155 FERC ¶ 61,076
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc. Docket Nos. ER16-120-000
EL15-37-001

ORDER ON COMPLIANCE AND REHEARING

(Issued April 21, 2016)

1. On February 19, 2015, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)[1] to direct the New York Independent System Operator, Inc. (NYISO) to submit tariff revisions governing the retention of and compensation to generating units needed for reliability, including procedures for designating such resources, the rates, terms, and conditions for reliability must run (RMR) service, provisions for the allocation of costs of RMR service, and a *pro forma* agreement for RMR service.[2] This order addresses NYISO's October 19, 2015 compliance filing to the RMR Order and requests for rehearing of that order. As discussed below, we accept in part, subject to condition, and reject in part NYISO's compliance filing, with the conditionally accepted tariff revisions to be effective October 20, 2015, as requested, and we deny the requests for rehearing and clarification.

I. RMR Order

2. In the RMR Order, the Commission, acting under FPA section 206, found that NYISO's Market Administration and Control Area Services Tariff (Services Tariff) is unjust and unreasonable because it does not contain provisions governing the retention of and compensation to generating units needed for reliability.[3] The Commission stated that it was "fundamental to the proper and efficient operation of NYISO's markets" for the

[1] 16 U.S.C. § 824e (2012).

[2] *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, at P 4 (2015) (RMR Order).

[3] *Id.* PP 1, 4.

rates, terms, and conditions for services provided under RMR agreements to be on file.[4] Therefore, the Commission directed NYISO to submit proposed tariff revisions to establish an RMR process to govern "the retention of and compensation to generating units required for reliability, including procedures for designating such resources, the rates, terms and conditions for RMR service, provisions for the allocation of costs of RMR service, and a *pro forma* service agreement for RMR service."[5]

3. In the RMR Order, the Commission also provided guidance to NYISO concerning: (1) the RMR process; (2) compensation for RMR service; (3) a methodology for allocating the costs of RMR agreements; and (4) rules to eliminate, or at least minimize, incentives for toggling between receiving RMR compensation and market-based compensation. The Commission also encouraged NYISO to consider the RMR tariff provisions of other regional transmission organizations and independent system operators (RTOs/ISOs).

II. Requests for Rehearing and Clarification

4. On March 23, 2015, the New York Public Service Commission (New York Commission) filed a request for rehearing and the Indicated New York Transmission Owners (Indicated NYTOs)[6] filed a request for clarification of the RMR Order. The New York Commission states that the RMR Order is an overreach of the Commission's authority that interferes with the New York Commission's on-going exercise of its authority to make resource adequacy determinations and select generating facilities needed for reliability.[7] The Indicated NYTOs are concerned with the RMR Order's reference to a "full cost-of-service" rate if NYISO chooses a mandatory regime. They seek clarification that, if NYISO selects an exclusively mandatory RMR regime, neither NYISO nor any party will be precluded from addressing the issue of the appropriate compensation to generators in the context of NYISO's entire compliance filing.[8]

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[4] *Id.* P 9.

[5] *Id.* P 11.

[6] The Indicated NYTOs are Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Power Supply Long Island; New York Power Authority; Niagara Mohawk Power Corporation d/b/a National Grid; and Orange and Rockland Utilities, Inc.

[7] New York Commission Request for Rehearing at 2, 6.

[8] Indicated NYTOs Request for Clarification at 2-3.

III. NYISO's Compliance Filing

5. On October 19, 2015, in compliance with the RMR Order, NYISO filed proposed revisions to its Open Access Transmission Tariff (OATT) and Services Tariff. NYISO states that its filing would establish a NYISO-administered process for identifying generators that wish to deactivate,[9] determining when one or more generators are needed to provide RMR service, and entering into agreements for such service. NYISO states that it is not proposing to mandate that generators enter into such agreements, but if a generator voluntarily offers to provide RMR service, and enters into an agreement for that service, it would be eligible to receive RMR compensation pursuant to NYISO's proposed tariff revisions and would be legally bound to fulfill the resulting contractual and tariff obligations.[10] NYISO asserts that all of its proposed tariff revisions are either expressly required by the RMR Order, necessary to implement or clarify the existing tariff language to accommodate the Commission's directives in the RMR Order, or are non-substantive organizational or clarifying revisions. NYISO contends that the proposed tariff revisions seek to reasonably balance the interests of deactivating generators, RMR generators, and New York consumers, who will pay for RMR service.[11] The details of NYISO's proposed tariff revisions are discussed further below.

IV. Notice of Filing and Responsive Pleadings

6. Notice of NYISO's October 19, 2015 filing was published in the *Federal Register*, 80 Fed. Reg. 65,731-32 (2015), with interventions and protests due on or before November 9, 2015. Subsequently, the comment period was extended to November 30, 2015.[12]

7. Exelon Corporation; NextEra Energy Resources, LLC; National Fuel Gas Distribution Company; Independent Power Producers of New York, Inc. (IPPNY); H.Q. Energy Services (U.S.), Inc.; Electric Power Supply Association (EPSA); Calpine Corporation; Entergy Nuclear Power Marketing, LLC (Entergy); Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM Interconnection,

[9] For purposes of its filing, NYISO states that generator "deactivation" refers to a generator wishing to Retire or enter into a Mothball Outage, or a generator that has entered into an ICAP Ineligible Forced Outage, as those terms are defined in the NYISO OATT and Services Tariff. NYISO October 19, 2015 Transmittal Letter at 1 n.3 (NYISO Transmittal Letter).

[10] *Id.* at 1-2.

[11] *Id.* at 2.

[12] *N.Y. Indep. Sys. Operator, Inc.*, Notice of Extension of Time, Docket No. ER16-120-000 (Oct. 29, 2015).

L.L.C.; Multiple Intervenors (MI);[13] City of New York; Municipal Electric Utilities Association of New York (MEUA); PSEG Companies;[14] Direct Energy Business, LLC and Direct Energy Business Marketing, LLC (Direct Energy); Sierra Club; the New York Transmission Owners (NYTOs);[15] and NRG Companies (NRG)[16] filed timely motions to intervene. The New York Commission filed a notice of intervention. The Utility Intervention Unit of the New York State Department of State (UIU) and Potomac Economics, Ltd., the Market Monitoring Unit for NYISO (MMU) filed out-of-time motions to intervene.

8. Direct Energy; Sierra Club; NYTOs; the New York Commission; UIU; and MMU filed comments. IPPNY and EPSA (jointly, IPPNY/EPSA); Entergy; and NRG filed protests. City of New York and MI (jointly, City of NY and MI) filed a limited protest and comments.

9. On December 15, 2015, MEUA filed an answer to the protests. On December 17, 2015, IPPNY/EPSA filed an answer to the New York Commission's and Sierra Club's comments. On December 21, 2015, NYISO filed an answer to the comments and protests. On December 31, 2015, NYTOs filed an answer to MMU's comments. On January 7, 2016, Entergy filed an answer to NYISO's answer and the New York Commission's comments. On January 19, 2016, the New York Commission filed an answer to the protests.

V. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[17] the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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[13] Multiple Intervenors is an unincorporated association of approximately 60 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

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

[15] NYTOs consist of Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Niagara Mohawk Power Corporation d/b/a National Grid; New York Power Authority; New York State Electric & Gas Corporation; Orange and Rockland Utilities, Inc.; Power Supply Long Island; and Rochester Gas and Electric Corporation.

[16] NRG consists of NRG Power Marketing, LLC and GenOn Energy Management, LLC.

11. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,[18] we will grant UIU's and MMU's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[19] prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

13. We will first address NYISO's compliance filing and then turn to the requests for rehearing and clarification of the RMR Order.

VI. Compliance Filing Discussion

14. We find that NYISO's compliance filing partially complies with the directives in the RMR Order. Accordingly, we accept in part, subject to condition, and reject in part NYISO's proposed revisions to its OATT and Services Tariff, to be effective October 20, 2015, as requested, as discussed below. We direct NYISO to submit a further compliance filing within 60 days of the date of this order.

15. NYISO's filing—and its RMR process generally—raises several issues, as discussed below, including: (1) the use of the Gap Solution process; (2) the New York Commission's role; (3) the notice period for deactivating generators; (4) how NYISO will select an alternative to entering into an RMR agreement; (5) how to compensate an RMR generator; (6) how to allocate the costs of an RMR generator; and (7) how to minimize toggling concerns. Aspects of NYISO's filing not discussed below are accepted.

A. The Gap Solution Process and Delegation of Authority to the New York Commission

1. Compliance Directive

16. With regard to the RMR process, the Commission directed NYISO to include tariff "provisions governing the schedule by which a generation owner must notify NYISO that it intends to deactivate," including "a clear timeline by which NYISO will notify the generation owner that its unit is required for reliability, or, alternatively, determine that the deactivation will not impact reliability and the unit can be deactivated

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[17] 18 C.F.R. § 385.214 (2015).

[18] *Id.* § 385.214(d).

[19] *Id.* § 385.213(a)(2).

as planned."[20] The Commission further directed NYISO to "describe the process for conducting the reliability analyses necessary to determine that there is a reliability need for the unit."[21] The Commission also required NYISO to "be the entity that makes the determination whether a specific generator is needed to ensure reliable transmission service and thus whether the facility is designated an RMR unit."[22] In addition, the Commission directed NYISO to describe in detail "the process NYISO will use to evaluate alternatives for addressing the identified reliability need," including "how the process will ensure a thorough consideration of all types of RMR alternatives in an open and transparent manner."[23]

2. NYISO's Proposal

17. NYISO proposes to situate its RMR process within the existing Gap Solution process in section 31.2.11 of Attachment Y of the NYISO OATT.[24] Under its existing OATT, NYISO states that it commences the Gap Solution process when it determines that there is: (1) a need identified in the reliability needs assessment that cannot be timely addressed in the biennial comprehensive reliability planning process; or (2) an imminent threat to reliability.[25] NYISO proposes to add a third basis for NYISO to commence the Gap Solution process—NYISO's identification of a reliability need that would result if a generator deactivates. NYISO states that the Gap Solution process is an element of its existing comprehensive reliability planning process that has been accepted by the Commission as compliant with Order Nos. 890[26] and 1000.[27]

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[20] RMR Order, 150 FERC ¶ 61,116 at P 13.

[21] *Id.*

[22] *Id.* P 14.

[23] *Id.* P 16.

[24] NYISO, OATT, Attachment Y, § 31.2.11 (15.0.0).

[25] NYISO Transmittal Letter at 13-14.

[26] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

[27] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order

18. Under the revised Gap Solution process, if NYISO identifies a reliability need that would result from a generator deactivation, NYISO proposes to solicit Gap Solution proposals and market-based solution proposals to address the need.[28] Gap Solution proposals may include generation, transmission, or demand response solutions.[29] In addition, NYISO will review generators that are currently in an outage state to determine whether they may be capable of satisfying the reliability need in whole or in part.[30] NYISO will then review those proposals to determine whether they are viable and sufficient, consistent with its comprehensive reliability planning process, to satisfy the identified reliability need.[31] NYISO will conclude the Gap Solution process without implementing a Gap Solution if there are adequate market-based solutions.[32] If there are no adequate market-based solutions, NYISO will provide the New York Commission with a list of transmission and demand response Gap Solution proposals (i.e., non-generation Gap Solution proposals) that satisfy NYISO's viability and sufficiency review for the New York Commission to consider for selection.[33] NYISO will consider viable and sufficient generation Gap Solution proposals. If there are no non-generation viable and sufficient Gap Solution proposals available to resolve the reliability need, or if the

No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41 (D.C. Cir. 2014).

[28] Proposed NYISO OATT §§ 31.2.11.1(iii), 31.2.11.3.

[29] NYISO, OATT, Attachment Y, § 31.2.11.1 (15.0.0).

[30] Proposed NYISO OATT § 31.2.11.4.

[31] Proposed NYISO OATT § 31.2.11.6. In determining "viability," NYISO will evaluate whether: (1) the developer has provided the required developer qualification data and the required project information data; (2) the proposed solution is technically practicable; (3) the developer has indicated possession of, or an approach for acquiring, any necessary rights-of-way, property, and facilities that will make the proposal reasonably feasible in the required timeframe; and (4) the proposed solution can be completed in the required timeframe. NYISO, OATT, Attachment Y, § 31.2.5.3 (15.0.0). In determining "sufficiency," NYISO will evaluate each solution to determine whether the solution proposed by the developer fully eliminates the reliability need. NYISO, OATT, Attachment Y, § 31.2.5.4 (15.0.0).

[32] Proposed NYISO OATT § 31.2.11.6.

[33] Proposed NYISO OATT § 31.2.11.9 ("The [New York Commission] or other appropriate governmental agency(ies) and/or authority(ies) with jurisdiction over the implementation or siting of Gap Solutions will determine which, if any, of the non-generation Viable and Sufficient Gap Solutions submitted by the ISO will be implemented to address the identified Reliability Need.").

New York Commission does not select such a solution from the list of solutions NYISO provided, NYISO may enter into an RMR agreement with one or more generators to resolve the reliability need.[34]

19. NYISO also proposes to revise the definition of Gap Solution, which currently states that the Gap Solution "must be designed to be temporary." NYISO proposes to clarify that a Gap Solution refers to a "temporary solution to a Reliability Need that may become a permanent solution."[35] NYISO maintains that the revision is necessary because NYISO may consider a non-generation Gap Solution as a possible permanent solution in the next biennial comprehensive reliability planning process following its identification in the Gap Solution process.

3. Comments and Protests

20. Entergy, NRG, IPPNY/EPSA, and Sierra Club take issue with NYISO's proposal to delegate authority to the New York Commission to select RMR alternatives as part of the revised Gap Solution process. Entergy, NRG, IPPNY/EPSA, and Sierra Club contend that NYISO's proposal fails to comply with the RMR Order, arguing that the Commission directed NYISO to evaluate and select the solution to the identified reliability need.[36] NRG and IPPNY/EPSA claim that, contrary to the RMR Order, the final decision regarding whether to address a reliability need with an RMR agreement will rest with the New York Commission, not NYISO, because, under NYISO's proposal, NYISO will only be able to enter into an RMR agreement with a generator if the New York Commission does not select an alternative Gap Solution.[37] IPPNY/EPSA assert that if the New York Commission chooses not to implement a lower-cost non-generation Gap Solution, NYISO would be forced to choose a generator even if the generator is the higher-cost solution.[38] Furthermore, NRG explains that under NYISO's proposal, the New York Commission could select a non-generation solution that does not resolve the reliability need in the most expeditious and cost-effective manner.[39]

[34] Proposed NYISO OATT §§ 31.2.11.10.1-2.

[35] Proposed NYISO OATT § 31.1.1.

[36] Entergy November 30, 2015 Protest at 42-44 (citing RMR Order, 150 FERC ¶ 61,116 at PP 14, 16); NRG November 30, 2015 Protest at 12-13; IPPNY/EPSA November 30, 2015 Protest at 22-25; Sierra Club November 30, 2015 Comments at 5.

[37] NRG November 30, 2015 Protest at 13; IPPNY/EPSA November 30, 2015 Protest at 23.

[38] IPPNY/EPSA November 30, 2015 Protest at 24-25.

[39] NRG November 30, 2015 Protest at 14.

IPPNY/EPSA contend that, despite the Commission's policy to limit the use of RMR agreements, the New York Commission may have conflicting policies that favor the continued operation of an uneconomic generator.[40] To that point, Sierra Club argues that, based on previous RMR experience, delegating authority to the New York Commission would not further the Commission's directive to enter into RMR agreements only as a "last resort."[41]

21. Additionally, NRG questions whether NYISO or the Commission has the authority to delegate reliability determinations to the New York Commission, given the general prohibition on delegating executive power to third parties.[42] NRG also cites section 215 of the FPA,[43] which according to NRG allows for limited state participation in setting reliability rules and requires that any entity charged with establishing such rules meet certain requirements, none of which the New York Commission satisfies.[44] Further, even if the final decision-making authority could be delegated to the New York Commission, NRG contends that the lack of oversight would mean NYISO could not ensure, as the RMR Order directed, that RMR agreements were only used as a last-resort measure or that the least-cost solution was ultimately selected.[45] In particular, NRG is concerned that the New York Commission is not subject to the Commission's transparency rules.[46]

22. Furthermore, Entergy contends that the Commission has consistently held that RTOs/ISOs are required to make the ultimate decisions in transmission planning and cannot delegate this responsibility to other entities, including state instrumentalities.[47] Entergy notes that Order No. 2000[48] requires an RTO/ISO to "have [the] ultimate

[40] IPPNY/EPSA November 30, 2015 Protest at 24.

[41] Sierra Club November 30, 2015 Comments at 5 (referring to the Cayuga and Dunkirk deactivations as examples of the New York Commission being presented with less expensive non-generation transmission alternatives that could be implemented faster, and not selecting those alternatives).

[42] NRG November 30, 2015 Protest at 14 (citing *Pittston Co. v. United States*, 368 F.3d 385, 393 (4th Cir. 2004)).

[43] 16 U.S.C. § 824o (2012).

