

170 FERC ¶ 61,121  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

New York Independent System Operator, Inc.

Docket No. ER16-1404-000

ORDER ON COMPLIANCE

(Issued February 20, 2020)

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1. On October 9, 2015, the Commission granted in part, and denied in part, the complaint filed by the New York Public Service Commission (New York Commission), New York Power Authority (NYPA), and New York State Energy Research and Development Authority (NYSERDA) (collectively, Complainants) against the New York Independent System Operator, Inc. (NYISO).<sup>1</sup> In the Complaint Order, the Commission required NYISO to make a compliance filing to revise the rules governing buyer-side market power mitigation in NYISO’s Market Administration and Control Area Services Tariff (Services Tariff) to exempt a narrowly defined set of renewable and self-supply resources. This order addresses NYISO’s April 13, 2016 compliance filing in response to the Complaint Order. As discussed below, we accept in part, subject to condition, and reject in part NYISO’s compliance filing, with the conditionally accepted Services Tariff revisions to be effective for the Class Year 2019. We direct NYISO to file, within 30 days of the date of this order, a further compliance filing with the proposed revisions to its Services Tariff discussed below.

## **I. Background**

2. NYISO’s buyer-side market power mitigation rules provide that, unless exempt from mitigation, new capacity resources must enter the New York City or G-J Locality<sup>2</sup> Installed Capacity (ICAP)<sup>3</sup> markets (mitigated capacity zones) at a price at or above the applicable offer floor until their capacity clears 12 monthly auctions.<sup>4</sup> NYISO will exempt a new entrant from the offer floor if the new entrant passes either Part A or Part B of the mitigation exemption test.<sup>5</sup> Under Part A, NYISO will exempt a new entrant from

<sup>1</sup> *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 2 (2015) (Complaint Order), *reh’g denied*, 154 FERC ¶ 61,088 (2016) (Rehearing Order).

<sup>2</sup> The G-J Locality consists of Load Zones G, H, I, and J, which are zones “within which a minimum level of Installed Capacity must be maintained.” NYISO, Services Tariff, § 2.12 (8.0.0) (defining “Locality”).

<sup>3</sup> The Services Tariff defines “Installed Capacity” as “External or Internal Capacity, in increments of 100 kW, that is made available pursuant to Tariff requirements and ISO Procedures.” NYISO, Services Tariff, § 2.9 (27.0.0).

<sup>4</sup> *Id.* § 23.4.5.7 (26.0.0).

the offer floor if the forecast of capacity prices in the first year of a new entrant's operation is higher than the default offer floor, which is 75% of the net cost of new entry (CONE) of the hypothetical unit modeled in NYISO's most recent demand curve reset. Under Part B, NYISO will exempt a new entrant from the offer floor if the forecast of capacity prices in the first three years of a new entrant's operation is higher than the unit-specific net CONE of the new entrant.

3. The Complainants alleged that NYISO's buyer-side market power mitigation rules are unjust, unreasonable, or unduly discriminatory or preferential because: (1) they are imposed in an overbroad manner on all new entrants in the mitigated capacity zone markets, regardless of whether the new entrant has the intention, incentive, and ability to suppress prices below a competitive level in those markets; and (2) the mitigation exemption test is fundamentally flawed and results in over-mitigation.<sup>6</sup> In the Complaint Order, the Commission granted in part the complaint and found NYISO's Services Tariff to be unjust, unreasonable, or unduly discriminatory or preferential insofar as the buyer-side market power mitigation rules therein applied to certain narrowly defined renewable and self-supply resources that have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.<sup>7</sup> The Commission required NYISO to make a compliance filing to revise its buyer-side market power mitigation rules to exempt these resources.<sup>8</sup>

4. With regard to the renewable resources exemption, the Commission found that applying NYISO's buyer-side market power mitigation rules to certain renewable resources up to a megawatt (MW) cap is unjust, unreasonable, or unduly discriminatory or preferential because such resources, narrowly defined, have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices. The Commission explained that intermittent renewable resources<sup>9</sup> with low capacity factors and high development costs, including many wind and solar resources, narrowly defined, provide their developer with limited or no incentive and ability to exercise buyer-side market power.<sup>10</sup> In order to ensure that the renewable resources exemption is

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<sup>5</sup> *Id.* § 23.4.5.7.2 (26.0.0).

<sup>6</sup> Complaint Order, 153 FERC ¶ 61,022 at P 11 (citing Complaint at 2, 5, 13).

<sup>7</sup> *Id.* PP 2, 36.

<sup>8</sup> *Id.* P 2.

<sup>9</sup> The Commission defined "intermittent renewable resources" for purposes of the renewable resources exemption to mean renewable resources that cannot be stored by the facility owner or operator and that have variability beyond the control of the facility owner or operator. *Id.* P 47 n.116 (citations omitted).

limited to only renewable resources with limited or no incentive and ability to exercise buyer-side market power, the Commission required NYISO to define the exemption to limit the type and amount of renewable resources that may qualify.<sup>11</sup> The Commission stated, however, that the specifics of the renewable resources exemption are best worked out through the stakeholder process.<sup>12</sup>

5. As for the self-supply exemption, the Commission found that certain self-supply resources, narrowly defined, have limited or no incentive and ability to exercise buyer-side market power. The Commission reasoned that, if a load serving entity, such as a municipality, cooperative, or single customer entity, self-supplies the majority of its needed capacity, the amount of capacity it procures from the ICAP markets will be relatively small. Therefore, the Commission explained, uneconomic entry would reduce the cost of procuring this portion by less than the cost of financing the uneconomic entry in the first place.<sup>13</sup> The Commission required NYISO to exempt from its buyer-side market power mitigation rules those load serving entities whose ICAP portfolios are consistent with reasonably anticipated levels of their future ICAP obligations, as measured by use of appropriate net-short and net-long thresholds.<sup>14</sup> The Commission also directed NYISO to consider: the impacts of state decisions to subsidize resources that are owned or contracted for by a self-supplied load serving entity; whether to bar from the self-supply exemption projects that have irregular or anomalous cost or revenue advantages that do not reflect arms-length transactions or that are not in the ordinary course of the self-supply load serving entity's business; and whether to exclude from the self-supply exemption load serving entities that have arrangements for payments or subsidies specifically tied to the load serving entity clearing its project in NYISO's ICAP market or to the construction of the project.<sup>15</sup> The Commission allowed NYISO flexibility to develop rules and parameters that recognize the unique characteristics of NYISO's capacity market and that address concerns raised by commenters regarding the structure of the self-supply exemption.<sup>16</sup>

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<sup>10</sup> *Id.* P 47.

<sup>11</sup> *Id.* PP 49-50.

<sup>12</sup> *Id.* P 50.

<sup>13</sup> *Id.* P 61.

<sup>14</sup> *Id.* P 62.

<sup>15</sup> *Id.* P 63.

<sup>16</sup> *Id.* P 65.

## **II. NYISO's Compliance Filing**

6. On April 13, 2016, in compliance with the Complaint Order, NYISO filed proposed revisions to its Services Tariff to implement renewable resources and self-supply exemptions to its buyer-side market power mitigation rules. NYISO's proposed Services Tariff revisions include rules governing eligibility for both exemptions, rules addressing the revocation of each exemption, a MW cap on the amount of ICAP eligible for the renewable resources exemption in a given Class Year, net-short and net-long thresholds for the self-supply exemption, certification and acknowledgement requirements for the self-supply exemption, and limits on requesting multiple exemptions in the same Class Year.<sup>17</sup> NYISO states that it engaged in extensive stakeholder discussions and sought input from its Market Monitoring Unit (MMU) in developing the proposed Services Tariff revisions.<sup>18</sup> NYISO requests an effective date of October 9, 2015, the date on which the Commission issued the Complaint Order.<sup>19</sup> The details of NYISO's proposed Services Tariff revisions are discussed further below.

## **III. Notice of Filing and Responsive Pleadings**

7. Notice of NYISO's compliance filing was published in the *Federal Register*, 81 Fed. Reg. 23,290–91 (2016), with interventions and protests due on or before May 4, 2016.<sup>20</sup>

8. Independent Power Producers of New York, Inc. (IPPNY); PSEG Companies;<sup>21</sup> New York Association of Public Power (NYAPP); Electric Power Supply Association

<sup>17</sup> NYISO conducts its interconnection process through Class Years, by which a new generator elects to join a Class Year and provides NYISO the required information, including any application for an exemption to the buyer-side market power mitigation rules. See NYISO, Open Access Transmission Tariff (OATT), Attach. X, § 30.1 (9.0.0) (defining Class Year); NYISO, OATT, Attachment S, § 25.5.9 (11.0.0) (explaining Class Year start date and schedule); NYISO, Services Tariff, § 23.4.5.7.9.1 (26.0.0) (regarding requesting a competitive entry exemption); Proposed Services Tariff §§ 23.4.5.7.13.1, 23.4.5.7.14.1.1(a) (regarding requesting a renewable resources or self-supply exemption).

<sup>18</sup> NYISO April 13, 2016 Transmittal Letter at 40 (NYISO Transmittal Letter).

<sup>19</sup> *Id.* at 41.

<sup>20</sup> Subsequently, the comment period was extended to May 31, 2016. *N.Y. Indep. Sys. Operator, Inc.*, Notice of Extension of Time, Docket No. ER16-1404-000 (Apr. 22, 2016).

<sup>21</sup> PSEG Companies consist of PSEG Power LLC, PSEG Energy Resources & Trade LLC, and PSEG Power New York LLC.

(EPSA); NRG Companies;<sup>22</sup> American Public Power Association (APPA); Exelon Corporation; Indicated TOs;<sup>23</sup> Entergy Nuclear Power Marketing, LLC (Entergy); and TDI USA Holdings Corp. (TDI) filed timely motions to intervene. MMU, the New York State Department of State Utility Intervention Unit (UIU), the New York Commission, NYSERDA, and NYPA filed out-of-time motions to intervene.

9. IPPNY and EPSA (jointly, IPPNY/EPSA); the New York Commission, NYPA, and NYSERDA (collectively, State Entities); NYAPP; and Entergy filed protests. TDI filed a request for clarification and limited protest. Indicated TOs, APPA, MMU, and UIU filed comments.

10. NYISO, State Entities, Entergy, and IPPNY filed answers to the comments and protests.

11. On July 19, 2019, NYISO filed a motion requesting Commission action on the instant filing, a notice of its implementation plans, and a conditional request for tariff waivers. NYISO explains that it anticipates receiving applications for the renewable resources exemption as part of the Class Year 2019.<sup>24</sup> Absent Commission action by August 9, 2019, NYISO states that it plans to begin administering the renewable resources exemption as filed on compliance.<sup>25</sup> NYISO explains that it estimates being required to issue buyer-side market power mitigation determinations in May 2020 and that Commission action 30 days in advance of that date would be sufficient to allow NYISO to account for any new Commission directives, depending on their nature.<sup>26</sup> Otherwise, NYISO states that it will apply the renewable resources exemption as filed.<sup>27</sup> To the extent the Commission issues an order modifying the proposed renewable resources exemption after NYISO issues buyer-side market power mitigation determinations for the Class Year 2019, NYISO seeks waiver to allow its determinations to remain in effect.<sup>28</sup> NYISO states that it does not anticipate any applications for a self-

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<sup>22</sup> NRG Companies consist of NRG Power Marketing LLC and GenOn Energy Management, LLC.

<sup>23</sup> Indicated TOs consist of Consolidated Edison Company of New York, Inc.; Orange and Rockland Utilities, Inc.; New York State Electric and Gas Corporation; Rochester Gas and Electric Corporation; and Central Hudson Gas and Electric Corporation.

<sup>24</sup> NYISO July 19, 2019 Motion at 1-2, 6.

<sup>25</sup> *Id.* at 2, 7.

<sup>26</sup> *Id.* at 2 nn.7, 8.

<sup>27</sup> *Id.* at 9.

supply exemption as part of the Class Year 2019, so the same considerations do not apply for that exemption.<sup>29</sup>

12. New York Transmission Owners,<sup>30</sup> IPPNY/EP SA, and State Entities filed answers to NYISO's motion. New York Transmission Owners and State Entities support NYISO's motion and proposed implementation plan.<sup>31</sup> IPPNY/EP SA support NYISO's request for the Commission to act on the compliance filing in time for NYISO to issue buyer-side market power mitigation determinations for the Class Year 2019.<sup>32</sup> However, IPPNY/EP SA repeat their protest to the MW cap on the renewable resources exemption, and discuss circumstances since their original protest.<sup>33</sup> IPPNY/EP SA disagree with NYISO's purported authority to implement the renewable resources exemption as filed absent Commission action before NYISO must issue the buyer-side market power mitigation determinations for the Class Year 2019<sup>34</sup> and dispute NYISO's satisfaction of the Commission's waiver standards under that scenario.<sup>35</sup>

#### **IV. Procedural Matters**

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>36</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>28</sup> *Id.* at 3, 12-14.

<sup>29</sup> *Id.* at 3 n.8.

<sup>30</sup> New York Transmission Owners consist of Central Hudson Gas and Electric Corporation; Consolidated Edison Company of New York, Inc.; Niagara Mohawk Power Corporation; New York Power Authority; New York State Electric and Gas Corporation; Orange and Rockland Utilities, Inc.; Power Supply Long Island; and Rochester Gas and Electric Corporation.

<sup>31</sup> New York Transmission Owners August 5, 2019 Answer at 3; State Entities August 6, 2019 Answer at 4-6.

<sup>32</sup> IPPNY/EP SA August 5, 2019 Answer at 6.

<sup>33</sup> *Id.* at 7-14.

<sup>34</sup> *Id.* at 15-17.

<sup>35</sup> *Id.* at 18-21.

<sup>36</sup> 18 C.F.R. § 385.214 (2019).



14. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>37</sup> we will grant MMU's, UIU's, the New York Commission's, NYSEDA's, and NYPA'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.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>38</sup> prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept NYISO's, State Entities', Entergy's, and IPPNY's answers because they have provided information that assisted us in our decision-making process.

## **V. Substantive Matters**

16. We accept in part, subject to condition, and reject in part NYISO's proposed compliance filing to implement renewable resources and self-supply exemptions, with the conditionally accepted Services Tariff revisions to be effective for the Class Year 2019.<sup>39</sup> We direct NYISO to submit a further compliance filing within 30 days of the date of this order, as discussed below

<sup>37</sup> *Id.* § 385.214(d).

<sup>38</sup> 18 C.F.R. § 385.213(a)(2).

<sup>39</sup> This order addresses buyer-side market power mitigation for renewable resources and self-supply resources in a different way than the Commission recently addressed such resources in PJM Interconnection, L.L.C. (PJM). *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (December 2019 Order). This order addresses NYISO's compliance with the October 2015 Complaint Order, which predates by over four years the Commission's recent orders addressing buyer-side market power mitigation in the PJM capacity market. Our task here is to assess compliance with the Commission's 2015 Complaint Order. Moreover, the Commission has explained that "regional markets are not required to have the same rules. Our determination about what rules may be just and reasonable for a particular market depends on the relevant facts." December 2019 Order, 169 FERC ¶ 61,239 at P 204 n.431; *see also* Complaint Order, 153 FERC ¶ 61,022 at P 38 (stating that "[w]hether the Commission has found certain exemptions from buyer-side market power mitigation in . . . any other region to be just and reasonable is not dispositive of whether the Commission should find NYISO's buyer-side market power mitigation rules to be unjust and unreasonable absent similar exemptions"); *Consol. Edison Co. of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at P 47 (Competitive Entry Exemption Order) (citations omitted) ("As the Commission has stated many times before, we allow for each region to develop rules to address the differing concerns of the regions."), *order on clarification, reh'g, & compliance*, 152 FERC ¶ 61,110 (2015) (Competitive Entry Exemption Rehearing Order).

17. To provide greater certainty for Class Year 2019 participants, we conditionally accept NYISO's Services Tariff revisions to implement the renewable resources and self-supply exemptions effective for the Class Year 2019. NYISO should include in the compliance filing directed herein any tariff revisions necessary to make the renewable resources and self-supply exemptions effective for the Class Year 2019. To the extent NYISO anticipates having to delay its issuance of the Class Year 2019 buyer-side market power mitigation determinations as a result of this order, NYISO should also provide an updated schedule for issuance of such determinations.

**A. Renewable Resources Exemption**

18. We accept in part, subject to condition, and reject in part NYISO's proposed renewable resources exemption, as discussed below. In particular, we accept, subject to condition, NYISO's eligibility criteria, including eligibility for requests for additional capacity resource interconnection service MW (Additional Capacity Resource Interconnection Service (CRIS)<sup>40</sup> MW);<sup>41</sup> reject NYISO's proposed MW cap; and accept, subject to condition, NYISO's proposed revocation provisions. We accept all aspects of NYISO's proposed renewable resources exemption not otherwise discussed below as in compliance with the Complaint Order.

**1. Eligibility**

**a. Compliance Filing**

19. NYISO proposes that a resource will be eligible for the renewable resources exemption if it satisfies one of two conditions: (1) the resource is an Exempt Renewable Technology; or (2) NYISO determines through an applicant-specific review that a generator not solely powered by an Exempt Renewable Technology has high development costs, and a low capacity factor such that it would have limited or no incentive and ability to artificially suppress ICAP market prices.<sup>42</sup>

<sup>40</sup> The OATT defines "Capacity Resource Interconnection Service" as: "the service provided by [NYISO] to Developers that satisfy the NYISO Deliverability Interconnection Standard or that are otherwise eligible to receive CRIS in accordance with Attachment S to the [NYISO] OATT; such service being one of the eligibility requirements for participation as an ISO Installed Capacity Supplier." NYISO, OATT, Attachment X, § 30.1 (9.0.0).

<sup>41</sup> The Services Tariff defines "Additional CRIS MW" as: "the MW of Capacity for which CRIS was requested for an Examined Facility pursuant to the provisions in [the ISO OATT] . . . , including either: (i) all, or a portion, of the MW of Capacity of that Examined Facility for which CRIS had not been obtained in prior Class Years . . . ; and/or (ii) all, or a portion, of an increase in the Capacity of that Examined Facility. . . ." NYISO, Services Tariff, § 23.2.1 (29.0.0).

20. NYISO proposes to define Exempt Renewable Technology as “an Intermittent Power Resource solely powered by wind or solar energy.”<sup>43</sup> However, NYISO also proposes a process for periodically reviewing the definition of Exempt Renewable Technology that is tied to its periodic ICAP market demand curve reset filing.<sup>44</sup> NYISO contends that linking this review to the ICAP demand curve reset filing is reasonable because the definition of Exempt Renewable Technology should be revisited at regular intervals, the ICAP demand curves will be used to analyze whether a technology could be used to artificially suppress ICAP market prices, and the periodicity of the ICAP demand curve reset filing is predictable and recognizes the pace of technological change.<sup>45</sup> Specifically, NYISO proposes to review “technologies that . . . are technically feasible” in NYISO’s markets “that could qualify as either Intermittent Power Resources or Limited Control Run-of-River Hydro Resources.”<sup>46</sup> To determine whether a technology has high development costs and a low capacity factor, and, therefore, should be an Exempt Renewable Technology, NYISO will consider: (1) the costs of new entry and operation; (2) the revenues from the sale of capacity, energy, and ancillary services; and (3) the cost savings to load due to a reduction in ICAP market prices from the new entry.<sup>47</sup> NYISO asserts that the requirement that the technology be “technically feasible” is needed to ensure NYISO can confidently estimate the cost of entry for the technology and predict the costs, revenues, and capacity factor of projects having that technology. NYISO explains that projects still in the research and development stage likely would not have reasonably predictable project designs, costs, capacity factors, and energy and ancillary service revenues; therefore, such projects would not be included in the definition of Exempt Renewable Technology.<sup>48</sup>

21. For those renewable resources exemption applicants that are not powered solely by an Exempt Renewable Technology, but that meet the definition of Intermittent Power Resource<sup>49</sup> or Limited Control Run-of-River Hydro Resource,<sup>50</sup> NYISO proposes to

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<sup>42</sup> Proposed Services Tariff § 23.4.5.7.13.1.1(a).

<sup>43</sup> *Id.* § 23.2.1.

<sup>44</sup> NYISO submits its ICAP demand curve reset filing every four years. *See N.Y. Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,039, at P 15 (2016).

<sup>45</sup> NYISO Transmittal Letter at 6-7.

<sup>46</sup> Proposed Services Tariff § 23.4.5.7.13.2.1.

<sup>47</sup> *Id.* § 23.4.5.7.13.2.1(b)-2.2.

<sup>48</sup> NYISO Transmittal Letter at 8.

<sup>49</sup> The Services Tariff defines “Intermittent Power Resource” as: “A device for the

perform an applicant-specific review to determine whether the applicant qualifies for a renewable resources exemption. NYISO contends that its proposal is reasonable because the Services Tariff already recognizes that these resources have unique operating characteristics that reduce or eliminate control over their output.<sup>51</sup> Moreover, NYISO proposes to allow technologies that NYISO “reasonably expects” to be included in either definition when the renewable resources exemption applicant is qualified as an ICAP supplier to be eligible to apply for an exemption, even though the applicant does not meet the Services Tariff definitions at the time it submits an application.<sup>52</sup> If the new technology is not within the Services Tariff definitions at the time the applicant is qualified as an ICAP supplier, NYISO would revoke the exemption at that time.<sup>53</sup> As part of its applicant-specific review, NYISO will consider the same factors it will consider when reviewing Exempt Renewable Technologies to determine which applicants have high development costs and low capacity factors “such that there would be limited or no incentive and ability to develop” the projects to artificially suppress ICAP market prices.<sup>54</sup>

22. NYISO states that, while some stakeholders asked NYISO to more specifically define “high” development costs and “low” capacity factors, NYISO does not believe further details are necessary or appropriate because of the wide variability among project types and potential market conditions at the time NYISO conducts the analysis.<sup>55</sup>

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production of electricity that is characterized by an energy source that: (1) is renewable; (2) cannot be stored by the facility owner or operator; and (3) has variability that is beyond the control of the facility owner or operator. In New York, resources that depend upon wind, solar energy or landfill gas for their fuel have been classified as Intermittent Power Resources.” NYISO, Services Tariff, § 2.9 (27.0.0).

<sup>50</sup> The Services Tariff defines “Limited Control Run-of-River Hydro Resource” as: “A Generator above 1 MW in size that has demonstrated to the satisfaction of the ISO that its Energy production depends directly on river flows over which it has limited control and that such dependence precludes accurate prediction of the facility’s real-time output.” *Id.* § 2.12 (8.0.0).

