

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent System Operator, Inc.)

Docket No. ER14-2518-000

**REQUEST FOR LEAVE TO ANSWER AND ANSWER OF
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“Commission’s”) Rules of Practice and Procedure,¹ the New York Independent System Operator, Inc. (“NYISO”) submits this request for leave to answer and answer to the protests filed in the above-captioned proceeding by (i) Independent Power Producers of New York, Inc. (“IPPNY”), and (ii) Astoria Generating Company, L.P. (“Astoria”) on September 2, 2014.² The NYISO previously filed a motion seeking leave to submit this answer later than the response period specified in Commission Rule 213(d).

IPPNY supports several of the proposals set forth in the NYISO’s July 28 filing of proposed tariff revisions (“Outage States Filing”) including revisions to the calculation of a generator’s derating factor when it is returning to service from an outage, such as a Mothball Outage or ICAP Ineligible Forced Outage, that precluded Installed Capacity³ (“ICAP”) eligibility and the 180 day cap on ICAP eligibility for generators in a Forced outage that have not Commenced Repair.⁴

¹ 18 C.F.R. §§ 385.212, 213 (2014).

² Referred to herein as “IPPNY Protest” and “Astoria Protest.”

³ Terms with initial capitalization that are not otherwise defined herein shall have the meaning set forth in the NYISO Market Administration and Control Area Services Tariff (“Services Tariff”), and if not defined therein, the NYISO Open Access Transmission Tariff (“OATT”), or the meaning set forth in the NYISO’s Outage States Filing.

⁴ IPPNY Protest at 4-6.

Nonetheless, IPPNY and Astoria ask the Commission to reject several other aspects of the NYISO's Outage States Filing. IPPNY's request is based on erroneous claims that the proposed revisions will authorize the NYISO to abrogate existing contractual interconnection rights and take generator property rights in violation of the Fifth Amendment to the U.S. Constitution ("Fifth Amendment").⁵ IPPNY also makes several erroneous claims that the NYISO proposal establishes unreasonable obligations on units taking outages. Contrary to these assertions, the proposed tariff modifications represent a balanced and reasonable approach to effectively address a set of reliability and market concerns that are not adequately addressed in the current tariffs. They establish clear rules regarding the consequences of a unit's removal from service for an extended period of time without abrogating contracts or infringing on cognizable property rights.

Accordingly, for the reasons explained below, the protests should be rejected⁶ and the Commission should issue an order accepting the Outage States Filing without any modifications.⁷

I. REQUEST FOR LEAVE TO ANSWER

The Commission has discretion to accept answers to protests when they help to clarify complex issues, provide additional information, or are otherwise helpful in the development of

⁵ U.S. Const. amend. V.

⁶ The NYISO also urges the Commission to reject IPPNY's request that the Commission order the NYISO to complete its incorporation of these rule changes into its Comprehensive Planning Process within 60 days of a Commission Order. (IPPNY Protest at 2.) The NYISO is committed to completing this incorporation process in a deliberate manner, with the considered input of its stakeholders well in advance of the February 1, 2015 proposed effective date and a Commission order in this regard is unnecessary.

⁷ The NYISO has limited its response to those issues for which it believes that providing additional information will best assist the Commission reach its decision. The NYISO's silence with respect to any particular argument or assertion should not be construed as acceptance or agreement.

the record in a proceeding.⁸ The Commission should follow its precedent and accept the NYISO's answer in this instance. This answer clarifies complex issues, addresses inaccurate statements and mischaracterizations, and provides additional information that will help the Commission better understand the issues and fairly evaluate the tariff revisions proposed in the Outage States Filing.

II. ANSWER

A. **The Proposed Tolling Period for the Expiration of an ICAP Ineligible Forced Outage Is Just and Reasonable and Benefits Generators, Instead of Harming Them, by Extending by 120 Days the Amount of Time the Generator Would Otherwise Have to Return to Service**

The Commission should reject IPPNY's alternative proposal to toll the expiration of an ICAP Ineligible Forced Outage "so long as the generator continues to make reasonable and credible repair efforts."⁹ The NYISO's original proposal is just and reasonable for the reasons specified in the Outage States Filing and below.¹⁰ IPPNY's alternative is unnecessary and could

⁸ See, e.g., *Southern California Edison Co.*, 135 FERC ¶ 61,093 at P 16 (2011) (accepting answers to protests "because those answers provided information that assisted [the Commission] in [its] decision-making process"); *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,058 at P 24 (2011) (accepting the answers to protests and answers because they provided information that aided the Commission in better understanding the matters at issue in the proceeding); *PJM Interconnection, LLC*, 132 FERC ¶ 61,217 at P 9 (2010) (accepting answers to answers and protests because they assisted in the Commission's decision-making process).

⁹ IPPNY Protest at 7. Inexplicably, IPPNY complains the 120 day tolling period is arbitrary for units in an ICAP Ineligible Forced Outage but makes no complaint over the NYISO proposal to similarly limit the tolling available to a unit on a Mothball Outage to 120 days.

