178 FERC ¶ 61,101
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

New York Independent System Operator, Inc. Docket No. ER20-1718-002

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING, SETTING ASIDE PRIOR ORDER, AND ACCEPTING TARIFF REVISIONS

(Issued February 17, 2022)

1. On September 4, 2020, the Commission rejected a filing submitted by the New York Independent System Operator, Inc. (NYISO), pursuant to section 205 of the Federal Power Act (FPA),[1] proposing revisions to its Market Administration and Control Area Services Tariff (Services Tariff) to revise Part A of the mitigation exemption test under NYISO's buyer-side market power mitigation measures.[2] NYISO, the Indicated New York Transmission Owners (Indicated NYTOs),[3] Equinor US LLC (Equinor), and the New York State Public Service Commission and New York State Energy Research and Development Authority (NYPSC/NYSERDA) (collectively, Petitioners) each requested rehearing of the September 2020 Order.

2. Pursuant to *Allegheny Defense Project v. FERC*,[4] the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the FPA,[5] we are modifying the discussion in the September 2020 Order

[1] 16 U.S.C. § 824d.

[2] *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,206 (2020) (September 2020 Order).

[3] Indicated NYTOs include: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Long Island Lighting Company; Long Island Power Authority; New York Power Authority; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; Orange and Rockland Utilities; Inc.; and Rochester Gas and Electric Corporation.

[4] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[5] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon

and setting aside the order, in relevant part, and accepting NYISO's proposed revisions to the Part A test, subject to a further compliance filing by NYISO proposing an effective date, as discussed below.[6]

I. Background

3. Under NYISO's buyer-side market power mitigation rules applied in the installed capacity market, NYISO will exempt a new entrant from the applicable offer floor if it passes either one of two tests: the Part A test, discussed herein, or the Part B mitigation exemption test.[7] These tests assess capacity market conditions and unit-specific costs, respectively. Under the Part A test, 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 (Net CONE) of the hypothetical unit modeled in the most recent demand curve reset. NYISO states that the Part A test allows new resources to avoid an offer floor at times when the market is approaching the minimum required level of capacity needed in a given load zone, regardless of whether approaching the minimum required level of capacity is due to load growth or the exit of existing resources.[8] Under the Part B test, 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 (three-year mitigation study period), is higher than the Net CONE of the new entrant. Under NYISO's currently effective Services Tariff, the Part B test is performed before the Part A test.

4. On April 30, 2020, as amended on July 9, 2020, NYISO proposed to change the Part A test under its buyer-side market power mitigation rules in four ways.[9] First, NYISO proposed to modify its current practice of conducting the Part B test prior to the Part A test and instead proposed to conduct the test for the renewable resources exemption[10] first, then the Part A test, and finally the Part B test. Second, NYISO

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reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[6] *Allegheny Def. Project,* 964 F.3d at 16-17.

[7] NYISO, Services Tariff, § 23.4.5.7.2 (26.0.0).

[8] NYISO Apr. 30, 2020 Filing at 4 (citing Johnson Aff. ¶ 16).

[9] NYISO's independent market monitor (MMU), Equinor, and the NYPSC filed in support of NYISO's proposal. Helix Ravenswood LLC (Ravenswood) and Independent Power Producers of New York, Inc. (IPPNY) each filed protests. TDI-USA Holdings Corp. (TDI) filed a limited protest of NYISO's July 9, 2020 Deficiency Response.

proposed to establish two separate Part A mitigation study periods, which correspond to two consecutive three-year periods used in the Part A test. Third, NYISO proposed to evaluate resources under the Part A test for each capability year of the corresponding three-year Part A mitigation study period in which each project is grouped.

5. Under the fourth proposed change, which is the subject of the instant rehearing requests, NYISO proposed to modify how new resources are ordered for evaluation under the Part A test. NYISO explained that resources are currently evaluated in sequential cost order (lowest to highest) based on Net CONE. NYISO proposed to adjust this ordering to place Public Policy Resources (i.e., renewable resources, battery storage, and other zero emission resources) ahead of non-Public Policy Resources in evaluations under the Part A test. NYISO explained that the proposed re-ordering of resources was designed to reflect the fact that the development and entry of Public Policy Resources in the future will be reasonably certain due to New York State's recent policy initiatives as well as Public Policy Resources' economics compared to non-Public Policy Resources. NYISO asserted that its proposal will not have price suppressive effects on the capacity market because the proposed changes do not result in incremental exemptions but instead create a mechanism for Public Policy Resources to enter and receive compensation from the NYISO wholesale markets when expected prices are at a level that would support new entry without price suppression in the capacity market.

6. In rejecting NYISO's filing, the Commission determined that the fourth proposed modification to the Part A test was unduly discriminatory because it would prioritize the evaluation of Public Policy Resources before non-Public Policy Resources.[11] The Commission explained that Public Policy Resources are similarly situated to non-Public Policy Resources and disagreed with arguments that the anticipated or desired prevalence of Public Policy Resources in the future composition of New York State's resource mix justified disparate treatment.[12]

II. Rehearing Requests

7. Petitioners claim that the Commission erred in finding that NYISO's fourth proposed Part A modification was unduly discriminatory. Petitioners maintain that Public Policy Resources are not similarly situated to non-Public Policy Resources because the former category of resources are more likely to reach commercial operation

[10] *See N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121, at P 18, *order on compliance*, 172 FERC ¶ 61,058 (2020) (NYISO Renewables Proceeding) (accepting, subject to condition, NYISO's proposed renewable resources exemption); *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER16-1404-003 (Oct. 20, 2020) (delegated order).

[11] September 2020 Order, 172 FERC ¶ 61,206 at P 29.

[12] *Id.*

based on siting and other developmental advantages they receive under New York State laws and regulations.[13]

8. Indicated NYTOs assert that the Part A test "was designed under the assumption that . . . [resources] are evaluated in order of likelihood to be constructed and enter the market."[14] They argue that, while this likelihood was previously measured by a facility's Net CONE, the better indicator for whether a resource will reach commercial operation is now whether that facility is a Public Policy Resource.[15] Similarly, NYISO argues that the prevalence of Public Policy Resources in New York State's future resource mix is an adequate justification for disparate treatment of Public Policy Resources and non-Public Policy Resources because, absent the reordering of the more prevalent resources, inefficient capacity surpluses will result.[16] NYISO also argues that the Commission has a statutory responsibility to avoid such costly inefficiencies, and that the Commission should not have disregarded arguments explaining why disparate treatment is appropriate in this instance.[17]

9. Petitioners characterize as irrelevant the Commission's observation that Public Policy Resources and non-Public Policy Resources are subject to the same interconnection requirements.[18] NYISO points out that almost all supply resources, irrespective of type, are subject to the same interconnection and market participation rules. NYISO argues that, if all such resources are now considered to be similarly situated for purposes of applying the undue discrimination standard, no sequencing of resources could ever occur, resulting in an impossible standard.[19] NYISO adds that, under the undue discrimination principle set forth in the September 2020 Order, ISO New England Inc.'s (ISO-NE) fuel security mechanism, which helps to ensure fuel

[13] Indicated NYTOs Rehearing Request at 10; NYPSC/NYSERDA Request at 12; Equinor Rehearing Request at 11-12.