[44] NRG November 30, 2015 Protest at 14.

[45] *Id.* at 14-15.

[46] *Id.* at 12.

[47] Entergy November 30, 2015 Protest at 35.

responsibility for both transmission planning and expansion within its region."[49] Entergy further asserts that Order No. 890 emphasizes that state agencies can play an important role with regard to regional planning, but that role is to provide input into the ultimate planning decision, not to control that decision.[50] Entergy contends that the Commission reaffirmed these principles and requirements in Order No. 1000.

23. Entergy and IPPNY/EPSA both cite the Commission's order on NYISO's first compliance filing with Order No. 1000, in which the Commission rejected NYISO's proposal to delegate evaluation and selection of transmission solutions proposed in the regional transmission planning process to the New York Commission and held that a state entity "can consult, collaborate, inform and even recommend a transmission project . . . but the public utility transmission providers . . . must make the transmission project selection decision, not the state entity."[51] According to IPPNY/EPSA, the Commission required that NYISO, not the New York Commission, be the entity to select the more efficient or cost-effective transmission solution.[52] While NYISO suggests that the Commission found the existing Gap Solution process to be compliant with Order No. 1000, Entergy counters by stating that, in reality, the Gap Solution process was a pre-existing process that was simply not modified on compliance with Order No. 1000.[53]

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[48] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

[49] Entergy November 30, 2015 Protest at 35 (quoting Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,163) (citing 18 C.F.R. § 35.34(k)(7) (2015) (stating that RTOs/ISOs "must be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades that will enable [them] to provide efficient, reliable and non-discriminatory transmission service")).

[50] *Id.* at 36-37 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at PP 454, 569, 574).

[51] *Id.* at 37 (citing *N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059, at PP 75, 77, 79, 81 (2013) (First Compliance Order), *order on reh'g & compliance*, 148 FERC ¶ 61,044 (2014) (Second Compliance Order), *order on reh'g & compliance*, 151 FERC ¶ 61,040 (2015) (Third Compliance Order), *order on reh'g & compliance*, 153 FERC ¶ 61,341 (2015)); IPPNY/EPSA November 30, 2015 Protest at 25.

[52] IPPNY/EPSA November 30, 2015 Protest at 25 (citing First Compliance Order, 143 FERC ¶ 61,059 at P 77).

[53] Entergy November 30, 2015 Protest at 44 (citing First Compliance Order, 143 FERC ¶ 61,059 at P 79). Entergy explains that no protester argued that the existing Gap Solution process should be changed, so the Commission never specifically addressed

Entergy asks the Commission to reaffirm—as both Order No. 1000 and the RMR Order require—that NYISO is required to evaluate and select the least-cost transmission alternative to an identified reliability need.[54]

24. Entergy further asserts that NYISO's proposal to delegate authority to the New York Commission "is unreasonable because it creates an inefficient, fragmented, and discriminatory process for evaluating RMR alternatives."[55] Entergy argues that NYISO's proposal would result in the New York Commission choosing the short-term transmission solution, and NYISO choosing the long-term transmission solution, to address the *same* identified reliability need, irrespective of the fact that there is no clear demarcation between the two.[56] According to Entergy, this fragmentation creates multiple problems. First, Entergy contends there is no guarantee that the least-cost solution will be selected because that decision is split between two entities, one of which—the New York Commission—is under no federal tariff obligation to select the least-cost solution. Second, Entergy avers that the fragmented process is discriminatory because different resources will be subject to differing standards depending on which entity is reviewing that resource.[57] Entergy is also concerned that the fragmentation will result in uncertainty, litigation, and conflict.[58]

25. In contrast, the New York Commission asserts that it should be permitted to select a generation solution or a non-generation solution where applicable. Specifically, the New York Commission asks that the Commission require NYISO to revise its RMR process to provide for the New York Commission to select among generation resources, if more than one is available, as the alternative to meet a reliability need, rather than only among non-generation solutions.[59] The New York Commission interprets the RMR Order's directives as pertaining solely to the designation of a deactivating generator as an RMR unit where there is no other alternative, and not as requiring NYISO to select among alternatives. The New York Commission contends that its position is consistent with its responsibilities under the New York Public Service Law, which the New York Commission explains "encompasses broad public interest matters such as the provision of

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the New York Commission's role in that process. *Id.*

[54] *Id.* at 47.

[55] *Id.* at 45.

[56] *Id.* at 42, 45.

[57] *Id.* at 45-46 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 779).

[58] *Id.* at 46-47.

[59] New York Commission November 30, 2015 Comments at 9-10.

'safe and adequate' service, considering the 'economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.'"[60] The New York Commission argues that the Commission should recognize the New York Commission's authority to regulate generation facilities and to make resource adequacy determinations, including selecting among viable and sufficient generation resources.[61]

4. Answers

26. In response to the comments and protests, NYISO explains that the Commission approved its existing Gap Solution process in 2004, and subsequently accepted it as compliant with the principles of Order No. 890 and Order No. 1000, without modification to the New York Commission's role.[62] NYISO states that, consistent with the RMR Order, it proposes to revise its existing Gap Solution process to provide that it will be the entity responsible for identifying whether to enter into an RMR agreement with a generator, a revision that NYISO states does not disturb the New York Commission's role regarding non-generation Gap Solutions.[63]

27. Entergy and IPPNY/EPSA ask that the Commission reject the New York Commission's proposal to extend its role in the RMR process to also include evaluation and selection of generation Gap Solutions. Entergy argues that the Commission's regulation of wholesale agreements "does not run afoul of FPA section 201's preservation of state authority over 'generating facilities' and thus, for the same reason, does not implicate the 'savings clause' under FPA section 215."[64] IPPNY/EPSA contend that the Commission has jurisdiction because service under an RMR agreement constitutes wholesale sales and otherwise affects or relates to wholesale rates and transmission service in New York.[65] Entergy notes that the Commission has already

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[60] *Id.* at 8 (citing N.Y. Pub. Serv. L. §§ 5(2), 65(1), 66(2)).

[61] *Id.* at 9 (citing 16 U.S.C. §§ 824(b)(1), 824o(i)(2) (2012)).

[62] NYISO December 21, 2015 Answer at 33-34 (citing *N.Y. Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61,372 (2004), *order on reh'g & compliance*, 111 FERC ¶ 61,182 (2005)).

[63] *Id.* at 34.

[64] Entergy January 7, 2016 Answer at 16 (citing *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009); *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 479 (D.C. Cir. 2008), *rev'd in part on separate grounds sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 588 U.S. 165, 168-69 (2010)).

[65] IPPNY/EPSA December 17, 2015 Answer at 6-8 (citing *Conn. Dep't of Pub.*

rejected similar jurisdictional arguments from the New York Commission.[66] Similarly, IPPNY/EPSA argue that the New York Commission's jurisdictional contentions are "an untimely and impermissible attempt to supplement its request for rehearing of the RMR Order."[67]

28. Entergy also argues that requiring NYISO to evaluate and select RMR alternatives does not run afoul of the New York Public Service Law because such action does not constitute "environmental" regulation; rather, Entergy argues that once NYISO selects a least-cost alternative, the New York Commission may exercise whatever siting authority it may have over that alternative to the extent that authority is not preempted by federal law.[68] Likewise, IPPNY/EPSA state that NYISO's proposed RMR process does not, and could not, impact the New York Commission's authority over generation siting because NYISO may only select generators that are viable and sufficient (i.e., that are available and capable of meeting the reliability need).[69] Moreover, IPPNY/EPSA contend that the New York Commission misconstrues the RMR Order, which did not limit NYISO's authority to select a deactivating generator as an RMR generator only when the deactivating generator is the sole available solution.[70]

29. In its answer, the New York Commission interprets the RMR Order as providing a "very limited role" for NYISO, which does not require NYISO to select among the alternatives to the deactivating generator, but, instead, requires that NYISO describe the process that will be used.[71] In response to transparency concerns, the New York Commission explains that it would provide for public notice and comment and would issue a written determination explaining why particular resources should or should not be pursued. The New York Commission contends that the Commission "should find that these procedures are adequately open and transparent."[72] While some protesters suggest

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Util. Control, 569 F.3d at 481-82; 16 U.S.C. §§ 824e(a), 824d(a) (2012)).

[66] Entergy January 7, 2016 Answer at 16-17 (citing *R.E. Ginna Nuclear Power Plant, LLC*, 152 FERC ¶ 61,027, at PP 20-21 (2015)).

[67] IPPNY/EPSA December 17, 2015 Answer at 6.

[68] Entergy January 7, 2016 Answer at 17-18.

[69] IPPNY/EPSA December 17, 2015 Answer at 8.

[70] *Id.* at 4-5 (citing RMR Order, 150 FERC ¶ 61,116 at PP 3, 9, 13-14, 16).

[71] New York Commission January 19, 2016 Answer at 7 (citing RMR Order, 150 FERC ¶ 61,116 at P 16).

[72] *Id.* at 8 (describing the details of the New York Commission's procedures).

that the RMR Order required NYISO to select the "least-cost" solution, the New York Commission disagrees that the RMR Order imposed such an obligation. The New York Commission further argues that using cost as the sole criteria for selection would be inappropriate because it could result in the utilization of resources that operate contrary to the public interest. In addition, the New York Commission responds to arguments that NYISO's proposed RMR process will not limit RMR agreements to a last-resort option. In particular, the New York Commission explains that, under NYISO's proposal, it will consider a broad array of solutions, and, in the event an RMR agreement is necessary, the *pro forma* RMR agreement ensures the limited duration of such agreement with its unilateral termination provision.[73]

30. In response to arguments that NYISO cannot delegate planning authority, the New York Commission explains that the RMR Order recognized that the RMR process may "include a process for it to take into consideration the relevant reliability studies and evaluations made by the New York Commission."[74] According to the New York Commission, NYISO's proposed RMR process is consistent with this statement. Regardless of the RMR Order, the New York Commission contends that it has independent authority under the New York Public Service Law to undertake the reliability and planning responsibilities NYISO proposes.[75] The New York Commission also cites Commission precedent approving the Gap Solution process over objections, in which the Commission recognized the New York Commission's "siting authority and . . . statutory charge to maintain reliability in New York and thus in the NYISO region, and

[73] *Id.* at 8-9.

[74] *Id.* at 10 (quoting RMR Order, 150 FERC ¶ 61,116 at P 4).

[75] *Id.* at 10-11 (citing N.Y. Pub. Serv. L. § 5(2) (authorizing the New York Commission to "encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources"); N.Y. Pub. Serv. L. § 66(2) (granting the New York Commission authority to "order such reasonable improvements as will best promote the public interest, preserve the public health . . . and have power to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of . . . electric corporations"); *N.Y. & Queens Gas Co. v. McCall*, 245 U.S. 345 (1917)).

therefore [its] . . . critical part to play in the transmission planning process."[76] As for assertions that the New York Commission's selection of a transmission Gap Solution could lead to costly and less-efficient long-term solutions, the New York Commission argues that its early involvement in the planning process is likely to reduce delays and increase efficiencies by helping to identify any environmental or other siting issues that are likely to arise during the permitting process.[77]

5. Commission Determination

31. We find that NYISO's proposal to situate the RMR process in its existing Gap Solution fails to address the flaws in NYISO's Services Tariff which the Commission identified in the RMR Order as unjust and unreasonable. Specifically, NYISO's proposal to allow the New York Commission to select non-generation Gap Solutions does not comply with the RMR Order, is inconsistent with Order No. 1000, and could lead to inefficient transmission development. Therefore, as discussed below, we reject NYISO's proposal to situate the RMR process within the existing Gap Solution process and require NYISO to submit, within 60 days of the date of this order, a compliance filing with a proposed RMR process separate from NYISO's existing Gap Solution process, under which NYISO evaluates and selects solutions to identified reliability needs caused by generator deactivations. We will rule on any outstanding concerns regarding the evaluation and selection of RMR alternatives, including the timeline for soliciting proposals and how NYISO evaluates the cost-effectiveness of proposals, when NYISO's revised proposal is before the Commission.

32. We find that NYISO's proposal inappropriately delegates evaluation and selection of RMR alternatives to the New York Commission and, thus, does not comply with the RMR Order. The Commission stated in the RMR Order that "NYISO must be the entity that makes the determination whether a specific generator is needed to ensure reliable transmission service and thus whether the facility is designated an RMR unit."[78] The Commission also required NYISO to "describe the process NYISO will use to evaluate alternatives for addressing the identified reliability need," which "deserves the full consideration of NYISO and its stakeholders to ensure that RMR agreements are used only as a limited, last-resort measure."[79] The Commission explained that NYISO's "process for identifying RMR alternatives" should "ensure a thorough consideration of

[76] *Id.* at 11-12 (quoting *N.Y. Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61,372 at P 18).

[77] *Id.* at 12-14.

[78] RMR Order, 150 FERC ¶ 61,116 at P 14.

[79] *Id.* P 16.

all types of RMR alternatives in an open and transparent manner."[80] We find that NYISO's proposal does not meet these requirements.

33. The clear intent of the RMR Order was that NYISO must, in an open and transparent manner, solicit RMR alternatives, and evaluate those alternatives, to help ensure that designating a generator for RMR service is a last-resort option for meeting immediate reliability needs. Through its information collection requirements, which we are approving herein, NYISO itself will be in the best position to solicit and evaluate all options and identify the least-cost non-generator solution.[81] On the other hand, the New York Commission does not have an obligation to choose an alternative to an RMR agreement, even if there are more cost-effective viable and sufficient non-generation Gap Solution proposals. While the New York Commission points out that it will consider a broad array of solutions, this does not counter the fact that the New York Commission is not required to select one of those solutions. In addition, we are not persuaded by the New York Commission's citation to the termination provision of the *pro forma* RMR agreement, which the New York Commission argues ensures its limited duration.[82] We not only want to ensure that RMR agreements are limited in duration, but that they are only entered into in the first place as a last-resort measure.[83]

34. Moreover, the RMR Order explicitly required NYISO to propose a process under which NYISO will "evaluate alternatives for addressing the identified reliability need."[84] However, NYISO's proposed RMR process provides for NYISO to solicit RMR alternatives and to review their viability and sufficiency, but does not provide for NYISO to fully *evaluate* those alternatives. Under NYISO's existing comprehensive reliability planning process, evaluation of proposals occurs in two steps, the first of which is the viability and sufficiency determination. The second step in the evaluation process occurs after the viability and sufficiency determination and results in NYISO selecting the more efficient or cost-effective solution.[85] While we do not require NYISO in its RMR process

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[80] *Id.*

[81] NYISO Transmittal Letter at 23; *id.* at 26 ("The NYISO will therefore signal the [New York Commission] . . . , and all stakeholders whether there is a non-Generator solution with a 'net present value that is distinctly higher than the net present value of any Initiating Generator or Generator that is a Viable and Sufficient Gap Solution for a Reliability Need (*i.e.*, the non-Generator Viable and Sufficient Gap Solution has a lower net cost).'").

[82] New York Commission January 19, 2016 Answer at 8-9.

[83] RMR Order, 150 FERC ¶ 61,116 at PP 2, 16.

[84] *Id.* P 16.

to adhere to the entire evaluation and selection process in its existing comprehensive reliability planning process,[86] it must go beyond the "initial assessment" to ensure an adequate process for *evaluating* RMR alternatives.[87]

35. In addition, the Commission emphasized in the RMR Order the need for an RMR process that is not unduly discriminatory or preferential.[88] Allowing the New York Commission to select non-generation Gap Solutions may result in a process that unduly discriminates based on resource type. This is because NYISO's proposed RMR process would subject similarly-situated entities to differing standards (i.e., those NYISO will use to evaluate generation Gap Solution proposals and those the New York Commission will use to evaluate demand response and transmission Gap Solution proposals). Therefore, NYISO's proposal may be unduly discriminatory and preferential.[89]

36. While NYISO argues that its proposed RMR process must be just and reasonable in part because it is contained within the existing Gap Solution process, which was found compliant with Order No. 1000,[90] we are not persuaded by this argument. The Gap Solution process pre-existed, and was not modified on compliance with, Order No. 1000.[91] Moreover, NYISO is proposing to substantially modify its existing Gap

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[85] NYISO, OATT, Attachment Y, § 31.2.6 (15.0.0) ("ISO Evaluation and Selection of Proposed Regulated Transmission Solutions").

[86] We recognize that the evaluation and selection process contained in NYISO's comprehensive reliability planning process may be too burdensome to complete in the timeframe required to resolve a reliability need caused by a generator deactivation.

[87] *See, e.g.*, NYISO, *Reliability Planning Process Manual*, at 5-1 (Dec. 2014), http://www.nyiso.com/public/webdocs/markets_operations/documents/Manuals_and_Guides/Manuals/Planning/rpp_mnl.pdf ("The initial assessment of proposed solutions will address their viability and sufficiency . . . Following the initial assessment, the NYISO will perform the evaluation and selection of the more efficient or cost-effective transmission solution . . . .").

[88] *See, e.g.*, RMR Order, 150 FERC ¶ 61,116 at P 16 ("Our requiring that NYISO describe this process promotes the transparency needed to ensure that the process has indeed not been unduly discriminatory or preferential.").