¹⁰ Under Section 205 of the FPA, the Commission may only reject the NYISO's proposal if it finds that the changes proposed are not just and reasonable. The Commission need not determine whether the NYISO's proposal is more or less just and reasonable than alternative proposals. See, e.g., *Oxy USA, Inc. v. FERC*, 64 F.3d 679 at 692 (D.C. Cir. 1995) (finding that, under the Federal Power Act, as long as the Commission finds a methodology to be just and reasonable, that methodology "need not be the only reasonable methodology, or even the most accurate one"); cf. *City of Bethany v. FERC*, 727 F.2d 1131 at 1136, 234 U.S. App. D.C. 32 (D.C. Cir. 1984) (when determining whether a proposed rate was just and reasonable, the Commission properly did not consider "whether a proposed rate schedule is more or less reasonable than alternative rate designs"). See also *Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,282 at P 31 (2009) (finding that, because the Commission found the ISO's proposal to be just and reasonable, it need not assess the justness and reasonableness of an alternative proposal); *Louisville Gas & Electric Co.*, 114 FERC ¶ 61,282 at P 29 (2006) (finding that "the just and reasonable standard under the FPA is

unreasonably encourage generators to delay their repairs in order to extend their outage state indefinitely. It would also fail to resolve the planning and market uncertainty that indefinite outages create and that these proposed amendments were intended to remedy.

Importantly, the NYISO's proposal introduces new flexibility for Market Participants facing the expiration of their generators' Mothball Outage or ICAP Ineligible Forced Outage, and related CRIS, because they cannot complete repairs in time. Market Participants that Commenced Repair of their generators before the outage and related CRIS expires, but which cannot complete those repairs before the three year period would otherwise close, have an additional three months, under the NYISO proposal, to complete those repairs. This is a significant generator benefit and the first time that the NYISO has proposed an extension for CRIS which is currently limited to three years.

The NYISO's proposal is reasonable. It is limited in scope and makes the period of the extension clear and objective by providing a bright-line, 120 day definition.¹¹ Contrary to IPPNY's assertions, the NYISO's tolling provision reasonably provides for the "myriad unforeseeable contingencies"¹² that could cause repairs¹³ to be delayed beyond a three year outage period while retaining the important objective of establishing finite, transparent expiration dates for the Mothball and ICAP Ineligible Forced Outages. As the NYISO explained in the Outage States Filing, clearly defined expiration dates for Mothball and ICAP Ineligible Forced

not so rigid as to limit rates to a 'best rate' or 'most efficient rate' standard. Rather, a range of alternative approaches often may be just and reasonable").

¹¹ Contrary to IPPNY's assertions, the 120-day tolling provision does not "trigger" the termination of a generator's interconnection rights. As is explained in greater detail in Section II. B. of this Answer, the expiration of a Mothball Outage and ICAP Ineligible Forced Outage after three years is reasonable and does not result in automatic termination of a generator's Interconnection Agreement.

¹² IPPNY Protest at 8.

¹³ Extensions are available only for generators that Commenced Repair before the outage expiration date. See proposed Services Tariff §§ 5.18.2.3.2 and 5.18.3.3.2.

Outages improve the ability of system planners to separate units which may be available in the future from those that will not be without further study and evaluation. Clearly defining the extension period facilitates both economic and reliability planning.¹⁴

By contrast, IPPNY's alternative to "allow for the tolling period to run as long as the generator continues to make reasonable and credible repair efforts" would indefinitely extend an outage in the event of unforeseen difficulties in completing a repair. It would therefore prevent the application of any expiration date to these outages, so long as the generator continues "reasonable and credible repair efforts."¹⁵ As such, the IPPNY proposal would not resolve the uncertainty that currently surrounds the future availability of generators in these outage states and thus would, at best, fail to address the very problem that prompted the NYISO's proposal and, at worst, could aggravate it.

It would be a mistake to abandon the benefits of establishing the NYISO's 120-day outage expiration extension in order to address IPPNY's concern. The rare occurrence that may legitimately require a repair to take more than 120 days can be better addressed through an individual generator seeking a tariff waiver to extend an individual outage.

A tariff waiver is appropriate when the strict application of a tariff provision could create a "concrete problem" that a party cannot address through good faith efforts.¹⁶ The need for additional time to complete repairs before an outage expires in the face of unique, unforeseen

¹⁴ Outage States Filing at 17.

¹⁵ IPPNY Protest at 8.

