, Inc. (NYISO) (Complaint Order), and requiring NYISO to make a compliance filing to add a competitive entry exemption to the rules governing buyer-side market power mitigation in NYISO's Market Administration and Control Area Services Tariff (Services Tariff).[1]

[1] *Consolidated Edison Co. of New York, Inc. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at PP 1, 14 (2015) (Complaint Order).

2. On March 30, 2015, Entergy Nuclear Power Marketing, LLC (Entergy) and the PSEG Companies[2] (jointly), the NRG Companies,[3] and Potomac Economics, Ltd., as the Market Monitoring Unit for NYISO (MMU), filed requests for rehearing and clarification of the Complaint Order.

3. On April 13, 2015,[4] NYISO submitted in Docket No. ER15-1498-000, pursuant to section 206 of the Federal Power Act (FPA),[5] compliance revisions to its Services Tariff and Open Access Transmission Tariff (OATT) to address the Commission's directives in the Complaint Order (Compliance Filing).

4. For the reasons discussed below, we grant in part and deny in part the requests for clarification, deny the requests for rehearing, conditionally accept NYISO's Compliance Filing, and direct NYISO to submit a further compliance filing within 60 days of the date of this order.

5. In particular, we grant the NRG Companies' request for clarification that the Commission did not pre-judge in the Complaint Order how NYISO chooses to apply the competitive entry exemption to merchant transmission projects. We deny all other requests for clarification and rehearing for the reasons discussed below.

6. As to NYISO's Compliance Filing, we find that the applicability of the competitive entry exemption to Additional Capacity Resource Interconnection Service MWs is beyond the scope of this proceeding. In addition, we find that NYISO's proposed tariff revisions concerning the eligibility of the competitive entry exemption to Class Year 2012 are ambiguous and direct NYISO to submit further tariff revisions to clarify that the competitive entry exemption is not available to members of completed Class Years. We conditionally accept NYISO's other proposed tariff revisions and reject all other protests for the reasons discussed below.

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[2] The PSEG Companies consist of PSEG Power LLC, PSEG Energy Resources & Trade LLC, and PSEG Power New York LLC.

[3] The NRG Companies consist of NRG Power Marketing LLC and GenOn Energy Management, LLC.

[4] On March 31, 2015, the Commission granted NYISO a two-week extension of time to submit its Compliance Filing.

[5] 16 U.S.C. § 824e (2012).

I. Background

7. New York State's Installed Capacity (ICAP) market, which NYISO administers, is designed to send appropriate economic signals to investors to ensure sufficient capacity is available to satisfy New York State's peak demand along with its planning reserve margin. NYISO's ICAP market uses administratively-determined demand curves for each ICAP pricing zone and includes market power mitigation rules in the New York City and G-J Locality zones to prevent the exercise of both buyer and seller market power. These mitigation rules ensure that market clearing capacity prices reflect a competitive outcome even when buyers and sellers may have the ability and incentive to exercise market power.[6]

8. In 2012 and 2013, NYISO and its stakeholders discussed tariff revisions that would have provided for a competitive entry exemption to the mitigation rules.[7] Specifically, NYISO had proposed to exempt projects that have "no direct or indirect (i) contracts with, (ii) financial support from, or (iii) in kind support from any NY electric distribution company, Municipal Utility, or any NY state or local governmental entity, including but not limited to Public Authorities."[8] However, during a stakeholder vote in May 2014, only thirty-two percent of the sector-weighted vote of stakeholders supported the proposal, failing to garner the fifty-eight percent support required to enable it to submit the proposal to the Commission pursuant to section 205 of the FPA.[9]

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[6] *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,217, at P 3 (2013).

[7] Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric and Gas Corp., Rochester Gas and Electric Corp., and Central Hudson Gas and Electric Corp. December 4, 2014 Complaint (Complaint), Exhibit A, Affidavit of Richard B. Miller ¶ 28 (Miller Aff.); Complaint, Exhibit C, Management Committee Meeting May 28, 2014 Final Motions (Management Committee Motions).

[8] Complaint, Exhibit D, NYISO, *Proposed ICAP Buyer-Side Mitigation Modifications* at 7 (May 28, 2014) (NYISO Presentation).

[9] Management Committee Motions; NYISO, NYISO Agreements, Foundation Agreements, ISO Agreement §§ 7.10, 19.01 (Mar. 5, 2013), http://www.nyiso.com/public/webdocs/markets_operations/documents/Legal_and_Regulatory/Agreements/NYISO/iso_agreement.pdf.

9. On December 4, 2014, Complainants filed a complaint against NYISO, alleging that the rules governing buyer-side market power mitigation in section 23 of NYISO's Services Tariff[10] were unjust, unreasonable, or unduly discriminatory or preferential without a competitive entry exemption. On February 26, 2015, the Commission issued the Complaint Order, granting in part the complaint and requiring NYISO to make a compliance filing to add a competitive entry exemption to its Services Tariff.

II. Summary of the Complaint Order

10. In the Complaint Order, the Commission found that the Complainants had demonstrated that NYISO's Services Tariff is unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA without a competitive entry exemption to the buyer-side market power mitigation rules. The Commission also found that the Complainants' proposed tariff revisions providing for a competitive entry exemption to the rules governing buyer-side market power mitigation in NYISO's Services Tariff, as modified in the Complaint Order, are just and reasonable.[11]

11. The Commission agreed that, while the purpose of buyer-side market power mitigation is to deter the exercise of buyer-side market power and the resulting price suppression, NYISO's existing buyer-side market power mitigation rules acted as a barrier to entry for merchant resources. The Commission found that NYISO's then-existing buyer-side market power mitigation rules should not be applied to competitive unsubsidized merchant resources because these resources do not have the incentive to exercise buyer-side market power.[12] Moreover, the Commission found that subjecting such resources to an offer floor serves no competitive objective or market efficiency, regardless of whether the resources are judged uneconomic according to NYISO's

[10] NYISO's buyer-side market power mitigation rules provide that, unless exempt from mitigation, new capacity resources must enter the New York City or G-J Locality markets at a price at or above the applicable offer floor and continue to meet the offer floor until their capacity clears twelve monthly auctions. A new entrant can be exempted from the offer floor if NYISO determines that it passes either part of the mitigation exemption test. NYISO, Services Tariff, § 23.4.5.7 (9.0.0).

[11] Complaint Order, 150 FERC ¶ 61,139 at PP 3-4, 53.

[12] As used in this order, "merchant" projects are those projects that are funded privately, rather than with subsidies, and recover their costs only through market revenues.

existing buyer-side market power mitigation exemption test, because customers do not bear the risk or costs of uneconomic entry of such resources.[13]

12. Although the Commission largely adopted the Complainants' proposed competitive entry exemption in part, it also required a number of modifications. Specifically, the Commission addressed: (1) the extent to which any subsidy should be allowed; (2) certification requirements to ensure that a resource is purely merchant; and (3) penalty provisions for submitting false information.

13. First, the Commission rejected the Complainants' proposed *de minimis* exception, which would have allowed a new entrant to qualify for a competitive entry exemption with a certain "*de minimis*" level of non-qualifying contractual relationships.[14] The Commission found that permitting any subsidy contradicts a seminal principle underlying the buyer-side market power mitigation rules: that uneconomic entities with market power should not be permitted to lower capacity market prices by adding uneconomic capacity.[15]

14. While the Commission rejected the *de minimis* exception, the Commission adopted a modified version of the Complainants' proposed list of contracts in section 23.4.5.7.8.1.3, which would not be considered non-qualifying contractual relationships, meaning that these contracts would not disqualify a new entrant for the competitive entry exemption. The Commission also adopted the MMU's suggestion to remove from that same list of contracts those contracts providing financial hedges with Non-Qualifying Entry Sponsors. The Commission also ordered NYISO to remove from the list of allowable contracts reliability-must-run contracts. The Commission further agreed with TDI USA Holdings Corp. (TDI) that including on the list entities outside of New York could be over-inclusive and discriminate against owners of generation supply who have no reason or ability to depress prices in New York. The Commission reasoned that

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[13] Complaint Order, 150 FERC ¶ 61,139 at PP 45-51.

[14] Non-qualifying contractual relationships are contracts related to the planning, siting, interconnection, operation, or construction of the project, contracts for the energy or capacity produced by or delivered from or by the project, or contracts that provide services, financial support, or tangible goods to the project that are entered into with a Non-Qualifying Entry Sponsor. A Non-Qualifying Entry Sponsor is a Transmission Owner, a Public Power Entity, or any other entity with a Transmission District in the New York Control Area, or an agency or instrumentality of New York State, or a political subdivision thereof. Proposed Services Tariff § 23.4.5.7.9.1.1.

[15] Complaint Order, 150 FERC ¶ 61,139 at P 64.

expanding the list of Non-Qualifying Entry Sponsors to include entities outside of New York is unnecessary given the lack of support for the notion that such entities would benefit from low prices in New York.[16]

15. The Commission also found that the Complainants' proposed certification provisions,[17] which included fewer requirements than NYISO's, was significantly weaker than the oversight provisions NYISO proposed in its answer. As such, the Commission found that NYISO's proposed certification provisions, as further modified to reflect the MMU's suggestions, are just and reasonable. The Commission directed NYISO to revise its tariffs accordingly, and also required that NYISO include the certification form in its Services Tariff.[18]

16. In addition, the Commission declined to adopt the penalty structure NYISO proposed in its answer[19] because allowing NYISO to impose financial penalties for behavior that is not "objectively identifiable" is inconsistent with Commission rules and relevant precedent.[20] However, the Commission required NYISO to propose revocation provisions that achieve similar objectives to those provisions used by PJM Interconnection, L.L.C. (PJM).[21]

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[16] *Id.* PP 101-106.

[17] The certification provisions require that an applicant for a competitive entry exemption certify that the project does not have any non-qualifying contractual relationships. NYISO reviews the certification to determine the applicant's eligibility for the exemption.

[18] Complaint Order, 150 FERC ¶ 61,139 at PP 79-83.

[19] The proposed penalty structure would have allowed NYISO to revoke a new entrant's competitive entry exemption and impose a financial penalty if the new entrant provided false, misleading, or inaccurate information as part of its certification.

[20] Complaint Order, 150 FERC ¶ 61,139 at PP 88-89.

[21] *Id.* PP 90-91 (citing PJM Interconnection, L.L.C., Intra-PJM Tariffs, OATT, Attachment DD, § 5.14(h)(10) (17.0.0)). When PJM "reasonably believes" that an application for a competitive entry exemption included fraudulent or material misrepresentations or omissions, and that the exemption would not have been granted had the application not contained those misrepresentations or omissions, PJM can revoke the exemption, subject to certain notice requirements.