[14] Indicated NYTOs Rehearing Request at 9.

[15] *Id.*

[16] NYISO Rehearing Request at 9-10.

[17] *Id.* at 23-24, 30; *see also* Indicated NYTOs Rehearing Request at 18-19 (claiming that the September 2020 Order "propagates unjust and reasonable over-mitigation").

[18] NYISO Rehearing Request at 10, 14; Indicated NYTOs Rehearing Request at 9; Equinor Rehearing Request at 14-15.

[19] NYISO Rehearing Request at 14; *see also* Indicated NYTOs Rehearing Request at 12-13; NYPSC/NYSERDA Rehearing Request at 11.

diversity and reliability during the winter months, "would seemingly not pass muster" because both fuel secure and non-fuel secure resources are subject to similar interconnection requirements.[20]

10. Indicated NYTOs claim that "the Commission in other contexts has expressly found that the unique physical and operational characteristics of "[Public Policy Resource]-like generation facilities merit special participation models so as to remove barriers to entry and foster increased competition in capacity, energy and ancillary services markets."[21]

11. Petitioners maintain that the proposed Part A modifications should have been accepted because they were designed to help further New York State's policy objectives without undermining the purpose of NYISO's buyer-side market power mitigation rules.[22] NYISO contends that the September 2020 Order "goes beyond protecting markets from the economic impacts of state policies by seemingly prohibiting any effort to recognize the impacts of such policies" and is therefore "fundamentally incompatible" with the cooperative federalism framework under the FPA.[23] Similarly, NYPSC/NYSERDA maintain that the Commission has previously approached its determinations "with an eye toward trying to harmonize federal and state objectives" but departed from that policy in the September 2020 Order.[24]

12. Equinor and Indicated NYTOs argue that the September 2020 Order departs from Commission precedent, which has previously allowed exemptions from buyer-side market power mitigation when possible to accommodate state public policy.[25] Equinor

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[20] NYISO Rehearing Request at 15.

[21] Indicated NYTOs Rehearing Request at 10-11 (referencing *Integration of Variable Energy Resources*, Order No. 764, 139 FERC ¶ 61,246, *order on reh'g and clarification*, Order No. 764-A, 141 FERC ¶ 61,232 (2012), *order on clarification and reh'g*, Order No. 764-B, 144 FERC ¶ 61,222 (2013); *Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Organizations and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,154 (2019); *Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Organizations and Indep. Sys. Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020)).

[22] NYISO Rehearing Request at 18, 24; Indicated NYTOs Rehearing Request at 21-22; NYPSC/NYSERDA Rehearing Request at 17-18.

[23] NYISO Rehearing Request at 29.

[24] NYPSC/NYSERDA Rehearing Request at 17-18.

also contends that the September 2020 Order is inconsistent with the Commission's approval of the Competitive Auctions with Sponsored Policy Resources (CASPR) proposal in ISO-NE.[26] Equinor argues that, like NYISO's proposal in the instant proceeding, the CASPR mechanism was specifically designed to accommodate the entry of state sponsored resources in recognition that such resources were likely to be constructed regardless of whether they received a capacity supply obligation.[27] In addition, Equinor claims that the Commission's order approving CASPR "unambiguously recognizes that resources that are being developed with state support are not similarly situated to other resources with respect to their participation in the capacity markets."[28]

13. NYISO and NYPSC/NYSERDA allege that the Commission erred in failing to address the entirety of NYISO's pleading. NYPSC/NYSERDA state that the Commission should have provided a reasoned basis for rejecting the other three proposed modifications to the Part A exemption.[29] NYISO asserts that the court's decision in *NRG Power Mktg, LLC v. FERC* [30] is not controlling because while partial rejection would make the Part A modifications less effective, it would not fundamentally change their purpose.

14. Finally, NYISO and Equinor each seek clarification that the September 2020 Order's rejection of the filing is without prejudice and does not preclude NYISO from either re-filing the Part A modifications with additional support or from filing a new proposal.[31]

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[25] Indicated NYTOs Rehearing Request at 21-22 (citing *ISO New England*, 158 FERC ¶ 61,138, at PP 43, 48 (2017) (RTR Order)); Equinor Rehearing Request at 8 (citing *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 47 (2015); NYISO Renewables Proceeding, 170 FERC ¶ 61,121, *order on compliance*, 172 FERC ¶ 61,058).

[26] Equinor Rehearing Request at 7-10 (citing *ISO New England*, 162 FERC ¶ 61,205 (2018) (CASPR Order), *order on reh'g*, 173 FERC ¶ 61,161 (2020) (CASPR Rehearing Order)).

[27] *Id.* at 9.

[28] *Id.*

[29] NYPSC/NYSERDA Rehearing Request at 21-23.

[30] NYISO Rehearing Request at 31-32 (citing *NRG Power Mktg, LLC v. FERC*, 862 F.3d 108, 114 n.2 (D.C. Cir. 2017) (*NRG*)).

[31] *Id.* at 32-33; Equinor Rehearing Request at 15-16.

III. Discussion

15. As discussed below, we hereby set aside the September 2020 Order, in relevant part,[32] and accept NYISO's proposed modifications to the Part A test as just and reasonable, and we direct NYISO to make a further compliance filing to propose an appropriate effective date.

A. Rehearing Determination

16. Upon consideration of the arguments raised on rehearing, we find that NYISO's proposed sequencing system under the Part A test appropriately considers differences between Public Policy Resources and non-Public Policy Resources without being unduly discriminatory or preferential. Section 205(b) of the FPA prohibits "undue" preferences, advantages and prejudices, not all preferences *per se*.[33] A finding of undue discrimination between two classes of entities under the FPA is a fact-based determination that turns on whether the two classes of entities are similarly situated.[34] "To say that entities are similarly situated does not mean that there are no differences between them; rather, it means that there are no differences *that are material to the inquiry at hand.*"[35] In re-examining the record, we find sufficient evidence to support the

[32] While we are setting aside the substantive determination from the September 2020 Order, we preserve the procedural findings therein. *See* September 2020 Order, 172 FERC ¶ 61,206 at PP 27-28.