<sup>51</sup> NYISO Transmittal Letter at 4-5.

<sup>52</sup> Proposed Services Tariff § 23.4.5.7.13.1.1(a)(i).

<sup>53</sup> *Id.* § 23.4.5.7.13.3.1; NYISO Transmittal Letter at 5.

<sup>54</sup> Proposed Services Tariff § 23.4.5.7.13.1.1(a)(ii)(B).

<sup>55</sup> NYISO Transmittal Letter at 9.

**b. Protests and Comments**

23. Indicated TOs support NYISO's proposed eligibility requirements for the renewable resources exemption. According to Indicated TOs, NYISO's proposal appropriately uses existing Services Tariff definitions to define eligibility. Indicated TOs assert that NYISO's proposal to exempt applicants powered solely by wind or solar energy complies with the Commission's directives. They point to NYISO's analysis attached to its filing<sup>56</sup> to support the assertion that these resources lack the incentive and ability to artificially suppress ICAP market prices. In addition, Indicated TOs argue that NYISO's proposal to consider changes to the definition of Intermittent Power Resource through the stakeholder process will allow for the addition of new types of resources that should be eligible for a renewable resources exemption and recognizes that market and technological conditions associated with renewable resources may change. Indicated TOs assert that it is reasonable for NYISO to conduct its periodic review of Exempt Renewable Technologies during the ICAP demand curve reset process because it will allow NYISO to consider the technologies in the context of the entire ICAP market structure.<sup>57</sup>

24. State Entities and UIU protest limiting eligibility for the renewable resources exemption to generators powered "solely" by an Exempt Renewable Technology.<sup>58</sup> State Entities and UIU argue that conditioning eligibility for the renewable resources exemption on being powered "solely" by a defined resource will create a disincentive for developers to couple electric storage resources with renewable resources and impede state policy objectives that support such resource development regardless of the impact of electric storage resources on a facility's intermittency.<sup>59</sup> Further, State Entities argue that NYISO should not assume that an electric storage resource would transform an intermittent resource into a non-intermittent resource, or that a minor increase in capacity factor would provide the developer with the incentive and ability to exercise buyer-side market power.<sup>60</sup> Irrespective of whether a renewable resource is coupled with a non-exempt technology, such as storage, State Entities and UIU ask the Commission to require NYISO to establish a maximum capacity factor to distinguish which renewable resources would be eligible for the renewable resources exemption.<sup>61</sup>

<sup>56</sup> NYISO April 13, 2016 Compliance Filing, Attachment IV, Wind and Solar Analysis.

<sup>57</sup> Indicated TOs May 31, 2016 Comments at 2-3.

<sup>58</sup> State Entities May 31, 2016 Protest at 19-21; UIU June 6, 2016 Comments at 6-7.

<sup>59</sup> State Entities May 31, 2016 Protest at 19; UIU June 6, 2016 Comments at 6.

<sup>60</sup> State Entities May 31, 2016 Protest at 20.

25. UIU also contends that NYISO's proposed eligibility rules for the renewable resources exemption are too vague because they include a process for reviewing future candidate intermittent renewable technologies based on factors developed from national estimates that do not accurately account for the higher costs in the mitigated capacity zones. As a result, UIU alleges that NYISO's proposal affords NYISO substantial discretion that will hinder market growth by introducing uncertainty for future developers. UIU requests that the Commission direct NYISO to revise its proposal to include clear threshold criteria, such as detailed development costs, and energy and capacity factors.<sup>62</sup>

26. Entergy and IPPNY/EPSC contend that the resource types deemed to be Exempt Renewable Technologies should sunset at the end of each ICAP demand curve reset period, and NYISO should review and propose which technologies meet the eligibility criteria as part of an FPA section 205 filing with the Commission during each ICAP demand curve reset process.<sup>63</sup> Entergy argues that, because of technological advances and reduced development costs, wind and solar may not meet the high development costs criterion for obtaining an exemption as early as the next reset period. Moreover, Entergy argues that having Exempt Renewable Technologies sunset would allow NYISO's new list of Exempt Renewable Technologies to be in effect before the conclusion of the affected Class Year.<sup>64</sup>

**c. Answers**

27. IPPNY asserts that the Commission should reject State Entities' argument that renewable resources coupled with electric storage resources should be eligible for the renewable resources exemption. According to IPPNY, the purpose of NYISO's proposal is to limit eligibility for the renewable resources exemption to intermittent resources. IPPNY argues that, contrary to State Entities' argument, the defining characteristic of an intermittent resource is not its capacity factor alone, but rather that it cannot control its output. IPPNY contends that coupling a renewable resource with an electric storage resource would allow the resource to control its output and sell its energy during hours when energy prices are highest. However, if the Commission rejects NYISO's proposal to limit eligibility for the renewable resources exemption to resources powered solely by a renewable resource, then IPPNY asks that the Commission order NYISO to analyze on

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<sup>61</sup> State Entities May 31, 2016 Protest at 20-21; UIU June 6, 2016 Comments at 6-7.

<sup>62</sup> UIU June 6, 2016 Comments at 5-6.

<sup>63</sup> Entergy May 31, 2016 Protest at 11; IPPNY/EPSC May 31, 2016 Protest at 2 n.8.

<sup>64</sup> Entergy May 31, 2016 Protest at 10-11.

a case-by-case basis whether renewable resources coupled with electric storage resources can profitably be used to artificially suppress ICAP market prices, using a process similar to what NYISO proposes for evaluating renewable resources exemption applicants that are not solely powered by an Exempt Renewable Technology.<sup>65</sup>

**d. Commission Determination**

28. We accept NYISO's proposed eligibility criteria and process for the renewable resources exemption. In the Complaint Order, the Commission found that a capped amount of purely intermittent renewable resources has limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.<sup>66</sup> We find that NYISO's proposal is consistent with the Commission's directives because it appropriately limits eligibility for the renewable resources exemption to purely intermittent renewable resources with low capacity factors and high development costs. This is not to suggest that the renewable resources exemption cannot suppress prices but, under these facts, when combined with the MW cap discussed below,<sup>67</sup> those price suppressive effects should be minimized. Further, we find that NYISO's proposal to subject renewable resources exemption applicants not powered solely by an Exempt Renewable Technology to an applicant-specific review, based on the criteria set forth in NYISO's proposed Services Tariff, is just and reasonable and complies with the Commission's directives.<sup>68</sup>

29. We are unpersuaded by State Entities' and UIU's request that the Commission require NYISO to extend eligibility for the renewable resources exemption to renewable resources coupled with storage. The Commission emphasized in the Complaint Order that the renewable resources exemption should be "narrowly defined" and further agreed with NYISO that the renewable resources exemption should be limited to renewable resources that are "*purely* intermittent."<sup>69</sup> In this context, renewable resources coupled with storage are not purely intermittent. For the same reason, coupling a generator powered by an Exempt Renewable Technology with any resource that is not purely intermittent is inconsistent with the directives in the Complaint Order. We therefore are similarly unpersuaded by State Entities' and UIU's request to require NYISO to revise its proposal to establish a maximum capacity factor, or other threshold criteria, that would

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<sup>65</sup> IPPNY June 15, 2016 Answer at 12-13.

<sup>66</sup> Complaint Order, 153 FERC ¶ 61,022 at P 47.

<sup>67</sup> See *infra* Section V.A.2.d.

<sup>68</sup> Proposed Services Tariff § 23.4.5.7.13.1.1(a)(ii)(B).

<sup>69</sup> Complaint Order, 153 FERC ¶ 61,022 at PP 47, 51 (emphasis added).

distinguish intermittent renewable resources from non-intermittent renewable resources eligible for the renewable resources exemption.

30. We further reject UIU's request to require NYISO to revise its proposed process for reviewing future candidate intermittent renewable technologies that may become Exempt Renewable Technologies to include more specific threshold criteria, such as detailed development costs, and energy and capacity factors. We find that NYISO provides an adequate level of clarity in its proposal and the criteria it will consider sufficiently addresses the Commission's concerns in the Complaint Order. NYISO proposes to consider: the costs of new entry and operation; the revenues from the sale of capacity, energy, and ancillary services; and the cost savings to load due to a reduction in ICAP market prices from the new entry.<sup>70</sup> We are satisfied that NYISO's proposal to evaluate candidate intermittent renewable technologies using these criteria will enable it to determine which technologies have high development costs and low capacity factors, indicating that the developers have limited or no incentive and ability to develop that technology to artificially suppress ICAP market prices. We disagree with UIU that NYISO's proposal affords NYISO inappropriate discretion.

31. We also reject Entergy's and IPPNY/EPSC's request that the resource types deemed to be Exempt Renewable Technologies sunset at the end of each ICAP demand curve reset period. We find that NYISO's proposed process for reevaluating the definition of Exempt Renewable Technology strikes a reasonable balance between ensuring consistency in the near-term and maintaining flexibility for NYISO to consider future types of technologies as necessary. Furthermore, we agree with NYISO that a more frequent evaluation period as proposed by Entergy and IPPNY/EPSC could create uncertainty and unnecessary work, considering the rate at which renewable energy technologies can be expected to advance or their cost of entry vary.<sup>71</sup> NYISO must file its definition of Exempt Renewable Technology with the Commission if it seeks to change that definition.<sup>72</sup> Interested parties will have the opportunity to comment on NYISO's filing at that time.

## **2. Megawatt Cap**

### **a. Compliance Filing**

32. NYISO proposes a 1000 MW cap on renewable resources that can qualify for the renewable resources exemption in a single Class Year.<sup>73</sup> NYISO states that it conducted

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<sup>70</sup> Proposed Services Tariff § 23.4.5.7.13.2.1(b).

<sup>71</sup> NYISO Transmittal Letter at 7.

<sup>72</sup> Proposed Services Tariff § 23.4.5.7.13.2.4.



an analysis and determined that the maximum amount of MW that should qualify for a renewable resources exemption in any one Class Year is 1000 MW of ICAP. NYISO contends that its analysis demonstrated that allowing 1000 MW of ICAP to be eligible for the renewable resources exemption in a single Class Year is reasonable because it likely would not result in artificial suppression of ICAP market prices in the mitigated capacity zones. NYISO explains that the purpose of its proposed MW cap is to “serve as a safeguard against unanticipated events and conditions,”<sup>74</sup> but must be “high enough to avoid needlessly impeding the entry of renewable resources.”<sup>75</sup> NYISO argues that its proposed 1000 MW cap strikes a proper balance between these objectives.

33. NYISO explains that, to ensure the MW cap was not too low, it began its analysis by reviewing its then-existing interconnection queue to determine how many MWs of intermittent renewable projects NYISO could reasonably expect to be developed in the near future. NYISO contends that its analysis indicated that it was unlikely that more than 1000 MW of ICAP of renewable resources would enter the mitigated capacity zones in a given Class Year. To ensure the MW cap was not too high, NYISO states that it also examined levels of new entry over the last 10 years (2005-2014) and found that, on average, there have been 680 MW per year of total new entry across the entire New York Control Area (NYCA), and a range of 17 MW in 2014 to 1458 MW in 2006. Further, NYISO explains that its analysis showed that there was an average entry of 276 MW per year in New York City (Load Zone J), which ranged from no entry—for six years—to 1216 MW in 2006. NYISO contends it is reasonable to anticipate that the future entry of intermittent renewable resources in the mitigated capacity zones would not exceed past entry levels for all resource types across the entire NYCA. Therefore, NYISO concludes that setting the MW cap below 1000 MW of ICAP may needlessly limit entry.<sup>76</sup>

34. NYISO states that it considered several alternative proposals from its stakeholders but ultimately did not adopt them. Some stakeholders suggested that NYISO tie the MW cap to load growth, but NYISO disagrees with this approach because NYCA load growth can vary over time and the development of renewable resources may be unrelated to load growth.<sup>77</sup> NYISO also declined a suggestion to develop the MW cap using a backward-looking analysis based on past entry of wind and solar resources in the mitigated capacity zones because no new wholesale Intermittent Power Resources or Limited Control Run-of-River Hydro Resources have entered the mitigated capacity zones from 2005-2015.<sup>78</sup>

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<sup>73</sup> *Id.* § 23.4.5.7.13.1.1(b).

<sup>74</sup> NYISO Transmittal Letter at 11.

<sup>75</sup> *Id.* at 10-11.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 11.

35. Similarly, NYISO states that it also declined to adopt stakeholders' suggestion that the MW cap be measured in Unforced Capacity (UCAP)<sup>79</sup> rather than in ICAP. NYISO argues that the MW cap should be in terms of ICAP because measuring in ICAP:

(1) provides reliable and transparent information; (2) is consistent with the other exemptions to the buyer-side market power mitigation rules; (3) is a stable quantity that does not vary in its meaning either seasonally or year-over-year; (4) is less complicated and administratively burdensome than a UCAP-based MW cap; and (5) avoids the uncertainty of NYISO having to determine whether the MW cap is exceeded each time resources' derating factors are updated. In addition, NYISO contends that measuring the MW cap in UCAP would introduce additional uncertainty for resources seeking, and having already been granted, a renewable resources exemption.<sup>80</sup>

36. Under NYISO's proposal, if more than 1000 MW of ICAP of renewable resources would qualify for a renewable resources exemption in a given Class Year, then the exemption for each eligible renewable resources applicant would be reduced *pro rata* up to the 1000 MW cap.<sup>81</sup> In addition, NYISO states that CRIS MW associated with generators that are also eligible for a self-supply exemption or not subject to an offer floor because the resource passes the mitigation exemption test would not count toward the 1000 MW cap. In support, NYISO states that the MW cap is not intended to limit the impact of resources that are able to qualify under those other exemptions.<sup>82</sup>

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<sup>78</sup> *Id.* at 12.

<sup>79</sup> ICAP represents the installed capacity or nameplate of a facility, while UCAP is the amount of ICAP that NYISO has qualified to participate in the ICAP market, which takes into account forced outages and forced deratings. The Services Tariff defines "Unforced Capacity" as the "measure by which Installed Capacity Suppliers will be rated, in accordance with formulae set forth in the ISO Procedures, to quantify the extent of their contribution to satisfy the NYCA Installed Capacity Requirement, and which will be used to measure the portion of that NYCA Installed Capacity Requirement for which each LSE is responsible." NYISO, Services Tariff, § 2.21 (3.0.0); *see also supra* note 3 (defining "Installed Capacity").

<sup>80</sup> NYISO Transmittal Letter at 12-13.

<sup>81</sup> Proposed Services Tariff § 23.4.5.7.13.1.1(b). For example, if 1500 MW of renewable resources are eligible for the exemption for the Class Year 2015, and none of those MW are also exempt as self-supply resources or by satisfying the mitigation exemption test, NYISO will grant exemptions up to 1000 MW to each renewable resources exemption applicant based on the proportion of MW for which the applicant requested an exemption out of the 1500 MW of eligible renewable resources.

<sup>82</sup> NYISO Transmittal Letter at 13.

**b. Protests and Comments**

37. State Entities, MMU, IPPNY/EPSC, and Entergy protest NYISO's proposed MW cap, arguing it is too high and will result in significant price suppression in NYISO's ICAP markets. Based on the size of the MW cap compared to the forecasted load growth in the G-J Locality from 2016 to 2026, MMU asserts that "capacity prices will likely fall significantly and/or lead to generator retirements," many of which will require reliability must run agreements, increasing costs to consumers.<sup>83</sup> IPPNY/EPSC and Entergy argue that the proposed MW cap has no factual basis, would severely suppress ICAP market prices, and fails to comply with the Complaint Order.<sup>84</sup> They assert that NYISO should have provided a price impact analysis to support its proposed MW cap, rather than only reviewing past annual entry levels for all resources and its current interconnection queue.<sup>85</sup> According to IPPNY/EPSC, their witness determined that New York City ICAP market prices would drop by 67 percent and G-J Locality ICAP market prices would drop by 52 percent if 1000 MW of ICAP of onshore wind entered those markets each year for the next four years from the date IPPNY/EPSC submitted their protest. Further, IPPNY/EPSC's witness's analysis argued that NYCA ICAP market prices would drop by 40 percent and, if offshore wind entered instead, ICAP market prices would decline by 83 percent in New York City, 76 percent in the G-J Locality, and 58 percent in NYCA.<sup>86</sup> IPPNY/EPSC interpret the Complaint Order's directives as requiring NYISO to develop a renewable resources exemption that will: (1) limit eligibility to intermittent renewable resources having limited or no incentive to artificially suppress ICAP market prices; and (2) cap the MWs of eligible resources to protect the ICAP market from significant cost impacts.<sup>87</sup> Contrary to NYISO's description of the purpose of the MW cap as to "safeguard against unanticipated events and conditions," Entergy counters that the purpose is, instead, to serve as a "limitation on any risk of price suppression."<sup>88</sup> Rather than being a meaningful MW cap, Entergy asserts that NYISO's proposal is simply an estimate to account for the maximum amount of renewable resources that may ever seek to enter the mitigated capacity zones in a single Class Year.<sup>89</sup>

<sup>83</sup> MMU June 1, 2016 Comments at 4.

<sup>84</sup> IPPNY/EPSC May 31, 2016 Protest at 7-8; Entergy May 31, 2016 Protest at 5-7.

<sup>85</sup> IPPNY/EPSC May 31, 2016 Protest at 8; Entergy May 31, 2016 Protest at 7-8.

<sup>86</sup> IPPNY/EPSC May 31, 2016 Protest at 10-11 (citing Younger Aff. ¶¶ 25-26).

<sup>87</sup> *Id.* at 9.

<sup>88</sup> Entergy May 31, 2016 Protest at 6.

<sup>89</sup> *Id.* at 8.

38. MMU and IPPNY/EPSC contend that NYISO should consider load growth in developing the MW cap. MMU asserts that a reasonable MW cap based on UCAP that considers forecasted load growth could help limit the costs of premature generator retirements.<sup>90</sup> IPPNY/EPSC assert that NYISO's proposed MW cap would allow exempted renewable resources to far exceed load growth, producing "near-zero prices" far below CONE.<sup>91</sup> IPPNY/EPSC argue that the Commission pointed to ISO New England Inc.'s (ISO-NE) MW cap, which is tied to load growth, and argue that NYISO should have set its MW cap based on load growth and not based on the level corresponding to the amount of intermittent renewable resources it anticipates will be developed in the near future.<sup>92</sup> IPPNY/EPSC contend that the proposed 1000 MW ICAP-based cap translates to 200 MW of UCAP per Class Year (assuming all onshore wind resources); therefore, IPPNY/EPSC continue, the proposed MW cap is equivalent to more than 11 years of load growth in New York City and approximately eight years of load growth for the G-J Locality.<sup>93</sup>

39. IPPNY/EPSC and Entergy both object to NYISO's analysis used in developing the MW cap. IPPNY/EPSC assert that NYISO's use of past levels of new entry to set the proposed MW cap is inappropriate because it includes entry of all resource types across the entire NYCA, most of which occurred outside of the mitigated capacity zones. In addition, IPPNY/EPSC state that, as of the date of their protest, there is no proposed new entry of renewable resources in the mitigated capacity zones in NYISO's interconnection queue.<sup>94</sup> Entergy adds that the impact of the proposed 1000 MW cap will be significant, particularly given that it will be applied only in NYISO's mitigated capacity zones.<sup>95</sup> Entergy asserts that NYISO's proposed MW cap does not comply with the Commission's directive to consider the location of resources to determine whether eligibility for the exemption should be capped by zone or for the entire region, and whether the location of a resource is a prerequisite for eligibility. Entergy states that NYISO did not even scale the MW cap for the mitigated capacity zones.

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<sup>90</sup> MMU June 1, 2016 Comments at 4.

<sup>91</sup> IPPNY/EPSC May 31, 2016 Protest at 7-8.

<sup>92</sup> *Id.* at 8.

<sup>93</sup> *Id.* at 11. IPPNY/EPSC note that if the analysis considers a renewable resource with a higher capacity factor, such as offshore wind, the proposed MW cap would be equivalent to even longer periods of load growth.

<sup>94</sup> *Id.* at 8-9 (citing Younger Aff. ¶¶ 12-15).

<sup>95</sup> Entergy May 31, 2016 Protest at 5.

40. MMU, IPPNY/EP SA, and Entergy support a UCAP-based MW cap. MMU argues that the purpose of the MW cap is to limit the risk that renewable resources significantly impact ICAP market prices. Since the market impact of 1000 MW of ICAP of renewable resources is heavily dependent on the renewable technology selected, MMU contends that UCAP is the best reflection of the capacity value of a resource. According to MMU, the introduction of large quantities of intermittent renewable resources will raise the ICAP requirement,<sup>96</sup> while leaving the UCAP requirement relatively unaffected.<sup>97</sup> Entergy similarly adds that measuring the MW cap in ICAP could result in the total exemption in each Class Year varying greatly.<sup>98</sup>

41. IPPNY/EP SA propose an alternative MW cap set at one-half of one percent of the current minimum UCAP requirement for each mitigated capacity zone at the time the Class Year begins. IPPNY/EP SA contend that this alternative MW cap is preferable to NYISO's proposed MW cap because it takes into consideration the size of the mitigated capacity zones and any artificial price suppression is far less significant than that associated with NYISO's proposed MW cap.<sup>99</sup> Entergy supports IPPNY/EP SA's alternative MW cap proposal.<sup>100</sup>

42. State Entities argue that the MW cap should be adjusted if the Class Year process takes longer than a year. State Entities note that NYISO must perform Class Year studies consecutively after preceding studies have been completed, which they state could take an inordinate amount of time to process. State Entities assert that linking the MW cap to the Class Year study process is problematic because lengthy delays in completion of interconnection studies will impact the pace and magnitude of renewable generation deployment in New York. State Entities contend that the MW cap should be modified to compensate for such delays, such that for every month the Class Year process extends past twelve months, the 1000 MW cap is increased by 1/12th.<sup>101</sup>

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<sup>96</sup> Each year, New York State Reliability Council, L.L.C. establishes the Installed Reserve Margin (IRM) for the upcoming capability year. NYISO multiplies the IRM by the forecasted peak load for the NYCA to calculate the statewide minimum ICAP requirement for each capability year. Load serving entities must purchase a specified amount of capacity to count toward this statewide minimum.

<sup>97</sup> MMU June 1, 2016 Comments at 4.

<sup>98</sup> Entergy May 31, 2016 Protest at 9 & n.30.