[89] *See* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 779 ("[W]e are maintaining the approach taken in Order No. 890 and will require that generation, demand resources, and transmission be treated comparably in the regional transmission planning process.").

[90] NYISO Transmittal Letter at 13.

Solution process in a way that makes it inconsistent with the reasoning underlying the Commission's First Compliance Order.[92] The Gap Solution process was structured to facilitate market-based solutions, and structured to be temporary. Here, NYISO proposes to revise the definition of "Gap Solution" from one that "must be designed to be temporary and to strive to be compatible with permanent market-based solutions,"[93] to now be a "temporary solution to a Reliability Need that may become a permanent solution and shall strive to be compatible with permanent market-based solutions."[94] NYISO contends that the temporary nature of Gap Solutions was originally developed to avoid discouraging market-based solutions, but that the definition could be read to exclude consideration of many potential transmission upgrades, contrary to the RMR Order's directive that NYISO consider all types of RMR alternatives.[95] However, the Commission rejected NYISO's first Order No. 1000 compliance filing proposal to rely on the New York Commission to select transmission projects in its comprehensive reliability planning process for inclusion in the regional transmission plan for purposes of cost allocation.[96] The Commission explained that "Order No. 1000 places an affirmative obligation on public utility transmission providers to identify and evaluate, in consultation with stakeholders, alternative transmission solutions that may meet the transmission needs of the region more efficiently and cost-effectively."[97] The Commission therefore directed NYISO to revise its process so that NYISO is the entity that selects the more efficient or cost-effective permanent transmission solution to an identified reliability need.[98]

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[91] While the Commission noted in the orders on NYISO's Order No. 1000 compliance filings the existence of the Gap Solution process, the Commission did not address the Gap Solution process in its determinations. *See* First Compliance Order, 143 FERC ¶ 61,059 at PP 37, 248; Second Compliance Order, 148 FERC ¶ 61,044 at PP 20, 63, 215; Third Compliance Order, 151 FERC ¶ 61,040 at P 16. *See also* NYISO Transmittal Letter at 24 ("The Commission did not direct the NYISO to modify this process in response to Order No. 1000.").

[92] *See* First Compliance Order, 143 FERC ¶ 61,059 at PP 37, 248.

[93] NYISO, OATT, Attachment Y, §§ 31.1.1 (10.0.0).

[94] Proposed NYISO OATT § 31.1.1.

[95] NYISO Transmittal Letter at 21 (citing NYISO, Tariff Filing, Docket No. ER04-1144-000, at 6 (filed Aug. 20, 2004) ("These are intended to be temporary solutions that will not adversely impact any market-based proposals.")).

[96] First Compliance Order, 143 FERC ¶ 61,059 at PP 77-81.

[97] *Id.* P 78.

37. Here, NYISO is proposing to allow the New York Commission to select transmission Gap Solutions that may become permanent transmission solutions. In addition to revising the definition of Gap Solution to state that it may become a permanent solution, NYISO states that it may consider a non-generation Gap Solution, including a demand response or transmission solution, as a possible permanent solution in the next comprehensive reliability planning process.[99] However, NYISO has not proposed tariff revisions describing how this would work and only states that it "may include this non-generation Gap Solution in the base case of the Reliability Need assessment as appropriate."[100] It is therefore unclear how NYISO would "consider" a non-generation Gap Solution as a possible permanent solution in its comprehensive reliability planning process (i.e., would NYISO evaluate and select a potentially permanent transmission Gap Solution pursuant to the Order No. 1000-compliant comprehensive reliability planning process). We are concerned that, contrary to the Commission's findings in the First Compliance Order, NYISO proposes to allow the New York Commission to select a transmission solution that may become permanent outside of the Order No. 1000-compliant comprehensive reliability planning process. Revising the Gap Solution process as NYISO proposes here is inconsistent with the Commission's expectation that the process would be used to select a solution to a reliability need which is "designed to be temporary and . . . compatible with permanent market-based proposals."[101] Although the RMR Order stated that "NYISO may elect to address these requirements by expanding upon its OATT Attachment Y planning process, or developing another process as it deems appropriate for inclusion in the NYISO [Services] Tariff," NYISO was obligated to propose an RMR process that satisfies the general guidance in the RMR Order.[102] Situating the RMR process in NYISO's existing Gap Solution process, even with the revisions NYISO proposes, does not satisfy that requirement.

38. Finally, we agree with Entergy that NYISO's proposal to allow the New York Commission to select Gap Solution proposals could lead to inefficient transmission development. NYISO proposes to allow the New York Commission to select non-generation Gap Solutions, including transmission solutions, even if they are not the most

[98] *Id.* P 81.

[99] NYISO Transmittal Letter at 21.

[100] *Id.* at 32; Proposed NYISO OATT § 31.2.2.3.2 (simply stating that "the ISO may include a non-RMR Generator Gap Solution in the [Reliability Needs Assessment] Base Case as appropriate").

[101] NYISO, OATT, Attachment Y, § 31.1.1 (10.0.0).

[102] RMR Order, 150 FERC ¶ 61,116 at P 13; *see id.* P 12 ("NYISO's proposal should be consistent with this general guidance.").

cost-effective solution. Once NYISO begins its comprehensive reliability planning process, however, NYISO will have the authority to select the more efficient or cost-effective transmission solutions to identified reliability needs, consistent with its obligation under Order No. 1000.[103] An RMR agreement may be needed for a limited period of time until a permanent transmission solution can be completed, so an RMR agreement could run in parallel with the comprehensive reliability planning process. Having two different entities with authority over selecting transmission solutions to the same identified reliability need could result in inefficient implementation of both processes—two entities would perform evaluations of potential solutions, two entities would solicit comments on potential solutions, and one entity would select a temporary solution, which may be different than the permanent solution, or may become permanent itself. Therefore, NYISO's proposed RMR process may inhibit NYISO's ability to "efficiently and reliably administer the resources and transmission facilities under its control" and to "ensure reliable transmission service until more permanent reliability solutions are in place."[104]

39. While it is true that the Commission has recognized a role for the New York Commission in addressing a limited set of reliability needs, the Commission in the RMR Order did not contemplate the level of involvement provided for in NYISO's proposal here. The Commission stated in the RMR Order that "NYISO's proposal may also include a process for it to take into consideration the relevant reliability studies and evaluations made by" the New York Commission or the New York State Reliability Council.[105] The RMR Order is consistent with the Commission's statements in the First Compliance Order that the "role of state regulatory authorities . . . must be to provide guidance and recommendations and must be defined in the NYISO OATT;" a state entity "can consult, collaborate, inform, and even recommend a transmission project for selection . . . 1."[106] Similarly, in Order No. 890, the Commission stated, "[a]s with any other interested stakeholder, we emphasize that planning must be coordinated with relevant state regulators . . . that wish to participate in the transmission provider's planning process."[107]

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[103] NYISO, OATT, Attachment Y, § 31.2 (15.0.0).

[104] RMR Order, 150 FERC ¶ 61,116 at P 1; *see* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 43 ("[I]nadequate transmission planning . . . requirements may be impeding the development of beneficial transmission lines or resulting in inefficient or overlapping transmission development due to a lack of coordination, all of which contributes to unnecessary congestion and difficulties in obtaining more efficient or cost-effective transmission service.").

[105] RMR Order, 150 FERC ¶ 61,116 at P 14.

[106] First Compliance Order, 143 FERC ¶ 61,059 at P 79.

40. Further, in approving the existing Gap Solution process, the Commission "recognize[d] that the New York Commission has siting authority and a statutory charge to maintain reliability in New York and thus in the NYISO region, and therefore has a critical part to play in the transmission planning process."[108] The Commission went on to recognize, however, that the Commission's jurisdiction also arises in the transmission planning process and stated that its goal "is to appropriately recognize the respective state-federal authorities over transmission matters and to dovetail [its] regulation in a way that supports timely, efficient reliability solutions."[109] The Commission furthered this goal in the RMR Order when it explained that NYISO's RMR process may provide for consideration of the relevant reliability studies and evaluations made by New York State entities. Likewise, we reiterate here that the New York Commission may continue to exercise any authority it has over the solution NYISO selects, but NYISO must be the entity that selects the solution.[110]

41. For all of these reasons, we reject NYISO's proposal and require NYISO to establish an RMR process separate from its Gap Solution process, under which NYISO evaluates and selects solutions to identified reliability needs caused by generator deactivations, whether market-based solutions, generation solutions, or non-generation solutions. In developing a separate RMR process, NYISO should develop additional tariff revisions to clarify when its separate RMR process will be triggered, as opposed to its existing Gap Solution process.[111]

B. Generator Deactivation Notice and Assessment

1. NYISO's Proposal

42. NYISO proposes to require generators wishing to deactivate to provide NYISO with at least 365 days' advance notice of deactivation by submitting a Generator Deactivation Notice.[112] NYISO proposes to begin the 365-day notice period once

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[107] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 574.

[108] *N.Y. Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61,372 at P 18.

[109] *Id.*

[110] We further address the New York Commission's jurisdictional arguments in section VII below in reference to its request for rehearing of the RMR Order.

[111] For example, NYISO's existing Gap Solution process commences, in one scenario, where there is an imminent threat to reliability. In theory, a generator deactivation could create an imminent threat to reliability. However, reliability needs caused by generator deactivations should be addressed through NYISO's RMR process.

NYISO has provided written notice to the deactivating generator that the submitted Generator Deactivation Notice is complete (i.e., the Generator Deactivation Assessment Start Date).[113] NYISO has 10 business days to review the Generator Deactivation Notice to determine whether it is complete or whether additional information is required.[114] NYISO asserts that this 365-day notice period provides NYISO with the time necessary to evaluate the reliability impacts of the proposed deactivation and to consider alternatives to an RMR agreement that might address an identified reliability need.[115]

43. At the same time the deactivating generator submits the Generator Deactivation Notice, it must also provide cost, revenue, and other information specified in proposed NYISO OATT section 31.9.[116] NYISO states that, as it does when making going-forward cost and buyer-side market power mitigation determinations, it will post on its website a spreadsheet form and instructions for submitting the required information. According to NYISO, its proposed information collection requirements will enable it to evaluate all options and identify the least-cost non-generation solution to a reliability need caused by a generator deactivation if that solution has a net present value that is "distinctly higher" than that of the deactivating generator or any other generation solution.[117]

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[112] Proposed NYISO OATT § 31.2.11.2.1. NYISO proposes to establish a form of the Generator Deactivation Notice in section 31.8 of Attachment Y of the NYISO OATT.

[113] Proposed NYISO OATT § 31.2.11.2.2.

[114] Proposed NYISO OATT § 31.2.11.2.2.

[115] NYISO Transmittal Letter at 15-16.

[116] In particular, NYISO requires deactivating generators to provide: capital expenses; fixed operating and maintenance costs; variable operating and maintenance costs; the quantity of specific items of inventory necessary to be maintained and the costs of those items; the cost of other expenditures necessary for the generator to operate; all information pertaining to the capital structure of the generator and its financing structure, the sources of capital, financing agreements, and dividend payout schedules; if proposing to retire, existing agreements and proposals pertaining to the cost of opportunities that will be foregone if the generator is not retired and that contain a cost, premium, or fee for termination of the agreement or proposal; if proposing to mothball or enter into an ICAP Ineligible Forced Outage, the costs necessary to enable the generator to return to service; and all sources of revenue, and the amount of, and terms and conditions associated with each source of revenues related to the construction of, investment in, upgrade to, or operation of the generator. Proposed NYISO OATT § 31.9.2.1.

[117] NYISO Transmittal Letter at 23.

44. Once the Generator Deactivation Notice is complete, NYISO will begin the Generator Deactivation Assessment (i.e., NYISO's determination whether a reliability need will arise as a result of the proposed generator deactivation).[118] NYISO states that, based on previous experience performing reliability studies, it requires 90 days to perform the first step of evaluating the reliability impacts of a generator's proposed deactivation, which includes performing the required reliability studies, coordinating with the relevant transmission owners, and developing and reporting study results.[119]

45. NYISO explains that, after completing the first step, if it identifies a reliability need, it will initiate its existing Gap Solution process, as revised in its filing, and provide 30 days for interested parties to propose Gap Solutions as alternatives to NYISO entering into an RMR agreement with the deactivating generator. NYISO states that it then requires 120 days to evaluate the viability and sufficiency of the potential alternative solutions. NYISO explains that the remaining portion of the 365-day notice period (i.e., 125 days) is needed to provide the New York Commission with enough time to determine whether one or more viable and sufficient non-generation Gap Solutions should be implemented to resolve the identified reliability need.[120]

46. On the other hand, if after completing the first step in the Generator Deactivation Assessment, NYISO does not identify a reliability need caused by the proposed generator deactivation, NYISO proposes to create an "off ramp" that would trigger as early as 120 days into the process.[121] Pursuant to this "off ramp," a generator could proceed with its proposed deactivation before the conclusion of the 365-day notice period where NYISO has determined that its deactivation would not create a reliability need.[122]

2. Comments and Protests

47. Entergy, IPPNY/EPSA, and NRG argue that the 365-day notice period is unreasonably long. First, Entergy and IPPNY/EPSA contend that NYISO's proposed notice period is excessive when compared to the deactivation notice periods of the New York Commission (180 days) and the other RTOs/ISOs (the longest of which is the Midcontinent Independent System Operator (MISO) at 180 days).

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[118] Proposed NYISO OATT § 31.2.11.2.4.

[119] NYISO Transmittal Letter at 16.

[120] *Id.*

[121] Proposed NYISO OATT § 31.2.11.2.5.

[122] NYISO Transmittal Letter at 16.

48. In addition, Entergy and NRG assert that NYISO cannot lawfully require a public utility to provide a reliability service without just compensation. Entergy argues that the Commission has consistently held that, when a generator is *required* to provide a reliability service, it is properly characterized as "utility" service for which it is entitled to seek full cost-of-service recovery.[123] Entergy, IPPNY/EPSA, and NRG also rely on the Commission's statement in the RMR Order that, "should NYISO choose an exclusively mandatory RMR regime, under which a generator wishing to deactivate but determined by NYISO to be needed for reliability is required to remain in operation, NYISO's proposal should provide for compensation at a full cost-of-service rate."[124] Entergy, IPPNY/EPSA, and NRG assert that the fact that NYISO is proposing a voluntary approach after the 365-day notice period expires does not change the fact that NYISO is mandating reliability service prior to the expiration of that notice period starting once the reliability determination is made by the 90th day.[125] According to NRG, this creates discriminatory treatment between generators needed for reliability, which must operate uncompensated for 365 days, and those not needed for reliability, which may be allowed to retire after 120 days. IPPNY/EPSA assert that NYISO's proposal deprives generators seeking to deactivate of the compensation needed to support ongoing operations and, in turn, will increase the risk that the generators cannot maintain reliable operations. IPPNY/EPSA argue that this undermines the foundation of the Commission's RMR policy, which aims to ensure the continued reliability and efficient operation of the system.[126] Therefore, Entergy, IPPNY/EPSA, and NRG argue that if NYISO determines that a deactivating generator must continue to operate for any period of time to meet an identified reliability need, NYISO should be required pay the generator a rate that reflects the generator's full cost-of-service because the generator's operation is, in effect, mandatory during this period.

49. Furthermore, Entergy, IPPNY/EPSA, and NRG ask that the Commission require NYISO to eliminate the proposal to require a deactivating generator to remain in service beyond the 90th day if it is not needed for reliability. Entergy asserts that there is no lawful basis on which to require a generator that is not needed for reliability to remain in service, much less to require that generator to remain in service without just compensation. Therefore, Entergy, IPPNY/EPSA, and NRG argue that the Commission

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[123] Entergy November 30, 2015 Protest at 41 (citing *AmerenEnergy Res. Generating Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,062, at P 37 (2015)).

[124] *Id.* (quoting RMR Order, 150 FERC ¶ 61,116 at P 17).

[125] NRG November 30, 2015 Protest at 5-6.