17. Finally, the Commission rejected the vintaging proposal put forth by New York Power Authority (NYPA) and the Long Island Power Authority's (LIPA).[22] Under existing rules, if a resource does not obtain an exemption from the buyer-side market power mitigation rules in advance of operation, based on NYISO's forecast of future revenues, mitigation continues until it is demonstrated that the resource is needed in the market by clearing in twelve, not-necessarily-consecutive, monthly auctions. Therefore, the Commission found NYPA/LIPA's proposal challenged the existing mitigation exemption calculation methodology, which was not at issue.[23]

III. Requests for Rehearing and Clarification of the Complaint Order - Docket No. EL15-26-001

18. On March 30, 2015, Entergy and the PSEG Companies jointly filed a timely request for rehearing of the Complaint Order, and the NRG Companies and the MMU filed timely requests for rehearing and/or clarification.

19. As discussed more fully below, Entergy, the PSEG Companies, and the NRG Companies seek rehearing regarding the Commission's finding that the Complainants met their burden of proof under FPA section 206 to show that NYISO's existing mitigation rules were unjust and unreasonable.

20. Entergy and the PSEG Companies also seek rehearing of issues related to structuring of the exemption, including: (1) requiring developers to certify that no entity in their chain of suppliers and customers received subsidies to support the project; (2) adding out-of-state entities to the definition of Non-Qualifying Entry Sponsors; (3) expanding the definition of non-qualifying contractual relationships beyond contracts, agreements, arrangements, and relationships to ensure that all forms of subsidy are covered; and (4) new entrants notifying NYISO and the MMU if they receive any subsidy to support the construction of a project after the initial certification, even after service commences.

21. The MMU requests clarification of the Commission's rejection of the MMU's proposed requirement that new entrants certify that none of their suppliers or customers, and no entity in the chain of their contractual relationships with its suppliers or customers, is party to non-qualifying contractual relationships that are contingent on the

[22] The vinataging proposal would have allowed projects previously subjected to mitigation under NYISO's buyer-side market power mitigation rules to continue to be judged against the system they entered.

[23] Complaint Order, 150 FERC ¶ 61,139 at P 113.

project's completion. If the Commission does not grant the request for clarification, the MMU requests rehearing of the Commission's rejection of the MMU's proposed certification requirement concerning supply- and customer-chain relationships.

22. The NRG Companies assert on rehearing that the Commission erred in approving a competitive entry exemption allowing new entrants to bid at substantially less than their actual costs. The NRG Companies also request two clarifications. First, the NRG Companies seek clarification that the Commission is not intending to limit NYISO's consideration of whether to allow certain transmission lines to be exempt from the buyerside market power mitigation rules that NYISO proposes in its compliance filing in Docket No. ER15-1498-000. Second, the NRG Companies request that existing projects in NYISO's interconnection queue that fit the qualifications of the competitive entry exemption be allowed to apply for the exemption.

A. Procedural Matters

23. On April 14, 2015, TDI filed an answer to the requests for rehearing.

24. Rule 713(d) of the Commission's Rules of Practice and Procedure[24] prohibits an answer to a request for rehearing. Accordingly, we reject TDI's answer to the requests for rehearing filed in this proceeding.

B. Substantive Matters

1. Sufficiency of the Existing Mitigation Measures

a. Requests for Rehearing

25. The NRG Companies argue that the Commission ignored compelling evidence that NYISO's existing buyer-side market power mitigation rules remained just and reasonable without a competitive entry exemption. According to the NRG Companies, the Commission failed to address the fact that two merchant projects cleared under the existing tariff rules.[25] Rather, they state that the Commission dismissed the arguments with the *non sequitur* that it did not base its decision on "whether there are flaws with the

[24] 18 C.F.R. § 385.713(d)(1) (2014).

[25] NRG Companies Request for Rehearing at 5-6 (citing Complaint Order, 150 FERC ¶ 61,139 at P 32 (citing IPPNY/EPSA January 15, 2015 Protest at 13); *id.* P 51).

calculation methodology underlying NYISO's existing mitigation test."[26] To support their argument, the NRG Companies refer to the Bayonne Energy Plant, which was a new project that passed NYISO's existing buyer-side market power mitigation exemption test and entered into service in 2012.[27]

26. Entergy and the PSEG Companies contend that the Commission erred in finding that the Complainants met their burden of proof under FPA section 206 because, according to Entergy and the PSEG Companies, the Complainants failed to submit any evidence that the mitigation rules had prevented any economic entry, and were, thus, unjust and unreasonable.[28] Further, they argue that the Commission ignored arguments that improvements in the forecasting process were already underway, and since this was the Complainants' primary concern, the forecasting improvements should have been adopted in place of the competitive entry exemption.[29]

b. Commission Determination

27. We deny the requests for rehearing on this issue. The Commission continues to find that the Complainants sufficiently demonstrated that NYISO's Services Tariff was unjust, unreasonable, or unduly discriminatory or preferential without a competitive entry exemption to the buyer-side market power mitigation rules.[30] The Complainants presented ample evidence in this proceeding to demonstrate that NYISO's buyer-side market power mitigation rules were unnecessarily applied to unsubsidized competitive entrants who have no incentive to inappropriately suppress capacity market prices.[31]

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[26] *Id.* at 6 (citing Complaint Order, 150 FERC ¶ 61,139 at P 51; *Bangor HydroElec. Co. v. FERC*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996); *Morall v. Drug Enforcement Admin.*, 412 F.3d 165, 178 (D.C. Cir. 2005); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1241 (9th Cir. 2005)).

[27] *Id.* at 6-7 (citing *Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189, at PP 1, 41-42, 64 (2012), *order on reh'g*, 151 FERC ¶ 61,044 (2015)).

[28] Entergy and PSEG Companies Request for Rehearing at 15 (citing Entergy January 15, 2015 Protest at 8-10).

[29] *Id.* (citing Entergy January 30, 2015 Answer at 8-9).

[30] Complaint Order, 150 FERC ¶ 61,139 at P 45.

[31] *Id.* PP 45-51.

As the Commission explained in the Complaint Order, NYISO's application of an offer floor to such resources "serves no competitive objective or market efficiency . . . because customers do not bear the risk or costs of uneconomic entry of such resources."[32]

28. Further, as described in the Complaint Order, NYISO agreed with the Complainants, expressing its strong support for a competitive entry exemption on the basis that competitive entrants should not be prohibited from taking the risk of entry based on their projections of future capacity prices.[33] Several parties agreed that, while the purpose of buyer-side market power mitigation is to deter the exercise of buyer-side market power and the resulting price suppression, NYISO's existing buyer-side market power mitigation rules act as a barrier to entry for merchant resources, thus rendering the existing buyer-side market power mitigation rules unjust and unreasonable.

29. According to the NRG Companies, the Commission also failed to address arguments that two merchant projects cleared under the existing tariff rules.[34] However, as the Commission explained in the Complaint Order, the relevant issue in this proceeding is not whether new entrants are properly judged uneconomic according to the existing mitigation exemption test, but, rather, whether the correct parties are being subjected to the test in the first place. Merchant resources should not be subjected to the test if they can qualify for the competitive entry exemption.[35] The fact that two merchant projects managed to clear under the existing mitigation exemption test is not dispositive of the issues in this case. Rather, the Commission applied economic theory to support its determination that a purely merchant entity only benefits from higher prices and thus, with the proper rules in place, should not be subjected to the mitigation exemption test.[36] Accordingly, we reaffirm the determination that Complainants demonstrated that the

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[32] *Id.* P 46.

[33] *Id*.

[34] NRG Companies Request for Rehearing at 5-6 (citing Complaint Order, 150 FERC ¶ 61,139 at P 32 (citing IPPNY/EPSA January 15, 2015 Protest at 13); *id.* P 51).

[35] Complaint Order, 150 FERC ¶ 61,139 at P 51.

[36] The D.C. Circuit has held that the Commission may rely on economic theory to support its conclusions if it has applied the relevant economic principles in a reasonable manner and adequately explained its reasoning. *See, e.g.*, *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010).

existing mitigation rules were not just and reasonable without a competitive entry exemption to the buyer-side market power mitigation rules.

2. Issues with the Competitive Entry Exemption

a. Requests for Rehearing and Clarification

30. The MMU requests clarification of the Commission decision to reject the MMU's proposed requirement that new entrants certify that none of their suppliers or customers, and no entity in the chain of its contractual relationships with their suppliers or customers, is party to non-qualifying contractual relationships that are contingent on the project's completion.[37] According to the MMU, NYISO's proposed definition of "indirect, non-qualifying contractual relationship"[38] limits the certification requirements the Commission approved to disclosing non-qualifying contracts with only "direct" and "indirect" entities, meaning direct customers, suppliers, and contractors, or entities that have contracts with those direct customers, suppliers, and contractors.[39] The MMU gives the example of a new entrant building a generating plant that has a contract to sell the plant to a second entity that is not a Non-Qualifying Entry Sponsor; the second entity sells its plant output in the form of a long-term bilateral contract to a broker that is also not a Non-Qualifying Entry Sponsor. The MMU contends that, if the broker re-sells the output to a third entity that is a Non-Qualifying Entry Sponsor in a long-term bilateral contract, the competitive entry exemption could still be granted because the certification only requires disclosure through the broker.[40]

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[37] MMU Request for Rehearing at 4-5 (citing Complaint Order, 150 FERC ¶ 61,139 at P 82).

[38] The MMU quotes NYISO's proposed Services Tariff section 23.4.5.7.9.1.2 as defining "indirect, non-qualifying contractual relationships" as "any contract between the [entrant] and an entity (for purposes of this section 23.4.5.7.9, a 'third party') if the third party has a non-qualifying contractual relationship with a Non-Qualifying Entry Sponsor, the recital, purpose, or subject of which includes, or has the effect of including [the entrant's project]." An applicant for a competitive entry exemption is ineligible if it has contracts that fit within this definition and that are not otherwise allowed.

[39] MMU Request for Rehearing at 4, 6.

[40] *Id.* at 6-7.

31. The MMU proposes that, as an alternative to the MMU's suggestion that the Commission previously rejected, the Commission clarify that the revocation clause the Commission ordered can be used in instances where NYISO and the MMU find that a subsidy is provided to the new entrant via a contract or affiliation with a Non-Qualifying Entry Sponsor that is further removed than direct or indirect entities.[41] Specifically, the MMU requests that the Commission clarify as follows: "The NYISO revocation clause should include measures that would revoke an entrant's [competitive entry exemption] if it becomes known that one of the suppliers in the entrant's supply or customer chain is a [Non-Qualifying Entry Sponsor] whose contractual relationship is contingent on the project's completion and is providing material support to the project."[42] The MMU asserts that, by creating this liability, the new entrant would be motivated to engage in contracts that would ensure that non-qualifying contractual relationships are not used to convey subsidies (e.g., through liquidated damages clauses).

