

175 FERC ¶ 61,081  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
Neil Chatterjee, James P. Danly,  
Allison Clements, and Mark C. Christie.

New York Independent System Operator, Inc.

Docket Nos. ER16-1404-005  
ER16-1404-006  
ER16-1404-007

ORDER ACCEPTING COMPLIANCE FILING IN PART AND DIRECTING  
FURTHER COMPLIANCE

(Issued April 29, 2021)

1. In the February 2020 Order,<sup>1</sup> the Commission accepted in part, subject to condition, and rejected in part the New York Independent System Operator, Inc.'s (NYISO) April 13, 2016 compliance filing to implement the renewable resources and self-supply exemptions to NYISO's buyer-side market power mitigation rules. Although the February 2020 Order required NYISO to submit compliance revisions within 30 days of the date of that order, NYISO was granted two extensions of time to submit compliance tariff revisions concerning the self-supply exemption.<sup>2</sup> On December 21, 2020, as amended on December 22, 2020, and January 8, 2021, NYISO submitted proposed revisions to its Market Administration and Control Area Services Tariff (Services Tariff) to address the Commission's directives in the February 2020 Order related to the self-supply exemption. As discussed below, we accept in part, subject to condition, NYISO's compliance filing, effective February 20, 2021, as requested. We also 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

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<sup>1</sup> *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121, at P 1 (2020) (February 2020 Order).

<sup>2</sup> See *Notice of Extension of Time*, Docket No. ER16-1404-000, at 1 (issued Mar. 17, 2020); *Notice of Extension of Time*, Docket No. ER16-1404-000, at 1 (issued Sept. 17, 2020).

Installed Capacity (ICAP)<sup>3</sup> markets (mitigated capacity zones)<sup>4</sup> at a price at or above an applicable offer floor until their capacity clears 12, not necessarily consecutive, monthly auctions.<sup>5</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>6</sup> Under Part A, NYISO will exempt a new entrant from 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.

**A. Complaint Order and April 2016 Compliance Filing**

3. In 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, the Complainants), alleging that NYISO's buyer-side market power mitigation rules are unjust, unreasonable, or unduly discriminatory or preferential because the rules are overbroad and result in over-mitigation.<sup>7</sup> In the Complaint Order, the Commission found NYISO's Services Tariff to be unjust, unreasonable, unduly discriminatory and 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>8</sup> The Commission therefore required NYISO to make a compliance filing to revise its buyer-side market power mitigation rules to exempt a narrowly defined set of renewable and self-supply resources.<sup>9</sup>

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<sup>3</sup> NYISO's 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 (29.0.0).

<sup>4</sup> The G-J Locality consists of Load Zones G, H, I, and J, zones "within which a minimum level of Installed Capacity must be maintained." *Id.* § 2.12 (11.0.0) (defining "Locality").

<sup>5</sup> *Id.* § 23.4.5.7 (3.0.0).

<sup>6</sup> *Id.* § 23.4.5.7.2 (1.0.0).

<sup>7</sup> *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 (2015) (Complaint Order), *reh'g denied*, 154 FERC ¶ 61,088 (2016).

<sup>8</sup> *Id.* PP 2, 36.

4. With regard to 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>10</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>11</sup> The Commission also directed NYISO to consider: (1) the impacts of state decisions to subsidize resources that are owned or contracted for by a self-supplied load serving entity; (2) 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 (3) 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>12</sup>

5. 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 (April 2016 Compliance Filing). With regard to the self-supply exemption, NYISO's April 2016 Compliance Filing included rules governing eligibility and revocation, net-short and net-long thresholds, certification and acknowledgement requirements, and limits on requesting multiple exemptions in the same Class Year.<sup>13</sup>

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<sup>9</sup> *Id.* P 2.

<sup>10</sup> *Id.* P 61.

<sup>11</sup> *Id.* P 62.

<sup>12</sup> *Id.* P 63.