¹⁶ *New York Independent System Operator, Inc.*, 139 FERC ¶ 61,108, at P 14 (2012). *See also*, *e.g.*, *PJM Interconnection, LLC*, 137 FERC ¶ 61,184, at P 13 (2011); *PJM Interconnection, LLC*, 137 FERC ¶ 61,109, at P 11 (2011); *PJM Interconnection, LLC*, 135 FERC ¶ 61,069, at P 8 (2011); *ISO-New England, Inc.*, 134 FERC ¶ 61,182, at P 8 (2011); *California Independent System Operator Corp.*, 132 FERC ¶ 61,004, at P 10 (2010); *Hudson Transmission Partners*, 131 FERC ¶ 61,157, at P 10 (2010); *Pittsfield Generating Co., L.P.*, 130 FERC ¶ 61,182, at P 9-10 (2010); *ISO New England Inc. - EnerNOC*, 122 FERC ¶ 61,297 (2008); *Central Vermont Public Service Corp.*, 121 FERC ¶ 61,225 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008).

contingencies or other extraordinary circumstances is much more reasonably and appropriately resolved by an a petition for a tariff waiver than by indefinitely extending all Mothball or ICAP Ineligible Outages while repairs continue. Such a waiver request is not an “unnecessary burden” or an “administrative hurdle” but rather the most appropriate approach to resolve the issues IPPNY has presented.

B. Defining What it Means for a Generator to Be “Retired” and Requiring New Interconnection Requests of Retired Generators Are Reasonable Responses to Promote Reliable Service and Do Not Impermissibly Abrogate or Modify Existing Interconnection Agreements

The Commission should reject IPPNY’s erroneous assertion that the NYISO’s proposals to define the term “Retired” in its tariff and require that a “Retired” generator submit a new Interconnection Request before returning to commercial operation, would impermissibly modify, or even terminate, existing Interconnection Agreements.¹⁷ Similarly, the Commission should reject Astoria’s claim that providing a Transmission Owner with temporary access to Astoria’s interconnection point unlawfully modifies the terms of its Continuing Site Agreement.¹⁸ In both respects, the NYISO proposals are reasonable, promote reliable service and do not revise the term(s) of any existing two-party or three-party Interconnection Agreements.

IPPNY’s claim that the designation of a unit with an expired Mothball or ICAP Ineligible Forced Outage as Retired “frustrates considered business decisions” does not support a conclusion that the NYISO’s proposal impermissibly modifies or terminates existing Interconnection Agreements.¹⁹ Similarly, IPPNY’s claim that the definition of the term “Retired” in the NYISO tariff “[could] potentially trigger rights and obligations under various

¹⁷ IPPNY Protest at 9-12.

¹⁸ Astoria Protest at 2-4.

¹⁹ IPPNY’s references to *New England Power Generators Ass’n v FERC* and the *Permian Basis Areas Rate Cases* are inapplicable to the case before the Commission because the NYISO is not proposing to amend or abrogate existing agreements.

agreements” does not render the proposed amendment a “unilateral terminat[ion]”²⁰ or a revision to the body of any existing Interconnection Agreement.²¹ While the NYISO’s proposed tariff revisions may inform the Commission’s future interpretation of certain Interconnection Agreement provisions, as determined by the Commission on a case-by-case basis, there is nothing impermissible about that outcome. Any modification to, or termination of, an existing Interconnection Agreement even after the effective date of the proposed tariff revisions will continue to be subject to the terms and conditions of the underlying agreements.

Similarly, the NYISO’s proposal to require an out-of-service generator²² to provide temporary use of its unused interconnection point to the Transmission Owner in order to maintain reliability would not modify any existing Interconnection Agreement, including Astoria’s Continuing Site Agreement. The NYISO’s proposal provides only for temporary use and requires the Transmission Owner to provide for the unit’s return to service on six months notice, at no cost,²³ using “efforts that are timely, [and] consistent with Good Utility Practice.”²⁴ Moreover, the tariff requires these efforts be substantially equivalent to those the Transmission Owner would use to return its own equipment to service.²⁵ Since temporary use of a point of

²⁰ IPPNY Protest at 10.

²¹ IPPNY Protest at 11. A unit with an expired Mothball or ICAP Ineligible Forced Outage has not participated in the Energy or Capacity markets for at least three years, nor is it engaged in activity necessary to make such a return possible. Such a unit would need a new Interconnection Agreement to re-establish its CRIS and otherwise assure a reliable interconnection under existing tariff and manual provisions. *See Services Tariff* § 25.9.3.1. and *Transmission Expansion and Interconnection Manual*, § 3.3.4.A.3.) These facts and existing provisions reasonably indicate a unit out of service for three years has ceased operating. The definition of the term “Retired” in the NYISO tariffs simply reflects in the tariff the existence of these circumstances.

²² A generator in a Mothball Outage or ICAP Ineligible Forced Outage is not operating in the Energy market nor is it eligible to sell Capacity.

²³ A no -cost return is available unless the unit’s own failure to return to service under Proposed Services Tariff § 5.18.4.3, required use of the interconnection point.

²⁴ *See* proposed Services Tariff § 5.18.5.2.