32. If the Commission does not grant the request for clarification, the MMU requests rehearing of the Commission's rejection of the MMU's proposed certification requirement concerning supply- and customer-chain relationships.[43] Entergy and the PSEG Companies seek rehearing of the same.[44] The MMU argues that confining the contractual restrictions to direct and indirect relationships is an error because it will allow new entrants to circumvent the buyer-side market power mitigation measures relatively easily by using an additional intermediary in the supply or customer chain to bypass the rules. While Entergy previously expressed concern about how NYISO would effectively verify the certifications, it clarifies that it did not mean that new entrants should be excused from providing these verifications to NYISO in the first place and, as the Commission stated, the burden is on the new entrant.[45]

33. The MMU, Entergy, and the PSEG Companies disagree with the Commission that the MMU's proposed expanded certification is too burdensome, stating that any burden can be eased by contractual mechanisms that transfer the liability to any entities that

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[41] *Id.* at 5.

[42] *Id.* at 7.

[43] *Id.* at 8 (citing MMU January 15, 2015 Comments; Complaint Order, 150 FERC ¶ 61,139 at P 82).

[44] Entergy and PSEG Companies Request for Rehearing at 4, 6 (citing Complaint Order, 150 FERC ¶ 61,139 at PP 79, 81-82, 106).

[45] *Id.* at 8-9 (citing Complaint Order, 150 FERC ¶ 61,139 at PP 80-81).

engage in a non-qualifying contractual relationship.[46] Entergy and the PSEG Companies contend that no project can obtain financing without a clear picture of where its money will come from and how much can reasonably be expected, so it is not credible to suggest that a subsidized resource would not be acutely aware of all of the sources and amounts of its subsidies and other revenues.[47] They also note that similar certifications are common in seeking financing and for participating in solicitation processes, and are accepted as routine aspects of doing business.[48]

34. Entergy and the PSEG Companies also argue that the Commission erred by failing to close potential loopholes.[49] According to Entergy and the PSEG Companies, the Commission was unresponsive to evidence in the record that the basic structure of the competitive entry exemption enables uncompetitive entry.[50] They quote from Mr. Schnitzer's affidavit, which asserted that "[t]he basic problem with the whole approach is that it is focused on who the counterparty is, and what the contract payments are, *neither of which are dispositive as to whether the contract provides a subsidy*."[51]

35. Entergy and the PSEG Companies also argue that the Commission erred by failing to include out-of-state entities in the definition of Non-Qualifying Entry Sponsors.[52] They explain that the most likely source of out-of-state subsidies is from other governmental entities sponsoring sales into New York, such as the Canadian government

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[46] MMU Request for Rehearing at 9-10; Entergy and PSEG Companies Request for Rehearing at 9-10 (quoting Complaint Order, 150 FERC ¶ 61,139 at P 82).

[47] Entergy and PSEG Companies Request for Rehearing at 9.

[48] *Id.* at 10 (providing the example of New York state agencies that issue requests for proposals seeking competitive power bids) (citing New York State Office of General Services, Procurement Guidelines, Appendix A, http://ogs.ny.gov/About/appendixa.asp (Jan. 2014)).

[49] *Id.* at 4.

[50] *Id.* at 5.

[51] *Id.* (citing Schnitzer Aff. 15:3-14) (emphasis added by Entergy and the PSEG Companies).

[52] *Id.* at 11 (citing Complaint Order, 150 FERC ¶ 61,139 at PP 95-96, 106).

in the case of TDI.[53] According to Entergy and the PSEG Companies, these entities may have their own financial motivations to sell power into New York irrespective of the artificially suppressive impact on market clearing prices; for example, the State of New York might pay back the subsidy to an out-of-state entity through a "myriad of interrelated transactions."[54]

36. Entergy and the PSEG Companies further contend that the Commission erred by failing to directly respond to Entergy's request that the definition of non-qualifying contractual relationships be "expanded beyond contracts, agreements, arrangements, and relationships to ensure that all forms of subsidy are covered, including those achieved via special tariff treatment or discriminatory tax credits."[55] They contend that the current definition of non-qualifying contractual relationships is incomplete and will result in the competitive entry exemption failing to achieve its purpose, whereas the proposed clarification would result in all forms of project subsidies disqualifying a new project from receiving the exemption.[56]

37. Entergy and the PSEG Companies also ask that the Commission confirm that new entrants have a continuing obligation to notify NYISO if they receive subsidies to support their project, even after the project enters into service.[57] They contend that this clarification is particularly important given NYISO's and the MMU's own past assertions that they are not in a position to be able to effectively monitor contractual arrangements.[58]

38. By accepting the competitive entry exemption without the improvements Entergy and the PSEG Companies propose, they contend the Commission made several additional errors. First, they assert that the Commission failed to address record evidence that

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[53] *Id.* Entergy and the PSEG Companies contend that the Canadian government subsidizing TDI would enable significant sales from publicly-owned Canadian facilities into New York.

[54] *Id.* at 11-12 (citing Complaint Order, 150 FERC ¶ 61,139 at P 106).

[55] *Id.* at 12 (quoting Complaint Order, 150 FERC ¶ 61,139 at PP 100, 106).

[56] *Id.*

[57] *Id.* at 12-13 (citing Complaint Order, 150 FERC ¶ 61,139 at P 80).

[58] *Id.* at 13 (citing NYISO Request for Clarification or, in the Alternative, Rehearing, Docket No. EL07-39 (filed Apr. 7, 2008)).

eligibility for the competitive entry exemption should not be based exclusively on the existence or non-existence of certain affiliate and contractual relationships.[59] Second, they contest the Commission's finding that, from an "administrative aspect," a "generic exemption" was preferable to NYISO "engag[ing] in detailed reviews of individual projected costs, revenues, capacity levels, and other factors that may lead to litigation before the Commission."[60] Entergy and the PSEG Companies counter that the "generic exemption" is only preferable if properly structured and safeguarded to apply only to purely competitive entry. Third, they argue that the Commission failed to address unique aspects of the NYISO markets that render them particularly susceptible to subsidized new entry.[61] They state, however, that the improvements they seek should be sufficient to remedy the principal shortcomings of the competitive entry exemption.[62]

b. Commission Determination

39. We deny the following requests for rhearing and clarification: (1) the MMU's and Entergy and the PSEG Companies' requests for rehearing concerning the Commission's rejection of the MMU's proposal to require that new entrants certify that there are no non-qualifying contractual relationships in their entire supply and customer chain that are contingent on the project's completion and the MMU's request for clarification on this issue; (2) Entergy and the PSEG Companies' request for rehearing regarding the Commission's decision not to include out-of-state entities in the definition of Non-Qualifying Entry Sponsors; (3) Entergy and the PSEG Companies' request for rehearing of the Commission's decision to not expand the definition of non-qualifying contractual relationships beyond contracts, agreements, arrangements, and relationships; (4) Entergy and the PSEG Companies' request that the Commission confirm that new entrants have a continuing obligation to notify NYISO if they receive subsidies for their projects; (5) Entergy and the PSEG Companies' argument that, by accepting the competitive entry exemption without certain modifications, the Commission made additional errors; and (6) Entergy and the PSEG Companies' assertion that the Commission failed to address unique aspects of NYISO's markets in designing the competitive entry exemption. Each of these requests for rehearing and clarification are discussed in more detail below.

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[59] *Id*.

[60] *Id.* at 14 (quoting Complaint Order, 150 FERC ¶ 61,139 at P 48).

[61] *Id.* (citing Complaint Order, 150 FERC ¶ 61,139 at P 47; Schnitzer Aff. 16:13-20; Entergy January 15, 2015 Protest at 8-9 & nn.20, 21; Entergy January 30, 2015 Answer at 5-6).

[62] *Id.* at 15.

40. First, we deny the MMU's and Entergy and the PSEG Companies' requests for rehearing, and the MMU's request for clarification, regarding the Commission's rejection of the MMU's proposed requirement that new entrants certify that there are no non-qualifying contractual relationships that exist in the entire supply and customer chain that are contingent on the project's completion. The Commission found that "certifying the inputs and financing of the entire supply chain for complex generation and transmission facilities is too burdensome on developers and insufficiently supported by the MMU or any other participant."[63] On rehearing, Entergy and the PSEG Companies state that no project can obtain financing without a clear picture of its money flow and similar certifications are common in seeking financing and for participating in solicitation processes.[64] They assert that, without the proposed certification, subsidies could still be provided to the new entrant using a chain of contracts. However, we find Entergy and the PSEG Companies' concerns to be speculative and unsupported by record evidence. As the Commission found in the Complaint Order, requiring an examination of every contractual relationship, regardless of how far removed the contract is from the project itself, imposes a significant burden upon developers.[65] Such a requirement also creates significant risk of liability for not discovering and disclosing every possible contract that might be deemed to be non-qualifying. This risk could serve as an unreasonable barrier for new entrants to even apply for the competitive entry exemption in the first place. The MMU suggests that new entrants could pass this risk on to their contractors using liquidated damages clauses,[66] but we are not convinced that this is a risk that their contractors would be willing, or should be required, to accept. For these reasons, we deny the requests for rehearing and clarification on this issue.

41. We deny Entergy and the PSEG Companies' request for rehearing regarding the Commission's decision not to include out-of-state entities in the definition of Non-Qualifying Entry Sponsors. We reaffirm the finding in the Complaint Order that including out-of-state entities "could be over-inclusive and discriminate against owners of generation supply who have no reason or ability to depress prices in New York."[67] The Commission found in the Complaint Order that there was insufficient support for the notion that entities outside of New York would benefit from low prices in New York.

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[63] Complaint Order, 150 FERC ¶ 61,139 at P 82.

[64] Entergy and the PSEG Companies Request for Rehearing at 9-10.

[65] Complaint Order, 150 FERC ¶ 61,139 at P 82.

[66] MMU Request for Rehearing at 9-10.

[67] Complaint Order, 150 FERC ¶ 61,139 at P 106.

Entergy and the PSEG Companies have not presented convincing evidence to the contrary here.

42. We similarly deny Entergy and the PSEG Companies' request for rehearing of the Commission's decision to not expand the definition of non-qualifying contractual relationships beyond contracts, agreements, arrangements, and relationships. We disagree that the current definition will result in the competitive entry exemption failing to achieve its purpose. We find that the definition of "non-qualifying contractual relationships" as "includ[ing] *but not be[ing] limited* to any contract, agreement, arrangement, or relationship"[68] to be sufficiently broad to capture improper subsidies, including special tariff treatment or discriminatory tax credits. We confirm our finding that the Complainants' definition of non-qualifying contractual relationship is just and reasonable.[69]

43. We further deny Entergy and the PSEG Companies' request that the Commission confirm that new entrants have a continuing obligation to notify NYISO of new subsidies, even after they enter into operation. The Commission considered this request in the Complaint Order and found that the safeguards provided by the applicant's certification, the fact that NYISO's oversight and review will not cease when an entrant begins operating, combined with the requirement that NYISO report false, misleading, or inaccurate information to the Commission's Office of Enforcement, are sufficient.[70] We continue to find that these protections are just and reasonable, and that adding a continuing reporting obligation is unnecessary.