<sup>99</sup> IPPNY/EP SA May 31, 2016 at 12-13.

<sup>100</sup> Entergy May 31, 2016 Protest at 9.

<sup>101</sup> State Entities May 31, 2016 Protest at 22.

**c.     Answers**

43.     NYISO contends that IPPNY/EPSC's and Entergy's claims that the proposed MW cap will decrease ICAP market prices are premised on analyses that oversimplify the effect of several critical ICAP market parameters. For example, NYISO asserts that new entry of intermittent renewable resources will raise the ICAP requirements, which would tend to offset the price suppressive effects of the entry of those resources. Therefore, NYISO argues that the scenarios that result from IPPNY/EPSC's and Entergy's analyses are not certain to occur.<sup>102</sup>

44.     IPPNY responds that, while NYISO is correct that the entry of new intermittent renewable resources will raise the ICAP requirement, the increased ICAP requirement will have little, if any, impact on the need for UCAP. IPPNY asserts that, contrary to NYISO's claim, the renewable resources exemption will result in increased supply and lower ICAP market prices, as supported by IPPNY's price suppression analysis.<sup>103</sup>

45.     State Entities argue that MMU's, IPPNY/EPSC's, and Entergy's arguments that the proposed MW cap is too high and should be reduced and measured in UCAP fail to consider the policy reasons to implement the MW cap as NYISO proposes. State Entities assert that the renewable resources exemption is needed to harmonize conflicting federal and state policies concerning the increased deployment of renewable resources.<sup>104</sup> State Entities support NYISO's proposed MW cap as striking a reasonable balance between the potential risk of ICAP market price suppression and promoting renewable resource development.<sup>105</sup> In addition, State Entities argue that MMU's assumptions related to increased generator retirements are unsupported and ignore the complexity of reliability needs and market reactions.<sup>106</sup>

46.     With regard to arguments that the MW cap should be based on UCAP, State Entities respond that basing the MW cap on ICAP is preferable because it is consistent with all other buyer-side market power mitigation exemptions and rules. State Entities

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<sup>102</sup> NYISO June 13, 2016 Answer at 4-5.

<sup>103</sup> IPPNY June 15, 2016 Answer at 15-16.

<sup>104</sup> State Entities June 15, 2016 Answer at 20-21 (quoting Commissioner Honorable's concurring statement to the Complaint Order, which acknowledges that "[s]triking the proper balance for buyer-side mitigation rules is critical" and that the renewable resources exemption "is an important step in accommodating New York's public policy goals").

<sup>105</sup> *Id.* at 25.

<sup>106</sup> *Id.* at 23-24.

argue that the fact that capacity factors vary across renewable resource technologies is not a reason to adopt a UCAP-based MW cap because UCAP fluctuates seasonally and its value is based on the derating factor of particular units and may also vary based on location. State Entities contend that the complexity associated with a UCAP-based MW cap would make it difficult to provide reliable and transparent information regarding the amount of renewable capacity eligible for an exemption.<sup>107</sup>

47. In response to arguments that the MW cap should be based on load growth, as in ISO-NE, State Entities respond that the Commission referenced the ISO-NE cap “only as an example” and directed NYISO to work with stakeholders to develop a MW cap that reflects the facts, circumstances, and policies relevant to New York.<sup>108</sup> They assert that basing the cap on load growth would be inappropriate for NYISO because New York’s load growth varies over time and might not correlate with the MW cap because renewable resources may be developed to replace existing non-renewable resources.<sup>109</sup> State Entities also object to IPPNY/EPSC’s and Entergy’s proposed alternative MW cap, claiming because it appears to lack any rational basis and seems outcome-oriented to protect the interests of existing generators.<sup>110</sup>

**d. Commission Determination**

48. NYISO’s proposed MW cap on the renewable resources exemption fails to comply with the directives in the Complaint Order and we therefore reject it. We direct NYISO to include in the further compliance filing ordered herein revisions to its Services Tariff to establish a revised MW cap that is: (1) narrowly tailored to the mitigated capacity zones, and not based on the entire NYCA; and (2) based on UCAP rather than ICAP. Moreover, as recognized by commenters in this proceeding, including MMU,<sup>111</sup> a MW cap limits the risk that the renewable resources exemption will significantly impact market prices and it is such limitation that makes this tariff revision just and reasonable. Therefore, we similarly direct NYISO to be mindful of the relationship between: (1) the size of the MW cap; and (2) the limit the MW cap imposes on the renewable resource exemption’s impact to market prices.

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<sup>107</sup> *Id.* at 27-28.

<sup>108</sup> *Id.* at 22.

<sup>109</sup> *Id.* at 26-27.

<sup>110</sup> *Id.* at 27.

<sup>111</sup> MMU June 1, 2016 Comments at 4; Entergy May 31, 2016 Protest at 6; IPPNY/EPSC May 31, 2016 Protest at 9.

49. In the Complaint Order, the Commission directed NYISO to “work with its stakeholders to develop a proposed cap on the total amount of renewable resources eligible for the exemption based on NYISO’s mitigated capacity zones.”<sup>112</sup> Rather than basing the MW cap on the mitigated capacity zones, NYISO proposes a MW cap based on historical entry of all resource types across the entire NYCA, which is inconsistent with the Complaint Order. We reject NYISO’s proposed MW cap. We reiterate that NYISO must develop a MW cap narrowly tailored to the mitigated capacity zones that recognizes that only eligible renewable resources entering the mitigated capacity zones are subject to the buyer-side market power mitigation rules, and, therefore, are eligible to apply for the renewable resources exemption.

50. Additionally, we direct NYISO to develop a MW cap based on UCAP, rather than on ICAP. NYISO proposes an ICAP-based MW cap because, among other reasons, NYISO contends that ICAP provides reliable and transparent information, is a stable quantity that does not vary in its meaning seasonally or year-over-year, and is less complicated and administratively burdensome than a UCAP-based cap. However, different types of exempt renewable resources have different UCAP values. Given that the amount of capacity that a resource can sell into the ICAP market is measured in UCAP, an exemption based on ICAP could have a different impact on ICAP market prices depending on the type of renewable resource that enters the ICAP market under the exemption. By contrast, measurement based upon UCAP represents a comparable metric for the exemption across renewable resource types in order to have more consistency with a year-to-year measure. Therefore, we find that it is more appropriate to express the MW cap in UCAP rather than ICAP in order to better reflect the renewable resources exemption’s actual effect.

51. We will not require NYISO to base its MW cap on load growth, as MMU and IPPNY/EPSC request, but do not prohibit NYISO from using load growth, or some combination of load growth and retirements, to set the MW cap. We recognize that load growth can vary significantly over time and that New York’s load growth has been near zero, on average, for the past several years.<sup>113</sup> We emphasize that the Commission’s reference in the Complaint Order to ISO-NE’s MW cap, which factors in load growth, was only intended to serve as an example.<sup>114</sup> We also will not require NYISO to adopt IPPNY/EPSC’s proposed alternative MW cap. Although IPPNY/EPSC appropriately ~~focus on the mitigated capacity zones~~, their proposal is not fully supported by the record.

<sup>112</sup> Complaint Order, 153 FERC ¶ 61,022 at P 51.

<sup>113</sup> See generally NYISO, 2019 Load & Capacity Data: “Gold Book” (Apr. 2019), <https://www.nyiso.com/documents/20142/2226333/2019-Gold-Book-Final-Public.pdf/>.

<sup>114</sup> Complaint Order, 153 FERC ¶ 61,022 at P 51 (“We reference ISO-NE’s cap only as an example . . .”).



IPPNY/EPISA will have the opportunity to file comments addressing the revised MW cap in response to the further compliance filing directed here.

52. As for State Entities' request that the MW cap be modified to compensate for delays in the Class Year interconnection process when that process takes longer than a year to complete, we are not persuaded to adopt this requirement. The MW cap should be applied to renewable resources exemption applicants on a Class Year basis, consistent with the manner in which NYISO evaluates new capacity resources for interconnection.

## **B. Self-Supply Exemption**

53. We accept in part, subject to condition, and reject in part NYISO's proposed self-supply exemption, as discussed below. In particular, we accept in part NYISO's proposed eligibility criteria for the self-supply exemption, but reject NYISO's proposal to allow certain instrumentalities of the State, as described in greater detail below, to be eligible. We also accept NYISO's proposal to allow self-supply exemption applicants that are existing generators to request Additional CRIS MW. We accept, subject to condition, NYISO's proposed definition of Long Term Contract and proposed net-short and net-long thresholds and proposed revocation provisions. Below we discuss eligibility for the self-supply exemption, the definition of Long Term Contract, the net-short and net-long thresholds, indirect contracts and cross-subsidization, and modification of CRIS requests in this subpart, and discuss eligibility for requests for Additional CRIS MW and revocation of the self-supply exemption in subpart C. We accept all aspects of NYISO's proposed self-supply exemption not otherwise discussed below as in compliance with the Complaint Order.

### **1. Eligibility**

#### **a. Compliance Filing**

54. NYISO's proposed self-supply exemption would allow a self-supply load serving entity that proposes to develop, or enters into a Long Term Contract to develop, a new project, to apply for a self-supply exemption and to qualify for that exemption if NYISO determines that the entity satisfies the proposed net-short and net-long thresholds. With regard to eligibility, NYISO proposes to define a self-supply load serving entity as a load serving entity that "operates under a long-standing business model to meet more than fifty percent of its Load obligations through its own generation and that is a Public Power Entity, 'Single Customer Entity,' or 'Vertically Integrated Utility.'"<sup>115</sup> NYISO further proposes to define vertically integrated utility as "a utility that owns generation, includes such generation in a non-bypassable charge in its regulated rates, earns a regulated return on its investment in such generation, and that as of the date of its request for a Self-Supply Exemption, has not divested more than seventy-five percent of its generation

<sup>115</sup> Proposed Services Tariff § 23.2.1.

assets owned on May 20, 1996.”<sup>116</sup> In addition, NYISO proposes to define a single customer entity as a load serving entity that “serves at retail only customers that are under common control with such [load serving entity], where such control means holding 51% or more of the voting securities or voting interests of the [load serving entity] and all its retail customers.”<sup>117</sup> NYISO asserts that its definition of self-supply load serving entity reflects the Commission’s view that load serving entities that self-supply a majority of their capacity are unlikely to finance uneconomic entry because doing so would not be profitable.<sup>118</sup>

55. A self-supply exemption applicant may request a self-supply exemption for a specified quantity of MW up to the CRIS MW either requested in the Class Year, or that will be transferred to the applicant at the same location.<sup>119</sup> Unforced capacity deliverability rights (UDR) projects<sup>120</sup> are likewise eligible to apply for a self-supply exemption because, according to NYISO, they have the same ability as a generator to satisfy the requirements that the Commission said self-supply exemption applicants should have.<sup>121</sup>

56. If the self-supply load serving entity or an entity that wholly owns the self-supply load serving entity does not wholly own the self-supply exemption applicant, then the applicant must have a Long Term Contract with the self-supply load serving entity to qualify for the self-supply exemption. The Long Term Contract must obligate the self-supply exemption applicant to provide the capacity for which the applicant seeks an exemption.<sup>122</sup> Additionally, the self-supply exemption applicant must submit its request jointly with the self-supply load serving entity with which it has a Long Term Contract. If a self-supply exemption applicant is wholly owned by the self-supply load serving entity, then the applicant must provide documentation that, to NYISO’s reasonable satisfaction, it has a statutory, regulatory, or organizational obligation to provide energy and capacity to meet the self-supply load serving entity’s ICAP obligation.<sup>123</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> NYISO Transmittal Letter at 19.

<sup>119</sup> Proposed Services Tariff § 23.4.5.7.14.1.1(a).

<sup>120</sup> UDR projects are controllable transmission line projects that “provide a transmission interface to a Locality.” NYISO, Services Tariff, § 2.21 (3.0.0).

<sup>121</sup> NYISO Transmittal Letter at 20.

<sup>122</sup> Proposed Services Tariff § 23.4.5.7.14.1.1(b).

57. As part of its application, a self-supply exemption applicant must, among other requirements, certify “that it does not have any contract, agreement, arrangement or relationship . . . for any material (in whole or in aggregate) payments, concessions, rebates, or subsidies, connected to or contingent on” the self-supply exemption applicant constructing or operating the project or clearing in the ICAP market, except as expressly permitted.<sup>124</sup> NYISO proposes to list certain contracts, in its proposed tariff language, that do not raise concerns even though they provide for material payments, concessions, rebates, or subsidies so long as those contracts are not “irregular or anomalous, and only reflect[] arms-length transactions,” or are “consistent with the overall objectives” of the self-supply exemption.<sup>125</sup> NYISO explains that the list of contracts is substantially similar to those the Commission previously determined would not disqualify entities from obtaining a competitive entry exemption.<sup>126</sup> A self-supply exemption applicant may ask NYISO to provide its view, along with MMU input, of whether a particular contract or other arrangement would be disqualifying before completing the application process.<sup>127</sup>

#### **b. Protests and Comments**

58. APPA supports NYISO’s proposed eligibility rules for the self-supply exemption, arguing that load serving entities, such as NYPA and the members of NYAPP, can best determine the specific resource needs of the communities they serve, incorporate policy preferences, and react to the changing nature of the load.<sup>128</sup>

59. MMU, IPPNY/EPSCA, and Entergy oppose NYISO’s proposal to allow state entities to be eligible for the self-supply exemption. MMU claims that the net-short threshold is designed assuming that the incentive of a load serving entity is related to the

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* § 23.4.5.7.14.1.2(e).

<sup>125</sup> *Id.* § 23.4.5.7.14.1.2(e)(A).

<sup>126</sup> NYISO Transmittal Letter at 24. The Commission found that subjecting competitive unsubsidized merchant resources to an offer floor serves no competitive objective or market efficiency, regardless of whether the resources are judged uneconomic according to NYISO’s existing buyer-side market power mitigation exemption test, because customers do not bear the risk or costs of uneconomic entry of such resources. Competitive Entry Exemption Order, 150 FERC ¶ 61,139, at PP 45-51, *order on clarification, reh’g, & compliance*, Competitive Entry Exemption Rehearing Order, 152 FERC ¶ 61,110, at P 11.

<sup>127</sup> Proposed Services Tariff § 23.4.5.7.14.1.2(e)(C).

<sup>128</sup> APPA May 31, 2016 Comments at 2.

costs of serving a specific set of customers, which is reasonable for most load serving entities because they are only concerned with the costs of serving their customers. However, MMU and Entergy contend that this principle is not true for state entities, such as NYPA,<sup>129</sup> which act on behalf of the entire state, not just their own load.<sup>130</sup> IPPNY/EPSC and Entergy assert that state entities have both the incentive and ability to artificially suppress ICAP market prices, as evidenced by NYPA's and LIPA's prior actions in subsidizing the Astoria Energy II and Hudson Transmission Partners' projects.<sup>131</sup> IPPNY/EPSC note that the Commission, in the Complaint Order, explicitly enumerated entities that should be eligible to apply for the narrow self-supply exemption—municipalities, cooperatives, and single customer entities—and pointedly omitted state entities. In addition, IPPNY/EPSC and Entergy quote the Commission's statement in the Complaint Order about its "concerns regarding the state's ability to artificially suppress prices by channeling uneconomic entry through an exempted load serving entity," and argue that NYISO failed to address these concerns.<sup>132</sup>

60. If state entities are eligible for the self-supply exemption, MMU asks that the net-short threshold be based on all New York load.<sup>133</sup> Alternatively, IPPNY/EPSC ask that state entities be required to certify that all costs associated with the self-supply exemption applicant will be recovered directly from the self-supply load serving entity's customers. IPPNY/EPSC contend that this additional certification requirement is needed to ensure that a self-supply load serving entity cannot pay for an uneconomic new entrant and only pass part of the costs on to its own customers. According to IPPNY/EPSC, this loophole exists because NYISO's proposed certification requirements only prohibit subsidies from third parties, and not from the self-supply load serving entity itself.<sup>134</sup>

61. UIU asserts that NYISO does not adequately explain or provide clear standards on how it will assess information regarding contracts that provide a material payment,

<sup>129</sup> According to MMU, NYPA's "mission is to provide clean, economical and reliable energy consistent with its commitment to safety, while promoting energy efficiency and innovation, for the benefit of its customers and *all New Yorkers*." MMU June 1, 2016 Comments at 5 n.11 (quoting NYPA's 2012 Annual Report).

<sup>130</sup> *Id.* at 5; Entergy May 31, 2016 Protest at 14 (citing Schnitzer Aff. at 16).

<sup>131</sup> IPPNY/EPSC May 31, 2016 Protest at 16-18; Entergy May 31, 2016 Protest at 14-15 (citing Schnitzer Aff. at 16-17).

<sup>132</sup> IPPNY/EPSC May 31, 2016 Protest at 18 (quoting Complaint Order, 153 FERC ¶ 61,022 at P 63); Entergy May 31, 2016 Protest at 14.

<sup>133</sup> MMU June 1, 2016 Comments at 5-6.

<sup>134</sup> IPPNY/EPSC May 31, 2016 Protest at 18-20.

concession, rebate, or subsidy. UIU argues that NYISO's vague standards provide NYISO and MMU with excessive discretion to decide whether a contract's terms include "irregular" or "anomalous" cost advantages or sources of revenue. UIU requests that the Commission direct NYISO to revise its proposal to include "clearly defined and reasonable" criteria.<sup>135</sup>

**c.     Answers**

62.     State Entities object to MMU's, IPPNY/EPSC's, and Entergy's assertions that state entities, such as NYPA, should not be eligible for the self-supply exemption. State Entities argue that, other than insinuating that NYPA's mission may drive it to make uneconomic investments in excess supply, MMU does not explain how NYPA's mission is inappropriate or should preclude NYPA from obtaining a self-supply exemption.<sup>136</sup> State Entities similarly respond to IPPNY/EPSC's and Entergy's statements to the effect that NYPA has previously shown a strong incentive to artificially suppress ICAP market prices and taken action to do so. In particular, State Entities contend that nothing in IPPNY/EPSC's, Entergy's, or MMU's filings show that NYPA or any other entity has acted with the purpose of artificially suppressing ICAP market prices. Moreover, State Entities argue that such assertions disregard the fact that NYISO's proposed net-short and net-long thresholds are designed to effectively eliminate an entity from receiving a self-supply exemption if it may have an incentive to artificially suppress ICAP market prices and to limit the impact additional supply may have on the market.<sup>137</sup>

63.     State Entities argue that the Commission should reject IPPNY/EPSC's request that, if state entities are eligible for the self-supply exemption, they be required to certify that all costs associated with the self-supply exemption applicant will be paid for by the self-supply load serving entity's customers. State Entities assert that this proposal is unworkable and unnecessary because "all costs associated with the self-supply exemption applicant" is too vague of a standard and assumes that NYISO can determine whether a project's costs are being recovered from the state entity's customers. According to State Entities, it is difficult to determine whether costs associated with one particular contract were recovered from end-use customers for complex entities like NYPA, which receive revenues from a variety of sources and incur many different types of costs. State Entities argue that IPPNY/EPSC's proposed continuing obligation disregards the evolving nature of cost recovery mechanisms and market products, and could needlessly prevent a project holding a self-supply exemption from participating in a new market because it would prevent the project from meeting the certification requirement.<sup>138</sup>

<sup>135</sup> UIU June 6, 2016 Comments at 7-8 (citing Kordonis Aff. ¶¶ 22-23; PJM, Intra-PJM Tariffs, OATT, Attachment DD, § 5.14(h)(6)(i)).

<sup>136</sup> State Entities June 15, 2016 Answer at 5.

<sup>137</sup> *Id.* at 5-6.

64. State Entities contend that the Commission should likewise reject MMU's recommendation to use total state load when evaluating a state entity's eligibility for the self-supply exemption. State Entities explain that NYPA would have to deduct all contracts or other firm obligations each load serving entity that participates in the state uses to serve load in order to count all NYISO load toward NYPA's net-short position. Since these contracts are proprietary to the load serving entities, State Entities assert that it would be impossible to present this information at the time of applying for a self-supply exemption. State Entities further argue that if total state load is used for the net-short threshold, small changes in market clearing prices would cause NYPA to violate the net-short threshold, such that MMU's proposal is a *de facto* outright ban on NYPA's eligibility for a self-supply exemption. Finally, State Entities claim that MMU's proposal ignores the fact that the net-long threshold will limit the impact that NYPA can have on ICAP market prices through adding new capacity.<sup>139</sup>

**d. Commission Determination**

65. We accept in part NYISO's proposed eligibility criteria for the self-supply exemption, and reject NYISO's proposal to allow "public authorit[ies] or corporate municipal instrumentalit[ies], including a[ny] subsidiary thereof, created by the State of New York that own[] or operate[] generation or transmission and that [are] authorized to produce, transmit or distribute electricity for the benefit of the public"<sup>140</sup> to be eligible. Allowing these types of Public Power Entities to be eligible for the self-supply exemption, as NYISO proposes here, is inconsistent with the Complaint Order, as discussed below.

66. As an initial matter, in the Complaint Order, the Commission provided examples of load serving entities that it considered potential applicants for a self-supply exemption: "municipality, cooperative, or single customer entity."<sup>141</sup> The Commission expressed "concerns regarding the state's ability to artificially suppress prices by channeling

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<sup>138</sup> *Id.* at 6-7.

<sup>139</sup> *Id.* at 7-8.

<sup>140</sup> NYISO, Services Tariff, § 2.16 (14.0.0) (defining Public Power Entity). NYISO proposes to define a self-supply load serving entity for eligibility for the self-supply exemption as a load serving entity that "operates under a long-standing business model to meet more than fifty percent of its Load obligations through its own generation and that is a Public Power Entity, 'Single Customer Entity,' or 'Vertically Integrated Utility.'" Proposed Services Tariff § 23.2.1. NYISO proposes to incorporate the existing definition of Public Power Entity in the Services Tariff, which contains the quoted language.

<sup>141</sup> Complaint Order, 153 FERC ¶ 61,022 at P 61.

uneconomic entry through an exempted load serving entity” and directed NYISO to “consider the impacts of state decisions to subsidize resources that are owned or contracted for by a self-supplied load serving entity.”<sup>142</sup> As explained below, we are not persuaded that NYISO has accounted for the state’s ability to artificially suppress ICAP market prices through self-supplied load serving entities. Therefore, we find that allowing certain instrumentalities of the State, as contained within the definition of Public Power Entity quoted above, to be eligible for the self-supply exemption is contrary to the rationale underlying the self-supply exemption, as set forth in the Complaint Order.