[33] *See, e.g.*, *Missouri River Energy Servs v. FERC*, 918 F.3d 954, 958 (D.C. Cir. 2019); *City of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984).

[34] CASPR Order, 162 FERC ¶ 61,205 at P 44. *See Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010) ("The court will not find a Commission determination to be unduly discriminatory if the entity claiming discrimination is not similarly situated to others."); *City of Newark v. FERC*, 763 F.2d 533, 546 (3d Cir. 1985) ("[D]ifferences in rates are justified where they are predicated upon factual differences between customers . . . ."); *N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124, at P 10 & n.30 (2018).

[35] CASPR Order, 162 FERC ¶ 61,205 P 44 & n.66, *order on reh'g*, 173 FERC ¶ 61,161 at P 21 (quoting *N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124, at P 10 & n.30 (2017)); *see also, e.g.*, *Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002) ("A rate is not unduly preferential or unreasonably discriminatory if the utility can justify the disparate effect."); *Town of Norwood v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000) ("[D]ifferential treatment does not necessarily amount to undue preference where the difference in treatment can be explained by some factor deemed acceptable by the regulators (and the courts)."); *see also Entergy Servs., Inc.*, 148 FERC ¶ 61,202, at P 24 (2014) (citing *Sw. Power Pool, Inc.*, 137 FERC ¶ 61,075,

conclusion that Public Policy Resources and non-Public Policy Resources are not similarly situated for purposes of applying the Part A test and, thus, that disparate treatment of such resources in this case is justified.

17. We start with the core purpose of the Part A test, which is to allow new resources to submit unmitigated capacity supply offers when additional capacity is needed to meet resource adequacy needs.[36] As the Commission previously explained, the Part A test "allows new resources to avoid an offer floor at times *when the market is approaching the minimum required level of capacity needed in a given load zone* . . . ."[37] Consistent with its core purpose, the Part A test has always determined which resources should receive an exemption based on the consideration of Net CONE, which reflects an analysis of how likely the resource is to enter the market.[38] That ordering ensures that the resources most likely to be successfully developed are the ones that submit supply offers without mitigation when additional capacity is needed.

18. In light of New York State legislation, including enactment of the Climate Leadership and Community Protection Act (CLCPA),[39] we agree that Public Policy Resources are now more likely to be constructed than their non-Public Policy Resource counterparts due to favorable laws and policies governing siting, operation, and financing.[40] For example, in addition to the binding targets in the CLCPA,[41] the recently

at P 52 (2011)).

[36] NYISO July 9, 2020 Deficiency Response, Patton Aff. ¶ 8 ("The Part A Exemption Test is intended to exempt resources from mitigation when the market is sufficiently tight that new resources will soon be needed to satisfy NYISO's resource adequacy needs."). *See also* NYISO Rehearing Request at 9, quoting NYISO's April 30, 2020 Filing at 12 ("the core purpose of the Part A Exemption Test . . . is to identify whether the market has a sufficiently small surplus so that new entry should not be subject to an Offer Floor."); NYTOs' Rehearing Request at 9 (citing NYISO's April 30, 2020 Filing at 5-6 ("the Part A test . . . was designed under the assumption that, and operates most efficiently when, Examined Facilities are evaluated in order of likelihood to be constructed and become available to market.")).

[37] September 2020 Order, 172 FERC ¶ 61,206 at P 2 (emphasis added); *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,060, at P 4 (2020) (emphasis added).

[38] *See supra* P 3.

[39] S.Res. 6599, 2019 Leg., 242nd Sess. (N.Y. 2019) (codified as Ch. 106, L. 2019). The CLCPA requires that 70% of energy consumed in New York State be produced by renewable resources by 2030, and that all energy consumed in the state be completely emissions free by 2040. NYISO Rehearing Request at 8.

enacted Accelerated Renewable Energy Growth and Community Benefit Act provides for a consolidated and accelerated environmental review and permitting process for "Major Renewable Energy Facilities."[42] Also, a number of non-Public Policy Resources are expected to exit the market as a result of the New York State Department of Environmental Conservation's "Peaker Rule."[43] As NYISO explains, the effect of these laws and policies is that Public Policy Resources "are more likely to be built and become operational, even if they do not have the lowest Net CONE" and are also "more likely to have firm off-takers and receive favorable financing terms from private lenders."[44] Further, we find compelling the Indicated NYTOs' argument that, while Net CONE had historically been the best indicator of whether a resource would be constructed, the better indicator in New York State now is whether the resource is a Public Policy Resource.[45] Based on differences in their respective likelihoods of being successfully developed, we find that Public Policy Resources and non-Public Policy Resources are not similarly situated for the purposes of the Part A test and that NYISO's proposed resequencing of Public Policy Resources before non-Public Policy Resources is thus not "unduly" discriminatory.

19. Our determination is consistent with Commission precedent. For example, in both of its orders regarding ISO-NE's CASPR construct, the Commission rejected the

[40] *See* Equinor Rehearing Request at 11-12 (citing NYISO April 30, 2020 Filing at 13). To be clear, our determination that Public Policy Resources and non-Public Policy Resources are not similarly situated turns on the likelihood of development, which, as noted, directly implicates the purpose of the Part A test *supra* P 17, and not on any particular state preference. Accordingly, contrary to the suggestion in the dissent, we find that this is a legitimate factor in differentiating between the two types of resources for purposes of applying the Part A test. The dissent provides no evidence to substantiate its speculation that our analysis would be different had the more-likely-to-be-developed resources been of a different fuel type.

[41] *See supra* n.39

[42] NYISO Apr. 30, 2020 Filing at 13 (citing https://www.nyserda.ny.gov/About/Newsroom/2020-Announcements/2020-04-03-NEW-YORK-STATE-ANNOUNCES-PASSAGE-OF-ACCELERATED-RENEWABLE-ENERGY-GROWTH-AND-COMMUNITY-BENEFIT-ACT-AS-PART-OF-2020-2021-ENACTED-STATE-BUDGET).