44. With regard to Entergy and the PSEG Companies' argument that, by accepting the competitive entry exemption without certain modifications, the Commission made additional errors, we deny rehearing. First, they argue that the Commission failed to address record evidence that the focus on the existence of certain affiliate and contractual relationships is not necessarily indicative of improper subsidies under those contracts.[71] In defining competitive entry exemption eligibility on the basis of whether certain affiliate and contractual relationships exist, rather than through analyzing whether each contract provides a subsidy, the Commission sought to balance the need for a competitive entry exemption with administrative efficiency. As the Commission explained in the

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[68] Proposed Services Tariff § 23.4.5.7.9.1.2 (emphasis added).

[69] Complaint Order, 150 FERC ¶ 61,139 at P 53.

[70] *Id.* P 81.

[71] Entergy and PSEG Companies Request for Rehearing at 5, 13.

Complaint Order, creating a generic exemption "eliminates the need for NYISO to engage in detailed review of individual projected costs, revenues, capacity levels, and other factors that may lead to litigation before the Commission."[72] We confirm our findings that the competitive entry exemption ordered in the Complaint Order, as modified in this order, is just and reasonable and provides sufficient safeguards to make a "generic exemption" preferable to individualized review that "may lead to litigation before the Commission."[73]

45. As for Entergy and the PSEG Companies' assertion that the Commission failed to address unique aspects of NYISO's markets in designing the competitive entry exemption,[74] we deny rehearing. The Commission considered the unique aspects of the NYISO markets when it found that the safeguards provided by the applicant's certification, the fact that NYISO's oversight and review will not cease when an entrant begins operating, and the requirement that NYISO report false, misleading, or inaccurate information to the Commission's Office of Enforcement are sufficient.[75] Recognizing that NYISO is a single-state regional transmission organization and that New York State is active in providing public funding for energy projects, the Commission carefully considered the structure of the competitive entry exemption and made modifications to the Complainants' proposal to put adequate safeguards in place.[76]

3. Ability to Recover Fixed Costs

a. Requests for Rehearing

46. The NRG Companies contend that the Complaint Order denies suppliers any "reasonable opportunity" to recover their fixed costs. They point to Commission precedent describing the Commission's statutory obligation as requiring a regulatory

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[72] Complaint Order, 150 FERC ¶ 61,139 at P 48.

[73] *Id*.

[74] Entergy and PSEG Companies Request for Rehearing at 14 (citing Complaint Order, 150 FERC ¶ 61,139 at P 47; Schnitzer Aff. 16:13-20; Entergy January 15, 2015 Protest at 8-9 & nn.20, 21; Entergy January 30, 2015 Answer at 5-6).

[75] Complaint Order, 150 FERC ¶ 61,139 at P 81.

[76] *See, e.g.*, *id.* PP 64 (rejecting the *de minimis* exception), 79-83 (adopting additional certification requirements), 90 (requiring NYISO to propose a revocation mechanism).

regime that provides generators a "reasonable opportunity" to earn a return of and on equity, over a sufficiently long period of time.[77] The NRG Companies argue that without meeting this standard, the compensation scheme risks violating both the FPA and the Fifth Amendment to the U.S. Constitution.[78] The NRG Companies assert that the Commission fundamentally altered the regulatory structure that the NRG Companies, along with other suppliers, relied on in making their investments, such that, instead of competing against economically-efficient supply, existing suppliers must compete with economically *in*efficient suppliers as well.[79] The NRG Companies argue that allowing uneconomic generation resources to enter the market with no price floor exposes existing suppliers to "predatory pricing" for which there is no obvious defense or remedy.[80]

47. The NRG Companies further contend that the competitive entry exemption significantly weakens buyer-side market power protections in NYISO, despite the Commission's recognition, according to the NRG Companies, that the exercise of market

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[77] NRG Companies Request for Rehearing at 8 (citing *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311, at P 29 (2005); *ISO New England Inc.*, 125 FERC ¶ 61,102 (2008); *Devon Power LLC*, 115 FERC ¶ 61,340 (2006); *Devon Power LLC*, 103 FERC ¶ 61,082 (2003); *Devon Power LLC*, 107 FERC ¶ 61,240 (2004); *ISO New England Inc.*, 135 FERC ¶ 61,029, at P 254 (2011)).

[78] *Id.* (citing *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311, at P 29 (2005); *ISO New England Inc.*, 125 FERC ¶ 61,102, *order on clarification*, 125 FERC ¶ 61,324 (2008), *order on clarification*, 130 FERC ¶ 61,089 (2010); *Devon Power LLC*, 115 FERC ¶ 61,340 (2006), *order on appeal sub nom. Maine Pub. Utils. Comm'n v. FERC* 520 F.3d 464 (D.C. Cir. 2008), *reversed in part sub nom. NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010); *Devon Power LLC*, 103 FERC ¶ 61,082 (2003); *Devon Power LLC*, 107 FERC ¶ 61,240, *order on reh'g*, 109 FERC ¶ 61,154 (2004), *orders on reh'g*, 110 FERC ¶ 61,313, 110 FERC ¶ 61,315 (2005); *ISO New England Inc.*, 135 FERC ¶ 61,029, at P 254 (2011), *order on reh'g*, 138 FERC ¶ 61,027 (2012); U.S. Const. Amend. V).

[79] *Id.* at 9 (citing *Panhandle E. Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999); EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce, 114th Cong. 31-32 (2015) (testimony of Laurence H. Tribe, Professor, Harvard University and Harvard Law School)).

[80] *Id.* at 9-10 (citing *Pac. Bell Tel. Co. v. linkLine Communs., Inc.*, 555 U.S. 438 (2009)).

power is one of the greatest threats to its obligation to ensure just and reasonable rates.[81] The NRG Companies assert that the existing buyer-side market power mitigation rules are already easy to pass. Specifically, the NRG Companies point to the Commission's recent order re-affirming its decision to set the offer floor in NYISO at 75 percent of the mitigation net cost of new entry, which is already well below the actual estimated cost of bringing a new facility to the market.[82] The NRG Companies contend that, with this already low offer floor, economic new entry should be able to clear the market without a competitive entry exemption and, if not, they state that it is a small administrative burden to show actual costs instead.

b. Commission Determination

48. We deny the NRG Companies' request for rehearing on this issue because it is beyond the scope of this proceeding. The NRG Companies' arguments constitute an inquisition into buyer-side market power mitigation and exemptions from minimum offer price rules in general.[83] While we maintain here that a market participant that does not have the ability or incentive to exercise buyer-side market power, or has otherwise proven itself to be economic, should not be subjected to buyer-side market power mitigation, this proceeding is not a forum to discuss the virtues of exemptions from minimum offer price rules in general. Rather, this proceeding is limited to the competitive entry exemption and its related provisions in NYISO's Services Tariff and OATT.[84]

49. Specifically, the Commission found in the Complaint Order that NYISO's existing buyer-side market power mitigation rules act as a barrier to entry for merchant resources and that those rules should not be applied to competitive unsubsidized merchant resources because those resources do not have the incentive to exercise buyer-side market power.[85] We also maintain here that the competitive market process alone is sufficient to

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[81] *Id.* at 10-11 (citing *Astoria Generating Co.*, 140 FERC ¶ 61,189 at P 64; *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 62 (2011), *reh'g denied*, 138 FERC ¶ 61,194, at P 19 (2012); *ISO New England Inc.*, 135 FERC ¶ 61,029 at P 61).

[82] *Id.* at 11 (citing *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,208 (2015)).

[83] *Id.* at 8-10.

[84] Complaint Order, 150 FERC ¶ 61,139 at PP 45-46.

[85] *Id.* P 46.

discipline competitive unsubsidized merchant entry because purely merchant generators that place their own capital at risk have the incentive to bid their true costs into the auction, and will thus only clear the market when it is cost-effective. Moreover, merchant generators and Unforced Capacity Deliverability Rights projects are wholly reliant on ICAP revenues to recover their fixed costs and generate a reasonable return.

50. Therefore, we find that any inclination to bid below costs and engage in predatory pricing, as described by the NRG Companies,[86] would be an unsustainable strategy for merchant resources, and that the incentive to bid at costs and potentially increase market revenues outweighs any potential incentive to bid below costs and suppress market prices. While we acknowledge that the competitive entry exemption creates the ability of a market participant to be a price taker, as does any exemption from buyer-side market power mitigation, the importance of recovering the costs of entry for a merchant generator or Unforced Capacity Deliverability Rights project in the ICAP market exceeds that of resources not eligible for the competitive entry exemption. Thus, while we dismiss as beyond the scope of this proceeding the NRG Companies' allegation that exempt resources would engage in price suppressive and predatory behavior in general, we find that argument to be particularly without merit as applied to resources eligible for the competitive entry exemption.

51. As to the NRG Companies' assertion that the Commission fundamentally altered the regulatory structure that the NRG Companies and other suppliers relied on,[87] we are not persuaded that the benefits of the revisions directed here and in the Complaint Order are outweighed by any settled expectations of market participants, especially because the new competitive entry exemption is only available prospectively as of the Class Year 2015. It will not affect any previous year's Class Year cost allocation.[88]

4. Application of the Competitive Entry Exemption

a. Requests for Clarification

52. The NRG Companies also request two clarifications or, if the Commission denies the clarifications, rehearing. First, they ask for clarification that the Complaint Order does not pre-judge how NYISO chooses to apply the competitive entry exemption to "merchant" transmission projects, such as TDI's Champlain Hudson Project (Champlain

[86] NRG Companies Request for Rehearing at 9-10.

[87] *Id.* at 9.

[88] Complaint Order, 150 FERC ¶ 61,139 at P 117.

Hudson). Specifically, the NRG Companies seek clarification that the Commission is not intending to limit NYISO's consideration of whether to allow transmission lines like those which TDI proposes to be exempt from the buyer-side market power mitigation rules that NYISO proposes in its compliance filing to the Complaint Order in Docket No. ER15-1498-000.[89] The NRG Companies argue that if the Champlain Hudson Project, which receives generation from a state-owned utility, is granted the competitive entry exemption, NYISO would essentially be allowing state-subsidized investment into the market.

53. Second, the NRG Companies request that existing projects in NYISO's interconnection queue that fit the qualifications of the competitive entry exemption be allowed to apply for the exemption. They argue that it would be unduly discriminatory to provide a competitive entry exemption to new projects without also making the same rules available to existing projects.[90]

b. Commission Determination

54. We grant the NRG Companies' first request for clarification of the Complaint Order. The NRG Companies ask for clarification that the Complaint Order does not pre-judge how NYISO chooses to apply the competitive entry exemption to merchant transmission projects, such as TDI's Champlain Hudson.[91] On December 16, 2014, TDI filed a complaint against NYISO, alleging that applying NYISO's buyer-side market power mitigation rules to Champlain Hudson was unjust and unreasonable, and seeking a Commission order exempting Champlain Hudson from the mitigation exemption test on a prospective basis. In an order issued on February 26, 2015 (TDI Complaint Order),[92] the Commission dismissed as moot TDI's request for an individual exemption for Champlain Hudson from NYISO's buyer-side market power mitigation exemption test. The Commission noted that it was concurrently, in this proceeding, directing NYISO to change its existing buyer-side market power mitigation rules to provide a process by which resources such as TDI could seek the same relief it requested for Champlain Hudson in its complaint.[93] Accordingly, the Commission found TDI's request for an

[89] NRG Companies Request for Rehearing at 12-13.