67. NYISO filed, as the Commission directed, net-short and net-long thresholds as part of the proposed parameters for the self-supply exemption. As MMU explains, NYISO’s proposed net-short threshold is premised on the assumption that a load serving entity’s incentive is to minimize the costs of serving its specific set of customers.<sup>143</sup> This assumption does not hold true for certain instrumentalities of the State, such as NYPA, because these entities act on behalf of more than their own specific set of customers (i.e., the whole state). While State Entities argue that nothing in NYPA’s mission should preclude NYPA from obtaining a self-supply exemption, we disagree. NYPA’s stated mission is to act on behalf of all customers across the entire State of New York, not just the limited portion of customers that NYPA serves.<sup>144</sup> The Commission’s directive in the Complaint Order was for NYISO to propose net-short and net-long thresholds “tight enough to prevent a load serving entity from being able to deliberately overpay for a resource in an attempt to manipulate ICAP market prices in a way that benefits the load serving entity’s other purchases from the ICAP market.”<sup>145</sup> The incentive of certain instrumentalities of the State to act on behalf of the whole state is critical in considering whether these thresholds will achieve their intended purpose—these entities’ “other purchases from the ICAP market” must be considered substantially greater than those purchases made to serve only the entity’s specific set of customers. This results in such entities having the incentive and ability to artificially suppress ICAP market prices, contrary to the rationale underlying the self-supply exemption, as set forth in the Complaint Order.

68. We disagree with UIU that NYISO should establish criteria that describe how NYISO will evaluate contracts that provide a material payment, concession, rebate, or

<sup>142</sup> *Id.* P 63.

<sup>143</sup> MMU June 1, 2016 Comments at 5.

<sup>144</sup> *See id.* at 5 n.11 (quoting NYPA’s 2012 Annual Report as stating that NYPA’s “mission is to provide clean, economical and reliable energy consistent with its commitment to safety, while promoting energy efficiency and innovation, for the benefit of its customers and *all New Yorkers*”).

<sup>145</sup> Complaint Order, 153 FERC ¶ 61,022 at P 62.

subsidy. We also disagree with UIU's assertion that NYISO's standards are vague and vest NYISO and MMU with excessive discretion. Proposed Section 23.4.5.7.14.1.2(e)(A) of NYISO's Services Tariff provides that an applicant will remain eligible for a self-supply exemption if it has an executed contract or is associated with a contract "that provides for a material payment, concession, rebate or subsidy, and either: (i) is not irregular or anomalous, and only reflects arms-length transactions; or (ii) is consistent with the overall objectives of the Self Supply Exemption."<sup>146</sup> NYISO explains that "[t]he types of permissible contracts are substantially similar to those that the Commission previously determined would not disqualify entities from obtaining" a competitive entry exemption.<sup>147</sup> We find that NYISO's proposed Services Tariff provisions provide an appropriate level of detail regarding how NYISO will evaluate contract terms, thereby providing adequate certainty to market participants and self-supply exemption applicants.

## **2. Contract Term Length**

### **a. Compliance Filing**

69. NYISO proposes to allow a self-supply load serving entity that proposes to develop, or that enters into a "Long Term Contract" with a self-supply exemption applicant to develop, a new project to qualify for a self-supply exemption if NYISO determines that the entity satisfies the proposed net-short and net-long thresholds. NYISO proposes to define Long Term Contract as "a fully executed contract" between the self-supply exemption applicant and a self-supply load serving entity that obligates the self-supply exemption applicant to provide capacity to the self-supply load serving entity "for a minimum of 10 years" in "an amount greater than or equal to the CRIS MW" for which the self-supply exemption applicant requests an exemption.<sup>148</sup> NYISO explains that the proposed definition of Long Term Contract establishes a minimum of a 10 year commitment to reflect that the self-supply business model is inherently built on the need to plan on a long-term basis, without establishing an overly burdensome duration requirement. NYISO states that it also selected a 10-year minimum contract duration because NYISO proposes to use 10-year load growth assumptions to determine the net-long threshold. While some stakeholders suggested a 20-year minimum contract duration, based on the expected life of a power plant, NYISO states that other stakeholders suggested 10 years was too long given the short-term nature of NYISO's ICAP markets. NYISO explains that 10 years recognizes real world investment horizons while establishing a parameter that is consistent with a long-term self-supply business strategy.<sup>149</sup>

<sup>146</sup> Proposed Services Tariff § 23.4.5.7.12.1.2(e)(A).

<sup>147</sup> NYISO Transmittal Letter at 24.

<sup>148</sup> *Id.* § 23.4.5.7.14.1.1(b)(1).



70. NYISO similarly proposes to use a 10-year period for two terms included in the calculation of net-short thresholds. First, for purposes of determining a self-supply exemption applicant's self-supply capacity, NYISO proposes to define Existing Long Term Commitments as those "with a minimum term of 10 years, and a minimum term of six years remaining" as of the start of the Class Year.<sup>150</sup> NYISO will use its "independent judgment" and its "sole discretion" to determine whether to consider as part of the term of an existing contract "any potential extension to the current time . . . that may reasonably result from renewal provisions."<sup>151</sup> NYISO also uses a 10 year period to exclude from the definition of additional self-supply capacity all MWs that were previously granted a self-supply exemption in the 10 year period immediately preceding the start of the relevant Class Year based on the self-supply load serving entity being a self-supply load serving entity (the "look back" period).<sup>152</sup> NYISO further proposes to use 10 year peak demand growth in calculating the net-long threshold. NYISO contends that setting this growth figure equal to the minimum contract duration required for eligibility for the self-supply exemption is reasonable because both combine to define "the need for certain load serving entities to plan on a long-term basis."<sup>153</sup>

71. NYISO also explains that it will calculate the net-short threshold for each self-supply load serving entity of each proposed project and that the net-short threshold will be satisfied if NYISO determines that, summed over all localities and the NYCA, the self-supply load serving entity's and all of its affiliates' Total Capacity Costs without Entry<sup>154</sup> are expected to be less than the self-supply load serving entity's and all of its affiliates' Total Capacity Costs with Entry.<sup>155</sup> As part of calculating these costs, NYISO

<sup>149</sup> NYISO Transmittal Letter at 22.

<sup>150</sup> Proposed Services Tariff § 23.4.5.7.14.3.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> NYISO Transmittal Letter at 35 (quoting Complaint Order, 153 FERC ¶ 61,022 at P 61).

<sup>154</sup> NYISO explains that Total Capacity Costs without Entry are representative of the costs that the self-supply load serving entity would incur if it kept buying the same quantity of capacity at ICAP spot market auction prices, i.e., if it did not self-supply in the manner proposed. NYISO states that its proposal would estimate this amount by examining the quantity of capacity procured by the self-supply load serving entity and the prevailing market prices over the three capability years preceding the Class Year start date, less the current capacity resources that the self-supply load serving entity owns (directly or indirectly), has a contractual obligation to purchase, or for which it previously received a self-supply exemption. *Id.* at 13; Proposed Services Tariff § 23.4.5.7.14.3.1.1.

will subtract from the costs capacity purchases of the self-supply load serving entity that will be exposed to market prices. NYISO explains that this proposal recognizes that the amount of capacity the self-supply load serving entity procures from the ICAP markets will not necessarily equal the total capacity obligation of the self-supply load serving entity. NYISO states that it proposes to subtract only capacity resources that are long-term in nature and that the load serving entity expects to have the obligation to purchase after the self-supply exemption applicant enters into service. NYISO contends that excluding this capacity, including Existing Long Term Commitments, from the cost calculation is reasonable because the cost to purchase such capacity does not depend on future market prices.<sup>156</sup>

**b. Protests and Comments**

72. IPPNY/EPSC request that the Commission direct NYISO to revise its definition of Long Term Contract to require contracts with a minimum term of 20 years, unless the resource will be retired earlier. IPPNY/EPSC contend that NYISO's proposed minimum term of 10 years is too short because it does not recognize that new resources will likely have a service life that is longer than 10 years. IPPNY/EPSC assert that, under NYISO's proposal, a self-supply load serving entity could apply for a self-supply exemption for new resources every 10 years, while the previously contracted-for resources continue operation, suppressing ICAP market prices and pressuring existing resources to prematurely retire.<sup>157</sup>

73. IPPNY/EPSC and Entergy similarly argue that the Commission should direct NYISO to revise its definition of additional self-supply capacity to extend the "look back" period to 20 years for the same reasons IPPNY/EPSC contend the definition of Long Term Contract should be extended to 20 years.<sup>158</sup> IPPNY/EPSC and Entergy argue that the "look back" period provision is critical to preventing entities, including state entities, from gaming the self-supply exemption.<sup>159</sup> IPPNY/EPSC assert that a 20-year

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<sup>155</sup> NYISO explains that Total Capacity Costs with Entry are representative of the costs that the self-supply load serving entity would incur after the entry of the self-supply exemption applicant. NYISO adds that, after this entry, the self-supply load serving entity purchases less capacity from the ICAP market and the self-supply load serving entity's remaining purchases from the ICAP market occur at a lower price due to a reduction in ICAP market prices. NYISO Transmittal Letter at 13; Proposed Services Tariff § 23.4.5.7.14.3.1.2.

<sup>156</sup> NYISO Transmittal Letter at 30.

<sup>157</sup> IPPNY/EPSC May 31, 2016 Protest at 21-22 (citing Younger Aff. ¶¶ 38-42).

<sup>158</sup> *Id.* at 21-22; Entergy May 31, 2016 Protest at 15.

term for Long Term Contracts and a 20-year “look back” period will not prevent a load serving entity from meeting its long-term capacity needs.<sup>160</sup>

74. NYAPP points out that NYISO’s definition of Long Term Contract requires a contract “for a minimum of 10 years,” but does not clarify whether there must be 10 years remaining on the contract at the time the self-supply exemption applicant applies. NYAPP notes that NYISO’s definition of Existing Long Term Commitments clearly states that the contract must be for a minimum term of 10 years, with a minimum of six years remaining. NYAPP asks that the Commission direct NYISO to clarify its intent with regard to the 10-year term for Long Term Contracts.<sup>161</sup>

75. In addition, NYAPP argues that NYISO’s proposal to exclude contracts that have less than six years remaining in length from its definition of Existing Long Term Commitments may result in NYISO considering more of a load serving entity’s capacity as capacity exposed to market prices than is actually the case.<sup>162</sup> As a result, NYAPP argues that NYISO’s proposal would reduce the credit for the load serving entity’s current capacity resources and increase its estimate of the load serving entity’s Total Capacity Costs without Entry. NYAPP asserts that, since NYISO’s net-short threshold test is only satisfied when the self-supply load serving entity’s Total Capacity Costs without Entry are less than its Total Capacity Costs with Entry, NYISO’s proposed assumptions in the net-short threshold test make it more likely that the self-supply load serving entities will be subjected to the risk of having to pay twice for the capacity resources for which they have bilaterally contracted.<sup>163</sup>

**c. Answers**

76. State Entities contend that the Commission should reject IPPNY/EPSC’s and Entergy’s request that the Commission direct NYISO to revise its definition of Long Term Contract from 10 years to 20 years. State Entities claim that IPPNY/EPSC and Entergy have not explained why a 20-year period is appropriate, other than by stating that new resources will likely have a longer service life than 10 years, which does not demonstrate that NYISO’s proposal is not just and reasonable. State Entities assert that IPPNY/EPSC’s and Entergy’s contention that self-supply load serving entities are likely

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<sup>159</sup> IPPNY/EPSC May 31, 2016 Protest at 20; Entergy May 31, 2016 Protest at 15.

<sup>160</sup> IPPNY/EPSC May 31, 2016 Protest at 22.

<sup>161</sup> NYAPP May 31, 2016 Protest at 13-14 & n.35.

<sup>162</sup> *Id.* at 13-14.

<sup>163</sup> *Id.* at 15.

to build or contract for new resources with the intention of flipping them every 10 years is speculative and unsupported.<sup>164</sup>

**d. Commission Determination**

77. We accept, subject to condition, NYISO's proposal to define Long Term Contracts as those with a minimum term of 10 years and accept NYISO's proposed "look back" period for purposes of calculating the net-short threshold. We find that a 10-year period appropriately recognizes long-term business strategies and investment horizons. In addition, a 10-year period is consistent with NYISO's calculation of the net-long threshold, which is based on a 10-year load growth horizon. For these same reasons, we disagree with IPPNY/EPSC and Entergy that NYISO should extend the "look back" period to 20 years and define a Long Term Contract as a contract with a minimum term of 20 years. We also note that one of IPPNY/EPSC's and Entergy's concerns involves the ability of certain instrumentalities of the State to game the self-supply exemption, but we are rejecting eligibility of such entities for the self-supply exemption, as discussed in the prior subsection, thus addressing this concern.

78. While we accept NYISO's proposal to require a minimum term of 10 years for Long Term Contracts, we direct NYISO to include in the further compliance filing ordered herein revisions to its Services Tariff to clarify that there must be 10 years remaining on the contract at the time the self-supply exemption applicant applies. We find that requiring a minimum of 10 years to be remaining on the contract at the time the self-supply exemption applicant applies for the exemption is necessary to ensure the exemption is only available to those load serving entities that are planning on a long-term basis.<sup>165</sup> Furthermore, this is consistent with NYISO's description of the Long Term Contract as establishing a "minimum term" of 10 years to qualify for an exemption.<sup>166</sup>

79. With regard to NYAPP's protest regarding the definition of Existing Long Term Commitments, we disagree that the proposed definition of Existing Long Term Commitments should include contracts that have less than six years remaining in length. As the Commission stated in the Complaint Order, the self-supply exemption recognizes the need to plan on a long-term basis,<sup>167</sup> but must be narrowly tailored to ensure that ICAP market prices remain just and reasonable.<sup>168</sup> NYISO's definition of Existing Long

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<sup>164</sup> State Entities June 15, 2016 Answer at 11.

<sup>165</sup> Complaint Order, 153 FERC ¶ 61,022 at P 61 ("We recognize the need for certain load serving entities to plan on a long-term basis.").

<sup>166</sup> NYISO Transmittal Letter at 22.

<sup>167</sup> Complaint Order, 153 FERC ¶ 61,022 at P 61.

Term Commitments appropriately balances these directives in a way that NYAPP's alternative would not. In particular, including contracts with less than six years remaining in length would not appropriately narrow the self-supply exemption.

### **3. Net-Short and Net-Long Thresholds**

80. We accept, subject to condition, NYISO's proposed net-short and net-long thresholds. Specifically, as discussed below, we direct NYISO to include in the further compliance filing ordered herein revisions to its Services Tariff to: (1) calculate the net-long threshold on the portion of the load serving entities' customer base that is truly long-term; (2) include capacity that a self-supply load serving entity sold through the sale of a physical asset in the net-long threshold calculation; and (3) calculate Total Capacity Costs without Entry and Total Capacity Costs with Entry for purposes of the net-short threshold accounting for the nested structure of locational UCAP supply obligations in NYISO's ICAP markets.

#### **a. General Structure of the Thresholds**

##### **i. Compliance Filing**

81. NYISO will calculate net-short and net-long thresholds for each self-supply exemption applicant's request for a self-supply exemption to ensure it does not grant an exemption to an applicant that is significantly net short or net long, and therefore, has the incentive and ability to exercise buyer-side market power.<sup>169</sup> According to NYISO, the purpose of the net-short threshold is to determine whether a self-supply load serving entity procures a relatively small amount of capacity from the ICAP market (i.e., is not significantly net short), such that it has limited or no incentive and ability to artificially suppress ICAP market prices to benefit its other purchases from the ICAP market.<sup>170</sup> NYISO notes that its proposed net-short and net-long thresholds have a purpose and function that are conceptually similar to those of the thresholds used in PJM, but, as expressly permitted by the Complaint Order, NYISO designed its thresholds to reflect NYISO's market and, as a result, would be implemented differently than those in PJM.<sup>171</sup>

82. NYISO states that if there is more than one self-supply load serving entity associated with a self-supply exemption applicant's request for a self-supply exemption, NYISO will consider separately the MW associated with each self-supply load serving

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<sup>168</sup> *Id.* P 62.

<sup>169</sup> NYISO Transmittal Letter at 26.

<sup>170</sup> *Id.* at 28.

<sup>171</sup> *Id.* at 26.

entity.<sup>172</sup> NYISO explains that this is because NYISO will calculate the net-short and net-long thresholds for each individual self-supply load serving entity at the time of its request for an exemption, and using parameters specific to each self-supply load serving entity. As a result, NYISO continues, NYISO can consider each request for an exemption by evaluating whether the particular self-supply load serving entity under consideration would have the incentive and ability to artificially suppress ICAP market prices under the arrangement proposed with the self-supply exemption applicant and for the period of the analysis. NYISO concludes that, by evaluating the net-short and net-long thresholds specific to each self-supply load serving entity during the Class Year process, NYISO's proposal minimizes the potential for over-mitigation and under-mitigation.<sup>173</sup>

83. Pursuant to NYISO's proposal, a request for a self-supply exemption will satisfy the net-short threshold if NYISO determines that the self-supply load serving entity's Total Capacity Costs without Entry are expected to be less than the self-supply load serving entity's Total Capacity Costs with Entry.<sup>174</sup> NYISO explains that the Total Capacity Costs without Entry represent a no change scenario under which the self-supply load serving entity continues to purchase the same quantity of capacity from the ICAP market as it did during the three-year historical period that informs NYISO's analyses, while the Total Capacity Costs with Entry assume the self-supply exemption applicant enters into service. NYISO explains that the net-short threshold will allow a self-supply load serving entity to procure capacity from the self-supply exemption applicant if the self-supply exemption applicant's CONE is higher than the cost saving that the self-supply load serving entity, and all of its affiliates, might receive from any associated ICAP market price reduction due to the entry of the self-supply exemption applicant.<sup>175</sup>

84. For the net-long threshold, NYISO will determine the largest amount of ICAP MW that is reasonably anticipated to be associated with a self-supply exemption applicant. The largest amount could be up to the cumulative quantity of the self-supply load serving entity's and all of its affiliates' ICAP MW that is associated with a self-supply exemption applicant for which the self-supply load serving entity and all of its affiliates' "Total Self Supply Capacity" is less than or equal to the "Future Capacity Obligation" for each mitigated capacity zone in which the self-supply exemption applicant's facility is located. The net-long threshold will be satisfied for the smallest of these determined amounts of ICAP MW that are reasonably anticipated to be associated with a self-supply exemption applicant. The net-long threshold will not be satisfied if the

<sup>172</sup> *Id.*; Proposed Services Tariff § 23.4.5.7.14.3.

<sup>173</sup> NYISO Transmittal Letter at 26-27.

<sup>174</sup> Proposed Services Tariff § 23.4.5.7.14.3.1.

<sup>175</sup> NYISO Transmittal Letter at 28-29.

smallest of these amounts is less than or equal to zero.<sup>176</sup> If the self-supply load serving entity and any of its affiliates are associated with more than one self-supply exemption request in the same Class Year, NYISO will make the net-long threshold determination based on the cumulative quantity of ICAP MW.<sup>177</sup> NYISO proposes to base its net-long threshold determination on NYISO's public forecast of 10-year peak demand growth, which NYISO will incorporate into its forecast of the self-supply load serving entity's load obligations (i.e., the "Future Capacity Obligation").<sup>178</sup> NYISO contends that its proposal is a balance between recognizing that self-supply load serving entities may have investment horizons that extend farther into the future than public market price quantities and other short-term price signals, and addressing the concern that long-term growth forecasts (e.g., 20 years) could allow self-supply load serving entities to sell substantially more capacity than they buy.<sup>179</sup>

85. NYISO explains that a self-supply exemption applicant may receive a partial exemption for some of its requested MW.<sup>180</sup> In particular, NYISO states that a self-supply exemption applicant can be partially exempt due to either: (1) the exemption request being for less than the amount of CRIS MW requested in the Class Year or to be transferred at the same location; or (2) the self-supply load serving entity not meeting the net-short and net-long thresholds for the full amount of the MW for which the exemption was requested. In this latter case, NYISO notes that it would make a mitigation determination for the remaining MW pursuant to the mitigation exemption test.<sup>181</sup> NYISO argues that, were it not to provide for partial exemptions, it would be mitigating new entrants that have limited or no incentive and ability to artificially suppress ICAP market prices, whereas exempting the entire requested MW amount would result in under-mitigation.<sup>182</sup>

## **ii. Protests and Comments**

86. UIU contends that NYISO's proposed net-short and net-long thresholds are complex, not transparent, and introduce ambiguity that may deter entities from entering

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<sup>176</sup> *Id.* at 35; Proposed Services Tariff § 23.4.5.7.14.3.2.

<sup>177</sup> Proposed Services Tariff § 23.4.5.7.14.3.2.

<sup>178</sup> *Id.* § 23.4.5.7.14.3.2(ii); NYISO Transmittal Letter at 26, 34.

<sup>179</sup> NYISO Transmittal Letter at 35.

<sup>180</sup> *Id.* at 39; Proposed Services Tariff § 23.4.5.7.14.1.2.

<sup>181</sup> NYISO Transmittal Letter at 39.

<sup>182</sup> *Id.* at 40.

into potential self-supply exempt agreements. UIU argues that NYISO's proposed thresholds do not account for variations, such as load forecast uncertainty, differences in how load serving entities procure capacity, changes in state policy, or long-term planning for the procurement of a specific type of resource. UIU recommends that the Commission require NYISO to consider a wider range of variations and build upon the PJM net-short and net-long threshold structure.<sup>183</sup>

87. With respect to the proposed net-long threshold test, NYAPP asserts that if a self-supply load serving entity's owned and contracted for capacity exceeds its Future Capacity Obligation, the load serving entity will fail this test. NYAPP contends that, in order to satisfy the net-long threshold test, NYISO's proposal would require the self-supply exemption applicant to reduce the quantity of CRIS MW it seeks in the interconnection process.<sup>184</sup> NYAPP reiterates that, since load serving entities self-supply the majority of their needed capacity outside the ICAP markets, load serving entities do not have an intent or reason to finance uneconomic entry.<sup>185</sup>

88. MMU asserts that NYISO's proposed net-short and net-long thresholds do not satisfy the Commission's directive to develop thresholds that ensure a self-supply exemption is only granted to a load serving entity that does not have the incentive and ability to artificially suppress ICAP market prices. In addition to its comments about changing the calculation of the net-short threshold for state entities, as discussed above, and its concerns about sales of physical assets, as discussed below, MMU argues that the proposed net-long threshold would allow a public power entity to attract new retail customers with no long-term commitment to obtain a self-supply exemption for a new generator. To remedy this concern, MMU recommends that the Commission require NYISO to modify its net-long threshold to base it on the portion of the load serving entity's customer base that is truly long-term, which would include captive ratepayers or ratepayers that are "sticky" because of an ongoing long-term relationship or obligation to serve.<sup>186</sup>

### iii. Answers

89. State Entities argue that MMU fails to support its contention that NYISO's proposal would allow a public power entity to attract new retail customers with no long-term commitment to obtain a self-supply exemption for a new generator. According to State Entities, a self-supply load serving entity cannot obtain a self-supply exemption for

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<sup>183</sup> UIU June 6, 2016 Comments at 8-9 (citing Kordonis Aff. ¶¶ 25, 27).