²⁵ *Id.*

interconnection does not amend Astoria's Continuing Site Agreement, judicial and Commission precedent involving the *Mobile-Sierra* doctrine is not implicated by the NYISO's proposal.²⁶ Neither do either of these tariff amendments constitute a taking without compensation under the Fifth Amendment.²⁷

Both the proposed provision to add the term "Retired" to the tariff and the provision to require new Interconnection Requests for Retired units serve legitimate purposes, are not unfair to any party, and help to ensure the transmission system is operated in a safe and reliable manner.²⁸ They are therefore just and reasonable and should be accepted.

Defining the term "Retired" and establishing requirements for Retired units to follow before returning to service assures that the NYISO, Transmission Owners and Developers have accurate information about the generators' future availability. This is essential to the ability of the NYISO and the Transmission Owners to maintain and plan for a reliable system. Better information also provides significant value to developers planning new projects in New York.

Authorizing use of the interconnection point of an out-of-service unit is a reasonable amendment to the NYISO tariff and necessary to ensure that the transmission system remains reliable notwithstanding an unexpected reliability issue that arises after the unit's outage began. The application of the NYISO's proposed tariff revisions to any unit that enters into an outage

²⁶ Because the NYISO is not proposing to revise the body of any existing Interconnection Agreements, IPPNY's reference to *Midwest Indep. Transmission Sys. Operator, Inc.* is also misplaced. IPPNY Protest at n. 30.

²⁷ IPPNY Protest at 13-14. See discussion at Section II.C.

²⁸ Moreover, these provisions build on and are consistent with existing limitations in the tariff. The NYISO's existing Services Tarff indicates that units will lose their CRIS if they do not participate in the ICAP market for more than three years (See OATT § 25.9.3.1) and the NYISO's current procedures require units on certain extended outages to go through the NYISO's interconnection process before reentering the market. (See *Transmission Expansion and Interconnection Manual*, § 3.3.4.A.3.)

after the effective date of the revisions, regardless of when its Interconnection Agreement was entered into, is consistent with Commission precedent.²⁹

Further, the potential adverse consequences of a Commission ruling that applies Mobile-Sierra protections to generic revisions to the NYISO's tariffs proposed to enhance its interconnection procedures cannot be ignored. Such a ruling would not only hinder the NYISO's ability to enhance its operating procedures and protocols to ensure reliability, it would also restrict the Commission's ability to take generic action to improve interconnection rules generally.³⁰

Finally, the Commission should reject IPPNY's proposed revision to subpart (ii) of the NYISO's proposed definition of "Retired" as unnecessary and incomplete.³¹ It is unclear what issue IPPNY's suggestion, that a generator with an expired Mothball Outage or ICAP Ineligible Forced Outage should be "deemed" to have permanently ceased operating, would resolve. Adopting IPPNY's proposal would also leave unanswered whether the NYISO could pursue planning activities by assuming such a unit would not be returning to service - a result at odds with the purpose of the amendments proposed in the Outage States Filing.

²⁹ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,363, at PP 74-76, 100-107 (2006) (accepting operating protocols for existing generators and confirming that the protocols supersede existing interconnection agreements to the extent necessary for MISO to maintain the safety and reliability of the transmission assets under its control). See also *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233, at PP 74-76, 100-107 (2012) (accepting MISO's proposal to prospectively apply changes to its generator interconnection procedures to units with existing generator interconnection agreements). IPPNY cites the latter order as supporting its assertion that amendments to existing generator interconnection agreements must be filed with the Commission and shown to be just and reasonable. (IPPNY Protest at n. 30). But that aspect of the Commission's holding is inapplicable to this proceeding because the NYISO is not proposing to modify, or terminate, the terms of any existing interconnection agreements.

³⁰ See, e.g., *Interconnection Queuing Practices, Order on Technical Conference*, 122 FERC ¶ 61,252 (2008); *Small Generator Interconnection Agreements and Procedures, Order No. 792*, 145 FERC ¶ 61,159 (2013).

³¹ IPPNY Protest at 10.

C. Nothing in the NYISO's Proposal Will Result in a Compensable "Taking"

The Commission should reject IPPNY's legally erroneous assertion that: (i) a generator's uninterrupted, continued use of its interconnection point pursuant to the terms of an Interconnection Agreement is a "property interest" and (ii) even a temporary loss of access to an interconnection point that a non-operational generator is, by definition, no longer capable of using would somehow constitute "a taking without just compensation under the Fifth Amendment."³² The Commission should also reject IPPNY's incorrect claim that the "Commission itself held that a generator has a property interest in its interconnection point."³³

Using an interconnection point pursuant to the terms of an Interconnection Agreement provides a generator with access to the grid but in no way transfers ownership rights from Transmission Owners to generators. As the Outage States Filing explained, it is the Transmission Owner, not the generator, that owns the physical facilities where a generator's unit is interconnected to the transmission system.³⁴

Likewise, IPPNY's claim that the Commission found, in a single order issued fourteen years ago and prior to the establishment of its current interconnection regime, that a generator has a property interest in its interconnection point is contradicted by more recent precedent. In 2012, the Commission indicated that the issue of whether interconnection rights are "properly viewed as 'property rights'" has not been resolved by the Commission.³⁵ The Commission should not create such rights in this proceeding.