[90] *Id.* at 13 (citing 16 U.S.C. § 824e (2012)).

[91] *Id.* at 12-13.

[92] *TDI USA Holdings Corp. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,140 (2015).

[93] *Id.* PP 41-42.

individual exemption to be moot. We clarify here that the Commission did not pre-judge or intend to limit how NYISO chooses to apply the competitive entry exemption to merchant transmission projects, such as TDI's Champlain Hudson. In the TDI Complaint Order, the Commission stated that TDI could apply for the competitive entry exemption and "receive notification from NYISO regarding its eligibility for the exemption before any financial obligation is triggered."[94] The Commission did not find that TDI, nor any other transmission project, was necessarily eligible for the competitive entry exemption. Rather, the Commission only required that NYISO create a competitive entry exemption, in accordance with the Complaint Order, and follow the process provided for therein.

55. We deny the NRG Companies' second request for clarification, in which they ask that existing projects in NYISO's interconnection queue be allowed to apply for the competitive entry exemption, to the extent applicable. The NRG Companies state that they only seek clarification that NYISO is permitted to address these and other concerns in its compliance filing.[95] This issue is also raised on compliance, and we find that it is more appropriately addressed in that context.[96]

IV. NYISO's Compliance Filing - Docket No. ER15-1498-000

56. On April 13, 2015, NYISO submitted proposed revisions to its Services Tariff to address the Commission's directives in the Complaint Order. Specifically, NYISO proposes tariff language to, in pertinent part: (1) clarify that Additional Capacity Resource Interconnection Service (CRIS) MWs are ineligible to request a competitive entry exemption; (2) explain that a proposed new generator or Unforced Capacity Deliverability Rights project, in Class Year 2013 or later, may request to be evaluated for a competitive entry exemption; (3) clarify the certification requirements; (4) provide that revocation may be invoked against applicants that submit false, misleading, or inaccurate information; (5) add a certification requirement that specifies that no unexecuted agreements with a Non-Qualifying Entry Sponsor, written or unwritten, exist that would support the development of the project; (6) describe the eligibility requirements, including the definitions of Non-Qualifying Entry Sponsor and Entry Date; and (7) provide clarification, as necessary, to implement the competitive entry exemption. NYISO also requests limited waiver for the Class Year 2015 of the requirement that developers provide the executed Certification and Acknowledgement form set forth in

[94] *Id.* P 42.

[95] NRG Companies Request for Rehearing at 13.

[96] *See infra* section IV.C.2.

Proposed Services Tariff section 23.4.5.7.9.2.1 by the deadline for them to give notice of their intent to join Class Year 2015.

A. Notice of Filing and Responsive Pleadings

57. Notice of the Compliance Filing was published in the *Federal Register*, 80 Fed. Reg. 22,172 (2015), with interventions and protests due on or before May 4, 2015. The New York Public Service Commission (NYPSC) filed a notice of intervention. HQ Energy Services (U.S.) Inc. and the NRG Companies filed motions to intervene. TDI, the Independent Power Producers of New York, Inc. (IPPNY), the City of New York (City of NY), Entergy, Cogen Technologies Linden Venture, L.P. (Linden Cogen), and the Indicated New York Transmission Owners (Indicated TOs)[97] filed motions to intervene and comments. The Electric Power Supply Association (EPSA) filed an out-of-time motion to intervene.

58. On May 13, 2015, NYISO filed an answer to IPPNY's and TDI's protests.

B. Procedural Matters

59. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[98] the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

60. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,[99] we will grant EPSA's late-filed motion to intervene given its interest in this proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

61. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[100] prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept NYISO's answer because it has provided information that assisted us in our decision-making process.

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[97] The Indicated TOs consist of Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, and Central Hudson Gas & Electric Corporation.

[98] 18 C.F.R. § 385.214 (2014).

[99] 18 C.F.R. § 385.214(d).

[100] 18 C.F.R. § 385.213(a)(2).

C. Substantive Matters

62. We find that NYISO's Compliance Filing partially complies with the directives in the Complaint Order. Accordingly, we conditionally accept NYISO's Compliance Filing, to become effective February 26, 2015, as requested, as discussed below. We direct NYISO to submit a further compliance filing within 60 days of the date of issuance of this order. Consistent with the conditional acceptance of NYISO's Compliance Filing, and the Commission's extension of the notification deadline for Class Year 2015 in the Complaint Order,[101] we grant NYISO's limited waiver request, applicable only to Class Year 2015, of the requirement that developers provide the executed Certification and Acknowledgement form set forth in Proposed Services Tariff section 23.4.5.7.9.2.1 by the deadline for them to give notice of their intent to join Class Year 2015.

1. The Applicability of Additional CRIS MWs

a. Compliance Filing

63. NYISO proposes to add a sentence to clarify that Additional CRIS MWs are not eligible to apply for the competitive entry exemption. NYISO states that, subsequent to the Commission's issuance of the Complaint Order, NYISO made a filing in Docket No. ER15-1281-000[102] to define the term Additional CRIS MW in the Services Tariff.[103]

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[101] Complaint Order, 150 FERC ¶ 61,139 at P 117.

[102] NYISO's filing was accepted via delegated authority on May 6, 2015, subject to the outcome of tariff revisions ultimately accepted in ongoing proceedings in Docket Nos. ER10-2371-000, ER12-2414-000, ER14-2518-000, and ER14-2518-001. *New York Indep. Sys. Operator, Inc.*, Docket No. ER15-1281-000 (May 6, 2015) (delegated letter order).

[103] "Additional CRIS MW" means "the MW of Capacity for which CRIS was requested for an Examined Facility pursuant to the provisions in the ISO OATT Sections 25, 30, or 32 (OATT Attachments S, X, or Z), including either: (i) all, or a portion, of the MW of Capacity of that Examined Facility for which CRIS had not been obtained in prior Class Years through a prior Class Year process or through a transfer completed in accordance with OATT Section 25 (OATT Attachment S); and/or (ii) all, or a portion, of an increase in the Capacity of that Examined Facility. Additional CRIS MW does not include any MW quantity of CRIS that is exempt from an Offer Floor pursuant to Section 23.4.5.7.7(a) or (b), Section 23.4.5.7.8, or an increase of 2 MW or less in an Examined Facility's MW quantity of CRIS obtained pursuant to Section 30.3.2.6 of Attachment X to the OATT." NYISO, Services Tariff, § 23.2.1 (7.0.0).

NYISO contends that, although the competitive entry exemption tariff provisions provided with the complaint and in the Compliance Filing specify that an eligible project is a "proposed new Generator or [Unforced Capacity Deliverability Rights] project," NYISO proposes to add a sentence to section 23.4.5.7.6 to make clear that Additional CRIS MWs are tested under that section, and, thus, are ineligible to request a competitive entry exemption. NYISO explains that it is not opposed to the eligibility of Additional CRIS MWs for a competitive entry exemption and states that eligibility appears to be consistent with the Complaint Order's underlying rationale. However, NYISO states that because providing for Additional CRIS MWs was not addressed in the pleadings, or specified in the Services Tariff before the issuance of the Complaint Order, NYISO believes it is beyond the scope of its Compliance Filing.[104]

64. In addition, NYISO states that further revisions to apply a competitive entry exemption to requests for Additional CRIS MWs would differ substantially in some respects from the rules for new entrants.[105] Therefore, NYISO requests that the Commission direct it to make a further compliance filing to address the applicability of a competitive entry exemption to Additional CRIS MWs after a sufficient period to develop such further revisions in its stakeholder process. Further, NYISO suggests that, should the Commission direct such a compliance filing, it make the filing due no sooner than December 31, 2015.[106]

b. Protests and Comments

65. Entergy notes that, while the competitive entry exemption complaint was pending, NYISO filed an unrelated tariff proposal to establish rules for applying buyer-side market power mitigation to Additional CRIS MWs, including certain exemptions.[107] Entergy contends that NYISO appropriately proposed to add tariff language to clarify that the pending buyer-side market power mitigation rules for Additional CRIS MWs will be applied to parties seeking Additional CRIS MWs, but that these parties are not eligible to

[104] NYISO April 13, 2015 Transmittal at 11.

[105] *Id.* at 11-12.

[106] *Id.* at 12.

[107] Entergy May 4, 2015 Protest at 5; *see also New York Indep. Sys. Operator, Inc.*, Docket No. ER15-1281-000 (May 6, 2015) (delegated letter order).

apply the new competitive entry exemption rules. Entergy states that, without this clarification, the tariff would be unclear about which rules apply.[108]

66. Entergy agrees with NYISO that applying the competitive entry exemption to Additional CRIS MWs would require tariff revisions that would differ substantially in some respects from the rules for new entrants.[109] Entergy avers that, since the Additional CRIS MWs rules were complex and required extensive stakeholder development, attempting to combine the two rule sets would require the development of new rules that will differ substantially from those developed, approved, and filed to date.[110] Entergy also states that directing a compliance filing could improperly prejudge the merits of applying the competitive entry exemption to Additional CRIS MWs.[111] Entergy contends that imposing an obligation on a regional transmission organization to submit a compliance filing could be viewed as an improper, advance Commission stamp of approval that such rules are necessary and appropriate.[112]

67. Entergy explains that the NYISO Agreement is a tariff on file with the Commission and it only permits NYISO to file tariff changes under FPA section 205 upon receiving at least 58 percent approval of NYISO's stakeholders (requiring that, otherwise, NYISO must file proposed tariff changes under FPA section 206 and meet the mandated additional showing that the existing rate is unjust and unreasonable).[113] Therefore, Entergy concludes that the Commission would improperly bypass these tariff protections if it ordered a compliance filing for issues that NYISO admits are outside the scope of this proceeding.[114]

68. IPPNY and Entergy contend that NYISO's proposed approach is an improper attempt to make a material modification to the tariff and is in violation of the requirement that NYISO obtain the Management Committee's approval before proposing a tariff

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[108] Entergy May 4, 2015 Protest at 5-6.

[109] *Id.* at 6.

[110] *Id*.

[111] *Id.* at 7.

[112] *Id.* at 8.

[113] *Id.* at 7.