<sup>184</sup> NYAPP May 31, 2016 Protest at 15-16.

<sup>185</sup> *Id.* at 12.

<sup>186</sup> MMU June 1, 2016 Comments at 5-7 & n.15.



capacity that is needed to meet the needs of load that the load serving entity serves for only a short period; instead, State Entities explain, to be included in the net-long threshold, the load serving entity must have served that load for three years or more before applying for an exemption. State Entities note that PJM also uses a three-year average basis to calculate load for its net-long threshold and MMU provides no evidence that load serving entities in PJM are manipulating this provision, as MMU suggests could happen in NYISO.<sup>187</sup>

**iv. Commission Determination**

90. We accept, subject to condition, NYISO's proposed net-short and net-long thresholds, as discussed below. As the Commission explained in the Complaint Order, the objective of the thresholds is to prevent a load serving entity from manipulating ICAP market prices in a way that benefits the load serving entity's other purchases from the ICAP market.<sup>188</sup> We find that NYISO's proposal accomplishes this objective. However, we direct NYISO to include in the further compliance filing ordered herein revisions to its Services Tariff to calculate the net-long threshold based on the portion of the load serving entity's customer base that is truly long-term, as discussed below.

91. We disagree with UIU that NYISO's proposed net-short and net-long thresholds are unreasonably complex, non-transparent, and ambiguous. NYISO's proposed Services Tariff provisions describe how NYISO will calculate Total Capacity Costs without Entry and Total Capacity Costs with Entry for the net-short threshold, and, similarly, how NYISO will compare a load serving entity's total self-supply capacity with its Future Capacity Obligation.<sup>189</sup> While the net-short and net-long threshold calculations are detailed, we find that they are not unreasonably so and are necessary to limit the self-supply exemption "to load serving entities whose ICAP portfolios are consistent with reasonably anticipated levels of their future ICAP obligations."<sup>190</sup>

92. Further, we disagree with UIU that NYISO's proposed thresholds do not adequately account for variations and that NYISO should build on the PJM net-short and net-long threshold structure. We find NYISO's proposed thresholds adequately account for variations between self-supply exemption applicants. NYISO proposes to calculate net-short and net-long thresholds on an applicant-specific basis, which allows NYISO to focus its analysis on each specific applicant. Also, the Commission stated in the

<sup>187</sup> State Entities June 15, 2016 Answer at 9-11 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 65 (2013)).

<sup>188</sup> See Complaint Order, 153 FERC ¶ 61,022 at P 62.

<sup>189</sup> Proposed Services Tariff §§ 23.4.5.7.14.3.1-2.

<sup>190</sup> Complaint Order, 153 FERC ¶ 61,022 at P 62.

Complaint Order that NYISO may “propose rules unique to the New York capacity market and its participants.”<sup>191</sup> We find that NYISO complied with the Commission’s directive to propose a narrowly tailored exemption.

93. We also disagree with NYAPP’s assertion that, in order to satisfy the net-long threshold test, NYISO’s proposal would require a self-supply exemption applicant to reduce the quantity of CRIS MW it seeks in the interconnection process. NYISO’s proposal allows for a self-supply exemption applicant to be partially exempt if the self-supply load serving entity does not meet the net-short and net-long thresholds for the full amount of the MW for which it requested an exemption. Therefore, NYISO would exempt the qualifying portion of MW without imposing a barrier to the load serving entity receiving the exemption altogether.<sup>192</sup>

94. While we reject UIU’s and NYAPP’s protests, we agree with MMU that NYISO’s proposed net-long threshold may allow load serving entities to attract new retail customers without long-term commitments and satisfy the net-long threshold based on those customers. State Entities are correct that NYISO proposes to base a self-supply load serving entity’s capacity obligations without the entry of the self-supply exemption applicant on the self-supply load serving entity’s shares of the locational and NYCA UCAP requirements “over the three most recently completed Capability Years,” such that the self-supply load serving entity must have served the load included in the net-long threshold calculation for at least three years.<sup>193</sup> However, we are not persuaded that the three-year average language is sufficient. Therefore, we direct NYISO to revise its net-long threshold calculation to clarify that the customer base for the net-long threshold will only include truly long-term customers, which would include captive ratepayers or ratepayers that are “sticky” because of an ongoing long-term relationship or obligation to serve. We find this clarification necessary to ensure that load serving entities are only granted the self-supply exemption based on long-term customers, consistent with the Commission’s rationale for directing NYISO to implement a self-supply exemption.<sup>194</sup>

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<sup>191</sup> *Id.* P 62 n.154.

<sup>192</sup> *See* Proposed Services Tariff § 23.4.5.7.14.1.2.

<sup>193</sup> *See id.* § 23.4.5.7.14.3.

<sup>194</sup> *See* Complaint Order, 153 FERC ¶ 61,022 at P 61 (“We recognize the need for certain load serving entities to plan on a long-term basis.”).

**b. Definition of Additional Self-Supply Capacity**

**i. Compliance Filing**

95. As part of the net-long threshold, to determine the total self-supply capacity of a self-supply load serving entity, NYISO will include a self-supply load serving entity's "additional self-supply capacity."<sup>195</sup> Additional self-supply capacity is the quantity of MWs for which a self-supply load serving entity or any of its affiliates have been granted a self-supply exemption in previous Class Years over the preceding 10 years.<sup>196</sup> NYISO contends that including this capacity is needed to deter self-supply load serving entities from purchasing capacity to meet load growth, selling off the capacity at the end of the contract term, and purchasing new capacity to meet that same load growth.<sup>197</sup>

**ii. Comments**

96. MMU asserts that, while NYISO's proposed net-long threshold addresses the concern that a self-supply load serving entity could engage in bilateral sales to repeatedly qualify for self-supply exemptions by including that capacity in the total self-supply capacity that goes into the net-long threshold, it does not address the sale of physical assets. According to MMU, the sale of physical assets would have the same effect as a bilateral sale—a load serving entity could lower ICAP market prices by selling an asset and simultaneously building an uneconomic new generator to replace it. Therefore, MMU recommends that the Commission require NYISO to modify its net-long threshold to exclude the sale of physical assets.<sup>198</sup>

**iii. Answers**

97. State Entities contend that it is unclear why MMU believes that NYISO's proposed definition of additional self-supply capacity does not address the sale of physical assets. State Entities explain that NYISO's proposed Services Tariff language includes all "ICAP MW that were granted a Self Supply Exemption" other than capacity that is already included in the load serving entity's self-supply capacity or resources that are not expected to provide capacity. State Entities interpret this as including capacity provided by physical assets that the self-supply load serving entity sold.<sup>199</sup>

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<sup>195</sup> Proposed Services Tariff § 23.4.5.7.14.3.2(i).

<sup>196</sup> *Id.* § 23.4.5.7.14.3.

<sup>197</sup> NYISO Transmittal Letter at 30.

<sup>198</sup> MMU June 1, 2016 Comments at 7.

<sup>199</sup> State Entities June 15, 2016 Answer at 13-14.

**iv. Commission Determination**

98. We accept, subject to condition, NYISO's proposed definition of additional self-supply capacity. In particular, we direct NYISO to include in the further compliance filing ordered herein revisions to its Services Tariff to also include capacity that a self-supply load serving entity sold through the sale of the physical asset itself in the net-long threshold calculation, along with bilateral power purchase agreements. We agree with MMU that the sale of a physical asset would have the same effect as a bilateral power purchase agreement, and, therefore, that capacity should be included in the net-long threshold. As with bilateral power purchase agreements, the sale of a physical asset could allow a self-supply load serving entity or its affiliates to build a new resource that qualifies for a self-supply exemption, sell the physical asset to satisfy the net-long threshold, and then receive a self-supply exemption to build another new resource. While we agree with State Entities that NYISO's proposed definition of additional self-supply capacity could be interpreted to include all MW granted a self-supply exemption, including those sold through the sale of a physical asset, NYISO's proposed Services Tariff language does not explicitly state that both the physical sale of an asset and the sale of capacity through bilateral power purchase agreements are included in the definition of additional self-supply capacity. We therefore find that the additional language discussed herein will provide further needed clarity.

**c. Definition of Total Capacity Costs without Entry and Total Capacity Costs with Entry**

**i. Compliance Filing**

99. For purposes of the net-short threshold, NYISO proposes to calculate Total Capacity Costs without Entry as the sum over all localities and NYCA of the product of (1) the ICAP spot market auction price without the entry of the self-supply exemption applicant for that locality or NYCA, and (2) the capacity exposed to market prices without the entry of the self-supply exemption applicant.<sup>200</sup>

**ii. Protests and Comments**

100. State Entities argue that NYISO's proposed net-short threshold calculation of Total Capacity Costs without Entry and Total Capacity Costs with Entry does not account for the nested structure of locational UCAP supply obligations in NYISO's markets. As a result, State Entities contend, those procedures will not correctly calculate the amount that a self-supply load serving entity would need to pay to acquire UCAP to meet its locational UCAP supply obligations. State Entities assert that NYISO may, therefore, reach incorrect conclusions, ultimately leading to incorrect determinations as to whether a self-supply exemption applicant should receive a self-supply exemption.<sup>201</sup>

<sup>200</sup> Proposed Services Tariff § 23.4.5.7.14.3.1.2.

101. State Entities explain that when a load serving entity self-supplies UCAP using a resource within a locality or purchases UCAP from a resource within that locality, the UCAP counts toward both the load serving entity's UCAP supply obligations for the locality and for any other localities that contain the locality, as well as for NYCA as a whole. State Entities assert that NYISO's proposed procedures for calculating Total Capacity Costs without Entry and Total Capacity Costs with Entry will double- or triple-count the amount of UCAP that a self-supply load serving entity must purchase to meet its UCAP supply obligations by not accounting for this nested structure.<sup>202</sup> Therefore, according to State Entities, NYISO's calculation, as proposed, would overstate the amount of UCAP a self-supply load serving entity must purchase, and therefore overstate the impact of the self-supply exemption applicant's entry on the amount of UCAP the self-supply load serving entity must purchase. State Entities argue that this could cause NYISO to incorrectly conclude that a self-supply exemption applicant's entry would reduce the overall cost incurred by a self-supply load serving entity to obtain sufficient ICAP, and deny the exemption. For these reasons, State Entities ask that the Commission direct NYISO to revise its proposed Services Tariff language to reflect the nested structure of NYISO's ICAP market when determining self-supply load serving entities' UCAP supply obligations.<sup>203</sup>

### **iii. Commission Determination**

102. We accept, subject to condition, NYISO's proposed definitions of Total Capacity Costs without Entry and Total Capacity Costs with Entry. We share State Entities' concerns and condition acceptance of NYISO's proposed net-short threshold on NYISO including in the further compliance filing ordered herein revisions to its Services Tariff to calculate Total Capacity Costs without Entry and Total Capacity Costs with Entry for purposes of the net-short threshold accounting for the nested structure of locational UCAP supply obligations in NYISO's ICAP markets. We agree with State Entities that NYISO's net-short threshold calculation, as proposed, would overstate the impact of a self-supply exemption applicant's entry because the Total Capacity Costs without Entry and Total Capacity Costs with Entry fail to consider the nested structure of NYISO's ICAP markets—capacity purchased to meet the capacity obligation in one locality also counts toward meeting the capacity obligation of NYCA, as well as any other locality in which it is nested. Therefore, NYISO's net-short threshold should account for the nested structure of locational UCAP supply obligations in the ICAP markets to ensure that UCAP counts toward both the load serving entity's UCAP supply obligations for the

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<sup>201</sup> State Entities May 31, 2016 Protest at 13-14.

<sup>202</sup> *Id.* at 14-18.

<sup>203</sup> State Entities provide a list of the specific revisions they propose to Proposed Services Tariff Sections 23.4.5.7.14.3.3.1(b) and 23.4.5.7.14.3.1.2(b). *Id.* at 18, Ex. A.

locality and for any other localities that contain the locality, as well as for NYCA as a whole.

#### **4. Indirect Contracts and Cross-Subsidization**

##### **a. Compliance Filing**

103. To qualify for a self-supply exemption, NYISO proposes to require that a self-supply exemption applicant that is not wholly owned by a self-supply load serving entity must have a Long Term Contract with the self-supply load serving entity that obligates the self-supply exemption applicant to provide the capacity that forms the basis for the self-supply exemption. The contract must be directly between the self-supply exemption applicant and the self-supply load serving entity or entities.<sup>204</sup> As part of the application, both the self-supply exemption applicant and the self-supply load serving entity must comply with the certification requirements. Among other things, these entities must certify that the self-supply exemption applicant “does not have any contract, agreement, arrangement, or relationship . . . for any material (in whole or in aggregate) payments, concessions, rebates, or subsidies, connected to or contingent on” the self-supply exemption applicant constructing or operating the project or clearing in the ICAP market, except for contract types expressly permitted.<sup>205</sup> NYISO explains that the only exception to the limitation on contracts contingent on the project clearing in the ICAP market is if a self-supply exemption applicant has only one self-supply load serving entity and the contract is with that self-supply load serving entity. NYISO asserts that this provision will prevent one self-supply load serving entity from cross-subsidizing other self-supply load serving entities by bearing a disproportionate share of a proposed new generator’s development costs in order to reduce the other self-supply load serving entity’s costs to procure capacity from that generator.<sup>206</sup>

##### **b. Comments**

104. TDI protests the requirement that a self-supply exemption applicant that is not owned by or affiliated with a self-supply load serving entity must have a direct Long Term Contract with the self-supply load serving entity. TDI explains that UDR projects may not have a Long Term Contract with a self-supply load serving entity, but may instead have a contract with a power supplier or transmission customer that has a contract with a self-supply load serving entity. TDI requests that the Commission direct NYISO to revise its proposed self-supply exemption to allow a UDR project to be eligible for a self-supply exemption if it can demonstrate that its transmission customer has a Long

<sup>204</sup> Proposed Services Tariff § 23.4.5.7.14.1.1(b).

<sup>205</sup> *Id.* § 23.4.5.7.14.1.2(e).

<sup>206</sup> NYISO Transmittal Letter at 25.

Term Contract with a self-supply load serving entity. TDI contends that this change would better reflect the commercial arrangements of merchant transmission projects, while still ensuring sufficient long-term arrangements are in place to justify the exemption.<sup>207</sup>

105. NYAPP protests NYISO's proposal to prohibit a load serving entity developing a generation project under contract with another load serving entity from seeking a self-supply exemption. NYAPP argues that NYISO has not provided justification for this proposal, which NYAPP contends unjustly and unreasonably restricts the ability of self-supply load serving entities to contract at arm's length with other load serving entities to develop self-supply resources. NYAPP requests that the Commission reject this restriction and direct NYISO to allow self-supply exemptions where one or more load serving entities enter into an arm's length transaction with another load serving entity that constructs generation resources. NYAPP argues that these transactions allow a load serving entity to procure resources on a long-term basis to meet its needs and to hedge its exposure to future ICAP obligations.<sup>208</sup>

106. MMU protests, as insufficient, NYISO's proposed requirement that a self-supply exemption applicant and each self-supply load serving entity associated with that applicant certify that no arrangement exists to cross-subsidize (i.e., for one self-supply load serving entity to bear a disproportionate share of the applicant's development costs to reduce the other self-supply load serving entity's costs to procure capacity from the applicant). MMU asserts that a self-supply load serving entity could cross-subsidize an applicant without communicating this fact to the self-supply exemption applicant or other self-supply load serving entities. To address this concern, MMU recommends that the Commission direct NYISO to require each self-supply load serving entity that backs a self-supply exemption applicant to bear a share of the embedded cost of the project commensurate with the benefits it receives. MMU notes that it strongly supports NYISO's proposed provisions to prevent a self-supply exemption applicant from having contracts or other arrangements to receive revenue or other benefits from entities other than the self-supply load serving entity in return for developing the project.<sup>209</sup>

**c. Answers**

107. NYISO states that TDI's proposal to allow UDR projects with indirect contractual relationships with self-supply load serving entities to be eligible for the self-supply exemption was not proposed or discussed during the lengthy stakeholder process. While

<sup>207</sup> TDI May 31, 2016 Request for Clarification and Limited Protest at 12-13 (TDI May 31, 2016 Protest).

<sup>208</sup> NYAPP May 31, 2016 Protest at 16-17.

<sup>209</sup> MMU June 1, 2016 Comments at 7-8.

NYISO states that it is open to considering this expansion of the self-supply exemption, it would need to fully consider, for example, how to define potential attributes and details of the contractual structure, how to determine net-short and net-long thresholds with an additional entity, and the implications of another party's direct participation in and support of the arrangement that forms the basis of the exemption. If the Commission were to agree with TDI's recommendation, NYISO asks that the Commission not delay ruling on the pending compliance filing and give NYISO and stakeholders adequate time to develop additional rules and protections.<sup>210</sup>

108. Entergy and IPPNY object to TDI's requested expansion. Entergy argues that TDI's request could significantly expand eligibility for the self-supply exemption and expose the market to significant artificial price suppression.<sup>211</sup> Entergy asserts that TDI's proposal could trigger flaws in the proposed certification rules that govern the self-supply exemption in addition to those already identified by MMU. Entergy agrees with NYISO that TDI's proposal would be a significant and complex undertaking that would need to go through comprehensive stakeholder review. Moreover, Entergy contends that NYISO proposed to apply the self-supply exemption to generators and UDR projects on the same grounds and TDI has not provided a compelling reason why self-supply load serving entities could not purchase transmission rights directly from TDI during the open season auction.<sup>212</sup> IPPNY argues that NYISO carefully designed the proposed certification requirements to guard against discriminatory state arrangements, and that TDI's proposal could potentially open a major loophole by allowing UDR projects to receive a self-supply exemption when the transmission customer is being used as a conduit to engage in the very practices prohibited of the self-supply exemption applicant and the self-supply load serving entity. Further, IPPNY asserts TDI's proposal would require careful crafting to ensure that there is no potential for an inappropriate subsidy anywhere in the chain.<sup>213</sup>

109. State Entities disagree with MMU that the Commission should require multiple self-supply load serving entities that back a self-supply exemption applicant to certify that they share the costs of the project in a manner that is commensurate with the benefits they receive. According to State Entities, MMU has not explained how, in practice, a self-supply load serving entity could subsidize a project by incurring a disproportionately large portion of the cost without communicating this to the self-supply exemption applicant or other self-supply load serving entities. Further, State Entities note that parties may disagree about the quantification of benefits received by each load serving entity backing a new project. State Entities also question whether NYISO will be in a

<sup>210</sup> NYISO June 13, 2016 Answer at 11-14.

<sup>211</sup> Entergy June 15, 2016 Answer at 8-9.

<sup>212</sup> *Id.* at 10.

<sup>213</sup> IPPNY June 15, 2016 Answer at 8-9.



position to determine what shares the parties should internalize under complex transaction structures. State Entities argue that MMU's proposal is unworkable and assert that the existing certification requirements are a sufficient safeguard against cross-subsidization.<sup>214</sup>

**d. Commission Determination**

110. We accept NYISO's proposal to limit the definition of Long Term Contract to direct contracts between the self-supply exemption applicant and the self-supply load serving entity as in compliance with the Complaint Order. We further accept NYISO's proposed certification requirement to guard against cross-subsidization between self-supply load serving entities as in compliance with the Complaint Order. These safeguards are necessary to ensure that the self-supply exemption functions as intended.

111. We reject TDI's request to expand the definition of Long Term Contract to allow for indirect contracts between a UDR project and a transmission customer that has a contract with a self-supply load serving entity. If a UDR project wants to apply for a self-supply exemption, it can do so through the same process and subject to the same requirements as other eligible market participants. We are not persuaded that UDR projects should be treated any differently than generators nor that there is any basis for expanding eligibility for the self-supply exemption to include indirect contracts. In the Complaint Order, the Commission emphasized that the self-supply exemption should be narrowly tailored and directed NYISO to develop an exemption that would address concerns about a resource manipulating ICAP market prices using the self-supply exemption.<sup>215</sup> TDI's request would result in a self-supply exemption that is not narrowly tailored.

112. We are also not persuaded by NYAPP's argument that NYISO should allow self-supply exemptions where one or more load serving entities enter into an arm's length transaction with another load serving entity that constructs generation resources. Rather, we find that NYISO's proposed limitation on self-supply load serving entities developing projects for other self-supply load serving entities properly addresses the Commission's concerns about cross-subsidization without unduly burdening self-supply long serving entities' ability to plan on a long-term basis. We reiterate that the self-supply exemption is meant to be narrowly tailored to exempt a limited set of self-supply load serving

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<sup>214</sup> State Entities June 15, 2016 Answer at 12.

<sup>215</sup> See, e.g., Complaint Order, 153 FERC ¶ 61,022 at P 62 ("[T]he net-short and net-long thresholds should be tight enough to prevent a load serving entity from being able to deliberately overpay for a resource in an attempt to manipulate ICAP market prices in a way that benefits the load serving entity's other purchases from the ICAP market.").

entities that need to plan on a long-term basis to “procure a portfolio that best allows [them] to manage [their] assessment of the risks [they] face[.]”<sup>216</sup>

113. We likewise reject MMU’s recommendation that the Commission direct NYISO to require each self-supply load serving entity that backs a self-supply exemption applicant to bear a share of the embedded costs of the project commensurate with the benefits it receives. We find that NYISO’s proposed certification requirement is sufficient to guard against cross-subsidization concerns. Although MMU raises a hypothetical concern with a self-supply load serving entity cross-subsidizing another self-supply load serving entity without telling the other self-supply load serving entity, we find that concern to be speculative at this time and on this record.