³² *Id.* at 13-17.

³³ *Id.* at 13.

³⁴ Outage States Filing at 23.

³⁵ *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,079 at P 53 (2012) (accepting PJM's tariff amendments limiting a generator's right to transfer capacity interconnection rights to the one year period after the unit is deactivated and finding that the issue of whether those interconnections rights are property rights to be an unresolved question.)

Even if it were assumed that a generator had some form of property right in the interconnection point that it uses when operational, the NYISO's proposed tariff revisions would not give rise to a compensable taking under the Fifth Amendment. IPPNY claims that the NYISO's proposal would constitute a "direct physical occupation" of generator property³⁶ and cites the Supreme Court's *Loretto* decision, which held that regulations that result in direct physical occupations constitute "*per se*" takings.³⁷ But IPPNY's claim of physical occupation is implausible given that Transmission Owners own the physical interconnection points. Any generator takings claim related to an interconnection point could thus only be considered under conventional "regulatory takings analysis."

A regulatory taking is one in which a government regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster."³⁸ Courts have held that a regulatory taking occurs when a regulation results in a property owner suffering a total deprivation of the value of its property.³⁹ Governmental actions that fall short of causing a "total deprivation of value" are analyzed based "on a complex of factors including the regulation's economic effect on the [property owner], the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."⁴⁰ These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from

³⁶ IPPNY at 13, 14, 16.

³⁷ IPPNY at n. 39, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

³⁸ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

³⁹ See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁴⁰ *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001). See also *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978).

"forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁴¹

IPPNY has not come close to establishing that it has, or will be, subject to a regulatory taking under either of these standards. It has simply, and wrongly, asserted that a taking would occur under the "physical occupation" theory. In reality, there would be no "total deprivation of value" under the NYISO's proposal given the potentially temporary and limited nature of the loss of access to an interconnection point. Nothing is misappropriated by a tariff amendment that requires a generator with an out-of-service unit to provide temporary use of the unit's unused interconnection point to the Transmission Owner in order to maintain reliability and then requires the Transmission Owner to reconnect the unit to the transmission system upon the generator's request.⁴²

The temporary use of an interconnection point by a Transmission Owner does not destroy its future value to the generator nor permanently deprive it of future use. Moreover, it is ultimately the generator's own decision to keep its unit in an outage instead of taking steps to timely return to service.

Under the proposed tariff amendments, the Transmission Owner is obligated to reconnect the generator to the transmission system upon a notice of the generator's intent to return to service provided at least six months before the expiration of the outage.⁴³ During that six month period, the Transmission Owner must regularly update the generator and the NYISO about the status of its reconnection of the unit.⁴⁴ The regular notices of the Transmission Owner's

⁴¹ *Id.*

⁴² When such request follows the generator's failure to make a timely return, the generator may also have a cost responsibility. *See* proposed Services Tariff § 5.18.4.3.

⁴³ Proposed Services Tariff §5.18.5.2 with the caveat noted in footnote 42.

⁴⁴ *Id.*

progress provide ample time to correct inadvertent delays or seek other solutions. Requiring the payment of lost opportunity costs in the event of an inadvertent delay is unnecessary and inconsistent with principles underlying the Fifth Amendment and the Transmission Owner's return of the use of the interconnection point to the generator. Nothing about these circumstances should raise any concern about generators being forced to unfairly bear burdens that ought to be borne by the public as a whole.

Similarly, temporary use of an unused interconnection point to resolve a reliability issue does not justify a cost-based payment or other form of compensation. IPPNY does not define a right at the interconnection point that is interfered with by a temporary use—particularly since this use would only occur when the generator itself is not using the interconnection point. Furthermore, the generator would continue to have the ability to return to service within the permitted timeframe without incurring additional interconnection costs.⁴⁵

D. IPPNY's References to Attachment S "Headroom" and Order No. 1000 Evaluations are Misplaced

IPPNY's argument that there should be compensation for use of generator's "rights" to facilities beyond the point of interconnection is likewise misplaced. IPPNY points to the Headroom provisions in Attachment S of the OATT as support for its assertion. Attachment S contains the process under which the NYISO allocates to a "Class Year" of proposed projects the costs of System Upgrade Facilities that would not be necessary "but for" those proposed projects. The Headroom mechanism in Attachment S identifies circumstances where a subsequent developer must reimburse a prior developer for System Upgrade Facility costs.

⁴⁵ Although, as noted, when a request to return to service follows the generator's failure to make a timely return, the generator may also have a cost responsibility. *See* proposed Services Tariff § 5.18.4.3.