[114] *Id*.

change to the Commission.[115] IPPNY and Entergy also assert that the Commission should not allow NYISO to request a compliance filing as a vehicle to bypass the Management Committee voting process.[116] IPPNY states that consideration of whether to combine the Additional CRIS MWs rules and the competitive entry exemption rules will raise complex market power and manipulation issues.[117] Therefore, IPPNY asserts that the Commission should reject NYISO's request that the Commission direct it to make a further compliance filing to address the applicability of a competitive entry exemption to Additional CRIS MWs.[118]

69. The City of NY explains that it has encouraged existing owners to replace, upgrade, or modernize their facilities in order to decrease emissions and update currently inefficient technologies.[119] However, the City of NY states that upgrades to existing units may be subject to mitigation and this fact is causing owners to be reluctant to make substantial new investments in their facilities.[120] The City of NY points out that the Commission did not distinguish in the Complaint Order between new generating facilities and actions by existing generation owners that upgrade and expand existing facilities.[121] The City of NY claims that there is no reason to treat projects by existing generation owners differently than developers of entirely new projects, and to subject the former to the buyer-side market power mitigation test, while exempting the latter.[122] Therefore, the City of NY protests NYISO's proposal to prohibit existing generators seeking Additional CRIS MWs from accessing the competitive entry exemption.[123] In addition, the City of

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[115] IPPNY May 4, 2015 Protest at 7; Entergy May 4, 2015 Protest at 6. [116] IPPNY May 4, 2015 Protest at 7; Entergy May 4, 2015 Protest at 6. [117] IPPNY May 4, 2015 Protest at 6.

[118] *Id.* at 6-7.

[119] City of NY May 4, 2015 Protest at 5.

[120] *Id*.

[121] *Id*.

[122] *Id.* at 6.

[123] *Id.* at 2.

NY states that the Commission should direct NYISO to submit an additional compliance filing extending the competitive entry exemption to Additional CRIS MWs.[124]

70. The Indicated TOs contend that making the competitive entry exemption available to Additional CRIS MWs is within the scope of NYISO's Compliance Filing.[125] The Indicated TOs explain that NYISO had to add proposed tariff language that would exclude Additional CRIS MWs because otherwise Additional CRIS MWs would be eligible for a competitive entry exemption.[126] The Indicated TOs explain that a capacity addition to an existing facility is a project that would be considered a new generator or Unforced Capacity Deliverability Rights project that may request to be evaluated for a competitive entry exemption under Section 23.4.5.7.9.1.[127] The Indicated TOs state that it would be unjust and unreasonable if NYISO did not allow an existing facility that is increasing its CRIS MWs to qualify for a competitive entry exemption if it were qualified to do so. The Indicated TOs point to the Commission's statement that, "while the existing unit-specific exemption review process is necessary as a general matter, it is unjust and unreasonable for NYISO to apply the existing buyer-side [market power] mitigation test to a merchant resource that has no incentive to artificially suppress capacity market prices."[128] The Indicated TOs request that the Commission approve the Compliance Filing and direct NYISO to make a further compliance filing to address the applicability of a competitive entry exemption to Additional CRIS MWs after it has been reviewed in its stakeholder process.[129]

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[124] *Id.* at 7.

[125] Indicated TOs May 4, 2015 Protest at 2. [126]

Id. at 4.

[127] *Id*.

[128] *Id.* at 4-5.

[129] *Id.* at 3.

c. Commission Determination

71. We find that the applicability of the competitive entry exemption to Additional CRIS MWs is beyond the scope of this proceeding, which is limited to the consideration of whether NYISO has complied with the directives in the Complaint Order.[130] In the Complaint Order, the Commission did not require NYISO to make tariff revisions related to, or to otherwise address issues related to, Additional CRIS MWs. As various parties note, NYISO has submitted a filing with the Commission concerning Additional CRIS MWs subsequent to the Complaint Order.[131]

72. While we decline to require NYISO to submit a further compliance filing on this issue, we note that the competitive entry exemption is intended to apply to any resource relying solely on market revenues. As stated in the Complaint Order, because a purely merchant generator places its own capital at risk when it invests in a new resource, any such resource will have a strong incentive to bid its true costs into the auction, and it will clear the market only when it is cost-effective.[132] Therefore, we expect that NYISO and its stakeholders will discuss this issue in the stakeholder process and file any proposed tariff revisions with the Commission under section 205 or section 206, as appropriate.

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[130] The Commission has long established that compliance filings must be limited to the specific directives ordered by the Commission. The purpose of a compliance filing is to make the directed changes and the Commission's focus in reviewing them is whether they comply with the Commission's previously-stated directives. *See Pacific Gas & Elec. Co*., 109 FERC ¶ 61,336, at P 5 (2004); *Midwest Indep. Transmission Sys. Operator*, *Inc*., 99 FERC ¶ 61,302, at 62,264 (2002); *ISO New England*, *Inc*., 91 FERC ¶ 61,016, at 61,060 (2000); *Sierra Pacific Power Co*., 80 FERC ¶ 61,376, at 62,271 (1997); *Delmarva Power & Light Co*., 63 FERC ¶ 61,321, at 63,160 (1993).

[131] NYISO April 13, 2015 Transmittal at 11. We note that this filing was made in Docket No. ER15-1281-000 and requires Additional CRIS MWs to be subject to the mitigation exemption test. NYISO's filing was accepted via delegated authority on May 6, 2015, subject to the outcome of tariff revisions ultimately accepted in ongoing proceedings in Docket Nos. ER10-2371-000, ER12-2414-000, ER14-2518-000, and ER14-2518-001. *New York Indep. Sys. Operator, Inc.*, Docket No. ER15-1281-000 (May 6, 2015) (delegated letter order).

[132] Complaint Order, 150 FERC ¶ 61,139 at P 46 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 57 (2013)).

2. Eligibility of the Exemption to Class Year 2012

a. Compliance Filing

73. NYISO's proposed tariff language states that a proposed new generator or Unforced Capacity Deliverability Rights project that becomes a member of a Class Year after Class Year 2012 may request to be evaluated for a competitive entry exemption.[133] Additionally, NYISO proposes that requests for competitive entry exemptions for generators or Unforced Capacity Deliverability Rights projects in Class Years subsequent to Class Year 2012 must be received by NYISO no later than the deadline by which a facility must notify NYISO of its election to enter the Class Year, and that "Generators or Unforced Capacity Deliverability Rights projects in, and that remain a member of, Class Year 2012 or prior Class Years shall not be eligible to request or receive a Competitive Entry Exemption."[134]

b. Protests and Comments

74. Commenters express concern about potential misinterpretation of NYISO's proposed tariff language, such that projects in the completed Class Year 2012 or prior Class Years may be eligible to apply for the competitive entry exemption. Specifically, Entergy and IPPNY state they are concerned that the phrase "and that remain a member of" could be interpreted to imply that a generator or a Unforced Capacity Deliverability Rights project that is a member of the completed Class Year 2012 or completed Class Years prior to 2012 could terminate its membership in such Class Year and become eligible for the competitive entry exemption.[135] Entergy states that there is nothing in the Complaint Order to suggest that resources that have already completed the Class Year process and are members of the final Class Year 2012 (or earlier Class Years) should now be reevaluated.[136]

75. IPPNY and Entergy assert that, pursuant to NYISO's Services Tariff, a project that elects to remain a member of a Class Year through its completion, and receives CRIS rights in that Class Year, is bound by the determination rendered in that Class Year and

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[133] Proposed Services Tariff § 23.4.5.7.9.1.1.

[134] Proposed Services Tariff § 23.4.5.7.9.3.2.

[135] IPPNY May 4, 2015 Protest at 3; Entergy May 4, 2015 Protest at 4 (citing Proposed Services Tariff § 23.4.5.7.9.3.2).

[136] Entergy May 4, 2015 Protest at 4.

may not be reevaluated for an exemption from offer floor mitigation.[137] Moreover, IPPNY states that Class Year 2012 and all prior Class Years have been completed, and, thus, members of those Class Years that received offer floor determinations cannot be reevaluated for an exemption. Therefore, IPPNY and Entergy state that the Commission should order NYISO to revise its proposed tariff provisions to clarify that a competitive entry exemption is not available to members of completed Class Year 2012 and prior Class Years.[138]

76. IPPNY explains that NYISO authorized IPPNY to state that NYISO did not intend to propose language that could be interpreted to make the competitive entry exemption available to generators and Unforced Capacity Deliverability Rights projects in the completed Class Year 2012 or prior Class Years and that NYISO does not object to IPPNY's proposal to clarify the tariff language.[139] Specifically, IPPNY proposes to replace NYISO's proposed sentence containing the phrase "and that remain a member of" with: "A Generator or [Unforced Capacity Deliverability Rights] project[] that remains a member of a completed Class Year[,] if such Class Year is Class Year 2012 or prior Class Years, shall not be eligible to request or receive a Competitive Entry Exemption."[140] IPPNY states that this language is consistent with other language proposed by NYISO to indicate the inclusion of a project in a completed Class Year.[141]

c. Commission Determination

77. We agree with protestors that generators or Unforced Capacity Deliverability Rights projects that are members of completed Class Year 2012 and prior Class Years, and have therefore already received final offer floor determinations for their respective Class Year from NYISO, should not be eligible for the competitive entry exemption.

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[137] IPPNY May 4, 2015 Protest at 4; Entergy May 4, 2015 Protest at 4 (citing NYISO, Services Tariff, §§ 23.4.5.7.3 ("The NYISO shall make such exemption and Unit Net CONE determination for each 'Examined Facility'…which term shall mean… (II) each (i) existing Generator that did not have CRIS rights"), 23.4.5.7.3.5 ("An Examined Facility under the criteria in 23.4.5.7.3 (II) that did receive CRIS rights will be bound by the determination rendered and will not be reevaluated…") (14.0.0)).

[138] IPPNY May 4, 2015 Protest at 4; Entergy May 4, 2015 Protest at 4. [139]

IPPNY May 4, 2015 Protest at 4-5.

[140] *Id.* at 5 (citing Proposed Services Tariff § 23.4.5.7.9.3.2). [141]

Id. at 5 n.7.

NYISO's Services Tariff states that an Examined Facility under the criteria in section 23.4.5.7.3(II) that did receive CRIS rights will be bound by the determination rendered and will not be reevaluated, and an Examined Facility under the criteria in section 23.4.5.7.3(III) will not be reevaluated.[142] Furthermore, members of completed Class Years cannot be reevaluated, and, thus, are ineligible for the competitive entry exemption. We do, however, maintain that generator or Unforced Capacity Deliverability Rights projects that have not received completed Class Year determinations from NYISO and have not entered into commercial operation (i.e., projects that are members of a Class Year after Class Year 2012) should be eligible to apply for the competitive entry exemption, as was indicated in the complaint and in the Complaint Order.[143]

78. Additionally, we agree with Entergy and IPPNY that the proposed language allows for the interpretation that members of Class Year 2012 and prior Class Years could terminate their membership in such Class Year and thereafter become eligible for the competitive entry exemption.[144] We therefore conditionally accept NYISO's tariff revisions regarding Class Year 2012 eligibility and direct NYISO to submit further tariff revisions within 60 days of the date of this order to incorporate IPPNY's proposed tariff language,[145] thereby clarifying that the competitive entry exemption is not available for generator or Unforced Capacity Deliverability Rights projects that are members of completed Class Years.

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[142] NYISO, Services Tariff, § 23.4.5.7.3.5 (14.0.0).