## **5. Modification of CRIS Requests**

### **a. Compliance Filing**

114. A self-supply exemption applicant must, as part of its application, specify the quantity of CRIS MW for which it seeks an exemption.<sup>217</sup> NYISO states that the amount need not be the entire amount of CRIS MW that the self-supply exemption applicant is requesting in the Class Year or that it is expected to receive in a transfer at the same location, although it may not exceed that total amount. NYISO notes that if there is more than one self-supply load serving entity making an exemption request jointly with the self-supply exemption applicant, each must specify the amount of CRIS MW for which it is requesting the exemption, which may not exceed the total quantity of CRIS MW that the self-supply exemption applicant is requesting in the Class Year.<sup>218</sup> The amount of exempt CRIS MW will be the lesser of: (1) the quantity of CRIS MW for which the self-supply exemption applicant requested an exemption; and (2) the quantity determined in accordance with the net-short and net-long thresholds to be eligible for an exemption, if the request satisfies several other requirements stated in the Services Tariff.<sup>219</sup> Therefore, a self-supply exemption applicant may receive a partial exemption for the MWs that satisfy the net-long threshold even if that is less than amount of CRIS MW for which the applicant requested an exemption.

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<sup>216</sup> *Id.* P 61.

<sup>217</sup> Proposed Services Tariff § 23.4.5.7.14.1.1(c).

<sup>218</sup> NYISO Transmittal Letter at 22-23.

<sup>219</sup> Proposed Services Tariff § 23.4.5.7.14.1.2.

**b. Protests and Comments**

115. State Entities argue that, until NYISO completes its net-short and net-long threshold evaluation, a self-supply exemption applicant will not know whether it satisfies the net-long threshold. State Entities ask that the Commission direct NYISO to revise its proposed self-supply exemption to allow self-supply exemption applicants to revise their CRIS requests in the Class Year process so that only the MWs that satisfy the net-long threshold are part of the request, enabling the self-supply exemption applicant to avoid having a portion of its supply be subject to mitigation. According to State Entities, such a process would be similar to what is available in the context of NYISO's deliverability requirements.

116. State Entities explain that capacity provided by a new resource that is not initially exempt from offer floor mitigation may become exempt if it clears in twelve monthly auctions in which it is offered at its offer floor. State Entities argue that the additional exemptions provide avenues for resources that would be subject to an offer floor to enter the market unmitigated, which reduces the likelihood that ICAP market prices will rise to the level necessary for a mitigated resource to clear. State Entities contend that, as the number of exemptions increases, the likelihood that mitigated resources will emerge from mitigation diminishes.<sup>220</sup>

**c. Answers**

117. NYISO objects to State Entities' request. NYISO explains that it makes mitigation determinations (including exemption determinations) as part of the same Class Year study process that determines project cost allocations for new interconnection facilities. NYISO argues that permitting adjustments to CRIS requests outside the bounds of the established interconnection process could disrupt and delay that process and negatively impact all members of a given Class Year. Further, NYISO asserts that State Entities' request could create uncertainty for and upset expectations of other entities seeking exemptions from the buyer-side market power mitigation rules, or whose interests are affected by NYISO's exemption determinations. Therefore, NYISO concludes that State Entities' request could disrupt and delay the administration of both the buyer-side market power mitigation rules and the interconnection cost allocation procedures.<sup>221</sup>

118. IPPNY also objects to State Entities' request, arguing that it would provide self-supply exemption applicants with an easy way to game the net-long threshold. IPPNY asserts that self-supply exemption applicants would likely overestimate their CRIS requests to maximize the amount of MWs subject to a self-supply exemption and then

<sup>220</sup> State Entities May 31, 2016 Protest at 12-13.

<sup>221</sup> NYISO June 13, 2016 Answer at 16-17.

seek additional self-supply exemptions in future Class Years. IPPNY adds that the net-long threshold is not hard to predict, contrary to State Entities' argument, because it is based on historical load plus the greater of one percent load growth or projected regional load growth over 10 years, minus the self-supply load serving entity's existing and other planned resources. Finally, IPPNY contends that State Entities' request is beyond the scope of the Complaint Order because State Entities' request changes NYISO's existing CRIS rules.<sup>222</sup>

**d. Commission Determination**

119. We accept NYISO's proposal to require a self-supply exemption applicant to specify the quantity of CRIS MW for which it seeks an exemption and to subject any CRIS MW that do not qualify for the exemption to the mitigation exemption test as in compliance with the Complaint Order. We reject State Entities' request that self-supply exemption applicants be able to revise their CRIS requests after NYISO completes its net-long threshold determination to ensure that their CRIS request is only for exempted MWs. As NYISO explains, exemption determinations are part of the Class Year study process, and therefore, allowing self-supply exemption applicants to revise their CRIS requests after NYISO completes the net-long threshold determinations may delay and disrupt the process. Furthermore, we agree with IPPNY that modifications to an applicant's CRIS request would provide an opportunity for a self-supply exemption applicant to game the net-long threshold to maximize the amount of MW that qualify for the exemption. The Commission explained in the Complaint Order that the self-supply exemption "must be limited to load serving entities whose ICAP portfolios are consistent with reasonably anticipated levels of their future ICAP obligations" and that net-short and net-long thresholds are an effective means of narrowly tailoring the exemption.<sup>223</sup> Thus, ensuring the thresholds function as intended and limit the potential for gaming is essential to ensuring a just and reasonable self-supply exemption.

**C. Issues that Apply to Both Exemptions**

**1. Eligibility of Additional CRIS MW for Exemptions**

**a. Compliance Filing**

120. NYISO proposes to allow applicants for the renewable resources and self-supply exemptions to request an exemption for Additional CRIS MW where the applicant is an existing generator.<sup>224</sup> NYISO states that its buyer-side market power mitigation rules

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<sup>222</sup> IPPNY June 15, 2016 Answer at 11-12.

<sup>223</sup> Complaint Order, 153 FERC ¶ 61,022 at P 62.

<sup>224</sup> Proposed Services Tariff §§ 23.4.5.7.13.1.1, 23.4.5.7.14.1.1(a).

currently apply to all proposed new generators, UDR projects, and existing generators and UDR projects that seek to increase their CRIS rights through a request for Additional CRIS MW in the Class Year process.<sup>225</sup>

**b. Protests and Comments**

121. Although IPPNY/EPSC are not opposed to eligibility for the self-supply exemption for applicants requesting Additional CRIS MW, IPPNY/EPSC contend that NYISO has not proposed a methodology to calculate the costs and revenues associated with an existing resource that requests Additional CRIS MW for purposes of the net-short threshold calculation. Therefore, IPPNY/EPSC request that the Commission direct NYISO to work with stakeholders to develop such a methodology.<sup>226</sup>

122. Entergy opposes eligibility for the renewable resources and self-supply exemptions based on requests for Additional CRIS MW. While the Commission did not directly address requests for Additional CRIS MW, Entergy argues the Commission emphasized that the exemptions should apply to new resources and cautioned that the exemptions should be narrowly tailored. Therefore, Entergy argues that NYISO's proposal goes beyond the scope of the Commission's directives and significantly expands the exemptions without Commission authorization. Entergy argues that NYISO declined to allow requests for Additional CRIS MW to be eligible for the competitive entry exemption because it was beyond the scope of that proceeding. Further, Entergy contends that NYISO did not support its proposal to expand eligibility to Additional CRIS MW or analyze how the exemptions could be gamed through requests for Additional CRIS MW.<sup>227</sup>

**c. Answers**

123. In response to IPPNY/EPSC's argument that NYISO did not propose a net-short threshold methodology for Additional CRIS MW, NYISO counters that its proposed net-short threshold provides a methodology that is appropriate and effective to calculate the proportional entry costs (based on the unit net CONE for Additional CRIS MW) and other necessary elements. NYISO argues that its rules for calculating the unit net CONE of Additional CRIS MW are suitable to use when determining the net-short threshold for purposes of the self-supply exemption.<sup>228</sup>

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<sup>225</sup> NYISO Transmittal Letter at 2-3.

<sup>226</sup> IPPNY/EPSC May 31, 2016 Protest at 14.

<sup>227</sup> Entergy May 31, 2016 Protest at 11-13.

<sup>228</sup> NYISO June 13, 2016 Answer at 14.

124. State Entities likewise disagree with IPPNY/EPSC, pointing to the same unit net CONE calculation for Additional CRIS MW to which NYISO cites. State Entities claim that IPPNY/EPSC argue that NYISO must develop a methodology to calculate costs that counteracts the potential to game the calculation. State Entities counter that any potential to game the self-supply exemption through requests for Additional CRIS MW is speculative and should be rejected.<sup>229</sup>

125. Contrary to Entergy's assertions, NYISO explains that requests for Additional CRIS MW are treated as new entrants into the ICAP market, and, thus, are subject to the buyer-side market power mitigation rules. Moreover, NYISO contends the Commission's directive was to address over-mitigation through the application of the existing buyer-side market power mitigation rules and was not limited to "new" construction. With regard to Entergy's reference to the competitive entry exemption proceeding, NYISO explains that it had not yet filed the Additional CRIS MW rules when the Commission ruled on the competitive entry exemption, and, thus, application of the buyer-side market power mitigation rules to Additional CRIS MW was beyond the scope of that proceeding. NYISO states that, since then, the Commission has accepted those rules. NYISO further notes that it discussed the application of the proposed exemptions to all examined facilities, including to requests for Additional CRIS MW, during the stakeholder process.<sup>230</sup>

126. State Entities similarly argue that Entergy does not cite to any language in the Complaint Order indicating that eligibility for the exemptions should be limited to new resources, nor is there any such language. With regard to Entergy's reference to the competitive entry exemption, State Entities point out, as NYISO does, that NYISO had not yet filed its Additional CRIS MW rules when the Commission ruled on the competitive entry exemption.<sup>231</sup>

**d. Commission Determination**

127. We accept NYISO's proposal to allow requests for Additional CRIS MW to be eligible for the renewable resources and self-supply exemptions as in compliance with the Complaint Order. We agree with NYISO that Additional CRIS MW are properly treated as new resources, and, thus, are subject to NYISO's buyer-side market power mitigation rules.<sup>232</sup> As NYISO explains, NYISO evaluates requests for Additional CRIS MW in the

<sup>229</sup> State Entities June 15, 2016 Answer at 17-19.

<sup>230</sup> NYISO June 13, 2016 Answer at 14-16.

<sup>231</sup> State Entities June 15, 2016 Answer at 15-16.

<sup>232</sup> *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER15-1281-000 (May 6, 2015) (delegated order) (accepting NYISO's uncontested Additional CRIS MW rules).

Class Year process pursuant to NYISO's existing buyer-side market power mitigation rules along with proposed new generators and UDR projects. Therefore, consistent with the Commission-approved buyer-side market power mitigation rules, requests for Additional CRIS MW should likewise be eligible to apply for exemptions to those rules. We disagree with Entergy that NYISO's proposal is an expansion of the Commission's directives. To the extent the Commission referred to "new" resources in the Complaint Order, the Commission was referring to the resources to which NYISO's buyer-side market power mitigation rules apply. We agree with NYISO and State Entities that Entergy's reference to the competitive entry exemption proceeding is inapposite because NYISO had not even proposed to apply its buyer-side market power mitigation rules to requests for Additional CRIS MW at that time.

128. We disagree with IPPNY/EPSCA that NYISO did not propose a net-short threshold methodology for Additional CRIS MW. On the contrary, NYISO's existing Services Tariff includes a methodology for calculating the net CONE for Additional CRIS MW.<sup>233</sup> NYISO proposes to use that existing methodology to calculate the net-short threshold for Additional CRIS MW for purposes of the self-supply exemption and we agree with NYISO that using that methodology is just and reasonable.

## **2. Revocation**

### **a. Compliance Filing**

129. NYISO proposes to revoke a renewable resources exemption if an applicant: (1) "at the time it first qualifies as an Installed Capacity Supplier, or at any time thereafter, is not solely powered by the same technology based on which it was evaluated for" a renewable resources exemption; or (2) "at the time it first qualifies as an Installed Capacity Supplier it is not solely powered by a technology that is defined as an Intermittent Power Resource or Limited Control Run-of-River Hydro Resource," even if NYISO expected the technology to fall within those definitions when it granted the exemption.<sup>234</sup> However, NYISO will not revoke a renewable resources exemption under those circumstances if the renewable resources exemption applicant "will be solely powered by an Exempt Renewable Technology."<sup>235</sup> Before revoking a renewable resources exemption, NYISO will provide the renewable resources exemption applicant with a thirty-day written notice period and "an opportunity to respond."<sup>236</sup>

<sup>233</sup> NYISO, Services Tariff, § 23.4.5.7.6 (26.0.0) ("Exemption for Additional CRIS MW").

<sup>234</sup> Proposed Services Tariff § 23.4.5.7.13.3.1.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* § 23.4.5.7.13.3.3.

130. While some stakeholders suggested NYISO should not revoke the renewable resources exemption due to changes in technology, NYISO contends that the Complaint Order was clear that resources eligible for the renewable resources exemption had to be powered “solely” by a qualifying technology. In addition, NYISO asserts that revoking the exemption due to a technology change is reasonable in the case of applicant-specific evaluations because the exemption determination would have been case-specific and based on a particular set of assumptions regarding costs and revenues.<sup>237</sup>

131. NYISO proposes to revoke a self-supply exemption under two scenarios. First if, “at the time prior to the [self-supply exemption applicant] first producing or transmitting[] Energy it or the [self-supply load serving entity] no longer satisfies” the net-short and net-long thresholds “or no longer meets the requirements of the Acknowledgement and Certification.”<sup>238</sup> Second, NYISO proposes to revoke a self-supply exemption where NYISO “reasonably believes that a request for a [self-supply exemption] was granted based on . . . false, misleading, or inaccurate information,” or the self-supply load serving entity included in its “self-supply capacity” determination capacity that was projected to expire, but has not expired.<sup>239</sup> In this second scenario, NYISO proposes to provide the self-supply exemption applicant with 30 days’ written notice and an opportunity to explain, and NYISO proposes to submit a report to the Commission’s Office of Enforcement.

132. NYISO contends that its proposed revocation provisions for the renewable resources and self-supply exemptions protect the integrity of NYISO’s rules, and the ICAP market, by making it clear that resources that should not retain a renewable resources or self-supply exemption (or that should never have obtained one in the first place) will lose it. Further, NYISO contends that these proposed revocation provisions clarify that misconduct is potentially both a violation of NYISO’s tariffs and subject to enforcement action by the Commission.<sup>240</sup>

#### **b. Protests and Comments**

133. State Entities object to NYISO’s proposal to revoke the renewable resources exemption if there is a change in the technology that formed the basis for granting the exemption. State Entities argue that NYISO’s proposal conflicts with NYISO and Commission practice that mitigation decisions will not be revisited based on changed circumstances. In particular, State Entities point to the competitive entry exemption, for

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<sup>237</sup> NYISO Transmittal Letter at 15.

<sup>238</sup> Proposed Services Tariff § 23.4.5.7.14.5(a).

<sup>239</sup> *Id.* § 23.4.5.7.14.5(c).

<sup>240</sup> NYISO Transmittal Letter at 15, 38.



which the Commission rejected requests that NYISO revoke the competitive entry exemption if the exempted project received subsidies after NYISO approved the exemption.<sup>241</sup> Moreover, State Entities assert that the Commission should be encouraging resources to adapt to a changing industry and to adopt technologies to improve performance, rather than deterring such progress by prohibiting a renewable resources exemption applicant from changing technologies or fuel sources after NYISO has made an exemption determination. State Entities argue that, aside from ensuring no false or misleading information was supplied that led to NYISO granting an exemption, there should be no additional concern for a project to lose an exemption.<sup>242</sup>

134. UIU also objects to the proposed revocation provisions for the renewable resources exemption. Specifically, UIU asserts that NYISO's proposed revocation provisions may hinder the growth of exempted intermittent renewable technologies.<sup>243</sup> UIU contends that the Commission should direct NYISO to establish a more precise criterion that triggers revocation review, such as when the capacity factor reaches a specific value.<sup>244</sup>

135. State Entities further object to NYISO's proposed revocation provisions for the self-supply exemption, asserting that NYISO should not automatically revoke the self-supply exemption due to conditions that change after NYISO grants the exemption. State Entities explain that, if a self-supply load serving entity satisfies the net-short and net-long thresholds, but loses or gains load between the conclusion of the Class Year process and when it enters into operation, the self-supply load serving entity will automatically lose its self-supply exemption if it no longer satisfies those thresholds as a result of the change in load. State Entities assert that it is unjust and unreasonable for a self-supply load serving entity to lose its exemption due to circumstances outside of its reasonable control. According to State Entities, NYISO's proposal is inappropriate because: (1) NYISO's proposed Services Tariff language references Section 23.4.5.7.14(b), which does not exist; and (2) in the event NYISO intended to reference Section 23.4.5.7.14.3, which contains the self-supply exemption qualification requirements, the proposal conflicts with the longstanding NYISO and Commission practice that exemption determinations cannot be revoked once granted.<sup>245</sup>

<sup>241</sup> State Entities May 31, 2016 Protest at 23 (citing Competitive Entry Exemption Order, 150 FERC ¶ 61,139 at P 39).

<sup>242</sup> *Id.* at 24.

<sup>243</sup> UIU June 6, 2016 Comments at 5.

<sup>244</sup> *Id.* at 7.

<sup>245</sup> State Entities May 31, 2016 Protest at 8-10 (citing *Astoria Generating Co., L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,044, at P 24 (2015)).

136. State Entities disagree with NYISO that its proposed revocation provisions for the self-supply exemption are closely modeled on the revocation provisions for the competitive entry exemption. Specifically, State Entities claim that the only basis for revoking a competitive entry exemption is if the application contained false, misleading, or inaccurate information, or if the applicant enters into a non-qualifying contract that was effectively pre-arranged to circumvent the requirements for the competitive entry exemption.<sup>246</sup> State Entities note that the Commission expressly rejected requests to impose a continuing obligation on competitive entry exemption applicants to report to NYISO if they receive subsidies for their projects after receiving the exemption that were not effectively pre-arranged contracts.<sup>247</sup> State Entities contend that NYISO's proposal also differs from the competitive entry exemption revocation provisions in that NYISO does not provide an opportunity for the self-supply exemption applicant to explain why revocation may be inappropriate under the particular circumstances. Accordingly, State Entities request that the Commission direct NYISO to revise its proposed revocation provisions for the self-supply exemption to only permit NYISO to revoke an exemption where the applicant submitted false, misleading, or inaccurate information as part of its application.<sup>248</sup>

**c.     Answers**

137. NYISO contends that its proposed revocation provisions are reasonable, appropriate, and necessary in specified circumstances. NYISO explains that the renewable resources exemption should be revoked if an applicant no longer satisfies the criteria that formed the basis of the determination that it had limited or no incentive and ability to artificially suppress ICAP market prices because revocation in these circumstances is necessary to ensure that implementing the exemption does not result in under-mitigation. NYISO argues that, contrary to State Entities' position, if a renewable resources exemption applicant is modified and is no longer an Intermittent Power Resource, it should not be able to retain its exemption. Since the premise of the renewable resources exemption is that it is only available to those resources that NYISO has determined have limited or no incentive and ability to artificially suppress ICAP market prices, NYISO asserts that it would be unreasonable to exempt a project based on specific characteristics that are later modified, such that the project no longer has the characteristics on which the exemption was based.<sup>249</sup>

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<sup>246</sup> *Id.* at 10 (citing NYISO, Services Tariff, § 23.4.5.7.9.5.2).

<sup>247</sup> *Id.* at 10-11 (citing Competitive Entry Exemption Rehearing Order, 152 FERC ¶ 61,110 at P 39).

<sup>248</sup> *Id.* at 11-12.

<sup>249</sup> NYISO June 13, 2016 Answer at 17-18.

138. IPPNY disagrees with State Entities that NYISO should not be able to revoke a renewable resources exemption based on a change in technology or fuel source. IPPNY contends that removing this revocation provision would defeat the very purpose of the renewable resources exemption because the exemption is technology-specific, unlike the competitive entry exemption. IPPNY argues that allowing a resource to change its technology after NYISO grants a renewable resources exemption would invite resources to game the renewable resources exemption by, for example, proposing an Intermittent Renewable Technology, receiving an exemption, and then building a gas-fired facility instead.<sup>250</sup>

139. NYISO also contends that its self-supply exemption revocation provisions are reasonable, appropriate, and necessary in specified circumstances. First, NYISO acknowledges that there is a typographical error in Proposed Services Tariff Section 23.4.5.7.14.5(a) and the intended reference is not Section 23.4.5.7.14.1.1(b), as State Entities assert. Rather than proposing to revoke the self-supply exemption based on a self-supply exemption applicant's failure to continue to satisfy the net-short and net-long thresholds, NYISO explains that it proposes to revoke a self-supply exemption where the ownership and Long Term Contract requirements for eligibility for the self-supply exemption, as well as the certification and acknowledgement requirements, are no longer satisfied. NYISO states that no party has claimed that revocation would be inappropriate or unreasonable under such circumstances.<sup>251</sup>

140. IPPNY opposes State Entities' argument that NYISO should not automatically revoke the self-supply exemption due to changes in load that formed the basis for granting the exemption. IPPNY argues that, without such a revocation provision, a self-supply load serving entity could satisfy the net-short and net-long thresholds based on historical load and then, once it receives a self-supply exemption, it could lose the customers that formed the basis for granting the exemption. While IPPNY agrees that some fluctuations in load due to energy efficiency measures or demand response are outside the control of the self-supply load serving entity, IPPNY asserts that maintaining the load as a long-term customer is within a self-supply load serving entity's control because it could enter into Long Term Contracts with the customer to retain the customer at least for the life of the contract. Thus, IPPNY requests that the Commission direct NYISO to clarify that it will revoke a self-supply exemption if a self-supply load serving entity loses any of its customers that comprised the load that drove the need for the Long Term Contract that formed the basis for granting the self-supply exemption.<sup>252</sup>

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<sup>250</sup> IPPNY June 15, 2016 Answer at 14.

<sup>251</sup> NYISO June 13, 2016 Answer at 18-19.

<sup>252</sup> IPPNY June 15, 2016 Answer at 10-11.