[126] IPPNY/EPSA November 30, 2015 Protest at 11 (citing RMR Order, 150 FERC ¶ 61,116 at P 6).

should direct NYISO to revise its proposed OATT provisions to permit a generator to deactivate once NYISO determines no reliability need will result from the deactivation.[127]

50. With regard to the information requirements, Entergy, IPPNY/EPSA, and NRG argue that NYISO's proposal to require deactivating generators to provide financial information with their Generator Deactivation Notice is unduly burdensome and, in many cases, will serve no purpose. Entergy asserts that the Commission should require NYISO to revise its proposed RMR process as applied to the unique situation of a generator (particularly a nuclear unit) that is retiring at the end of its operating license, which may be unable to extend its operations beyond the deactivation date. In such a situation, Entergy contends, there is no need for the generator to submit the required avoidable cost information. Entergy argues that the Commission should therefore provide an exemption from the data submission requirements for such a unit or, alternatively, recognize that such a unit can request a waiver of those requirements in the appropriate circumstances. IPPNY/EPSA request that the Commission direct NYISO to revise its proposal to only require deactivating generators that wish to be considered as a Gap Solution to provide financial information to NYISO at the time they submit their Generator Deactivation Notice. NRG argues that because NYISO proposes to require submission of financial information before making a reliability determination, deactivating generators will be subject to costly reporting requirements that may not be necessary if the generator is not needed for reliability.[128]

51. IPPNY/EPSA and NRG also argue that the proposed 365-day notice period is inconsistent with NYISO's capacity market design, which relies heavily on monthly auctions. IPPNY/EPSA assert that, with a monthly capacity market, a generator may not be able to accurately predict what its future revenues will be and, thus, whether it will remain profitable on a rolling full year in advance basis. IPPNY/EPSA contend that NYISO's proposal may actually precipitate decisions to deactivate sooner than is the case today to protect owners' exposure against the duration of uneconomic operations. NRG asserts that generators seeking to deactivate would likely require substantial investments to be dependable for reliability going forward, especially given the long notice period, but, without assurance of cost recovery, owners will be unlikely to commit funds.[129]

52. On the other hand, the New York Commission supports NYISO's proposed 365-day notice period. The New York Commission requests, however, that the Commission direct NYISO to provide additional time for the New York Commission to complete its review of alternative solutions.

[127] Entergy November 30, 2015 Protest at 40-41; IPPNY/EPSA November 30, 2015 Protest at 15-16; NRG November 30, 2015 Protest at 22-23.

[128] NRG November 30, 2015 Protest at 22-23.

[129] *Id.* at 11.

53. Sierra Club argues that in order to protect New York's ratepayers and ensure that RMR generators are used only as a last-resort option for meeting immediate reliability needs, a 365-day window is far too short and several years' advance notice is both necessary and appropriate.[130] Sierra Club contends that ISO New England Inc. (ISO-NE) effectively requires greater than 365 days' notice by requiring generators to submit bids into the forward capacity market three and a half years in advance of the delivery year, and to submit delist bids and non-price retirement requests at that time, or to address existing capacity supply obligations through approved bilateral contracts.

3. Answers

54. NYISO asserts that the 365-day notice period is the shortest period practicable for NYISO to complete the Gap Solution process in a manner that complies with the RMR Order. NYISO argues that if the notice period were shorter, NYISO would not have sufficient time to adequately and thoroughly consider RMR alternatives, and therefore could not fulfill the RMR Order's mandate that NYISO only rely on RMR agreements "as a limited, last-resort measure."[131] NYISO also contends that the Commission should reject protesters' argument that NYISO should execute an RMR agreement immediately after it identifies a reliability need caused by a generator deactivation. NYISO counters that such a requirement would be inconsistent with the Commission's directive that NYISO only enter into RMR agreements as a limited last-resort measure. NYISO states that, while NYISO believes it is inappropriate to enter into an RMR agreement with a generator immediately after NYISO identifies a reliability need, NYISO would not be opposed to compensating generators that are required to remain in service beyond the 180th day of the notice period at the generator's demonstrated avoidable costs, including its variable operating costs, if the Commission determines that such compensation is necessary to produce a just and reasonable result. NYISO agrees that compensation beyond the 180th day may be justified, but not before that date, because additional payments under an RMR-like agreement have not generally been available in New York until after the New York Commission's 180-day notice period has expired.

55. NYISO further argues that the Commission should reject protesters' proposal to require NYISO to pay a deactivating generator its full cost-of-service after NYISO identifies a reliability need. NYISO contends that imposing such a requirement before NYISO has the opportunity to consider any RMR alternatives would send the wrong economic signal to generators that can reasonably anticipate or know that their deactivation will result in a reliability need. NYISO asserts that paying these generators a full cost-of-service rate during the notice period would encourage surprises and reward delay.

[130] Sierra Club November 30, 2015 Comments at 3.

[131] NYISO December 21, 2015 Answer at 7 (quoting RMR Order, 150 FERC ¶ 61,116 at P 16).

56. NYISO refutes protesters' arguments that the 365-day notice period prevents generators from deactivating at the time of their choosing. NYISO explains that, on the contrary, its proposal requires generators to submit advance notice of their proposed deactivation date. NYISO states that, as long as a generator submits its notice sufficiently in advance, it can deactivate on the date it chooses. With regard to deactivation after NYISO determines that a generator deactivation would not create a reliability need, NYISO states that it does not object to a tariff revision permitting a generator to commence the deactivation process pursuant to NYISO procedures as soon as NYISO completes the Generator Deactivation Assessment and determines there is no reliability need.

57. NYISO further asserts that the Commission should not adopt the New York Commission's proposed alternative notice time-frame, which provides the New York Commission with additional time to perform its responsibilities. NYISO explains that, in establishing its proposed time-frame, it reviewed its past experience in performing reliability studies and related planning and market monitoring activities and determined the minimal, reasonable period of time necessary to perform the different Gap Solution process steps.

58. Moreover, NYISO contends that the Commission should reject protests regarding scope and timing of the information submission requirements for a deactivating generator. NYISO explains that it proposes to require such information submission at the time a generator submits its Generator Deactivation Notice for two purposes: (1) so NYISO can perform its analysis of the impact of the generator's proposed deactivation on the system, consistent with NYISO's responsibility to continuously monitor competitive market behavior; and (2) so NYISO can calculate the Availability and Performance Rate (APR) for the deactivating generator. NYISO argues that its ability to perform its required responsibilities within the 365-day notice period would be significantly impeded if it were unable to obtain the required information at the start of the RMR process. NYISO does not, however, object to the Commission requiring it to make narrowly tailored revisions to proposed NYISO OATT sections 31.9.1.2 and 31.9.6 to address some of IPPNY/EPSA's concerns.

59. MEUA supports a notice period that allows sufficient time for NYISO to evaluate any reliability need and to identify any appropriate Gap Solutions to resolve that need. MEUA opposes, however, any requirement that NYISO compensate deactivating generators for providing reliability services during the 365-day notice period. MEUA argues that no precedent exists for such compensation, the proposed deactivation notice period does not constitute mandatory service, and providing such compensation would significantly increase the costs of RMR service to customers to a prohibitive level, potentially by as much as 48 percent under certain circumstances.[132]

[132] MEUA December 15, 2015 Answer at 6-7.

60. In their answer, IPPNY/EPSA argue that the Commission should reject Sierra Club's argument that the notice period should be extended to resemble the multi-year notice period in ISO-NE. IPPNY/EPSA assert that a longer notice period would be much more burdensome for generators, that the Commission has previously held that the fact that a rule is in place in one market does not provide an adequate basis to simply adopt it wholesale in another market, and that Sierra Club has misconstrued the operation of ISO-NE's forward capacity market, which provides that generators may offer or de-list their capacity three years in advance in a forward capacity auction.

61. While Entergy states that it appreciates NYISO's agreement in its answer to compensate generators during the notice period after 180 days, Entergy argues that compensation on the 90th day is preferable because that is the day by which NYISO will deem the generator necessary for reliability. Entergy contends that compensation after the 90th day aligns the time period with RTO/ISO best practices (including PJM Interconnection, L.L.C. (PJM)). Entergy does not oppose adoption of a 180-day period as a reasonable compromise under these circumstances. Entergy argues, however, that the Commission should reject NYISO's argument that a generator should not be eligible to receive up to its full cost-of-service during the notice period. Entergy asserts that the two-phase compensation approach NYISO proposes should be rejected because there is no rational basis to compensate the same generator for the same service at two different rates based on an arbitrary timeline.

62. Regarding the financial information reporting requirement, Entergy asserts that NYISO bases it argument on the fact that it needs the information in order to perform its analysis of the impact of the generator deactivation on its system. Entergy contends, however, that only one of the provisions NYISO cites provides the actual test that NYISO will use to assess the generator deactivation, and that provision is limited to deactivating generators in mitigated capacity zones only (i.e., the zones to which NYISO's market power mitigation rules apply). Entergy asserts that if NYISO expects that deactivating generators outside of the mitigated capacity zones will also be subject to a physical withholding analysis, NYISO must define the parameters for that assessment in its Services Tariff.

4. Commission Determination

63. In light of our rejection of NYISO's proposal to situate the RMR process within its existing Gap Solution process, and our requirement that NYISO establish an RMR process separate from its Gap Solution process, we reject NYISO's proposed 365-day notice period. We direct NYISO to submit, within 60 days of the date of this order, a compliance filing with a proposed timeline that reflects the new RMR process that we direct NYISO to propose (i.e., an RMR process separate from the Gap Solution process, under which NYISO evaluates and selects solutions to identified reliability needs caused by generator deactivations). Because we do not have such an RMR process before us at this time, we cannot determine whether a 365-day notice period is just and reasonable,

nor can we determine whether a generator should be compensated during the notice period. We will address outstanding concerns regarding the timeline for the RMR process, whether a generator should be compensated during the notice period, and, if so, at what level, when NYISO's revised proposal is before the Commission.

64. As for the financial information requirements contained in proposed Appendix F of Attachment Y of the NYISO OATT, we find NYISO's proposal to be just and reasonable. Protesters argue that NYISO's proposed information requirements are not needed to confirm the reasonableness of a generator's decision to deactivate and are excessive, particularly when applied to generators that are not found to be needed for reliability. We disagree. As NYISO notes, these requirements allow NYISO to fully consider the impact of a generator's proposed deactivation. In addition, NYISO's proposed requirements are consistent with NYISO's responsibility to monitor its markets and competitive market behavior. We further find that the information requirements are also consistent with the information requirements NYISO currently imposes on deactivating generators so NYISO can analyze market power considerations.[133]

C. Standard for Selection of RMR Alternatives

1. NYISO's Proposal

65. NYISO states that in order to determine which solution to a reliability need caused by a generator deactivation is the least-cost solution, taking into account uncertainty in cost and revenue estimates, NYISO will calculate the net present value of potential solutions and apply a "distinctly higher" standard to the calculations. Specifically, NYISO proposes to estimate net costs to determine if there is a non-generation solution that has a net present value that is "distinctly higher" than the net present value of any generation solution.[134] NYISO states that it proposes the "distinctly higher" net present value standard to determine which solution is actually the least-cost solution, rather than relying on the project sponsor's cost and revenue estimates, because project estimates alone have error bounds in the range of 5 percent to 20 percent, and for some projects the error bounds can be considerably higher. NYISO states that revenue estimates, which are netted from costs, can have even higher error bounds.[135] NYISO does not propose to precisely define the term "distinctly."

66. Once NYISO makes the net present value determination, NYISO proposes to post which non-generation solution has the highest estimated net present value on its website and inform the New York Commission.[136] NYISO states that this posting is intended to

[133] *See* NYISO, Services Tariff, Attachment O, §§ 30.3.3 (2.0.0), 30.6.2 (5.0.0).

[134] Proposed NYISO OATT § 31.2.11.8.2.

[135] NYISO Transmittal Letter at 27.

provide transparency and also to signal to all stakeholders that an RMR agreement will not be the least-cost solution to the reliability need. However, NYISO explains that it does not either propose to disclose the estimated costs or revenues of any proposed solution, or to identify which generation solution has the lowest estimated net cost. NYISO states that it will also signal to stakeholders, as well as to the New York Commission, that absent the New York Commission's selection of the non-generation viable and sufficient Gap Solution with the highest estimated net present value, the RMR generator will be subject to an RMR offer price.

2. Comments and Protests

67. IPPNY/EPSA argue that the Commission should reject NYISO's proposal to identify non-generation solutions that have estimated net present values that are "distinctly higher" than the net present value of a generator solution. IPPNY/EPSA contend that NYISO's proposal would *de facto* cause NYISO to enter into an RMR agreement as a first-resort option unless it was absolutely clear that the non-generation solution was a lower-cost solution. IPPNY/EPSA assert that NYISO's proposal biases the selection of solutions towards generators when the Commission directed that RMR generators should only be used as a last-resort option.[137]

68. NRG asserts that NYISO's filing does not explain what constitutes a "distinctly higher" net present value and that the language is excessively vague. NRG argues that NYISO's proposal does not provide market participants with sufficient clarity as to how NYISO intends to implement the market participation rules following a New York Commission selection of an RMR alternative.[138] Similarly, UIU argues that NYISO has proposed an unbounded criterion that is not clear or reliable and that leaves too much to NYISO's discretion.[139]

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[136] NYISO proposes to use the "distinctly higher" net present value standard to inform the New York Commission. As discussed above, we reject NYISO's proposal to allow the New York Commission to select non-generation solutions. NYISO also proposes to use the "distinctly higher" net present value standard to determine whether to subject an RMR generator to a minimum offer price. As discussed below, we reject NYISO's proposal to impose an offer price higher than $0.00/kW-month on an RMR generator. Therefore, NYISO will only use the "distinctly higher" net present value standard when analyzing the net present values of non-generation solutions as compared to an RMR generator during the selection process.

[137] IPPNY/EPSA November 30, 2015 Protest at 26.

[138] NRG November 30, 2015 Protest at 16.

[139] UIU December 4, 2015 Protest at 4-5.

69. Sierra Club argues that while it is possible that actual costs may exceed project estimates, it is also possible that actual costs are far lower than project estimates. Sierra Club asserts that because the "distinctly higher" net present value standard would unjustifiably discriminate against non-generation Gap Solutions, and because the Commission directed that RMR generators only be used as a "last resort," NYISO should select a non-generation Gap Solution with any value higher than a generation solution.[140]

70. NYTOs state that NYISO proposes to compare the net present value of an alternative solution to the net present value of an RMR agreement to determine if there is an RMR alternative with a "distinctly higher" net present value. NYTOs seek clarification that when NYISO performs this comparison it will do so using an equivalent time horizon.[141]

3. Answers

71. NYISO asserts that the protests mischaracterize its proposal and that the "distinctly higher" net present value standard is appropriate because project cost and revenue estimates inherently have substantial error bounds. NYISO contends that it is unreasonable for protesters to essentially call on NYISO to ignore uncertainty factors and default to non-generation solutions when they may not be as economic as a generation solution. NYISO further argues that it would be impracticable to establish formulaic standards or specific criteria for weighing the impact of "unquantifiable" factors.[142] According to NYISO, the purpose of the "distinctly higher" net present value standard is clear, and given the need to allow NYISO to exercise independent and impartial judgment in this area, there is no reason for concern that NYISO will wield undue discretionary authority.

72. Entergy answers that the issue is not whether the purpose of the standard is clear, but rather whether the standard itself is clear. Entergy argues that the Commission should require NYISO to eliminate the amorphous "distinctly higher" standard or, in the alternative, require NYISO to file transparent, objective criteria for implementing it.[143]

4. Commission Determination

73. We accept NYISO's proposal to use a "distinctly higher" net present value standard, subject to condition. We agree with NYISO that, because project and cost

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[140] Sierra Club November 30, 2015 Comments at 3.

[141] NYTOs November 30, 2015 Comments at 9.

[142] NYISO December 21, 2015 Answer at 32.

[143] Entergy January 7, 2016 Answer at 14.

estimates have substantial error bounds, it is just and reasonable for NYISO to use a standard that is able to account for a margin of error in cost and revenue estimates for both a proposed generation and non-generation solution. While we emphasize that RMR agreements should be used only as a last-resort measure, we also have an interest in minimizing costs. It would be unreasonable, as NYISO states, to ask NYISO to ignore uncertainty factors associated with a non-generation solution and automatically dismiss the generation solution, when the non-generation solution may turn out to be the more expensive option. With these objectives in mind, we find that NYISO has not sufficiently explained or defined how it will determine which solution has a "distinctly higher" net present value.[144] In addition, as discussed above, NYISO must be the entity that selects a solution to a reliability need caused by a generator deactivation, whether a generation or non-generation solution. The standard for determining which solution NYISO will select is an important part of NYISO's RMR process. In certain circumstances, the Commission has allowed NYISO some flexibility regarding tariff provisions where a specific, uniform, or formulaic standard may be infeasible.[145] In one instance, the Commission required NYISO to provide the "conceptual basis and general framework" that NYISO would use, but allowed NYISO's tariff provisions to be "sufficiently broad and flexible" to take into account variations in circumstances.[146] Therefore, to ensure clarity and transparency, we direct NYISO to submit, within 60 days of the date of this order, a compliance filing with tariff revisions that identify the criteria NYISO will use to implement its "distinctly higher" net present value standard and provide a conceptual basis as to how the standard will be implemented.

D. Participation of RMR Generators in NYISO's Installed Capacity Markets

1. NYISO's Proposal

74. NYISO proposes to require RMR generators to offer all of their unforced capacity (UCAP) into an installed capacity (ICAP) spot market auction,[147] unless an

[144] RMR Order, 150 FERC ¶ 61,116 at P 16 (requiring NYISO to "explain its process for identifying RMR alternatives in detail, including how the process will ensure a thorough consideration of all types of RMR alternatives in an open and transparent manner"); *see also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1649 (maintaining the Commission's policy of requiring "rules, standards, and practices that significantly affect transmission service [to] be incorporated into a transmission provider's OATT").

[145] *Hudson Transmission Partners, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,191, at P 54 (2015).