<sup>13</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 (11.0.0) (defining Class Year); NYISO, OATT, Attach. S, § 25.5.9 (13.0.0) (explaining Class Year start date and schedule); NYISO, Services Tariff, Attach H, § 23.4.5.7.9.1 (1.0.0) (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-

**B. February 2020 Order**

6. In the February 2020 Order, the Commission accepted in part, subject to condition, and rejected in part, NYISO's April 2016 Compliance Filing, directing that the conditionally accepted Services Tariff revisions be effective for the Class Year 2019.<sup>14</sup> The Commission also directed NYISO to submit a further compliance filing within 30 days.<sup>15</sup>

7. Relevant here, the Commission accepted in part NYISO's proposed eligibility criteria for the self-supply exemption. The Commission reiterated that the Complaint Order considered municipalities, cooperatives, and single customer entities as potential applicants for NYISO's self-supply exemption, but rejected NYISO's proposal to allow certain instrumentalities of the State to be eligible for the exemption. Specifically, the Commission rejected 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," to be eligible for the self-supply exemption, finding that it would run contrary to the Complaint Order's assumption that a load serving entity's incentive is to minimize the costs of serving its specific set of customers.<sup>16</sup>

8. The Commission also directed NYISO to require a minimum term of 10 years remaining on a Long Term Contract at the time a self-supply exemption applicant applies.<sup>17</sup> The Commission held that requiring a minimum of 10 years should remain on such a 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>18</sup>

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supply exemption).

<sup>14</sup> Class Year 2019 has now ended. The Services Tariff revisions that NYISO proposes in this proceeding will be effective on February 20, 2021, as requested by NYISO, consistent with this order.

<sup>15</sup> February 2020 Order, 170 FERC ¶ 61,121 at P 1.

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

<sup>17</sup> February 2020 Order, 170 FERC ¶ 61,121 at P 77; *see* April 2016 Compliance Filing, Proposed Services Tariff § 23.4.5.7.14.1.1(b)(1) (defining Long Term Contract).

<sup>18</sup> February 2020 Order, 170 FERC ¶ 61,121 at P 77; *see* April 2016 Compliance Filing, Proposed Services Tariff § 23.4.5.7.14.3.2(i) (defining Additional Self Supply Capacity).

9. The Commission also directed 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.<sup>19</sup> The Commission found that this clarification was 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>20</sup>

10. Additionally, the Commission directed NYISO to revise the definition of Additional Self Supply Capacity, used in calculating the net-long threshold, to “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.”<sup>21</sup>

11. The Commission also ordered NYISO 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 unforced capacity (UCAP) supply obligations in NYISO’s ICAP markets, to ensure that 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 the New York Control Area (NYCA) as a whole.<sup>22</sup>

12. Finally, the Commission accepted, subject to condition, NYISO’s proposed process for revoking a self-supply exemption. The Commission found that the proposed revocation provisions were appropriate because, consistent with the Complaint Order, they narrowly tailored 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.<sup>23</sup> However, the Commission conditioned its acceptance of NYISO’s proposed tariff revisions on NYISO providing renewable resources and self-supply exemption applicants an opportunity to explain why revocation may be inappropriate.<sup>24</sup> The Commission specified that NYISO

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<sup>19</sup> February 2020 Order, 170 FERC ¶ 61,121 at P 94.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* P 98.

<sup>22</sup> *Id.* P 102; *see* April 2016 Compliance Filing, Proposed Services Tariff §§ 23.4.5.7.14.3.1.1, 23.4.5.7.14.3.1.2 (defining Total Capacity Costs without Entry and Total Capacity Costs with Entry).

<sup>23</sup> February 2020 Order, 170 FERC ¶ 61,121 at P 141.

<sup>24</sup> *Id.* P 146.

should use the language in then proposed Services Tariff section 23.4.5.7.14.5 as a model.<sup>25</sup>

**C. July 2020 Order**

13. In the July 2020 Order, the Commission discussed requests for rehearing of the February 2020 Order, modified the discussion of the order, and continued to reach the same result in the February 2020 Order.<sup>26</sup> Relevant here, the Commission disagreed with arguments that the February 2020 Order's decision to exclude public power entities from the self-supply exemption was arbitrary and capricious and inconsistent with the directives in the Complaint Order.<sup>27</sup> The July 2020 Order explained that the Commission was unpersuaded by arguments that NYISO's net-long threshold fully accounts for the State's ability to suppress ICAP market prices. Finally, the July 2020 Order maintained the February 2020 Order's holding that public power entities, like NYPA, act on behalf of more than their own specific set of customers and, as a result, have the incentive and ability to artificially suppress ICAP market prices.<sup>28</sup>

**II. NYISO's Compliance Filing**

14. On December 21, 2020, as amended on December 22, 2020, and January 8, 2021, NYISO submitted proposed revisions to its Services Tariff to address the Commission's directives in the February 2020 Order related to the self-supply exemption. NYISO also proposes ministerial amendments to align the proposed self-supply exemption tariff language with other Services Tariff amendments that have been made and accepted by the Commission since NYISO's April 2016 Compliance Filing.