**d. Commission Determination**

141. We accept, subject to condition, NYISO's proposed revocation provisions for the renewable resources and self-supply exemptions. We find that the proposed revocation provisions are appropriate because, consistent with the Complaint Order, they narrowly tailor the exemptions to circumstances in which renewable resources and self-supply load serving entities have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices. NYISO's proposed revocation provisions ensure that, under the circumstances that NYISO outlines, resources lose their exemption if they no longer qualify (or if they should never have qualified in the first place) for the applicable exemption. However, as discussed below, we direct NYISO to include in the further compliance filing ordered herein, revisions to its Services Tariff that provide an opportunity for an exemption holder to explain to NYISO why revocation may be inappropriate before NYISO revokes either exemption.

142. In reference to the renewable resources exemption, State Entities and UIU argue that NYISO's revocation provisions may hinder growth of exempted intermittent renewable technologies. This argument is inapposite. The renewable resources exemption is neither intended to grow nor hinder intermittent renewable technologies. Rather, the Commission found in the Complaint Order that "intermittent renewable resources with low capacity factors and high development costs . . . narrowly defined, provide their developer with limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices."<sup>253</sup> Once there is a change in technology, the Commission's concern is that the renewable resources exemption holder may have the incentive and ability to exercise buyer-side market power. Therefore, revoking the exemption at that time, as NYISO proposes, is appropriate, regardless of the impact on the growth of any type of renewable technology.

143. We disagree with State Entities that NYISO's proposed revocation provision for the renewable resources exemption conflicts with the practice, adopted as part of the competitive entry exemption proceeding, that mitigation determinations will not be revised based on changed circumstances. Unlike the competitive entry exemption, NYISO will grant renewable resources exemptions based on an applicant-specific evaluation, including the applicant's technology and associated costs and revenues. If the technology changes such that the exemption holder would no longer qualify for the exemption, it is appropriate to revoke the exemption at that time. As noted above, once there is a change in technology, the exemption holder may have the incentive and ability to exercise buyer-side market power. In this manner, the revocation provision supports the purpose of the renewable resources exemption by only exempting those intermittent renewable resources with low capacity factors and high development costs, narrowly defined, from the application of NYISO's buyer-side market power mitigation rules.

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<sup>253</sup> Complaint Order, 153 FERC ¶ 61,022 at P 47.

144. With regard to the self-supply exemption revocation provisions, we accept NYISO's proposal, subject to condition. As an initial matter, we note NYISO's correction to the typographical errors in Proposed Services Tariff Section 23.4.5.7.14.5(a), as set forth in NYISO's answer, and direct NYISO to include this correction as part of the further compliance filing ordered herein.<sup>254</sup> We understand NYISO's proposed revocation provision for the self-supply exemption in Section 23.4.5.7.14.5(a) to relate to the changes in the ownership and Long Term Contract requirements, and not to changes in the self-supply exemption applicants' load (and, therefore, the revocation provision would not turn on the self-supply exemption applicant's continuing ability to satisfy the net-short and net-long thresholds). We therefore dismiss State Entities' objection to NYISO's ability to revoke the self-supply exemption due to changes in load that result in the self-supply load serving entity no longer satisfying the net-short and net-long thresholds.

145. At the same time, we reject IPPNY's request to establish a revocation provision that would revoke the self-supply exemption due to changes in load. We agree with NYISO that NYISO should be able to revoke a self-supply exemption if, at any time prior to the self-supply exemption applicant beginning operation, it ceases to be owned by or under contract with the self-supply load serving entity, or if it no longer has a contract, agreement, arrangement, or relationship for payments related to the self-supply exemption applicant's construction or participation in the ICAP market. This is consistent with the competitive entry exemption's certification requirement to "update NYISO if the information in the request is no longer true."<sup>255</sup> We are not persuaded that NYISO also needs to be able to revoke the self-supply exemption due to changes in load between the end of the Class Year process and when the self-supply exemption applicant enters into operation. We believe that NYISO's proposal, as revised through further compliance, balances the need for a narrowly tailored self-supply exemption with tight net-short and net-long thresholds, while recognizing that changes in load may occur outside of the self-supply load serving entity's control after NYISO grants the self-supply exemption. As with the competitive entry exemption, we note "the existing requirement that NYISO refer to the Commission's Office of Enforcement if an applicant provides false, misleading, or inaccurate information," and NYISO's and MMU's continuing oversight and review of market participants' behavior.<sup>256</sup>

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<sup>254</sup> NYISO June 13, 2016 Answer at 18 & n.47.

<sup>255</sup> Competitive Entry Exemption Order, 150 FERC ¶ 61,139 at P 80.

<sup>256</sup> *Id.* P 81; NYISO, Services Tariff, §§ 30.2 (1.0.0) (defining "market violation" as a tariff violation, a violation of a Commission order, rule, or regulation, market manipulation, or inappropriate dispatch), 30.4.5.3.1 (56.0.0) (stating that MMU must submit a non-public referral to the Commission when it believes a market violation has occurred and cease its own investigation unless directed to continue).

146. While we generally accept NYISO's revocation provisions for the renewable resources and self-supply exemptions, we condition our acceptance on NYISO providing renewable resources and self-supply exemption applicants an opportunity to explain why revocation may be inappropriate. NYISO should use the language in Proposed Services Tariff Section 23.4.5.7.14.5 as a model.<sup>257</sup>

### **3. Deadline for Requesting Exemptions**

#### **a. Compliance Filing**

147. NYISO proposes to allow participants in the Class Year 2015 process to be eligible to apply for the renewable resources and self-supply exemptions. As such, NYISO proposes a deadline of April 28, 2016, for NYISO to receive requests for either exemption.<sup>258</sup> NYISO does not propose to allow members of Class Years prior to Class Year 2015 to apply for either exemption, except with respect to requests for Additional CRIS MW.<sup>259</sup>

#### **b. Protests and Comments**

148. TDI asserts that it is unjust and unreasonable that Class Year 2015 members only had fifteen days after NYISO submitted the proposed self-supply exemption to file applications for the exemption. According to TDI, this deadline is unreasonable because TDI would have had to review NYISO's proposal and negotiate and execute a Long Term Contract with a self-supply load serving entity in fifteen days. While TDI notes that NYISO asserted that stakeholders were on notice for some time that NYISO would only make the exemptions available briefly, TDI argues this is not a justification for the short application period, as parties could not begin preparations for entering into a Long Term Contract to qualify for the self-supply exemption until NYISO filed the final proposal. Therefore, TDI requests that the Commission direct NYISO to extend the application deadline to September 30, 2016. TDI asserts that extending the application deadline will give NYISO at least one to two months to process self-supply exemption applications and will not impose any administrative burdens on NYISO, harm other market participants, or delay the completion of Class Year 2015.<sup>260</sup>

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<sup>257</sup> That section states, in relevant part: "Prior to the revocation of a Self Supply Exemption . . . the ISO shall provide the [self-supply exemption applicant] an opportunity to explain any statement, information, or action . . . . The ISO cannot revoke the Self Supply Exemption until after the 30 days written notice period has expired, unless ordered to do so by the Commission."

<sup>258</sup> Proposed Services Tariff §§ 23.4.5.7.13.1.1, 23.4.5.7.14.1.1(a).

<sup>259</sup> NYISO Transmittal Letter at 21.

**c. Answers**

149. NYISO disagrees with TDI that its proposed application deadline for the self-supply exemption is unreasonable. However, due to delays in the Class Year 2015 process, NYISO states that it is not opposed to an extension of the application deadline to July 29, 2016, but NYISO argues that TDI's requested September 30, 2016 deadline is unreasonable. NYISO explains that it spent months discussing its proposal and sharing detailed drafts of its proposed Services Tariff revisions with stakeholders.<sup>261</sup> Further, NYISO asserts that the nature, scope, and core concepts of the self-supply exemption were settled well before NYISO submitted the compliance filing. In addition, NYISO explains that TDI's proposed deadline does not account for the time NYISO needs to make the buyer-side market power mitigation Class Year determinations for all Class Year participants and it creates a substantial risk of disrupting and delaying many Class Year processes and decisions.<sup>262</sup>

**d. Commission Determination**

150. We dismiss as moot TDI's request to extend the April 28, 2016 deadline for Class Year 2015 members to file an application for a self-supply exemption to September 30, 2016. Class Year 2015 is now closed, rendering the extension of any previously imposed deadline for Class Year 2015 members moot. As discussed above, we conditionally accept NYISO's proposed renewable resources and self-supply exemptions effective for the Class Year 2019.

**4. Requesting Different Exemptions for the Same Capacity**

**a. Compliance Filing**

151. NYISO proposes to prevent a new entrant from applying for a competitive entry exemption in the same Class Year as it applies for a renewable resources or self-supply exemption.<sup>263</sup> NYISO explains that prohibiting a new entrant from applying for a competitive entry exemption in the same Class Year as a renewable resources exemption is appropriate because the rationales underlying the two exemptions are inconsistent—the renewable resources exemption is focused on the resource having a low capacity factor and high development costs, whereas the competitive entry exemption is focused on the resource being wholly reliant on the market for profitability. Additionally, NYISO notes

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<sup>260</sup> TDI May 31, 2016 Protest at 10-12.

<sup>261</sup> NYISO June 13, 2016 Answer at 6.

<sup>262</sup> *Id.* at 6-8.

<sup>263</sup> Proposed Services Tariff §§ 23.4.5.7.13.1.1, 23.4.5.7.14.1.1(a).

that most renewable resources receive support that would make them ineligible for a competitive entry exemption.<sup>264</sup> With regard to the self-supply exemption, NYISO contends that the prohibition on also applying for a competitive entry exemption is necessary because the two exemptions address different and mutually exclusive categories of entrants—the self-supply exemption is intended to allow load serving entities to develop resources themselves, which might not be supported exclusively by market revenues, whereas the competitive entry exemption is predicated on the assumption that a new resource’s CONE will be supported by market revenues alone.<sup>265</sup> However, NYISO explains that it is not proposing to prevent a new entrant from applying for both a renewable resources and self-supply exemption in the same Class Year.<sup>266</sup>

**b. Protests and Comments**

152. TDI requests clarification that it may withdraw a request for a competitive entry exemption (which it submitted on March 13, 2015, for the Class Year 2015) and apply for a self-supply exemption without being subject to mitigation. TDI explains that, seven months after it applied for a competitive entry exemption, the Commission issued the Complaint Order directing NYISO to adopt a self-supply exemption. TDI contends that it would like to apply for a self-supply exemption instead of a competitive entry exemption, but the existing Services Tariff specifies that an applicant for a competitive entry exemption that later withdraws its request because it enters into a non-qualifying contract will be subject to an offer floor.<sup>267</sup> According to TDI, to be eligible for the self-supply exemption, it would have to withdraw its request for a competitive entry exemption and enter into a Long Term Contract with a self-supply load serving entity, which would be a non-qualifying contract under the competitive entry exemption, and thereby subject TDI to offer floor mitigation. TDI notes that this conflict is likely only relevant to TDI, since it is the only member of Class Year 2015 that applied for a competitive entry exemption.<sup>268</sup>

153. TDI argues that the Commission should grant its requested clarification because: (1) no party will be harmed; (2) TDI could not foresee that the Commission would approve another exemption option when it applied for a competitive entry exemption; and (3) when the competitive entry exemption rules were adopted, it was not contemplated

<sup>264</sup> NYISO Transmittal Letter at 6.

<sup>265</sup> *Id.* at 21.

<sup>266</sup> *Id.* at 39.

<sup>267</sup> TDI May 31, 2016 Protest at 5 (citing NYISO, Services Tariff, § 23.4.5.7.9.3.3).

<sup>268</sup> *Id.* at 5-6.



that Section 23.4.5.7.9.3.3 would serve as a prohibition to applying for a different exemption because there were no other exemptions. Therefore, as a matter of fairness and non-discriminatory treatment, TDI contends it should not be prevented from applying for a self-supply exemption for Class Year 2015.<sup>269</sup>

154. Furthermore, with regard to NYISO's proposal to prevent a new entrant from applying for a self-supply exemption in the same Class Year as a competitive entry exemption, TDI states that, while it supports the new proposed Services Tariff provisions as a general matter, given the unique circumstances of Class Year 2015, TDI requests that these provisions not be interpreted to preclude TDI from withdrawing its request for a competitive entry exemption to apply for a self-supply exemption for Class Year 2015.<sup>270</sup> TDI also requests that the Commission clarify that a project that withdraws from a Class Year after submitting an application for an exemption should be allowed to pursue the same or a different exemption in the next Class Year it enters.<sup>271</sup>

**c. Answers**

155. NYISO contends that TDI's request for "clarification" is actually asking for a modification to NYISO's compliance filing to allow a new entrant to apply for a self-supply exemption in the same Class Year it applies for a competitive entry exemption. NYISO reiterates that seeking both a competitive entry exemption and a self-supply exemption in the same Class Year should be prohibited for the reasons stated in its compliance filing.<sup>272</sup> With that said, NYISO states that it is not opposed to a narrow transition rule to allow new entrants in Class Year 2015 that requested a competitive entry exemption to withdraw that exemption by a prescribed deadline without being subject to an offer floor contingent on that new entrant concurrently applying for a self-supply exemption.<sup>273</sup> NYISO adds that the compliance filing is clear that if a new entrant that has applied for an exemption withdraws from a Class Year and enters a subsequent Class Year, it can pursue the same or a different exemption in that subsequent Class Year.<sup>274</sup>

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<sup>269</sup> *Id.* at 6-7.

<sup>270</sup> *Id.* at 8.

<sup>271</sup> *Id.* at 9.

<sup>272</sup> NYISO June 13, 2016 Answer at 9.

<sup>273</sup> *Id.* at 10 (citing Complaint Order, 153 FERC ¶ 61,022 at P 10).

<sup>274</sup> *Id.* at 11.

156. IPPNY and Entergy also oppose TDI's request for clarification that it can withdraw its competitive entry exemption request without being subject to an offer floor and apply for a self-supply exemption for Class Year 2015. IPPNY and Entergy contend that the Commission should reject TDI's request because it is beyond the scope of the Complaint Order and NYISO's compliance filing.<sup>275</sup> Therefore, Entergy argues that TDI should file a complaint with the Commission if it believes NYISO's Services Tariff provisions governing the competitive entry exemption are unjust and unreasonable and need to be altered.<sup>276</sup> Further, IPPNY and Entergy assert that the Services Tariff provisions to which TDI cites were designed to prohibit the very action that TDI is now seeking to take—to withdraw its request for a competitive entry exemption and to enter into a non-qualifying contract.<sup>277</sup> Entergy contends that the requirement that NYISO apply an offer floor to Class Year developers that withdraw their request for a competitive entry exemption is an important component of the exemption's overall structure and should not be revised.<sup>278</sup> Further, IPPNY contends that when TDI applied for the competitive entry exemption in March 2015, it knew that it would be subject to an offer floor if it subsequently entered into a non-qualifying contract.

157. IPPNY notes that the Commission did not require NYISO to make any changes to the competitive entry exemption, much less to allow developers that had previously applied for a competitive entry exemption to withdraw their applications and request a self-supply exemption.<sup>279</sup> Entergy adds that the Commission did not require NYISO to apply the renewable resources and self-supply exemptions to the Class Year 2015 process that began seven months prior to the Complaint Order being issued.<sup>280</sup> IPPNY asserts that it did not protest NYISO's decision to allow Class Year 2015 developers to apply for a renewable resources or self-supply exemption because no Class Year 2015 projects applied, rendering the issue moot. However, IPPNY argues that allowing developers to implement these new exemptions in the middle of the Class Year 2015 process would be unfair because it would give them an unexpected benefit in competing to enter into a contract with a self-supply load serving entity in the Class Year 2015. IPPNY notes that projects that may have entered the Class Year 2015 had they known they could obtain a renewable resources or self-supply exemption will have to wait to subsequent Class

<sup>275</sup> IPPNY June 15, 2016 Answer at 5; Entergy June 15, 2016 Answer at 3-4.

<sup>276</sup> Entergy June 15, 2016 Answer at 3-4.

<sup>277</sup> IPPNY June 15, 2016 Answer at 5-6 (citing NYISO, Services Tariff, § 23.4.5.7.9.3.3); Entergy June 15, 2016 Answer at 4.

<sup>278</sup> Entergy June 15, 2016 Answer at 4.

<sup>279</sup> IPPNY June 15, 2016 Answer at 6.

<sup>280</sup> Entergy June 15, 2016 Answer at 5.

Years to apply.<sup>281</sup> Entergy likewise argues that the Class Year process has begun and other Class Year developers are engaged in that process on the basis of NYISO's notice of which entities applied for a competitive entry exemption.<sup>282</sup>

158. Finally, with regard to TDI's argument that it could not have foreseen that the Commission would require NYISO to implement a self-supply exemption when TDI applied for the competitive entry exemption, Entergy counters that TDI's argument is irrelevant because, since the inception of competitive markets, parties have been on notice that the Commission would approve rule changes, even if the rules may affect the positions taken by parties in the market.<sup>283</sup> Entergy points to the Commission's order on rehearing of the competitive entry exemption, in which the Commission confirmed that projects that had previously completed their Class Year process could not be re-examined and apply for a competitive entry exemption.<sup>284</sup> Entergy states that TDI's request is nothing other than an attempt to secure special treatment for its project.

**d. Commission Determination**

159. We accept NYISO's proposed limitations on applying for exemptions for the same CRIS MW in the same Class Year as just and reasonable and in compliance with the Complaint Order. We agree with NYISO that prohibiting a new entrant from applying for a competitive entry exemption in the same Class Year as a renewable resources or self-supply exemption is appropriate. As NYISO explains, the rationales underlying the competitive entry and renewable resources exemptions are inconsistent and the categories of entrants addressed by the competitive entry and self-supply exemptions are mutually exclusive. This conflict does not exist between the renewable resources and self-supply exemptions, thus, it is appropriate to allow entrants to apply for both the renewable resources and self-supply exemptions in the same Class Year.

160. We dismiss, as moot, TDI's requested clarification that it may withdraw its application for a competitive entry exemption submitted as part of the Class Year 2015 and enter into a non-qualifying contract to qualify for a self-supply exemption in the Class Year 2015, without being subject to an offer floor. Class Year 2015 is now closed, rendering TDI's requested clarification concerning the Class Year 2015 moot.

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<sup>281</sup> IPPNY June 15, 2016 Answer at 6-7 & n.13.

<sup>282</sup> Entergy June 15, 2016 Answer at 7.

<sup>283</sup> *Id.* at 7 (citing *Hudson Transmission Partners, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,156, at P 128 (2013)).

<sup>284</sup> *Id.* at 7-8 (citing Competitive Entry Exemption Rehearing Order, 152 FERC ¶ 61,110 at P 77).

161. With regard to TDI's request that the Commission clarify that a project that withdraws from a Class Year after submitting an application for an exemption should be allowed to pursue the same or a different exemption in the next Class Year it enters, we agree with the requested clarification. However, we do not find that any revisions to NYISO's Services Tariff are needed to make this clarification. We accept NYISO's statements in its answer that if an applicant for one exemption withdraws from a Class Year, it will be able to pursue the same or a different exemption in the next Class Year it enters. Nothing in the Services Tariff appears to prevent this outcome.

**D. Settlement Judge Procedures or Technical Conference**

162. NYAPP requests that the Commission appoint a settlement judge to assist interested parties in resolving issues with NYISO's proposed net-short and net-long thresholds as part of its self-supply exemption. NYAPP also contends that a technical conference on certain issues may be useful in the timely development of a NYISO proposal that complies with the Complaint Order.<sup>285</sup>

163. NYISO states that there is no reason to initiate settlement judge or technical conference processes in this proceeding. NYISO argues that NYAPP offers no explanation as to why or how such processes would lead to a more timely resolution of the issues in this proceeding or would otherwise be helpful.<sup>286</sup>

164. We reject NYAPP's and APPA's requests to appoint a settlement judge or schedule a technical conference to resolve issues with NYISO's proposed net-short and net-long thresholds. We do not find any issues of material fact that warrant establishing settlement judge procedures or scheduling a technical conference. As outlined above, we provide additional guidance for NYISO to use to develop the further compliance filing ordered herein. Stakeholders and interested parties will have the opportunity to comment on that further compliance filing when NYISO files it with the Commission.

The Commission orders:

(A) NYISO's compliance filing is hereby accepted in part, subject to condition, effective for the Class Year 2019, and rejected in part, as discussed in the body of this order.

(B) NYISO is hereby directed to submit a further compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement

<sup>285</sup> NYAPP May 31, 2016 Protest at 17-18.

<sup>286</sup> NYISO June 13, 2016 Answer at 19-20.

attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket No. ER16-1404-000

(Issued February 20, 2020)

GLICK, Commissioner, *dissenting*:

1. Today the Commission issues a series of orders addressing buyer-side market power mitigation rules in the NYISO capacity market. Notably, none of the orders is actually focused on buyers with market power. Instead, these orders only illustrate the extent to which the Commission has perverted “buyer-side market power mitigation” in order to prop up prices, lock in the current resource mix, and attack state policies that promote clean energy. As I have previously explained, that “is illegal, illogical, and truly bad public policy.”<sup>1</sup> Buyer-side market power mitigation should be all about and only about mitigating buyer-side market power. To extent that buyer-side market power mitigation rules apply to buyers without market power, they are *per se* unjust and unreasonable.

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2. When first introduced, buyer-side market power rules were (as their name would suggest) aimed squarely at mitigating the exercise of buyer-side market power—*i.e.*, the ability of a large buyer of capacity to exercise its monopsony power to lower the capacity market clearing price. To the extent that the Commission required buyer-side mitigation of capacity market offers, it limited the mitigation to only resources that could be used effectively for the purpose of depressing capacity market prices or to resources with both the incentive and ability to depress capacity market clearing prices.<sup>2</sup> In short, buyer-side market power mitigation was all about and only about the exercise of buyer-side market power.<sup>3</sup>

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<sup>1</sup> *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (*Calpine v. PJM*) (Glick, Comm’r, dissenting at P 1).

<sup>2</sup> See, e.g., *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at PP 34, 103-104 (2006) (discussing the buyer-side market power mitigation provisions imposed as part of the settlement that created the Reliability Pricing Model); see also Richard B. Miller, Neil H. Butterklee & Margaret Comes, “*Buyer-Side Mitigation in Organized Capacity Markets: Time for a Change?*,” 33 Energy L.J. 449, 460-61 (2012) (*Time for a Change?*) (discussing the Commission’s early approach to buyer-side market power mitigation).