[146] *Id.*

[147] NYISO Transmittal Letter at 47.

RMR agreement expressly excuses an RMR generator from this requirement due to a pre-existing bilateral agreement. NYISO explains that it has no authority to abrogate an existing contract, and it asserts that mandating doing so would violate the voluntary nature of its RMR proposal. In most cases, though, NYISO states that RMR generators will be required to offer all of their UCAP into the auctions at an RMR UCAP Offer Price of $0.00/kW-month, i.e., as "price-takers." However, NYISO specifies two scenarios in which the RMR UCAP Offer Price would be higher than $0.00/kW-month: (1) if NYISO's determination of the need to enter into an RMR agreement is based on a resource adequacy need; or (2) if an RMR generator is not the least-cost solution to the identified reliability need. Under these scenarios, the RMR UCAP Offer Price would be equal to the RMR generator's RMR avoidable costs net of likely projected annual energy and ancillary services revenues, translated into seasonally adjusted values.

75. In the case of RMR generators subject to offer floor mitigation prior to seeking to deactivate, NYISO proposes that the generator's UCAP be offered into the ICAP auctions at the higher of the RMR generator's offer floor or its RMR UCAP Offer Price. NYISO explains that this requirement is intended to ensure that UCAP subject to the Commission-approved offer floor rules are not excused from buyer-side market power mitigation prematurely on account of addressing a temporary reliability need through an RMR agreement.[148]

76. Under NYISO's current supplier-side market power mitigation rules, UCAP under the control of a Pivotal Supplier located in a mitigated capacity zone is subject to a "must offer" requirement at no higher than the higher of the generator's reference level for the applicable ICAP spot market auction, or a generator's going-forward costs. NYISO proposes to exclude from the determination of Mitigated UCAP an RMR generator's UCAP. To accomplish this exclusion, NYISO proposes to revise subsection iv of the definitions of "Affiliated Entity" and the definition of "Control" with respect to UCAP. Because UCAP from the RMR generator and its offer price will be controlled by the RMR agreement, NYISO asserts additional mitigation rules are not needed.

2. Comments and Protests

77. Entergy argues that even when NYISO proposes to impose an offer price on RMR generators, it may be too low. In instances where a deactivating generator has elected to file an owner-developed rate, Entergy contends that setting the offer price at the deactivating generator's RMR avoidable costs fails to meet the fundamental purpose of reflecting the costs of the resource in the bid floor and, thus, will discourage future efficient investment. Entergy agrees in concept that if an RMR agreement is not the least-cost solution, the RMR generator should be required to bid its UCAP at an established offer price.[149] However, Entergy argues that this approach neglects the root

[148] *Id.* at 48.

cause of the problem (i.e., the New York Commission's ability to avoid choosing the least-cost solution). Entergy further argues that NYISO's proposal to impose an offer price on an RMR generator if the RMR agreement is based on a resource adequacy need fails to address the underlying problem that makes the step necessary. Entergy agrees with NYISO's proposal only to the limited extent that *if* NYISO is permitted to intervene in the market to execute an RMR agreement to resolve a resource adequacy need, the RMR generator's offers should be at an established price. However, in this situation, Entergy contends that the Commission should order NYISO to fix the underlying flaws in its market design that make RMR agreements a more likely occurrence, not a true last-resort measure.[150]

78. IPPNY/EPSA argue that NYISO's proposal biases the selection of solutions towards generators when it should be the other way around to ensure generators are selected only as a last-resort. Thus, according to IPPNY/EPSA, the Commission should require NYISO to impose an RMR offer price unless the estimated net present value of all of the non-generation viable and sufficient Gap Solutions are distinctly lower than the estimated net present value of the RMR generator (i.e., impose an RMR UCAP Offer Price unless all of the non-generation viable and sufficient Gap Solutions are distinctly more expensive than the RMR generator).[151] IPPNY/EPSA also argue that if the RMR offer price is set based on the RMR generator's RMR avoidable costs when the RMR generator has conditioned its continued operation on receiving compensation based on its full cost of service, it presents an arbitrarily low threshold for this capacity to clear the market, thereby undercutting the very purpose of instituting the RMR offer price in the first place. IPPNY/EPSA and NRG assert that the Commission should require NYISO to revise its Services Tariff to broaden the scope of its RMR offer price mitigation to apply to uneconomic arrangements for the purpose of retaining, repowering, or establishing a new generator that occur outside of, and thereby without triggering, NYISO's RMR process. They argue doing so would effectively discourage all such arrangements, including those that end-run the RMR process itself.[152]

79. NRG argues that NYISO's proposed RMR process potentially harms the integrity of NYISO's ICAP markets because it does not impose an offer price on resources retained for needs not related to bulk resource adequacy, such as a transmission security reliability need. NRG asserts that requiring generators that would have exited the market "but for" an uneconomic retention agreement to participate in the ICAP markets as price

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[149] Entergy November 30, 2015 Protest at 5.

[150] *Id.* at 6.

[151] IPPNY/EPSA November 30, 2015 Protest at 36.

[152] *Id.* at 40-41; NRG November 30, 2015 Protest at 15.

takers artificially suppresses market clearing prices and denies competing generators a reasonable opportunity to recover their fixed costs.[153]

3. Answers

80. NYISO explains that the "distinctly higher" net present value standard avoids imposing an offer price on RMR generators when it is not clear that a more economic non-generation solution exists. NYISO further explains that its use of the "distinctly higher" net present value standard will allow NYISO to provide appropriate signals to stakeholders and the New York Commission regarding the potential need to select a non-generation alternative. NYISO argues that nothing in IPPNY/EPSA's protest invalidates NYISO's proposal to use RMR avoidable costs to set the offer price for RMR generators. NYISO contends that IPPNY/EPSA's suggestion to require NYISO to impose an offer price on other uneconomic retentions outside of the RMR process is outside the scope of this proceeding, which is confined to NYISO's proposal on compliance with the RMR Order.

81. NYISO argues that NRG's protest that NYISO's proposal will harm the integrity of the ICAP market is based on a fundamentally flawed economic theory that the Commission already rejected in Docket No. EL13-62-000. NYISO states that it explained in that proceeding that when a constraint is not priced into the markets, as in the case of transmission security needs, then it would be unreasonable to mitigate offers since that would be tantamount to pricing the need for a resource into the market (which would send an inefficient price signal).[154]

4. Commission Determination

82. We reject NYISO's proposal to impose a capacity offer price on RMR generators higher than $0.00/kW-month as unjust and unreasonable. RMR generators are needed to maintain reliability, but they have not received sufficient market revenues to continue operations and therefore seek to deactivate. It is more efficient for RMR generators to offer their UCAP at $0.00/kW-month as "price-takers." If NYISO imposes a higher than $0.00/kW-month offer price on an RMR generator and the generator does not clear in the ICAP spot market auction, another generator that otherwise would not have cleared will clear instead. In this instance, ratepayers will pay twice—once for the cost of the RMR agreement, and again for the generator that otherwise would not have cleared the market. That said, the Commission notes that the first circumstance under which NYISO proposes to impose an offer price (i.e., when there is an alternative solution with a

[153] NRG November 30, 2015 Protest at 15.

[154] *See* NYISO, Request for Leave to Answer and Answer, Docket No. EL13-62-000, at 4-6 (filed June 28, 2013); NYISO, Answer, Docket No. EL13-62-000, at 11-13 (filed May 30, 2013).

"distinctly higher" net present value than the RMR generator) will most likely never occur because of our directives above that NYISO must be the entity that selects a solution to a reliability need caused by a generator deactivation.

83. The Commission has previously found that it is efficient for units retained under a Reliability Support Services Agreement (RSSA), a form of RMR agreement, to clear in the ICAP market, and that any mitigation imposed on such units which would prevent them from clearing in the ICAP market would be unreasonable.[155] The Commission further stated that:

> [C]ompetitive offers are expected to reflect going-forward costs as adjusted for revenues that are consistent with revenues earned in competitive markets. If going-forward costs adjusted for revenues are very low, then it would be reasonable to expect a low capacity market offer that reflects the low going-forward costs. . . . Because Cayuga and Dunkirk are needed for reliability and would clear a capacity market that also reflected local reliability needs, RSSA revenues received by these resources reflect the value of the services provided by these resources to customers.[156]

We continue to believe that RMR generators should not be subject to a capacity minimum offer price because RMR generators are needed to fulfill a reliability need that market forces have not fulfilled. Imposing a minimum offer price would allow for inefficient outcomes and is thus unreasonable.

E. Compensation for RMR Service

1. Compliance Directive

84. The Commission directed NYISO to propose compensation provisions that reflect the nature of NYISO's RMR proposal (i.e., whether NYISO proposes a voluntary or mandatory RMR regime). Specifically, the Commission stated that if NYISO proposes an "exclusively voluntary RMR regime," NYISO must include a process by which NYISO and an RMR generator may negotiate an appropriate cost-based rate, which "must at a minimum allow for the recovery of the generator's going-forward costs," with flexibility to negotiate "up to the generator's full cost-of-service."[157] On the other hand, the Commission explained that, should NYISO propose an "exclusively mandatory RMR regime," NYISO "should provide for compensation at a full cost-of-service rate."[158] The

[155] *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214, at P 66 (2015).

[156] *Id.*

[157] RMR Order, 150 FERC ¶ 61,116 at P 17.

Commission also required NYISO to develop procedures governing the filing of RMR agreements for review and approval by the Commission, including developing a *pro forma* RMR agreement and providing authorization for a generator to file an RMR agreement under FPA section 205 containing cost-based rates for the provision of RMR service.[159] Moreover, the Commission directed NYISO to "address the circumstance of accelerated cost recovery for generators that require upgrades, retrofitting, repowering, or some other form of additional investment required to continue operating during the term of the RMR agreement."[160] The Commission also required NYISO to "address recovery of such investments from RMR generators should the RMR unit receive compensation for the investment during the term of the RMR agreement but then continue to operate as a merchant unit after the term of the RMR agreement."[161]

2. NYISO's Proposal

85. NYISO proposes compensation for an RMR generator based on either: (1) an APR determined in accordance with Schedule 8 of the Services Tariff; or (2) an owner-developed rate that the RMR generator proposes on its own. NYISO asserts that because it is not proposing to mandate that resources become RMR generators, the APR is not designed to provide full cost-of-service compensation.

86. NYISO's proposed APR features four components: (1) RMR avoidable costs; (2) variable costs; (3) an availability incentive; and (4) a performance incentive. NYISO states that its proposal is intended to put total compensation at or above an RMR generator's avoidable costs. NYISO proposes to determine RMR avoidable costs pursuant to proposed sections 31.2.11.8 and 31.2.11.17 of the OATT. NYISO explains that avoidable costs do not include variable costs or any other costs that might be included in an RMR generator's reference level. NYISO states that variable costs are frequently changing incremental costs that a generator incurs to produce energy or ancillary services. According to NYISO, variable costs also include the cost of providing energy, operating reserves, and regulation service to the NYISO-administered markets. NYISO states that it will determine RMR avoidable costs and variable costs based on the lower of: (1) the RMR generator's bids; or (2) the reference levels that NYISO determines for market power mitigation purposes under section 23 of the Services Tariff.[162]

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[158] *Id.*

[159] *Id.* P 18.

[160] *Id.* P 19.

[161] *Id.*

[162] NYISO Transmittal Letter at 34.

87. NYISO states that incentive payments are a necessary feature of a voluntary RMR regime because generators will no longer have a market-based incentive to maximize their availability or to respond to dispatch instructions. NYISO explains that the value of its proposed incentive payments should support additional possible expenditures related to fixed costs during the life of an RMR agreement and provide for a reasonable return on investment sufficient to make the voluntary acceptance of a NYISO-calculated APR a financially attractive option. According to NYISO, it would measure the incentives against each RMR generator's calculated availability and performance, based on the generator being offered into the NYISO markets, and the generator's ability to follow dispatch instructions. NYISO proposes a return of 12.5 percent, which it believes is consistent with industry averages and provides a reasonable incentive. NYISO states that this value is also consistent with the value used in NYISO's currently approved demand curve. In order to avoid creating an incentive for a generator to overstate the amount of capital expenditures required, NYISO explains that it designed the incentive payment so that it is calculated using RMR avoidable costs less the cost of capital expenditures.

88. NYISO explains that eligibility for availability incentive payments will be based on the RMR generator's availability for scheduling and dispatch. NYISO proposes to use the North American Electric Reliability Corporation's (NERC) "Equivalent Availability Factor" metric to determine availability incentive payments on a six month capability period basis. NYISO states that eligibility for performance incentive payments will be based on the RMR generator's performance in appropriately following NYISO dispatch signals, meaning, in effect, the extent to which an RMR generator produces energy above NYISO's penalty limit for under-generation. NYISO will use the penalty limit for under-generation metric to determine performance incentive payments on a monthly basis. For each type of incentive payment and metric, NYISO states that it will establish a long-term "baseline," a "bandwidth," and two performance targets. The baseline for each RMR generator will be specified in its RMR agreement, while the bandwidth and performance targets can be calculated from the baseline using the equations set forth in sections 15.8.3 and 15.8.4 of Rate Schedule 8 of the Service Tariff.[163]

89. NYISO's proposal expressly accommodates a generator's right to submit an owner-developed rate in lieu of APR to the Commission for its review and potential acceptance. Under NYISO's proposal, owner-developed rates cannot exceed full cost-of-service and have two components: (1) variable costs, which will be determined in the same manner used to calculate variable costs included in the APR; and (2) a Commission-authorized component, which will effectively replace the RMR avoidable cost portion of the APR with a value that must be justified by the generator and accepted by the Commission.[164] NYISO also proposes that its MMU will review owner-developed rates and participate in Commission proceedings concerning them.

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[163] *Id.* at 36-37.

90. NYISO proposes to permit RMR generators to recover as additional costs, extraordinary capital expenditures, or other RMR avoidable costs that arise during the term of an RMR agreement that: (1) are not already being recovered as components of an RMR generator's RMR avoidable costs, its owner-developed rate, or its variable costs; (2) could not have been reasonably anticipated at the time the generator entered into an RMR agreement; and (3) are necessary for the RMR generator to continue to provide service during the term of the RMR agreement. NYISO proposes to require generators to present most proposed additional costs to the Commission for its review before NYISO has an obligation to pay the costs.[165] Specifically, NYISO proposes to require generators to present for Commission review and approval additional costs if: (1) the RMR generator is being compensated pursuant to an owner-developed rate; (2) the additional costs exceed $10 million per event for a non-nuclear powered generator or $25 million per event for a nuclear-powered generator; or (3) the additional costs do not involve capital expenditures.

3. Comments and Protests

91. City of NY and MI do not believe that RMR generators should be paid the proposed availability incentive.[166] City of NY and MI argue that base compensation under an RMR agreement should entitle NYISO to at least the generator's historical average level of availability, and thus paying an additional incentive for performance at or above historic levels, as proposed, is unnecessary. City of NY and MI request that the Commission either reject the proposed availability incentive or, alternatively, limit it to availability above the historical average level. City of NY and MI also caution the Commission that creating an incentive structure that makes RMR service attractive could increase toggling concerns.[167]

92. NRG argues that NYISO's proposal treats generators with a Commission-approved owner-developed rate significantly worse than generators that accept NYISO's calculation of an APR. First, NRG contends that NYISO proposes to subject generators under the APR to penalties capped at an amount no greater than their incentive payment, while subjecting generators with an owner-developed rate to unlimited penalties. Second, NRG asserts that NYISO proposes to allow generators compensated under the APR to receive availability and performance incentives, subject to a cap at the resource's full cost-of-service, but to not allow generators compensated under an owner-developed rate to receive any available and performance incentives. NRG asserts that generators

[164] *Id.* at 38-39.

[165] Proposed NYISO OATT §§ 31.2.11.16.3-4.

[166] City of NY and MI November 30, 2015 Protest at 4-5.

[167] *Id.* at 6.

with an owner-developed rate should be eligible to receive the same incentives, subject to the same full cap. Third, NRG contends that, under the APR methodology, NYISO proposes to authorize substantiated additional costs of up to $10 million with no additional review, but generators compensated under an owner-developed rate must seek Commission approval of *all* substantiated costs. NRG argues that the Commission should reject this discriminatory treatment.[168]

93. Several parties support NYISO's proposed compensation mechanisms. Sierra Club supports NYISO's proposed APR model as an effective rate structure for providing reliable service at the lowest cost to ratepayers. Sierra Club argues, however, that NYISO's owner-developed rate provisions are vague and lack clear ratepayer safeguards. Sierra Club contends that it is unclear what, if anything, would prevent generators from seeking full cost-of-service compensation through the owner-developed rate.[169] NYTOs also support the proposed APR compensation because it is based on avoidable costs plus the availability and performance incentive, rather than full cost-of-service compensation. Similarly, the New York Commission argues that the Commission should eliminate the automatic right of generators to propose full cost-of-service compensation under an owner-developed rate. The New York Commission cites *Market Street Railway Co. v. Railroad Commission of California*[170] in arguing that it is well settled that full cost-of-service compensation is not required when a service is abandoned because it is no longer financially viable.[171] The New York Commission also asserts that full cost-of-service compensation is unjust and unreasonable because it overcompensates generators by shifting all fixed costs and risks to ratepayers.[172]

4. Answers

94. NYISO argues that penalties should not be capped for generators under an owner-developed rate as NRG suggests. NYISO claims it would be unjust and unreasonable to insulate the owner of an RMR generator that is being compensated at a level that exceeds market compensation, and that is being paid a return on its investment, from the obligation to pay the same penalties that all generators that participate in the NYISO-administered markets at market-based rates must pay when they break a tariff rule.[173]

[168] NRG November 30, 2015 Protest at 18-19.