[43] *Id.* at 13, n.23 (citing *Ozone Season Oxides of Nitrogen Emission Limits for Simple Cycle and Regenerative Combustion Turbines*, 6 NYCRR Subpart 227-3 (2019)).

[44] NYISO Apr. 30, 2020 Filing at 13; Johnson Aff ¶ 18.

[45] *See supra* P 8.

argument that limiting eligibility for the substitution auction to State-Sponsored Resources—which are analogous to NYISO's Public Policy Resources—was unduly discriminatory or preferential.[46] In reaching that conclusion, the Commission pointed to record evidence showing that State-Sponsored Resources were being developed in significant quantities with or without receiving a capacity supply obligation and that this dynamic could potentially affect the capacity market-clearing price.[47] The Commission then pointed to the absence of similar evidence for other types of resources to support its conclusion that State-Sponsored Resources were not similarly situated to other types of resources and, thus, that it was not unduly discriminatory to limit CASPR's substitution auction to State-Sponsored Resources.[48]

20. Similarly, NYISO has pointed to concrete record evidence to indicate that Public Policy Resources are more likely to be successfully developed than other types of resources.[49] In addition, NYISO has explained why this difference is distinguishing for the purposes of the Part A test.[50] Under the Commission's precedent, that is sufficient to demonstrate that the proposed revisions to the Part A test are not unduly discriminatory or preferential.

21. Moreover, as Equinor points out, the Commission has also drawn distinctions between renewable resources and non-renewable resources in granting exemptions to buyer-side market power mitigation.[51] In the RTR Order and the NYISO Renewables Proceeding, as here, distinguishing between renewable and non-renewable resources was justified notwithstanding their similar interconnection and market participation

[46] CASPR Rehearing Order, 173 FERC ¶ 61,161 at PP 21-31; CASPR Order, 162 FERC ¶ 61,205 at PP 44-45 (2018). The dissent attempts to distinguish the CASPR proceeding as addressing "tariff provisions aimed at the mitigation of market impacts" but fails to grapple with its unambiguous holding that State-Sponsored Resources and non-State-Sponsored Resources are not similarly situated. Danly, Comm'r, dissenting at P 6. Indeed, nothing in the dissent explains why its characterization of the CASPR Rehearing Order is at all relevant to the question at hand, namely whether Public Policy Resources and non-Public Policy Resources are similarly situated for the purposes of the Part A test.

[47] CASPR Rehearing Order, 173 FERC ¶ 61,161 at P 25.

[48] *Id.*

[49] *See supra* P 18.

[50] *See supra* P 17.

[51] RTR Order, 158 FERC ¶ 61,138 at PP 2, 6, 46; NYISO Renewables Proceeding, 170 FERC ¶ 61,121, *order on compliance*, 172 FERC ¶ 61,058.

requirements.[52] We find that the principles applied in those proceedings apply here and that disparate treatment of Public Policy Resources and non-Public Policy Resources in this context is not unduly discriminatory.[53]

22. In the September 2020 Order, the Commission concluded that Public Policy Resources and non-Public Policy Resources are similarly situated "in that they must adhere to similar requirements for interconnection and for participation in the NYISO ICAP market."[54] Upon reconsideration, we find that any such similarity is not dispositive for purposes of an undue discrimination analysis. The standard set forth in the September 2020 Order is overbroad and contrary to Commission precedent relying on material differences, such as a resource's likelihood of being developed and entering service.

23. In addition, we are persuaded by evidence in the record indicating that NYISO's proposed resequencing of resources is just and reasonable because it will minimize artificial capacity surpluses, which, as NYISO's MMU explains, would otherwise occur "because the current Part A test can provide inefficient incentives for investment in new resources that are not needed."[55] NYISO's affiant, Dr. Patton, further explains that, without NYISO's proposed resequencing, there may be an inefficient entry of non-Public Policy Resources, which could lead to higher costs for consumers and other market distortions, including lower energy and ancillary service prices.[56] We agree with

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[52] *Id.*

[53] The dissent attempts to distinguish these cases as being "narrowly tailored to strike a balance between the potential risk of price suppression and the purpose of not impeding the entry of renewable resources unlikely to cause artificial price suppression" but disregards record evidence that the Part A modifications do not undermine the purpose of NYISO's buyer-side market power mitigation rules. *Compare* Danly, Comm'r, dissenting at P 6 *with* arguments summarized *supra* P 11.

[54] September 2020 Order, 172 FERC ¶ 61,206 at P 29.

[55] NYISO Rehearing Request at 9 (citing NYISO July 9, 2020 Deficiency Response, Patton Aff. ¶ 8). The Commission appropriately considers promoting economic efficiency in fulfilling its statutory responsibility to ensure just and reasonable rates. *Hughes v. Talen Energy Mktg*, 578 U.S. 150, 157 (2016) (describing the Commission's extensive regulation of the capacity auction "to ensure that it efficiently balances supply and demand, producing a just and reasonable clearing price"); *FERC v. EPSA*, 577 U.S. 260, 267 (2016) (the Commission "undertakes to ensure just and reasonable wholesale rates by enhancing competition").

[56] NYISO July 9, 2020 Deficiency Response, Patton Aff. ¶ 10.

Dr. Patton's assessment that NYISO's proposal will produce "more efficient, lower cost long run outcomes that benefit consumers."[57]

B. Other Aspects of NYISO's Proposal

24. Given our determination to set aside the September 2020 Order, the rehearing arguments concerning *NRG* and the related clarification requests are moot. Further, for the same reason, we now address the three additional changes NYISO proposed to the Part A test under its buyer-side market power mitigation rules.[58] We find that the uncontested portions of the remaining modifications are just and reasonable, and we are unpersuaded by other objections raised in the underlying proceeding, as discussed below.

1. Definition of Public Policy Resource

a. NYISO's Proposal

25. NYISO proposed to define Public Policy Resources as:

> An Examined Facility that is an Energy Storage Resource, or an Intermittent Power Resource solely powered by wind or solar energy, or that is determined by the ISO to be a zero-emitting resource. A resource may request an ex-ante determination from the ISO if they qualify as a zero-emitting resource prior to their entrance into a Class Year Study or Expedited Deliverability Study. The ISO, in consultation with the MMU, shall issue a determination no later than 20 days after the necessary information has been submitted for consideration. This determination will be binding as long as the resource's technology and characteristics are not modified before issuance of a final determination to the Examined Facility. The ISO will post such ex-ante determinations to its website concurrent with the response to the resource. Public Policy Resources shall be identified and posted on the ISO website no later than the ISO's posting of the Part A Group 1 Examined Facilities and the Part A Group 2 Examined Facilities for Class Year 2019, and any subsequent Class Year Study, Additional SDU Study, and Expedited Deliverability Study that start after July 1, 2020, as provided in Section 23.4.5.7.3.1.4 of this Services Tariff. [59]

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[57] *Id.* P 11.