15. In relevant part, NYISO proposes to define Self Supply LSE as a:

Load Serving Entity in one or more Mitigated Capacity Zones 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 (i) a municipally owned electric system that owns or controls distribution facilities and provides electric service, (ii) a cooperatively owned electric system that owns or controls distribution facilities and provides electric service, (iii) a "Single Customer Entity," or

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

<sup>26</sup> July 2020 Order, 172 FERC ¶ 61,058 at P 2.

<sup>27</sup> *Id.* P 14.

<sup>28</sup> *Id.* P 16.

(iv) a “Vertically Integrated Utility.” A Self Supply LSE cannot be an entity that is a public authority or corporate municipal instrumentality, including a subsidiary thereof, created by the State of New York that owns or operates generation or transmission and that is authorized to produce, transmit or distribute electricity for the benefit of the public.<sup>29</sup>

16. NYISO states that these revisions implement the February 2020 Order’s directives by allowing municipal electric utilities and cooperatively owned electric systems to remain eligible for the self-supply exemption, while explicitly excluding a public authority or corporate municipal instrumentality created by the State of New York from eligibility. NYISO further contends that the compliance revisions distinguish corporate municipal instrumentalities created directly by the State of New York and that serve a broader state interest from local municipal and cooperative utilities that do not act on behalf of more than their own specific set of customers (i.e., the whole state).<sup>30</sup>

17. In order to comply with the Commission’s directive concerning Long Term Contracts, NYISO proposes to amend the definition of Existing Long Term Commitments in section 23.4.5.7.14.3 of the Services Tariff to clarify that the term covered by this definition includes only capacity that a Self Supply LSE is projected by NYISO to receive, pursuant to a written agreement, and that has a minimum term of 10 years remaining as of the start of the relevant Class Year.<sup>31</sup>

18. To comply with the Commission’s directive regarding the customer base for the net-long threshold, NYISO proposes to amend section 23.4.5.7.14.3 of its Services Tariff to clarify that Projected ICAP Requirements reflect the amount of ICAP MW reasonably projected by NYISO to reflect the expected obligations of the Self Supply LSE to satisfy the ICAP Requirements of its long-term customers. NYISO also proposes to retain the directive that such amounts be “based on the Self Supply LSE’s and all its Affiliates’ share(s) of the Locational Minimum Unforced Capacity Requirements and the NYCA Minimum Unforced Capacity Requirement, as applicable and in accordance with ISO Procedures, over the three most recently completed Capability Years preceding the Class Year Start Date,” but to add to that amount “any incremental long-term customers that have entered contracts with the Self Supply LSE or its Affiliates with a term of 10 years or more prior to the Class Year Study’s Initial Decision Period.”<sup>32</sup> NYISO contends that this addition to the definition of Projected ICAP Requirements will help ensure that the

<sup>29</sup> Proposed Services Tariff § 23.2.1.

<sup>30</sup> Transmittal at 6.

<sup>31</sup> *Id.* at 7.

<sup>32</sup> *Id.* at 8 (citing Proposed Services Tariff § 23.4.5.7.14.3).

customer base for the net-long threshold will include only those customers that are truly “sticky” over the long-term.<sup>33</sup>

19. Regarding the directive to include the sale of physical assets in the net-long threshold, NYISO asserts that the Additional Self Supply Capacity already clearly incorporates both bilateral power purchase agreements and capacity associated with a sale of a physical asset by the Self Supply LSE. Thus, NYISO proposes to retain the existing language of section 23.4.5.7.14.3 but agrees to clarify that Additional Self Supply Capacity “include[s] 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.”<sup>34</sup>