[143] Complaint, Exhibit B, §§ 23.4.5.7.8.1.1 ("A proposed new Generator or [Unforced Capacity Deliverability Rights] project that is a member of a Class Year after Class Year 2012 may request to be evaluated for a "Competitive Entry Exemption" for its CRIS MW…"), 23.4.5.7.8.3.2 ("Generators or [Unforced Capacity Deliverability Rights] projects in Class Year 2012 or prior Class Years shall not be eligible to request or receive a Competitive Entry Exemption."); Complaint Order, 150 FERC ¶ 61,139 at PP 14, 45, 53.

[144] IPPNY May 4, 2015 Protest at 3; Entergy May 4, 2015 Protest at 4. [145]

IPPNY May 4, 2015 Protest at 5.

3. Information and Revocation

a. Scope of Information NYISO May Request

i. Compliance Filing

79. NYISO proposes in section 23.4.5.7.9.2.2 under Certifications and Acknowledgements to adopt the certification requirements proposed in NYISO's answer to the complaint, and as directed by the Complaint Order.[146] The certification requirements state that a duly authorized officer of the Generator or Unforced Capacity Deliverability Rights project must also submit a certification acknowledging that parents or affiliates will provide any information or cooperation requested by NYISO.[147]

ii. Protests and Comments

80. TDI states that NYISO has a legitimate need to gather information, but that the information requested by NYISO should be limited to information relevant to the project's request for a competitive entry exemption.[148] TDI further asserts that the proposed certification provision is overbroad and would enable NYISO to request information from parents and affiliates of a project regarding matters that the Commission has determined are outside of the scope of, or are not germane to, a competitive entry exemption.[149] Therefore, TDI requests that the Commission clarify the scope of information that NYISO may request from a project's parents or affiliates.[150]

iii. Answer

81. NYISO states that the Complaint Order specifically identified certification requirements that were just and reasonable and not unreasonably burdensome and directed that these provisions be included in the compliance filing. NYISO further explains that one of these requirements is reflected in proposed section 23.4.5.7.9.2.2, which states that the parents or affiliates of a project shall provide any information or

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[146] NYISO April 13, 2015 Transmittal at 6 (citing Complaint Order, 150 FERC ¶ 61,139 at P 79).

[147] Proposed Services Tariff § 23.4.5.7.9.2.2. [148]

TDI May 4, 2015 Protest at 3.

[149] *Id*.

[150] *Id.* at 4.

cooperation requested by the NYISO.[151] NYISO states that the Commission should not accept TDI's unsupported premise that NYISO would act contrary to its directives. NYISO asserts that there is no reason to think that it would seek information that was not relevant to a project or its qualification for the competitive entry exemption.[152] NYISO explains that adopting TDI's proposed tariff revision could complicate and delay NYISO's ability to administer the competitive entry exemption. Further, NYISO asserts that it could enhance an applicant's parent's or affiliate's ability to resist sharing material information relevant to NYISO's analysis of the project and its eligibility for a competitive entry exemption by claiming that it was not sufficiently connected with a project's exemption request.[153]

iv. Commission Determination

82. We find that NYISO has complied with the Complaint Order by including section 23.4.5.7.9.2.2, which states: "A duly authorized officer of the Generator or [Unforced Capacity Deliverability Rights] project shall also submit a certification acknowledging that parents or Affiliates shall provide any information or cooperation requested by the ISO."[154] Although TDI argues that this provision is overbroad, we disagree. We are persuaded by NYISO's explanation that it would not have any incentive to seek information that was not relevant to a project or its qualification for the competitive entry exemption.[155] We further agree with NYISO that accepting TDI's proposed tariff revision could complicate and delay NYISO's ability to administer the competitive entry exemption.

b. Certification Resubmission

i. Compliance Filing

83. NYISO proposes, in section 23.4.5.7.9.2.4 under certifications and acknowledgements, to adopt the certification requirements it proposed in its answer to the

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[151] NYISO May 13, 2015 Answer at 2.

[152] *Id.* at 3.

[153] *Id.*

[154] Complaint Order, 150 FERC ¶ 61,139 at P 53; Proposed Services Tariff § 23.4.5.7.9.2.2.

[155] TDI May 4, 2015 Protest at 3; NYISO May 13, 2015 Answer at 2-3.

complaint in this proceeding. NYISO also proposes to adopt the requirements that were set out in the complaint, as directed by the Complaint Order.[156]

ii. Protests and Comments

84. TDI asserts that the proposed certification does not contain a limitation on the authority NYISO has to request updated information from a developer who has received a competitive entry exemption, nor does the tariff require NYISO to have a reason for requiring the developer to resubmit its certification.[157] TDI requests that the Commission clarify that NYISO should only request updated certifications if it reasonably believes that there have been material changes to the facts and representations contained in the previously submitted certification.[158]

iii. Answer

85. NYISO states that TDI acknowledges that NYISO will likely act reasonably when it implements this provision. However, NYISO explains that, even without that acknowledgement, there would be no reason, and it would be inappropriate, to restrict NYISO's ability to require resubmittals. NYISO contends that exemption applicants should not be empowered to obstruct mitigation analyses by requiring NYISO to demonstrate, potentially through litigation, that it reasonably believes that material changes have occurred.[159] Rather, NYISO explains that there is no reason to suspect that its request for resubmittals would be vexatious or overly burdensome. Therefore, NYISO states that the Commission should not require it to spend time and resources proving its need for information. In addition, NYISO asserts that waiting until there is sufficient evidence for a "reasonable belief" of a material change could delay NYISO's action on any activity that might cause a new entrant to be ineligible for a competitive entry exemption or result in a determination being revoked. NYISO explains that such a delay could affect the decisions of other new entrants in the Class Year and other market participants.[160]

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[156] NYISO April 13, 2015 Transmittal at 6 (citing Complaint Order, 150 FERC ¶ 61,139 at P 79).

[157] TDI May 4, 2014 Protest at 4.

[158] *Id*.

[159] NYISO May 13, 2015 Answer at 4. [160]

Id. at 5.

iv. Commission Determination

86. We find that NYISO has complied with the Complaint Order by including section 23.4.5.7.9.2.4. As stated in the Complaint Order, because NYISO will be relying in large part on the certifications to determine a new entrant's eligibility for the competitive entry exemption, a more stringent certification requirement is reasonable because it provides for greater assurance that the applicant meets the criteria for obtaining a competitive entry exemption.[161] We agree with NYISO that there is no reason that its request for resubmittals would be overly burdensome. In addition, we agree with NYISO that adhering to TDI's request could potentially adversely impact other market participants unnecessarily.[162] Therefore, we reject TDI's request that the Commission clarify the limits for which NYISO can require a resubmittal of a certification.[163]

c. Revocation Provisions

i. Compliance Filing

87. NYISO states that the Commission directed it to propose revocation provisions that could be invoked against applicants that submit false, misleading, or inaccurate information in connection with a request for a competitive entry exemption. Further, NYISO states that the Commission directed it to propose procedures for responding to such submissions that "achieve the same objective as those adopted" by PJM.[164] NYISO states that it reviewed PJM's revocation provisions and used them to develop the tariff provisions set out in proposed section 23.4.5.7.9.5. According to NYISO, the proposed revocation procedures require NYISO, if it reasonably believes that it granted a request for a competitive entry exemption based on false, misleading, or inaccurate information, to notify the project developer that its exemption may be revoked and provide the project developer an opportunity to explain any statement, information, or action.[165]

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[161] Complaint Order, 150 FERC ¶ 61,139 at P 79.

[162] NYISO May 13, 2015 Answer at 4-5.

[163] TDI May 4, 2015 Protest at 4.

[164] NYISO April 13, 2015 Transmittal at 8.

[165] *Id*.

ii. Protests and Comments

88. TDI claims that NYISO provides no qualifier or threshold for the phrase "inaccurate information," which creates the possibility that a developer could be subject to substantial penalties for inadvertently and unintentionally submitting inaccurate information.[166] Therefore, TDI asserts that NYISO should adopt a materiality standard that would require that only intentional and material misrepresentations would result in the revocation of a competitive entry exemption.[167]

iii. Answer

89. NYISO argues that language concerning "intent" should not be accepted because, if an exemption is granted based on false premises, then the project was never truly eligible for the exemption regardless of whether the information was submitted intentionally. Further, NYISO explains that it does not seem plausible that a project exercising due diligence would truly be unaware of information regarding non-qualifying contractual relationships that would make it ineligible for a competitive entry exemption.[168]

iv. Commission Determination

90. We find that NYISO has complied with the requirement to implement a revocation mechanism with similar features to those adopted in PJM.[169] We agree with NYISO that intent is irrelevant for purposes of determining if a competitive entry exemption should be revoked. Even if a new entrant submitted the inaccurate information unintentionally, the incentive to inappropriately suppress capacity market prices could nevertheless be present. As for materiality, NYISO's proposed revocation provision only permits revocation of the competitive entry exemption from a new entrant where NYISO "reasonably believes" that it granted the request "based on false, misleading, or inaccurate information."[170] We believe that the requirement that NYISO must have granted the request *based on* the false, misleading, or inaccurate information means that

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[166] TDI May 4, 2014 Protest at 5.

[167] *Id*.

[168] NYISO May 13, 2015 Answer at 5-6.

[169] Complaint Order, 150 FERC ¶ 61,139 at P 91.

[170] Proposed Services Tariff § 23.4.5.7.9.5.2.

the information must necessarily have been material. We therefore reject TDI's request to require NYISO to clarify that only intentional and material misrepresentations would result in the revocation of a competitive entry exemption.

4. Other Issues

a. Unexecuted Agreements

i. Compliance Filing

91. NYISO states that the proposed tariff language addressing unexecuted agreements follows the Commission's directive in the Complaint Order to add an additional certification requirement proposed by the MMU. The additional certification requirement specifies that no unexecuted agreements with a non-qualifying entity, written or unwritten, exist that would support the development of the project.

ii. Protests and Comments

92. Entergy states that NYISO's proposed tariff language intending to deny the exemption to a resource with "an unexecuted agreement, written or unwritten, with a Non-Qualifying Entry Sponsor that would support the development of the project" is a good faith attempt to address the MMU's proposal and the Commission's directive to expand the certification.[171] However, Entergy contends that the language opens a loophole for a developer to rely on unexecuted subsidy agreements involving indirect parties and, thus, improperly escape mitigation by using an intermediary.[172] Entergy explains that, under a strict reading of the tariff as drafted, a Non-Qualifying Entry Sponsor could enter into an unexecuted agreement with a third party to support the development of a new project; such an arrangement would not disqualify the entrant for the competitive entry exemption, thus permitting resources that are not truly competitive to escape mitigation.[173]

93. Entergy contends that the solution to this loophole is to specify in the tariff that a direct or indirect non-qualifying contractual relationship includes any unexecuted agreement, written or unwritten, that would support the development of the project,

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[171] Entergy May 4, 2015 Protest at 3.

[172] *Id*.