[169] Sierra Club November 30, 2015 Comments at 5-6.

[170] 324 U.S. 548 (1945) *Market Street Railway*.

[171] New York Commission November 30, 2015 Comments at 13.

[172] *Id.* at 16.

[173] NYISO December 21, 2015 Answer at 45.

95. NYISO also answers NRG by explaining that the reason NYISO proposes to require RMR generators with owner-developed rates to obtain Commission approval to recover additional costs is because NYISO may not be able to determine whether all or a portion of the requested additional costs are already being recovered under the RMR generator's owner-developed rate. NYISO contends that NRG incorrectly states that capital expenditures cannot qualify as additional costs, but multiple sections of the proposed OATT specifically authorize NYISO to pay additional costs that are capital expenditures. As it relates to recovery of additional costs, NYISO argues that its proposal adequately ensures that RMR generators operating pursuant to a reasonably designed owner-developed rate will, at a minimum, recover their avoidable costs.

96. IPPNY/EPSA argue that the Commission should reject arguments that RMR generators must be paid less than their full cost-of-service. IPPNY/EPSA assert that the Commission has previously ruled that a generator is required to provide RMR service in providing "utility" service and thereby should be eligible for full cost-of-service compensation. Entergy similarly argues that the Commission should reject protests that reject the ability of a generator to file for full cost-of-service compensation. Entergy adds that these arguments would violate the bedrock statutory right that gives public utilities the right to propose rates in the first instance under section 205 of the FPA and, for the same reason, prohibits the Commission from divesting public utilities of that right.[174]

97. IPPNY/EPSA assert that *Market Street Railway*, as cited by the New York Commission, is inapposite because it pertained to a utility that was no longer able to compete with other entities and, due to market forces, would lose customers and revenues if its rates were raised in an attempt to provide it a profit. The New York Commission counters that *Market Street Railway* applies in this context, contrary to IPPNY/EPSA's argument, and like any monopoly provider, the owner of an RMR generator confronts the market as it finds it, not as it wishes it would otherwise be.

5. Commission Determination

98. We accept NYISO's proposal to compensate a generator at either an APR determined in accordance with Schedule 8 of the Services Tariff, or an owner-developed rate that the RMR generator proposes and the Commission approves, as just and reasonable.

99. With regard to the APR, we find NYISO's proposed APR compensation to be sufficiently supported as just and reasonable and in compliance with the directives of the RMR Order. We agree with NYISO that incentive payments are a necessary feature of NYISO's voluntary RMR regime because RMR generators will no longer have a market-based incentive to maximize their availability or to respond to dispatch instructions. The proposed rate incentives will give generators the financial motive to be available, and to

[174] Entergy January 7, 2016 Answer at 10.

perform when called upon, at or above their historic levels. For this same reason, we reject NRG's argument that generators operating under an owner-developed rate should be able to receive incentives. Those generators are able to negotiate the terms of their compensation and operation and, thus, already have a financial motive to perform accordingly. We address City of NY and MI's concerns about toggling below. We note that if a generator is not satisfied with an APR, it may file with the Commission an owner-developed rate and justify that rate, effectively replacing the avoidable cost portion of the APR. The Commission accepted a similar process in MISO.[175]

100. Regarding the owner-developed rate, we reject arguments in this compliance proceeding that a generator should not be eligible to request compensation up to its full cost-of-service under NYISO's proposal. In the RMR Order, the Commission stated that compensation to an RMR generator "must at a minimum allow for the recovery of the generator's going-forward costs, with parties having the flexibility to negotiate a cost-based rate up to the generator's full cost of service."[176] Arguments that a generator should not be eligible for full cost-of-service compensation are outside the scope of NYISO's compliance filing proceeding. Such arguments were raised in requests for rehearing of the RMR Order, which we deny as discussed below. In addition, the New York Commission's reliance on *Market Street Railway* is misplaced. The company at issue in that case was failing because of competition from other modes of transportation; therefore, the company was not necessary to provide a public transportation service.[177] By contrast, an RMR generator is, by definition, needed to meet a specific reliability need.

101. As for NRG's assertion that generators operating under an owner-developed rate should not be required to seek approval to recover any additional costs, we agree with NYISO that the Commission is in a better position than NYISO to determine whether the additional costs are already being recovered under the owner-developed rate. This is because the Commission is the entity that analyzes and accepts the owner-developed rate proposed by the generator. So while the process is different for generators under an owner-developed rate from those with APR compensation, we do not agree that it is unduly discriminatory. The owner-developed rate option gives generators the ability to justify to the Commission additional compensation above their going-forward costs. It does not make practicable sense for NYISO to then determine whether there should be recovery of additional costs. Generators operating under an owner-developed rate chose to justify their recovery of costs to the Commission when developing their rate and it is

[175] *AmerenEnergy Res. Generating Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,057, at P 93 (2014), *order on reh'g & compliance*, 153 FERC ¶ 61,062 at PP 66-68.

[176] RMR Order, 150 FERC ¶ 61,116 at P 17.

[177] *Market Street Railway*, 324 U.S. at 555-57.

reasonable to require those generators to justify additional costs as well. Therefore, we find NYISO's proposal to require generators operating under an owner-developed rate to seek approval from the Commission to recover any additional costs to be just and reasonable.

F. Cost Allocation Methodology

1. Compliance Directive

102. The Commission directed NYISO to "include tariff provisions specifying a methodology for allocating costs of RMR agreements."[178] Pointing to the cost allocation methodologies used by other RTOs/ISOs to address the recovery of costs associated with RMR agreements, the Commission gave NYISO discretion, but required that any proposed methodology be "consistent with the Commission's cost allocation principles and precedent."[179]

2. NYISO's Proposal

103. NYISO proposes to allocate the costs of an RMR generator or a transmission Gap Solution in accordance with its Commission-approved, Order No. 1000-compliant,[180] regional transmission cost allocation method. This cost allocation method allocates costs to those load serving entities that contribute to a reliability need and benefit from solutions to that reliability need (i.e., using a "needs-based" method).[181] According to NYISO, its existing Order No. 1000-compliant regional transmission cost allocation method establishes a three-step approach that focuses on whether there is a locational, statewide, or bounded region need. Under this existing methodology, NYISO explains, the costs of a transmission solution that arises from causes other than resource adequacy issues are deemed local and not allocated under the NYISO OATT, even if they arise on the bulk power transmission facilities. However, NYISO explains that it may need to enter into an RMR agreement to address a reliability need that arises under circumstances in which the existing Order No. 1000-compliant regional transmission cost allocation method does not apply (e.g., where the generator deactivation only affects local non-bulk power transmission facilities). NYISO therefore proposes to revise its existing Order

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[178] RMR Order, 150 FERC ¶ 61,116 at P 20.

[179] *Id.*

[180] *See* First Compliance Order, 143 FERC ¶ 61,059 at PP 37, 248; Second Compliance Order, 148 FERC ¶ 61,044 at PP 20, 63, 215; Third Compliance Order, 151 FERC ¶ 61,040 at P 16.

[181] NYISO, OATT, Attachment Y, § 31.5.3 (8.0.0).

No. 1000-compliant regional transmission cost allocation method to create a hierarchy of cost allocation methods to address any type of reliability need.[182]

104. Specifically, NYISO proposes to add five methods of cost allocation to its existing resource adequacy cost allocation method—for a total of six cost allocation methods (which NYISO refers to as "steps")—for all regulated reliability projects.[183] Under its proposal, NYISO will continue to apply its existing Order No. 1000-compliant regional transmission cost allocation method to allocate the costs of a solution to a reliability need that arises from a resource adequacy issue as the first step, meaning NYISO will first allocate that portion of the costs of a reliability solution that is attributable to resolving resource adequacy issues under its existing resource adequacy cost allocation method. If, after allocating the costs attributable to resolving resource adequacy issues, there remains costs attributable to other reliability issues, NYISO will allocate those costs in a hierarchy. NYISO's proposed hierarchy is as follows: (1) resource adequacy; (2) bulk power transmission facilities thermal transmission security; (3) bulk power transmission facility voltage security; (4) local transmission security; (5) dynamic stability; and (6) short circuit.[184] NYISO will proceed through the hierarchy until all of the costs of the solution have been allocated.[185] NYISO contends that its revised regional transmission cost allocation method remains in compliance with the six regional cost allocation principles described in Order No. 1000.[186]

105. NYISO also states that, consistent with the requirement in section 31.5.3.2.1.6 of Attachment Y of the NYISO OATT, it has reviewed its regional transmission cost allocation method and determined that it should continue to use this method, as modified in its RMR compliance filing, going forward without expiration. NYISO therefore requests that the Commission accept this filing as satisfying its filing requirement in section 31.5.3.2.1.6 and proposes to remove that provision.[187]

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[182] NYISO Transmittal Letter at 56-58.

[183] Under NYISO's proposal, regulated reliability projects would include regulated backstop solutions (proposed by the transmission owner in the zone where the reliability need has been identified), alternative regulated transmission solutions (proposed by transmission owners or non-incumbent transmission developers and selected by NYISO in its comprehensive reliability planning process as the more efficient or cost-effective solution), transmission Gap Solutions, and RMR generators. *Id.* at 58 & n.172.

[184] Proposed NYISO OATT § 31.5.3.2.

[185] NYISO Transmittal Letter at 58.

[186] *Id.* at 56, 64-67 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 586, 603, 622, 637, 646, 657, 668, 685).

3. Comments

106. NYTOs support NYISO's proposal to allocate the cost of the portion of an RMR agreement attributable to a transmission security violation based on the relative contribution of the load in each subzone to the transmission security violation. However, NYTOs express concern about the lack of a defined process for identifying new bulk power transmission facilities, state that they have raised the issue with NYISO, and reserve their rights to address this issue in the future.[188]

4. Answer

107. NYISO responds by explaining that nothing in its RMR compliance filing changes the existing definition of "New York State Bulk Power Transmission Facilities" in the NYISO OATT or how it is applied to planning for the reliability of those facilities and for non-bulk power transmission facilities in the event of a generator deactivation, or in any of NYISO's other planning processes.[189]

5. Commission Determination

108. We reject NYISO's proposal to apply a revised version of its Order No. 1000-compliant regional transmission cost allocation method to RMR generators and to transmission Gap Solutions selected by the New York Commission to resolve a reliability need caused by a generator deactivation. NYISO's proposal is inconsistent with Order No. 1000, and therefore is not "consistent with the Commission's cost allocation principles and precedents,"[190] as required by the RMR Order.

109. We require NYISO to submit, within 60 days of the date of this order, a compliance filing with a proposed cost allocation method as part of its RMR process that is separate from its Order No. 1000-compliant regional transmission cost allocation method. We further reject NYISO's request that the Commission accept this filing as satisfying its filing requirement in section 31.5.3.2.1.6 of the NYISO OATT (further detailed below) and require NYISO to submit the filing required by that section within 60 days of the date of this order.

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[187] *Id.* at 67-68 (citing NYISO, OATT, Attachment Y, § 31.5.3.2.1.6 (8.0.0)).

[188] NYTOs November 30, 2015 Comments at 4-5.

[189] NYISO December 21, 2015 Answer at 49-50 (citing NYISO, OATT, Attachment Y, § 31.1.1 (10.0.0)).

[190] RMR Order, 150 FERC ¶ 61,116 at P 20.

a. Application of the Order No. 1000-Compliant Regional Transmission Cost Allocation Method to RMR Generators and Transmission Gap Solutions

110. The Commission emphasized in the RMR Order that any cost allocation regime NYISO proposes should be "consistent with the Commission's cost allocation principles and precedent."[191] We find that NYISO's proposal does not meet this requirement because it is inconsistent with Order No. 1000.

111. NYISO proposes to apply a revised version of its Order No. 1000-compliant regional transmission cost allocation method to RMR generators and to transmission Gap Solutions selected by the New York Commission to resolve a reliability need caused by a generator deactivation. This proposal is inconsistent with Order No. 1000 and, therefore, is inconsistent with the Commission's directives in the RMR Order. In Order No. 1000, the Commission linked the regional transmission planning requirements with eligibility to use the regional transmission cost allocation method, stating that, "to be eligible for regional cost allocation, a proposed new transmission facility first must be selected in a regional transmission plan for purposes of cost allocation, which depends on a full assessment by a broad range of regional stakeholders of the benefits accruing from transmission facilities planned according to the reformed transmission planning process."[192] Contrary to this requirement, NYISO proposes to use a revised version of its Order No. 1000-compliant regional transmission cost allocation method to allocate the costs of reliability solutions that have not been planned pursuant to NYISO's Order No. 1000-compliant regional transmission planning process.[193] Therefore, we reject NYISO's

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[191] *Id.*

[192] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 539 (explaining that, through the regional transmission planning process, the public utility transmission providers "identify the beneficiaries who will pay for the costs of the new transmission facility selected in a regional plan for purposes of cost allocation").

[193] *See, e.g.*, *id.* P 335 ("We require that each public utility transmission provider must participate in a regional transmission planning process that makes each transmission facility selected in the regional transmission plan for purposes of regional cost allocation eligible for such cost allocation. In other words, eligibility for regional cost allocation is tied to the transmission facility's selection in the regional transmission plan for purposes of cost allocation . . . ."); *N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,004, at P 186 (2015) ("In order for a transmission project to be eligible to use the regional cost allocation method, NYISO must select the transmission project in the regional transmission plan for purposes of cost allocation. NYISO has not selected the [transmission projects at issue] in the regional transmission plan for purposes of cost allocation, and as such, neither [transmission project is] eligible to use the regional cost

proposal as inconsistent with "the Commission's cost allocation principles and precedent,"[194] and, therefore, as not just and reasonable.

112. Accordingly, we require NYISO to include in the compliance filing ordered herein a proposed cost allocation method as part of its RMR process that is separate from its Order No. 1000-compliant regional transmission cost allocation method. We note that having a cost allocation method for the RMR process separate from the Order No. 1000-compliant regional transmission cost allocation method is consistent with the approach used in other regions.[195]

b. Other Proposed Revisions to the Regional Transmission Cost Allocation Method

113. We also reject NYISO's other proposed changes to its Order No. 1000-compliant regional transmission cost allocation method as beyond the scope of this proceeding.[196] The Commission initiated this proceeding to require NYISO to establish a process

allocation method at this time."); *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215, at P 82 (2013) ("[A] transmission developer may submit its transmission project into the regional transmission planning process for potential selection in the regional transmission plan for purposes of cost allocation. In that case, the regional transmission planning process would evaluate the proposed transmission project . . . and, if the transmission project is selected in the regional transmission plan for purposes of cost allocation, it would be eligible to use the regional cost allocation method."), *order on reh'g & compliance*, 147 FERC ¶ 61,127 (2014), *order on reh'g & compliance*, 150 FERC ¶ 61,037 (2015).

[194] RMR Order, 150 FERC ¶ 61,116 at P 20.

[195] *See, e.g.,* PJM, Intra-PJM Tariffs, OATT, § 120 (0.0.0) ("The costs incurred to compensate Generation Owners pursuant to [Generator Deactivation] shall be an additional transmission charge allocated to the load in the Zone(s) of the Transmission Owner(s) that will be assigned financial responsibility for the reliability upgrades necessary to alleviate the reliability impact that would result from the Deactivation of the generating unit and this new charge shall be collected monthly from such loads in addition to all other charges for transmission service to such loads."); MISO, OATT, § 38.2.7 (37.0.0) ("The costs pursuant to the [System Support Resources] Agreement shall be allocated to the LSE(s) which require(s) the operation of the [System Support Resources] Unit for reliability purposes.").

[196] Specifically, NYISO proposes to add five methods of cost allocation to its existing resource adequacy cost allocation method—for a total of six cost allocation methods (which NYISO refers to as "steps")—for all regulated reliability projects. NYISO Transmittal Letter at 58.

"governing the retention of and compensation to generating units required for reliability, including procedures for designating such resources, the rates, terms and conditions for RMR service, provisions for the allocation of costs of RMR service, and a *pro forma* service agreement for RMR service."[197] As such, NYISO's proposed revisions to its Order No. 1000-compliant regional transmission cost allocation method are beyond the scope of the section 206 proceeding the Commission initiated in the RMR Order.