20. To comply with the Commission’s directive to account for the nested structure, NYISO proposes to amend the definitions of Capacity Exposed to Market Prices without Entry and Capacity Exposed to Market Prices with Entry by modifying the calculation of each to include a requirement to subtract Previously Included Capacity Exposed to Market Prices without Entry and Previously Included Capacity Exposed to Market Prices with Entry, respectively.<sup>35</sup> NYISO also proposes to amend section 23.4.5.7.14.3.1 to clarify that the net-short calculation will be met when Total Capacity Costs without Entry are expected to be less than Total Capacity Costs with Entry, when accounting for the nested structure of the Self Supply LSE’s ICAP Requirements. NYISO contends that collectively, these proposed revisions will ensure that the nested structure of UCAP supply in NYISO’s ICAP Markets is fully reflected in the net-short threshold calculations.<sup>36</sup>

21. To comply with the Commission’s directives regarding the revocation provision, NYISO proposes to amend section 23.4.5.7.14.5 of the Services Tariff to provide self-supply exemption applicants and Self Supply LSEs with an opportunity to rebut a proposed self-supply exemption revocation. NYISO explains that section 23.4.5.7.14.5(a) addresses the revocation of a self-supply exemption prior to the time that the applicable resource first produces energy, and requires that the self-supply exemption applicant and the Self Supply LSE notify each other and NYISO in writing within three business days of the event or basis for the failure to meet the requirements for a self-supply exemption. NYISO proposes to add to this section additional processes requiring NYISO to provide written notice of its intent to revoke the self-supply exemption, and giving the self-supply exemption applicant and the Self Supply LSE an opportunity to

<sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.* at 9.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> *Id.* at 11.

rebut NYISO's intent to revoke.<sup>37</sup> NYISO also contends that section 23.4.5.7.14.5(b), in turn, governs revocation of a self-supply exemption for an operating resource, and requires that NYISO provide notice to the self-supply exemption applicant or owner/operator of the generator that the self-supply exemption is subject to revocation. NYISO proposes to add language providing that the written notice shall provide to the self-supply exemption applicant, or the owner/operator of the generator or Unforced Capacity Deliverability Rights, and the Self Supply LSE an opportunity to submit documentation to NYISO and meet jointly with NYISO to rebut the findings within 30 days from the date of NYISO's written notice. NYISO adds that the proposed language requires NYISO to determine within 10 business days of this meeting whether the revocation of the self-supply exemption shall be finalized and post on its website its determination to revoke the self-supply exemption.<sup>38</sup>

22. NYISO requests that the revisions be made effective on February 20, 2021. NYISO explains that the April 2016 Compliance Filing revisions to sections 23.4.5 and 30.4 of the Services Tariff regarding the self-supply exemption are included in this compliance filing so that the proposed revisions to those sections will share an effective date with the Services Tariff revisions proposed in this proceeding.<sup>39</sup>

23. NYISO also states that in Docket Nos. ER17-2096 and ER18-80, it requested flexible effective dates for certain proposed tariff revisions that referenced its then-pending renewable resources and self-supply exemptions. NYISO explains that in both filings, NYISO indicated that it would give notice and make additional filings in those dockets to establish specific effective dates for the relevant revisions shortly after the Commission accepted the revisions proposed in this proceeding.<sup>40</sup> According to NYISO, in the time since those commitments were made, Docket Nos. ER17-2096 and ER18-80 were closed.<sup>41</sup> Therefore, NYISO explains, it is no longer possible for NYISO to make a filing to establish specific effective dates and re-file the underlying tariff revisions in those proceedings. For this reason, NYISO states that this filing includes the proposed revisions in Docket No. ER17-2096 that were filed and accepted with an open effective date. NYISO adds that because these revisions affect Services Tariff section 23.4.5.7.15, this filing includes in Attachment IV to the transmittal a clean version of the language

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

<sup>38</sup> *Id.* at 12.

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

<sup>40</sup> *Id.* at 12-13.

<sup>41</sup> See *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER17-2096-000 (Sept. 9, 2017) (delegated letter order); *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER18-80-000 (Dec. 12, 2017) (delegated letter order).

proposed in this proceeding with the language filed in Docket No. ER17-2096 marked in italics.<sup>42</sup> NYISO contends that this is the most practical and effective method of satisfying NYISO's prior commitments.<sup>43</sup>

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

24. Notice of NYISO's compliance filing was published in the *Federal Register*, 85 Fed. Reg. 86,554 (Dec. 30, 2020) with interventions and protests due on or before January 12, 2021.