Rather than recognizing a property right, the Headroom mechanism seeks to equitably assign cost responsibility for System Upgrade Facilities among developers in different Class Years.⁴⁶

IPPNY's Protest does not support its assertion that generators have a "property right[] to . . . system capability" created by System Upgrade Facilities. First, the NYISO's tariff is clear that Transmission Owners own System Upgrade Facilities (and pay for operating and maintaining them), and the Commission has clarified that such facilities are an integrated part of the transmission system. Further, paying for a System Upgrade Facility does not give a generator a priority right to "use" the upgrade in actual operations—instead, paying for the upgrade is a requirement for the generator to interconnect. Again, under the NYISO's proposal, the generator retains that right to return to service (*i.e.*, interconnect) within the permitted timeframes. For all these reasons, the NYISO's proposals are reasonable and do not justify a Commission finding that they represent a compensable taking.

Finally, the Commission should also reject IPPNY's proposal to require a Transmission Owner to demonstrate that use of the interconnection point connecting the generator is "the most efficient and cost-effective reliability solution" before being allowed to use it.⁴⁷ The NYISO proposal provides for temporary use of an interconnection point only if such use has been selected as a Gap Solution⁴⁸ or to resolve a reliability issue on a facility other than those of the

⁴⁶ The Headroom mechanism recognizes that upgrades may have capability in excess of the minimum necessary to resolve the issue create by a given project. The Headroom mechanism addresses what would be an undesirable result of allowing a developer to avoid a cost allocation merely by being in a later Class Year.

⁴⁷ IPPNY Protest at 16.

⁴⁸ The term Gap Solution is defined in Attachment Y, § 31.1.1 of the OATT as:
A solution to a Reliability Need that is designed to be temporary and to strive to be compatible with permanent market-based proposals. A permanent regulated solution, if appropriate, may proceed in parallel with a Gap Solution.

New York State Bulk Power Transmission Facilities⁴⁹ system (“non-bulk system”).⁵⁰ In selecting, as a Gap Solution, a transmission project that uses an unused interconnection point, the NYISO’s tariff requires that the NYISO evaluate and report to the governmental agency with jurisdiction over the implementation or siting of Gap Solutions on whether any or all of the Gap Solutions proposed meet the Reliability Need or imminent threat before use of the interconnection point is chosen.⁵¹

IPPNY's suggestion that Order 1000 principles should be applied to the Gap Solutions process is unreasonable and not practicable. The NYISO has filed tariff provisions to evaluate and select the more efficient or cost effective solution to transmission needs but only in the normal course of its expanded two-year planning process.⁵² FERC has not directed the application of this lengthy process, reserved for regulated transmission solutions, to obtaining solutions designed to be temporary or to fill the gap between regular planning processes.⁵³

Moreover, it is simply not practicable to apply the evaluation and selection process to obtaining Gap Solutions needed to maintain reliability in the Comprehensive Reliability Plan or to mitigate an imminent threat to reliability. Under these circumstances, the tariff requires immediate action by the NYISO, after consultation with the New York Department of Public

⁴⁹ The term *New York State Bulk Power Transmission Facilities* is defined in Attachment Y, § 31.1.1 of the OATT as:

The facilities identified as the New York State Bulk Power Transmission Facilities in the annual Area Transmission Review submitted to the NPCC by the ISO pursuant to NPCC requirements.

⁵⁰ Proposed Services Tariff § 5.18.5.1

⁵¹ OATT § 31.2.10.

⁵² See OATT Section 31.2.6.5.2 (NYISO selection of more efficient or cost effective regulated transmission solution to satisfy reliability need).

⁵³ See OATT Section 31.2.10.5 (Gap Solutions "shall be designed to be temporary solutions and to strive to be compatible with permanent market-based proposals").

Service, and by the Transmission Owners to maintain bulk power system reliability.⁵⁴

Appropriate governmental agencies and authorities then decide whether to proceed with a Gap Solution or any alternative Gap Solution that is offered.⁵⁵

E. The Commission Should Reject as Unnecessary IPPNY's Proposal to Require the NYISO to Further Clarify the Return to Service Process

IPPNY argues that the NYISO's proposal requiring that generators return to service when necessary to resolve a reliability need is incomplete and should be revised. Pursuant to the NYISO proposal, a generator would be required to return to service following an order establishing compensation for such return from an applicable regulatory agency.⁵⁶ Complaining that such an order "must be issued by the Commission," IPPNY requests that the Commission direct the NYISO to "amend its proposal to clarify that the Compensation Order must be issued by the Commission"⁵⁷ and include language in its tariff "specifying a generator owner's right to file proposed rates with the Commission for approval pursuant to Section 205 if the generator is required to operate to meet a reliability need."⁵⁸ The Commission should reject both requests as unnecessary.

The NYISO proposal does not add or detract from any right a generator may have to make a filing with the Commission seeking a wholesale rate in the circumstances outlined in Section III.G of the Outage States Filing. Nor could it possibly add to or detract from the Commission's authority.

⁵⁴ See OATT Section 31.2.10.2 and 31.2.10.3.

⁵⁵ OATT Section 31.2.10.4.