<sup>3</sup> See, e.g., *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 104 (“The

3. Over the course of the last decade, however, the Commission has abandoned that narrow focus. It now no longer requires a resource to have market power—or even any incentive to depress capacity market prices—before subjecting that resource to buyer-side market power mitigation. Minimum offer price rules (MOPR) that were once intended only as a means of preventing the exercise of market power have evolved into a scheme for propping up prices, freezing in place the current resource mix, and blocking states’ exercise of their authority over resource decisionmaking.<sup>4</sup> The result is an ever-expanding system of administrative pricing that is, ironically enough, justified on the basis that it promotes competition.<sup>5</sup> But, in reality, the Commission is not promoting anything remotely resembling actual competition.<sup>6</sup>

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Commission finds the Minimum Offer Price Rule a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self supply.”); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61211, at P 106 (2008) (explaining that buyer-side market power “mitigation is aimed at preventing uneconomic entry by net buyers of capacity, the only market participants with an incentive to sell their capacity for less than its cost”).

<sup>4</sup> See *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm’r, dissenting at P 4); see also Miller, Butterklee & Comes, *Time for a Change?*, 33 Energy L.J. at 461 (“[B]uyer mitigation has effectively become new entrant mitigation under which all new entrants are subject to mitigation unless otherwise exempted because they have somehow demonstrated that their new facility is not ‘uneconomic.’”).

<sup>5</sup> See, e.g., *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 38 (discussing the Commission’s finding on the need to main the “integrity of competition”); *id.* n.38 (“This Commission determined many years ago that the best way to ensure the most cost-effective mix of resources is selected to serve the system’s capacity needs was to rely on competition.”); *ISO New England, Inc.*, 162 FERC ¶ 61,205, at P 24 (2018) (asserting that states’ exercise of their authority over generation facilities “raises a potential conflict with . . . competitive wholesale electric markets”).

<sup>6</sup> It is also worth noting that this Commission’s infatuation with mitigation only goes one way. It is interested in mitigation only when it raises prices. While the Commission has devoted untold resources to pursuing illusory concerns about monopsony power, it has so far refused to take a hard look at seller-side market power. One example is the Chairman’s premature termination of the enforcement process regarding the nearly 1,000 percent year-over-year increase in prices in MISO Zone 4 and the Commission’s failure to provide any justification for its finding that such a rate is just and reasonable. See *Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 (2019) (Glick, Comm’r, dissenting at PP 4-5). Another is the Commission’s failure over the course of the last year to take any action on the complaints regarding PJM’s Market Seller Offer Cap. Those complaints allege that PJM’s current

4. The basic premise of market competition is that sellers should compete with each other to offer the best terms, including price, to provide a particular product or service. And the purpose of capacity markets is to provide the “missing money” that resources need to remain viable, but are unable to earn by providing energy and ancillary services due to various limitations in the markets for those services.<sup>7</sup> That means that capacity market competition should follow a single ‘first principle’: Enabling resources to vie with each other to require as little “missing money” as possible in order to cover their going forward costs, receive a capacity commitment, and help to ensure resource adequacy. For the market to be truly “competitive,” resources must have the flexibility to reflect their own expertise, experience, technology, risk tolerance and whatever else might provide them with a competitive advantage in the quest to provide capacity at the lowest possible cost. That type of competition can, in theory, produce enormous benefits for consumers by shifting risk to investors, facilitating the entry of relatively efficient resources (and the retirement of inefficient ones), and spurring the development and deployment of new technologies and business models—all while procuring the lowest-cost set of resources needed to keep the lights on.

5. Instead of promoting that type of competition, the Commission’s approach to buyer-side market power has degenerated into a scheme for propping up prices, protecting incumbent generators, and impeding state clean energy policies.<sup>8</sup> Although the specifics of the mitigation regimes vary among the eastern RTOs, they all generally force new entrants to bid at or above an administratively determined estimate<sup>9</sup> of what a new resource “should” cost, while existing resources are permitted to bid at a lower level.<sup>10</sup>

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rules allow for the exercise of market power, which increased the total cost of capacity by more than a billion dollars. *See* PJM Independent Market Monitor Complaint, Docket No. EL19-47-000 at 11-12.

<sup>7</sup> *See, e.g.,* James F. Wilson, “*Missing Money*” *Revisited: Evolution of PJM’s RPM Capacity Construct* 1 (2016), available at [https://www.publicpower.org/system/files/documents/markets-rpm\\_missing\\_money\\_revisited\\_wilson.pdf](https://www.publicpower.org/system/files/documents/markets-rpm_missing_money_revisited_wilson.pdf) (discussing the concept of “missing money” and the origin of capacity markets in the eastern RTOs); Roy J. Shanker January 10, 2003 Comments, Docket No. RM-01-12-000 (discussing the idea of missing money).

<sup>8</sup> *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm’r, dissenting at P 4).

<sup>9</sup> In previous orders, the Commission has made much out of so-called unit-specific exemptions, which permit a resource to bid below a default offer floor if it can convince the relevant market monitor that its estimated net going forward costs are below that floor. If the resource succeeds in that endeavor, the market monitor permits the resource to bid at a lower, but still administratively determined, level. That is still administrative pricing.



In practice, those administrative pricing regimes create a systemic bias in favor of existing resources and curtail resources' incentive and ability to compete across all possible dimensions. Moreover, because potential new entrants to the capacity market tend to be disproportionately made up of new technologies and resources needed to satisfy state or federal public policies, the Commission's use of the MOPR also has the unmistakable effect (and, recently, the intent<sup>11</sup>) of slowing the transition to a cleaner, more advanced resource mix.

6. That type of quasi-competition does not lead to an efficient market outcome. As noted, the purpose of capacity markets is to procure the lowest-cost of bundle of resources needed to reliably provide electricity by making resources compete based on the amount of "missing money" they require to cover their costs.<sup>12</sup> To achieve that outcome efficiently, resources' capacity market offers must reflect all relevant costs minus all relevant revenues, including costs and revenues that are not derived directly from Commission-jurisdictional markets.<sup>13</sup> If the market ignores some of those costs and

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<sup>10</sup> In *ISO New England and NYISO*, existing resources are exempt from mitigation. *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 170 FERC ¶ 61,119, at P 38 (2020) (*NYPSC v. NYISO*) ("NYISO's buyer-side market power mitigation measures are applied to all new entrants in the mitigated capacity zones."); *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 3 ("ISO-NE utilizes a minimum offer price rule, or MOPR, that requires new capacity resources to offer their capacity at prices that are at or above a price floor set for each type of resource"). The Commission's recent order in *PJM* applied the MOPR to existing resources, but makes them subject to a different—and generally more favorable—pricing regime than new resources. *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 2 ("[T]he default offer price floor for applicable new resources will be the Net Cost of New Entry (Net CONE) for their resource class; the default offer price floor for applicable existing resources will be the Net Avoidable Cost Rate (Net ACR) for their resource class." (footnotes omitted)); *id.* (Glick, Comm'r, dissenting at PP 32-35) (criticizing the Commission for using different offer floor formulae for existing and new resources).

<sup>11</sup> See *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 4).

<sup>12</sup> See *supra* P 4.

<sup>13</sup> The periodic demand curve resets that occur in the eastern RTOs illustrate the variety of factors that go into determining the missing money. For example, consider everything that went into developing the net CONE in NYISO's most recent demand curve reset, which address factors ranging from federal, state, and local requirements related to environmental considerations, regional differences in capital and labor costs, as well differences in social justice requirements. See NYISO Transmittal, Docket No. ER17-386-000, Exhibit D (Analysis Group study addressing demand curve parameters).

revenues, then the set of resources selected will not actually reflect the lowest-cost or most efficient means of ensuring resource adequacy. And yet that is where we find ourselves: All three eastern RTOs now force new resources to compete based on administratively determined estimates of their costs and revenues rather than their own estimates of what they need to make up the missing money. The result is neither a competitive market nor an efficient outcome.

7. We got to this point largely because of the Commission's misguided belief that it must "protect" capacity markets from the influence of state public policies.<sup>14</sup> That is simply wrong. As explained below, the Commission's efforts to prop up prices by mitigating the effects of state public policies upset the jurisdictional balance that is the heart of the FPA and interfere with capacity markets' ability to produce efficient market outcomes.

8. The FPA is clear. The states, not the Commission, are the entities responsible for shaping the generation mix. Although the FPA vests the Commission with jurisdiction over wholesale sales of electricity as well as practices affecting those wholesale sales,<sup>15</sup> Congress expressly precluded the Commission from regulating "facilities used for the generation of electric energy."<sup>16</sup> Instead, Congress gave the states exclusive jurisdiction to regulate those facilities.<sup>17</sup>

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Those factors affect not only what resource you build and where you can build it, but also how you can operate that resource and, therefore, what revenues you can expect to earn and what costs you can expect to incur. Considering all those factors is necessary in order produce efficient price signals guiding when and where to cite new capacity, notwithstanding the fact that they are not derived from Commission-jurisdictional markets.

<sup>14</sup> See, e.g., *NYPSC v. NYISO*, 170 FERC ¶ 61,119, at P 37; *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5 (explaining that the Commission is applying a minimum offer price rule to state-sponsored resources in order to "protect PJM's capacity market from the price-suppressive effects of resources receiving out-of-market support"); *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 24 ("It is . . . imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support.").

<sup>15</sup> Specifically, as relevant here, the Commission's jurisdiction applies to "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission" and "any rule, regulation, practice, or contract affecting such rate, charge, or classification." 16 U.S.C. § 824e(a) (2018); see also *id.* § 824d(a) (similar).

<sup>16</sup> See *id.* § 824(b)(1) (2018); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) (describing the jurisdictional divide set forth in the FPA); *FERC v.*

9. Although those jurisdictional lines are clearly drawn, the practical reality is far messier. As the Supreme Court has observed, the FPA's spheres of jurisdiction are not "hermetically sealed."<sup>18</sup> One sovereign's exercise of its authority will inevitably affect matters subject to the other sovereign's exclusive jurisdiction.<sup>19</sup> For example, any state regulation that increases or decreases the number of generation facilities will, through the law of supply and demand, inevitably affect wholesale rates.<sup>20</sup> But the existence of such

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*Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) (*EPSA*) (explaining that "the [FPA] also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction"); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517–18 (1947) (recognizing that the analogous provisions of the NGA were "drawn with meticulous regard for the continued exercise of state power"). Although these cases generally deal with the question of preemption, which is, of course, different from the question of whether a rate is just and reasonable under the FPA, the Supreme Court's discussion of the respective roles of the Commission and the states remains instructive when it comes to evaluating how the application of a MOPR squares with the Commission's role under the FPA.

<sup>17</sup> 16 U.S.C. § 824(b)(1); *Hughes*, 136 S. Ct. at 1292; *see also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (recognizing that issues including the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States").

<sup>18</sup> *EPSA*, 136 S. Ct. at 776; *see Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) (explaining that the natural gas sector does not adhere to a "Platonic ideal" of the "clear division between areas of state and federal authority" that undergirds both the FPA and the Natural Gas Act).

<sup>19</sup> *See EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1601; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018) (explaining that the Commission "uses auctions to set wholesale prices and to promote efficiency with the background assumption that the FPA establishes a dual regulatory system between the states and federal government and that the states engage in public policies that affect the wholesale markets").

<sup>20</sup> *Zibelman*, 906 F.3d at 57 (explaining how a state's regulation of generation facilities can have an "incidental effect" on the wholesale rate through the basic principles of supply and demand); *id.* at 53 ("It would be 'strange indeed' to hold that Congress intended to allow the states to regulate production, but only if doing so did not affect interstate rates." (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 512-13 (1989) (*Northwest Central*))); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (explaining that the subsidy at issue in that

cross-jurisdictional effects is not necessarily a “problem” for the purposes of the FPA. Rather, those cross-jurisdictional effects are the product of the “congressionally designed interplay between state and federal regulation”<sup>21</sup> and the natural result of a system in which regulatory authority is divided between federal and state government.<sup>22</sup>

10. Maintaining that interplay and permitting each sovereign to carry out its designated role is essential to the FPA’s dual-federalist structure. When the Commission tries to prevent a state public policy from having an inevitable, but indirect effect on the capacity market, it takes on the role that Congress gave to the states. That is true even where the Commission claims that its only “policy” is to block the effects of state public policies, not the policies themselves. After all, a federal policy of eliminating the effects of state policies is itself a form of public policy—just not one that Congress gave the Commission authority to pursue.

11. Moreover, as former Commission Chairman Norman Bay correctly observed, an “idealized vision of markets free from the influence of public policies . . . does not exist, and it is impossible to mitigate our way to its creation.”<sup>23</sup> Instead, public policy and energy markets are inextricably intertwined.<sup>24</sup> Nearly every aspect of the electricity market is affected by at least one—and more often many—federal, state, or local policies.<sup>25</sup>

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proceeding “can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close . . . . A larger supply of electricity means a lower market-clearing price, holding demand constant. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law.”).

<sup>21</sup> *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central*, 489 U.S. at 518); *id.* (“recogniz[ing] the importance of protecting the States’ ability to contribute, within their regulatory domain, to the Federal Power Act’s goal of ensuring a sustainable supply of efficient and price-effective energy”).

<sup>22</sup> *Cf. Star*, 904 F.3d at 523 (“For decades the Supreme Court has attempted to confine both the Commission and the states to their proper roles, while acknowledging that each use of authorized power necessarily affects tasks that have been assigned elsewhere.”).

<sup>23</sup> *N.Y. State Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator*, 158 FERC ¶ 61,137 (2017) (Bay, Chairman, concurring at 2).

<sup>24</sup> As the FPA itself recognizes, “the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest.” 16 U.S.C. § 824 (2018).

<sup>25</sup> *See Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm’r, dissenting at PP 27-

Even if the Commission is successful in ferreting out state efforts to shape the generation mix, the result will not be a “competitive” market. Instead, the market will remain a reflection of public policy, but will ignore the effects of the very policy decisions that Congress *expressly* gave the states the authority to make. And while that might further the Commission’s goal of increasing prices and slowing the transition to a cleaner energy mix, it will not establish a market based on anything close to actual competition or one that is insulated from public policy.

12. And the end result will be deeply inefficient, no matter how many times my colleagues use the words “market” and “competition.” The resources procured through that market will require considerably more missing money than would the set of resources procured in the absence of this kind of over-mitigation.<sup>26</sup> That means customers will be paying for more expensive capacity than they should. Moreover, the mitigation regimes that the Commission has approved will, by design, ignore resources that must be built because they are necessary to satisfy state public policies. As a result, the capacity markets will procure more capacity than the regions actually need and customers will be left paying twice for capacity. That means customers will be paying for *more* of the *more* expensive capacity than they should.

13. In addition, widespread mitigation undermines a capacity market’s ability to establish price signals that efficiently guide resource entry and exit. States will continue to exercise their authority over the resource mix no matter how hard the Commission tries to frustrate those efforts, especially given the ever-growing threat posed by climate change.<sup>27</sup> A capacity construct that ignores those states’ public policies will produce price signals that do not reflect the factors that are actually influencing the development of new resources. Those misleading price signals will encourage the participation of the ~~wrong types of resources or resources that are not needed at all. It is hard for me to see~~ 28) (discussing the scope of federal and state subsidies affecting the PJM capacity market); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (Glick, Comm’r, dissenting at 6-9) (explaining how “[g]overnment subsidies pervade the energy markets and have for more than a century”); *ISO New England Inc.*, 162 FERC ¶ 61,205 (Glick, Comm’r, dissenting in part and concurring in part at 3) (“Our federal, state, and local governments have long played a pivotal role in shaping all aspects of the energy sector, including electricity generation.”).

<sup>26</sup> That is particularly true given that the Commission permits a resource to increase its estimated costs due to state policy and environmental goals (e.g., the increased fixed and variable costs associated with selective catalytic reduction, *see* NYISO Transmittal, Docket No. ER17-386-000 at 2), but not its revenue derived from state public policies or goals that may happen to be aimed at the exact same goals.

<sup>27</sup> *See, e.g., Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm’r, dissenting at P 55).

how a price signal that encourages redundant investment is a “competitive” or desirable outcome, much less a just and reasonable one.

14. The Commission has suggested that if it succeeds in blocking state policies, then capacity markets will become efficient little islands unto themselves.<sup>28</sup> But a capacity market is a means to an end, not an end in itself. It is a construct that is supposed to minimize the amount of money that customers spend on capacity in order to meet a target reserve margin.<sup>29</sup> A capacity market that does not serve that purpose and is “efficient” only if you disregard the fact that, in the real-world, it produces inefficient results is a market that we ought to reject out-of-hand.

15. Instead of interfering with state public policies, the Commission’s buyer-side market power mitigation regime should focus only on actual market power. In the event that a resource lacks buyer-side market power, its capacity market offer should not be subject to buyer-side mitigation.<sup>30</sup> That result is both more consistent with the FPA’s dual-federalist design and the Commission’s core responsibility as a regulator of monopoly/monopsony power.<sup>31</sup> That approach would also be a great deal simpler and would get the Commission out of these interminable disputes about who gets mitigated, when, and to what level.<sup>32</sup> In short, I believe that buyer-side market power mitigation rules that are not limited only to market participants with actual buyer-side market power are *per se* unjust and unreasonable and should be abandoned immediately.<sup>33</sup>

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<sup>28</sup> *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5; *ISO New England*, 162 FERC ¶ 61,205 at P 21.

<sup>29</sup> *See supra* P 4.

<sup>30</sup> State policies that exceed the states’ jurisdiction because they set or aim at wholesale rates would, of course, remain preempted. *See, e.g., Hughes*, 136 S. Ct. at 1298.

<sup>31</sup> *Cf. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (noting that “FERC’s authority generally rests on the public interest in constraining exercises of market power”).

<sup>32</sup> Some of the proceedings resolved by today’s orders have stretched on for nearly seven years at this point. *See, e.g., Independent Power Producers of New York Complaint*, Docket No. EL-13-62-000 (filed in May 2013).

<sup>33</sup> In dissents from previous Commission orders addressing MOPRs, I have also argued that the Commission’s policy in those particular cases exceeded its jurisdiction because it directly targeted state policies. *E.g., Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm’r, dissenting at PP 7-17). I still believe that to be true. But my point today is a broader one: The Commission should altogether abandon the use of buyer-side

16. “Actual” is an important distinction here. The Commission has at times suggested that extending buyer-side market power mitigation to resources that receive state subsidies on the basis that the state is like a quasi-buyer that looks out for the interests of all consumers in the state.<sup>34</sup> We should abandon that notion as well. States regulate for a variety of reasons and acting as if any regulation is or could be an exercise of market power fundamentally misunderstands the role of state regulation under the FPA. Philosophical market power—as distinguished from actual market power—should have no place in the Commission’s regulatory regime. In any case, to the extent that a state is directly targeting the wholesale market price, then the law in question is preempted and there is no need to muddle things up with a MOPR.<sup>35</sup>

17. Recently, several parties and even the Commission have argued that if we do not block state policies, prices may drop so low that capacity markets may cease to ensure resource adequacy.<sup>36</sup> As an initial matter, there is simply no evidence that we are even remotely close to a scenario in which states policies render the capacity markets useless.<sup>37</sup> Although capacity prices have fallen in recent years, that has more to do with the entry of more efficient resources and excess supply (which is likely due at least in part to the mitigation regime itself), not state policies. In any case, if we ever reach a point where the only way to “save” a capacity market is to unmoor it from reality by blocking state market power regimes to address something other than actual buyer-side market, even putting aside whether the Commission’s application of those regimes exceeds its jurisdiction in the first place.

<sup>34</sup> See, e.g., *NYPSC v. NYISO*, 170 FERC ¶ 61,119 at PP 37, 39; see also *N.Y. State Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator*, 158 FERC ¶ 61,137 (Bay, Chairman, concurring at 3) (“The MOPR is not applied to the state, which may not actually be a buyer and which is acting on behalf of its citizenry, but to the resource, which is offering to sell capacity to the market and which may be a commercial entity. The theory, in other words, assumes such a congruence of interests between the state and the resource that the resource is mitigated for the conduct of the state.”).

<sup>35</sup> See *Hughes*, 136 S. Ct. at 1298 (“States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC’s authority over interstate wholesale rates.”); see also *New England Ratepayers Ass’n*, 168 FERC ¶ 61,169, at PP 41-46 (2019) (finding a state policy preempted because it sets a wholesale rate).

<sup>36</sup> E.g., *ISO New England*, 162 FERC ¶ 61,205 at PP 21, 24; see *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (asserting that state policies compromise the “integrity” of the capacity market); see *Calpine Complaint*, Docket No. EL16-49-000, at 31-32.

<sup>37</sup> *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (Glick, Comm’r, dissenting at 9-11).

policies, then it will be past time to find an alternative approach to ensuring resource adequacy—one whose feasibility does not depend on inefficient real-world outcomes or the Commission usurping the role that Congress reserved for the states.

18. Indeed, the Commission’s efforts to “save” capacity markets are more likely to hasten their eventual demise. The more the Commission interferes with state public policies under the pretext of mitigating buyer-side market power, the more it will force states to choose between their public policy priorities and the benefits of the wholesale markets that the Commission has spent the last two decades fostering. Although that should be a false choice, the Commission is increasingly making it into a real one. One need look no further than New York, where the Public Service Commission has begun a proceeding to consider “taking back” from NYISO the responsibility for ensuring resource adequacy. The Commission’s overreach in today’s orders will no doubt create greater momentum in that direction.

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19. Turning to the merits of this specific order, I dissent because I believe that buyer-side market power mitigation regimes that do not apply only to buyers with market power are *per se* unjust and unreasonable. Today’s order requires NYISO to mitigate renewable and self-supply resources irrespective of whether they are buyers with market power. Although the approach in today’s order, which exempts some renewables from mitigation, is certainly better than mitigating all renewables, it is still unjust and unreasonable. After all, renewable resources in NYISO are rarely buyers, much less buyers with market power.

20. Self-supply resources present a more difficult case since they are, by definition, buyers and may have market power. As such, some mitigation of self-supply resources may be appropriate. And a net-short/net-long standard may be a just and reasonable way to evaluate whether a self-supply resource has market power. Nevertheless, I am concerned that the criteria established by the Commission for evaluating whether a resource satisfies the net-short/net-long standard may result in over-mitigation insofar as it discounts long-term customers and, therefore, distorts the results of the net-short/net-long calculation.

For these reasons, I respectfully dissent.

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Richard Glick  
Commissioner