[58] *See supra* P 4.

[59] NYISO Services Tariff, Attach. H § 23.2.1 (37.0.0).

b. IPPNY's Protest

26. In its protest, IPPNY requested that NYISO be directed to modify its proposed definition of Public Policy Resources to provide that Public Policy Resources include energy storage resources or Tier 1 resources as defined by the NYPSC in its Clean Energy Standard program.[60] IPPNY stated that NYISO's proposed definition of Public Policy Resources is too broad because it may include zero-emitting resource technologies that are not consistent with New York State's policy to support new entry of certain generating technologies over others.[61] IPPNY explained that the NYPSC's Clean Energy Standard program requires load serving entities to procure a percentage of their electricity requirements to meet load from Tier 1 renewable technology types.[62] Further, IPPNY stated that the NYPSC is expected to update its Clean Energy Standard program to implement the requirements of the CLCPA. IPPNY argued that its proposal provides more transparency and is designed to track New York State public policy developments.[63]

c. Commission Determination

27. We are not persuaded that NYISO should be directed to revise its proposed definition of Public Policy Resources to include Energy Storage Resources or Tier 1 resources, as defined by the NYPSC in its Clean Energy Standard program or any successor. NYISO's proposed definition states that energy storage resources, intermittent power resources (including wind or solar resources), and zero-emitting resources as determined by NYISO could be defined as Public Policy Resources. NYISO also states that "other types of zero-emitting resources that exist now or that may exist in the future, may be supported by future New York State programs that might emerge under the auspices of the CLCPA in the years ahead."[64] We disagree with IPPNY that NYISO's proposed definition is too broad. Rather, we find that NYISO's proposed definition is just and reasonable because it provides NYISO with the discretion to identify which zero-emitting resources should qualify as a Public Policy Resource as New York State clean energy policies evolve.[65] While IPPNY pointed to New York State's Clean Energy

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[60] IPPNY Protest at 3, 11-12.

[61] *Id.* at 11.

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

[63] *Id.* at 12.

[64] NYISO April 30, 2020 Filing at 14.

[65] As NYISO explains, intermittent renewables and energy storages are already expressly favored by New York State policy, but other types of zero-emitting resources

Standard program and the CLCPA as examples of clean energy legislation that apply to a defined set of resources, we find that adopting IPPNY's approach with respect to the definition of Public Policy Resources would unnecessarily exclude resources not currently covered by New York State law.[66]

2. Public Policy Resources in Class Year 2019

28. As discussed in the September 2020 Order, TDI requested that the Commission direct NYISO to implement a mechanism through which Public Policy Resources in Class Year 2019, including those that require additional System Deliverability Upgrade studies, are evaluated under the buyer-side market power mitigation rules with all other projects that entered into Class Year 2019.[67] We find that this request is beyond the scope of this proceeding, which is limited to the proposed revisions to the Part A test. The rules specifying that entrants selected to undergo additional System Deliverability Upgrade studies in the Class Year process may receive delayed buyer-side market power mitigation determinations were established in a separate proceeding.[68] We are also not persuaded by TDI's concerns that NYISO's proposal to evaluate a subset of Public Policy Resource projects in Class Year 2019 after other Public Policy Resource and other projects are evaluated unduly discriminates against resources that require additional System Deliverability Upgrade studies. Under NYISO's current interconnection process, exemptions for resources that require additional System Deliverability Upgrade studies are processed separately from other buyer-side market power mitigation exemption determinations in each Class Year.[69] This process is bifurcated because these categories of resources go through NYISO's interconnection process differently. NYISO has not

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that exist now or that may exist in the future may also by supported by future New York State programs emerging from the CLCPA. *See id*.

[66] The issue before us is whether NYISO's proposed definition is just and reasonable, and not whether the it is more or less reasonable than an alternative proposed by IPPNY. *See Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) ("FERC is not required to choose the best solution, only a reasonable one."); *City of Bethany v. FERC*, 727 F.2d at 1136 ("FERC has interpreted its authority to review rates under the FPA as limited to an inquiry into whether the rates proposed by a utility are reasonable—and not to extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs.").

[67] September 2020 Order, 172 FERC ¶ 61,206 at P 26 (citing TDI Protest at 5).

[68] *See* NYISO Filing, Docket No. ER20-638-000 (filed Dec. 19, 2019); *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER20-638-000 (Jan. 31, 2020) (delegated order).

[69] *See id.*

proposed to revise that process in this proceeding; thus, separate evaluation of the resources is not relevant to the issues presented here.

3. Coordination of Exemption Tests

a. NYISO's Filing

29. As described above, NYISO proposed to conduct the renewable resources exemption test first, followed by the Part A test for all remaining capacity that does not qualify for a renewable resources exemption, while including capacity that qualified for a renewable resources exemption in forecasted supply.[70] NYISO proposed to conduct the Part B test for all remaining capacity that did not qualify for the previous exemptions after conducting the Part A test, and to continue counting all capacity that had qualified for a previous exemption as part of forecasted supply.[71] Further, NYISO proposed that, for the purpose of evaluating resources under the Part A and Part B tests, the capacity associated with a resource awarded an exemption under the Part B test will continue to be treated as having received a Part A exemption. NYISO explained that this will ensure that another resource will not receive a Part A exemption for the capacity of the resource that was awarded the Part B exemption after having passed both the Part A and Part B tests.[72]

b. Protests

30. IPPNY and Ravenswood argued that the Commission should direct NYISO to revise its Services Tariff to modify NYISO's proposed coordination of the exemption tests consistent with language that NYISO proposes to clarify the interplay between recipients of Part A exemptions that also pass the Part B test.[73] IPPNY and Ravenswood argued that NYISO should withhold a renewable resources exemption if the resource receiving the exemption also passes the Part B test and not grant the renewable exemption MWs to another resource.[74] IPPNY and Ravenswood stated that, while NYISO proposed to perform the renewable resources exemption test prior to the Part A test, previous NYISO stakeholder discussions indicated that if the resource that received the renewable resources exemption also passed the Part B test, NYISO would reverse its renewable resources exemption determination to reallocate the renewable exemption

[70] NYISO April 30, 2020 Filing at 9.