⁵⁶ Proposed Services Tariff § 5.18.4.1

⁵⁷ IPPNY Protest at 18.

⁵⁸ IPPNY Protest at 20.

F. The Commission Should Reject IPPNY's Alternate Payment Proposal for Generators Needed for Reliability that Fail to Make a Timely Return to Service, but Later Return to Service

IPPNY complains that the NYISO would require generators to make excessively large payments if they choose to return to service after failing to return to service under the provisions of proposed Services Tariff § 5.18.4, thereby causing the need for a reliability solution to be installed at their interconnection points. The NYISO designed this cost obligation to encourage generators on outage to return to service when they are needed to remedy a reliability issue, once arrangements for compensation related to their return to service are in place.⁵⁹ The Commission should reject IPPNY's proposal that a generator that fails to make a timely return to service, but later returns to service, "pay only the excess amount above what customers would have had to pay if the generator had returned to service and received full cost of service rate recovery"⁶⁰ as it could completely undermine the incentive that the cost assignment was intended to create. Moreover, Dr. Patton never concluded that the NYISO's proposal in this regard would deprive energy markets of efficient suppliers unwilling to take on high risks. Indeed, Dr. Patton was quite supportive of the need for the NYISO and the Transmission Owners to devise rules that would allow them to maintain reliability under circumstances where one or more generators unexpectedly cease to operate.⁶¹

The NYISO's proposal to impose the cost of the alternate reliability solution on a generator that fails to make a timely return to service, but later returns to service, unless the generator and the Transmission Owner agreed on an alternate rate, is just and reasonable. These are costs the generator had the opportunity to avoid by making a timely return to service, or

⁵⁹ Proposed Services Tariff § 5.18.4.1

⁶⁰ IPPNY Protest at 21.

⁶¹ Patton Affidavit at P 33

seeking a waiver from the Commission if its untimely return to service was unavoidable for extraordinary circumstances. Further, imposing the full cost of the alternate reliability solution on a generator that fails to make a timely return to service establishes an appropriate, readily quantifiable financial deterrent to a generator's untimely return to service. Even if the alternative proposal by IPPNY would be a reasonable methodology, the Commission must accept the NYISO's proposal because it is just and reasonable.⁶²

If the Commission determines, nevertheless, that a generator that fails to make a timely return to service, but later returns to service, should pay for something less than all of the costs to install the alternate reliability solution, then the NYISO respectfully requests that the Commission order the NYISO to work with its stakeholders to determine the appropriate amount to allocate to the generator. This issue of the appropriate costs to impose on a non-returning generator was debated in the stakeholder process and the proposal the NYISO put forward was accepted by the requisite super majority of its Market Participants. Rather than rush to adopt the IPPNY proposal, the Commission should indicate the criteria which it believes should apply in these cases and allow the stakeholders to return to this issue and craft an acceptable proposal based on them. Net cost calculations are complex and should be developed and adopted after thorough evaluation.

G. The NYISO's Definition of "Catastrophic Failure" and Its Approach to Physical Withholding Evaluations Are Just and Reasonable

The Outage States Filing proposed that the NYISO would perform an audit and review ("Physical Withholding Test") on the removal of a unit in a Mitigated Capacity Zone from the

⁶² Cf. *Southern California Edison Co. et al*, 73 FERC ¶ 61,219 at 61,608 n. 73 (1995) ("Having found the plan to be just and reasonable, there is no need to consider in any detail the alternative plans proposed by the Joint Protestors." (citing *Cities of Bethany, et al. v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984))).

ICAP market as a result of the reclassification of the unit from a Forced Outage to an ICAP Ineligible Forced Outage.⁶³ The purpose of this review is to determine whether the unit owner is intentionally avoiding repair of its unit in order to raise ICAP prices or has a legitimate economic justification for its actions. Under the proposed tariff revisions, a unit entering into an ICAP Ineligible Forced Outage would be exempt from the Physical Withholding Test if: (1) it experienced a “Catastrophic Failure,” defined as damage that would reasonably require at least 270 days to repair; or (2) the unit owner experienced “Exceptional Circumstances” inhibiting the owner’s ability to obtain the data necessary to determine the viability of repairing the unit but later Commenced Repair when the data became available.

IPPNY proposes to shorten, from 270 days to six months, the amount of time it would take to repair a damaged unit for that damage to constitute a “Catastrophic Failure” and, thereby, broaden the exemption from the Physical Withholding Test to a potentially larger set of generators.⁶⁴ The Commission should reject IPPNY’s proposal because the NYISO’s proposal is reasonable and appropriately identifies those units that should receive this broad exemption

The underlying rationale for applying the Physical Withholding Test when a unit enters an ICAP Ineligible Force Outage is to ensure that the ICAP market performs competitively when existing suppliers might otherwise withhold capacity. The NYISO’s view is that defining Catastrophic Failure as damage that would require at least 270 days to repair appropriately exempts from the Physical Withholding Test only those units that experience such severe damage that it is very unlikely that an owner might be intentionally seeking to remove capacity from the market. As Dr. Patton noted in his affidavit appended to the Outage States Filing:

⁶³ Outage States Filing at 24-27. This evaluation would be the same whether the unit removed itself from the ICAP market or was reclassified from a Forced Outage to an ICAP Ineligible Forced Outage.