[173] *Id*.

except those otherwise permitted in the tariff.[174] Entergy explains that this modification would clarify that a developer cannot escape mitigation simply by having a Non-Qualifying Entry Sponsor enter into an unexecuted agreement with a third party to support the project.[175]

94. IPPNY states that NYISO has proposed subpart 8 of the certification form to incorporate the proscription against unexecuted agreements in accordance with the Complaint Order and the competitive entry exemption prohibits both direct and indirect agreements with Non-Qualifying Entry Sponsors. IPPNY further explains that the same structure is required for both executed and unexecuted agreements. Therefore, IPPNY states that this subpart should be revised as follows: "To the best of my knowledge and having conducted due diligence that is current as of the date of this Certification, (a) no unexecuted, direct or indirect agreements, written or unwritten, with a Non-Qualifying Entry Sponsor exist…."[176]

iii. Commission Determination

95. We accept NYISO's proposed tariff language regarding unexecuted agreements. We are not persuaded by either Entergy's or IPPNY's argument that the proposed tariff language provides a loophole for resources to potentially escape mitigation.[177] We note that this certification subjects project developers to civil penalties under section 316A of the FPA.[178] We find that an applicant certifying that it has no unexecuted agreements, combined with the existing requirement that NYISO refer information to the Commission's Office of Enforcement if an applicant provides false, misleading, or inaccurate information, will incentivize applicants to avoid negotiating and executing prohibited contracts.[179] We also find, as in the Complaint Order, that NYISO's and the MMU's commitment to continued oversight, review, and scrutiny of contracts entered

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[174] *Id*.

[175] *Id.* at 3-4.

[176] IPPNY May 4, 2015 Protest at 8-9.

[177] Entergy May 4, 2015 Protest at 3-4; IPPNY May 4, 2015 Protest at 8-9.

[178] Complaint Order, 150 FERC ¶ 61,139 at P 80; 16 U.S.C. § 825o-1 (2012). [179]

Complaint Order, 150 FERC ¶ 61,139 at P 81.

into with a Non-Qualifying Entry Sponsor after the entrant begins operating will provide sufficient deterrence.[180]

b. Out-of-State Entities

i. Compliance Filing

96. NYISO states that the Commission directed it to file section 23.4.5.7.9.1.1, which describes the eligibility requirements, including the definition for Non-Qualifying Entry Sponsor, for the competitive entry exemption, unchanged from the provision proposed by the Complainants.[181] NYISO defines Non-Qualifying Entry Sponsor as a Transmission Owner, a Public Power Entity, or any other entity with a Transmission District in the New York Control Area (NYCA) or an agency or instrumentality of New York State or a political subdivision thereof.[182]

ii. Protests and Comments

97. Linden Cogen requests that the Commission direct NYISO to amend its tariff to include out-of-state entities sponsoring sales into New York in the definition of Non-Qualifying Entry Sponsors.[183] Linden Cogen avers that the Commission inappropriately narrowed the list of Non-Qualifying Entry Sponsors by excluding entities outside of New York and limiting the certification to indirect, non-qualifying contractual relationships.[184] Linden Cogen reiterates its comments in support of the requests for rehearing and the requests that all forms of subsidy be included in the definition of Non-Qualifying Entry Sponsors.[185] Linden Cogen asks that the Commission direct NYISO to amend its Compliance Filing to include out-of-state entities in the definition of Non-Qualifying Entry Sponsor.[186]

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[180] *Id*.

[181] NYISO April 13, 2015 Transmittal at 5.

[182] Proposed Services Tariff § 23.4.5.7.9.1.1.

[183] Linden Cogen May 4, 2015 Protest at 5.

[184] *Id.* at 6.

[185] *Id*.

[186] *Id.* at 7.

iii. Commission Determination

98. Above we deny the requests for rehearing asking that the Commission include out-of-state entities in the definition of Non-Qualifying Entry Sponsor[187] and, therefore, will not address protests on that issue here. We accept NYISO's proposed section 23.4.5.7.9.1.1, which includes the definition of Non-Qualifying Entry Sponsor, as filed.

c. Entry Date

i. Compliance Filing

99. NYISO states that the Commission directed it to file section 23.4.5.7.9.1.1, which describes the eligibility requirements for the competitive entry exemption, including the definition for Entry Date, unchanged from the provisions proposed by the Complainants.[188] NYISO defines Entry Date as the time before the generator first produces or the Unforced Capacity Deliverability Rights project first transmits energy.[189]

ii. Protests and Comments

100. Linden Cogen contends that the compliance filing fails to provide for adequate scrutiny of non-qualifying contractual relationships following each competitive entry exemption project's entry into service because the language only requires the applicant to confirm that the relationships do not exist "before the Generator first produces or the [Unforced Capacity Deliverability Rights] project first transmits energy" and "as of the date of Certification."[190] Linden Cogen argues that these requirements would allow competitive entry exemption applicants to evade scrutiny upon and following entering service and would not satisfy the Complaint Order's requirements.[191]

101. Linden Cogen states that both sections pertaining to the temporal restriction on the new entrant's obligation to disclose non-qualifying contractual relationships appear to address a situation in which the applicant notifies NYISO of a non-qualifying contractual relationship before the competitive entry exemption is granted and before the applicant

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[187] *See supra* section III.B.2.

[188] NYISO April 13, 2015 Transmittal at 5.

[189] Proposed Services Tariff § 23.4.5.7.9.1.1.

[190] Linden Cogen May 4, 2015 Protest at 3.

[191] *Id*.

begins commercial operation.[192] Linden Cogen explains that the compliance filing does not effectuate a requirement that competitive entry exemption-exempt entities provide timely information to NYISO if the entity receives subsidies through contracts that are contingent on the project's completion after the entrant begins operating.[193] Linden Cogen explains that there does not appear to be any requirement that the new entrant notify NYISO of, or that NYISO scrutinize, contracts entered into with a Non-Qualifying Entry Sponsor after the entrant begins operating.[194]

102. Linden Cogen acknowledges that NYISO's proposed revocation procedures allow NYISO to revoke the competitive entry exemption when NYISO reasonably believes that a competitive entry exemption was granted based on false, misleading, or inaccurate information, and that the competitive entry exemption may be revoked even after the applicant's entry date.[195] However, Linden Cogen requests that the Commission direct NYISO to require entities that obtain a competitive entry exemption to notify NYISO if information in a certification ceases to be true or if it later enters into a non-qualifying contractual relationship or an unexecuted agreement to support the project's development, even after the Entry Date.[196] Linden Cogen states that this will ensure that NYISO has all available information to reasonably determine whether a competitive entry exemption was granted based on information that was or has become false, misleading, or inaccurate, and would otherwise properly place the burden on the project developer, rather than on NYISO, to ensure no contracts are executed with Non-Qualifying Entry Sponsors after the certification is completed.[197]

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[192] *Id.* at 4.

[193] *Id*.

[194] *Id.* at 5.

[195] *Id*.

[196] *Id*.

[197] *Id*.

iii. Commission Determination

103. We find that NYISO has complied with the Complaint Order by including section 23.4.5.7.9.2.1.1, which includes the definition of Entry Date.[198] As stated in the Complaint Order, the Commission found NYISO's proposed certification provisions, as further modified to reflect the suggestions by the MMU, to be just and reasonable.[199] Embedded in NYISO's proposed certification was the definition of Entry Date, which NYISO defined, and the Commission accepted, for purposes of a competitive entry exemption in section 23.4.5.7.9.1 of the Services Tariff as the time at which "the Generator first produces or the [Unforced Capacity Deliverability Rights] project first transmits energy."[200] In addition, another element of NYISO's proposed certification provisions was NYISO's interpretation of the reference to the time of a project's "completion" as a reference to non-qualifying contracts that are contingent on a project reaching the Entry Date.[201]

104. We reject Linden Cogen's request that the Commission direct NYISO to require entities that obtain a competitive entry exemption to notify NYISO if information in a certification ceases to be true or if it later enters into a non-qualifying contractual relationship or an unexecuted agreement to support the project's development, even after the Entry Date.[202] As discussed above, we find that NYISO's and the MMU's continued monitoring provides sufficient protection and that NYISO's proposed tariff provisions, as modified herein, are just and reasonable without this additional requirement.

d. Limited Modifications

i. Compliance Filing

105. NYISO proposes revisions to section 23.4.5.7, which it had proposed in its answer to the complaint. NYISO explains that these revisions were developed in the stakeholder process and were presented to the Business Issues Committee and Management Committee in May 2014. NYISO asserts that, like the other revisions described in the

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[198] Complaint Order, 150 FERC ¶ 61,139 at P 53.

[199] *Id.* P 79.

[200] *Id.* P 74 n.138.

[201] *Id.* P 74.

[202] Linden Cogen May 4, 2015 Protest at 5.

Complaint Order, the revisions to section 23.4.5.7 are necessary to make the competitive entry exemption clearly operative and implementable.[203]

ii. Protests and Comments

106. IPPNY states that NYISO proposed the following revision: "Offer Floors applied pursuant to Section 23.4.5.7.9.5.2 shall apply to offers for Unforced Capacity from an Installed Capacity Supplier starting with all ICAP auction activity subsequent to the date of the revocation." However, IPPNY argues this language may be read to permit forward sales for future months made prior to revocation to stand, which is contrary to the findings of the Complaint Order. IPPNY proposes the following limited modification: "Subsequent to the date of the revocation, Unforced Capacity from an Installed Capacity Supplier shall participate subject to Offer Floor applied pursuant to Section 23.4.5.7.9.5.2."[204]

iii. Answer

107. NYISO asserts that IPPNY's proposed language is not in fact required to reflect the Commission's determinations in the Complaint Order. NYISO explains that its proposed revision to section 23.4.5.7 does not create an exception that would allow a project whose competitive entry exemption was revoked pursuant to section 23.4.5.7.9.5.2 to sell its capacity pursuant to a transaction outside of the Spot Market. Therefore, NYISO concludes that the compliance filing's proposed language complies with the Complaint Order and the Commission does not need to adopt IPPNY's proposed modification.

iv. Commission Determination

108. We find that NYISO's proposed revision to section 23.4.5.7 does not create an exception that would allow a project whose competitive entry exemption was revoked pursuant to section 23.4.5.7.9.5.2 to sell its capacity pursuant to a transaction outside of the Spot Market.[205] Rather, we agree with NYISO that the proposed revision to section 23.4.5.7 is consistent with the direction provided by the Commission in the Complaint Order.[206] We therefore disagree with IPPNY that the section may be read to permit

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[203] NYISO April 13, 2015 Transmittal at 10.

[204] IPPNY May 4, 2015 Protest at 8.

[205] *Id*.

[206] NYISO May 13, 2015 Answer at 7-8.

forward sales for future months made prior to revocation to stand. Accordingly, we reject IPPNY's proposed revision to NYISO's proposal and accept NYISO's proposed revision to section 23.4.5.7.

The Commission orders:

(A) The requests for clarification are hereby granted in part and denied in part, and the requests for rehearing are hereby denied, as discussed in the body of this order.

(B) NYISO's compliance filing is hereby conditionally accepted, effective February 26, 2015, as requested, subject to further a compliance filing, as discussed in the body of this order.

(C) NYISO is hereby directed to submit a further compliance filing, within 60 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.