[71] *Id.*

[72] *Id.* at 18 (citing NYISO, Services Tariff, § 23.4.5.7.2, Attach. H (1.0.0)).

[73] IPPNY Protest at 8; Ravenswood Protest at 15.

[74] IPPNY Protest at 5, 8; Ravenwood Protest at 3, 15.

MWs to other resources in the Class Year.[75] IPPNY and Ravenswood argued that such an outcome would improperly increase the level of renewable resources exemptions.[76] IPPNY also asserted that such an outcome would result in price suppression.[77] IPPNY recognized that NYISO's proposed Services Tariff revisions do not explicitly allow for this outcome but requests that NYISO be directed to revise its Services Tariff to prohibit this outcome, due to NYISO's interpretation, as presented at a NYISO stakeholder meeting.[78] IPPNY and Ravenswood stated that, if a resource qualifies for a renewable resources exemption but also passes the Part B test, that resource technology type should not be considered for a renewable resources exemption in the first place because a renewable resource technology that could pass the Part B test is, by definition, economic.[79]

c. Commission Determination

31. We find IPPNY's and Ravenswood's request, that the Commission direct NYISO to clarify that a renewable resources exemption awarded to a resource will not be reallocated if that resource also passes the Part B test, is beyond the scope of this proceeding, which is limited to proposed modifications to the Part A test. As IPPNY explained, NYISO's proposed Services Tariff revisions do not provide that NYISO can reallocate a resource's renewable resources exemption to other resources if it passes the Part B test.[80] Although IPPNY noted that its concern is based on a statement made by NYISO during a stakeholder meeting, that concern is not a part of NYISO's proposed tariff revisions here, and therefore, will not be addressed in this proceeding.

4. Treatment of Nesting Localities

a. NYISO's Filing

32. With respect to how the renewable resources exemption and the Part A and Part B tests would apply to resources in nested zones (e.g., Zone J: New York City), NYISO stated that it will perform the Part A test for the nested zones and then perform the same test for the nesting zone (e.g., Zone G-J).[81] NYISO stated that this testing order will

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[75] IPPNY Protest at 5-6; Ravenswood Protest at 14.

[76] IPPNY Protest at 7; Ravenswood Protest at 14-15.

[77] IPPNY Protest at 7.

[78] *Id*. at 6.

[79] IPPNY Protest at 6; Ravenswood Protest at 14.

[80] IPPNY Protest at 6.

allow resources to receive an exemption under the Part A test if the market signal in any Locality where the resources are located indicates a need for new capacity. NYISO contended that, given that resources in Zone J are also nested within the G-J Locality, it is imperative to allow them to satisfy any market need that they are capable of meeting.[82] NYISO stated that preventing such an outcome would be at odds with the actual market mechanics and would effectively only permit resources in Zones G-I to meet a resource adequacy need in the G-J Locality. NYISO explained that, while exempting units in Zone J for a G-J Locality need may put downward pressure on Zone J capacity prices, this process is consistent with the construct of nested zones.[83] NYISO maintained that, if the G-J Locality reflects a market need within the locality, then all resources within that locality must have the ability to enter and address the need.

b. Protests and Comments

33. IPPNY and Ravenswood asserted that NYISO should be prohibited from applying the Part A test for the G-J Locality to resources in Zone J.[84] IPPNY argued that NYISO's interpretation of the nesting rules is flawed and that NYISO's proposal would impermissibly exempt Zone J resources from potential buyer-side market power mitigation by evaluating them against irrelevant G-J Locality demand curve parameters.[85] IPPNY stated that NYISO's proposal would therefore suppress Zone J capacity prices below the Zone J Part A test default price level.[86] IPPNY contended that Part A exemptions awarded to Zone J resources must be limited to resources that pass the Part A test for Zone J and that NYISO should separately determine whether any resources in Zones G-I pass the Part A test for the G-J Locality.[87] Ravenswood argued that NYISO's application of the Part A test for the G-J Locality to resources in Zone J is flawed and further exacerbated by NYISO's proposal to change the Part A test from an assessment made for one year of a mitigation study period to a three year assessment and to allow a resource to be exempt in the first year that it qualifies for an exemption.[88]

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[81] NYISO April 30, 2020 Filing at 10.

[82] *Id.* at 10.

[83] *Id.* at 10.

[84] IPPNY Protest at 2, 8-11; Ravenswood Protest at 3, 15-16.

[85] IPPNY Protest at 9.

[86] *Id*. at 9-10.

[87] *Id.* at 10-11.

[88] Ravenswood Protest at 16.

34. Equinor argued that NYISO's proposal to apply the Part A test to a nested Locality (i.e., Zone J) before applying it to the nesting Locality (i.e., the G-J Locality) appropriately recognizes the relationship between Zone J and the broader G-J Locality.[89] Equinor stated that the Commission has recognized that generation capacity located within Zone J is located within, and plays a role in, meeting the capacity requirements of the G-J Locality.[90] Equinor contended that NYISO's proposal will help ensure that the Part A test is not applied in a manner that results in the unnecessary mitigation of a Zone J resource that is capable of meeting capacity needs in the broader Zone G-J Locality. Equinor also stated that NYISO's proposal is consistent with the design of the Part B test, which currently takes into account the ability of Zone J resources to meet the requirements of the G-J Locality.[91]

c. Commission Determination

35. We deny IPPNY's and Ravenswood's request that the Commission prohibit NYISO from applying the Part A test for the G-J Locality to resources in Zone J. We find that NYISO's proposal to allow resources in Zone J to obtain Part A exemptions for a G-J Locality need is just and reasonable because it appropriately recognizes the nested structure of NYISO's mitigated capacity zones. In particular, we agree with NYISO that it is important to allow resources to receive an exemption under the Part A test if the market signal in any zone or locality where they are located indicates a need for new capacity.[92] We disagree with IPPNY and Ravenswood that NYISO's proposal would result in price suppression because, as noted above, the Part A test is intended to only provide exemptions for resources that address the needs of a zone or locality on the condition that prices do not fall below pre-determined levels.[93]

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[89] Equinor Comments at 6.

[90] *Id*. (citing *N.Y. Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,126, at P 53 (2013)).

[91] *Id*. at 7.

[92] NYISO April 30, 2020 Filing at 10.

[93] *See supra* P 23 & n.55.

[94] NYISO April 30, 2020 Filing at 21-22.