114. We note that NYISO, as part of its Order No. 1000 compliance filing, previously notified the Commission of its intent to file revisions to its Order No. 1000-compliant regional transmission cost allocation method to establish allocation provisions to address reliability solutions that resolve transmission security violations.[198] NYISO may propose revisions to its Order No. 1000-compliant regional transmission cost allocation method as part of its ongoing Order No. 1000 compliance proceedings in Docket No. ER13-102, or may make a separate FPA section 205 filing with the Commission with appropriate stakeholder support.[199]

115. While NYISO also requests that the Commission accept this filing as satisfying its filing requirement in section 31.5.3.2.1.6 and proposes to remove that provision,[200] we reject this request in light of our rejection of NYISO's proposed changes to its Order No. 1000-compliant regional transmission cost allocation method.[201] We require NYISO

[197] RMR Order, 150 FERC ¶ 61,116 at P 4.

[198] *See* Second Compliance Order, 148 FERC ¶ 61,044 at P 298 ("We note the Filing Parties' placeholder for a method for allocating the costs of transmission projects that resolve transmission security violations, other than those that also resolve resource adequacy issues, as well as NYISO's commitment to file this cost allocation method with the Commission by the end of the third quarter of 2014.").

[199] NYISO states that it has worked with stakeholders over the past two years on the revised regional transmission cost allocation method. NYISO Transmittal Letter at 59-60, 67.

[200] *Id.* at 67-68.

[201] Section 31.5.3.2.1.6 of the NYISO OATT provides, in relevant part: "Costs associated with any regulated transmission backstop solution identified by the ISO on or after January 1, 2016 or alternative regulated transmission solution selected by the ISO as part of the planning cycle commencing January 1, 2016 will be allocated according to a methodology, which, after proper consideration within the ISO stakeholder process, will be filed by the ISO for the Commission's approval prior to January 1, 2016, in accordance with the ISO governance process. The filing may provide for a continuation of the foregoing methodology or a revised methodology." NYISO, OATT, Attachment Y, § 31.5.3.2.1.6 (8.0.0).

to submit the filing required by section 31.5.3.2.1.6 of the NYISO OATT within 60 days of the date of this order.

G. Anti-Toggling Provisions

1. Compliance Directive

116. With regard to toggling, the Commission required NYISO to propose rules to "eliminate, or at least minimize, incentives for a generator needed for reliability to toggle between receiving RMR compensation and market-based compensation for the same units."[202] The Commission stated that it was "concerned that any proposed provisions not provide an incentive for a generation resource to propose to deactivate earlier than it otherwise would have in expectation of being needed for reliability and, therefore, be able to receive more revenues under an RMR service agreement than by remaining in the market."[203] The Commission also stated that NYISO's proposed tariff provisions "should not provide an incentive for a generation resource to re-enter the market after having received accelerated recovery of the cost of additional investments made under its RMR agreement."[204]

2. NYISO's Proposal

117. NYISO proposes revisions to section 15.8.6 of existing Rate Schedule 8 to its Services Tariff providing for recovery of capital expenditures from RMR generators, which NYISO states will be an effective deterrent to toggling between receiving RMR compensation and market-based compensation. According to NYISO, if NYISO reimburses all or any portion of the cost of a capital expenditure that is needed to permit an RMR generator to provide service under an RMR agreement then, following the conclusion of the RMR agreement, the generator will not be permitted to submit offers into the NYISO-administered markets or to be scheduled until the RMR generator has repaid all capital expenditure costs that NYISO reimbursed (less depreciation).[205] NYISO states its proposal will prevent RMR generators that are not sufficiently financially viable, or that are unwilling to repay the cost of capital expenditures, from returning to participate in the NYISO-administered markets or being scheduled by NYISO. NYISO notes that it also designed its proposal to ensure that any reimbursement NYISO receives is repaid to the appropriate loads.[206]

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[202] RMR Order, 150 FERC ¶ 61,116 at P 21.

[203] *Id.*

[204] *Id.*

[205] NYISO Transmittal Letter at 43.

3. Comments and Protests

118. City of NY and MI argue that NYISO's proposed toggling mechanism should be more robust. City of NY and MI suggest adding interest to the repayment, claiming that not doing so would amount to providing RMR generators with an interest-free loan. City of NY and MI argue that such treatment would give former RMR generators an unfair advantage over existing generators and new generators, provide an incentive to toggle, and be unequitable to end-use consumers. City of NY and MI note, however, that they do not oppose funding necessary capital expenditures under RMR agreements, or an adjustment for depreciation when repaying those expenses.[207]

119. Sierra Club contends that NYISO's proposal is appropriate to discourage generators from toggling, but because "Additional Costs," as defined, are mostly unforeseen capital expenditures, Sierra Club argues that NYISO should ensure that these costs are repaid just like capital expenditures if the generator seeks to continue operating following termination of the RMR agreement.[208]

120. UIU argues that NYISO's toggling proposal will only deter those generators that make meaningful capital expenditures during the term of the RMR agreement. UIU instead proposes to require RMR generators to repay all above-market payments received during the term of the RMR agreement, including costs incurred to develop infrastructure that would not have been needed absent the generator's declared intention to retire. UIU also argues that NYISO's proposed toggling mechanism fails to consider how a generator returning to service after the end of an RMR agreement would be treated. For example, UIU asks whether an RMR generator returning to the market would be treated as a new generator interconnection and whether its return would affect the ongoing construction of an alternative permanent reliability solution (if any).[209]

4. Answer

121. NYISO agrees with City of NY and MI that the proposed capital expenditures repayment requirements do not clearly specify that capital expenditure costs must be repaid with interest. NYISO also agrees with City of NY and MI that it is appropriate for

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[206] Section 6.14.6 of proposed NYISO OATT Rate Schedule 14 requires NYISO to return any capital expenditure reimbursement it receives to the RMR load serving entities that were allocated RMR costs that exceeded market rates while the RMR agreement was in effect. *Id.* at 43-44.

[207] City of NY and MI November 30, 2015 Protest at 6-7.

[208] Sierra Club November 30, 2015 Comments at 2.

[209] UIU December 4, 2015 Protest at 2-3.

interest to be included with those capital expenditure costs to be repaid. Therefore, NYISO states that it does not object to the Commission directing it to develop tariff revisions to include an interest requirement for capital expenditures that are required to be repaid.[210]

5. Commission Determination

122. We accept in part, subject to condition, and reject in part NYISO's proposed anti-toggling provisions in section 15.8.6 of the Services Tariff because they do not fully address the toggling concerns the Commission identified in the RMR Order.[211] We therefore direct NYISO to submit, within 60 days of the date of this order, a further compliance filing which addresses the toggling concerns outlined below.

123. The RMR Order discussed two types of toggling concerns. The first type arises when a generator is needed for reliability and has an incentive to seek to deactivate prematurely. As one example, the generator may be operating profitably in the market with its existing facilities. Because the generator is profitably operating in the market, its market revenues equal or exceed its going-forward costs. The generator might have an incentive to seek to deactivate prematurely if the generator knows it is needed for reliability (and thus, has market power) and the non-market compensation that it would receive under an RMR agreement would exceed its current market-based compensation.

124. The second type arises when a generator that is operating under an approved RMR agreement must make capital expenditures to continue to meet the reliability need during the term of the RMR agreement. The toggling concern presents itself when the upgrade would be profitable based solely on market revenues (i.e., without any out-of-market revenues), but the generator seeks to recover the upgrade costs through an RMR agreement and then, after the termination of the RMR agreement, returns to market-based revenues that exceed going-forward costs.

125. On compliance, NYISO addresses the second type of toggling by proposing to require reimbursement of capital expenditure costs as a condition for operating after the termination of the RMR agreement. While NYISO's proposal addresses the second type of toggling, we agree with UIU that NYISO's proposal does not adequately address the first type of toggling because it does not deter toggling by generators that do not require capital expenditures during the term of an RMR agreement.

126. We therefore require NYISO to include in the compliance filing ordered herein tariff revisions to provide that where an RMR generator wishes to continue to operate at the end of its RMR agreement, it must repay NYISO the higher of: (1) the capital

[210] NYISO December 21, 2015 Answer at 50-51.

[211] RMR Order, 150 FERC ¶ 61,116 at P 21.

expenditures less depreciation, that NYISO reimbursed the RMR generator to enable it to remain in service during the term of the RMR agreement; or (2) the above-market payments the RMR generator received during the term of the RMR agreement. The above-market payments would be the difference between the total market-based revenues, including uplift revenues, the generator would have received during the term of the RMR agreement, and the revenues received pursuant to the RMR agreement. NYISO should propose a process to allow the RMR generator to return to the NYISO-administered markets immediately upon termination of the RMR agreement, while repaying NYISO any applicable capital expenditures, as described above, or above-market payments, both with interest,[212] on a pro-rata monthly basis.[213] These repayments to NYISO will continue until all applicable capital expenditures or above-market payments are fully repaid, provided the now-former RMR generator continues to operate in the NYISO-administered markets. Either repayment obligation described above should follow the generator regardless of any change in ownership. We find this revised anti-toggling mechanism necessary to address the first type of toggling by removing an RMR generator's ability to receive above-market payments during the term of an RMR agreement and then continue to operate in the market after the termination of that agreement without refunding the above-market payments. Requiring reimbursement of the higher of capital expenditures or above-market payments will "eliminate, or at least minimize, incentives for a generator needed for reliability to toggle between receiving RMR compensation and market-based compensation for the same units," even when there are no required capital expenditures.[214]

127. As noted above, while we accept NYISO's proposed reimbursement of capital expenditures, less depreciation, we reject NYISO's proposal to require a generator to reimburse *all* capital expenditures *before* it is eligible to participate in the NYISO-administered markets. Requiring reimbursement of all capital expenditures before participating in the markets could discourage an otherwise efficient generator from continuing to operate to the detriment of customers. The pro-rata payment alternative balances these concerns by ensuring the repayment of capital expenditures, while also ensuring that customers have the opportunity to receive the full value of service from upgrades for which they have paid.

128. We reject Sierra Club's argument that an RMR generator should also reimburse NYISO all additional costs, in addition to capital expenditures, if it seeks to reenter the market after the termination of its RMR agreement. Additional costs are those costs that

[212] In addressing NYISO's proposed toggling mechanism, City of NY and MI requested that any capital expenditures be repaid with interest set at the Commission interest rate, and NYISO agreed to include interest in its answer.

[213] *See, e.g.*, PJM, Intra-PJM Tariffs, OATT, § 118 (0.0.0).

[214] RMR Order, 150 FERC ¶ 61,116 at P 21.

could not have been reasonably anticipated at the time a generator entered into an RMR agreement, and are necessary for the RMR generator to provide service needed for reliability.[215] Because additional costs could not have been reasonably anticipated, we find that requiring reimbursement of these costs would not provide additional disincentive to toggle and, therefore, that such reimbursement is not just and reasonable.

H. Other Issues

1. Entergy's and MMU's Market Enhancement Proposals

a. Entergy's and MMU's Proposals

129. Entergy argues that to fulfill the RMR Order's directive that RMR agreements be used as limited last-resort measures, broad capacity market reforms must be instituted. Specifically, Entergy requests that the Commission direct NYISO to develop capacity market design changes to send efficient, non-discriminatory, locational price signals to generators whose operation relieves a transmission security constraint. Entergy contends that whatever specific solution is adopted, its objective should be market design changes that create a single, common market clearing price for all similarly-situated suppliers needed to resolve a security constraint.[216]

130. Similarly, MMU asserts that the primary goal of wholesale market design is to provide market-based incentives for investment and operation that efficiently satisfy electricity demand and reliability requirements. Hence, MMU asserts that the need for an out-of-market RMR agreement indicates at least a partial failure of the market to provide price signals that accurately reflect the value of resources that are critical for satisfying reliability needs.[217] MMU agrees with Entergy that NYISO should evaluate the feasibility of locational capacity market improvements that would include all locational planning needs, including the design Entergy proposes. MMU further recommends that NYISO: (1) pre-define the interfaces that could potentially bind to ensure that the capacity market would be capable of reflecting in market clearing prices any emergent resource adequacy issue that could arise in the future; and (2) model 115 kV transmission constraints in upstate New York in the day-ahead and real-time markets.[218]

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[215] Proposed NYISO OATT §§ 31.2.11.16.1.

[216] Entergy November 30, 2015 Protest at 61.

[217] MMU December 17, 2015 Comments at 3-4.

[218] *Id.* at 6-8.

b. Answers

131. NYISO asserts that Entergy's proposal is clearly outside the scope of this proceeding. NYISO states that although the Commission granted NYISO some discretion to propose tariff revisions beyond the Commission's "general guidance" regarding RMR agreements, this discretion cannot reasonably be read as broadening the scope of this proceeding to encompass global market design changes.[219]

132. Entergy counters that NYISO failed to comply with the requirement in the RMR Order that RMR agreements only be used as a "last-resort option." Entergy contends that NYISO can ensure it complies with this directive only by instituting the major market redesigns Entergy proposes. Entergy argues that these changes are not outside the scope and that the Commission should either condition acceptance of NYISO's compliance filing on the implementation of Entergy's two proposed market design changes or, in the alternative, initiate a section 206 proceeding to require them.[220]

c. Commission Determination

133. We reject Entergy's and MMU's market enhancement proposals as outside the scope of this proceeding. In the RMR Order, the Commission directed NYISO to submit tariff provisions governing the "retention of and compensation to generating units required for reliability, including procedures for designating such resources, the rates, terms, and conditions for RMR service, provisions for the allocation of costs of RMR service, and a *pro forma* service agreement for RMR service."[221] NYISO partially complied with that directive. While the Commission gave NYISO some flexibility as to how it would comply with the Commission's directives, the RMR Order was not intended to allow or require NYISO to redesign its capacity market to ensure that RMR generators are never needed.

2. *Pro Forma* RMR Agreement Provisions

a. Comments and Protests

134. NRG argues that NYISO's 90-day termination provision in the *pro forma* RMR agreement is a "serious injustice" on generators and is insufficient to ensure that RMR generators have sufficient certainty over the minimum term of the RMR agreement to recover investments and other required major expenses, and to plan for labor and other considerations that may take more than 90 days to resolve.[222] NRG contends that the

[219] NYISO December 21, 2015 Answer at 4-6.

[220] Entergy January 7, 2016 Answer at 2-3.

[221] RMR Order, 150 FERC ¶ 61,116 at P 4.

pro forma RMR agreement also fails to adequately provide assurance that an RMR generator will be able to recover all of its expenses incurred for providing reliability service, such as property taxes.[223]

135. Sierra Club supports NYISO's inclusion of a tariff provision that requires NYISO to terminate an RMR agreement as soon as such agreement is no longer needed to address a reliability need. Sierra Club urges the Commission to also include a companion tariff provision that would ensure that any developments that could affect a reliability need trigger a renewed review of the continued necessity of the RMR agreement so that unneeded RMR agreements are timely identified and terminated.[224] City of NY and MI support NYISO's termination provision, stating that the position that RMR agreements should be terminated upon the resolution of the underlying reliability need is consistent with the Commission's directives in the RMR Order.[225]

136. NRG also argues that while the *pro forma* RMR agreement considers the need for units to self-schedule, this is only with regards to testing that might be needed. NRG asserts that there are other situations in which a generator should be allowed to self-schedule on a limited basis, and that these should be specified in the *pro forma* RMR agreement.[226]

b. Answer

137. NYISO argues that NRG's protest should be rejected because its concerns are already addressed in section 4.8 of the *pro forma* RMR agreement, which provides the owner of an RMR generator an opportunity to recover costs that it must incur because NYISO terminates the RMR agreement prior to the conclusion of its full term.

138. NYISO states that it does not agree with or support NRG's proposal for self-scheduling. NYISO asserts that the reason prior approval is required for RMR generators to self-schedule is because RMR generators are compensated at their reference level for all energy they are scheduled to produce. If an RMR generator self-schedules and operates at times when market prices are low and the generator would not be economically committed based on its marginal costs, the generator's operation will increase the subsidy that loads must pay to keep the RMR generator in service.[227]

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[222] NRG November 30, 2015 Protest at 16.

[223] *Id.* at 17.

[224] Sierra Club November 30, 2015 Comments at 3-4.

[225] City of NY and MI November 30, 2015 Protest at 8.

[226] NRG November 30, 2015 Protest at 21.

c. Commission Determination

139. We reject Sierra Club's request that the Commission direct NYISO to include a companion provision along with the termination provision that triggers a reevaluation of the need for RMR agreements with any changes in the market that might affect the relevant reliability need. NYISO will reevaluate existing reliability needs as part of its biennial comprehensive reliability planning process.

140. We further find that NYISO's proposed termination and survival provisions in sections 4.8 and 4.3.2.6 of the *pro forma* RMR agreement adequately address NRG's concerns regarding termination and survival because they allow an RMR generator to recover wind-down costs incurred if NYISO terminates an RMR agreement before the end of its term. We also reject NRG's proposal to expand the ability for generators to self-schedule. We believe that NYISO has a reasonable justification for limiting the ability of generators to self-schedule because of the risk of increasing the subsidy consumers must pay to an RMR generator to maintain its service to meet the reliability need.