⁶⁴ IPPNY Protest at 24.

[I]f a repair requires more than nine months, it is more likely that the costs of repair and the revenues the generator would earn following the repair would be uncertain, making the evaluation of whether the decision had a legitimate economic justification overly speculative. Furthermore, if a repair requires more than nine months, it is more likely that the generator would be unable to return to service by the next summer peak conditions.⁶⁵

IPPNY justifies its request to broaden the Catastrophic Failure exemption to cover additional generators by expressing concern that the NYISO, and the MMU, are incapable of fairly determining whether the cost of repair is economic, particularly for a unit with “extensive failure” or “costs that are difficult to estimate.”⁶⁶ In making this argument, however, IPPNY disregards the option available to a unit owner, with repair costs that are difficult to estimate, to request a finding of “Exceptional Circumstances” and thereby delay a Physical Withholding Test until complete information can be acquired or to completely avoid it by Commencing Repair once data is available.⁶⁷ As the proposed definition of Exceptional Circumstances states:

Exceptional Circumstances may include, but are not limited to: the inaccessibility of the physical facility; the inaccessibility of necessary documentation or other data; and the unavailability of information regarding the regulatory obligations with which the Market Party will be required to comply in order to return its Generator to service which regulatory obligations are not yet known but which will be made known by the applicable regulatory authority under existing laws and regulations provided that none of the above described circumstances are the result of delay or inaction by the Market Party.⁶⁸

The inaccessibility of the physical facility or the inaccessibility of necessary documentation or other data with which to estimate repair costs, which can lead to a finding of Exceptional Circumstances, sound very much like the circumstances that IPPNY claims support its redefinition of Catastrophic Failure to six months. As such, a redefinition is unnecessary and

⁶⁵ Outage States Filing Attachment V, Patton Affidavit at P 26.

⁶⁶ IPPNY Protest at p 22.

⁶⁷ Proposed Services Tariff § 23.4.5.6.2.2.

⁶⁸ Services Tariff, proposed amendment to § 23.2.1

a generator that delays its Physical Withholding Test upon a showing of Exceptional Circumstances and then Commences Repair will avoid its Physical Withholding Test altogether.⁶⁹

The Commission should also reject IPPNY's proposal to require the NYISO to incorporate into its tariffs as the criteria for the Physical Withholding Test, the factors Dr. Patton articulated in his affidavit as, in general, demonstrating when a generator would have a legitimate economic justification for not repairing a unit.⁷⁰ Dr. Patton included in his affidavit a representative list of the factors that go into a Physical Withholding determination and did not intend to indicate he would be ignoring any additional factors that may be particularly relevant in specific circumstances, factors that could, actually, inure to the benefit of the generator. The NYISO has already posted many documents to its website that provide transparency and a comprehensive level of detail on how the NYISO will perform the Physical Withholding Test.⁷¹ The Commission should approve the NYISO proposal in this regard as it is reasonable and consistent with the NYISO's administration of the other physical withholding mitigation provisions already in its tariffs.

⁶⁹ Proposed Services Tariff §23.4.5.6.2.2

⁷⁰ IPPNY Protest at 23.

⁷¹ For the template of information that the NYISO would be requesting in making this determination see:

http://www.nyiso.com/public/markets_operations/services/market_monitoring/index.jsp Under ICAP Market Mitigation-->Supply Side Mitigation-->Data Submission-->GFC Input Template

For template Instructions see:

http://www.nyiso.com/public/webdocs/markets_operations/services/market_monitoring/ICAP_Market_Mitigation/Data_Submission/GFC%20Input%20Template%20Instructions.pdf

For the Physical Withholding ICAP Reference System Online Training, see:

http://www.nyiso.com/public/services/market_training/online_resources/PhysicalWithholdingICAPReferenceSystemTraining/player.html

H. IPPNY's Request for an Explicit Exemption Addressing Pivotal Supply Requirements is Unnecessary and Should be Rejected

The further amendment requested by IPPNY to address Pivotal Supplier requirements is unnecessary and should be rejected. The NYISO has committed to developing procedures that would provide consistency between a unit's qualification to participate as a supplier in the capacity auctions and the inclusion of a unit's MWs in the determination of whether a party is a Pivotal Supplier. This consistency should address the concern identified by IPPNY without needing to introduce an express exception into the tariff.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, the NYISO respectfully requests that the Commission reject the protests as discussed herein, and accept the Outage States Filing.

Respectfully submitted,

/s/Mollie Lampi

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September 29, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Rensselaer, NY this 29th day of September, 2014.

/s/ Joy A. Zimmerlin

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