[95] *See* Feb. 9, 2021 Notice of Class Year 2019 Completion, *available at* https://www.nyiso.com/documents/20142/1396587/CY2019-Notice-of-Completion.pdf/9c14abbe-3991-c470-0322-5da293088a99.

C. Effective Date and Compliance

36. NYISO's April 30, 2020 filing in this proceeding proposed an effective date of June 30, 2020 such that the Part A modifications would "be in place before the NYISO must make [buyer-side market power mitigation] determinations for Class Year 2019."[94] Because Class Year 2019 has concluded,[95] we cannot expect NYISO to have applied the Part A modifications to that Class Year. Instead, we direct NYISO to submit a compliance filing, within 30 days of the date of this order, proposing a new effective date that will enable NYISO to apply the new Part A provisions to the appropriate Class Year, as indicated by NYISO. However, NYISO's proposed effective date should be no later than the start of the next Class Year. NYISO should include in the compliance filing directed herein any tariff revisions necessary to make the Part A revisions effective for the Class Year so indicated.

The Commission orders:

(A) In response to the requests for rehearing, the September 2020 Order is hereby modified and set aside, in relevant part, as discussed in the body of this order.

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

(C) NYISO's April 30, 2020 filing is hereby accepted, as discussed in the body of this order.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.
Commissioner Christie 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 No. ER20-1718-002

(Issued February 17, 2022)

DANLY, Commissioner, *dissenting*:

1. I dissent from this order[1] because it approves an unduly discriminatory tariff.

2. FPA section 205(b) prohibits the Commission from approving unduly discriminatory tariffs.[2] This standard has been described in both Commission and court precedent. "Discrimination is undue when there is a difference in rates or services among similarly situated customers *that is not justified by some legitimate factor*."[3] Note that the majority in this case speaks of "differences *that are material to the inquiry at hand*"[4] rather than "legitimate" factors. Our duty is to ensure just and reasonable rates pursuant to the FPA, and not to determine whether NYISO's proposal is consistent with federal, state, or municipal renewable energy policies.[5]

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[1] *N.Y. Indep. Sys. Operator, Inc.*, 178 FERC ¶ 61,101 (2022) (*NYISO*). The majority wrongly reverses the Commission's prior rejection of a Federal Power Act (FPA) section 205 filing by the New York Independent System Operator, Inc. *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,206 (2020) (September 2020 Order); 16 U.S.C. § 824d.

[2] 16 U.S.C. § 824d(b).

[3] *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045, at P 115 (2003), *reh'g denied*, 106 FERC ¶ 61,233 (2004) (emphasis added) (footnote omitted); *see also Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002) ("A rate is not 'unduly' preferential or 'unreasonably' discriminatory if the utility can justify the disparate effect."); *Cities of Bethany v. FERC,* 727 F.2d 1131, 1139 (D.C. Cir. 1984) ("Rate differences may be justified and rendered lawful by 'facts-cost of service or otherwise.'") (footnote omitted); *Pub. Serv. Co. of Ind., Inc. v. FERC*, 575 F.2d 1204, 1211 (4th Cir. 1978) (differences may be justified when predicated upon individual characteristics and market impacts).

[4] *NYISO*, 178 FERC ¶ 61,101 at P 16 ("To say that entities are similarly situated does not mean that there are no differences between them; rather, it means that there are no differences *that are material to the inquiry at hand*.") (emphasis in original) (quoting *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 44 (2018)).

[5] *See N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 154 FERC

3. And the factor relied upon here cannot support such transparent discrimination. The majority cites New York State's "favorable laws and policies" for Public Policy Resources,[6] declaring that "differences in their respective likelihoods of being successfully developed"[7] stand as a sufficient basis upon which to discriminate between otherwise similarly situated entities "for the purposes of the Part A test."[8] This is not a material, lawful or legitimate factor. This cannot justify the proposal's "disparate treatment"[9] which would prioritize the evaluation of Public Policy Resources before non-Public Policy Resources, independent of any other consideration, including cost.[10]

4. Can it be that the majority really believes its own reasoning? Could anyone now make this showing? Could, for example, a NYISO market participant now come before the Commission with a complaint and plead facts that it should be preferenced over competitors because it could secure better financing terms, or perhaps have a better credit rating? Would the majority show the same solicitude toward and enthusiasm for the more-likely-to-be-developed Public Policy Resources were they in a state that, for example, promoted coal generators? The analysis should be just the same. No. This is obviously the majority's cynical attempt to justify (however unconvincingly) the approval of a tariff that just happens to advance their preferred public policy objectives.

5. The primary point of the FPA is to ensure that tariffs are non-discriminatory and that costs are not overly burdensome. It does not permit us to approve tariff provisions that baldly favor a state's preferred resources without regard to other considerations. The FPA certainly does not allow us to sacrifice one of its core purposes in the pursuit of a goal like that of ensuring that NYISO's proposal compliments state and municipal energy

¶ 61,088, at P 12 (2016) (citing 18 U.S.C. § 824d).

[6] *NYISO*, 178 FERC ¶ 61,101 at P 18 ("In light of New York State legislation, including enactment of the Climate Leadership and Community Protection Act . . . we agree that Public Policy Resources are now more likely to be constructed than their non-Public Policy Resource counterparts due to *favorable laws and policies* governing siting, operation, and financing.") (emphasis added) (footnotes omitted). The majority's contention that its determination turns on the likelihood of development and not any particular state preference is not compelling. It is precisely because of state preferential treatment that Public Policy Resources are more likely to be developed and constructed. *Id.* P 18 n.40.

[7] *Id.*

[8] *See id.*

[9] *Id.* P 16.

[10] *Id*.

policies.[11] What does that have to do with the FPA? NYISO's existing approach for evaluating resources in sequential cost order of lowest to highest, based on the net cost of new entry is just and reasonable; it should not be replaced.

6. The justifications offered in this order are simply unconvincing. First, the majority announces the need for a new standard for analyzing undue discrimination that does not ignore "material differences, such as a resource's likelihood of being developed and entering service," thereby rejecting arguments that resources are similarly situated which have similar interconnection and market participation requirements.[12] This is not a legitimate analytical standard—it is discriminatory and unlawful. Second, the majority justifies prioritizing Public Policy Resources because doing so will minimize artificial capacity surpluses and reduce inefficient incentives for future investment.[13] Recognizing public policy choices may cause inefficiencies: the courts have recognized this and have long held that states "are free to make their own decisions regarding how to satisfy their capacity needs, but they 'will appropriately bear the costs of [those] decision[s],' . . . including possibly having to pay twice for capacity."[14] Third, the majority asserts that the Commission itself has granted exemptions based on whether resources were renewable.[15] The majority misapprehends these cases which were narrowly tailored to strike a balance between the potential risk of price suppression and the purpose of not impeding the entry of renewable resources unlikely to cause artificial price suppression.[16] Fourth, the majority points to ISO New England Inc.'s Competitive Auctions with Sponsored Policy Resources mechanism.[17] Those cases are inapposite because they

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[11] *See N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,088 at P 12 (citing 18 C.F.R. § 824d ("All rates and charges . . . subject to the jurisdiction of the Commission . . . shall be just and reasonable . . . .")).