25. Notice of NYISO's errata to the compliance filing was published in the *Federal Register*, 85 Fed. Reg. 86,915 (Dec. 31, 2020) with interventions and protests due on or before January 12, 2021.

26. Notice of NYISO's second errata to the compliance filing was published in the *Federal Register*, 86 Fed. Reg. 3147 (Jan. 14, 2021) with interventions and protests due on or before January 29, 2021.

27. The City of New York (City of New York) filed comments and a limited protest and the New York Municipal Power Agency (NYMPA) filed comments in response to NYISO's filings on January 12, 2021. The New York Power Authority (NYPA) filed comments in response to NYISO's filings on January 26, 2021.

### **IV. Comments**

28. City of New York, NYMPA, and NYPA contend that NYISO's proposed definition of Self Supply LSE contains contradictory language and should be revised.<sup>44</sup> Specifically, these parties contend that although the February 2020 Order intended to allow municipal electric companies to continue to be eligible for the self-supply exemption, NYISO's proposed tariff language effectively prevents any municipality and any municipal electric company from being able to qualify for the exemption.<sup>45</sup>

29. City of New York and NYPA explain that, as a matter of law, all municipalities in New York State are corporate municipal instrumentalities created by the State.<sup>46</sup> City of

<sup>42</sup> Transmittal attach. IV.

<sup>43</sup> *Id.* at 12.

<sup>44</sup> City of New York Comments at 2; NYMPA Comments at 3-4; NYPA Protest at 5-6.

<sup>45</sup> City of New York Comments at 3

<sup>46</sup> *Id.*; NYPA Protest at 5-6.

New York also explains that the State Constitution provides that “[t]he legislature shall provide for the creation of local government,” and continues that a municipal corporation is defined under State law as “a county, town, city and village.”<sup>47</sup> City of New York further explains that a town is statutorily defined as “a municipal corporation . . . formed for the purpose of exercising such powers . . . as have been, or, may be conferred or imposed upon it by law.”<sup>48</sup> City of New York states that there is legal precedent demonstrating that municipal corporations are political subdivisions of the State, which exist by virtue of the exercise of the power of the State.<sup>49</sup> According to City of New York, municipal electric companies are either direct parts or subsidiaries of the counties, cities, towns, or villages in which they are located, which are created pursuant to State law and controlled by the legislative bodies of the municipal corporations.<sup>50</sup> NYMPA adds that, because of this, all municipally owned electric systems could be excluded from eligibility for NYISO’s self-supply exemption under NYISO’s proposed definition of Self Supply LSE.<sup>51</sup>

30. City of New York addresses NYISO’s proposal to exclude an entity that is “authorized to produce, transmit or distribute electricity for the benefit of the public.”<sup>52</sup> According to City of New York, the purpose of a municipal corporation is to serve the public and provide service, and it is not possible to distinguish between an entity that provides service for the benefit of the public from an entity that provides public service.<sup>53</sup> City of New York contends that the Commission should reject NYISO’s filing and direct NYISO to develop tariff language that is consistent with the February 2020 Order.

31. NYMPA argues that, despite its members’ creation under state law, they are not “instrumentalities of the State” and have limited or no incentive and ability to suppress prices.<sup>54</sup> NYMPA contends that the February 2020 Order expressly found that municipal

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<sup>47</sup> City of New York Comments at 4 (citing N. Y. Gen. Mun. Law § 2; N. Y. Gen. Constr. Law § 66(2)).

<sup>48</sup> *Id.* at 3-4 (citing N. Y. Town Law § 2).

<sup>49</sup> *Id.* at 4 (citing *Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 548 (1905); *City of N.Y. v. New York*, 86 N.Y.2d 286, 289-290 (N.Y. 1995)).

<sup>50</sup> *Id.* at 5 (citing N. Y. Gen. Mun. Law § 360(7)).

<sup>51</sup> NYMPA Comments at 4.

<sup>52</sup> City of New York Comments at 3.

<sup>53</sup> *Id.* at 5.