3. Requests for Clarification

a. Requests

141. In their comments, NYTOs request clarification on a variety of topics. First, NYTOs request that the Commission clarify that while their local transmission plan projects on the New York State bulk power transmission facilities will be included in the base case if they are firm projects expected to be in service within three years, NYISO will include in the base case local transmission plan projects that NYTOs report as firm transmission plans to be implemented on non-bulk power transmission facilities at any time during the 10-year study period.

142. NYTOs also request clarification that NYISO has the discretion to complete a non-generation solution identified to meet a reliability need caused by a generator deactivation if the deactivating generator rescinds its Generator Deactivation Notice.

143. NYTOs further request clarification of how NYISO intends to incorporate bilateral contracts that pre-date the execution of an RMR agreement into its determination of RMR avoidable costs.

144. In addition, NYTOs request clarification of whether payments to RMR generators for Voltage Support Service or Restoration Service (i.e., Blackstart) under NYISO's proposed APR would be allowed to the extent they cause payments to the RMR

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[227] NYISO December 21, 2015 Answer at 48-49.

generators to exceed the costs the RMR generators would have avoided if the generator had deactivated.

145. UIU requests clarification regarding NYISO's treatment of an RMR generator in the base case of its comprehensive reliability planning process if it remains in service upon the expiration of the term of an RMR agreement.

b. Answer

146. In response to NYTOs' first clarification request, NYISO states that it does not object to this clarification because it reflects current practice memorialized in section 3.1.1 of its Reliability Planning Process Manual, which states that New York transmission owners' local transmission plans "for non-bulk transmission facilities and [New York Power Authority] transmission plans for non-bulk power facilities which are reported to the NYISO as firm transmission plans will be included" in the base case.[228]

147. NYISO also responds that there are circumstances when it would be reasonable for a non-generation solution to be completed even if a generator rescinds its Generator Deactivation Notice. For example, in cases where a transmission solution is substantially complete at the time the generator rescinds its Notice, completion of the solution may be appropriate. Accordingly, NYISO does not object to being directed to develop tariff revisions that clarify this requirement.

148. Next, NYISO clarifies that if a pre-existing bilateral contract will not terminate and will continue to impose a financial obligation even after the generator deactivates, NYISO does not intend to treat the contract revenues as avoidable costs. On the other hand, NYISO further clarifies that if the pre-existing bilateral contract will terminate and will not continue to impose a financial obligation if the generator deactivates, NYISO will treat the contract revenues as avoidable costs.

149. NYISO further clarifies that RMR generators that accept an APR will be permitted to retain Voltage Support Service and Restoration Service payments even if those revenues will cause the total payments to the RMR generator to exceed the costs the RMR generator would have avoided if it had deactivated.

150. In response to UIU's request for clarification, NYISO states that it would treat a generator that satisfies all of the requirements to return to service like any other existing generator that participates in the NYISO-administered markets and would include it in the base case for NYISO's comprehensive reliability planning process.

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[228] *Id.* at 35 (citing NYISO, *Reliability Planning Process Manual* § 3.1 (Dec. 2014), http://www.nyiso.com/public/webdocs/markets_operations/documents/Manuals_and_Guides/Manuals/Planning/rpp_mnl.pdf).

c. Commission Determination

151. We agree that a tariff provision specifying that NYISO may complete certain non-generation solutions if a generator rescinds its Generator Deactivation Notice would prevent waste and increase efficiency of system planning. Therefore, we direct NYISO to submit, within 60 days of the date of this order, a compliance filing with tariff revisions that clarify that NYISO may complete a non-generation solution that is substantially complete at the time a generator rescinds its Generator Deactivation Notice.

152. As for the other requested clarifications, we find that NYISO's proposed tariff revisions are clear and consistent with the clarifications NYISO provides in its answer. We therefore accept NYISO's other clarifications without requiring additional tariff revisions.

VII. Requests for Rehearing and Clarification in Docket No. EL15-37-001

A. Jurisdiction Over RMR Service

1. Rehearing Request

153. The New York Commission argues that the RMR Order is an overreach of the Commission's authority that interferes with the New York Commission's ongoing exercise of its authority to make resource adequacy determinations and select generating facilities needed for reliability, which are matters reserved to the states under the FPA.[229] According to the New York Commission, NYISO's existing reliability planning process under the Gap Solution process in Attachment Y of the NYISO OATT, previously approved by the Commission, already provides a mechanism for retaining and compensating generation facilities needed for reliability, including an "explicit role" for the New York Commission in determining whether to retain and how to compensate generation facilities needed for reliability[230] The New York Commission argues that the RMR Order failed to address or acknowledge such provisions and failed to provide evidence that the New York Commission's approved RSSAs are inadequate to address the reliability concerns cited in the RMR Order. The New York Commission asserts that its approval of RSSAs comports with NYISO OATT provisions, which recognize the New York Commission's responsibility to select among non-transmission alternatives and to determine compensation under New York State law.[231]

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[229] New York Commission Request for Rehearing at 2, 6.

[230] *Id.* at 2, 7-8 (citing NYISO, OATT, Attachment Y, § 31.2.10 (15.0.0)).

[231] *Id.* at 12.

154. Additionally, the New York Commission argues that the RMR Order was arbitrary and capricious because the Commission allowed NYISO to select an exclusively voluntary regime and to allow a generator to deactivate or retire unilaterally. The New York Commission asserts that this option is inconsistent with the Commission's expressed goal of ensuring reliability through RMR service.[232] Moreover, the New York Commission argues that the voluntary option provided in the RMR Order only highlights the fact that the Commission lacks jurisdiction to mandate that a generator continue to operate. The New York Commission argues that it has the requisite authority to ensure that generating facilities do not abandon service prematurely and thereby ensure system reliability. The New York Commission asserts that the Commission should not allow a generator to voluntarily retire in contravention of the New York Commission's authority.[233]

2. Commission Determination

155. We deny the New York Commission's request for rehearing of the RMR Order. The New York Commission argues that the RMR Order interferes with the New York Commission's jurisdiction. We disagree. The rates, terms, and conditions for RMR service under NYISO's Services Tariff and OATT fall squarely within the Commission's jurisdiction under the FPA.

156. The FPA grants the Commission jurisdiction over all facilities for the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale.[234] FPA section 201(b)(1) limits the Commission's jurisdiction by stating that the Commission "shall not have jurisdiction, *except as specifically provided* in [Subchapters II and III of the FPA], over facilities used for the generation of electric energy."[235] However, the Commission's authority over interstate transmission and wholesale rates are examples of jurisdiction specifically provided in Subchapters II and III of the FPA.[236]

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[232] *Id.* at 15.

[233] *Id.* at 15-16.

[234] 16 U.S.C. §§ 824(a), 824(b) (2012).

[235] *Id.* § 824(b)(1) (emphasis added). We note that the language in FPA section 201(a) concerning matters regulated by the states does not alter our analysis of this issue. While FPA section 201(a) provides that the Commission's authority extends "only to those matters which are not subject to regulation by the States[,]" *id.* § 824(a), the Supreme Court has explained that this language is "a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction," and "[b]ecause the FPA contains such a clear and specific grant of jurisdiction to FERC over interstate transmissions . . . the [language in FPA section 201(a)] does not undermine FERC's jurisdiction." *New York v. FERC*, 535 U.S. 1, 22 (2002).

As a result, the courts have long held that the Commission "clearly has exclusive jurisdiction over [wholesale rates]"[237] and that the Commission "may exercise jurisdiction over generation facilities to the extent necessary to regulate interstate commerce."[238]

157. The RMR Order addresses the rates, terms and conditions of providing service under an RMR agreement to maintain the reliability and efficient operation of the interstate transmission system[239] and NYISO's wholesale markets.[240]

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[236] *See* 16 U.S.C. §§ 824(a), 824(b)(1), 824d(a), 824e(a), 824o(b); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (holding that the Commission has exclusive jurisdiction over wholesale rates) (*Nantahala*); *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) (explaining that section 201(b) does not limit the Commission's plenary jurisdiction over wholesale rates); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 383 (1988) (Scalia, J., concurring) ("[I]t is reasonable to regard FERC's § 824e(a) authority to set wholesale rates as precisely an example of jurisdiction 'specifically provided.'"); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 718 (D.C. Cir. 2000) (explaining that the Commission's jurisdiction over interstate transmission is jurisdiction "specifically provided"), *aff'd sub nom. New York v. FERC*, 535 U.S. at 28; *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 63 (D.C. Cir. 2014) (holding that the Commission's transmission planning mandate did not intrude on states' authority because it was directed at ensuring the proper functioning of the interconnected grid and, therefore, fits within the Commission's jurisdiction over the transmission of electric energy in interstate commerce).

[237] *Nantahala*, 476 U.S. at 966.

[238] *Transmission Access Policy Study Group*, 225 F.3d at 667, 718; *see also Conn. Dep't of Pub. Util. Control*, 569 F.3d at 482, 485 (holding that the Commission's determination of the rate necessary to procure sufficient resources to meet the Commission's estimate of demand does not constitute regulation of generation facilities in violation of FPA section 201).

[239] Similar to our jurisdiction over the rates, terms, and conditions for the provision of RMR service to support the reliability and efficient operation of the interstate transmission system, the Commission regulates, under the Commission's open access transmission policies, various ancillary services, which include the provision of capacity and energy from generating facilities, to support the reliability and efficient operation of the interstate transmission system. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*,

158. Furthermore, out-of-market compensation is of particular concern in the context of RMR agreements because of the locational market power issues inherent in RMR

Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[240] *See, e.g.*, RMR Order, 150 FERC ¶ 61,116 at P 3 ("[T]o ensure the proper and efficient operation of NYISO's markets, we find that NYISO should have on file the rates, terms, and conditions for RMR service. . . . The uncertainty created for resources by the lack of clear tariff provisions has the potential to exacerbate the very concerns an RMR service is meant to address—ensuring the continued reliable and efficient operation of the grid, and of NYISO's markets."); *id.* P 11 ("NYISO's inability to secure adequate RMR services could impede its ability to ensure the reliable and efficient operation of the electric grid and its markets."); NYISO Transmittal Letter at 47 ("An obligation to offer capacity into the market is a fundamental feature of the RMR tariff structure.").

contracts.[241] Preventing the exercise of market power through RMR agreements is important to ensure that wholesale rates are just and reasonable. Therefore, that the Commission has authority to regulate such agreements—which keep RMR resources online, provide them out-of-market compensation, and remedy a potential opportunity to exercise market power—is consistent with the Congressional intent behind the FPA.[242]

159. The New York Commission argues that Attachment Y of the NYISO OATT already provides a reliability planning process, the Gap Solution process, which recognizes the New York Commission's responsibility to select alternatives, among generation, transmission, or demand response resources.[243] As discussed above, however, we reject NYISO's proposal to situate its RMR process within the existing Gap Solution process in Attachment Y of the NYISO OATT.[244] As we explain above, NYISO's proposal to allow the New York Commission to select non-generation Gap Solutions does not comply with the RMR Order, is inconsistent with Order No. 1000, and could lead to inefficient transmission development. Instead, we require NYISO to establish an RMR process separate from its existing Gap Solution process, under which NYISO will evaluate and select the solution to an identified reliability need that arises as a result of a generator deactivation.

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[241] *See, e.g.*, *Pub. Utils. Comm'n of State of Cal. v. FERC*, 254 F.3d 250, 257 (D.C. Cir. 2001) (The "Commission has long been aware of the locational market power issues inherent in the ISO's efforts to contract for RMR service."); *Cities of Anaheim, et al. v. Cal. Indep. Sys. Operator Corp.*, 107 FERC ¶ 61,070, at P 26 n.6 (2004) ("RMR unit owners at those times have location-specific market power and could potentially charge a high price in the absence of an RMR agreement. The RMR agreements prevent RMR unit owners from taking advantage of location-specific market power."), *reh'g denied*, 110 FERC ¶ 61,387, *order denying reconsideration*, 111 FERC ¶ 61,218 (2005).

[242] *See, e.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) ("As FERC's authority generally rests on the public interest in constraining exercises of market power, see *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1003 (D.C. Cir. 1987), whether in the utility's rates or other terms of service, and as a common test for the lawfulness of rates is their connection to the reasonably-incurred costs of providing the regulated service, *National Fuel Gas Supply Corp. v. FERC*, 900 F.2d 340 (D.C. Cir. 1990), it is hard to see how the statute could leave FERC weaponless against conduct that might encourage or cloak the running up of unreasonable costs."), *cert. denied*, 552 U.S. 1230 (2008).

[243] New York Commission Request for Rehearing at 8.

[244] *See supra* PP 31-41.

160. Furthermore, the fact that the Commission previously allowed for a State role in the selection of certain alternatives to meet reliability needs under Attachment Y of the NYISO OATT does not affect the Commission's jurisdiction over the rates, terms, and conditions for RMR service, including compensation agreements.[245] As stated in section 31.5.1.6 of Attachment Y, which contains cost recovery language to which the New York Commission cites,[246] "[n]othing in this section shall affect the [Federal Energy Regulatory Commission's] jurisdiction over the sale and transmission of electric energy subject to the jurisdiction of the Commission."[247]

161. The New York Commission believes that allowing NYISO to select an exclusively voluntary regime and allowing a generator to deactivate unilaterally means that generators needed to ensure reliability cannot be retained. We disagree. The purpose of the RMR process is to provide certainty to resources needed for reliability by providing clear tariff provisions regarding the rates, terms, and conditions for its service. A well-structured voluntary regime that provides assurances to the generator that it will be treated in a non-discriminatory manner and will have the opportunity to collect compensatory rates in a timely manner will serve as a strong incentive to the generator to continue to operate. Moreover, under the RMR process, after a generator indicates its intent to deactivate, it is NYISO that must then determine whether the generator is needed for reliability. Based upon its determination and evaluation of the proposed solutions, NYISO will select a generation or a non-generation resource to satisfy the assessed reliability need, in order to ensure system reliability. Thus, we find that, contrary to the New York Commission's contention, allowing NYISO to choose a voluntary regime is not inconsistent with the Commission's goal of ensuring reliability through RMR service.

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[245] The Commission has previously rejected the New York Commission's claim that the Commission acknowledged the New York Commission's authority to address reliability matters and to approve RSSAs based on the Commission's approval of the Gap Solution process in Attachment Y of the NYISO OATT. *See R.E. Ginna Nuclear Power Plant, LLC*, 152 FERC ¶ 61,027 at PP 18-22. Similarly, the Commission rejected the New York Commission's arguments that the Commission does not have jurisdiction to issue a compensation order that triggers a generator's return to service to resolve an identified reliability need. *See N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,010, at PP 9-11 (2015).

[246] New York Commission Request for Rehearing at 9.

[247] NYISO, OATT, Attachment Y, § 31.5.1.6 (8.0.0).

B. Compensation for RMR Service

1. Requests for Rehearing/Clarification

162. The Indicated NYTOs are concerned with the RMR Order's reference to a "full cost-of-service" rate if NYISO chooses a mandatory regime. They seek clarification that, if NYISO selects an exclusively mandatory RMR regime, neither NYISO nor any party will be precluded from addressing the issue of the appropriate compensation to generators in the context of NYISO's entire compliance filing. The Indicated NYTOs ask that the Commission specify that it has not yet determined that a full cost-of-service rate must be adopted and that any such final determination will be made in the context of the total compliance filing.[248]

163. The New York Commission argues that a full cost-of-service rate should not be permitted under either a voluntary or mandatory regime because it is excessive, unjust and unreasonable, and shifts all fixed costs and risks from a generator to ratepayers.[249] The New York Commission submits that a full cost-of-service rate is not required when a service is abandoned because it is no longer financially viable.[250] The New York Commission asserts that the appropriate rate is a going-forward cost standard. It maintains that generators seeking to cease operations but directed to continue them for reliability reasons would be adequately compensated under a going-forward cost standard.[251]

2. Commission Determination

164. The Indicated NYTOs' request for clarification if NYISO selects an exclusively mandatory RMR regime is moot because NYISO has chosen a voluntary regime.

165. We deny the New York Commission's request for rehearing regarding compensation. As noted herein, RMR generators will be paid under an APR, i.e., going-forward costs, plus additional incentives for performance. As an alternative to an APR, NYISO proposes to allow a generator to submit an owner-developed cost-based rate up to its full cost-of-service.[252] We disagree with the New York Commission's position that a full cost-of-service rate should not be permitted because it is excessive or unjust and

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[248] Indicated NYTOs Request for Clarification at 2-3.

[249] New York Commission Request for Rehearing at 4, 6, 17-18.

[250] *Id.* at 18.

[251] *Id.* at 19.

[252] NYISO Transmittal Letter at 8, 32.

unreasonable. Should a generator propose an owner-developed rate that seeks full cost-of-service compensation, a generator would need to fully support such a request as just and reasonable under section 205 of the FPA.

The Commission orders:

(A) NYISO's compliance filing is hereby accepted in part, subject to condition, effective October 20, 2015, as requested, and rejected in part, as discussed in the body of this order.

(B) 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.

(C) The requests for rehearing and clarification of the RMR Order are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.