[12] *NYISO*, 178 FERC ¶ 61,101 at P 22.

[13] *See id.* P 23.

[14] *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 96-97 (3d Cir. 2014) (quoting *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009)).

[15] *See NYISO*, 178 FERC ¶ 61,101 at P 21.

[16] *See, e.g., N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121 (2020), *order on reh'g and compliance*, 172 FERC ¶ 61,058 (2020). The proposed Part A modifications would indeed undermine the purpose of NYISO's buyer-side market power mitigation rules, in their current construct, notwithstanding the majority's arguments otherwise. *NYISO*, 178 FERC ¶ 61,101 at P 21 n.53.

[17] *See, e.g.*, *NYISO*, 178 FERC ¶ 61,101 at P 19.

address tariff provisions aimed at the *mitigation* of the market impacts of Public Policy Resources.[18]

7. I have determined that NYISO's proposal is unduly discriminatory. That is dispositive, and I see no need to address the merits of the remaining provisions of NYISO's filing. We should reject.

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner

[18] *See ISO New England, Inc.*, 162 FERC ¶ 61,205 at P 45 ("ISO [New England, Inc.'s (ISO-NE)] proposed definition of Sponsored Policy Resource is narrowly tailored to meet ISO-NE's objective of limiting the impact of out-of-market state procurements on the [Forward Capacity Market]."); *see also N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124, at P 10 (2018) ("[C]ourts have explained that entities are similarly situated if they are in the same position with respect to the ends that the law seeks to promote or the abuses that it seeks to prevent, even if they are different in many other respects.") (citation omitted); *id.* P 11 ("The relevant inquiry in this respect is whether NYISO will evaluate the proposed transmission projects of these entities *using the same criteria for the purpose of identifying the more efficient or cost-effective solution* and thus for selection in the regional transmission plan for purposes of cost allocation.") (emphasis added).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc Docket No. ER20-1718-002

(Issued February 17, 2022)

CHRISTIE, Commissioner, *concurring*:

1. I concur with the result, which is to approve NYISO's tariff filing. I do not join the reasoning expressed in the order justifying that outcome.[1]

2. In constitutional law, reviewing courts frequently ask whether a challenged law or regulation is unconstitutional "on its face" or only "as-applied."[2] The latter involves a close analysis of the unique factual record in the case and asks whether the law or regulation under challenge is being *applied* in a constitutional or unconstitutional manner, as opposed to asking the much broader question whether the law is facially unconstitutional, which would have far more sweeping implications.

3. While not a perfect analogy, here I believe that a fact-based, as-applied analysis of NYISO's proposed tariff revisions under the Federal Power Act (FPA) makes acceptance of those revisions appropriate for the reasons I set forth below. The State of New York has enacted legislation that makes clear its preference for certain types of generating resources and its desire ultimately to push other, non-preferred, types of generation out of

[1] For example, I do not agree with what I believe to be certain unnecessarily overreaching language this order employs to support its finding.

[2] *See, e.g.*, *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015) ("A facial challenge is an attack on a statute itself as opposed to a particular application."); Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions and Statutory Severability*, 99 TEX. L. REVIEW 215, 228 (2020) ("The terms are impossible to make wholly precise, but a rough cut will suffice for current purposes. In an as-applied challenge, a party maintains that the Constitution forbids a statute's application to his or her case. In contrast, a facial challenge asserts that a statute – or, more commonly, a provision of a multipart statute – exhibits a defect that renders it invalid as applied to all cases, even if a more narrowly (or occasionally a more broadly) framed provision could have prohibited the challenger's conduct.") (footnote omitted).

the resource mix entirely.[3] New York's state law is discriminatory in its expressed preference for certain types of resources. Does this make the NYISO's tariff revisions – through which NYISO is acting necessarily to *accommodate* the reality of New York's laws – produce rates that are "unjust, unreasonable and/or unduly discriminatory" under the FPA? Under an "as-applied" analysis of this specific, single-state ISO filing by NYISO– and under a practical approach – I do not find it so.

4. We start with the proposition that each state in the United States has the sovereign authority, under its general police power, to *choose* the generating resources necessary to meet its own state's power supply needs. The FPA does not contain any specific provision that pre-empts the states from exercising this authority, even if a state chooses to allow its utilities to enter an RTO. Further, FERC does not have the authority to order a state to build a certain type of generation resource, nor can FERC order a state to retire or ban certain types of resources. Congress has enacted no federal resource mandate nor given FERC the authority to enforce such a mandate, despite occasional legislative efforts to do so.

5. Here the record shows – *and this is critically important to my analysis* – that no one has suggested that this single-state ISO's proposal to accommodate the resource decisions made by the New York legislature will harm consumers in other states. Thus, there being no evidence in this record that citizens of other states will be made to pay for New York's policy decisions through the potential impacts of NYISO's proposed tariff revisions, I conclude that any costs will be confined to New York. Based on the particular set of facts in this record, I do not find that the NYISO proposal "as-applied" results in rates that are "unjust, unreasonable and unduly discriminatory or preferential" under the FPA. If the people and businesses of New York do not like the impacts of their new state laws, their recourse is to the ballot box.

6. A similar analysis could well lead to a different outcome in a *multi-state* RTO, if the record showed that the RTO was implementing one state's public policies as to preferred resources, and that implementation resulted in impacts being shifted to consumers in one or more other states in the multi-state RTO. Such impacts and cost-shifting in multi-state RTOs, if proven by the record, could well be unjust, unreasonable and unduly discriminatory or preferential under the FPA.

[3] By way of example, as today's order notes, the State of New York's Climate Leadership and Community Protection Act requires that 70% of energy consumed in the State of New York be produced by renewable resources by 2030 and that all energy consumed in the State of New York be completely emissions free by 2040.

For these reasons, I respectfully concur.

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Mark C. Christie
Commissioner