<sup>54</sup> NYMPA Comments at 5.

utilities should qualify for the self-supply exemption and asks that the Commission reaffirm that finding.<sup>55</sup>

32. NYPA argues that the Commission should reconsider the restrictions it imposed on NYPA and other State instrumentalities.<sup>56</sup> According to NYPA, the July 2020 Order did not provide sufficient explanation about why the net-long and net-short thresholds proposed in NYISO's April 2020 Compliance Filing failed to sufficiently mitigate NYPA's theoretical ability to engage in price suppression.<sup>57</sup> NYPA also contends that the Commission's decision to disqualify NYPA from eligibility for the self-supply exemption is premised on the inaccurate notion that NYPA has an incentive to manipulate ICAP market prices because it is an instrumentality of the State.<sup>58</sup> NYPA argues that the Commission should revisit its reasoning in the February 2020 Order and direct that all instrumentalities of the State, including municipal corporations and NYPA, should be considered eligible for NYISO's self-supply exemption.<sup>59</sup>

## V. Discussion

33. We accept, subject to condition, NYISO's compliance filing to implement its self-supply exemption, with the conditionally accepted Services Tariff revisions to be effective February 20, 2021, as requested. We direct NYISO to submit a further compliance filing within 30 days of the date of this order, as discussed below. We accept all of NYISO's proposed revisions not otherwise discussed below as in compliance with the February 2020 Order.

34. We accept NYISO's proposed definition of Self Supply LSE insofar as it proposes to include municipally owned electric systems. However, we find that NYISO should revise the proposed definition to the extent that its application would exclude those same entities due to the fact that they could be considered entities "that [are] a public authority or corporate municipal instrumentality, including a subsidiary thereof, created by the State of New York that owns or operates generation or transmission and that is authorized to produce, transmit or distribute electricity for the benefit of the public."<sup>60</sup> We agree with City of New York, NYMPA, and NYPA that the proposed definition could be

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<sup>55</sup> *Id.* at 4-5.

<sup>56</sup> NYPA Comments at 1-2.

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Id.* at 6.

<sup>60</sup> Proposed Services Tariff § 23.2.1.

interpreted to be internally inconsistent. The first sentence of the proposed definition includes a Load Serving Entity that is a municipally owned electric system that owns or controls distribution facilities and provides electric service, but the second sentence of the proposed definition excludes any entity that is a public authority or corporate municipal instrumentality, including a subsidiary thereof, created by the State of New York. As protestors explain, as a matter of law, all municipalities in New York State are corporate municipal instrumentalities created by the State.<sup>61</sup>

35. In rejecting NYISO's proposal to allow certain instrumentalities of the State to be eligible for the self-supply exemption in the February 2020 Order, the Commission did not exclude municipally owned electric systems created by local governments from eligibility for the self-supply exemption.<sup>62</sup> While entities such as NYPA that act on behalf of all customers across the entire State of New York are excluded from eligibility for the self-supply exemption under the February 2020 Order,<sup>63</sup> municipally owned electric systems are created by local governments that are created by State law.<sup>64</sup> Therefore, we direct NYISO to submit a further compliance filing within 30 days of the date of this order to clarify that municipally owned electric systems created by local governments are eligible for the self-supply exemption.

36. We also find that NYPA's protest raises untimely rehearing arguments of the February 2020 Order. The principal question in this proceeding is whether NYISO complied with the February 2020 Order's directives related to NYISO's self-supply exemption. The July 2020 Order specifically addressed arguments that the February 2020 Order's decision to exclude public power entities from the self-supply exemption was arbitrary and capricious and inconsistent with the directives in the Complaint Order and that NYISO's net-long threshold fully accounts for the State's ability to suppress

<sup>61</sup> City of New York Comments at 3; NYPA Protest at 5-6; N.Y. Gen. Mun. Law § 2; N.Y. Gen. Constr. Law § 66(2); N.Y. Town Law § 2.

<sup>62</sup> See February 2020 Order, 170 FERC ¶ 61,121 at P 66.

<sup>63</sup> *Id.* P 67 ("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 . . .").

<sup>64</sup> N.Y. Pub. Auth. Law §§ 1001 - 1017 (creating NYPA); N.Y. State Const., art. IX, §2(a) (providing that "[t]he legislature shall provide for the creation and organization of local government"); N.Y. Gen. Law §§ 19, 20 (providing every city in New York State the general "power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution," and specifically granting them the authority to maintain and operate a sewage disposal plant and to construct, maintain and operate of a water supply system for such city).

ICAP market prices. For these reasons, we deny the portions of NYPA's protest that are an untimely request for rehearing, as the Commission already denied rehearing on these issues.

The Commission orders:

(A) NYISO's filing is hereby conditionally accepted, effective February 20, 2021, subject to further a compliance filing, 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. Chairman Glick is concurring with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket Nos. ER16-1404-005  
ER16-1404-006  
ER16-1404-007

(Issued April 29, 2021)

GLICK, Chairman, *concurring*:

1. I agree that municipal electric companies should be eligible for the self-supply exemption and that NYISO's proposed definition of Self Supply LSE may inappropriately exclude those same entities on the basis that they are instrumentalities of the State of New York.<sup>1</sup> Further, while I agree with New York Power Authority (NYPA) that the Commission should not exclude public power entities like NYPA from the self-supply exemption,<sup>2</sup> at this stage of the proceeding these arguments amount to untimely requests for rehearing, as the order correctly points out.<sup>3</sup>

2. I write separately to underscore my continuing disagreement with the conclusions the Commission reached throughout this proceeding.<sup>4</sup> The Commission's underlying orders in this proceeding have perverted NYISO's buyer-side market power mitigation into a series of unnecessary and unreasoned obstacles to New York's efforts to shape the resource mix. These mitigation rules are *per se* unreasonable and serve only to prop up prices, protect incumbent generators, and impede state clean energy policies.<sup>5</sup> I continue

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<sup>1</sup> *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,081, at PP 34-35 (2021) (Order) (explaining that in the February 2020 Order the Commission did not intend to exclude from eligibility for the self-supply exemption those instrumentalities indirectly controlled by the State, like municipally owned electric systems).

<sup>2</sup> *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (2020) (Rehearing Order) (Glick, Comm'r, dissenting at PP 2, 21-25) (explaining that the decision to "exclude[] public power self-supply entities [like NYPA] from that exemption . . . was arbitrary and capricious").

<sup>3</sup> Order, 175 FERC ¶ 61,081 at P 36.

<sup>4</sup> *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121 (2020) (February 2020 Order) (Glick, Comm'r, dissenting); Rehearing Order, 172 FERC ¶ 61,058 (Glick, Comm'r, dissenting).

<sup>5</sup> February 2020 Order, 170 FERC ¶ 61,121 (Glick, Comm'r, dissenting at P 1); *see also N.Y. Indep. Sys. Operator, Inc.*, 174 FERC ¶ 61,242 (2021) (Glick, Comm'r,

to believe that buyer-side market power mitigation should be all about and only about buyers with market power. Applying buyer-side market power mitigation to entities that are not buyers or buyers that lack market power is nonsensical. Moreover, even when applied to buyers who may have market power, mitigation must reasonably address their potential to exercise that market power.<sup>6</sup>

3. I urge NYISO and its stakeholders to move expeditiously to replace these buyer-side market power mitigation rules with a model that moves beyond minimum offer price rules as a means of mediating the interaction between state policies and wholesale markets. In the event NYISO and its stakeholders cannot settle upon a replacement for its current buyer-side market power rules, then we will be left with little choice but to step in and establish such rules ourselves.<sup>7</sup>

For these reasons, I respectfully concur.

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Richard Glick  
Chairman

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concurring at P 2).

<sup>6</sup> Rehearing Order, 172 FERC ¶ 61,058 (Glick, Comm'r, dissenting at P 1).

<sup>7</sup> 174 FERC ¶ 61,242 (Glick, Comm'r, concurring at P 3) (citing 16 U.S.C. § 824e; *Technical Conference Regarding Resource Adequacy in the Evolving Electricity Sector*, Docket No. AD21-10-000, Tr. at 9:10-20 (Mar. 23, 2021) (Comments of Chairman Richard Glick) (“I think we should to the extent we can, allow . . . the RTOs themselves, and the stakeholders to come up with their own proposals, to organically come up with an approach that’s different on the current MOPR rules around the country. . . . But to the extent they don’t come up with something, I think we have an obligation under the Federal Power Act to act where rates and terms of these markets are unjust and unreasonable.”)).